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| IN THE MATTER OF THE APPLICATION OF THE BOROUGH OF ENGLEWOOD CLIFFS, A MUNICIPAL CORPORATION OF THE STATE OF NEW JERSEY | SUPERIOR COURT OF NEW JERSEY<br>LAW DIVISION<br>BERGEN COUNTY<br>DOCKET NO. BER-L-6119-15 |

**BRIEF IN SUPPORT OF MOTION FOR RECONSIDERATION OF THE COURT'S JUNE 8, 2020 ORDER**

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## PRELIMINARY STATEMENT

On January 17, 2020, the Court entered an Order adjudicating, among other things, that:

(1) The Borough has an RDP of 174 (based largely upon the assignment of an RDP of 136 to the Prentice Hall site, notwithstanding that site having been developed with LG Electronics' North American Headquarters);

(2) The 800 Sylvan and Cioffi sites are unmet need sites; and

(3) The Borough is not entitled to rental bonus credits.

In response, the Borough studied how it might comply with this order, concluded that it is impossible to do so without violating applicable laws, and so informed the Court. On April 16th, the Court deemed the Borough in contempt of its January 17th Order for failing to have achieved the impossible by April 16th.

As COAH's measured words denote, and as this case illustrates, a realistic development potential must be realistic or the municipality is put in an impossible situation. The Borough explained its position in Resolution 20-70 and again in its letter to the Court dated April 9, 2020. Therein, it affirmed its belief that it would be impossible to fashion a plan without violating the FHA, COAH's rules and/or Mount Laurel IV since, inter alia, compliance with the Court's January 17th order required the Borough to expend its own money to comply in violation of the FHA. If the Borough is wrong, the Borough respectfully invited the Special Master to demonstrate otherwise.

To date, the Special Master has not suggested how a compliant plan could be implemented though re-zoning (i.e., without the Borough being compelled to spend its own money to sponsor 100% affordable housing projects). Yet, in furtherance of the Court's finding of contempt for being unable to do that which the Special Master appears to affirm through silence is impossible, the Court entered an Order on June 8th as follows:

(1) Reserving its decision on FSHC's motion to compel the Borough to spend its own money to achieve compliance with the Court's January 17th Order;

(2) Directing the Special Master, in apparent recognition of the fact that it is not possible to develop a plan for the Borough to comply with the Court's January 17th Order through re-zoning without violating the FHA and COAH's Rules, to seek out potential third-party solutions to this problem by inviting in whole, or in part more inclusionary development and possible 100% affordable housing projects;

(3) Attempting to have these yet to be identified third-party projects: (i) be able to apply for low income housing tax credits by virtue of the Court's commitment that it will order the Borough to grant tax abatements to such projects; and (ii) obtain site plan approval before the entry of a final judgment in this matter; and

(4) Continuing to keep this matter in an interlocutory state until at least 2021 (during which time the Borough's tax payers shall be required to pay potentially exorbitant legal fees and expenses to the Court's Special Master, Special Counsel and Special Hearing Officer to investigate whether or not it is possible to circumvent the fact that it is impossible for the Borough to comply with the Court's January 17th Order without the Borough being order to spend its own money - the Borough presumably being unable to recover these fees for work being done during an interlocutory period to implement a judgment that the Borough intends to seek to have reversed in whole or in part.

For the reasons set forth herein, it is beyond credible debate that the only way that the Borough could satisfy the RDP of 174 imposed by the Court's January 17th Order is if the Court orders the Borough to spend its own money (which the Court does not have the legal authority to do).

While the Borough recognizes that the Court may disagree with the foregoing statements, the Borough respectfully submits that it is prejudicial to the Borough for the Court to attempt to hold this matter in an indefinite interlocutory state so to look for non-existent third-party solutions at the expense of the rights of the Borough's tax payers. There is no legal authority to seek to add new inclusionary development sites or seek out third-party 100% affordable housing developers - particularly where the result of doing so:

(1) With respect to inclusionary development, will not reduce the RDP assigned by the January 17th Order as new inclusionary development sites must presumably be

deemed unmet need sites (and, even if deemed RDP sites, any affordable housing created would only go to address the RDP generate by the new site);

(2) With respect to proposed 100% affordable housing project, will not create a realistic opportunity for the creation of affordable housing without the Borough providing tax abatements and/or being compelled to spend its own money to substantially fund the same (neither of which alternatives the Borough can be compelled to do);

(3) Will financially burden the Borough's tax payers whose rights to timely appellate review should not be disregarded in favor of a protracted interlocutory appeal process where tax payers are required to fund work towards implementing a judgment that the Borough believes should be reversed in whole or in part; and

(4) Will potentially confer rights on developers inconsistent with the manner in which the Borough may wish to comply - a right which the Borough seeks to restore on appeal.

For these reasons, Borough respectfully seeks reconsideration of the Court's June 8th Order and toward this end, notes that there are only a limited number of paths as to how this matter may lawfully proceed:

(1) The Court may adjudicate that the Borough can be compelled to spend its own money to sponsor 100% affordable housing projects and thereby, the Court should direct the Special Master to forthwith prepare a plan (e.g., within the next 30 days) based upon this adjudication for the Court's approval in the form of a final judgment; or

(2) The Court may adjudicate that it believes that the Borough can satisfy the RDP of 174 in compliance with the Court's January 17th Order, the FHA and COAH's Rules without the Borough being required to spend its own money and thereby, the Court should direct the Special Master to forthwith prepare a plan (e.g., within the next 30 days) based upon this adjudication for the Court's approval in the form of a final judgment; or

(3) The Court may reconsider the obligations imposed by the January 17th Order and other orders, including, but not limited to imposition of an RDP of 174; or

(4) The Court may declare the August 27, 2019, the January 17th Order (and related Orders - including the June 8th Order) as final judgments so to permit the Borough to pursue timely appellate review of the same.

Simply put, it is time for the Court to bring this matter to a conclusion and a final judgment to approve whatever plan the Court believes is appropriate, so as to afford the Borough its right to appellate review.

It is neither legal appropriate, nor fair to the Borough's tax payers for this matter to be indefinitely held in an interlocutory state to have the Special Master explore and facilitate implementing (through site plan approval and otherwise) possible affordable housing projects by potential third-parties (all at the tax payers expense) - particularly where doing so is somehow being premised upon punishing the Borough for either:

(1) Being unable to do the impossible - satisfy the RDP of 174 based upon re-zoning; or

(2) Refusing to spend its own money to comply with the Court's January 17th Order - it being clearly improper to punish the Borough for refusing to volunteer to do something that would be inappropriate for the Court to order.

## PROCEDURAL HISTORY AND STATEMENT OF FACTS

On April 22, 2020, FSHC brought a motion in aid of litigant's rights. By its motion, FSHC sought to compel the Borough to move forward with the 57-unit project in its 2019 housing element and fair share plan. If the Court had granted the motion, the Borough would have had to cure the title issues, issued requests for proposals to develop the project, fund any gap in funding and award FSHC counsel fees to boot. According to the Borough's estimates, the fiscal exposure of this project was roughly $12.7 million: $5.57 million for demolition and reconstruction costs and $7.1 million in direct subsidies if the developer failed to win the extreme competition for 9% tax credits. That means that even if the redeveloper wins the extreme competition for tax credits, the Borough still estimates $5.57 million in demolition and reconstruction costs not to mention other costs. With the amount the Borough expects to have in its trust fund through 2025, it would still be millions of dollars short just to reach the $5.57 million in demolition/reconstruction costs.

Although FSHC argued that the issue as to whether a municipality needed to expend its

own money to comply was irrelevant, the Borough insisted that this legal principle was absolutely relevant. At the conclusion of oral argument, the Court said that it would issue its opinion in five to seven days. When the Court ultimately did issue its decision on June 8, 2020, it did not address the central point raised by the Borough in opposition to the motion: that a municipality cannot be compelled to expend its own money to comply. Instead, the Court reserved on ruling on FSHC's motion in aid of litigant's rights because "there is the need for the preparation of a compliance plan to address this Court's January 17, 2020 decision" before she orders the Borough to implement its 2019 plan or give back the money. (See June 8, 2020 Order at paragraph 1).

The Court also directed the Mary Beth Lonergan, PP and Leslie London, Esq., who it refers to as the "Special Master/Counsel", to prepare a compliance plan. In preparing a compliance plan, the Court directed Special Master/Counsel, to inter alia

a. To determine "the feasibility and use of the municipal site (both fiscally and physically)" "and in addition to such use, when compared to other possible 100 % affordable housing sites in the Borough". As part of their tasks, they should determine if the deed restriction prohibits use of all or part of the municipal site.
b. To prepare a Request for Qualifications for the possible development of a 100 percent affordable project on another suitable site "in addition to the possible use of the municipally proposed site".
c. To make recommendations to the Court for one or more 100 percent set-aside developers**,** who, upon selection, "shall proceed to get a suitable site under contract, prepare a pro forma and construction schedule, address site suitability criteria, prepare, developments applications, applications for 9 percent tax credits, etc.
d. To prepare an RFP for traditional inclusionary sites (20% set aside)
e. To propose zoning additional lands in the Borough
f. To authorize, with Court approval, to apply to the Land Use Board for approvals or to develop an inclusionary ordinance for court approval which can be used to apply to the Special Hearing Officer
g. To develop a schedule for the completion of the tasks set forth above by mid-July with the understanding that by the end of the year, the Court expects the completion of the following tasks: all sites in plan zoned, all affordable housing developers selected, submission for court approval of an affirmative marketing plan, Administrative Agent Contract, etc.

Finally, the Court directed the Special Master/Counsel to develop a schedule for the completion of the tasks set forth above by mid-July with the understanding that by the end of the year, the Court expects all sites in plan zoned, all affordable housing developers selected, submission for court approval of an affirmative marketing plan, Administrative Agent Contract, etc.

After the courts invalidating COAH's fair share formula for a second time because the formula was based on "growth share" and directed COAH to establish a fair share formula yet again by a specific deadline, the Court made clear to COAH not to return with a formula based on growth share. In re Adoption of N.J.A.C. 5:96 & 5:97, 215 N.J. 578 (2013). In contrast, when directing the Special Master/Counsel to come back with a compliance plan, the Court did not establish limits. It did not say, for example, don't come back to me with a compliance plan that violates the prohibition against forcing a municipality to expend its own money to comply. Nor did the Court limit the Special Master/Counsel to only selecting sites the Court used to impose an RDP of 174. To the contrary, the Court encouraged the Special Master/Counsel to hunt for additional sites for 100% or 20% affordable projects regardless of whether those sites contributed to the 174 RDP.

## RELIEF SOUGHT BY MOTION TO RECONSIDER

1. The Court should decide one way or another if its position is that a municipality can be compelled to expend its own money to comply.

2. The Court should decide whether a municipality should be able to meet "all" or part of the municipality's fair share through mandatory set-asides or density bonuses.

3. The Court should direct the Masters to act within the parameters established by the FHA, COAH regulations and Mount Laurel IV and should not, for example, authorize the Masters to hunt for new sites that do not contribute to the 174 RDP the Court established.

4. The Court should structure its rulings so as not to damage the Borough's right to appeal. Such relief should include, at a minimum, a condition that any land use approvals granted in connection with the Court's orders be subject to the Borough's rights on appeal (in other words, the vested

rights not be conferred until the Borough has exhausted its rights on appeal).

5. The Court should declare the following decisions to be final judgments so that the Appellate Division can decide whether the court or Master was correct:

(a) The August 27, 2019 rulings stripping the Borough of immunity and denying it the right to cure any deficit in satisfaction of its adjusted obligation once that decision was made;
(b) The January 17, 2020 order imposing an RDP of 174 based upon an RDP of 134 for the new LG site and without imposing an RDP for 800 Sylvan or Cioffi etc;
(c) The February 12, 2020 Order awarding Sylvan a builder's remedy;
(d) The April 16, 2020 order empowering 800 Sylvan and potentially others to obtain development approvals and building permits before the Appellate Division considers the Borough's appeals; and
(e) The June 8, 2020 ruling encouraging the Special Master/Counsel to hunt for additional sites beyond those that contribute to the 174 RDP the Court assigned and that may be contrary to the Borough's vision of the best plan for the community, a right which only a higher court can determine.

## LEGAL ARGUMENT

### I. SINCE THE FHA PROHIBITS COMPELLING A MUNICIPALITY TO EXPEND ITS OWN MONEY TO COMPLY, THE SPECIAL MASTER/COUNSEL NEED TO KNOW IF THEY MUST HONOR THIS LEGISLATIVE PRONOUNCEMENT OR NOT IN FULFILLING THEIR RESONSIBILITIES UNDER THE JUNE 8, 2020 ORDER.

#### A. The FHA Prohibits The Imposition Of A Requirement That A Municipality Expends Its Own Money To Comply.

The law is inescapably clear: the Legislature prohibited the requirement for a municipality to expend its own money to comply; COAH adopted regulations faithful to this principle; and the Supreme Court clearly did not intend any court to substitute its view of sound public policy for that of the Legislature.

##### 1. The Legislature's Prohibition Against Requiring a Municipality to Expend Its Own Money to Comply Is Beyond Credible Debate.

What could be clearer?

> Nothing in [this Act] shall require a municipality to raise or expend municipal revenues in order to provide low and moderate income housing.

N.J.S.A. 52:27D-311(d).

To ask the question is to answer it. Accord N.J.S.A. 52:27D-302(h) (which provides ". . . While provision for the actual construction of that housing by municipalities is not required, they are encouraged **but not mandated to expend their own resources to help provide low and moderate income housing**.) (emphasis added)

**2. Consistent with the Legislature's Prohibition Against Requiring a Municipality to Expend Its Own Money to Comply, COAH Regulations Do Not Require Municipalities To Spend Their Own Money To Comply.**

By way of background, the Appellate Division's ruling in In re Adoption of N.J.A.C. 5:96, 416 N.J. Super. 462 (App Div. 2010), aff'd 215 N.J. 578 (2013), addressed the statutory prohibition against compelling a municipality to expend its own money to comply set forth in the N.J.S.A. 52:27D-311(d) and N.J.S.A. 52:27D-302(h). In that case, the claim was that the imposition of a Mount Laurel obligation on a municipality forced a municipality to expend its own money to comply because of the municipal costs generated by traditional inclusionary zoning that are not covered by taxes. Id. at 502. To address that claim, the Appellate Division distinguished between expenses a municipality incurs because of (i) traditional inclusionary zoning in which 20 percent of the units are affordable; and (ii) other compliance techniques that require the expenditure of municipal monies to make them an effective way to create a realistic opportunity for the construction of affordable housing. The Appellate Division ruled that traditional inclusionary zoning does not violate the statutory prohibition against a municipal expenditure in violation of N.J.S.A. 52-27- 311 (d). Id. at 503. However, if another compliance technique required the expenditure of municipal monies, the Court clearly ruled that a municipality "**cannot be compelled**" to spend its own money to comply.

> The FHA expressly authorized municipalities to expend their revenues for subsidized affordable housing either within their own borders or, through

> regional contribution agreements, in other municipalities, by providing in N.J.S.A. 52:27D-302(h) that municipalities "are encouraged but not mandated to expend their own resources to help provide low and moderate income housing." Thus, N.J.S.A. 52:27D-311(d) **can be reasonably construed simply to indicate that the authorization that N.J.S.A. 52:27D-302(h) provides for the direct expenditure of municipal revenues to provide affordable housing is purely voluntary and that any municipality that chooses not to make such expenditures cannot be compelled to do so.**

Id. at 504 (emphasis added). Since 100 percent set-aside requires "the direct expenditure of municipal revenues to provide affordable housing", a municipality cannot be compelled to rely on this technique.

COAH designed its regulations consistent with the principle that traditional inclusionary zoning does not violate the FHA prohibition, but that compliance techniques such as 100 percent set-asides do because they require "the direct expenditure of municipal revenues to provide affordable housing." Two examples illustrate this principle. First, COAH regulations do not require a land-poor municipality to expend its own money to comply to address its RDP through 100 percent set-asides or other techniques that require "the direct expenditure of municipal revenues to provide affordable housing." COAH avoids the requirement – a requirement that would trigger a FHA violation -- by giving land-poor municipalities "**the option to zone for their entire housing obligation**":

> 90. COMMENT: In calculating realistic development potential, the Council establishes a minimum of six units per acre and a maximum 20 percent set-aside. The rule should state that the Council will require higher densities where the site will support them. The rule should also establish a 20 percent set-aside as a minimum.
>
> RESPONSE: In general, the Council views the density of six units per acre to be a minimum in the calculation of realistic development potential. It has and will utilize higher densities when the surrounding land uses indicate that higher densities are appropriate. The 20 percent set-aside is viewed as a maximum. **This is because municipalities have the option to zone for their entire housing obligation.** The Council is not empowered to require municipalities to spend municipal funds to

> subsidize inclusionary developments. Absent such subsidies, a 20 percent set-aside is, generally, the maximum requirement of the private sector.

25 N.J.R. 5770 (December 20, 1993).

Similarly, in In re Adoption of N.J.A.C. 5:96 416 N.J. Super. 462, 504-505 (App Div. 2010) aff'd 215 N.J. 578 (2013), Judge Skillman, writing for the Appellate Division, noted that a land poor municipality should be able to satisfy its obligations "**solely by zoning for inclusionary developments**". Finally, the point of N.J.A.C. 5:93-4.2(g) is that while land-poor municipalities are free to satisfy their entire RDP through what is often regarded as the most burdensome compliance technique -- traditional inclusionary zoning -- they don't have to. They can select a money based compliance technique to avoid traditional inclusionary zoning.[1]

Second, the principle that a municipality cannot be forced to expend its own money to comply in violation of N.J.S.A. 52-27- 311(d) also explains why COAH does not require a municipality to satisfy its rehab obligation by doing what would seem to be the logical choice: financing a rehab program. Instead, COAH permits the municipality to satisfy its rehab obligation through new units:

> Once a municipality has subtracted its credits (pursuant to N.J.A.C. 5:93-3) from its calculated need, and/or received an adjustment pursuant to N.J.A.C. 5:93-4, it shall develop a plan to address the municipal housing obligation. **In addressing the need, a municipality may address its rehabilitation component through a rehabilitation program, ECHO housing or by creating new units.**

N.J.A.C. 5:93-5.1(a) (emphasis added).

If COAH compelled a municipality to spend its own money to implement a "rehabilitation program, it would violate the N.J.S.A. 52-27D - 311(d) prohibition. Only by empowering a

[1] See J.W. Field Co, Inc. v. Franklin Tp., 204 N.J. Super. 445, 458 (Law Div. 1985) (wherein explained the public's opposition to traditional inclusionary development in 1985 because it takes four market units to generate just one affordable units).

municipality to satisfy its rehab obligation through traditional inclusionary zoning does COAH avert violating N.J.S.A. 52-27D-311 (d).

**3. Far From Authorizing Trial Judges To Substitute Their Judgment For That Of The Legislature, The Supreme Court Has Emphatically Pledged and Demonstrated Deference To The Legislature in Almost A Half Century of Mount Laurel Jurisprudence.**

Our courts have an obligation to honor the essential legislative policy of the FHA and to give meaning to its reason and spirit. See New Jersey Sports & Exposition Auth. v. McCrane, 61 N.J. 1, 8-9 (1972) ("The judicial branch of the government does not and **cannot concern itself with the wisdom or policy of a statute. Such matters are the exclusive concern of the legislative branch,** and the doctrine is firmly settled that its **enactment may not be stricken because a court thinks it unwise.**") Perhaps nowhere more than in Mount Laurel jurisprudence has the New Jersey Supreme Court emphasized and exhibited the importance of deference to the Legislature. See Mount Laurel I, 67 N.J. at 177; Mount Laurel II, 92 N.J. at 212-13; Mount Laurel III, 103 N.J. at 25; Mount Laurel IV, 221 N.J. at 6, 27, 28 and 29; Mount Laurel V, 227 N.J. at 531 (demonstrating that the Supreme Court's emphasis on deference to the Legislature could not have been more pronounced).

In Mount Laurel III, the Supreme Court squarely addressed FSHC's argument that there should be different standards for municipalities that complied voluntarily and those that – purportedly - do not seek to comply voluntarily. In this case, wherein the Supreme Court enthusiastically proclaimed the FHA constitutional over the most vigorous challenge by developers and nonprofits, the Supreme Court faced a situation where there would be two categories of municipalities (i) those that failed to comply voluntarily and thus found themselves the subject of exclusionary zoning suits by developers seeking a builder's remedy and/or non-profits seeking to compel compliance and (ii) those that brought themselves under COAH's

jurisdiction and sought to comply voluntarily. Instead of ruling that there will be one set of rules for the virtuous and another for the recalcitrant, the Supreme Court opined that it did not think the Legislature intended the law to evolve in two directions at once; that COAH should take the lead and that courts should follow. Mount Laurel III at 63. Therefore, the Supreme Court has squarely rejected the notion that any Court should substitute its view – or that of FSHC - of sound public policy for that of the Legislature.

In Mount Laurel IV, the Supreme Court did not retreat from the principle that deference to the Legislature and COAH is essential. To the contrary, it reconfirmed this principle. More specifically, in Mount Laurel IV, the Supreme Court emphasized that it had authorized a judicial process to "reflect as closely as possible the FHA's processes." By warning trial judges not to attempt to "become a replacement agency for COAH," the Court made clear that trial judges should follow COAH's substantive policies as well. Mount Laurel IV at 6, 29.

In sum, the examination of the pronouncements of the Legislature, COAH, the Appellate Division and the Supreme Court make inescapably clear that the Borough cannot be compelled to spend its own money to comply.

### B. The Special Master/Counsel Paid For With The Public's Money Need To Know, Just As The Borough Needed To Know, If This Court's Position Is That A Municipality Can Be Compelled To Expend Its Own Money To Comply.

When the Borough adopted resolution 20-70 and wrote the April 9, 2020 letter setting forth its position, there was no credible question as to whether the FHA prohibited compelling a municipality to expend its own money to comply. Moreover, when FSHC brought its motion in aid of litigants rights seeking to compel the Borough to expend from $5.6 million to $15 million in lieu of potentially just replenishing the trust fund at an appropriate time, again there was no question as to the parameters the Legislature had established. Instead of stating its position on what limitations the FHA imposes in response to FSHC's motion, the Court "reserved judgment." See

June 8, 2020 Order at Paragraph 1.

However, now that the Court has directed the Masters to do what the Borough was unable to do within the parameters of the law, they too need to know the Court's position on the statutory limitation that Borough has brought to the Court's attention. If the Masters come back with a proposal that requires municipal expenditures and the Court concludes then that the FHA prohibits compulsory municipal expenditures, we will have needlessly wasted a great deal of time and money. The Court can solve the problem now by agreeing or disagreeing with the Borough's contention.

## II. A COROLLARY TO THE PRINCIPLE THAT NO MUNICIPALITY NEED EXPEND ITS OWN MONEY TO COMPLY IS THAT EVERY MUNICIPALITY MUST BE ABLE TO SATISFY "ALL" OF ITS OBLIGATIONS THROUGH INCLUSIONARY DEVELOPMENTS.

Just as the FHA prohibits requiring municipalities to expend their own money to comply, it empowers municipalities to meet ***"all"*** of their fair share through traditional inclusionary zoning. Compare N.J.S.A. 52:27D-311 (d) with N.J.S.A. 52:27D-311 (a) (1). More specifically, N.J.S.A. 52:27D-311 (a) (1) provides as follows:

> a. In adopting its housing element, the municipality may provide for its fair share of low and moderate income housing by means of any technique or combination of techniques which provide a realistic opportunity for the provision of the fair share. **The housing element shall contain an analysis demonstrating that it will provide such a realistic opportunity, and the municipality shall establish that its land use and other relevant ordinances have been revised to incorporate the provisions for low and moderate income housing**. In preparing the housing element, the municipality shall consider the following techniques for providing low and moderate income housing within the municipality, as well as such other techniques as may be published by the council or proposed by the municipality:
>
> (1) Rezoning for densities necessary to assure the economic viability of any inclusionary developments, either through mandatory set-asides or density bonuses, **as may be necessary to meet *all* or part of the municipality's fair share** in accordance with the regulations of the council and the provisions of subsection h.

of this section.[2]

(Emphasis added). Since the problem that the Mount Laurel doctrine seeks to cure is exclusionary zoning, logic dictates that a municipality must be able to cure that problem with inclusionary zoning. Thus, when instructing COAH and municipalities how they might comply, they made clear what was obvious to all; you can rezone at densities needed to create a realistic opportunity through mandatory set-asides or density bonuses, i.e., through traditional inclusionary zoning. This is true regardless of whether the municipality seeks a vacant land adjustment or not.

It is significant that the statutory provision prohibiting the imposition of a municipal expenditures to comply (N.J.S.A. 52:27D-311(d)) and the statutory provision empowering a municipality to address "all" of its fair share with traditional inclusionary zoning (N.J.S.A. 52:27D-311(a)) are part of the same provision of the FHA: N.J.S.A. 52:27D-311. That is the section of the FHA where the Legislature sought to provide guidance on how municipalities can comply. Thus, the section is aptly titled, "**Housing element; techniques for providing fair share of low and moderate income housing; phasing schedule; expenditure of municipal revenues unnecessary.**" (Emphasis added). Therefore, this Court has an obligation to honor the essential legislative policy of the FHA and to give meaning to its reason and spirit—particularly where, as here, the New Jersey Supreme Court emphasized and exhibited the importance of deference to the Legislature for almost half a century. See Point I. A. 3. Accordingly, this Court should direct the Special Master/Counsel to be faithful to these fundamental parameters in considering what techniques to use to fashion a compliance plan for the Borough.

[2] Section h of this section reads as follows: "h. Whenever affordable housing units are proposed to be provided through an inclusionary development, a municipality shall provide, through its zoning powers, incentives to the developer, which shall include increased densities and reduced costs, in accordance with the regulations of the council and this subsection."

No doubt, in the future as in the past, FSHC will complain that such procedure is somehow unfair. However, this Court must defer to what the Legislature deemed to be fair when it designed and adopted the Fair Housing Act- not what a zealous housing advocate or avaricious developer deems to be fair today. That point is as inescapable as it is fundamental.

In implementing the FHA generally and designing standards to determine the RDP particularly, COAH was faithful to the principle that a municipality should be able to satisfy all of its fair share through standard inclusionary zoning. Since the point of a realistic development potential determination is to determine the number of affordable units that can realistically be created through inclusionary zoning, that explains why COAH repeatedly explained that the purpose of the adjustment process was to calculate the RDP (a) by identifying all the sites that are realistic for inclusionary zoning and (b) adding up the number of affordable units each site could realistically generate if rezoned for inclusionary development. See 25 N.J.R. 1121 (March 15, 1993) (When COAH, in conjunction with its initial proposal of the Round 2 regulations, introduced the concept of "realistic development potential" and stated that through this concept, "the Council will make site-by-site determinations regarding which sites could realistically develop for low and moderate income housing during the period of substantive certification, if appropriately zoned. Only the sites determined by the Council to be realistic would be included in calculating the municipal realistic development potential"). See also 25 N.J.R. 5786 (when COAH, in conjunction with its re-proposal of its Round 2 regulations, used the identical explanation of how it designed its vacant land adjustment regulations to operate); N.J.A.C.5:93-4.1 (b) (wherein COAH explains that the purpose of the multistep process to determine the municipality's RDP is as follows: "Where a municipality attempts to demonstrate that it does not have the capacity to address the housing obligation calculated by the Council, the municipality shall identify sites that are realistic

for inclusionary development in order to calculate the realistic development potential (RDP) of the community, in accordance with N.J.A.C. 5:93-4.2. . . . "); N.J.A.C.5:93-4.2(g) (which COAH designed to give land-poor municipalities an alternative to satisfying their RDP by zoning some of the sites that contribute to it with traditional inclusionary zoning); 25 N.J.R. 5770 (December 20, 1993) (Wherein, in response to a comment, COAH stated that "municipalities have the option to zone for their entire housing obligation."); In re Adoption of N.J.A.C. 5:96 416 N.J. Super. 462, 504-505 (App Div. 2010) aff'd 215 N.J. 578 (2013) (Wherein the Appellate Division ruled that a land poor municipality should be able to obligations "solely by zoning for inclusionary developments").

In light of the above, we urge this Court to acknowledge not only that the Legislature established the principle that a municipality should be able to satisfy its entire fair share through standard inclusionary zoning, but also that COAH designed its vacant land adjustment regulations to entitle a land-poor municipality to satisfy its obligation by rezoning just some of the sites that contributed to it with traditional inclusionary zoning. We say just some because those regulations empowered a municipality to satisfy half its RDP through RCAs – a technique that the legislature subsequently invalidated and to satisfy 25 percent of its RDP through rental bonus credits. See N.J.A.C. 5:93 – 6.1 (a) 2 (authorizing municipalities that are "requesting a vacant land adjustment" and that never received a grant of substantive certification or a judgment of repose to satisfy half their RDP through RCAs). See also N.J.A.C. 5:93 – 5.15(d) (authorizing municipalities to satisfy 25 percent of their RDP through rental bonus credits). In addition, COAH established a number of other compliance techniques in N.J.A.C. 5:93-5 that municipalities could use to address their RDP. Thus, COAH sought to empower land poor municipalities to find alternative ways to comply without, for example, including a massive residential project in the middle of their "vibrant

commercial districts." See Deposition of Mary Beth Lonergan, dated October 1, 2019, at 53.

In making the arguments set forth above, we are aware that 800 Sylvan, through Mr. Bernard argues, in essence, that COAH staff's recommendation for an increased RDP on an approved site in Wanaque (the Powder Hill site) justifies imposing an RDP for the Prentice Hall site. See Bernard Report, dated January 7, 2019 at 17. More specifically, COAH staff assigned an RDP for the Powder Hill site premised on a density of six per acre. However, while Wanaque's petition for substantive certification was still pending, COAH learned from a third party (the Office of State Planning) that Wanaque's Planning Board had approved the project at much higher densities. Thus, COAH made the municipality address a much higher RDP even though the municipality had no place to provide more affordable housing.

Although 800 Sylvan, through the Bernard report and testimony, sought to drive home the point that Englewood Cliffs should have to address a larger RDP for the Prentice Hall site even though it has no land to address the RDP, Ms. Lonergan appropriately did not assign an RDP to the site. In both of her reports and in her testimony, she assigned no RDP to the site.

She was absolutely right. The case is clearly distinguishable as explained in our trial brief at pages 38-41 and in our summation at pages 51-53. The most striking distinction is that COAH denied Wanaque's petition for substantive certification subject to the condition that the Borough address the full RDP it assigned to the Powder Hill site premised upon the density for which the site was approved. 11/7/19 Tr. AM 51:6-14. In response, Wanaque satisfied the condition. As a result, Wanaque got the just reward called for by the FHA: substantive certification giving the municipality an additional six years of immunity.[3] Similarly, COAH denied Englewood Cliff's

[3] Ironically, although Wanaque employed Mr. Bernard from 2003-2010, and although Mr. Bernard relied on Wanaque's experience with COAH as a justification for his opinions regarding his calculation of Englewood Cliff's RDP, Mr. Bernard was uncertain as to whether Wanaque had

petition for substantive certification subject to the Borough adopting an overlay on the Prentice Hall site at a density of six units per acre with a 20 percent set-aside. In response, Englewood Cliffs did not adopt the overlay zone as FSHC and 800 Sylvan have informed this court countless times. As a result, Englewood Cliffs got the just reward called for by the FHA: exposure to exclusionary lawsuits for over a decade. Thus, in accordance with the design of the FHA, Wanaque's satisfaction of the condition of denial of substantive certification created 6 years of protection whereas Englewood Cliffs refusal to satisfy the condition of denial of substantive certification created 11 years of exposure to exclusionary zoning lawsuits.

In any event, the fact that the limitations that the FHA imposes takes precedence over anything that COAH may have done is so fundamental that no authority need be cited for this statement of law. Therefore, even if COAH had taken an action that forced a municipality to expend its own money to comply or disempowered a municipality from having the right to satisfy its entire fair share through inclusionary zoning, this Court would have an obligation to follow the Legislature and not COAH. Certainly, this Court should show no less deference for the Legislature than the Supreme Court has pledged and exhibited for almost half a century.

## III. AS WE INFORMED THE COURT IN OUR APRIL 9, 2020 LETTER, IT IS IMPOSSIBLE TO SATISFY THE COURT'S JANUARY 17, 2020 RULING WITHOUT VIOLATING THE FHA, COAH REGULATIONS AND/OR THE SUPREME COURT'S PROMISES IN MOUNT LAUREL IV.

The choice for the municipality to satisfy its RDP comes down to choosing traditional inclusionary zoning, 100 percent set-aside(s) or a combination of the two techniques. Thus, in In

obtained substantive certification from COAH pursuant to COAH's revised RDP. 11/6/19 Tr. PM 49:2-50. However, Kinsey testified that COAH conditionally denied Wanaque's petition for substantive certification; the Town re-petitioned COAH for substantive certification; and COAH certified Wanaque's affordable housing plan. 10/29/19 Tr. AM 29:12-17; 10/29/19 Tr. AM 31:23-32:5.

the Matter of the Application of the Municipality of Princeton, et al., Docket No. MER-L-1550-50, Judge Jacobson recited testimony provide by Dr. David Kinsey regarding his analysis of data he had obtained from COAH, data which demonstrated that 57 percent of affordable housing units created in New Jersey under the Mount Laurel doctrine had been developed through 100 percent affordable projects, and 28 percent of the units had been created through inclusionary developments. Id. at 209. Thus, twice as much affordable housing is produced through 100 percent set-asides than as through inclusionary developments and, together, these devices create 85 percent of the affordable housing in the state.

In view of these realities, the Borough has examined if it is possible to satisfy the Court's RDP of 174 (1) exclusively through 100 percent set-asides; (2) exclusively through traditional inclusionary development; and (3) through possible combinations of 100 percent set-asides and traditional inclusionary development. As to this third category, the Borough has examined if it is possible to satisfy the RDP of 174 by implementing the 57-unit project in the 2019 plan and then addressing the remaining 117 gap in another way. To avoid roughly $5.6 million in demolition/reconstruction costs associated with the 57-unit project in the 2019 plan, the Borough has considered an approach that cuts down the 57-unit project to avoid the majority of those costs and then address a bigger gap than 117. Whatever avenue it considered, the Borough could not find a way to address an RDP of 174 without violating the FHA, COAH regulations and/or Mount Laurel IV.

**A. It Is Not Possible To Fully Satisfy The Court's RDP Of 174 RDP Exclusively Through 100 Percent Set-Asides Without Violating The FHA, COAH Regulations And/Or The Supreme Court's Promises In Mount Laurel IV.**

Dr. Powell analyzed the cost of generating 174 units through 100 percent set-asides and concluded that the total costs would be $44,864,629 if none of the projects secured 9% tax credits and had to rely on 4% tax credits. See Table A of the Certification of Dr. Robert Powell, dated

June 29, 2020 (hereinafter "Powell Certification"). If all three 100 percent developers secure 9 percent tax credits, there would still be a deficit of $23,265,484. Id. See also Paragraphs 31-48 of Certification of Michael Mistretta, PP, dated June 29, 2020 (hereinafter "Mistretta Certification")

Denying the Borough the ability to satisfy its RDP through inclusionary zoning and thereby forcing the Borough potentially to spend $44,864,629 just to address its 174 RDP obviously violates the Legislature's prohibition from having "**to raise or expend municipal revenues in order to provide low and moderate income housing**." N.J.S.A. 52:27D-311 (d) (emphasis added).

### B. It Is Not Possible To Fully Satisfy The 174 RDP Through Traditional Inclusionary Zoning Without Violating The FHA, COAH Regulations And/Or The Supreme Court's Promises In Mount Laurel IV.

It also is not possible to satisfy the 174 RDP the Court assigned exclusively through traditional inclusionary zoning without violating the FHA, COAH regulations and/or Mount Laurel IV because a municipality should be able to satisfy "all" of its fair share through inclusionary zoning. See point II. If a municipality secures a vacant land adjustment, it should be able to satisfy all of its RDP by zoning just some of the sites that contribute to it. See Point II. If the Borough rezoned all the sites that contribute to the 174 RDP, the maximum number of affordable units that traditional inclusionary zoning would generate is 26 units—a far cry from 174. See Mistretta Certification at ¶ 51.

If the Special Master/Counsel looks beyond the sites that contribute to the RDP—which for the reasons set forth in Point IV is entirely inappropriate—those sites would contribute to the unmet need, not the RDP, based upon the Court's ruling. Indeed, all the sites would be developed sites and would be indistinguishable from the 800 Sylvan and Cioffi sites. Moreover, even if the sites contributed to the RDP and not the unmet need, they would simply satisfy the RDP they generate. To illustrate, assume that the Special Master/Counsel find sufficient sites that could

reasonably accommodate 874 units after the existing structures are demolished and that the Court ordered the sites rezoned with a 20 percent set-aside to net 174 units. Assume that all these sites are not sites that the Court ruled contributed to the RDP of 174. The rezoning of these additional sites – if they did not contribute to the unmet need as required by this Court's rulings – would generate an additional 174 RDP. Rezoning the sites would merely satisfy the RDP the sites generated and the Borough would still not satisfy any of the initial 174 RDP. The Mistretta Certification at ¶¶ 49-63 further details why it is not possible to address an RDP of 174 exclusively through traditional inclusionary development.

Beyond this, consider what Englewood Cliffs looks like assuming arguendo there were not the fatal problems outlined above. It would have 874 units in traditional inclusionary zoning. It would have 600 units on 800 Sylvan and 30 units on Cioffi. It would have up to 500 units on the three areas that the Borough targeted for overlay zoning to address the unmet need that the Master found to be such a great way to satisfy the unmet need subject to limited changes:

> The Borough's proposed unmet need mechanisms are similar to those utilized in other VLA municipalities in Bergen County and across the state. The proposed inclusionary overlay zones provide a significant compensatory benefit of permitting residential uses in zones currently restricted to only commercial uses. Additionally, the requirement of ground-floor commercial uses is consistent with many other similar municipalities in the area that wish to preserve their commercial corridors.

See Master's Report 8/14/19 at 42 (DF-5). That totals an additional 2,000 new units in a town that currently has 1,924 units according to the 2020 Census. See Powell Certification at ¶ 41. So many units would have a crushing impact on the public school system as school enrollment could increase as much as 81 percent. Id. at ¶ 42. Dr. Powell explains the impact of such an influx of new housing on the community. See id. at ¶¶ 36-42, and Worksheets 2-5 attached thereto.

For all these reasons, clearly the Borough could not satisfy an RDP of 174 exclusively through traditional inclusionary development without violating the FHA, COAH regulations and/or Mount Laurel IV.

**C. It Is Not Possible To Fully Satisfy The 174 RDP Through The Implementation Of The 57-Unit Project In The 2019 HEFSP And The 117 Balance Through Other Means Without Violating The FHA, COAH Regulations And/Or The Supreme Court's Promises In Mount Laurel IV.**

The above analysis demonstrates that the Borough cannot satisfy an RDP of 174 exclusively through 100 percent set-asides or exclusively through traditional inclusionary zoning the FHA, COAH regulations and/or the Supreme Court's promises in Mount Laurel IV. This section explores whether the Borough can reach the Court's RDP of 174 by starting out with the 57-unit project in the plan and then finding another way to make up the 117 shortfall without violating the FHA, COAH regulations and/or the Supreme Court's promises in Mount Laurel IV. The following section explores whether the Borough could satisfy the Court's 174 RDP by scaling the municipal site back to avoid roughly $5.6 million in demolition and reconstruction costs and then addressing a larger deficit in another way without violating the FHA, COAH regulations or the Supreme Court's promises in Mount Laurel IV.

The Borough would clearly violate the FHA if it sought to achieve an RDP of 174 by starting with the municipal 57-unit project and then finding other ways to make up the remaining 117 deficit. That is because implementing the 57-unit project alone would force the Borough to expend its own money to comply largely because using all of the anticipated trust fund revenue would leave the Borough roughly $2.5 million short in underwriting just the $5.6 million demolition/reconstruction costs associated with the Borough's plan. See Mistretta Certification at ¶¶ 34-42, 64-68.

**D. It Is Not Possible To Fully Satisfy The 174 RDP By Scaling Back The 57-Unit Project In The 2019 HEFSP And Addressing A Larger Balance Through Other Means Without Violating The FHA, COAH Regulations And/Or The Supreme Court's Promises In Mount Laurel IV.**

As demonstrated above, the problem with a combination of compliance techniques that begins with the 57-unit project causes a FHA violation because it generates $5.57 million in demolition/rehabilitation costs. See Mistretta Certification at ¶ 69. However, it is possible to scale back the project to avoid those costs or at least drastically reduce them. Id. at ¶ 70. Mr. Mistretta considered a scenario where he eliminated the redevelopment of the Borough Police Station, Community Station and associated off-street parking facilities. Id. at ¶ 71. By so doing he concluded he could avoid the vast majority of the $5.57 million in demolition/rehabilitation costs associated with the 57-unit project. Id. at ¶ 77. However, Mr. Mistretta calculated that with a smaller parcel, he could only fit 37 units. Id. at ¶ 76.

Since very few 100% affordable housing projects in recent years with unit counts below 40 have been funded and since the average size of affordable housing projects receiving 9% tax credits from 2015 – 2019 was 67 units, the likelihood of securing funding is small. Id. at ¶ 79. Moreover, FSHC recently stated that it has settled over 300 affordable housing cases. Many municipally sponsored projects are proposed in all these settlements. This will increase the demand for a finite supply of tax credits statewide and thereby reduce the probability of securing 9 percent tax credits for such a project. Id. at ¶ 80.

So while scaling back the 57-unit project avoids expense, it also increases the likelihood that the project won't get full funding through the tax credit program, creating the distinct possibility that the Court would have to force the Borough to expend its own money to comply in violation of the FHA.

Even if the 37-unit project is funded without the need to infuse municipal monies, the

Borough would be left with a 137 unit gap: 174 minus 37 equals 137.

If the Borough rezoned all the sites that contributed to the RDP of 174 with traditional inclusionary zoning, that would generate a maximum of 26 affordable units and the Borough would still be 11 short of the 174 RDP the Court imposed. The Borough could not satisfy that 111 gap with either 100 percent projects or with traditional inclusionary zoning for the reasons set forth above. Mistretta Certification at ¶¶ 84-86.

As with the other alternatives discussed above, it is not possible for the Borough to propose a smaller, modified municipally sponsored project on the Borough owned lands along Hudson Terrace and prepare a Plan that would satisfy the RDP of 174 without violating the FHA, COAH regulations and/or Mount Laurel IV. Id. at ¶87.

Whether through exclusive use of 100 percent set-asides, exclusive use of traditional inclusionary zoning or through a combination, the Borough was unable to find any combination of techniques that would enable it to satisfy an RDP of 174 without a violation of the FHA, COAH regulations and/or Mount Laurel IV. Id. at ¶88.

Nor can we see how the Special Master/Counsel could come to a different conclusion. They have had the Court's January 17, 2020 decision as long as we have and have not shown us how it is possible to satisfy an RDP of 174 without the aforementioned violations even in the face of our April 9, 2020 letter inviting them to show us how we are wrong.

Only by changing the rules might it theoretically be possible to satisfy an RDP of 174. However, the Supreme Court sternly warned trial judges not to try to become substitute agency for COAH.

## IV. NO COAH PRECEDENT AUTHORIZES THIS COURT TO ACTIVELY INVITE LANDOWNERS AND/OR DEVELOPERS WITH PARCELS THAT DID NOT CONTRIBUTE TO THE RDP TO REDEVELOP THEIR LAND FOR INCLUSIONARY ZONING.

The June 8, 2020 order invites the Special Master/Counsel to hunt for new sites for 100 percent set-asides or for traditional inclusionary zoning. However, the order does not limit the Special Master/Counsel to select only sites that contribute to the 174 RDP the Court assigned. We are aware of no COAH precedent where COAH authorized its staff, the functional equivalent of the Master, to take the actions called for in the June 8, 2020 order, i.e., to go hunt for additional sites outside those that contributed to the RDP and mandate the municipality to do a 100 percent affordable project or traditional inclusionary zoning on the new sites.

The Borough has consistently claimed that this Court should follow the path set forth in Mount Laurel IV and should not rely on Mount Laurel II superseded by the enactment of the FHA and the implementation of same. That said, since the Court has apparently relied upon the remedies for noncompliance from Mount Laurel II, we examined the few cases we could find where the trial judge used those remedies. We can find no instance where a Court ordered a Master to hunt for additional sites outside those that contributed to the RDP and mandate the municipality to do a 100 percent affordable project or traditional inclusionary zoning on that site. In any event, Mount Laurel II clearly does not authorize any court to violate the FHA.

We have reviewed a transcript of a deposition of Art Bernard whose opinions have carried such weight with this Court and he stated that he has never seen COAH or a Master "ever require the municipality to approach developers and see if they would be willing to have an overlay on their site as a means of addressing their unmet need." *See* Deposition Transcript, attached as Exhibit B to Mistretta Certification, 21:7-20. He also that he is "certainly not aware" of COAH requiring a municipality "to look at the multiple listing service to see is there any site

for sale that might be redeveloped as an affordable housing site" to address the unmet need. Id. at 21:21 – 22:13. He went on to say that as a Master, he has never required a town to check the multiple listing service to address the unmet need. Id. at 22:14-19. Finally, Mr. Bernard responded to Mr. Surenian's final question on this issue as follows:

> During the break my co-counsel reminded me when I was asking the questions about, does COAH require municipalities to knock on developer's door or approach developers or to look in the multiple listing services for purposes of developing an unmet need plan **or for purposes of determining the RDP**? I asked the questions and I framed the questions in that way.
>
> If we were to expand developers to include land owners and people who lease the properties, would your answer be any different?
>
> A. Land owners who -- no one knew if they – land owners who hadn't come forward?
>
> Q. Right.
>
> A. No. My answer wouldn't be any different.

Id. at 22:7-22 (emphasis added). All this highlights the unprecedented nature of the June 8, 2020 order.

The impact of the June 8, 2020 ruling is worse than a builder's remedy. The Court revoked the Borough's immunity on August 27, 2020 and not one developer beyond Sylvan filed pleadings seeking a builder's remedy. The June 8, 2020 order directs the Special Master/Counsel to go find developers to obtain, in essence, a builder's remedy. The order is the antithesis of the FHA, which the Legislature adopted to suppress the builder's remedy. N.J.S.A. 52:27D-303.

## V. THE COURT SHOULD PRESERVE THE FUNDAMENTAL RIGHT OF ALL LITIGANTS: THE RIGHT TO A MEANINGFUL APPEAL.

The Borough has respectfully noted that it simply disagrees with the Court's rulings and that a higher court will need to decide whether the Borough is correct in its claim that the Master's recommendations heretofore were sound. Indeed, we contend that the quickest way to achieve true

finality in this case, is to obtain appellate review so we can all be sure the Borough is on the right path. For these reasons, we formally, by way of this motion, ask this Court to declare its August 27, 2019, January 17, 2020, February 12, 2020, April 16, 2020 and June 6, 2020 orders to be final judgments so that a higher Court can determine if this Court properly or improperly rejected the recommendations of the Master heretofore.

If the Court is not inclined to declare these orders to be final judgments, then we urge the Court to bring this matter to a conclusion as quickly as possible so that we can make our case to the Appellate Division. One way or another, the Court needs to decide

1. If the FHA prohibits forcing municipalities to spend municipal monies to comply;
2. If the FHA empowers municipalities to satisfy "all" their obligations through inclusionary zoning; and/or
3. If this Court has the power to do what COAH has never done, what Art Bernard has never done or seen-direct the Master to actively seek to find landowners or developers to redevelop their land for inclusionary zoning even if the sites do not contribute to the RDP.

The Court should not task the Special Master/Counsel to bring back a compliance plan by the end of the year without providing guidance on these issues.

At the very least, the Borough urges the Court to condition that any land use approvals granted in connection with the Court's orders be subject to the Borough's rights on appeal (in other words, that vested rights not be conferred until the Borough has exhausted its rights on appeal). That is an essential first step to safeguarding the Borough's rights on appeal.

## CONCLUSION

The Legislature quite clearly said that no municipality can be compelled to expend its own money to comply and that every municipality should be able to satisfy its entire fair share through inclusionary zoning. N.J.S.A.52:27D-311(a) and (d). In Mount Laurel IV, the Supreme Court quite clearly warned trial judges not to try to become a "replacement agency" for COAH.

The June 8, 2020 order eschews these principles. It arguably requires the Borough to expend its own money to comply. It denies the Borough the right to satisfy its fair share through inclusionary zoning. It establishes new rules that COAH never established: directing its staff, the functional equivalent of the Master, to go hunt for new sites –sites that did not even contribute to the RDP and seek to entice the owners/developers to redevelop their land for inclusionary zoning.

The time has come for the Court to reconsider its decisions or declare that:

1. The Borough must spend its own money to comply;
2. The Borough cannot satisfy its entire obligations through inclusionary zoning;
3. The Court has the power to take actions that COAH has never taken.

In the alternative, the Court should declare its August 27, 2019, January 17, 2020, February 12, 2020, April 16, 2020 and June 6, 2020 orders to be final judgments.

Either way, the Court should direct the Special master to prepare a plan forthwith (e.g., within the next 30 days) for the Court's consideration in the form of a final judgment.

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*Attorney for Plaintiff*
*The Borough of Englewood Cliffs*

By: */s Thomas J. Trautner Jr.*_____

Dated: June 29, 2020