Matthew N. Fiorovanti, Esq.- 027332006
GIORDANO, HALLERAN & CIESLA
A Professional Corporation
125 Half Mile Road, Suite 300
Red Bank, N.J. 07701-6777
(732) 741-3900
Attorneys for Intervenor, Campus Associates, LLC

PARTIALLY GRANTED. PLEASE SEE ATTACHED STATEMENT OF REASONS

IN THE MATTER OF THE TOWNSHIP OF HILLSBOROUGH, a municipal corporation of the State of New Jersey,

Petitioner.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
SOMERSET COUNTY

DOCKET NO. SOM-L-900-15

Civil Action
(**Mt. Laurel**)

ORDER

THIS MATTER having been opened to the Court by way of Motion by Giordano, Halleran & Ciesla, P.C., attorneys for Intervenor Campus Associates, LLC ("*Campus*") in the above-captioned matter, and it appearing that due notice has been given to all parties of record; and the Court having duly considered the papers submitted in support of the motion, those (if any submitted) in opposition thereto; and having further considered the pleadings and heard the argument of counsel; and for good cause having otherwise been shown:

IT IS, on this __7th__ day of _June_____ 2021, **ORDERED**, as follows:

1. Petitioner the Township of Hillsborough (the "*Township*") is hereby directed and compelled to immediately draft and introduce at the next regularly scheduled Township Committee meeting an amendment to the Zoning Ordinance in order to make the application submitted by Campus to the Township of Hillsborough Planning Board (the "*Planning Board*") for preliminary and final major site plan to permit construction of an inclusionary residential development with 96 units, 23 of which would be set-aside as affordable (the "*Application*") fully conforming without the need for any variance or waiver relief, and to adopt the amendment to the Zoning Ordinance within 45 days of introduction.

2. ~~The Court finds that the Township has acted in bad faith in connection with its~~ Mount Laurel ~~obligations.~~

3. ~~The Township's immunity from exclusionary zoning builder's remedy actions previously granted to the Township in this matter is hereby revoked.~~

4. ~~Such exclusionary zoning actions may therefore be brought against the Township, in connection with which Campus may seek a builder's remedy against the Township.~~

5. Campus is awarded its reasonable attorneys' fees and costs in relation to the current motion, its prior motion to enforce litigants rights, and its Application to the

Planning Board. The amount of reasonable attorneys' fees and costs shall be set forth in a separate order following the Court's review of an Affidavit of Services, which shall be submitted by Campus within seven (7) days of receipt of this Order.

6. A copy of the within Order shall be served on counsel for all persons and/or entities on the municipal service list within five (5) days of receipt of this Order by counsel for Campus Associates.

Kevin M. Shanahan
Hon. Kevin M. Shanahan, P.J.Cv.

Opposed: _____ [X]
Unopposed: _____ [ ]

Docs #5051302-v1

In re Township of Hillsborough

Docket No. SOM-L-900-15

Intervenor's Motion to Enforce Litigant's Rights

OPPOSED

Returnable: May 14, 2021

I. PARTIES AND RELIEF SOUGHT

Intervenor Campus Associates, LLC ("Campus"), by and through its counsel, Matthew N. Fiorovanti, Esq. and Linda M. Lee, Esq. of Giordano Halleran & Ciesla, P.C., moves to enforce litigant's rights pursuant to R. 1:10-3. Campus has filed a reply brief dated May 10, 2021 which was considered by the Court.

Defendant/Petitioner, Township of Hillsborough ("Township" or "Hillsborough"), by and through its counsel, Eric M. Bernstein, Esq. and Brian M. Hak, Esq. of Eric M. Bernstein & Associates, LLC, opposes the Intervenor's Motion. The Township also filed an opposition to the brief submitted by the FSHC dated May 10, 2021 which was considered by the Court.

Intervenor, Fair Share Housing Center ("FSHC") by and through Adam M. Gordon, Esq., filed a brief in support of the Intervenor's Motion to Enforce Litigant's Rights and for affirmative relief for counsel fees as well.

II. INTERVENOR'S POSITION

In this Motion, Campus Associates, LLC ("Campus") contends that due to the Township of Hillsborough's (the "*Township*") "continued defiance" of its Court-approved settlement agreements with it and Fair Share Housing Center ("*FSHC*") in this Mount Laurel declaratory judgment action, Campus is once again compelled to file a Rule 1:10-3 motion to enforce litigant's rights.

The settlement agreements permit Campus to develop a 96 unit inclusionary residential development on its parcel as depicted on a concept plan attached to the Campus settlement agreement, and require the Township to adopt an ordinance intended to make the development fully conforming. The agreements also require the Township to further amend its ordinance in the event the Planning Board were to deny variances or waivers the Board determines are needed during site plan review. According to Campus, the Township failed to adopt the first ordinance until the Court compelled it to do so when Campus filed its initial motion for relief to litigant. Then, when the Planning Board denied variances and waivers that it determined the Campus development required, the Township failed to adopt the additional ordinance amendment required by the settlement

agreement to make the Campus development fully conforming, despite Campus's request that it do so.

Campus argues that the Township is once again in breach of the settlement agreements and the Orders approving same, the Court should enter an Order enforcing the settlement agreement by requiring the Township to adopt an amendment to its zoning ordinance that will cause Campus's application to be fully conforming and award Campus its attorneys' fees and costs in connection with this motion, Campus's prior motion, and Campus's application to the Planning Board. Moreover as the Township's continued noncompliance reflects its contempt for its constitutional affordable housing obligations, the Court should revoke the Township's immunity from builder's remedy litigation.

III. PROCEDURAL HISTORY AND STATEMENT OF FACTS

A. BACKGROUND

On or about July 2, 2015, the Township filed this declaratory judgment action pursuant to the Supreme Court's decision in In re Adoption of N.J.A.C. 5:96 & 5:97 ex rel. New Jersey Council on Affordable Hous., 221 N.J. 1 (2015) ("Mount Laurel IV"), seeking immunity from potential builder's remedy lawsuits while it developed a plan to satisfy its constitutional affordable housing obligations. Certification of Marc D. Policastro, Esq. ("Policastro Cert.") at ¶ 3.[1] The Township secured initial temporary immunity from exclusionary zoning actions, and the Court has since periodically extended its immunity. Id. at ¶ 4. By Order dated March 19, 2020, the Court extended the Township's immunity through May 31, 2020. Id. at ¶ 17; see Ex. C. Pursuant to an Order dated June 8, 2020, the Court arguably extended the Township's immunity by referencing and affirming the Court-approved Settlement Agreement between the Township and FSHC, which would extend the Township's immunity through the Third Round or 2025, subject to the Township's compliance with the settlement agreements. Policastro Cert. at ¶ 19; see Ex. E.

Campus is the owner of property located at 4 Campus Drive, Hillsborough Township, Somerset County, New Jersey, and identified as Block 58, Lot 1.05 on the Township's tax map (the "*Property*"). Policastro Cert. at ¶ 5. Campus intervened in this action as an interested party, and engaged in extensive settlement negotiations with the Township to reach an amicable resolution regarding the construction of an inclusionary residential development on the Property. Id. at ¶6.

[1] Exhibits A through G are annexed to the Certification of Marc D. Policastro, Esq.

B. THE SETTLEMENT AGREEMENT

In May 2019, Campus and the Township entered into a Settlement of Litigation Agreement (the "*Settlement Agreement*" or "*Agreement*") with respect to the Property and Campus's proposed development of same. Id. at ¶ 7; see Ex. A. A zoning ordinance (the "*Zoning Amendment*" or "*Zoning Ordinance*") intended to make the development fully conforming that was to be adopted by the Township in order to permit the construction of the proposed development and a concept plan (the "*Concept Plan*") of the proposed development were annexed as exhibits to and explicitly made a part of the Settlement Agreement. Id. at ¶ 8; see Ex. A. Ibid. The Court approved the Settlement Agreement, including the Zoning Ordinance and Concept Plan, by Order dated September 13, 2019. Id. at ¶ 7; see Ex. A.

The court-approved Settlement Agreement permits Campus to construct an inclusionary development not to exceed 96 units with 23 units being set-aside as affordable (the "*Proposed Development*"). Policastro Cert. at ¶ 9; Ex. A, Agreement at 1-2. As explicitly stated in the Settlement Agreement, the purpose of the Agreement is to "insure the construction of the Proposed Development generally consistent with the [Concept Plan]." Ex. A, Agreement at 3. The Township found "the design of the Proposed Development as represented on the Concept Plan, as a general concept, to be feasible and acceptable as well as consistent with the Zoning Amendment." Ex. A, Agreement at 4. The Township also agreed that "so as to permit the construction of the Proposed Development **as of right** it is necessary for the Township to amend its Land Use and Development Ordinance" in accordance with the Zoning Amendment. Ex. A, Agreement at 2 (emphasis added).

The Settlement Agreement set forth the Township's obligations with respect to the Proposed Development. Specifically, the Township agreed to: introduce the Zoning Amendment within 60 days of the approval of the Settlement Agreement by the court; schedule a public hearing and second reading on the Zoning Amendment within 60 calendar days after the introduction; and adopt the Zoning Amendment in accordance with the Municipal Land Use Law ("*MLUL*"), N.J.S.A. 40:55D-1 et seq. Ex. A, Agreement at 3. The Township further agreed "not to take any action that would modify the Zoning Amendment or that [would] otherwise require a variance application in connection with the Proposed Development." Ibid.

The Settlement Agreement permitted Campus "to pursue development approvals for the Proposed Development with the Planning Board" following the adoption of the Zoning Amendment. Ex. A, Agreement at 3-4. The Agreement also stated:

> In light of the Zoning Amendment, the parties do not contemplate that any waivers and/or variances will be necessary to develop the [] Property in accordance with the Concept Plan. However, the Parties acknowledge that Campus has not yet engineered the Proposed Development and the submission of land development applications, it may become necessary to seek minor waivers, minor variances (except use variance) and /or other relief. **In such event, the parties acknowledge that Campus shall be entitled to such minor relief as may be necessary to develop the [] Property in accordance with the Concept Plan**.

[Ex. A, Agreement at 6-7 (emphasis added).]

In this regard, the Township agreed that **"[i]f the Planning Board fails to grant . . . reasonable minor waivers, bulk variance requests, and other minor relief**," the Township would "**amend the Zoning Ordinance so as to permit the Proposed Development as-of-right, accommodating for any engineering constraints."** Ex. A, Agreement at 7 (emphasis added).

The Agreement set forth the following additional obligations of the Township with respect to Campus's anticipated application to the Planning Board.

> 2.2. **Obligation to Cooperate**. The Township acknowledges that in order to construct the Proposed Development on the [] Property, Campus will be required to obtain all necessary agreements, approvals and permits from all relevant public entities and utilities; such as, . . . the Planning Board . . . – including all ordinance requirements as to site plan and subdivision approvals . . . . The Township agrees to cooperate with Campus in its undertakings to obtain the [approvals] where applicable.
>
> . . . .
>
> 2.4. **The Planning Board's Obligation to Expeditiously Review Campus's Development Applications**. The Parties understand that while the Planning Board is not a party to this Agreement, the Parties anticipate that the Planning Board will honor the provisions set forth [in the Settlement Agreement].
>
> . . . .
>
> 2.4.3. **Obligations to Refrain From Imposing Cost-Generative Requirements**. The Planning Board recognizes that any approvals and this Agreement all contemplate the development of an "inclusionary development" within the meaning of the Mount Laurel doctrine, and Campus shall be entitled to any reasonable benefits, protections and obligations afforded to developers of inclusionary developments. Nothing shall prevent Campus from applying for a waiver or bulk variance from any standard imposed by the Township's Land Use and Development Ordinance, as applicable, and the standards set forth in the [MLUL] shall determine if Campus is entitled to this relief or from seeking a waiver of de minimus [*sic*] exception to any standard or requirement of the Residential Site Improvement Standards under the applicable regulations.
>
> . . . .

> 4.1. **Mutual Good Faith, Cooperation and Assistance**. The Parties shall exercise good faith, cooperate and assist each other in fulfilling the intent and purpose of this Agreement, including, but not limited to, the adoption of the Zoning Amendment, the approval of this Agreement by the Superior Court, the site plan and/or subdivision approval for the [] Property and the defense of any challenge with regard to any of the foregoing.

[Ex. A, Agreement at 4, 5, 8].

C. THE TOWNSHIP'S FAILURE TO ADOPT THE ZONING AMENDMENT AND CAMPUS'S FIRST MOTION TO ENFORCE LITIGANT'S RIGHTS

Despite the clear and unambiguous terms of the Settlement Agreement, it quickly became evident that the Township had no interest in performing as agreed, and would take whatever actions it deemed necessary to thwart the ultimate development of the Property by Campus.

Following the Court's approval of the Settlement Agreement on September 13, 2019, the Township introduced the Zoning Ordinance at its Township Committee meeting on September 24, 2019. Policastro Cert. at ¶ 10. The Township was thereafter required to hold a public hearing and second reading, and adopt the Zoning Ordinance by November 23, 2019 (*i.e.*, 60 days from September 24, 2019). See Ex. A, Agreement at 3.

A public hearing and second reading was conducted at the Township Committee meeting on October 22, 2019. Policastro Cert. at ¶ 11. However, the Township did not adopt the Zoning Ordinance at that time and instead carried over the public hearing to its November 12, 2019 meeting. Id. at ¶ 12. The public hearing continued on November 12, 2019, but the Township again did not adopt the Zoning Ordinance and carried over the hearing to its next meeting on December 10, 2019. Id. at ¶ 13.

By continuing to carry the public hearing, the Township failed to timely adopt the Zoning Ordinance in accordance with the Settlement Agreement. As a result, in November 2019, Campus filed a motion to enforce litigant's rights (the "*First Motion to Enforce Litigant's Rights*" or "*First Motion*") to compel the Township to adopt the Zoning Ordinance, and to include certain provisions that were inadvertently not included in the copy of the Zoning Ordinance that was annexed to the Settlement Agreement. Id. at ¶ 14. The Court granted, in part, Campus's First Motion by Order dated December 13, 2019 (the "*December 13, 2019 Order*"). Id. at ¶ 15; Ex. B.

As set forth in the December 13, 2019 Order, the Court found that the Township had anticipatorily breached the Settlement Agreement. Ex. B at 2. The Court directed the Township to introduce the Zoning Ordinance (as corrected) at its scheduled meeting in January 2020, and adopt the Zoning Ordinance (as corrected) at the next possible meeting but "no later than February 15,

2020." Id. at 3. The Court reserved decision on Campus's request for reasonable attorneys' fees "until such time as it is determined whether the Township had complied with [the December 13, 2019] Order." Id. at 4. The Township subsequently introduced and adopted the Zoning Ordinance. Policastro Cert. at ¶ 16.

D. THE TOWNSHIP AND FAIR SHARE HOUSING CENTER'S SETTLEMENT AGREEMENT

On or about March 27, 2020, the Township and FSHC entered into a comprehensive settlement agreement (the "*FSHC Settlement Agreement*"), which was approved by Court Order dated June 8, 2020. Id. at ¶ 18-19; see Ex. D; Ex. E. The FSHC Settlement Agreement incorporated Campus's Proposed Development as one of the developments that was "approved through prior fairness hearings by the court and/or rezoning has been put in place through prior rezonings by the Township," and would be used to satisfy a portion of the Township's affordable housing obligations. Ex. D at 4.

The FSHC Settlement Agreement further stated that "[i]n the event the Court approves the proposed settlement, the parties contemplate the [Township] will receive 'the judicial equivalent of substantive certification and accompanying protection as provided under the [Fair Housing Act of 1985, N.J.S.A. 52:27D-301 et seq.],' as addressed in the Supreme Court's decision in [Mount Laurel IV]," and "[t]he 'accompanying protection' shall remain in effect through July 1, 2025." Ex. D at 11-12.

E. THE PLANNING BOARD'S DENIAL OF CAMPUS'S APPLICATION

After the Court-ordered adoption of the Zoning Ordinance, in August 2020, Campus submitted an application for preliminary and final major site plan (the "*Application*") to the Hillsborough Township Planning Board (the "*Planning Board*"). Policastro Cert. at ¶ 20. The Application was for the construction of an inclusionary residential development with 96 units, 23 of which would be set-aside as affordable—the exact density authorized by the Settlement Agreement, and the density permitted by the Multifamily Inclusionary Overlay District, the zoning ordinance applicable to the development. Ibid. The site layout, setbacks, and means of ingress/egress proposed in Campus's plans that were submitted with the Application were substantially consistent with the Concept Plan that was part of the court-approved Settlement Agreement. Id. at ¶ 21.

The Planning Board held public hearings on the Application on December 3, 2020, January 14, 2021, February 4, 2021, and February 25, 2021. Id. at ¶ 22. During its meeting on February 25,

2021, the Planning Board denied Campus's Application, despite the uncontroverted testimony of Campus's experts and the Planning Board's own expert engineer. Id. at ¶ 23; see Ex. F.

The Proposed Development, as provided in the Application, complied with a 50 foot stream buffer required under New Jersey Department of Environmental Protection ("*DEP*") regulations. Policastro Cert. at ¶ 24; Ex. F at 39:14-18. However, the Planning Board concluded that a local stream corridor ordinance (the "*Stream Ordinance*") applied to the Property, and therefore a 150 foot buffer was required. Policastro Cert. at ¶ 25; see Ex. F at 39:716. The Planning Board determined that the Proposed Development was not compliant with the 150 foot buffer requirement and refused to grant a waiver from same.[2] Policastro Cert. at ¶ 26.

Notably, both the Mayor and the Deputy Mayor, who sit on the Township Council and were well aware of the Township's obligations under the Settlement Agreement, voted to deny the Application. Id. at ¶ 27; see Ex. F at 70:4-9. In fact, the Mayor moved to deny the Application and the Deputy Mayor seconded the Mayor's motion to deny. Ex. F at 70:4-9.

F. CAMPUS'S NOTICE OF DEFAULT TO THE TOWNSHIP AND THE TOWNSHIP'S FAILURE TO CURE

Section 5.1 of the Settlement Agreement sets forth the following procedure in the event a party defaults in its obligations under the Agreement:

> In the event that any Party shall fail to perform any material undertaking required to be performed by it pursuant to the terms of this Agreement, unless the Party (or Parties) for whose benefit such obligation was intended waive such obligation in writing, such material failure to perform shall constitute a breach under this Agreement. Upon the occurrence of any such breach, the nonbreaching Party shall have available any and all rights and remedies that may be provided in law or in equity. However, irrespective of above, the non-breaching Party shall provide notice of the breach and the breaching Party shall have a reasonable opportunity to cure the breach within fifteen (15) calendar days of such notice receipt. In the event the breaching Party fails to cure within fifteen (15) calendar days of such notice receipt or such reasonable period of time as may be appropriate, the Party for whose benefit such obligation is intended shall be entitled to exercise any and all rights and remedies that may be available in equity under the laws of the State of New Jersey, including the right of specific performance to the extent available.

[Ex. A, Agreement at 9.]

[2] Campus maintains that the Planning Board erroneously concluded that the Stream Ordinance applies to the Property and reserves the right to file a complaint in lieu of prerogative writs to challenge the Planning Board's wrongful denial of the Application, notwithstanding the Township's obligation to adopt an amendment to the Zoning Ordinance to make the Application fully conforming. Policastro Cert. at ¶ 26.

By letter dated March 4, 2021, Campus notified the Township that it was in default of the Settlement Agreement and invoked the 15-day cure period. Policastro Cert. at ¶ 28; Ex. G. Campus further requested that the Township draft and introduce an amendment to the Zoning Ordinance that would cause the Application to be fully conforming within 15 days of the date of the letter, in accordance with the Township's obligations under the Settlement Agreement. Ibid. However, the Township has failed to take any action regarding the requested amendment to the Zoning Ordinance. Id. at ¶ 29.

IV. SUMMARY OF THE TOWNSHIP'S OPPOSITION

Intervenor, Campus Associates, LLC ("Campus") has filed a Motion to Enforce Litigant's Rights for the alleged breach of its Settlement of Litigation Agreement ("Settlement Agreement") with the Township of Hillsborough ("Township") because the Township has not taken steps to amend its zoning ordinance to allow for Campus's development to be "fully conforming" after the Township Planning Board voted to deny its development application. Campus also seeks to revoke the Township's temporary immunity from builder's remedy lawsuits. Hillsborough opposes Campus's Motion.

First, Hillsborough contends that Campus's motion is premature. The Planning Board has not even memorialized its decision by voting on a resolution denying the application. In fact, a draft resolution was sent to counsel for Campus for review only on May 3, 2021.

In addition, Hillsborough asserts that although the Settlement Agreement contemplates the need for the Planning Board to consider "minor" waivers and/or variances, once Campus's full plan was presented to the Planning Board for its review, the Planning Board recognized serious flaws in the plan related primarily to the historic drainage problems on the site and the surrounding area. Specifically, the Planning Board was concerned about the plan failing to account for the Township's Stream Corridor Ordinance, which requires a one hundred and fifty (150) foot buffer from the stream that is present on the site. Although Campus maintains that the Stream Corridor Ordinance does not apply and that only a fifty (50) foot buffer is required, Hillsborough indicates that Campus's own environmental consultant, who testified at the Planning Board hearing, admitted that the Ordinance may apply to the development.

Hillsborough also points out that the Planning Board also requested Campus perform a drainage study to ensure that the forty-two (42) inch pipe that Campus proposes to direct its stormwater runoff into has sufficient capacity to handle the incoming flows. Allegedly, Campus refused to perform the requested drainage study.

In that regard as well, Hillsborough contends that Campus completely ignored the Planning Board's concerns, as testified to by numerous neighboring property owners, Environmental Commission members, Board professionals and Campus's own professionals regarding the stormwater runoff and drainage issues with respect to the property and the surrounding area, which the Planning Board believed were not adequately addressed and that the Planning Board was not satisfied that the proposed development will not exacerbate such issues.

As such, Hillsborough submits that due to the proposed development raising significant concerns relative to the health, safety and general welfare of the residents of the surrounding area and the community as a whole, the Planning Board decided to deny the application. These issues, in the Planning Board's view, were not limited to the "minor" waivers and/or variances envisioned by the Settlement Agreement. Campus presented its application before the Planning Board with an air of self-entitlement as if its proposed development was a *fait accompli* just because it is an inclusionary development with an affordable housing component, which it is not. In fact, Hillsborough avers that their position runs contrary to the purpose of planning board review, even in Mt. Laurel matters.

With respect to Campus's request to revoke the Township's temporary immunity, Hillsborough posits that it has not acted so egregiously as to expose itself to a finding that it is "determined to be constitutionally noncompliant." To the contrary, the Township indicates that it has a strong record of demonstrating that it has been determined to comply with its affordable housing obligations throughout the period in question (1998-2025), including the time since the New Jersey Supreme Court adopted In Re Adoption of N.J.A.C. 5:96 & 5:97 ex rel. New Jersey Council on Affordable Housing, 221 N.J. 1, which this Court is extremely familiar with.. The New Jersey Fair Housing Act, N.J.S.A. 52:27D-301 *et seq*. (hereinafter referred to as "FHA") requires municipalities to do no more than to consider the proposals of developers who have expressed a commitment to provide affordable housing. For instance, the Township points out that it has entered into settlement agreements with several intervenors, including Campus and Fair Share Housing Center (FSHC), and approved several other non-intervenor developments that contain affordable housing units. That does not even include the hundreds of affordable housing units that were approved and constructed prior to this current litigation. The Township urges that it has more than satisfied its responsibilities in this regard.

The Township also contends that it cannot reasonably be found to be determined to be noncompliant with its Mount Laurel obligation for failing to meet a deadline in one (1) of a series of

settlement agreements with various developers that the Township has entered into. According to the Township, this is particularly so notwithstanding the fact that the Planning Board has not yet even voted on a resolution to deny Campus's application, which would serve as the basis for the Township to consider an amendment to its zoning ordinance as set forth in the Settlement Agreement. In any event, the Township offers that even if this were not the case, the decision to refrain from taking such action at this time given the Planning Board's concerns about the application, is a "minor blip" in an otherwise overall proven track record of voluntary compliance that does not, in any remote way, render the Township constitutionally noncompliant. It just means the Township has chosen to exercise its right to take its time as to this specific site and the potential rezoning for same.

The Township also states that it is free to find another way in which to comply with its affordable housing obligations if it chooses to do so. According to the Township, the FHA requires that the Township to do no more than to consider Campus's inclusionary project. N.J.S.A. 52:27D-310(f). The Township indicates that if Campus's development cannot be built, the Township is still committed to finding another site for the twenty-three (23) affordable housing units that Campus proposes. See Certification of Mayor Shawn Lipani attached.

V. SUMMARY OF THE TOWNSHIP'S OBJECTION TO THE FSHC OPPOSITION

The Township acknowledges that the FSHC joins in Campus's motion and argues that: (1) in addition to violating the Campus Settlement Agreement, the Township has also violated the FSHC Settlement Agreement; (2) the Township's temporary immunity as to the Campus site only should be revoked; and, (3) FHSC should be awarded its attorneys' fees and costs associated with its court filings and the conference held since the Planning Board denied Campus's development application, as well as the time researching and writing its brief and arguing in support of Campus's motion.

The Township counters the FSHC's position by arguing that the Township is not in violation of the FSHC Settlement Agreement for the same reasons that it is not in violation of the Campus Agreement.

Further, the Township asserts that it has also endeavored to comply with every aspect of the FSHC Settlement Agreement. Indeed, each of the other projects identified in the table at paragraph 7B of the FSHC Settlement Agreement (see Policastro Cert., Exhibit D, p. 4), besides Campus, for which a development application has been submitted has been approved by the Planning Board. See Certification of David K. Maski, P.P., A.I.C.P. In fact, the Township points out that many of these projects are already under construction.

Again, the Township also argues that rather than reversing the Planning Board's decision, as argued by FSHC, the Court should, at most, remand the matter back to the Planning Board with instructions that Campus provide the downstream analysis that was requested and provide the necessary proofs in support of a waiver of the Stream Corridor Ordinance, which it did not do.

VI. HILLSBOROUGH'S VERSION OF THE PROCEDURAL HISTORY AND STATEMENT OF FACTS

The New Jersey Supreme Court decided In Re Adoption of N.J.A.C. 5:96 & 5:97 ex rel. New Jersey Council on Affordable Hous., 221 N.J. 1 (2015) (hereinafter referred to as "Mount Laurel IV") on March 10, 2015 as a result of COAH's failure to adopt valid regulations as required by the New Jersey Fair Housing Act ("FHA") and a prior Supreme Court order.

The Court promised municipalities that volunteered to participate in the new procedures it created that they would receive "like treatment" to municipalities that had secured a transfer of their cases from a court to COAH following the enactment of the FHA in 1985 (hereinafter "transferred municipalities"). Id. 221 N.J. at 27. More specifically, the Court: (a) identified a category of municipalities that had been participating in the COAH process when the Supreme Court decided Mount Laurel IV; (b) labeled this category of municipalities as "participating municipalities"; and (c) promised these participating municipalities that they would receive "like treatment" to "transferred municipalities" if they filed a declaratory judgment action in a thirty (30) day window between June 8, 2015 and July 8, 2015. Id.

Since transferred municipalities secured such enormous protections from exclusionary zoning suits, the Supreme Court's promise to participating municipalities that they could count on "like treatment" to transferred municipalities was enormously significant. It meant that the Supreme Court was ensuring that participating municipalities would have the right to determine the best plan for their communities and would not have to do any more than to consider the proposals of developers who had expressed a desire to provide affordable housing. See N.J.S.A. 52:27D-310(f).

When the Supreme Court decided Mount Laurel IV, supra on March 10, 2015, the Township was already a participating municipality. On or about July 2, 2015, the Township, like over three hundred (300) participating municipalities, filed a declaratory relief action as the Supreme Court had prescribed. As a result, the Township secured the same enormous protections from exclusionary zoning suits that transferred municipalities had enjoyed and owed no more than a consideration to any developer such as Campus who expressed a commitment to provide affordable housing. The FHA focused on voluntary municipal compliance and the various Superior Court judges assigned to

these matters (including Your Honor) have sought to facilitate that objective by working (through their own involvement and their Court appointed special masters) with the municipalities to attain this goal.

Over the course of this case, the Township has entered into settlement agreements with at several intervenors, including Intervenor, Campus, regarding their proposed inclusionary developments, which have been approved by the Court. The Township has also approved several other non-intervenor developments that contain affordable housing units. This does not even include the hundreds of affordable housing units that were approved and constructed prior to this current litigation and between 1998 and 2015.

A. The Campus Settlement Agreement.

On May 15, 2019, Campus and the Township entered into the Settlement Agreement, which was approved by the Court by Order dated September 13, 2019. See Exhibit A attached to the Certification of Marc D. Policastro, Esq. ("Policastro Cert.") The Settlement Agreement required that after the Township adopted a "Zoning Amendment", a copy of which was attached to and incorporated into the Settlement Agreement, "Campus shall be permitted to pursue development approvals for the Proposed Development with the Planning Board". Id. at pgs. 3-4.

The Settlement Agreement further provided:

> [T]he Parties acknowledge that **Campus has not yet engineered the Proposed Development** and the submission of land development applications, it may become necessary to seek **minor** waivers, **minor** variances (except use variance) and /or other relief. In such event, the parties acknowledge that Campus shall be entitled to such minor relief as may be necessary to develop the Subject Property in accordance with the Concept Plan. If the Planning Board fails to grant such reasonable **minor** waivers, bulk variance requests, **and other minor relief**, then the Township agrees to amend the Zoning Ordinance so as to permit the Proposed Development as-of-right, accommodating for any engineering constraints.

Id. at pgs. 6-7. (Emphasis added).

By Order dated December 13, 2019, the Township was directed by this Court to adopt the Zoning Amendment that was attached to the Settlement Agreement no later than February 15, 2020. See Policastro Cert., Exhibit B. The Township adopted the Zoning Amendment in accordance with Your Honor's December 13th Order in a timely manner. Thereafter, on March 19, 2020, the Court again extended the Township's immunity through May 31, 2020. See Policastro Cert., Exhibit C.

B. The Fair Share Housing Center Settlement Agreement.

On March 27, 2020, the Township and Fair Share Housing Center ("FSHC") entered into a settlement agreement ("FSHC Settlement Agreement"). See Policastro Cert., D. By Order dated June 8, 2020, the Court approved the FSHC Settlement Agreement. See Policastro Cert., Exhibit E. The FSHC Settlement Agreement further stated that "[i]n the event the Court approves the proposed settlement, the parties contemplate the [Township] will receive 'the judicial equivalent of substantive certification and accompanying protection as provided under the FHA as addressed in the Supreme Court's decision in [Mount Laurel IV]," and "[t]he 'accompanying protection' shall remain in effect through July 1, 2025."

The FSHC Settlement Agreement set forth seven (7) proposed developments, including Campus, which had been approved by the Court through prior fairness hearings and/or for which rezoning had been put in place through prior rezonings by the Township to satisfy a portion of the Township's affordable housing obligations. Id. at p. 4. These developments would provide two hundred and sixty-six (266) units and fifty-six (56) bonus credits for a total of three hundred and twenty-two (322) total credits. Id. at p. 5. The FSHC Settlement Agreement also listed five (5) other proposed development projects with pending fairness hearings before the Court and/or other compliance mechanisms which would meet the Township's remaining unaddressed Realistic Development Potential ("RDP") of two hundred and seventy (270), by providing one hundred and ninety-five (195) units and seventy-five (75) bonus credits.

A summary of the status of the eleven (11) other projects, besides Campus, identified in the FHSC Settlement Agreement are as follows:

- Brookhaven Lofts (two (2) projects): Site plan approved and project is under construction.
- 3 Ronson, LLC: Site plan approved by the Planning Board.
- Larken: Site plan approved and project is under construction.
- Sherman (RPM): Site plan approved by the Planning Board.
- 206 Holdings: Site plan approved by the Planning Board.
- Blue Star: Site plan approved by the Planning Board and project is under construction.
- M&M Realty[3]: Zoning amendment adopted. No application filed with Planning Board.

[3] M&M Realty was listed as pending a fairness hearing. However, the settlement has since been approved.

- Cost Cutters: Planning Board site plan hearings are underway.
- Premier (Valley Road): Zoning amendment adopted. No application filed with Planning Board.
- Premier (Amwell Road): Zoning amendment adopted. No application filed with Planning Board.
- Royce Brook[4]: Zoning amendment adopted. No application filed with Planning Board.

See Certification of David K. Maski, P.P., A.I.C.P.

C. The Planning Board Hearing on Campus's Application.

Campus submitted an application for Preliminary and Final Major Site Plan and Subdivision approval to construct a multi-family development consisting of four (4), three (3) story apartment buildings, each containing twenty-four (24) residential dwelling units for a total of ninety-six (96) residential dwelling units, which would include twenty-three (23) affordable housing units. The proposed development also included a Clubhouse and associated parking and required certain bulk "c" variances and waivers. See Exhibit A, p. 3 (12/3/2020 Planning Board hearing transcript) attached to the Certification of Brian M. Hak, Esq. ("Hak Cert.")

A public hearing was held on the application on December 3, 2020, January 14, 2021, February 4, 2021 and February 25, 2021. Campus presented the testimony of a professional engineer, architect, a traffic engineer, an environmental consultant, a professional planner and the lay testimony of a principle of Campus. The Township's Planning Director and Planning Board Engineer were present at the hearing, as well as Elizabeth McManus, P.P., the Court-appointed Special Master for the Township's Mount Laurel litigation. Id. at p. 5.

Campus's engineer testified that there is an existing storm sewer line along the easterly boundary of the site and beyond that is an existing state open water, or a drainage feature; that is a channel which collects and runs along our easterly boundary in a northerly direction toward the Raritan River and Dukes Parkway East. With respect to stormwater runoff, Campus's engineer indicated that the stormwater drains in a northeasterly direction towards the existing drainage feature on the easterly boundary and that, for stormwater mitigation, Campus is proposing is an underground stormwater detention basin. The engineer indicated that Campus proposes to connect the drainage

[4] Although Royce Brook was not mentioned in the FSHC Settlement Agreement, the settlement has since been approved.

system to an existing forty-two (42) inch pipe that goes under Dukes Parkway East. He further acknowledged that there has been concerns and issues raised by residents regarding existing drainage issues with the neighboring properties to the east of the property. Id. at pgs. 23-24.

During Campus's engineer's testimony, the Planning Board engineer indicated that the Planning Board would like Campus to perform a downstream drainage analysis of the existing drainage pipe and the state open water stream. Id. at p. 53. The Planning Board engineer indicated that by doing a downstream analysis, it could be determined whether the forty-two (42) inch pipe could handle the proposed flows from the property. Id. In response to these concerns and the suggestion of a downstream drainage analysis, Campus's engineer acknowledged that there were existing drainage conditions. Id. at p. 56. During the testimony, counsel for Campus made clear that it would not be undertaking a downstream drainage analysis as requested by the Planning Board. Id. at p. 57.

Campus's environmental consultant testified regarding the stream on the property that extends up into the site and the applicability of the Township's Stream Corridor Ordinance with respect to same. Campus's environmental consultant testified that it was his opinion that the Township's Stream Corridor Ordinance, which would require a one hundred and fifty (150) foot buffer from the stream, does not apply. See Hak Cert., Exhibit B, p. 48 (1/14/2021 Planning Board hearing transcript). The consultant's sole basis for his opinion was that it had been his experience, from doing other projects in the Township, that small features like the stream on the property, with a drainage area of less than fifty (50) acres, are not subject to the one hundred and fifty (150) foot buffer that is required by the Ordinance. Id. When questioned by a member of the Township's Environmental Commission, who is also the Director of the New Jersey Water Resources Research Institute at Rutgers University, Campus environmental consultant admitted that if a drainage area is less than fifty (50) acres the Ordinance could still apply. However, he simply indicated that that has just not been his experience on other projects. Id. at p. 79.

Elizabeth McManus, the Court-appointed Special Master, also testified as to the Mt. Laurel litigation process and some of the aspects of the Settlement Agreement as it may relate to the Board's obligations and decision-making process with respect to the application. Ms. McManus indicated that while the approval of Campus development application is what is intended by the Settlement Agreement, she also specifically stated that:

> While this is true, it doesn't mean that the developer is released from doing what's necessary to obtain approval, and that's quite simply why we are here -- why they are here before you seeking that site plan approval, and having to request that preliminary and final approval,

> as well as any relief that would be necessary. And so while the developer certainly has significant advantages with the settlement agreement, they are, indeed, of course required to request relief for anything that may be necessary, and to address the necessary criteria for that relief.

See Hak Cert., Exhibit C, p. 10 (2/4/2021 Planning Board hearing transcript).

Ms. McManus further testified that the loss of immunity from builder's remedy lawsuits is "certainly an extreme step". Id. at p. 13.

Various members of the public, including two (2) members of the Township's Environmental Commission, testified regarding the application. The concerns expressed by members of the public and the members of the Township's Environmental Commission (as was the concerns of the Environmental Commission as a whole) focused primarily on the applicability of the Township's Stream Corridor Ordinance and the drainage issues in the area. With respect to the Stream Corridor Ordinance, the Environmental Commission members reiterated the concerns that had previously been expressed by the entire Environmental Commission that the Township's Stream Corridor Ordinance and its one hundred and fifty (150) foot buffer versus the fifty (50) foot buffer that has been proposed by Campus must be applied to the development of the property.

All members of the public expressed grave concern relative to the historical drainage issues in the area and the ability of the forty-two (42) inch pipe to handle the proposed additional flows from the Property. Many members of the public relayed information relative to flooding in the area, which they feared would only become worse through the development of the Campus property. The refusal of Campus to perform a downstream drainage analysis of the existing drainage pipe and the state open water stream was indicative of Campus insensitivity to the issue.

Based on the testimony that was presented at the hearing, the Planning Board voted to deny Campus's application based upon its findings follows:

A. The benefits of granting the application are substantially outweighed by the detriments.

B. The Township's Stream Corridor Ordinance requires a one hundred and fifty (150) foot buffer that the Township's Environmental Commission strongly recommends be maintained over the fifty (50) foot buffer proposed by the Applicant.

C. A downstream drainage analysis was not done, and must be performed to determine the ability of the forty-two (42) inch pipe and the state open water stream to handle the proposed additional flows from the Property before the application can be fully considered.

D. The stormwater runoff and drainage issues regarding the Property and the surrounding area have not been adequately addressed and the Board is not satisfied that the proposed development will not exacerbate such issues.

E. The proposed development raises significant concerns relative to the health, safety and general welfare of the residents of the surrounding area and the community as a whole.
See Hak Cert., Exhibit D, pgs. 62-70 (2/25/2021 Planning Board hearing transcript).

A draft of the proposed Planning Board resolution was sent to counsel for Campus, Marc D. Policastro, Esq., on May 3, 2021. See Hak Cert., Exhibit E. Therefore, the Planning Board has not voted on the memorializing resolution.

VII. SUMMARY OF FSHC'S RESPONSE

FSHC joins Campus in urging the court to find that the Planning Board has violated the terms of the settlement agreement and HEFSP. FSHC also urges the court to enter an order granting Campus Associate's application to require the Township of Hillsborough (the "Township") to immediately draft and introduce an amendment to the Zoning Ordinance in order to make the application submitted by Campus to the Township of Hillsborough Planning Board (the "Planning Board") conforming in order for the Planning Board to authorize construction of Campus's inclusionary residential development providing 23 affordable units to low income residents, and to adopt said amendment within 45 days of introduction. FSHC also notes that based on applicable precedent reversal of the Board's decision, which Campus has reserved its rights on, would also be an acceptable form of relief to be sought.

Also, FSHC joins Campus's motion for the court to award attorney's fees pursuant to Rule 1:10-3, which is well warranted based on the record, to both Campus and FSHC. FSHC offers that the Township's noncompliance has diverted its limited resources towards requiring the Township to do what it already agreed to do, but refused to do.

FSHC contends that if denying conforming planning board applications resulting from Mount Laurel settlements results in the parties being back where they started if the application had been approved, then municipalities and planning boards will be encouraged to defy their obligations with impunity. The entire point of settling Mount Laurel cases, and the 300+ settlements that FSHC has now entered into statewide, is to expedite the construction of affordable housing vis a vis fully trying a case. FSHC argues that if municipalities can settle and receive the benefits of settlement, but then back off when actual affordable housing is ready to be built, that undermines the entire purpose of settlement. As such, FSHC advocates that the Court needs to order a stronger remedy than just

vacating an improper denial, including fees and other measures, so as to make it clear that municipalities must comply with their settlements.

Relatedly, FSHC joins Campus in respectfully submitting that the court should revoke the Township's immunity based on its failure to in good faith abide by its obligations, as evidenced by repeated delays and denials, at least as to the extent of the obligation satisfied by Campus.

VIII. COURT'S ANALYSIS AND DECISION

A. IS THE TOWNSHIP IS IN VIOLATION OF THE SETTLEMENT AGREEMENT AND THE SEPTEMBER 13, 2019 ORDER?

1) Campus's Position

By failing to adopt an amendment to the Zoning Ordinance that would make the Application fully conforming, in this Motion Campus contends that the Township is once again in violation of the Settlement Agreement and the September 13, 2019 Order. Campus therefore requests that the Court enter an Order requiring the Township to adopt an amendment to the Zoning Ordinance, in a form agreed to by Campus, providing that the Stream Ordinance does not apply to the Property.

The Settlement Agreement acknowledged that variance and waiver relief may be necessary as the site plans were vetted throughout the settlement agreement negotiation process but not fully engineered at that time. See Ex. A, Agreement at 6-7. Campus posits that no matter how well tailored an ordinance may be, it is common, perhaps even typical, that relief from some provision of a municipal ordinance will be identified during the formal site plan application review process which it says is exactly what occurred here. According to Campus, the Township understood this, and acknowledged that Campus would be entitled to relief as may be necessary to develop "in accordance with the Concept Plan." Ex. A, Agreement at 6-7. In fact, Campus asserts that in drafting the Settlement Agreement, the parties contemplated that notwithstanding the newly adopted Zoning Ordinance, the Planning Board might be of the view that the Application requires other variances or waivers and the possibility that the Planning Board might deny Campus's Application on that basis, which the Planning Board ultimately did. See Ex. A, Agreement at 7.

Campus submits that is why, as noted above, that a provision was negotiated which indicated that the Township explicitly agreed to amend the Zoning Ordinance "[i]f the Planning Board fails to grant such reasonable minor waivers, bulk variance requests, and other minor relief . . . so as to permit the Proposed Development **as-of-right**." Ex. A, Agreement at 7 (emphasis added).

According to Campus, the Township was aware that relief such as a waiver from the Stream Ordinance, may be necessary for site plan approval and preemptively agreed to provide such relief

to Campus. Notably the Proposed Development fully satisfies the stream buffer provisions of the applicable DEP regulations. See Ex. F at 39:18; see also N.J.A.C. 7:7A-3.3. Campus contends that, in addition, the relief sought here is merely a waiver from the site plan ordinance and does not even rise to the level of a minor variance. Thus, Campus concludes that by failing to adopt the requested amendment to the Zoning Ordinance despite being provided notice of its default, the Township is again in breach of the Settlement Agreement, including its obligation to exercise good faith and cooperate and assist Campus in obtaining site plan approval for the Proposed Development from the Planning Board, and the September 13, 2019 Order approving the Agreement.

2) Township's Position

The Township counters that notwithstanding Campus's position that the Township is in violation of the Settlement Agreement, it believes that the circumstances that have arisen show that the Township is not in violation of the Agreement. As an initial matter, the Township argues that Campus's motion is premature since the Planning Board has not even memorialized its decision by voting on a resolution denying the application. Indeed, a draft resolution was sent to counsel for Campus for review on May 3, 2021. Until such time as a final vote is taken on the resolution, the Township is not under any obligation to consider an amendment to its zoning ordinance.

Also, the Township points out that at the time that the Township and Campus entered into the Settlement Agreement, Campus has not yet engineered its proposed development and it may become necessary for Campus to seek "**minor** waivers, **minor** variances (except use variance) and /or other relief" at the time it submitted its application to the Planning Board for review. The Settlement Agreement further provided that "[i]f the Planning Board fails to grant such reasonable **minor** waivers, bulk variance requests, and **other minor relief**, then the Township agrees to amend the Zoning Ordinance so as to permit the Proposed Development as-of-right, accommodating for any engineering constraints". (Emphasis added). Policastro Cert., Exhibit A, p. 7.

Once Campus fully engineered plan was presented to the Planning Board for its review, the Planning Board claims that it then recognized serious flaws in the plan related primarily to the historic drainage problems on the site and the surrounding area. One such flaw was that Campus plan failed to account for the Township's Stream Corridor Ordinance, which requires a one hundred and fifty (150) foot buffer from the stream that is presently on the site. The Township posits that although Campus insists that the Stream Corridor Ordinance does not apply and that only a fifty (50) foot buffer is required, the Township states that Campus's own environmental consultant, who testified at the Planning Board hearing, admitted that the Ordinance may apply to the development. The

Township therefore submits that the failure of Campus's plan to account for the buffer area provided for by the Ordinance was a serious concern of the Township's Environmental Commission. According to the Township, this difference between the fifty (50) foot buffer proposed by Campus and the one hundred and fifty (150) foot buffer required by the Township's Stream Corridor Ordinance is not simply a "minor" waiver or variance and impacted more than one (1) of the proposed residential buildings on the site.

The Township also complains that Campus also refused to even consider performing the downstream drainage study that the Planning Board had requested Campus to perform to ensure that the forty-two (42) inch pipe that Campus proposes to direct its stormwater runoff into has sufficient capacity to handle the incoming flows. According to the Township, the ability of the drainage pipe to handle the runoff from the property was critical to the Planning Board's consideration of Campus's application. Campus refusal to provide the requested information before the Planning Board took action on the application was more than enough reason to deny same regardless of the terms of the Settlement Agreement.

The Township also asserts that Campus completely ignored the Planning Board's concerns, as testified to numerous neighboring property owners, regarding the stormwater runoff and drainage issues with respect to the property and the surrounding area, which the Planning Board believed were not adequately addressed and the Planning Board was not satisfied that the proposed development will not exacerbate the flooding and drainage problems in the area. According to the Township, this also was more than enough reason to deny Campus development application.

Thus, the Township proffers that due to the proposed development raising significant concerns relative to the health, safety and general welfare of the residents of the surrounding area and the community as a whole, the Planning Board was justified in denying the application. Thus, the Township contends that these issues did not involve the "minor" waivers and/or variances envisioned by the Settlement Agreement. The Township also complains that Campus also presented its application before the Planning Board with an air of self-entitlement just because it is an inclusionary development with an affordable housing component. The Township indicates that it has the right to determine the best plan for their communities and do not have to do any more than to consider the proposals of developers who had expressed a desire to provide affordable housing. See N.J.S.A. 52:27D-310(f).

Also, the Township indicates that while Campus suggests that the issue regarding the application of the Township's Stream Corridor Ordinance was the only waiver that Campus required,

it was not. That being said, the Township notes that the one hundred and fifty (150) foot buffer required by the Ordinance versus the fifty (50) foot buffer provided for by Campus is a significant departure from the requirements of the Ordinance and would not constitute a "minor" waiver. That circumstance, in conjunction with the failure of Campus to agree to perform the downstream drainage analysis, as well as the health and safety issues associated with the historic drainage problems in the area, in the Township's view, served as a legitimate basis for the Planning Board to deny the application so that Campus could appropriately and adequately address the flaws in its development plan.

3) *Court's Analysis and Decision*

(a) Did the Parties Enter into a Binding Agreement?

The Township and Campus entered into an Agreement which permits Campus to develop a 96 unit inclusionary residential development on its parcel as depicted on a concept plan attached to the Campus settlement agreement, and require the Township to adopt an ordinance intended to make the development fully conforming. The agreements also require the Township to further amend its ordinance in the event the Planning Board were to deny variances or waivers the Board determines are needed during site plan review. According to Campus, the Township failed to adopt the first ordinance until the Court compelled it to do so when Campus filed its initial motion for relief to litigant.

Clearly that agreement is a binding agreement. The Court's role here is to determine if it can construe the pertinent terms of the Agreement as they pertain to the circumstances presented, as a matter of law.

The Township also entered into a binding agreement with the FSHC. On or about March 27, 2020, the Township and FSHC entered into a settlement agreement, including Campus's site, and was approved by Order on June 8, 2020. The effect of that Agreement on these circumstances also needs to be considered.

Both agreements involve aspects of Hillsborough's "Mt. Laurel Plan" to provide its "fair share" of low and moderate income housing as mandated by the Mt. Laurel Doctrine.

Now that the Court has recognized that both agreements are valid agreements, the next issue presented then is whether the Court can determine, as a matter of law, that the Township violated either or both of these agreements. Notably, the issue raised in this Motion is different than the issues that are typically before a Court in a Prerogative Writ action. At least at this stage of the proceeding it is not for the Court to determine if the Board's action was arbitrary, capricious and unreasonable,

but instead whether the Township is in violation of the Agreements with Campus and FSHC and if so, what the Court should do about it.

(b) Consideration of the Effect of the Mt. Laurel Doctrine

The Mount Laurel doctrine's overriding aim is to provide housing that is affordable to New Jersey's working families. S. Burlington Cnty. NAACP v. Mount Laurel, 92 N.J. 158, 199 (1983) ("Mount Laurel II"). In order to achieve that aim, Mount Laurel requires that each municipality take the necessary steps to create a realistic opportunity for its fair share of housing.

Despite the clarity of the overriding policy considerations contained in the Mt. Laurel Doctrine, the Court is mindful that promise of Mount Laurel has, on occasion, been frustrated by some municipalities' determination to avoid compliance with their constitutional obligations. In certain cases, whatever these towns seemingly give, at length and grudgingly, with one hand, they have tried to take back with the other. In response, the State's courts have firmly held that a municipality will not be allowed to evade its obligations through perpetual delay or by frustrating development by "includ[ing] properties in their fair share plans . . . only to seek their removal from the plans when the developers are close to building the affordable housing." In re Fair Lawn Borough, Bergen Cnty., Motion of Landmark at Radburn, 406 N.J. Super. 433, 441 (App. Div. 2009).

Here, the Township's court-approved settlement agreements with Campus Associates ("Campus") and Fair Share Housing Center (FSHC) and its adopted Housing Element and Fair Share Plan (HEFSP) both clearly state that to satisfy its fair share obligations the Township must expeditiously follow through on these agreements.

Certainly the Court's task is to evaluate the Agreements in question in accordance with the terms and in the context of the Township's covenant to satisfy its "Mt. Laurel" obligation.

(c) The Court's Analysis and Construction of the Campus Agreement

The specific terms of the Agreement between Campus and the Township that are "in issue" provide:

> WHEREAS, the parties, subject to the terms hereof, have agreed that the Subject Property be permitted to be developed as an inclusionary multifamily residential development by (a) the construction of not to exceed seventy three [73] market rate units and not to exceed twenty three [23] affordable units as further delineated below on the Subject Property for a total of not to exceed ninety six [96] units; and (b) the construction of residential amenities including a club house, a "tot lot" and a pool (the "Proposed Development"). The allocation of the affordable housing units amongst very low, low and moderate affordable housing units and the construction of same shall be as per UHAC, COAH regulations and the Fair Share Housing Act and the provisions below; and

WHEREAS, the Parties have agreed that so as to permit the construction of the Proposed Development as of right it is necessary for the Township to amend its Land Use and Development Ordinance in the form attached hereto as Exhibit A, which is made part hereof (the "Zoning Amendment") and subject to further provisions below; and

WHEREAS, the Planning Board of the Township of Hillsborough (the "Planning Board") is not a party to this Agreement, but the parties understand and anticipate that the Planning Board will abide by the terms of this Agreement as set forth below for the purpose of facilitating a resolution of Campus's intervention in the Declaratory Judgment Litigation; and

…

1.1. PURPOSE. The purpose of this Agreement is to amical by resolve the Declaratory Judgment Litigation consistent with the terms hereof which, in part, are intended to insure the construction of the Proposed Development generally consistent with the Conceptual Site Plan for Block 58, Lot 1.05 situated in Hillsborough Township, Somerset County, New Jersey, dated November 29, 2018 as revised February 13, 2019, prepared by Michael K. Ford, P.E. of Van Cleef Engineering Associates (the "Concept Plan"), a true copy of which is attached hereto as Exhibit B.

2. OBLIGATIONS OF THE TOWNSHIP.

2.1. Adoption of Zoning Amendment. Within sixty (60) calendar days of the final Execution/approval of this Agreement by all Parties, the approval of this Agreement by the Court's Special Master and the approval of the Agreement by the Court, the Township agrees to introduce the Zoning Amendment. The Township further agrees to schedule a public hearing and second (2nd) reading on the Zoning Amendment within sixty (60) calendar days after said introduction and, adopt in accordance with the procedures in the Municipal Land Use Law, the proposed Zoning Amendment (Exhibit A), The Township hereby agrees not to take any action that will modify the Zoning Amendment or that will otherwise require a variance application in connection with the Proposed Development, Following adoption of the Zoning Amendment, Campus shall be permitted to pursue development approvals for the Proposed Development with the Planning Board.

2.2. Obligation to Cooperate. The Township acknowledges that in order to construct the Proposed Development on the Subject Property, Campus will be required to obtain all necessary agreements, approvals and permits from all relevant public entities and utilities; such as, by way of example only, the Township, the Planning Board, the County of Somerset, the Somerset County Planning Board, the New Jersey Department of Environmental Protection, the New Jersey Department of Transportation, the Soil Conservation District and the like- including all ordinance requirements as to site plan and subdivision approvals (collectively, the "Required Approvals"). The Township agrees to cooperate with Campus in its undertakings to obtain the Required Approvals where applicable.

2.3. Concept Plan. The Parties have reviewed the Concept Plan, which is attached hereto and made part hereof as Exhibit B. The Parties find the design of the Proposed Development as represented on the Concept Plan, as a general concept, to be feasible and acceptable as well as consistent with the Zoning Amendment (Exhibit A).

2.4. The Planning Board's Obligation to Expeditiously Review Campus's Development Applications. The Parties understand that while the Planning Board is not a party to this

> Agreement, the Parties anticipate that the Planning Board will honor the provisions set forth herein. The Parties agree that, in proceedings before the Planning Board, Campus shall be entitled so have the Planning Board expedite review of its application() as follows:
>
> …
>
> 2.4.2. Decision By the Planning Board. After the Planning Board determines that the site plan and/or subdivision application is complete, the Board shall schedule the public hearing on the application. The Planning Board will use its best efforts to act on the subdivision application within the time frames for such established under the Municipal Land Use Law. If necessary, the Planning Board shall provide Campus with one (1) or more special meetings for the review of the application for the Proposed Development. Any special meetings conducted shall be scheduled at the sole discretion of the Planning Board and paid for by Campus.
>
> 2.4.3. Obligation to Refrain From Imposing Cost-Generative Requirements. The Planning Board recognizes that any approvals and this Agreement all contemplate the development of an "inclusionary development" within the meaning of the Mount Laurel doctrine, and Campus shall be entitled to any reasonable benefits, protections and obligations afforded to developers of inclusionary developments. Nothing shall prevent Campus from applying for a waiver or bulk variance from any standard imposed by the Township's Land Use and Development Ordinance, as applicable, and the standards set forth in the Municipal Land Use Law shall determine if Campus is entitled to this relief or from seeking a waiver of de minimus exception to any standard or requirement of the Residential Site Improvement Standards under the applicable regulations.
>
> …
>
> 5.1 Violation and Default. In the event that any Party shall fail to perform any material undertaking required to be performed by it pursuant to the terms of this Agreement, unless the Party (or Parties) for whose benefit such obligation was intended waive such obligation in writing, such material failure to perform shall constitute a breach under this Agreement. Upon the Occurrence of any such breach, the non-breaching Party shall have available any and all rights and remedies that may be provided in law or in equity. However, irrespective of above, the non-breaching Party shall provide notice of the breach and the breaching Party shall have a reasonable opportunity to cure the breach within fifteen (15) calendar days of such notice receipt. In the event the breaching Party fails to cure within fifteen (15) calendar days of such notice receipt or such reasonable period of time as may be appropriate, the Party for whose benefit such obligation is intended shall be entitled to exercise any and all rights and remedies that may be available in equity under the laws of the State of New Jersey, including the right of specific performance to the extent available.

After both settlement agreements were approved by the Court, Campus submitted an application for preliminary and final major site plan to permit the proposed construction on the site with 96 units, 23 of which would be set aside as affordable units, which is the exact density authorized by the Court in the Settlement Agreement, and the exact density permitted by the zoning ordinance applicable to the development (Multifamily Inclusionary Overlay District). Furthermore, it is uncontradicted that the site layout, setbacks, and means of ingress/egress proposed in Campus's

plans were substantially consistent with the Concept Plan that was adopted as part of the Settlement Agreement, which was agreed to by the Township and approved by this Court.

Campus's application was heard in four separate Planning Board public hearings (December 3, 2020, January 14, 2021, February 4, 2021, and February 25, 2021). The Planning Board ultimately denied the application, determining that the plan was not compliant with the 150-foot buffer requirement. In so doing, the Board refused to grant waiver to this requirement. (Certification of Marc D. Policastro, Esq. in support of Campus Associates' motion to Enforce Litigant's Rights at 5.) The FSHC and Campus and maintain that the Planning Board erroneously concluded that the Stream Ordinance applies to the Property, and the Township's refusal to amend the ordinance is in direct violation of the Township's Settlement Agreement.

The Township contests the position of Campus and FSHC by arguing that the Board did not erroneously conclude that the Stream Ordinance applies to the Property and by contending that new and unanticipated health, safety and general welfare issues were raised by Campus's proposal. In the Township's view, these "unanticipated issues" create legitimate and non-arbitrary and capricious basis for it to (1) deny the application; and (2) they do not constitute a breach of the agreement.

Campus and FSHC both assert that the Township was aware that there may be instances in which variance and waiver relief may be necessary. They assert that the Township was aware that the site plans included in the settlement agreement negotiation were not yet fully engineered, and thus future amendments might be necessary. The Township acknowledged that fact and agreed that Campus would be entitled to relief as necessary to develop "in accordance with the concept plan." Campus Brief at 4. Thus, they posit that the Township's refusal to amend the relevant ordinance is an improper attempt to prolong the development of affordable housing. Furthermore, they argue that the fact that the Township's Mayor and Deputy Mayor, who were both aware of the Township's obligation to the Campus agreement, voted to deny the application demonstrates the Township's defiance to their constitutional obligation to provide affordable housing.

The first issue to be addressed then is whether the Township breached its agreement when the Township Planning Board denied its application for the reasons that were previously described in this opinion. As part of that analysis, the Court initially notes that the Township argues that this Motion is premature since the Planning Board has yet to adopt the Resolution of Denial. The Court rejects that position as simply form over substance. It is clear that the Board has rejected Campus's proposal so that the adoption of the Resolution is simply a ministerial action that documents the action that the Board has taken. The Court need not wait for that ratifying action to occur.

The real issue is whether the Board's action constitutes a breach of the agreement and, if so, how the Court should address that circumstance.

The crux of the Township's opposition to the motion is that Campus's failure to adequately address historic drainage problems on the site and the surrounding area, as found by the Planning Board, are more than "minor" issues associated with the application, and that the Township is therefore not contractually obligated to amend the Zoning Ordinance. According to the Township, Campus failed to comply with the 150-foot stream buffer and refused to undertake a drainage analysis, and that these issues were "serious flaws" in the application which cannot be saved by the Township under the Settlement Agreement.

A review of the Agreement leads the Court to the inescapable conclusion that the intent and terms of the Agreement have not been complied with. The Agreement is replete with evidence of the intent of the parties. The Township agreed to facilitate the approval of the housing development project in an agreed upon concept plan. The Township certainly benefited from the Agreement in that it provided one of the integral parts of the "Mt. Laurel Plan" that was ultimately presented by the Township in its application for the Court to issue "Substantive Certification" to it, which included immunity from Builder's Remedy Lawsuits. In fact, the Court approved Hillsborough's Plan which included the Campus Agreement as one of the components of Hillsborough's comprehensive and complex affordable housing plan.

The parties to this Agreement were careful and specific when they described the plan that was to be approved for the Campus site:

> the parties, subject to the terms hereof, have agreed that the Subject Property be permitted to be developed as an inclusionary multifamily residential development by (a) the construction of not to exceed seventy three [73] market rate units and not to exceed twenty three [23] affordable units as further delineated below on the Subject Property for a total of not to exceed ninety six [96] units; and (b) the construction of residential amenities including a club house, a "tot lot" and a pool (the "Proposed Development").

The parties also specifically agreed:

> the Parties have agreed that so as to permit the construction of the Proposed Development as of right it is necessary for the Township to amend its Land Use and Development Ordinance in the form attached hereto as Exhibit A, which is made part hereof (the "Zoning Amendment")

The "contractual dispute" involves the issues of whether the Township wrongfully denied Campus's land use application or whether their agreement required the Township to either approve the development or amend their Ordinances to allow for the issues that have arisen. The Township,

of course, maintains that it acted properly when it denied the application. The Township's denial was based upon two separate issues.

First, the Township maintains that Campus refused to account for a 150-foot buffer from the stream located on the site, which was a "serious concern" to the Township. Tb13.[5] Yet the Township's position fails to acknowledge that the NJDEP confirmed that the so-called "stream" located on the property is subject to a 50-foot riparian zone, a fact made clear to the Planning Board during the February 4, 2021 hearing. Mr. Auffenorde testified that the reason why NJDEP imposes a 50-foot buffer requirement is because there are no significant ecological components that would require imposition of a larger buffer. See Transcript of February 4, 2021 Hearing at T. 40:10-41:1. Importantly, Mr. Auffenorde testified as to whether the 150-foot ordinance or the 50- foot NJDEP riparian zone should control:

> Q. Now, what if you're in conflict under the ordinance and DEP's regulations, the local ordinance? Are you familiar with how this ordinance deals with that situation, where there's a conflict between what the DEP would require and the purported 150-foot buffer?
>
> A. Yes, one of the expressly stated purposes of the stream corridor protection ordinance is to complement the existing state, regional, and county stream corridor protection and management regulations and initiatives.
>
> Another expressly stated purpose of the stream corridor protection ordinance is that it is not intended to conflict with any applicable regulations from the New Jersey Department of Environmental Protection, the NJDEP, which shall govern. So in the event of a conflict, DEP's regulations control.[6]
>
> Q. So, in this case, which would govern, the 50-foot or the 150-foot buffer, hypothetically, to the extent this even applies?
>
> A. The 50-foot. The 50-foot DEP riparian zone.

[Id. at T. 41:2-24].

Mr. Auffenorde further testified that the Township had historically applied the 150-foot buffer ordinance if the drainage area to the stream feature is greater than 50 acres, and if less than 50 acres, the stream corridor ordinance has historically not been applied. Id. at T. 43:15-44:10.

---

[5] Campus shall cite to the Township's brief in opposition through use of the prefix "Tb" followed by the page number.

[6] The NJDEP's regulations on that subject would preempt the Township's Ordinance on the same subject anyway.

Once again, Mr. Yuro, the Township's engineer, testified that he agreed with Mr. Ford that he would "not necessarily classify [the water feature on the property] as a stream," and that "with that taken, that would then, sort of, go with the DEP's determination that it's a state open water with a 50-foot buffer, and if it is not classified as a stream, ***then the 150-foot stream corridor buffer would not be applicable***." Id. at T. 46:3-16 (emphasis added).

Yet the Planning Board rejected the expert testimony of its own professional, rejected the position of the NJDEP, and found that the 150-foot ordinance did in fact apply.

While the Court disagrees with the Planning Board's conclusion, even if the Planning Board was correct that the 150-foot buffer did apply, the Court finds that Campus's deviation from the 150-foot buffer requirement constitutes (1) a waiver that was contemplated in the parties' agreement; and/or (2) a "minor" waiver which triggers the Township's obligation to amend the Zoning Ordinance. The Court does acknowledge that, in its opposition, the Township asserts that "[t]his difference between the fifty (50) foot buffer proposed by Campus and the one hundred and fifty (150) foot buffer required by the Township's Stream Corridor Ordinance is a far cry from a 'minor' waiver or variance and impacted more than one (1) of the proposed residential buildings on the site." Tb13. Yet the Township does not explain why or proffer any arguments as to why a 150-foot buffer is necessary. As testified by Mr. Auffenorde, the NJDEP requires a 150-foot buffer only when: (1) the "stream" drains to a trout production water or a trout maintenance water; or (2) the "stream" flows through a documented habitat for endangered or threatened species that are critically dependent on the regulated water for their survival, on site or within a mile downstream. See February 4, 2021 Hearing Transcript at T. 40:6-41:1. The NJDEP requires a 300-foot riparian zone when the "stream" drains to a Category 1 water. Id. at 40:15-17. Here, the water on the property does none of these things. See id. at 40:12-23. As such, the Township was not justified by imposing the greater 150-foot buffer. Regardless, the deviation from such unnecessary 150-foot buffer is not material and therefore "minor" within the meaning of the Settlement Agreement.

Additionally, the Court notes that the concept plan that was appended to the Agreement included a fifty (50') foot buffer for the stream corridor that was located in the rear of the property. The Township should not be heard to now argue that the fifty (50') foot buffer should now be one hundred fifty (150') feet, when the agreement includes specific evidence that belies that position. If the Ordinance can be read to require a 150' buffer, the Township is required by the terms of its Agreement to modify its Ordinance or take action to require that the requirement be varied or waived.

The Court finds that the Township will be compelled to amend the Zoning Ordinance to allow for the 50-foot buffer so as to permit the development as-of-right or to grant the necessary variance or waiver that was required of it under the terms and/or intent of the Settlement Agreement.

The second basis for the denial of Campus's application was based upon Campus's refusal to accede to the Board's request to conduct a downstream drainage study. Regarding the drainage study issue, the nature of the testimony regarding drainage from the property and the Planning Board's concerns regarding the seriousness of the drainage issue needs to be explored. Campus's engineer made clear that the project would not be adding any water on a net basis to the stream area. Mr. Ford testified that he had performed a hydraulic analysis which demonstrated that the "proposed peak discharge is substantially reduced for those design storms well below what the standards require." See Transcript of December 3, 2020 Hearing at T. 71:10-15. Mr. Ford further testified:

> MR. BERNSTEIN: Let me start with issue number one, at least my issue number one, Mr. Ford. And I'm not sure it's everybody else's, but we'll start with this one.
>
> Obviously, as you are well aware, based on your own testimony and hearing the testimony of others, as well as the public, an issue has been raised as to the current stormwater discharge off the property in its current condition. The issue is what, if anything, does the applicant propose to do to more accurately measure the various 2, 5, 10, 100-year storms, et cetera, for runoff, to give all the parties – your client, my client, et cetera – the understanding as to what the current runoff is, so that we can measure that against your client's application that they will, under the stormwater regulations, not produce any more water off the site than is currently coming off the site, and, in fact, less? And as you know, I believe, there really has not been a full-blown analysis of same.
>
> MR. FORD: Okay. Sorry, I didn't hear what transpired this evening until this time. I was actually at another virtual hearing. But as I presented to the board back at the hearing in December – and I don't believe there was any dispute regarding our stormwater analysis, in that ***we – and this is, actually, even before the presentation to the planning board, this was a presentation to the environmental commission before coming to the planning board, that we are reducing the peak flows from the site for the 2, 10, and 100-year storm, not just, you know, inches below what is required, the 50, 75 and 80 percent reductions, but significantly below that, and we've presented numbers to that effect, at that time; the drainage report bears that out.***

[See Transcript of February 4, 2021 Hearing at T. 94:22-96:10; see also T. 102:20-23 ("We're comfortable with our on-site drainage system that reduces the peak flows in accordance with the state standards and the township standards.")].

Significantly, Township Engineer Yuro concurred with Mr. Ford's opinion that Campus would be reducing the amount of stormwater runoff from the property:

> MR. YURO: I concur with Mr. Ford. We have reviewed his drainage report, and they do meet the township's stormwater requirements for retention of the peak rate of runoff, and it does coincide with the state requirements. It was also providing the necessary methods for meeting the standards for water quality also.

[Id. at T. 98:11-17; see also T. 100:6-9 ("All I can tell you is that they are meeting the requirements of the ordinance; they are reducing their rate of runoff from the property.")].

In effect, the Planning Board agreed that the project complied with the applicable stormwater requirements. As a result, there was no reason whatsoever to require a drainage analysis. That analysis would be unnecessary, as it would not change the undeniable fact that the project would not result in any additional stormwater impacts, and would in fact reduce the peak flows from the 2, 10 and 100-year storms. The Planning Board's insistence that Campus provide a drainage analysis was, in the Court's view, unwarranted in addition to being contrary to the terms and intent of the parties' Agreement.

The Township, of course, counters that "Campus's refusal to provide the requested information before the Planning Board took action on the application was more than enough reason to deny same regardless of the terms of the Settlement Agreement." Tb14. Yet the Township does not explain why. The Township does not present any arguments as to why the drainage study is important or necessary in light of the uncontroverted testimony that the project will reduce stormwater impacts from the property.

The Court holds that the Township will be compelled to amend the Zoning Ordinance to remove any obligation to provide the drainage study so as to permit the development as-of-right and/or to provide any variance or waiver to Campus to allow its development project to proceed.

With regards to the "downstream study," to investigate the ramification of the storm drainage on the site on a forty two (42") inch pipe that is located downstream, it also seems implausible that the Township contend that such a circumstance was unintended when the parties agreed to that. The Agreement was based upon a specific concept plan, prepared by a Professional Engineer, and that was reviewed and approved by the parties (paragraph 2.3). In addition, the Township agreed to "refrain from imposing cost-genitive requirements." (paragraph 2.4.3) The cost of the engineering study and any potential remedial action to cure that existing condition is, in the Court's view, a cost-generative requirement and is not this developer's obligation.

Thus, in the Court's view, the failure of the Planning Board to approve the Plan submitted by Campus does violate the terms, intent and purpose of the Agreement between the parties.

Since the Court has decided that the Board's actions are contrary to the Agreement made by the Township, the next step is to determine what, if any, steps are necessary to remedy the breach. FSHC and Campus assert that the Court may grant reversal of the Planning Board's decision in lieu of amending the Zoning Ordinance. In other words, the Court can bypass dependence on the Planning Board to amend the ordinance by overriding the Planning Board's decision, and simply approve Campus's site plan. They note that in East Brunswick Township, the Honorable Thomas D. McCloskey ordered approval of a site in the Township's fair share plan after the Planning Board denied approved plans in violation of the town's settlement agreement. See Exhibit A to the Certification of Adam M. Gordon, Esq. attached hereto to this brief (henceforth "AMG Cert."). Similarly, in Jackson Township, the Honorable Mark A. Troncone ordered the Planning Board's denial of a site incorporated into the Township's Settlement Agreement vacated and reversed. See AMG Cert. Exh. B at 4.

The Court agrees that the request made by the FSHC and Campus is the appropriate remedy in this case. The Township not only agreed to approve the Campus Plan (as long as it matched the Plan attached as an Exhibit to the Agreement, which it did) but also to take steps to cooperate in the process of expeditiously approving that Plan. As such, the Court finds that the appropriate relief is for the Court to grant the relief requested by Campus subject to other reasonable conditions as may be imposed by the Board. Those reasonable conditions will not include the imposition of a 150' stream corridor buffer and/or to require a downstream drainage study of the viability of the 42" pipe located under Dukes Parkway. The matter shall be remanded to the Board only for the determination of what, if any, other conditions that are clearly supported in the record should be imposed.

B. HAS THE TOWNSHIP INTENTIONALLY AND CONSISTENTLY FAILED TO ACT IN GOOD FAITH AND THEREFORE ITS TEMPORARY IMMUNITY SHOULD BE REVOKED?

1) Campus's and FSHC's Position

Campus and FSHC also submit that the Township's "repeated breaches" of the terms of the Settlement Agreement and its engagement in conduct that is designed to thwart the development of affordable housing is egregious and renders the Township constitutionally non-compliant. As such, in addition, Campus requests that the Court immediately revoke the immunity granted to the Township due to the Township's failure to act in good faith and its non-compliance with its Mount Laurel obligations.

Pursuant to Mount Laurel IV, trial courts are permitted to "provide initial immunity" from exclusionary zoning actions to towns such as the Township of Hillsborough that have filed declaratory judgment actions. Supra, 221 N.J. at 28. However, such periods of immunity should be temporary and "not continue for an undefined period of time." Ibid. Continued immunity is warranted only where it furthers "prompt voluntary compliance from municipalities" acting "with good faith and reasonable speed." Id. at 33-34; see S. Burlington Cty N.A.A.C.P. v. Mount Laurel Twp., 92 N.J. 158, 279 (1983) ("Mount Laurel II") (stating that "builder's remedies must be made more readily available to achieve compliance with Mount Laurel"). The court may revoke a town's immunity if it "abuses the process." Mount Laurel IV, 221 N.J. at 26; see, e.g., Matter of Application of Twp. of S. Brunswick, 448 N.J. Super. 441, 448-51 (Law. Div. 2016).

In this case, Campus and FSHC advocate that the Township has failed to act in good faith and is abusing the protection afforded by this Court pursuant to Mount Laurel IV, and thus, the Township should not be afforded continued immunity. Campus posits that the Township has violated its obligation under the Settlement Agreement to adopt an amendment to the Zoning Ordinance in order to make Campus's Application fully conforming.

Thus, Campus and FSHC urge that the Court find that the Township's actions (or lack of action) bespeak a lack of good faith on its part. Notably, the Stream Ordinance and related 150 foot buffer that was relied upon by the Planning Board to deny Campus's Application was added to the Code of the Township of Hillsborough in 2005. In addition, Campus notes that the Concept Plan that was attached to the Settlement Agreement made clear that, to the extent the Stream Ordinance even applied to the Property, Campus would require a waiver from the 150 foot buffer requirement.

Campus states that the Township did not raise any concerns or issues regarding the Stream Ordinance when it negotiated the Settlement Agreement with Campus, when it entered into the Campus Settlement Agreement in May 2019, or when the court approved the Settlement Agreement in September 2019, even though the Stream Ordinance was indisputably in effect at that time and the Township was ostensibly aware that the Proposed Development could not provide a 150 foot buffer if the Stream Ordinance were applicable. By executing the Settlement Agreement (and to the extent the Stream Ordinance even applies to the Property, which Campus maintains it does not), the Township agreed to take whatever action necessary to provide Campus relief from the Stream Ordinance such that the Proposed Development would be permitted "as-of-right." Also, Campus alleges that the fact that it is the Township's Mayor and Deputy Mayor, sitting as Planning Board

members, who respectively made and seconded the Planning Board's motion to deny Campus's Application, highlights the Township's contempt for its constitutional obligations.

Furthermore, Campus and the FSHC argue that the Township's continuous bad faith conduct contravenes the goal of "prompt" compliance by municipalities such as the Township in accordance with Mount Laurel IV. By failing to act in accordance with the clear and express terms of the Settlement Agreement, the Township is undoing years of good faith negotiations and use of judicial resources. The time has come for the Court to immediately revoke the Township's immunity from builder's remedy litigation.

2) *Township's Position*

The Township conveys that its temporary immunity should not be revoked for several reasons. Those reasons will be explored below.

(a) Voluntary Compliance is Encouraged and the Revocation of Temporary Immunity Should Only Be a Last Resort.

The Township postulates that all three (3) branches of government have emphasized the goal of facilitating voluntary municipal compliance. Thus, in So. Burlington County N.A.A.C.P. v. Tp. of Mount Laurel, 92 N.J. 158, 214 (1983) (Mount Laurel II), the Supreme Court stated "[o]ur rulings today have several purposes. First, we intend to encourage voluntary compliance with the constitutional obligation by defining it more clearly." Similarly, N.J.S.A. 52:27D-303, in pertinent part, states that:

> The Legislature deciares that the State's preference for the resolution of existing and future disputes involving exclusionary zoning is the mediation and review process set forth in this act and not litigation, and that it is the intention of this act to provide various alternatives to the use of the builder's remedy as a method of achieving fair share housing.

Similarly, in Mount Laurel IV, supra, the Court stated that "In enacting the FHA, the Legislature clearly signaled, and we recognized, that an administrative remedy that culminates in voluntary municipal compliance with constitutional affordable housing obligations is preferred to litigation that results in compelled rezoning." Mount Laurel IV, 221 N.J. at 5l.

Finally, the Appellate Division, interpreting the holding of the New Jersey Supreme Court decision in Toll Bros. v, Tp. of W. Windsor, 173 N.J. Super. 502 (2002), articulated this goal most clearly when it stated that "the Court emphasized that voluntary compliance is preferred, should be encouraged, and that a builder's remedy action should be considered a remedy of last resort." (see

K. Hovnanian Shore Acquisitions L.L.C. v. Twp. of Berkeley, A-594-01Tl, 2003 WL 23206281, at 7 (App. Div. July 1, 2003).[7]

According to the Township, Campus and the FSHC seek to reverse the priorities that the Supreme Court created and make voluntary municipal compliance subordinate to the developer's right to site-specific relief. Campus attempts to do so against a municipality entitled to be insulated from exclusionary zoning lawsuits through immunity and to make its own choices about what is the best way for the community to satisfy its obligations and which this Court granted through July 1, 2025 when it approved the FSHC Settlement Agreement and Fairness Hearing on June 8, 2020 and as the Township moves towards a Compliance Hearing. The Township has a strong record of demonstrating that it has been determined to comply with its affordable housing obligations. The Township has entered into settlement agreements with several intervenors, including Campus and FSHC, and approved several other non-intervenor developments that contain affordable housing units. This does not even include the hundreds of affordable housing units that were approved and constructed prior to this current litigation and between 1998 and 2015.

Given these principles, the Township advocates that instead of throwing the doors open to a builder's remedy suit by Campus or other developers, this Court should adhere to the principles that the Courts and the legislature have emphasized: that voluntary municipal compliance is preferred and that the builder's remedy should be an absolute "last resort". The Township has shown that it has taken its affordable housing obligations very seriously and is far from the "last resort" stage of the process wherein the Court would expose it to builder's remedy lawsuits by Campus and perhaps others.

---

[7] See also In re Declaratory Judgment Actions Filed By Various Municipalities, 227 N.J. 508, 524 (2017) ("Mount Laurel V") (wherein the Supreme Court, once again, pointed out the importance of voluntary compliance by noting that towns that voluntarily subjected themselves to COAH's jurisdiction "willingly accepted responsibility" for satisfying their fair share obligations and were rewarded with "the quid pro quo of protection from exclusionary zoning actions."); see also In Re Adoption of N.J.A.C, 5:96, 215 N.J. 578, 610 (2013)(wherein the Supreme Court suggests that "relegat[ing] a builder's remedy to a more reserved status" might "reduc[e] the political turmoil" and encourage more towns to achieve compliance voluntarily; see also Allan-Deane Corp. v. Bedminster Twp., 205 N.J. Super. 87, 106-07 (Law. Div. 1985) (wherein Judge Serpentelli analyzed the "several justifications underlying the policy of fair share flexibility in cases of voluntary compliance."); see also J.W. Field Co. v. Franklin Twp., 204 N.J. Super. 445, 451 (Law. Div. 1985) (wherein Judge Serpentelli identified "[t]he desire to promote voluntary compliance and early settlement" as one of the principle policy considerations established by the Supreme Court in Mount Laurel II.) see also Morris Cy. Fair Hous. Council v. Boonton Twp., 197 N.J. Super. 359, 366 7 (Law. Div. 1984), affd, 209 N.J. Super., 108 (App. Div. 1986) (Noting that, in Mount Laurel II, the Supreme Court "expressed a desire 'to simplify litigation in this area' and 'to encourage voluntary compliance with the constitutional obligation.'" Id. at 366-67 (citing Mount Laurel II, supra, 92 N.J. at 214).

(b) Regarding the Township's Position that this Court Must Uphold the Will of the Legislature of Suppressing Builder's Remedy Lawsuits Except Under Extremely Severe Circumstances.

The Township avers that Trial judges should honor "the essential legislative policy" of legislation and give meaning to its "reason and spirit." See Giles v. Gassert, 23 N.J. 22, 33-34 (1956). The following passage underscores the importance of trial judges honoring "the essential legislative policy" of the FHA and to giving meaning to its "reason and spirit":

> One of the most delicate tasks a court has to perform is to adjudicate the constitutionality of a statute. In our tripartite form of government that high prerogative has always been exercised with extreme self-restraint, and with a deep awareness that the challenged enactment represents the considered action of a body composed of popularly elected representatives. As a result, judicial decisions from the time of Chief Justice Marshall reveal an unswerving acceptance of the principle that every possible presumption favors the validity of an act of the Legislature, As we noted in Roe v. Kervick, 42 N.J. 191, 229 (1964), all the relevant New Jersey cases display faithful judicial deference to the will of the lawmakers whenever reasonable men might differ as to whether the means devised by the Legislature to serve a public purpose conform to the Constitution. And these cases project into the forefront of any judicial study of an attack upon a duly enacted statute both the strong presumption of validity and our solemn duty to resolve reasonably conflicting doubts in favor of conformity to our organic charter. Moreover, the conclusions reached in such cases demonstrate that in effectuating this salutary policy, judges will read the questioned statute as implying matters requisite to its constitutional viability if it contains terms which do not exclude such requirements.
>
> 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. Holster v. Board of Trustees of Passaic County College, 59 N.J. 60, 66 (1971); New Jersey Mortgage Finance Agency v. McCrane, 56 N.J. 414, 422 (1970); Clayton v. Kervick, 52 N.J. 138 (1968); Roe v. Kervick, supra, 42 N.J. at 229; Fried v. Kervick, 34 N.J. 68, 74 (1961); Am. Budget Corp. v. Furman, 67 N.J. Super. 134, (Ch. Div.), aff'd o.b. 36 N.J. Super. 129 (1961); 16 Am.Jur. 2d, Constitutional Law, § 109, pp. 294-295 (1964).
>
> [New Jersey Sports & Exposition Auth. v. McCrane, 61 N.J. 1, 8-9 (1972) (internal citation omitted).]

Consistent with these principles, the Supreme Court's emphasis on deference to the Legislature in the Mount Laurel arena could not be more pronounced. See Burlington Cty, NAACP v. Mount Laurel Tp., 119 N.J. Super. 164 (Law. Div. 1972), modified sub nom. S. Burlington Cty, N.A.A.C.P. v. Mount Laurel Tp., 67 N.J. 151 (1975) ("Mount Laurel I") (noting that this is a case "that definitely calls for legislative action from either the national or state governments.) Id. at 177); see also Mount Laurel II, supra, 92 N.J. at 212-13 ("[P]owerful reasons suggest, and we agree, that the matter is better left to the Legislature [and] we have always preferred legislative to judicial action

in this field . . ."); and see Mount Laurel III; 103 N.J. at 25 ("This Act represents an unprecedented willingness by the Governor and the Legislature to face the Mount Laurel issue [and] this [is a] substantial occupation of the field by the Governor and the Legislature . . . [the FHA] is a response more than sufficient to trigger our "readiness to defer."); See also In re Adoption of N.J.A.C. 5:96, 215 N.J. 578, 590 (2013)(citing Mount Laurel III and the Supreme Court's repeated requests "to the Legislature to act when explaining, in part, the reasoning for strong deference to Legislature); See, Id. at 616- 17 (discussing the "importance of deference to legislative enactments addressing general welfare . . .") that "the judicial processes authorized herein reflect as closely as possible the FHA's processes . . .").

More recently in Mount Laurel IV, supra, the New Jersey Supreme Court again repeatedly directed our courts to defer to the Legislature and seek to advance the will of the Legislature:

1. The Supreme Court emphasized that "the judicial processes authorized herein reflect as closely as possible the FHA's processes . . ." Id. at 6.

2. The Supreme Court stated that it would "take our lead from the FHA," Id. at 27.

3. The Supreme Court stressed its desire to provide municipalities "like treatment to that which was afforded by the FHA." Id.

4. The Supreme Court also created a special standard for municipalities that do not file DJ actions within the 30-day window based upon the lack of a "parallelism" in the FHA for standards for how to deal with this category of municipalities. Id. at 28.

5. The Supreme Court highlighted its desire to develop a process "that seeks to track the processes provided for in the FHA." Id. at 29.

Thus, consistent with the Supreme Court's emphasis on deference to the Legislature throughout Mount Laurel jurisprudence, the Supreme Court emphasized this principle once again in Mount Laurel IV: that only under extreme circumstances should a court even consider revoking immunity without a justified finding and recommendation by the Court's Special Master, which is not the case here.

The Township submits that given the Supreme Court's repeated and unwavering deference to the Legislature over the past forty (40+) plus years, this Court has an immutable duty to do the same. Clearly, it is not within the province of this Court to question the validity of the Legislature's policy decisions: "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 otherwise."

New Jersey Sports & Exposition Auth. v. McCrane, 61 supra at 8-9 (1972) (citing Holster v. Bd. of Trustees of Passaic Cnty. College, 59 N.J. 60, 66 (1971); N.J. Mort. Fin. Agency v. McCrane, 56 N.J. 414, 422 (1970); Clayton v. Kervick, 52 N.J. 138 (1968); Roe v. Kervick, 42 N.J. at 229; Fried v. Kervick, 34 N.J. 68, 74 (1961); Am Budget Corp. v. Furman, 67 N.J. Super. 134 (Ch. Div.), aff'd o.b. 36 N.J. 129 (1961); 16 Am.Jur. 2d, Constitutional Law, § 109, pp. 294-295 (1964).

According to the Township, the Legislature could not have more clearly expressed its desire to suppress builder's remedy litigation. The extent to which the Legislature went to suppress the builder's remedy and restore home rule is extraordinary. Indeed, the FHA: (1) provided immediate immunity from future Mount Laurel lawsuits (N.J.S.A. 52:27D-328); (2) provided retroactive immunity from the lawsuits already filed (N.J.S.A. 52:27D-316); (3) provided a means for municipalities to obtain immunity from builder's remedy suits prospectively (N.J.S.A. 52:27D-309 and 316); (4) created an administrative agency with jurisdiction to keep Mount Laurel matters effectively out of the courts and gave that agency, COAH, "primary jurisdiction" (N.J.S.A. 52:27D-304(a) and 306); (5) made it nearly impossible for developers to secure "site specific relief," (N.J.S.A. 52:27D-310(f)); and, (6) created such a high presumption of validity for approved plans by requiring challengers to prove that the plan was invalid by "clear and convincing evidence." (N.J.S.A. 52:27D-3 l 7).

Thus, the Township concludes that it would be hard to imagine how the FHA could have been more favorable to municipalities attempting to meet their affordable housing obligations. For this reason, the Township posits that this Court should not revoke the Township's immunity and make it prey to builder's remedy lawsuits.

(c) Regarding the Township's Position that its Actions Enjoy a Legal Presumption of Good Faith and Validity.

Courts must presume that a municipality "will act fairly and with proper motives and for valid reasons." Kramer. Bd. of Adjustment, 45 N.J. 268, 296-97 (1965); see also Fanelli v. City of Trenton, 135 N.J. 582, 589 (1994). In matters involving local land use and zoning issues, "the ultimate interests of effective zoning will be advanced by permitting the action of the municipal officials to stand, in the absence of an affirmative showing that it was manifestly an abuse of their discretionary authority." Ward v. Scott, 16 N.J. 16, 23 (1954). "Even when doubt is entertained as to the wisdom of the action, or as to some point of it, there can be no judicial declaration of invalidity in the absence of clear abuse of discretion by the public agencies involved." Id. at 23; Reinauer Realty Corp. v. Paramus, 34 N.J. 406, 416 (1961).

A "natural corollary to the presumption of validity of governmental action" is that "the objector must carry the burden of demonstrating" that the municipal body acted in bad faith. Berninger v. Bd. of Adj. of Bor. Of Midland Park, 254 N.J. Super. 401,407 (App. Div. 1991) aff'd sub nom. Berninger v. Bd. of Adj. of Bor. of Midland Park, 127 N.J. 226 (1992); see also Cell South of New Jersey Inc. v. Zoning Bd. of Adj. of West Windsor Township, 172 N.J. 75, 81 ("Because a [board's] actions are presumed valid, the party 'attacking such action [has] the burden of proving otherwise.'") (quoting New York SMSA Ltd. P'ship, v. Bd. of Adj. of Bernards, 324 N.J. Super. 149, 163 (App. Div.), certif. denied, 162 N.J. 488 (1999)).

Thus, a challenge to the validity of any municipal action or inaction "must overcome the presumption of validity -- a heavy burden." Bryant v. City of Atl. City, 309 N.J. Super. 596, 610 (App. Div. 1998) (citing 515 Assocs. v. City of Newark, 132 N.J. 180, 185 (1993); First People Bank v. Medford Tp., 126 N.J. 413,418 (1991).

The Township indicates that it simply cannot be declared a bad faith actor for not taking steps to amend its zoning ordinance to allow for Campus's development to be "fully conforming" after the Township Planning Board voted to deny its development application and before it could memorialize its decision by resolution. According to the Township, the Planning Board had more than adequate reason to deny Campus's application due to the serious flaws in Campus's development plan, which it refused to address. The Township posits that this Court should presume that the Township, as well as its Planning Board, is acting "fairly and with proper motives and for valid reasons".

As such, the Township contends that Campus cannot satisfy its heavy burden of proving bad faith by pointing to the fact that the Township has not acted to amend its zoning ordinance to render Campus's proposed inclusionary project as fully conforming. The Township is free to find another way in which to comply with its affordable housing obligations if it chooses to do so. The FHA requires that the Township to do no more than to consider Campus inclusionary project. N.J.S.A. 52:27D-310(f). Surely, the Township has more than satisfied this obligation. If Campus's development cannot be built, the Township is still committed to finding another site for the twenty-three (23) affordable housing units that Campus proposes. See Certification of Mayor Shawn Lipani.

As set forth above, the Township has a strong record of demonstrating that it has been determined to comply with its affordable housing obligations. Campus's accusations of bad faith are entirely false. The Township is not acting in bad faith just because it has not taken action with respect to one (1) issue regarding one (1) settlement agreement, especially when reviewing the overall context of what the Township has achieved and will continue to achieve as to affordable housing.

Thus, the Township contends that Campus has not even remotely proven that the Township is determined to be constitutionally non-compliant.

(d) Regarding the Township's Position that it has Not Abused the Process Nor Is It Determined to Be Constitutionally Noncompliant.

The Township also contends that before a Court "may authorize exclusionary zoning actions seeking a builder's remedy to proceed," the Supreme Court ruled that the challenger must prove: (a) that there has not been "prompt, voluntary compliance"; and (b) that "the town is determined to be constitutionally noncompliant":

> Beyond those general admonitions, the courts should endeavor to secure, whenever possible, prompt voluntary compliance from municipalities in view of the lengthy delay in achieving satisfaction of towns' Third Round obligations. If that goal cannot be accomplished, with good faith effort and reasonable speed, and the town is determined to be constitutionally non-compliant, then the court may authorize exclusionary zoning actions seeking a builder's remedy to proceed against the towns either that had substantive certification granted from COAH under earlier iterations of Third Round Rules or that had held "participating" status before COAH until this action by our Court lifted the FHA's exhaustion-of-administrative-remedies requirement.

[Mount Laurel IV, supra at 33-34.]

The analysis above highlights why the Courts establish such an extraordinarily high burden to warrant the stripping of immunity and why the establishment of a high standard is consistent with a larger statutory scheme.

Consistent with the laws and court decisions set forth above, the New Jersey Supreme Court required any interested party challenging immunity to prove that the municipality purposefully "abused the process":

> We repose such flexibility in the Mount Laurel-designated judges in the vicinages, to whom all Mount Laurel compliance-related matters will be assigned post-order, and trust those courts to assiduously assess whether immunity, once granted, should be withdrawn if a particular town abuses the process for obtaining a judicial declaration of constitutional compliance. Review of immunity orders therefore should occur with periodic regularity and on notice.

[Mount Laurel IV, supra, 221 N.J. at 26.]

The Township advocates that the Court's ruling that immunity should only be "withdrawn if a particular town abuses the process" demonstrates that the Court intended to put the onus on those that would seek to strip a municipality of immunity, i.e., that it is the challenger's burden to prove that the municipality is determined to be constitutionally non-compliant.

The Court provided guidance as to what it meant when it said the challenger must demonstrate an "abuse of the process" when it ruled that trial judges should only consider exposing a town to Mount Laurel litigation in cases where the challenger proved that the municipality is "determined to be constitutionally noncompliant." Id. at 33-34. The Court's ruling that the trial judge "may authorize exclusionary zoning actions if the movant demonstrates that "prompt, voluntary compliance" has not been achieved "and the town is determined to be constitutionally noncompliant" demonstrates that it is not sufficient for any challenger to immunity just to demonstrate the lack of "prompt, voluntary compliance". In addition, the challenger must prove that "the town is determined to be constitutionally noncompliant." (Emphasis added) Campus has made no such proof here.

In Mount Laurel IV, supra, the Supreme Court promised to provide "participating municipalities," like the Township , that brought declaratory relief actions within the 30-day period the Court specified "like treatment" to municipalities that secured a transfer of their case from court to COAH in the wake of the enactment of the FHA (hereinafter "transferred municipalities"):

> Towns that were in "participating" status before COAH and that pursuant to our order now affirmatively come before the courts seeking to obtain approval of an affordable housing plan should receive like treatment to that which was afforded by the FHA to towns that had their exclusionary zoning cases transferred to COAH when the Act was passed. See N.J.S.A. 52:27D-316. Such towns received insulating protection due to COAH's jurisdiction provided that they prepared and filed a housing element and fair share plan within five months. Ibid. Similarly, towns that were in "participating" status before COAH and that now affirmatively seek to obtain a court declaration that their affordable housing plans are presumptively valid should have no more than five months in which to submit their supplemental housing element and affordable housing plan. During that period, the court may provide initial immunity preventing any exclusionary zoning actions from proceeding.

[Mount Laurel IV, 221 N.J. at 27-28.]

To appreciate the degree of protection a participating municipality is entitled, it is essential to understand the degree of protection the FHA conferred on a transferred municipality. In this regard, the FHA conferred extraordinary protections on transferred municipalities. As long as municipality was under COAH's jurisdiction, it was immune from any form of Mount Laurel litigation. See Mount Laurel IV, supra, 221 N.J. at 5. Pursuant to N.J.S.A. 52:27D-316, the statutory provision that the Supreme Court relied upon when ruling that participating municipalities are entitled to "like treatment" to transferred municipalities, Id. at 27. Thus, no lawsuits could be maintained against a municipality that had brought itself under COAH's jurisdiction prior to the institution of an exclusionary zoning lawsuit.

Moreover, the Township asserts that a municipality would have to behave egregiously to lose the protections created as a result of being under the protective umbrella of COAH's jurisdiction. In this regard, if a developer or nonprofit believed that a municipality under COAH's jurisdiction was abusing the COAH process, it could bring a motion for "accelerated denial of substantive certification." This is a motion in which the movant asks this Court to relinquish jurisdiction and expose the municipality to exclusionary zoning litigation. See N.J.A.C. 5:91-10.2 (providing that "[a]t any time, upon its own determination, or upon the application of any interested party, and after a hearing and opportunity to be heard, the Council may deny substantive certification without proceeding further with the mediation and review process.")

The Township points out that, for good reason COAH was loath to grant such motions. Indeed, COAH made clear such powers "should be utilized in only the most extreme cases". In Re Borough of Fanwood, COAH Dkt. 88/89- l 15(a) (April 24, 1989). See Hak Cert., Exhibit F, p. 14. Consequently, even though COAH characterized Fanwood's problems as "inexcusable," it also concluded that those problems "do not merit the remedy of accelerated denial." Id. By giving a municipality that acted inexcusably the opportunity to fashion its own plan, COAH highlighted the importance of voluntary municipal compliance and making the builder's remedy the absolute last resort.

COAH's extraordinary reluctance to grant accelerated denial motions made perfect sense. Opening the gate to builder's remedy actions would undermine the stated purpose of the FHA, i.e., to resolve exclusionary zoning disputes "without litigation." N.J.S.A. 52:27D-303. COAH specifically stated:

> It is clear that accelerated denial of substantive certification is an extraordinary remedy. It removes a municipality from the administrative process "without permitting the Council full review of the municipality's proposed housing element and fair share plan, designed to meet the municipality's Mt. Laurel obligation. The "result" in some cases will be that jurisdiction reverts to the courts. This clearly contravenes the preference of the Fair Housing Act and the Mt. Laurel decisions for an administrative review and adjudication of a municipality's attempt to meet its Mt. Laurel obligations, rather than a judicial resolution. N.J.S.A. 52:27D-303. Mount Laurel II, 92 N.J. at 212.

[Real Estates Equities. Inc. et al v. Holmdel Tp., et al, COAH Dkt. 86-1 (December 1986), at 5-6 (emphasis added). See Hak Cert., Exhibit G.]

Just as the rigorous standards concerning an accelerated denial of substantive certification motion provided an extraordinarily level of protection to municipalities in COAH proceedings, the "determined to be constitutionally noncompliant" should give municipalities, like the Township the

same extraordinary level of protection in a Court proceeding. In the Court's view, to date, the Township has not acted in a way so as to justify a determination that it has been constitutionally non-compliant.

3) Court's Analysis and Decision

In the Court's view, the Township's immunity should not be revoked at this time. Even though the Court has found the Township's actions to constitute a breach, the Township's actions were likely not motivated by bad faith, but instead simply by a mistaken understanding of their contractual duties. In the face of objections to the project, the Planning Board members chose a path which was understandable, even if legally erroneous. In the Court's view, the consequences of those actions do not warrant the drastic relief advocated by Campus and the FSHC in this aspect of their Motion.

In reaching this result, the Court is mindful of the principles of law as contained in the cases of the Mt. Laurel Doctrine that should be applied. Certainly voluntary compliance with a municipality's Mt. Laurel obligation is to be encouraged. The Court's action here facilitates voluntary compliance. Revocation of immunity is a drastic remedy that should only be used as a last resort. In the Court's view, it is not necessary here. The revocation of immunity would also facilitate the filing of Builder's Remedy Lawsuits which is not necessary given the Court's finding.

Also, the Court has considered the Township's past actions regarding its Mt. Laurel obligations. The Township engaged in a lengthy negotiation process which culminated in a complex but comprehensive Mt. Laurel Plan. That Plan ultimately was approved by the Court as part of its settlement. The Planning Board's miscalculation when it failed to approve one aspect of the Plan for an issue that it reasonably believed was in the interests, the public should not constitute a basis for such drastic relief.

The Court finds that there is no evidence that the Township is not committed to remain constitutionally non-compliant. In fact, since December 2018, the Township has entered into a member of settlement agreements, had all of them approved at Court hearings, had all, including Campus's, rezoning ordinances approved. The Court also approved an agreement with FSHC and granted, on June 8, 2020, immunity to the Township through July 1, 2025. The Planning Board has approved all applicable site plans brought before it by intervenors. In addition, the Township has approved two (2) other sites in the Township not being developed by Intervenors in this case as affordable housing sites. Furthermore, the Township has two (2) all affordable housing site and has at least one (1) more containing eighty-seven (87) unit all affordable housing project, in the pipeline.

Additionally, as noted herein in the Township's papers, the Township has moved hundreds and hundreds of affordable housing units through the pipeline from 1998 to the present. Campus is the first hiccup in an otherwise exceptionally good track record, especially considering the Township has successfully addressed litigation with multiple, as well as with intervenors, extensive and fruitful negotiations with FSHC.

For those reasons, the Court rejects the application to revoke the Township's immunity.

C. IS CAMPUS AND/OR FSHC ENTITLED TO ATTORNEYS' FEES AND COSTS IN RELATION TO THIS MOTION, THE FIRST MOTION, AND THE APPLICATION TO THE PLANNING BOARD?

Lastly, Campus and the FSHC request an award of its reasonable attorneys' fees and costs incurred in connection with the current motion, Campus's First Motion to Enforce Litigant's Rights, and Campus's Application to the Planning Board. The Court "in its discretion may make an allowance for counsel fees to be paid by any party to the action to a party accorded relief" under Rule 1:10-3. "The scope of relief in a motion in aid of litigants' rights is limited to remediation of the violation of a court order." Abbott v. Burke, 206 N.J. 332, 371 (2011).

As noted, FSHC joins Campus in requesting that because Hillsborough Township has willfully violated the plain terms of the May 2019 Settlement of Litigation Agreement and the March 27, 2020 Settlement Agreement with FSHC, the Court should award reasonable attorney's fees, costs, and interest expended in litigating this matter to Campus and FSHC as provided by Rule 1:10-3.

Campus and FSHC assert that the Court's authority to award fees and costs is long recognized under Rule 1:10-3, which provides in relevant part that "[t]he court in its discretion may make an allowance for counsel fees to be paid by any party to the action to a party accorded relief under this rule." R. 1:10-3. Comments on the rule explain that, "[a]lthough the so-called American rule . . . continues to require each party to bear his own attorney's fees except as otherwise provided by R. 4:42-9, this rule provision allowing for attorney's fees recognizes that as a matter of fundamental fairness, a party who willfully fails to comply with an order or judgment . . . is properly chargeable with his adversary's enforcement expenses." Pressler & Verniero, Current N.J. Court Rules, cmt. 4.4.5 on R. 1:10-3 (2018). Judicial opinions have likewise affirmed the principle that courts have wide discretion to enter an award of fees when an order or judgment is violated. See, e.g., Haynoski v. Haynoski, 264 N.J. Super. 408 (App. Div. 1993).

The Township argues that there is no violation of a Court order in this situation. The Township adopted the Zoning Ordinance in early 2020 in accordance with Your Honor's Order of

December 13, 2019; thus no violation. The Planning Board heard Campus's application in accordance with the Settlement Agreement; thus no violation. The issues in Campus's claims here are not in violation of any Court order, not as to the Planning Board's actions and/or any Township inaction. Further, the Township submits that there has not been a breach of the Settlement Agreement and derivatively any violation of the September 13, 2019 Order that needs to be remediated. The Township contends that the Planning Board had a legitimate basis, or at least a colorable basis, to deny Campus's application so that Campus could appropriately and adequately address the flaws in its development plan. The Township states that it simply has not breached the Settlement Agreement and is not in violation of the September 13, 2019 Order by not acting on an amendment to its zoning ordinance due to the grave concerns regarding Campus's flawed development application.

Campus is entitled to its attorneys' fees in connection with this motion, as it was commenced as a result of the Township's violation of the September 13, 2019 Order approving the Settlement Agreement. See Pressler & Verniero, *Current N.J. Court Rules*, cmt. 4.4.5 on R. 1:10-3 (2021) ("[T]his rule provision allowing for attorney's fees recognizes that as a matter of fundamental fairness, a party who willfully fails to comply with an order or judgment entitling his adversary to litigant's rights is properly chargeable with his adversary's enforcement expenses.").

In addition, Campus expended significant sums (including but not limited to attorneys' fees and other professionals' fees) in preparing and presenting the Application to the Planning Board in direct reliance on the September 13, 2019 Order, which the Township has once again violated. See Pressler & Verniero, cmt. 4.4.3 on R. 1:10-3 ("While a monetary sanction payable to the aggrieved party is not necessarily limited to the amount of the aggrieved party's actual damage, it must nevertheless be rationally related to the desideratum of imposing a 'sting' on the offending party within its reasonable economic means.").

The Court finds that the Township's intentional and repeated breaches of the Court-approved Settlement Agreement and the related September 13, 2019 Order, and its bad faith conduct warrant such relief. The Township, nor any other municipality, should be permitted to repeatedly violate a Court Order and flout its affordable housing obligations under the Constitution without sanction. Plaintiff's counsel will submit an Affidavit of Services to the Court for review in accordance with the Rules.

CONCLUSION

For the reasons set forth above, Plaintiff's Motion is GRANTED IN PART and DENIED IN PART.

Kevin M. Shanahan

Hon. Kevin M. Shanahan, P.J.Cv.