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August 29, 2016

Via Hand Delivery

Hon. Stephan C. Hansbury, P.J.Ch.
Morris County Courthouse
Washington & Court Streets
Morristown, NJ 07963

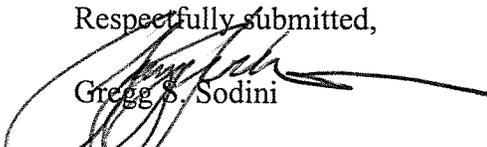
**Re: In the Matter of the Application of the Township of Chatham for a
Determination of Mount Laurel Compliance
Docket No. MRS-L-1659-15**

Dear Judge Hansbury:

As Your Honor is aware, Cutolo Mandel, LLC is general counsel to Vernon Grove Condominium Association, Inc. (the "Association") in connection with the above-referenced matter. In this regard, in accordance with the revised briefing schedule, enclosed are an original and two copies of the Association's Brief In Opposition the Application Of Petitioner To Extend or Change Affordable Housing Controls On Units and Common Elements In The Vernon Grove Condominium.

Please return an extra copy of marked "filed" or "received" in the enclosed envelope provided for Your Honor's convenience. By copy of this letter sent via e-mail and regular mail, we are providing a copy of this brief to all counsel as set forth Your Honor's May 16, 2016 Order.

Respectfully submitted,


Gregg S. Sodini

GSS/noe

cc: Steven A. Kunzman, Esq. and Albert E. Cruz, Esq. (via -email and regular mail)
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**IN THE MATTER OF THE
APPLICATION OF THE TOWNSHIP OF
CHATHAM FOR A DETERMINATION
OF MOUNT LAUREL COMPLIANCE**

Petitioner.

**SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
MORRIS COUNTY**

Docket No.: MRS-L-1659-15

Civil Action

**BRIEF OF VERNON GROVE CONDOMINIUM ASSOCIATION, INC. IN
OPPOSITION TO APPLICATION OF PETITIONER TO EXTEND OR CHANGE
AFFORDABLE HOUSING CONTROLS ON UNITS AND COMMON ELEMENTS IN
THE VERNON GROVE CONDOMINIUM**

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PRELIMINARY STATEMENT

As the Court is aware, we represent Vernon Grove Condominium Association, Inc. (the "Association") in connection with this matter. In this regard, as an initial matter, at least at this juncture, it is important to understand the limits of the Association's authority and its ability to act on behalf of the owners of the 72 units that comprise the Vernon Grove Condominium ("Vernon Grove"). As with all condominium associations, the Association's responsibilities are generally limited to the preservation, maintenance and repair of the common elements of the condominium and representing the interests of the unit owners as they pertain to the common elements. Absent authority from a unit owner, the Association does not represent the interests of each individual unit owner as to their units separate and apart from the common elements. While the Association fully intends to call a meeting of all unit owners within Vernon Grove to try and facilitate discussion and a prompt resolution of the issues between Vernon Grove (both the common elements and individual unit owners) with the Township of Chatham ("Chatham"), this has not been done at this point in time.¹

The above being said, Vernon Grove takes no position on the issue of what the overall "fair share" obligation of Chatham may be. We do note that it seems incredible that the Fair Share Housing Center (the "FSHC") posits an obligation of 567 units as opposed to the 104 units set forth in the draft Housing Plan Element and Fair Share Plan dated March 2016 submitted by Chatham, a true copy of which is attached hereto as Exhibit A. Rather, our opposition is limited to what is of concern to Vernon Grove, i.e., the unilateral extension of existing affordability

¹ We anticipate taking the necessary steps in short order so as to begin substantive discussions with Chatham and its counsel the week of September 9, 2016 in hopes of resolving the issues between Vernon Grove and Chatham prior to the September 16, 2016 and most certainly prior to the current September 23, 2016 hearing date.

controls as to the 72 units in Vernon Grove by Chatham to, in part, satisfy whatever its "fair share" obligation is ultimately determined to be.²

On the issue between Vernon Grove and Chatham, as demonstrated below, at least with respect to 19 of the units in Vernon Grove, Chatham has no authority to unilaterally extend the affordability controls and no right to impose the 95/5 formula. As to the other 53 units, resolution of this issue will depend upon the nature of the deed restrictions to which each individual unit owner agreed at the time they acquired their respective units and possibly resolution of issues involving duress, undue influence, misrepresentation and other bases by which their deeds may warrant reformation depending upon what their deeds actually provide. In both cases, the owners of the respective units truly need to be involved as it is their rights at issue which participation is problematical for each of them insofar as all of the unit owners are low and moderate income persons such that representation may not be so affordable for them.

STATEMENT OF FACTS³

Vernon Grove is comprised of seventy-two units. See July 18, 2016 Certification of Laurie Nielwocki previously submitted to the Court (hereinafter the "*Nielwocki Certif.*"), ¶ 2.

² On this issue, we do not envy the Court but cannot resist some commentary. Specifically, it appears that the constitutional dictates from the *Mt. Laurel* cases have somehow evolved from stopping municipalities from unconstitutionally preventing developers who find it economically feasible to build affordable housing within a community (see *Mt. Laurel II*, 92 N.J. 158 (1983)) to **affirmatively requiring** municipalities -- and thus the other taxpayers in those municipalities -- to funding affordable housing **irrespective of whether any developer finds it economically feasible to do so**. Basically, the *Mt. Laurel* doctrine appears to have evolved from preventing unconstitutional discrimination to an affirmative duty to create affordable housing **regardless of the existence of any unconstitutional discrimination and regardless of economic feasibility**. Indeed, this "evolution" raises interesting constitutional issues as to the proper roles of the Judiciary and the Legislature and who, between them, is authorized to spend tax revenues and for what. It is also a prime illustration of the effect of the law of unintended consequences when government either does not appreciate or account for TINSTAAFL -- the one law of economics which, like gravity, is inescapable: There Is No Such Thing As A Free Lunch. As set forth above, Vernon Grove does not really "have a dog in this fight" between Chatham and others involved in this matter. That fight is for the taxpayers through their elected representatives through legislation or perhaps a closer examination of how the *Mt. Laurel* Doctrine has been interpreted and implemented beyond its original intent -- especially when it comes to established as opposed to developing communities and, at least according to the FSHC, an ever growing and massive obligation on established communities to create more and more "affordable housing" where it may not be economically feasible to do so and no developer has an interest in even trying to do so.

³ The facts pertinent to resolution of the issues between Vernon Grove and Chatham as we know them to date are largely undisputed. How they are ultimately rectified is another matter.

All seventy-two units are low and moderate income-restricted units. *See Nielwocki Certif.*, ¶ 3. The Master Deed for the Association was recorded in the Morris County Clerk's Office on September 24, 1986. *See Nielwocki Certif., Ex. A.* There have been no changes to the Master Deed. *Id.* The proposed Housing Element and Fair Share Plan dated March 2016 submitted by Chatham (the "Affordable Housing Plan") seeks to extend the affordability controls for a period of thirty years for seventy-five affordable housing units within the Township. *See Nielwocki Certif., Ex. B*, ¶ 7 and copy of the Affordable Housing Plan attached hereto as *Ex. A.* Accordingly, 96 % of the affordable housing "for sale" units in the Township are located within Vernon Grove. According to the Affordable Housing Plan, of these 72 units, 19 were deeded to their current owners prior to June 10, 1988. The remaining 53 Units were deeded to their current owners November 30, 1989 and thereafter. *See Affordable Housing Plan, Ex. B.*

A community association comprised exclusively of low and moderate income-restricted units has certain inherent financial limitations. Other community associations, which have significantly lower percentages of affordable housing units, do not experience similar limitations as most of those members do not all fall within the low and moderate income classifications. As a result, the budgets of Vernon Grove must assume and consider the financial limitations of its entire membership. That is, significant increases in customary monthly assessments and the imposition of special assessments to meet the financial demands of an aging community are neither realistic nor practical. *Nielwocki Certif.*, ¶ 4.

The Association has in excess of 20% of its members in delinquency. *Nielwocki Certif.*, ¶ 5. The total amount currently due and owing to the Association by its members is approximately sixty thousand dollars. *Nielwocki Certif.*, ¶ 6. The Association is without the financial resources to commence or complete necessary capital repairs and/or replacement as

provided for in its capital reserve study. *Nieliwocki Certif.*, ¶ 7. Furthermore, the Association does not have the financial means to replace and/or repair capital items that have surpassed the designated useful life. *Nieliwocki Certif.*, ¶ 8.

Although the Association has statutory obligations under the New Jersey Condominium Act to maintain, repair and/or replace the common elements of the Association, the financial limitations of its membership serve as a significant impediment to the Association fulfilling its statutory obligations. *See N.J.S.A. 46:8B-14(a)*. The creation of a community association comprised exclusively of low and moderate income-restricted units has imposed unduly burdensome financial limitations on the Association. In turn, the Association must maintain the buildings and infrastructure of the Association with scarce financial resources. A constricted budget adversely affects the individual unit owners attempting a resale. The marketability and value of a condominium unit is directly impacted by the physical and financial condition of the community association in which it is located. Continuation of the *status quo* will only exacerbate these problems.

Moreover, the Association has vacant units that are not being addressed by Chatham. *Nieliwocki Certif.*, ¶ 9. There are units within the Association that are occupied by individuals whose names do not appear on the unit deed. *Nieliwocki Certif.*, ¶ 10. There are affordable housing units which are being improperly rented. *Nieliwocki Certif.*, ¶ 11. While the Association previously maintained a representative on the Glenwood Housing Council (the “Council”), which permitted some level of oversight by Association members, the Council was disbanded. *Nieliwocki Certif.*, ¶ 12. The Council was replaced by Piazza & Associates, Inc., which now oversees the affordable housing units at the Association. *Nieliwocki Certif.*, ¶ 13. In

short, the Association members were deprived of any opportunity to participate in the administration of the Affordable Housing Plan.

Not only does the proposed extension of controls for an additional thirty years fail to address the rights of the individual unit owners, it ignores the significant financial issues faced by Vernon Grove in connection with the preservation, maintenance and repair of the common elements of Vernon Grove which, along with preservation, maintenance and repair of the individual units, may arise in connection with required issuance of a Continuing Certificate of Occupancy or certified statements of the building inspector under *N.J.A.C. 5:80-26.10*. Simply stated, the Affordable Housing Plan must address the prejudice to the Association and the unit owners who have almost single handedly carried the burden of affordable housing for the Township for thirty years and the financial impact on the Association and the unit owners.

ARGUMENT

CHATHAM HAS NO AUTHORITY TO UNILATERALLY EXTEND OR CHANGE THE AFFORDABILITY CONTROLS

A. The Governing Documents Do Not Provide Chatham With Authority To Unilaterally Extend or Change the Affordability Controls

Article 17 of the Master Deed (filed on September 24, 1986) provides in relevant part as follows:

3. Each Condominium Unit Owner, by virtue of his being the owner of a Unit in the Condominium, does hereby covenant and agree to be bound by all of the restrictions, rules and regulations established by the Glenwood Housing Corporation including, without limitation, those provisions contained in the Glenwood Housing Corporation's Procedures for Selection and Resale as such document presently exists or as it may be amended from time to time. The provisions of such procedures for Selection and Resale, which is included as a part hereof as Exhibit "I", include without limitation eligibility criteria for the selections of purchasers of Units, restrictions on pricing and rental of Units, and resale restrictions and requirements. **Such restrictions shall run for a period of thirty (30) years following the recording of this Master Deed.**

...

5. The rights, restrictions, licenses, privileges, benefits and burdens established by and under this Article of the Master Deed shall be perpetual, **except that the restrictions on resale and leasing contained in the Glenwood Housing Corporation's Procedures for Selection and Resale shall expire on the thirty-first anniversary of the recording of this Master Deed, and shall run with the land.** . . .

See Master Deed attached to the *Nieliwocki Certif.* as Ex. A at Article 17 (p. 23-24) (emphasis added).

The Resale Restrictions and Requirements of the Glenwood Housing Corporation are contained in Article IV. of Exhibit I to the Master Deed and set a Maximum Resale Price at the original purchase price plus the original purchase price multiplied by 75% of the percentage increase in the Consumer Price Index between the date of the original purchase and the date of resale plus various reimbursements. See Section IV. to Exhibit I to Master Deed attached to the *Nieliwocki Certif.* as Ex. A (p. 5-7 of Exhibit I).

Significantly, **nowhere** in the Master Deed or Glenwood Housing Corporation's Procedures for Selection and Resale is Chatham afforded a unilateral right to extend or change the affordability controls and nowhere is there any provision for the recapture of any alleged "windfall" to the individual unit owners. Rather, provided the restrictions are in place, the price at which the individual unit owners may sell is subject to a 75% formula but, after expiration of the controls, there is no longer any such limit on the price at which the individual unit owners may sell. Moreover, to the best of the Association's knowledge, there have been no amendments to the Master Deed or the Glenwood Housing Corporation's Procedures for Selection and Resale.⁴

⁴ This is a significant difference from the 95/5 formula contained in the recapture regulations adopted by COAH on July 17, 1989. Specifically, the formula under the Master Deed gives the unit owner 75% of the increase and there is no recapture component. Applied here, based upon the Bureau of Labor Statistics inflation calculator, \$1 in 1986

B. The Applicable Regulations Do Not Provide Chatham With Authority To Unilaterally Extend or Change the Affordability Controls

Insofar as the Governing Documents do not provide Chatham with the authority to unilaterally extend or change the affordability controls, the only other source for such authority must emanate from the Fair Housing Act, *N.J.S.A. 52:27D-301, et seq.* (the "FHA") and/or the applicable regulations promulgated in accordance with the FHA. As demonstrated below, the regulations clearly give no such authority as to 19 of the 72 units and, unless there is language in the Deeds for the other 53 units from which such authority can be gleaned, Chatham has no authority to unilaterally extend the affordability controls for those units either.

While not binding on this Court, as set forth in the detailed analysis of Judge Wolfson in *Society Hill at Piscataway Condominium Association, Inc. v. Township of Piscataway*, 2016 N.J. Super. LEXIS 73 (Law Div. 2016) (a true copy of which is attached hereto as Exhibit B) (hereinafter "*Society Hill* slip op."), Courts must construe regulations in the same manner in which they would interpret a statute. *See Society Hill* slip op. at page 6 and cases cited therein. By the terms of the purportedly applicable regulations themselves (*N.J.A.C. 5:80-26.1 to 26.6*), they apply **only** to assure that "low-and moderate-income units created under the [FHA] are occupied by low-and moderate-income households for an appropriate period of time . . .". *N.J.A.C. 5:80-26.1*. In that case, as here, **none** of the units were constructed or approved by COAH after July 17, 1989 when the recapture regulation was first adopted and, at least the initial deed restrictions set forth in the Master Deed all **pre-date** the implementation of these regulations. *See Society Hill* slip op. at page 6.⁵

is now equal to \$2.20 such that a unit owner would get \$.90 for every dollar of the original purchase price on a resale. Moreover, if the controls expire, the unit owner would get 100% of the current market value of the unit with **no** recapture component.

⁵ The units located within Vernon Grove Condominium Association, Inc. were developed subject to a Master Deed which was recorded on September 24, 1986. *Nieliwocki Certif, Ex. A*. Attached as an Exhibit to the Master

Moreover, even if these regulations did control, the result is the same. *N.J.A.C.* 5:93-9.2

(a) adopted by COAH in 1989 which empowers municipalities to impose deed restrictions on affordable units only applies to "newly constructed low and moderate income sale units." *See also Society Hill* slip op. at page 6. Moreover, *N.J.A.C.* 5:80-26.5(a)(2) makes it abundantly clear that any unit that was deed restricted pursuant to COAH's grant of substantive certification or any court judgment, grant agreement or contract prior to December 20, 2004 is exempt under *N.J.A.C.* 5:80-26.5(a)(2):

[e]ach restricted ownership unit shall remain subject to the requirements of this subchapter until the municipality in which the unit is located elects to release the unit from such requirements... Prior to such a municipal election, a restricted ownership unit must remain subject to the requirements of this subchapter for a period of at least 30 years; provided, **however, that:...(2) Any unit that, prior to December 20, 2004, received substantive certification from COAH, was part of a judgment of compliance from a court of competent jurisdiction or became subject to a grant agreement or other contract with either the State or a political subdivision thereof, shall have its control period governed by said grant of substantive certification, judgment or grant agreement or contract...**

N.J.A.C. 5:80-26.5(a)(2)(emphasis added).

in short, the regulations do not provide Chatham with the authority to unilaterally extend or change the affordability controls.

C. The Existing Deed Restrictions May Not Extended or Changed As A Result of "Changed Circumstances"

As set forth in *Society Hill*, absent a showing of "changed circumstances" making adherence to the "duly recorded restrictive covenant impractical, or evidence that such a the deed restriction (**as originally enacted**) was, or has become, illegal or void against public policy, no

Deed and recorded with the Morris County Clerk's Office, is the "Procedures for Selection and Resale for the Affordable Housing Units." *Nieliwocki Certif., Ex. A*. Together these documents constitute the agreement by which the units were developed.

party may unilaterally amend the terms of a covenant running with the land.” *See Society Hill* slip op. at page 7 (emphasis added). Applied here, there is no dispute that the deed restrictions at issue run with the land. *See Master Deed, Article 17, paragraph 5 at page 24.* Moreover, there has been no showing that the deed restrictions, as originally enacted, were or have become illegal or void as against public policy. All Chatham has shown is that it needs to have the units in Vernon Grove counted towards its affordable housing obligation in order to fulfill its affordable housing obligation. Chatham's "need" in this regard is not a "changed circumstance" which empowers Chatham to unilaterally take -- without compensation or other consideration -- vested property rights from the Association and the unit owners by the unilateral extension and/or change of the affordability controls. In fact, the attempt of Chatham to do so here may itself be an unconstitutional taking from the Association and the unit owners. As set forth in the July 5, 2016 submission of Ann M. Witkowski (the owner of a unit in Vernon Grove who purchased her on March 30, 1988), what Chatham proposes takes away from her what she had originally acquired without compensation or other consideration. As succinctly put by Ms. Witkowski, the unilateral negation of vested rights of the unit owners in Vernon Grove is "unfair." Perhaps unbeknownst to Ms. Witkowski and other unit owners in Vernon Grove, it may also be unconstitutional.

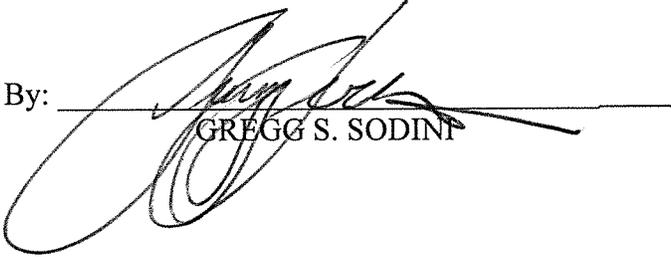
CONCLUSION

Unless there is language in Deeds for specific units from which such authority can be gleaned, Chatham has no authority to unilaterally extend the affordability controls for any of the units in Vernon Grove. Rather, the controlling language is found in the Master Deed which states that the affordability controls “shall run for a period of thirty (30) years following the recording of this Master Deed.” *Nieliwocki Certif., Ex. A., Master Deed, Article 17, Section 3.*

While Chatham may have great discretion under the affordable housing regulations of this State, the units located within the Association are not subject to the affordable housing regulations at issue and, in fact, are specifically excluded from those regulations. Chatham is simply not empowered to take -- without compensation or other consideration -- what it needs to satisfy its affordable housing obligations at the expense of the vested property rights of the Association and the unit owners. Accordingly, Chatham's application to unilaterally extend the affordability controls as to the Association and the unit owners must be denied.

Respectfully submitted,
CUTOLO MANDEL LLC
*Attorneys for Vernon Grove
Condominium Association, Inc.*

By: _____


GREGG S. SODINI

Dated: August 29, 2016

EXHIBIT A

Housing Plan Element
and
Fair Share Plan

Chatham Township
Morris County

March 2016

Prepared by:
The Chatham Township Planning Board

In Consultation with:

Banisch Associates, Inc.
111 Main Street
Flemington, New Jersey 08822

INTRODUCTION

Chatham Township is an attractive suburban residential community at the eastern edge of Morris County with a rural character imparted, in large measure, by the expansive Great Swamp. Here land use, zoning, and building regulations support a varied inventory of housing, and an array of buildings supporting business, institutional, and educational activities as well as active and passive recreational activities. A limited supply of vacant or partially developed land will constrain housing growth within the sewer service area located in the Metropolitan Planning Area, an area designated for growth in the State Development and Redevelopment Plan.

In December of 2005, the Township prepared and submitted to the Council on Affordable Housing (COAH) the adopted 2005 Housing Element and Fair Share Plan. This plan fully satisfied Chatham Township's initial Third Round (2004 to 2014) affordable housing obligation and, after deducting the 95 COAH-certified credits, left a surplus of affordable housing credits toward future obligations. However, under the latest revised rules for the Third Round (January 1, 2004 to December 31, 2018), and after applying the 95 COAH-certified credits, the Township has a remaining obligation to rehabilitate 19 units and to provide, through zoning or other approved methods, for another 98 housing units affordable to moderate, low and very low income households.

As the COAH Third Round rules continued to change, the Township adopted and submitted to COAH the November 2008 Housing Element and Fair Share Plan. The 2008 plan addressed the 83-unit recalculated Prior Round obligation for Chatham Township and added the 110-unit growth share obligation and 19-unit rehabilitation need for a 212-unit affordable housing obligation through 2018. The 2008 Fair Share Plan compliance program also fully addressed the rehabilitation share, the Prior Round obligation and the 110-unit growth share obligation.

This Housing Element and Fair Share Plan details how Chatham Township is planning to provide for affordable housing in the wake of "Mt. Laurel IV", the New Jersey Supreme Court's decision In re N.J.A.C. 5:96 and 5:97, 221 N.J. (2015) decided on March 10, 2015. Here the Court determined that the delay in pursuing affordable housing due to a dysfunctional COAH would no longer be tolerated. The Court dissolved the exhaustion of administrative remedies requirement of the Fair Housing Act, returning to the trial courts the responsibility for determining whether municipal land use regulations address the constitutional affordable housing obligation and offer an "opportunity for producing a fair share of regional present and prospective need for housing low- and moderate-income families." Mt. Laurel IV, 221 N.J. at 3-4.

Chatham Township's prior affordable housing production has included the construction and occupancy of affordable housing units at Chatham Glen, the establishment of group homes in the Township and a Regional Contribution Agreement with the City of Newark. COAH has previously acknowledged that these efforts qualified for 95 units of credit toward the housing obligation.

This Fair Share Plan is designed to ensure the provision of the required affordable housing in the Township with a minimal impact on neighborhood character and community services. This plan will establish affordable housing initiatives to rehabilitate deficient units and convert market-rate apartment units to affordable units. Additionally, a major element of this compliance plan will be the extension of the controls on affordability on the existing affordable family units in Chatham Glen. This will retain a valuable affordable housing resource that is currently part of the fabric of the community.

To provide funding for these initiatives, Chatham Township will collect affordable housing development fees from new home construction and non-residential development, to the extent authorized by New Jersey laws and/or regulations. The Township will also explore rehabilitation and development of affordable units through partnership efforts to address its affordable housing obligations.

Statutory Affordable Housing Obligations

This Housing Plan Element has been prepared in accordance with the Municipal Land Use Law (MLUL) at N.J.S.A. 40:55D-28b(3) to address Chatham Township's cumulative housing obligation for the period 1987- 2014. This Plan has also been prepared pursuant to N.J.S.A. 52:27D-310, which outlines the mandatory requirements for a housing plan element, including an inventory and projection of the municipal housing stock; an analysis of the demographic characteristics of the Township's residents; and, a discussion of municipal employment characteristics.

The Fair Housing Act requires municipalities that choose to enact and enforce a zoning ordinance to prepare a Housing Element as part of the community's Master Plan. The Fair Housing Act also established the Council on Affordable Housing (COAH) as the State agency to create rules and regulations to develop low- and moderate-housing in the State and administer municipal implementation of these plans.

COAH's Changing Rules and Mt. Laurel IV

Before March 2015, when the Supreme Court removed COAH from the affordable housing compliance process, COAH was the administrative agency created under the Fair Housing Act to calculate fair share obligations and administer the system whereby fair share plans could be certified as achieving constitutional compliance. Since 1987 COAH had established both procedural and substantive rules for a Compliance Plan to address the affordable housing obligation, based on a regional fair share allocation formula. COAH's failure to adopt Third Round rules consistent with the direction of the Court in 2014 resulted in Mt. Laurel IV, where the Court removed COAH from the process and returned the job of determining constitutional compliance to the trial courts.

According to the Fair Housing Act, municipal land development regulations are entitled to a ten-year presumption of validity against a builders remedy challenge where a local housing element/fair share plan has received either substantive certification from COAH or a Judgment

of Compliance and Repose approved by a Court. Since COAH is no longer in operation, only the trial court can determine constitutional compliance, a process that Chatham Township has invoked with the filing of a declaratory judgment action (DJA).

Under the current directive from the Supreme Court, the trial courts are to hold hearings to determine municipal fair share obligations and are subsequently to review the municipal housing plans submitted to the court for a judgment of compliance and repose. Municipalities cannot be called upon to demonstrate constitutional compliance before their obligation and related rules are clearly known, since, by definition, that would not be possible. Exclusionary zoning and builder's remedy actions are not permitted until the trial court assesses the fair share plan, finds it constitutionally non-compliant and the municipality thereafter fails to timely supplement the plan to correct the deficiencies. Mt. Laurel IV, *supra*, 221 N.J. at 28, 33.

Clearly, such challenges must be evaluated in light of the actual municipal fair share obligation, when the rules by which it must be satisfied are known. The Supreme Court endorsed the award of limited grants of immunity under the parameters established in In re COAH, provided municipalities are exercising good faith in addressing the obligation. Mount Laurel IV held that, as part of the court's review of a 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. (italics added)

The Court established a procedure whereby municipalities could obtain temporary immunity from builder's remedy litigation while the courts established the fair share obligations and standards for municipal compliance and the municipalities formulated revised housing plans in response thereto. Favoring voluntary compliance, the Court directed the use of processes similar to those previously available through COAH, including conciliation, mediation, and when necessary, special masters. The Court also made clear that municipalities should be given sufficient opportunity to prepare and subsequently supplement fair share plans submitted to the Court.

Summary of Prior Round and Third Round Obligations

COAH originally calculated a cumulative obligation of 89 units for Chatham Township for the First (1987-1993 and Second (1993-1999) Rounds, which was later recalculated at 83 units. Affordable housing obligations assigned to municipalities have been recalculated from Prior Round estimates and forecast estimates, based on population and housing data from the 2000 Census and permit activity after 2004.

The failed Third Round rules used a “growth share” methodology, whereby the regional housing need was assigned to communities based on their projected growth. These rules were found lacking because they did not account for regional need assignments and local growth potential was within the control of the municipality, who could choose not to grow.

Both the Appellate Division and the Supreme Court found critical flaws in the Third Round regulations, and in Mt. Laurel IV the Court directed the trial courts to adjudicate the fair share obligation using a methodology “based upon” the Prior Round approach.

Until the trial courts adjudicate the actual fair share obligations, New Jersey municipalities must select a target number for the fair share plan. Chatham Township is part of the Municipal Consortium that has retained Econsult Solutions, Inc. to develop the methodology for fair share assignments. The Econsult December 30, 2015 report titled “New Jersey Affordable Housing Need and Obligations” assigns the Township a *new construction obligation of 312 affordable units* for the period 1987-2025 as follows:

Component of Need	Municipal Obligation
Present Need	56
1987-1999 Prior Round	83
1999-2015	none
2015-2025 Prospective Need	229

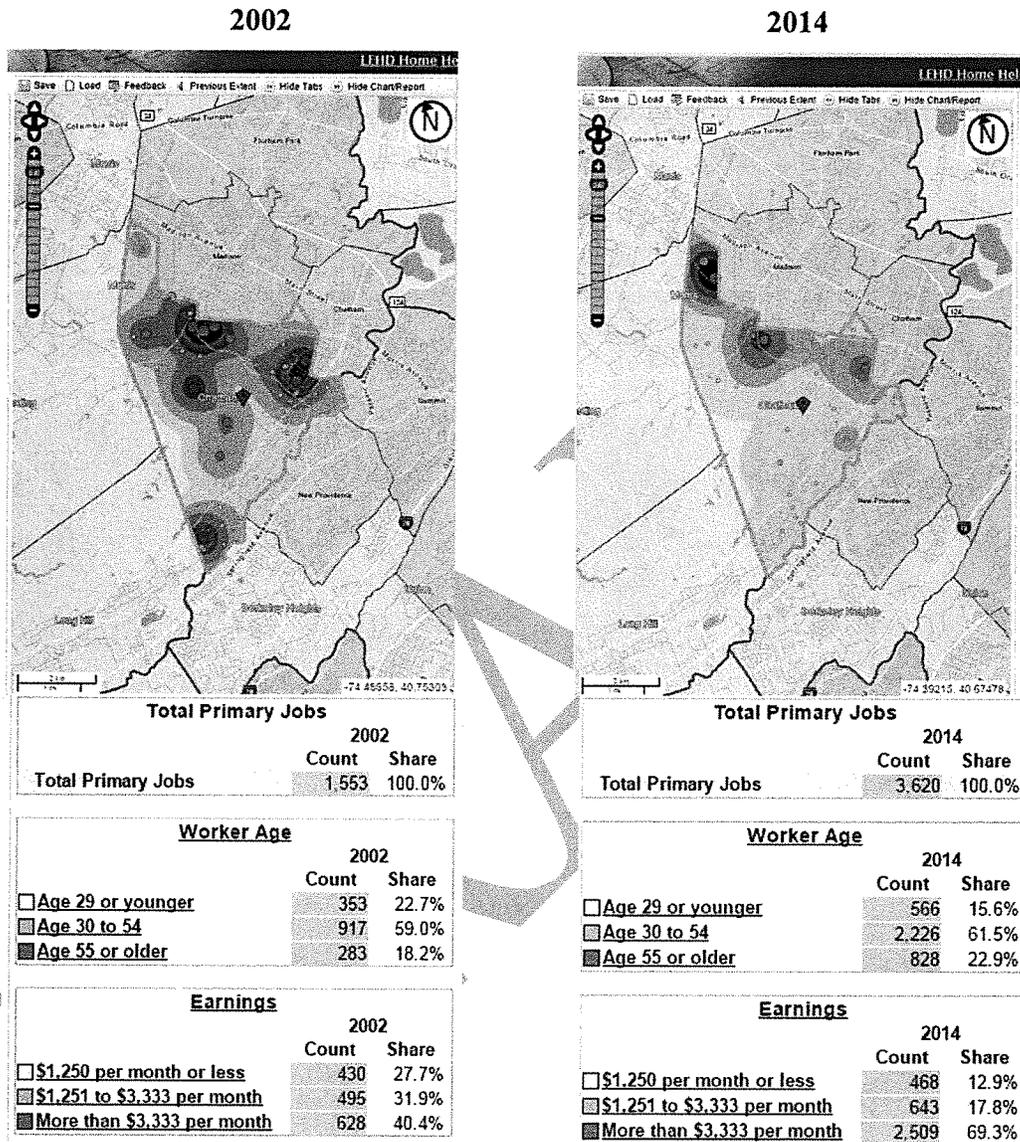
The Econsult allocation formula is “based on a combination of “responsibility” factors, which estimate the contribution of each municipality to regional need, and “capacity” factors, which estimate the ability of each municipality to absorb regional need”. The capacity factors include:

- Developable land in sewer service area
- Employment growth
- Income

According to N.J.A.C. 5:93, the present need total can be adjusted based on a housing survey that identifies likely rehabilitation targets. A preliminary survey revealed that there are fewer than 20 potential “present need” rehab units in the Township, not 56 as reported by Econsult. Developer fees can be applied to this portion of the obligation or the Township can participate in the County program.

Additionally, a review of Census data revealed that Chatham Township jobs are dramatically overestimated due to “geo-coding errors” in the data, which geographically mislocated jobs from outside the Township as being in Chatham Township. LEHD Origin-Destination Employment Statistics (LODES) shows only 1,553 primary jobs reported in the Township in 2002. Since there have been no new employers of consequence in the intervening years, there is no discernible reason that the reported jobs total should have more than doubled to 3,620 jobs by 2014 (the last year reported). The job density maps below, which reveal the locations of reported jobs in 2002 and 2014, clearly show shrinking indications in all parts of the Township except for

a new jobs node in the northernmost portion of the Township. This is not possible, since the area shown is the recently preserved Giralda Farms open space.



Source: LEHD Origin-Destination Employment Statistics (LODES)

This geo-coding error likely resulted from misapplication of new jobs in Madison, given the lack of any non-residential development in this area since 2002. Thus, it appears that a substantial reporting error resulted in an inflated regional fair share calculation due to job growth in Madison, as it appears that the error in geo-coding assigned Madison Borough jobs to Chatham Township.

When jobs totals are examined over the 2002-2013 period, the initial 1,553 jobs rose to 1,850 by 2008, before the effects of the recession were seen. This total dropped in 2009 to 1,737 jobs before the unexplained increases that saw a nearly 2,000 job increase in 4 years (2009-2013).

Work Area Profile Report

Total Primary Jobs

2013		2012		2011		2010		2009		2008		2007	
Count	Share												
3,690	100.0%	3,553	100.0%	3,339	100.0%	1,995	100.0%	1,737	100.0%	1,850	100.0%	1,842	100.0%
2006		2005		2004		2003		2002					
Count	Share												
1,584	100.0%	1,468	100.0%	1,432	100.0%	1,437	100.0%	1,553	100.0%				

Source: LEHD Origin-Destination Employment Statistics (LODES)

Based on this information, it is reasonable to assume that the true jobs total for 2013 was probably in the vicinity of 1,700-1,800 jobs, not 3,690. This reported total resulted in the biggest factor in the fair share allocation formula, assigning Chatham Township nearly 6% of the housing region's job growth.

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Municipality	County	Regional Prospective Need	Employ Level Share	Employ Change Share	Income Diff Share	Developable Land Share	Averaged Share	Allocated Prospective Need
Chatham township	Morris	8,531	0.67%	5.84%	1.94%	1.46%	2.48%	212

Source: New Jersey Affordable Housing Need and Obligations Econsult Solutions, Inc. December 30, 2015

Based on the calculation above, Econsult derived the following calculations of the affordable housing obligations for Chatham Township:

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Municipality	County	Reg.	Prior Rd (87-99) Initial Obligation (unadjusted)	Capped Present Need	Capped Prospective Need	Initial Summary Obligation ¹⁰⁶
Chatham township	Morris	2	83	56	229	368

Source: New Jersey Affordable Housing Need and Obligations Econsult Solutions, Inc. December 30, 2015

Using data that indicated that Chatham Township had witnessed nearly 6% job growth, Econsult determined that Chatham Township has a Third Round obligation of 229 units. However, it appears that there were about 1,800 township jobs in 2015, which reflects roughly 250 jobs gained over the period, not 1,800+.

As a result of this data correction, the Township's 5.84% employment change share would be replaced with a 0.81% share. Factoring this revised jobs total in the formula changes the Township's "averaged share" from the inflated 2.48% of the regional need to the actual share of 1.22%. When multiplied by the regional need of 8,531 affordable units, the 1.22% Township share amounts to 104 affordable units, not 229.

Chatham Township qualifies for a substantial compliance reduction according to N.J.A.C. 5:93-3.6 (a), which provides a 20% reduction of the 1987-1999 prior round obligation for a municipality that, within the period of substantive certification, actually created over 90% of the municipal 1987-1993 housing obligation within its borders. In Chatham Township, 81 units (98%) of the 83-unit prior round obligation were constructed within the municipality.

This 20% reduction will subtract 16.6 units from the 83-unit total for '87-'99, resulting in an adjusted prior round obligation of 67 units. As a result of these recalculations, this HE/FSP is planning to address the following fair share obligations:

- Present Need – 15
- Prior Round – 67
- Third Round - 104

This total includes a new construction obligation of 171 units for the period 1987-2025 and the need to rehabilitate 15 present need units.

Compliance Parameters

The compliance parameters recognized in Mt. Laurel IV and identified at N.J.A.C. 5:93-1 et seq. which have been utilized to demonstrate the Township's constitutional compliance are outlined below:

1. Round 3 Regulations invalidated by the Court are beyond the scope of applicability to evaluating Round 3 compliance as indicated in the Supreme Courts March 15, 2015 decision.
2. The Supreme Court directed that the Fair Housing Act and COAH's regulations and policies form the basis for the trial courts' measure of municipal compliance.
3. Family Rental Requirement – the trial courts should recognize the incentive bonuses established by COAH at N.J.A.C. 5:93-5.15, which sought to encourage and incentivize the creation of family rental housing. *No "family rental requirement" is embodied in COAH's regulations that have not been invalidated by the Court.*
4. Rental Requirements (171-unit new construction obligation x .25 = 43 units)
N.J.A.C. 5:93-5.15, Rental housing, subsection (a) requires that municipalities have an obligation to create an opportunity to construct rental units. For a municipality not receiving an adjustment pursuant to N.J.A.C. 5:93-4.2 (Lack of land), the rental obligation shall equal .25 (municipal precredited need - prior cycle credits - impact of the 20 percent cap - the impact of the 1,000 unit limitation pursuant to N.J.A.C. 5:93-14 - the rehabilitation component).

N.J.A.C. 5:93-5.15 (c) provides that: The municipal approach to addressing the rental obligation may include, but not necessarily be limited to, any combination of the following:

1. Creation of alternative living arrangements pursuant to N.J.A.C. 5:93-5.8;
 2. A municipally sponsored or non-profit sponsored rental development;
 3. Agreements with developers for the municipality to purchase low and moderate income units and maintain them as rental units;
 4. The creation of accessory apartments pursuant to N.J.A.C. 5:93-5.9;
 5. Permitting inclusionary sites to be developed as sales or rental housing with a density increase if the developer chooses to build rental housing. The Council shall presumptively require a minimum density of ten units per acre and a maximum set-aside of 15 percent for rental housing. Municipalities that choose a zoning response to all or part of the rental obligation shall permit such densities and set-asides on all inclusionary sites until the requirement for rental housing has been addressed;
 6. Agreements with developers to construct and administer low and moderate income rental units as part of an inclusionary development.
5. Rental Bonus Credits – to be provided pursuant to N.J.A.C. 5:93-5.15(d), as follows:
1. A municipality shall receive two units (2.0) of credit for rental units available to the general public up to the 25% rental obligation.
 2. A municipality shall receive one and one-third (1 .33) units of credit for age restricted rental units except that no more than 50 percent of the rental obligation shall receive a bonus for age restricted rental units unless:
 - i. The rental units have been constructed prior N.J.A.C. 5:93-to the effective date of this rule;
 - ii. The development has valid approval from the municipality and the developer remains committed to building rental housing as of June 1994; or
 - iii. The substantive certification time limit for constructing the rental units has not expired.
 3. No rental bonus shall be granted for rental units in excess of the rental obligation.
6. Age-restricted Housing Limits – Generally, 25% of the obligation as indicated in N.J.A.C. 5:93-5.14. Also, N.J.A.C. 5:93-5.15(d) 2. provides that:
“A municipality shall receive one and one-third (1 .33) units of credit for age restricted rental units” not to exceed 50% of the rental obligation unless the rental units were constructed prior to the effective date of this rule.
7. Very-low income units
- The 13% very low-income component required for Round 3 compliance pursuant to the FHA amendments of 2008 applies prospectively (i.e. Round 3), *not to the Prior Round*.
 - An allocation of a bonus credit to a municipality “for each unit that is affordable to the very poor, that is, a member of the general public earning thirty percent or less of the median income.” Citing 5:94-4.20(d): “Notwithstanding the provisions of N.J.A.C. 5:94-4.20(d), a municipality shall receive two units of credit for affordable units available to households of the general public earning 30 percent or less of median income by region.”
8. Redevelopment Area Credits – Not applicable in Chatham Township’s compliance plan.
9. Vacant Land Adjustments – Not applicable in Chatham Township’s compliance plan.

10. Substantial Compliance Reduction – Chatham Township is eligible for a 16.6-unit “Substantial Compliance Reduction”.
11. Smart Growth Bonus – Not applicable to Chatham Township’s obligations. No designated redevelopment area or rehabilitation area is included in the compliance plan.
12. Extension of Controls – Chatham Township utilizes the “Extension of Controls” pursuant to N.J.A.C. 5:94-4.16, authorized as eligible for credit if the affordability controls are extended.

Addressing the Fair Share Obligation

The substantial compliance-adjusted 67-unit new construction obligation for '87-'99 was more than satisfied by the affordable housing provided in Chatham Township. The Township’s affordable housing compliance in the past includes the following:

Summary of Chatham Township’s Affordable Housing Completion Status

Chatham Glen (for sale)	75
RCA	8
Group Homes	9
+ rental bonuses	9
Total units and credits	101

When these 101 affordable housing units and bonuses are compared to the adjusted 67-unit prior round obligation, a 34-unit excess is available to carry forward to the Third Round, where the employment-adjusted Econsult estimate of Chatham Township’s obligation is 104 units.

Chatham Township’s 117-unit compliance plan exceeds the adjusted 104-unit Third Round obligation by 13 units, using the following components:

Third Round Compliance Strategy

Compliance Component	# Units/Credits
Excess from Prior Round	34
Market to affordable-existing apartments	5
Rental bonus on market to affordable	5
Extended Affordability Controls	73
Total affordable units and credits	117

The new construction compliance plan for the Third Round includes the extension of controls on existing affordable units and a market-to-affordable program that will deed-restrict apartments to be affordable by low and moderate income households.

The largest component of the 3rd Round compliance plan is the extension of expiring controls on affordable units at Chatham Glen. This technique, which provides credit for imposing new affordability restrictions for another 30-year period, will retain this valuable component of the local housing stock. Mt. Laurel IV endorsed the extension of controls on affordable units and Chatham Township will extend the controls on 73 units expiring in 2016 (Appendix B).

Two existing group homes in the Township are licensed by the Division of Developmental Disabilities and include a total of 9 bedrooms¹. These 9 bedrooms qualify for 9 rental bonuses, combining for a total of 18 units from group homes.

The Fair Share Plan compliance program will also address the rehabilitation share with a rehabilitation program in cooperation with Morris County.

The following summary confirms the status of compliance with the detailed requirements regarding rental and very low income units:

Rental Requirement - 24 units vs. 9 credits available (waiver needed for 15 units)
(171-unit '87-'25 obligation minus 75 prior cycle credits = $96 \times 0.25 = 24$ rentals)

Very-low income units – 13% of 104-unit Third Round = 14 units required vs. 9 units from group homes (waiver needed for 5 units)

The Fair Share Plan is intended to be flexible, in order to meet emerging needs and opportunities. With this compliance plan, Chatham Township has fully met and exceeded its 83-unit Prior Round obligation (as adjusted to 67 units), as well as meeting the adjusted 104-unit Third Round affordable housing obligation, but will require a waiver of the minimum rental and very low income requirements.

¹ According to Daniel Frade of the Northern Region Division of Developmental Disabilities, Community Development Vacancy Tracking, Chatham Township has two (2) licensed group homes with a total of 9 bedrooms.

**APPENDIX A
HOUSING AND DEMOGRAPHIC CHARACTERISTICS**

Inventory of Municipal Housing Units

The primary sources of information for the inventory of the Township’s housing stock are the 2010 U.S. Census Summary File 1 and the U. S. Census Bureau 2013 American Community Survey 5-Year Estimates (herein ACS). Many of the datasets used in this analysis reflect the traditional 2010 Census data, however as of 2010, certain data is no longer reported through the decennial census and is instead released through the American Community Survey 1-, 3- and 5-year estimates. These sets are used particularly for physical housing characteristics. Because of the new data reporting methods, some differences in table totals may occur.

Table 1 identifies the units in a structure by tenure; as used throughout this Plan Element, "tenure" refers to whether a unit is owner-occupied or renter-occupied. According to the ACS, Chatham Township had 4,188 housing units, of which 3,994 (95.4%) were occupied. While the Township largely consisted of one-family, detached dwellings (69.9% of the total), there were 1,259 units in attached or multi-family structures. The Township had a relatively low percentage of renter-occupied units, 15.4%, compared to 24.1% in Morris County and 34.4% in the State.

Table 1: Units in Structure by Tenure

Units in Structure	Total Units	Vacant Units	Occupied Units		
			Total	Owner	Renter
1, detached	2,929	107	2,822	2,746	76
1, attached	208	9	199	166	33
2	44	0	44	28	16
3 or 4	91	0	91	54	37
5+	916	78	838	384	454
Other	0	0	0	0	0
Mobile Home	0	0	0	0	0
Total	4,188	194	3,994	3,378	616

Source: 2013 ACS 5 year estimates DP-04 and B25032

Table 2 indicates the year housing units were built by tenure, while Table 3 compares the Township to Morris County and the State for the same data. 36.8% of the Township’s housing stock was built between 1970 and 1989, with another 29.8% built between 1950 and 1969. While 10.6% of owner-occupied units were built between 1940 and 1949, no renter-occupied units were built during this period. 16.2% of renter-occupied units were built between 2000 and 2010, while only 5.9% of owner-occupied units were built during these years.

Table 2: Year Structure Built by Tenure

Year Built	Total Units	% of Total	Vacant Units	Occupied Units		
				Total	Owner	Renter
2010 or later	18	0.4	0	18	18	0
2000 - 2010	298	7.1	0	298	198	100
1990 – 1999	337	8.0	21	316	290	26
1980 – 1989	670	16.0	9	661	468	193
1970 – 1979	871	20.8	78	793	691	102
1960 – 1969	548	13.1	41	507	397	110
1950 – 1959	701	16.7	45	656	609	47
1940 – 1949	358	8.5	0	358	358	0
Pre-1940	387	9.2	0	387	349	38

Source: 2013 ACS 5 year estimates DP-04 and B25036

Table 3 compares the year of construction for all dwelling units in the Township to Morris County and the State. Chatham Township had a larger percentage of units built in the 1970s and 1980s than did the County or State and a smaller percentage of units built prior to 1940.

Table 3: Comparison of Year of Construction for Township, County, and State

Year Built	%		
	Chatham Township	Morris County	New Jersey
2010 or later	0.4	0.4	0.4
2000 – 2010	7.1	8.3	9.6
1990 – 1999	8.0	11.9	8.9
1980 – 1989	16.0	12.6	11.7
1970 – 1979	20.8	15.4	13.0
1960 – 1969	13.1	15.8	14.0
1940 – 1959	16.7	15.3	15.8
1940-1949	8.5	6.1	8.6
Pre-1940	9.2	14.1	18.0
Median Year	1971	1969	1965

Source: 2013 ACS 5 year estimates DP-04 and B25035

The 2010 Census documented household size in occupied housing units by tenure, and the number of bedrooms per unit by tenure; these data are reported in Tables 4 and 5, respectively. Table 4 indicates that renter-occupied units generally housed smaller households, with 80.7% of renter-occupied units having 2 persons or fewer compared to 49.7% of owner-occupied units.

Table 4: Household Size in Occupied Housing Units by Tenure

Household Size	Total Units	Owner-occupied Units	Renter-occupied Units
1 person	1,062	671	391
2 persons	1,105	923	182
3 persons	526	470	56
4 persons	732	681	51
5 persons	391	367	24
6 persons	85	79	6
7+ persons	14	14	0
Total	3,915	3,205	710

Source: 2010 U.S. Census, SF-1.

Table 5 indicates that the majority of the Township's housing units (54.3%) had 3 or 4 bedrooms, and that renter-occupied units generally had fewer bedrooms, with 68.8% having two bedrooms or fewer, compared to 12.4% of owner-occupied units.

Table 5: Number of Bedrooms per Unit by Tenure

Number of Bedrooms	Total Units	(%)	Occupied Units		
			Total	Owner	Renter
No bedroom	154	3.7	154	62	92
1 bedroom	767	18.3	689	357	332
2 bedrooms	403	9.6	394	293	101
3 bedrooms	808	19.3	763	706	57
4 bedrooms	1,465	35.0	1,430	1,369	34
5+ bedrooms	591	14.1	591	591	0

Source: 2013 ACS 5 year estimates DP-04 and B25042

Table 6 compares the Township's average household size for all occupied units, owner-occupied units, and renter-occupied units to those of the County and State. The Township's average household size for owner-occupied units was the same as that of the County, and the Township's average household size for renter-occupied was lower than that of the County and State.

Table 6: Average Household Size for Occupied Units for Township, County, and State

Jurisdiction	All Occupied Units	Owner-occupied units	Renter-occupied units
Chatham Township	2.64	2.83	1.81
Morris County	2.68	2.83	2.21
New Jersey	2.68	2.79	2.47

Source: 2010 U.S. Census, SF-1

The distribution of number of bedrooms per unit is shown in Table 7. The Township had considerably more units with 4 or more bedrooms and fewer units with 2 or 3 bedrooms than both the County and State.

Table 7: Percentage of All Units by Number of Bedrooms

Jurisdiction	None or one	Two or Three	Four or More
Chatham Township	22.0%	28.9%	49.1%
Morris County	15.2%	48.7%	36.1%
New Jersey	17.8%	58.0%	24.2%

Source: 2013 ACS 5 year estimates DP-04

In addition to data concerning occupancy characteristics, the 2010 Census includes a number of indicators, or surrogates, which relate to the condition of the housing stock. These indicators are used by the Council on Affordable Housing (COAH) in calculating a municipality's deteriorated units and indigenous need. The surrogates used to identify housing quality, in addition to age (Pre-1940 units in Table 2), are the following, as described in COAH's rules:

- Persons per Room 1.01 or more persons per room is an index of overcrowding.
- Plumbing Facilities Inadequate plumbing is indicated by either a lack of exclusive use of plumbing or incomplete plumbing facilities.
- Kitchen Facilities Inadequate kitchen facilities are indicated by shared use of a kitchen or the non-presence of a sink with piped water, a stove, or a refrigerator.

Table 8 compares the Township, County, and State for some of the above indicators of housing quality. The Township had more units with overcrowding than the County, but less than the State, and more units with inadequate kitchen facilities than both the County and the State. The Township had no units with inadequate plumbing facilities.

Table 8: Housing Quality for Township, County, and State

Condition	%		
	Chatham Township	Morris County	New Jersey
Overcrowding	1.9%	1.2%	3.5%
Inadequate plumbing	0.0%	0.4%	0.4%
Inadequate kitchen	2.2%	0.8%	0.8%

Note: The universe for this table is occupied housing units.

Source: 2013 ACS 5 year estimates DP-04

The last factors used to describe the municipal housing stock are the assessed housing values and gross rents for residential units. In 2009-2013, the median residential housing value was \$739,700 (Table 9) with most of the Township's housing stock valued at \$500,000 to \$1,000,000 or more.

Table 9: Value of Residential Units

Value	Number	%
Less than \$50,000	29	0.9
\$50,000 to \$99,999	18	0.5
\$100,000 to \$149,999	37	1.1
\$150,000 to \$199,999	23	0.7
\$200,000 to \$299,999	116	3.4
\$300,000 to \$499,999	696	20.6
\$500,000 to \$999,999	1,443	42.7
\$1,000,000 or more	1,016	30.1
Median (dollars)	\$739,700	

Source: 2013 ACS 5 year estimates DP-04

Table 10 indicates that in 2009-2013 the majority (82.5%) of renter-occupied units rented for more than \$1,500 per month.

Table 10: Gross Rents for Specified Renter-Occupied Housing Units

Contract Monthly Rent	Number	%
Less than \$200	0	0.0
\$200 to \$299	0	0.0
\$300 to \$499	23	3.7
\$500 to \$749	0	0.0
\$750 to \$999	27	4.4
\$1,000 to \$1,499	58	9.4
\$1,500 or more	508	82.5
No Cash Rent	0	--
Median (contract rent)	\$1,920	

Source: 2013 ACS 5 year estimates DP-04

The data in Table 11 indicate that 34.3% of renter households earned less than \$50,000, and 89.1% of these households were paying more than 35% of their income for rent. On the other end of the spectrum, 41.6% of renter households earned more than \$100,00 per year and all of these households were paying less than 35% of their income for rent. A figure of 35% is considered the limit of affordability for rental housing costs.

TABLE 11: Household Income by Gross Rent as a Percentage of Household Income

Income	Number of Households	Percentage of Household Income					
		0 – 19.99%	20 – 24.9%	25 – 29.9%	30 – 34.9%	35% +	Not computed
< \$10,000	11	0	0	0	0	11	0
\$10,000 – 19,999	75	0	0	23	0	52	0
\$20,000 – 34,999	83	0	0	0	0	83	0
\$35,000 -- 49,999	42	0	0	0	0	42	0
\$50,000-- 74,999	51	0	0	0	35	16	0
\$75,000 -- 99,999	98	0	8	60	8	22	0
\$100,000 or more	256	188	42	17	9	0	0

Source: 2013 ACS 5 year estimates B25074

Analysis of Demographic Characteristics

As with the inventory of the municipal housing stock, the primary sources of information for the analysis of the demographic characteristics of the Township's residents are the 2010 U.S. Census and the U.S. Census Bureau 2013 American Community Survey 5-year estimates. The data from these sources provide a wealth of information concerning the characteristics of the Township's population. The 2010 Census indicates that the Township had 10,452 residents, or 366 more residents than in 2000, representing a population increase of approximately 3.6%. The Township's 3.6% increase in the 2000's compares to a 4.7% increase in Morris County and a 4.5% increase in New Jersey. The age distribution of the Township's residents is shown in Table 12. There are more females than males in every age category.

Table 12: Population by Age and Sex

Age	Total Persons	Male	Female
0 – 4	587	291	296
5 – 19	2,591	1,288	1,303
20 – 34	846	394	452
35 – 54	3,531	1,678	1,853
55 – 69	1,766	836	930
70 +	1,131	439	692
Total	10,452	4,926	5,526

Source: 2010 U.S. Census, SF-1.

Table 13 compares the Township to the County and State by age categories. The principal difference among the Township, County, and State occurs in the 20-34 age category, where the Township had a smaller proportion than both the County and the State.

Table 13: Comparison of Age Distribution for Township, County, and State (% of persons)

Age	Chatham Township	Morris County	New Jersey
0 - 4	5.6%	5.6%	6.2%
5 – 19	24.8%	20.5%	19.9%

20 – 34	8.1%	15.3%	18.8%
35 – 54	33.8%	32.0%	29.8%
55 – 69	16.9%	16.9%	15.9%
70 +	10.8%	9.6%	9.5%
Median	43.3	41.3	39.0

Source: 2010 U.S. Census, SF-1.

Table 14 provides the Census data on household size for the Township, while Table 15 compares household sizes in the Township to those in Morris County and the State. The Township has a higher percentage of 1-person and 5-person households, and a lower percentage of 3-person households than the County and the State.

Table 14: Persons in Household

Household Size	Total Units
1 person	1,062
2 persons	1,105
3 persons	526
4 persons	732
5 persons	391
6 persons	85
7+ persons	14
Total	3,915

Source: 2010 U.S. Census, SF-1.

Table 15: Comparison of Persons in Household for Township, County, and State (% of households)

Household Size	Township	County	State
1 person	27.1	23.5	25.2
2 persons	28.2	30.6	29.8
3 persons	13.4	17.2	17.4
4 persons	18.7	17.6	15.7
5 persons	10.0	7.5	7.2
6 persons	2.2	2.3	2.7
7 or more persons	0.0	1.2	1.9
Persons per household	2.64	2.68	2.68

Source: 2010 U.S. Census, SF-1.

Table 16 presents a detailed breakdown of the Township's population by household type and relationship. There were 9,006 persons (86.2%) in family households in the Township and 1,339 persons (12.8%) in non-family households; a family household includes a householder living with one or more persons related to him or her by birth, marriage, or adoption, while a non-family household includes a householder living alone or with non-relatives only. 107 persons (1.0%) lived in group quarters.

Table 16: Persons by Household Type and Relationship

	Total
In family Households:	9,006
Spouse	2,476
Child	3,580

In Non-Family Households:	1,339
Male householder:	399
Living alone	334
Not living alone	65
Female householder:	796
Living alone	728
Not living alone	68
In group quarters:	107
Institutional	102
Non-institutional	5

Source: 2010 U.S. Census, SF-1.

Table 17 provides income data for the Township, County, and State. The Township's per capita and median incomes were higher than those of both the County and the State.

Table 17: Income for Township, County, and State

Jurisdiction	Per Capita Income	Median Income	
		Households	Families
Chatham Township	\$83,162	\$135,759	\$194,766
Morris County	\$48,814	\$98,633	\$117,683
New Jersey	\$36,027	\$71,629	\$87,347

Source: 2013 U.S. Census ACS 5 Year Estimates DP-03

Table 18 addresses the lower end of the income spectrum, providing data on poverty levels for persons and families. The determination of poverty status and the associated income levels is based on the 2013 cost of an economy food plan and ranged from an annual income of \$11,770 for a one-person family to \$40,898 for an eight-person family (three-person family is \$20,090). Many federal programs, including food stamps, use the economy food plan as the determining guideline. According to the data in Table 18, the Township had proportionately fewer persons qualifying for poverty status than the County and the State.

Table 18: Poverty Status for Persons and Families for Township, County, and State (% with 2009-2013 income below poverty)

Jurisdiction	Persons (%)	Families (%)
Chatham Township	3.9	1.5
Morris County	4.4	3.0
New Jersey	10.4	7.9

Source: 2013 ACS 5 year estimates DP-03

The ACS includes a vast array of additional demographic data that provide insights into an area's population. For example, Table 19 provides a comparison of the percent of households who moved into their current residence in 1999 or earlier; this is a surrogate measure of the mobility/stability of a population. The data indicate that the percentage of Township residents residing in the same house as in 1999 exceeds that of the County and State.

Table 19: Comparison of Place of Residence for Township, County, and State

Jurisdiction	Percent living in same house in 1999
--------------	--------------------------------------

Chatham Township	49.4%
Morris County	44.8%
New Jersey	40.2%

Source: 2013 ACS 5 year estimates DP-04

Table 20 compares the educational attainment for Township, County, and State residents over age 25. The data indicate that Chatham Township residents are highly educated, with a much higher percentage having achieved a bachelor's degree or higher than both the County and the State.

Table 20: Educational Attainment for Township, County, and State Residents

(Persons 25 years and over)

Jurisdiction	Percent (%) high school graduates or higher	Percent (%) with bachelor's degree or higher
Chatham Township	97.2	73.7
Morris County	93.5	50.0
New Jersey	88.1	35.8

Source: 2013 ACS 5 year estimates DP-02

The ACS also provides data on the means of transportation which people use to reach their place of work. Table 22 compares the Census data for the Township, County, and State relative to driving alone, carpooling, using public transit, and using other means of transportation. The Township had a relatively high percentage of workers who drive alone, and a relatively low percentage of workers who carpool or use public transit. Of the 11.3 % of workers who resided in the Township and used other means of transportation to reach work, 9.6% of workers worked from home.

Table 21: Means of Transportation to Work for Township, County and State Residents (Workers 16 years old and over)

Jurisdiction	Percent who drive alone	Percent in carpools	Percent using public transit	Percent using other means
Chatham Township	71.5	2.8	14.4	11.3
Morris County	79.3	8.2	4.6	8.0
New Jersey	71.9	8.4	10.8	8.9

Source: 2013 ACS 5 year estimates DP-03

The ACS also provided information on resident employment by industry (Table 22). Nearly 2/3 of Chatham Township residents are employed in just three (3) industry categories, with 24.5% in the field of finance and insurance, and real estate and rental and leasing 19.3% in educational services, health care and social assistance and 18.4% in professional, scientific, and management, and administrative and waste management service

Table 22: Employment by Industry

Industry	Persons	%
Civilian employed population 16 years and over	4,607	--
Agriculture, forestry, fishing and hunting, and mining	0	0.0
Construction	145	3.1

Manufacturing	461	10.0
Wholesale trade	145	3.1
Retail trade	297	6.4
Transportation and warehousing, and utilities	52	1.1
Information	256	5.6
Finance and insurance, and real estate and rental and leasing	1,130	24.5
Professional, scientific, and management, and administrative and waste management services	849	18.4
Educational services, and health care and social assistance	888	19.3
Arts, entertainment, and recreation, and accommodation and food services	186	4.0
Other services, except public administration	146	3.2
Public administration	52	1.1

Source: 2013 ACS 5 year estimates DP-03

According to the ACS, the percentage of Township residents in the labor force was lower than that of the County and State. The Township had a lower rate of unemployment than both the County and the State.

Table 23: Labor Force and Employment

Jurisdiction	Percent in Labor Force	Employed	Unemployed
Chatham Township	61.9	57.6	4.2
Morris County	69.2	64.1	5.1
New Jersey	66.6	59.7	6.7

Source: 2013 ACS 5 year estimates DP-03

Appendix B
Dates of Expiration of Deed-Restrictions on Chatham Glen Affordable Units

PROPERTY	DEED DATE	EXPIRATION DATE
1A Terrace Drive	1/19/1995	9/24/2016
2A Terrace Drive	1/15/2005	9/24/2016
3A Terrace Drive	8/27/1999	9/24/2016
4A Terrace Drive	6/17/2005	9/24/2016
5A Terrace Drive	2/21/2002	9/24/2016
6A Terrace Drive	9/1/2011	11/20/2016
1B Terrace Drive	10/31/1986	9/24/2016
2B Terrace Drive	12/10/2007	9/24/2016
3B Terrace Drive	2/11/1997	9/24/2016
4B Terrace Drive	2/14/2012	3/30/2018
5B Terrace Drive	11/17/1993	9/24/2016
6B Terrace Drive	7/12/1990	9/24/2016
1C Terrace Drive	6/17/2013	11/13/2016
2C Terrace Drive	10/26/2007	9/24/2016
3C Terrace Drive	6/8/2007	9/24/2016
4C Terrace Drive	3/9/1994	9/24/2016
5C Terrace Drive	11/17/1986	9/24/2016
6C Terrace Drive	6/14/2005	9/24/2016
1D Terrace Drive	10/29/2010	11/3/2016
2D Terrace Drive	4/13/1994	9/24/2016
3D Terrace Drive	8/28/2007	9/24/2016
4D Terrace Drive	8/5/2004	9/24/2016
5D Terrace Drive	12/30/2011	9/24/2016
6D Terrace Drive	6/23/2006	9/24/2016

1E Terrace Drive	4/4/1991	9/24/2016
2E Terrace Drive	1/5/1995	9/24/2016
3E Terrace Drive	3/31/1988	9/24/2016
4E Terrace Drive	3/30/1988	9/24/2016
5E Terrace Drive	11/17/1986	9/24/2016
6E Terrace Drive	12/22/1993	9/24/2016
1F Terrace Drive	12/2/1993	9/24/2016
2F Terrace Drive	10/30/1986	9/24/2016
3F Terrace Drive	4/7/2003	9/24/2016
4F Terrace Drive	1/26/1993	9/24/2016
5F Terrace Drive	11/18/1986	9/24/2016
6F Terrace Drive	6/15/2006	9/24/2016
1G Terrace Drive	8/15/2012	10/31/2016
2G Terrace Drive	11/5/1986	9/24/2016
3G Terrace Drive	8/4/2014	9/24/2016
4G Terrace Drive	11/30/1989	9/24/2016
5G Terrace Drive	10/26/1990	9/24/2016
6G Terrace Drive	12/14/2004	9/24/2016
1H Terrace Drive	8/19/2010	9/18/2016
2H Terrace Drive	8/21/2013	10/13/2016
3H Terrace Drive	8/3/1994	9/24/2016
4H Terrace Drive	4/4/88	9/24/2016
5H Terrace Drive	8/10/2007	9/24/2016
6H Terrace Drive	11/24/1986	9/24/2016
5I Terrace Drive	6/13/2001	9/24/2016

6I Terrace Drive	11/25/1986	9/24/2016
5J Terrace Drive	4/16/2013	11/21/2016
6J Terrace Drive	10/10/1996	9/24/2016
7A Vernon Lane	5/23/1988	9/24/2016
7B Vernon Lane	7/3/2002	9/24/2016
7C Vernon Lane	7/26/2011	5/9/2018
7D Vernon Lane	1/28/2000	9/24/2016
7E Vernon Lane	5/20/1988	9/24/2016
7F Vernon Lane	5/25/1988	9/24/2016
7G Vernon Lane	10/7/2008	9/24/2016
7H Vernon Lane	6/10/1988	9/24/2016
7I Vernon Lane		
7J Vernon Lane	4/7/2000	9/24/2016
8A Vernon Lane	5/23/1988	9/24/2016
8B Vernon Lane	2/15/1994	9/24/2016
8C Vernon Lane	12/6/1994	9/24/2016
8D Vernon Lane	1/3/2003	9/24/2016
8E Vernon Lane	11/20/2009	11/20/2039*
8F Vernon Lane	8/9/2011	5/20/2018
8G Vernon Lane	5/31/1988	9/24/2016
8H Vernon Lane	5/24/1988	9/24/2016
8I Vernon Lane	1/19/2001	9/24/2016
8J Vernon Lane	5/25/1988	9/24/2016
113 Riveredge Drive	8/26/2011	9/24/2016
Deeds without 95/5 are subject to the Township of Chatham's affordable housing rules and regulations.		
Units with 95/5 were restricted for 30 years from the date of the original transfer of title, except for ** which was extended 30 years from the current conveyance of title		

EXHIBIT B

Society Hill at Piscataway Condo. Ass'n v. Township of Piscataway

Superior Court of New Jersey, Law Division, Middlesex County

February 8, 2016, Decided

DOCKET NO. L-4192-15 CIVIL ACTION

Reporter

2016 N.J. Super. LEXIS 73

SOCIETY HILL AT PISCATAWAY CONDOMINIUM ASSOCIATION, INC., CRAIG WISDO, MICHELLE PINHEIRO, NANCY NOVACK, DUSHYANT PATEL and MONIKA PATEL, Plaintiffs, v. THE TOWNSHIP OF PISCATAWAY, and THE MAYOR AND COUNCIL OF THE TOWNSHIP OF PISCATAWAY, Defendants.

Subsequent History: [*1] Approved for Publication May 17, 2016.

Prior History: Urban League of Greater New Brunswick v. Carteret, 115 N.J. 536, 559 A.2d 1369, 1989 N.J. LEXIS 80 (1989)

LexisNexis® Headnotes

Administrative Law > Agency Rulemaking > Rule Application & Interpretation

HN1 In construing New Jersey regulations, the courts must do so in the same manner that they would interpret a statute. The paramount goal is to ascertain the intent of the drafter. To that end, the intent of the drafter may often be found in the actual language of the enactment. A court should not rewrite a plainly-written enactment, nor should it engage in conjecture that will subvert its plain meaning. Only when a fair reading of the enactment leads to more than one plausible interpretation does the court look to extrinsic evidence.

Public Health & Welfare Law > Housing & Public Buildings > Low Income Housing

Real Property Law > Encumbrances > Restrictive Covenants

HN2 See N.J.A.C. 5:80-26.5(a)(2).

Public Health & Welfare Law > Housing & Public Buildings > Low Income Housing

Real Property Law > Encumbrances > Restrictive Covenants

HN3 The language of N.J.A.C. 5:80-26.5 is plain and unambiguous. Its drafters expressly intended to exclude any restricted ownership unit whose control period was created or governed by a grant of substantive certification, judgment or grant agreement or contract prior to December 20, 2004.

Real Property Law > Encumbrances > Restrictive Covenants > Covenants Running With Land

HN4 Absent changed circumstances making adherence to a duly recorded covenant impractical, or evidence that such a deed restriction (as originally enacted) was, or has become, illegal or void against public policy, no party may unilaterally amend the terms of a covenant running with the land.

Counsel: *Stephen M. Eisdorfer* argued the cause for plaintiffs (*Hill Wallack LLP*, attorneys; *Mr. Eisdorfer* and *Cameron W. Macleod*, on the brief).

Michael J. Baker and *James F. Clarkin III* argued the cause for defendants (*Hoagland, Longo, Moran, Dunst & Doukas, LLC*, and *Clarkin & Vignuolo, LLC*, attorneys; *Mr. Baker*, *Anthony C. Iacocca*, *Rajvir S. Goomer*, and *Mr. Clarkin*, on the brief).

Edward Purcell argued the cause for amicus curiae New Jersey State League of Municipalities.

Judges: WOLFSON, J.S.C.

Opinion by: WOLFSON

Opinion

Civil Action

WOLFSON, J.S.C.

1. Statement of the Case

In this action, plaintiffs Society Hill at Piscataway Condominium Association, Inc. ("Society Hill") and five

individual owners of real property at Society Hill (collectively, "plaintiffs") filed this motion for summary judgment against defendant Township of Piscataway ("Piscataway"), claiming that its unilateral extension of existing thirty-year deed restrictions, which sought to regulate the resale and rental prices of low and moderate income units identified in and governed by a consent order in the *Urban League* litigation¹ was unlawful. These restrictions and covenants were, by their express terms, contained in Piscataway's [*2] affordable housing plan (the "Affordable Housing Plan" or "Plan"), the Master Deed and Declaration of Restrictive and Protective Covenants of Society Hill at Piscataway Condominium (the "Master Deed") as well in each of the individual unit deeds. For the reasons set forth below, these deed restrictions, by their express terms, have expired, and as such, plaintiffs' motions for summary judgment to nullify Piscataway's unilateral attempt to extend them for an additional thirty years, is granted.

2. Background Information

Society Hill is an inclusionary development that was constructed more than thirty years ago pursuant to Piscataway's partial settlement of the *Urban League* litigation. The development includes 109 low and moderate income units. With the exception of the Patels, the individual plaintiffs were deeded their respective units (each of which contained a thirty-year deed restriction limiting the resale or rental price of those units to affordable low and moderate income persons) in either 1985 or 1986.² In order to fully assess the various [*3] rights and obligations applicable to the owners of these units, I must first examine the procedural and legal processes that resulted in their construction.

Following the Supreme Court's remand in the *Urban League* case, various properties were rezoned throughout Middlesex County. In particular, one of these sites, in Piscataway, was acquired by K. Hovnanian, which sought site plan approval to build an inclusionary development. As a condition of site plan approval, an Affordable Housing Plan was adopted which, in pertinent part, stated:

Covenants Running With Land. The provisions of this Affordable Housing Plan shall constitute covenants running with the land with respect to each Affordable

Condominium affected hereby, and shall bind all purchasers of each such Unit, their heirs, assigns and all persons claiming by, through or under their heirs, executors, administrators and assigns. The terms, restrictions and covenants of this Plan shall, however, automatically expire and terminate at the earliest of the following: (1) thirty (30) years from the date hereof; and (2) the date upon which the event set forth in paragraph 13 hereinafter [*4] shall occur; and (3) the date upon which the association dissolves or ceases to exist for any period of time for any reason, in which case, an instrument executed by the Association evidencing same must be duly recorded with the Office of the Clerk of Middlesex County.

That Affordable Housing Plan required that the Master Deed, and each of the individual deeds transferring ownership rights to any of the 109 affordable housing units, incorporate that same covenant, and required further that every prospective buyer be given a disclosure statement informing them of the specific terms, restrictions, provisions, and covenants referenced in the Plan and in the Master Deed.

After the Affordable Housing Plan was fully implemented, Judge Serpentelli (one of the three trial judges specifically appointed by the Chief Justice to handle all *Mt. Laurel* litigation), memorialized Piscataway's settlement with the Urban League in an order dated July 17, 1985. As a consequence, Piscataway received, and has continued to receive, credit for each of the 109 affordable housing units against its then extant fair share: "The Township of Piscataway shall receive full credit towards its fair share obligation for [*5] the fifty-five moderate income homes and the fifty-four low income homes which are to be built as part of the development known as Society Hill."

Thereafter, the builder executed and recorded a Master Deed, which expressly incorporated by reference the thirty-year deed restriction and covenant limiting the resale and rental prices on those units so as to maintain their continued occupancy by low and moderate income persons:

The terms, restrictions, provisions and covenants of the Affordable Housing Plan, and the provisions of the

¹ *Urban League of Greater New Brunswick v. Mayor and Council of the Borough of Carteret*, 142 N.J. Super. 11, 359 A.2d 526 (Ch. Div. 1976) (Furman, J.S.C.), *rev'd*, 170 N.J. Super. 461, 406 A.2d 1322 (App. Div. 1979), *rev'd and remanded sub nom.*, *S. Burlington Cty. NAACP v. Twp. of Mount Laurel*, 92 N.J. 158, 340, 456 A.2d 390 (1983) (trial judge's opinion "rings with the true sound of the constitutional obligation").

² Dushyant and Monika Patel acquired their unit in 2013.

Master Deed referring to and incorporating the Affordable Housing Plan, shall automatically expire and terminate at the earliest of the following: (1) thirty (30) years from the date of the Affordable Housing Plan; and (2) the date upon which the right of redemption expires with respect to the foreclosure of the first mortgage lien upon an Affordable Condominium by the first mortgagee of the Affordable Condominium as the Plan applies to the specific unit which is subjected to a foreclosure pursuant to this provision; and (3) the date upon which the Society Hill at Piscataway Condominium Association, Inc. ceases [sic] to exist or dissolve for any reason and [*6] for any period of time.

Neither the Developer, the Owner, the Association nor the Agency shall amend or alter the provisions of this paragraph without first obtaining the approval of both the Agency and the Planning Board of the Township of Piscataway. Any such approved amendments or modifications of this plan shall be in writing and shall contain proof of Planning Board approval and shall not be effective unless and until recorded with the Middlesex County Clerk.

Consistent with these restrictions, each deed of conveyance, likewise referred to, incorporated by reference, and included that thirty-year deed restriction:

WHEREAS, certain specified condominium (hereinafter 'Affordable Condominiums') within Society Hill at Piscataway Condominiums are subject to the terms, provisions and restrictions contained in both the Master Deed and Declaration of Restrictive and Protective Covenants of Society Hill at Piscataway Condominiums, recorded on October 15, 1985, in the Middlesex County Clerk's Office in Deed Book 3468, Page 774 et seq. and the terms, provisions and restrictions contained in the Affordable Housing Plan for Society Hill at Piscataway (hereinafter 'Plan') recorded on Oct. 15, [*7] 1985, in the Middlesex County Clerk's Office in Deed Book 3468, Page 891 et seq.

On July 17, 1989, the Council on Affordable Housing (COAH) adopted its first recapture regulation (the "95/5 Rule") preventing the purchaser of an affordable housing unit from reaping a windfall after the expiration of their respective controls, and that recapture mechanism has

remained in place through COAH's adoption of the 2001 Uniform Housing Affordability Controls (UHAC) regulations and its 2004 amendments.³ See 21 N.J.R. 2021 (July 17, 1989) ("In reviewing the rules as proposed, the Council has determined a need for clarification of proposed N.J.A.C. 5:92-12.1. As the section heading indicates, this rule applies to *newly constructed* sales units. To affirm this application, the Council is changing the term "low and moderate income units" to "*newly constructed low and moderate income sales units*" (emphasis added)). The current version of the UHAC regulations, N.J.A.C. 5:80-26.25, provides in pertinent part that "[a] municipality shall have the right to determine that the most desirable means of promoting an adequate supply of low-and moderate-income housing is to prohibit the exercise of the repayment option and maintain controls on lower income housing [*8] units sold within the municipality beyond the period required by N.J.A.C. 5:93-9.2."

In an effort to ensure the continuing availability of these units to low and moderate income families, and desirous of retaining credits for them, the Township, on December 8, 2012, nearly thirty years after the first of these affordable housing units were constructed and sold, adopted an ordinance that purported to authorize the Township to "extend" the affordable housing resale controls for another thirty years, presumably pursuant to N.J.A.C. 5:97-6.14(a) ("A municipality may address a portion of its growth share obligation through the extension of affordability controls in accordance with N.J.A.C. 5:97-9 and UHAC"); see also N.J.A.C. 5:80-26.25 (a municipality may maintain controls on lower-income houses in accordance with the COAH regulations permitting length of control deed restrictions on newly constructed units).

To implement its goal of "recapturing" the "expiring" affordable units, on July 14, 2014, the Township filed and recorded a "Declaration of Restrictive Covenant," [*9] which states:

NOW, THEREFORE, BE IT RESOLVED by the Declarant declares [sic] that the Units [at Society Hill] shall be held, transferred, conveyed, leased, occupied and used subject to the following restrictions and conditions:

1. Pursuant to N.J.A.C. 5:97-6.14(b)(2)(Extension of Expiring Controls), *the Controls on the Units are*

³ As explained in more depth below, the UHAC regulations supplanted the COAH regulations in order to remedy inconsistent or conflicting regulatory schemes on the resale and rental controls. See In re Adoption of Uniform Hous. Affordability Controls, 390 N.J. Super. 89, 95-96, 914 A.2d 402 (App. Div. 2007).

extended until June 7, 2045, in accordance with the Uniform Housing Affordability Controls ("UHAC");

2. During this period of Extended Controls no seller of any of the one hundred nine (109) Units may utilize the Repayment Option as permitted by *N.J.A.C. 5:93-0.8* [sic]; specifically, the Repayment Option shall not be permitted for any of the Units from the date of recordation of this instrument until June 7, 2045;

3. The Controls are extended until June 7, 2045, and during this period of extended Controls, no seller of any of the one hundred nine (109) Units may utilize the Repayment Option as permitted by *N.J.A.C. 5:93-9.8*.

4. The sale and use of the Units is governed by UHAC, found in the New Jersey Administrative Code at Title 5, Chapter 80, subchapter 26 (*N.J.A.C. 5:80-26.1 et seq.*, the "Regulations") and any amendment, changes or supplements thereto.

5. All of the restricted Units shall remain subject to the requirement of *N.J.A.C. 5:80-26.25*, as may be amended and [*10] supplemented from time to time, during the extended Control period until Piscataway Township elects to release the Units from such requirements.

Any conveyance of the Property or the individual Units named herein shall contain a disclosure setting forth the existence of this Declaration. Each Unit owner is required to fully comply with the Affordability Controls originally placed on the Units which were extended by Resolution No. 13-459. The restrictions set forth in this Declaration shall run with the land and be binding upon the owners of the Units, and their successor, assigns and heirs, as set forth herein. Failure to comply with the extended Deed Restrictions shall subject the Owner(s) and/or Transferor(s) of any of the Units to any and all penalties permitted by law.

[Emphasis in original.]

If valid, Piscataway's extension of the initial thirty-year deed restrictions would put a cloud on their titles and preclude all plaintiffs from freely marketing their units, in terms of price and occupancy.

3. Discussion

In their motion, plaintiffs argue that Piscataway's extension of the deed restrictions for an additional 30 years violates their legal rights and constitutes a cloud on their [*11] respective titles. Piscataway disagrees and contends instead

that it was lawfully empowered to implement extended controls on those units in order to ensure an adequate supply of low-and moderate-income housing based on: (1) the UHAC, *N.J.A.C. 5:80-26.1 to -26.26*, which was enacted "to ensure that affordable housing units restricted to persons with low or moderate incomes (restricted units) would remain occupied by persons meeting those income levels," *In re Adoption of Uniform Hous. Affordability Controls, supra*, 390 N.J. Super. at 96, 914 A.2d 402; and (2) this state's strong constitutional and public policy imperatives, which compel municipalities to provide their respective fair share of affordable housing. See *S. Burlington Cty. N.A.A.C.P. v. Twp. of Mount Laurel*, 67 N.J. 151, 336 A.2d 713 (1975) (hereinafter "Mount Laurel I"); *S. Burlington Cty. N.A.A.C.P. v. Twp. of Mount Laurel*, 92 N.J. 158, 456 A.2d 390 (1983) (hereinafter "Mount Laurel II"); *Hills Dev. Co. v. Twp. of Bernards*, 103 N.J. 1, 20, 510 A.2d 621 (1986) (hereinafter "Mount Laurel III"); and *In re N.J.A.C. 5:96 & 5:97*, 221 N.J. 1, 110 A.3d 31 (2015) (hereinafter "Mount Laurel IV").

Urging traditional notions of deference, the Township insists that the UHAC regulations permit it to override and extend, retroactively, the thirty-year limitations contained in plaintiffs' original deeds.

a. The Township's Purported Reservation of a Unilateral Right to Amend or Modify the Covenants

As a preliminary matter, Piscataway contends that it "reserved" the right to amend or modify the covenants unilaterally, reasoning that the relevant [*12] documents, when read as a whole, allow for such an interpretation, and thus, sanction its actions. In response, plaintiffs strongly urge that no such express or implied grant of power exists, and that the Township's unilateral attempt to extend the resale and rental controls was a nullity and ultra vires.

Addressing each contention in order, the Township posits that its Affordable Housing Plan makes all deed restricted units, including those of the plaintiffs, subject not only to the rules and regulations of the Township's Affordable Housing Agency, but also to those of COAH and HMFA. I cannot agree.

That plan provides, in pertinent part:

In addition to the foregoing restrictions, the resale of Affordable Condominiums shall be subject to the rules and regulations of the Affordable Housing Agency which shall be established by the Township of Piscataway. This Agency shall monitor and approve

resales of Affordable Condominiums to assure that purchasers of same shall be Lower Income Purchasers as defined by the Agency's Income criteria in effect at the time of the proposed sale.

Contrary to the Township's urging, the phrase "Affordable Housing Agency" is unquestionably limited to the Township's [*13] agency, and not to any agency of the State, since it refers only to an agency "established by the Township of Piscataway." Nor does that document include any express grant or reservation of authority, which might permit the Township to unilaterally extend the deed restrictions whose genesis was the *Urban League* litigation.

The Township next references the Master Deed, which states:

Neither the Developer, the Owner, the Association nor the Agency shall amend or alter the provisions of this paragraph without first obtaining the approval of both the Agency and the Planning Board of the Township of Piscataway. Any such approved amendments or modifications of this plan shall be in writing and shall contain proof of Planning Board approval and shall not be effective unless and until recorded with the Middlesex County Clerk.

That provision, likewise, does not explicitly authorize any amendment to the restrictive covenants. Instead, it simply acknowledges, rather unremarkably, the Township's right to pursue amendments to the Affordable Housing Plan as distinct from and unrelated to the terms of the Master Deed and individual deeds, which contain the resale controls.

Next, the Township argues that [*14] the *Urban League* consent order itself sanctions its efforts to extend the deed restrictions. I do not agree. That consent order merely formalizes the "notice" procedures that must be followed if any application to amend or revise any of the development approvals of the Township's Affordable Housing Plan is submitted:

Piscataway shall serve notice upon the Urban League plaintiffs in the event that an application to amend or revise the approvals or the Affordable Housing Plan for Society Hill at Piscataway is submitted to the Planning Board... within ten (10) business days of the filing of such applications.

At best, the provisions cited by Piscataway are silent on whether the Township specifically reserved the authority to unilaterally extend the resale and rental controls. I am,

therefore, unwilling to rewrite the documents to include such a reservation.

b. The UHAC Regulations Do Not Permit Piscataway to Extend the Resale and Rental Controls Of Plaintiffs' Units

In 1985, the Legislature enacted the Fair Housing Act ("FHA"), *N.J.S.A. 52:27D-301 to -329*, to confer responsibility for the administration and enforcement of the *Mount Laurel* doctrine upon a state administrative agency. This obligation requires municipalities [*15] to provide a realistic opportunity, through their land use regulations, for the construction of their respective fair share of affordable housing for lower and moderate income households. See *Mount Laurel I, supra*, 67 N.J. at 151, 336 A.2d 713; *Mount Laurel II, supra*, 92 N.J. at 158, 456 A.2d 390; *Mount Laurel III, supra*, 103 N.J. at 20, 110 A.3d 31; and *Mount Laurel IV, supra*, 221 N.J. at 1, 110 A.3d 31.

The FHA vests COAH with primary jurisdiction over the implementation and administration of the *Mount Laurel* doctrine. See *Mount Laurel III, supra*, 103 N.J. at 32, 510 A.2d 621; *Holmdel Builders Ass'n v. Twp. of Holmdel*, 121 N.J. 550, 576, 583 A.2d 277 (1990) ("It cannot be overstressed that the Legislature, through the FHA, intended to leave the specific methods of compliance with *Mt. Laurel* in the hands of COAH and the municipalities, charging COAH with the singular responsibility for implementing the statute and developing the state's regulatory policy for affordable housing"). This is so, even though COAH has, for all intents and purposes, ceased to function over the past several years. See *In re Monroe Twp. Hous. Element*, 442 N.J. Super. 565, 569, 577-78, 581, 125 A.3d 760 (Law Div. 2015); see also *In re Failure of the Council on Affordable Hous. to Adopt Trust Fund Commitment Regulations*, 440 N.J. Super. 220, 225, 112 A.3d 595 (App. Div. 2015).

Prior to 2001, three separate state agencies—COAH, the HMFA, and the Department of Community Affairs ("DCA")—"adopted distinct sets of rules establishing controls on the continuing affordability of housing constructed pursuant to the FHA," which, predictably, resulted in confusion and inconsistent results. *In re Adoption of Uniform Hous. Affordability Controls, supra*, 390 N.J. Super. at 95-96, 914 A.2d 402. To avoid inconsistent and/or overlapping regulations, the HMFA repealed its original set of regulations and, [*16] in 2001, promulgated the UHAC regulations, thus specifically amending and superseding any contrary rules promulgated by either COAH

or the DCA.⁴ *Id. at 96, 914 A.2d 402*. In 2004, the HMFA adopted its most current iteration of the UHAC regulations, which have become the definitive regulations pertaining to affordability controls on low and moderate income units. *Ibid.*

HNI In construing New Jersey regulations, the courts must do so "in the same manner that [they] would interpret a statute." *U.S. Bank, N.A. v. Hough*, 210 N.J. 187, 199, 42 A.3d 870 (2012); see *Bedford v. Riello*, 195 N.J. 210, 221-222, 948 A.2d 1272 (2008). The paramount goal is to ascertain the intent of the drafter. *DiProspero v. Penn.*, 183 N.J. 477, 492, 874 A.2d 1039 (2005). To that end, the intent of the drafter may often be found in the actual language of the enactment. *U.S. Bank, N.A., supra*, 210 N.J. at 199, 42 A.3d 870. A court should not "rewrite a plainly-written enactment," see *DiProspero, supra*, 183 N.J. at 492, 874 A.2d 1039 (internal quotation marks omitted), nor should it "engage in conjecture that will subvert its plain meaning." *U.S. Bank, N.A., supra*, 210 N.J. at 199, 42 A.3d 870. "Only when a fair 'reading of the enactment leads to more than one plausible interpretation' do we look to extrinsic evidence." *Ibid.* (quoting *Bedford, supra*, 195 N.J. at 222, 948 A.2d 1272).

While no court has yet construed the reach of *N.J.A.C. 5:80-26.1 to -26.26* in the context of extending resale and rental controls, it is plain that the UHAC regulations were "designed to implement [*17] the [FHA] by assuring that low-and moderate-income units *created under the Act* are occupied by low-and moderate-income households for an appropriate period of time." *N.J.A.C. 5:80-26.1* (emphasis added); see also *In re Adoption of Uniform Hous. Affordability Controls, supra*, 390 N.J. Super. at 95-96, 914 A.2d 402 (prior to 2001, the three state agencies each promulgated a distinct set of regulations "establishing controls on the continuing affordability of housing *constructed pursuant to the FHA*").

In the matter before me, none of plaintiffs' units were constructed or approved by COAH after July 17, 1989, which is when the recapture regulation was first adopted, nor were any of those units constructed pursuant to a housing plan approved by COAH after that date. Instead, each of the affordable housing units at issue in this case was constructed much earlier, pursuant to the *Urban League* litigation. Likewise, all of the relevant documents relating to the deed restrictions pre-date the enactment of the FHA and its implementing regulations. Inasmuch as none of the

Society Hill units were constructed pursuant to, or under the auspices of, COAH or the FHA, the UHAC regulations do not apply to them as a matter of law.

Even if the UHAC regulations did control, however, their application would not yield a contrary [*18] result. The evolution of these regulations confirms such a conclusion. Prior to its voluntary adoption of the UHAC regulations in 2001, COAH had enacted its own "length of controls" regulations (in 1989), which authorized municipalities to impose deed restrictions on affordable housing units. Those regulations provided:

In developing housing elements, municipalities shall determine measures to assure that *newly constructed* low and moderate income sales units remain affordable to low and moderate income households for an appropriate period of not less than 30 years. The administrative entity shall do so by requiring all conveyances of *newly constructed* low and moderate income sales units subject to the Act, to contain the deed restriction and mortgage lien adopted by the Council.

[N.J.A.C. 5:93-9.2(a)] (emphasis added)].

As contemplated by COAH, municipalities were clearly empowered to impose deed restrictions, but only on *newly constructed* low and moderate income units subject to the FHA. The imposition of affordability controls on homes constructed *prior to* the enactment of the FHA itself, *were not* encompassed within the regulation and would, therefore, have been excluded from its reach. See 21 N.J.R. 2021 (July 17, 1989) [*19] (stating that the deed restrictions were intended to apply to "*newly constructed*" low and moderate income units); see also 36 N.J.R. 5095(a) (November 15, 2004) (stating that the 2004 UHAC regulations "provide mechanisms for the 30-year deed restrictions to be continued for new units. *The Council cannot, however, retroactively change an existing deed restriction*") (emphasis added).

However, even though the COAH and UHAC regulations are not *expressly* limited to newly constructed units, any such unit that was deed restricted pursuant to COAH's grant of substantive certification, or any court judgment, grant agreement or contract prior to December 20, 2004, would, in any event, still be exempt under *N.J.A.C. 5:80-26.5(a)(2)*. That regulation provides:

HN2 (a) Each restricted ownership unit shall remain subject to the requirements of this subchapter until the

⁴ The UHAC regulations were subsequently ratified and adopted by both COAH and the DCA. See *In re Adoption of Uniform Hous. Affordability Controls, supra*, 390 N.J. Super. at 96-97, 914 A.2d 402; *N.J.A.C. 5:93-9.17*; and *N.J.A.C. 5:43-4.10*.

municipality in which the unit is located elects to release the unit from such requirements pursuant to action taken in compliance with (g) below. Prior to such a municipal election, a restricted ownership unit must remain subject to the requirements of this subchapter for a period of at least 30 years; *provided, however, that:*

....

2. Any unit that, *prior to December 20, 2004* [*20], received substantive certification from COAH, was part of a judgment of compliance from a court of competent jurisdiction or became subject to a grant agreement or other contract with either the State or a political subdivision thereof, shall have its control period governed by said grant of substantive certification, judgment or grant agreement or contract

....

[Emphasis added.]

Indeed, the HMFA itself echoes and buttresses this conclusion as well: "units whose control periods are governed by substantive certification, agreement or contract, and 95/5 units,⁵ have their control periods set by legal standards or decisions outside of the scope of these rules and cannot be overridden." 36 N.J.R. 5713(a) (December 20, 2004) (emphasis added); see also 33 N.J.R. 248(a) (Jan. 16, 2001) ("N.J.A.C. 5:80-26.1 also provides, however, that any unit subject to a grant agreement or other contract with either the State or a political subdivision thereof, in effect on or before January 1, 2001, and which provides for a control period different from that specified in the Uniform Controls shall have its control period governed by said grant agreement or contract").

HN3 The language of N.J.A.C. 5:80-26.5 is plain and unambiguous. Its drafters expressly intended to exclude any unit whose control period was created or governed by a "grant of substantive certification, judgment or grant agreement or contract" prior to December 20, 2004.⁶ Since the control periods at Society Hill were established prior to

that date, plaintiffs' units all qualify for the "carve out" in N.J.A.C. 5:80-26.5(a), and as such, the Township lacked legal authority, under either the UHAC or the COAH regulations, to unilaterally extend the resale and rental controls on their units.

HN4 Absent "changed circumstances" making adherence to a duly recorded covenant impractical, or evidence that such a deed restriction (as originally enacted) was, or has become, illegal or void against public policy, no party may unilaterally amend the terms of a covenant running with the land. See Am. Dream at Marlboro, LLC v. Planning Bd. of Twp. of Marlboro, 209 N.J. 161, 169, 35 A.3d 1198 (2012); [*22] see also Citizens Voices Ass'n v. Collings Lakes Civic Ass'n, 396 N.J. Super. 432, 446, 934 A.2d 669 (App. Div. 2007). Since there has been no such showing, the Township's attempts to extend and limit the marketability of plaintiffs' units to low and moderate income persons, are void, unenforceable, and of no force and effect.⁷

My conclusion that the Township's actions are void as to all plaintiffs, does not, however, afford the Patels relief from their deed restriction. Unlike the other plaintiffs, (whose resale and rental controls were extended without their consent), the Patels, prior to the purchase of their unit in 2013, purportedly voluntarily agreed to, and their deed specifically reflects, an extension of resale and rental controls on their unit for an additional thirty years. That extension may, in fact, be legally and/or equitably enforceable, and places them in a different position from the other plaintiffs. Since the UHAC regulations do not preclude a voluntary extension of affordability [*23] controls through additional deed restrictions, I am unwilling to interfere with or invalidate them absent proof of duress, undue influence, or some other recognized basis upon which they would legally or equitably be relieved of this burden.

Inasmuch as the Patels' complaint essentially seeks a reformation of their deed, relief from the specific price and occupying restrictions contained therein, and an order enjoining the Township from enforcing those deed restrictions, their claims require proofs that are different from the other plaintiffs and are primarily equitable in

⁵ A "95/5 unit" is "a restricted ownership unit that is part of a housing element that received [*21] substantive certification from COAH pursuant to N.J.A.C. 5:93 before October 1, 2001." N.J.A.C. 5:80-26.2.

⁶ Additionally, plaintiffs' units were not constructed or approved by COAH prior to January 1, 2001—the date set forth in the 2001 UHAC regulations, or even July 17, 1989—the date that COAH first enacted regulations providing for a recapture of deed-restricted affordable units.

⁷ Because I have determined Piscataway's actions have been ultra vires and void as a matter of regulatory and statutory interpretation, I need not address whether retroactive application of the regulations is permitted or whether the Township has violated either the New Jersey or United States Constitutions.

nature. As such, their complaint and cause of action will be severed from this litigation (*see R. 4:38-2*), transferred to the Chancery Division, and assigned a new docket number. *Rendine v. Pantzer*, 141 N.J. 292, 310-11, 661 A.2d 1202 (1995) (trial court may, in its discretion, sever claims of multiple plaintiffs where there are different incidents and circumstances); *see also Innes v. Marzano-Lesnevich*, 435 N.J. Super. 198, 245, 87 A.3d 775 (App. Div. 2014) (a court retains discretion to order severance of unrelated claim *sua sponte*, for the convenience of all parties), *aff'd in part, mod. in part, remanded in part*, N.J., 2016 N.J. LEXIS 331 (2016); *Wacker-Ciocco v. Government Emps. Ins. Co.*, 439 N.J. Super. 603, 610-11, 110 A.3d 962 (App. Div. 2015) (severance permitted in the court's discretion).⁸

4. Conclusion

After carefully examining the evolving regulatory framework leading to the ultimate adoption of the UHAC regulations, I

am satisfied that the Township's attempts to extend the thirty-year resale and rental restrictions in plaintiffs' deeds for an additional thirty-year period was beyond its authority and was, accordingly, unlawful, of no effect, and ultra vires. The applicable resale controls established by the *Urban League* consent order and contained in: (1) Piscataway's original affordable housing plan; (2) the project's master deed; and (3) each unit deed, were not subject to unilateral modification. As such, the thirty-year deed restrictions extending resale and rental prices to those units affordable to low and moderate income persons expired as to all plaintiffs, except the Patels, and are of no further force and effect.

An order granting final judgment to this effect and incorporating this opinion by reference, will be entered simultaneously herewith.

⁸ Accordingly, a separate order directing a severance and transfer to the Chancery Division has been [*24] entered simultaneously with the issuance of this opinion.