IN THE MATTER OF THE APPLICATION OF THE TOWNSHIP OF CRANFORD, COUNTY OF UNION	**SUPERIOR COURT OF NEW JERSEY** LAW DIVISION: UNION COUNTY DOCKET NO.: UNN-L-3976-18 CIVIL ACTION *Mount Laurel*

BRIEF ON BEHALF OF THE TOWNSHIP OF CRANFORD IN OPPOSITION TO THE OBJECTIONS SUBMITTED BY DEFENDANT-INTERVENORS, HARTZ MOUNTAIN INDUSTRIES, INC., H-CRANFORD CONDUIT LP, AND H-CRANDFORD CREDIT LP.

Date: January 27, 2020

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Introduction

The Township's Settlement Agreement with Fair Share Housing Center ("FSHC") is fair and reasonable to the interests of the region's low- and moderate-income households on its face, under every relevant standard and source of law. The Fairness Hearing is not a plenary hearing – it is not a trial on the merits. See Morris County Fair Housing Council v. Boonton Twp. 197 N.J. Super. 359, 370 (Law Div. 1984) ("Morris County Fair Housing Council"). Rather, it is expressly an evaluation of the agreement's fairness to the protected class as a compromise of competing legal and factual disputes, as a vehicle for the public policy favoring the prompt and voluntary production of affordable housing in lieu of protracted litigation, and as the manifestation of the public policy encouraging settlements. Id. The law recognizes a presumption that agreements with housing advocates, like Fair Share Housing Center, are significantly more likely to be fair and reasonable as such advocates solely represent the protected class and, unlike Hartz, do not have the pecuniary interest in the outcome.

The Township's Settlement, which was authorized and signed a year after filing this DJ Action, outlines the mechanisms by which the Township has or will satisfy its entire rehabilitation obligation and prior round obligation, which does not appear to be in dispute. It further accounts for a Round 3 fair share of 440 units and an adjustment to that fair share predicated upon a lack of vacant developable land, which results in an RDP of 131. In addition the Settlement Agreement commits the Township to create a realistic opportunity for an additional 20 hard units (not bonus credits). The Township commits not only to create a realistic opportunity for 151 units, without the benefit of the full bonuses for that number, but also to create a significant surplus above and beyond its RDP. For unmet need, the Township

modifies and nearly doubles the density of the proposed overlay zones in the Downtown Core, permitting up to 35 units per acre, and surrounding areas and adds two additional sites that are not contiguous with those areas. In addition, the Township commits to adopting a mandatory set aside ordinance, which will capture additional affordable housing in the event of future multifamily developments. These unmet need mechanisms are significantly more onerous than those contained in many approved settlements having occurred subsequent to Mount Laurel IV.

As a result, Hartz, knowing it's a losing battle does not focus on how much affordable housing Cranford commits to build, but rather **where** it plans to build it. Hartz argues that the Court should upend a privately negotiated settlement to impose high-density urban development at a remote site, contrary to the Township's Master Plan, in a DJ Action with an active immunity order, in the context of a fairness hearing on the binary question of whether the Settlement is fair and reasonable. **In effect, Hartz argues that it is entitled to a backdoor builder's remedy.** In support, Hartz offers a series of convoluted arguments that defy the key precepts of the Mount Laurel Doctrine.

For starters, the Legislature designed the Fair Housing Act to 1) restore home rule, and prevent the exact relief Hartz seeks here - development contrary to municipal master plans; 2) to avoid litigation and litigious interference from developers; and 3) to impose reasonable fair share numbers and adjustments. Hartz position would violate all three of these foundational principles. Moreover, Hartz's position fatally ignores that the Fair Housing Act is entirely devoid of the concept or phrase unmet need. Thus, Hartz's position necessary requires this Court to conclude that it would somehow violate the Fair Housing Act to increase the number (RDP) resulting from the adjustment procedures articulated in the Act itself.

As to COAH regulations, and Hartz's claims that its site should not be included in the RDP despite: 1) the Round 1 regulations expressly include "redevelopment" in its definition of vacant land; 2) their own proposed answer provides: "Defendant-Intervenors' Property is suitable for inclusionary development and Defendants Intervenors are **ready, willing and able to proceed with such development**, ..." (Proposed Answer at 6); 3) the Cherry Hill case, decided after COAH's Round 2 regulations, is directly on point and requires treating the Hartz site as RDP; 4) COAH's Round 3 regulations account for Cherry Hill by including redevelopment in the class of lands provided in the vacant land inventory that may generate RDP to the extent the site presents a realistic opportunity (N.J.A.C. 5:97-5.2) and include redevelopment as a mechanism to create a realistic opportunity (N.J.A.C. 5:96-6.6); 5) the FSHC Settlement Agreement contemplates potential condemnation for redevelopment; 6) their own objections describe the underlying use as vacant and/or underutilized.

Finally, including the Hartz site in the RPD and requiring affordable housing to be built at that site represents a fair and reasonable compromise of that issue given the disparity in the parties' positions. This is especially true since the settlement is with FSHC and not a private developer with a financial interest at stake. See Morris County Fair Housing Council at 368.

Legal Argument

POINT I: HARTZ'S INTERPRETATION OF THE LAW WOULD REQUIRE THIS COURT TO IGNORE THE ENTIRE INTENT, SPIRIT AND STRUCTURE OF THE FAIR HOUSING ACT AND THE SUPREME COURT'S RELIANCE ON AND UTILIZATION OF THOSE PROCEDURES IN MOUNT LAUREL IV

Before summarizing the positions taken by Hartz and responding to each, a theme persistent throughout the Hartz objection that must be addressed up front -- both the legal brief and the expert report of Author Bernard, P.P. ("Mr. Bernard") are riddled with partial quotes and conjured standards about what the law should be and not what the law is: "We further submit that, should the Township's reading and interpretation of N.J.A.C. 5:93-4.2 be deemed plausible, **that regulation should be disregarded by the Court**." Brief at 11; "[The Supreme Court] did not direct courts to be concerned about 'what COAH actually did'." Bernard Report at 13. Forgetting for a moment that Mr. Bernard is not a lawyer and is not even qualified to make those legal net opinions, the Supreme Court in Mount Laurel IV squarely rejected Hartz's contention. Indeed, the Supreme Court could not have more clearly stated that all lower courts, including this Court, should substitute its own judgment for that of COAH:

> **The judicial role here is not to become a replacement agency for COAH. The agency** is sui generis—a legislatively created, unique device for securing satisfaction of *Mount Laurel* obligations. **In opening the courts for hearing challenges to, or applications seeking declarations of, municipal compliance with specific obligations, it is not this Court's province to create an alternate form of statewide administrative decision maker for unresolved policy details of replacement Third Round Rules**, as was proposed by NJLM. The courts that will hear such declaratory judgment applications or constitutional compliance challenges will judge them on the merits of the records developed in individual actions before the courts. However, certain guidelines can be gleaned from the past and can provide assistance to the designated *Mount Laurel* judges in the vicinages.
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> [Mount Laurel IV at 29-30 (emphasis added)].

Since many of the arguments create their own self-serving legal standards and phrases (i.e. the "Shell Game") they violate the statutory and regulatory framework for which Hartz

attempts to substitute its own judgment. As a result, many of their own positions are contradicted either later in the same document or in the corresponding report/brief: "[The Hartz] Property is vacant, as the attractiveness of the Property for the permitted nonresidential uses has vanished as the market considerations have changed over time." Hartz Brief at 2; "750 Walnut Avenue is not a vacant site." Bernard Report at 18.

According to Hartz, the law supports the proposition that municipalities, even those complying voluntarily, completely and entirely surrender all zoning discretion to the Courts and/or COAH relative to unmet need in the event of a vacant land adjustment. Though each document attempts to obscure this conclusion, it is the flagship theme of the entire objection: "The rule placed on COAH [or this Court] – not the municipality – the ultimate responsibility to determine how these sites would be rezoned to address unmet need". Bernard Report at 15. They then utilize this inane proposition to attempt to secure site-specific relief on the Hartz Site, against the Township's will, without a builder's remedy or a finding of non-compliance, in the context of a fairness hearing and in a manner inconsistent with a privately-negotiated settlement agreement. Unfortunately for Hartz, every ounce of the Mount Laurel law supports the exact opposite conclusion as demonstrated by the clear recitation of the law provided below.

A. Hartz Asks This Court To Violate The Core Principle Of The Fair Housing Act By Suggesting That It Should Divest A Municipality Of Its Home Rule Powers While Engaged In Good Faith And Voluntary Compliance

To understand the design and nature of the procedures embodied in the Fair Housing Act (FHA), it is necessary to understand what provoked the Act in the first place. After the Supreme Court created the builder's remedy in Mount Laurel II (the spark) and Judge Serpentelli created the AMG formula in 1984 creating exceedingly high statewide numbers (the flame), developers flooded the courts with builder's remedy lawsuits. See AMG Realty Co. v. Warren, 207 N.J. Super. 388 (Law 1984) ("AMG"). This section discusses the Legislature's response to the flood

of builder's remedy lawsuits and point I.B below addresses the Legislature's response to excessively high obligations.

In the legislative hearings that culminated in the enactment of the FHA, Senator Gagliano, one of the major forces behind the enactment of the FHA, articulated one of the driving principles of the FHA: "The **entire Mount Laurel process [as proposed in the FHA] really is a legal advance on local home rule**" and explained expressly that the intent was to avoid a long, drawn out litigious procedure in favor of municipal discretion in home rule power relative to compliance:

> In substitution, what we have designed is a streamlined procedure for the hearing process, where the municipality and any other concerned party can submit the reports, together with the housing element, to the Housing Council. A hearing will then be held which will last, in most cases, no more than one day. We propose to set in legislation a maximum of two days for the hearing process. We do not intend to permit full and extensive cross-examination because we feel this would be a duplication of the court process and it would only extend the time for implementation.
>
> Instead, we would permit the Housing Council to entertain limited questions from concerned parties, as well as their own questioning of the municipality concerning the proposed housing element. In the event that the Housing Council after this, in most cases, one-day review procedure felt that the municipality had made a good-faith effort to reach its own fair share obligation, through a housing element that truly was geared to implement the fair share, the Housing Council would then be empowered to grant that the presumption of validity be strengthened.
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> The entire Mount Laurel process really is a legal advance on local home rule. Previously, zoning legislation carried with it a strong presumption of validity, whereby a town was almost guaranteed insulation against developer attack. With the recalcitrance of many municipalities – and I stress, not all municipalities – the courts felt it necessary to put aside the presumption of validity and, thus, the onslaught of litigation that now comprises the Mount Laurel issue.
>
> If the Housing Council, proposed in this legislation, reviews a local town's effort at designing a workable housing element and it feels that the town has made a good-faith effort, that it has made an appropriate calculation of fair share, and that it has an appropriate methodology for implementation, we want the Housing Council to be able to offer the municipality a very strong presumption of validity…"

> [See transcript of legislative hearings on FHA, dated September 17, 1984, at 11, attached as Exhibit A to the Certification of Michael J. Edwards, dated January 27, 2019 ("Edwards Cert."_][1]

Thus, the Legislature intended to empower municipalities to decide how to comply and prevent developers from interfering with a municipality's choices through builder's remedy lawsuits and applications for site-specific relief. N.J.S.A. 52:27D-303 (providing 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. . ."). Indeed, the Legislature included many provisions in the FHA to restore home rule and commensurately suppress the builder's remedy. See N.J.S.A. 52:27D-316 (providing municipalities the opportunity to secure retroactive immunity from the lawsuits already filed); see also N.J.S.A. 52:27D-309 and 316 (providing a means for municipalities to obtain immunity from builder's remedy suits prospectively); see also N.J.S.A. 52:27D-304(a) and 306 (creating an administrative agency with jurisdiction to keep Mount Laurel matters effectively out of the courts and gave that agency, COAH, "primary jurisdiction"); see also N.J.S.A. 52:27D-310(f) (giving developers committed to providing affordable housing the right to no more than a consideration of their proposal by municipalities); see also N.J.S.A. 52:27D-317 (creating a high presumption of validity for approved plans by requiring challengers to prove that the plan was invalid by "clear and convincing evidence"); see also N.J.S.A. 52:27D-328 (imposing a moratorium on the builder's remedy).

To implement these policies, the FHA created the Council on Affordable Housing ("COAH"); conferred "primary jurisdiction on it (N.J.S.A. 52:27D-304 (a)); and charged it with

[1] Although the Legislature may not have ultimately secured quite the streamline procedures it desired as demonstrated by the above quote (1-day review process was overly optimistic), the intent was crystal clear. See also id. at 40 ("Well I'm going to answer it right now. What we are struggling to do here today is to develop a legislative solution that can take the courts out of the business of Mount Laurel and **return the power of home rule to the municipalities**."; see also id. at 40 (One of the architects of the bill described "…This legislation cannot address all the problems. We wish to help the municipalities return to some sense of home rule, which seems to have been taken away…I think we are seeking a reparable solution, and the presumption of validity that municipalities had in the first place, which seems to have been somewhat removed by the Mount Laurel decision, we are seeking to return by establishing this Housing Council.") Id. at 89.

devising a process by which municipalities seeking to comply voluntarily could petition COAH for approval of their Housing Element and Fair Share Plan (HEFSP) while being immunized from builder's remedy lawsuits. See Mount Laurel IV at page 4. If COAH certified the HEFSP, it would adopt a resolution granting the municipality Substantive Certification and insulation from future litigation. N.J.S.A. 52-27D-314 and 317. The FHA did not mandate that municipalities file affordable housing plans with COAH and petition COAH to certify their plans. In lieu of filing a plan with COAH and petitioning COAH to approve it, a municipality could risk being sued via an exclusionary zoning lawsuit N.J.S.A. 52-27D-301 and 309 et seq. Indeed, the Legislature designed the FHA to force a municipality to risk an exclusionary zoning lawsuit and the ability to decide how to comply if it forewent the opportunity to comply voluntarily by first filing a plan with COAH before an exclusionary zoning lawsuit was filed in Court. N.J.S.A. 52-27D-309 and 316.

Thus, the Act incentivized voluntary compliance by empowering a municipality to determine how to address its fair share (the carrot). Alternatively, through successful exclusionary zoning lawsuits and awards of builder's remedies, a municipality could lose control of its zoning destiny and a developer could commandeer the zoning standards applicable to its site over the strenuous opposition of the municipality (the stick). In short, the Act rewarded voluntary compliance by giving municipalities the power to decide how to comply regardless of the demands of any developer or non-profit. Indeed, instead of having to capitulate to builder's remedy demands as occurred prior to the enactment of the FHA, the FHA requires municipalities to do no more than consider the proposals of developers committed to providing affordable housing. N.J.S.A. 52:27D-310 (f).

As a result of COAH's failure to adopt valid regulations, the Supreme Court decided Mount Laurel IV in which the Court designed a transitional process whereby municipalities

could seek judicial approval of their HEFSPs. Mount Laurel IV at 35-36. Those transitional procedures gave municipalities the choice whether to seek compliance voluntarily via a DJ Action or to not file a DJ Action and risk being sued. This wasn't a coincidence; the Supreme Court designed these procedures by expressly relying upon the FHA. It demonstrated its desire to defer to the FHA at least five times: 1) It emphasized its desire to follow the FHA processes "as closely as possible." Mount Laurel IV at 6. 2); It stated that it would "take our lead from the FHA." Id. at 27; 3) It stressed its desire to provide municipalities "like treatment to that which was afforded by the FHA." Ibid.; 4) It created standards in instances where there was a lack of "parallelism" in the FHA. 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.

As part of these procedures, the Supreme Court authorized "a court to provide a town whose plan is under review immunity from subsequently filed challenges during the court's review proceedings, even if supplementation of the plan is required during the proceedings." Id. at 24. In this way, proactive municipalities were entitled "like treatment" to towns that petitioned COAH for review of their plans in the wake of the FHA and received broad protections from site-specific relief. Id. at 28. This incentives system was by design and demonstrated the Court's understanding of and reliance upon the Fair Housing Act:

> That said, the FHA clearly prefers the administrative forum, and its special processes, for addressing constitutional affordable housing obligations. Generally stated, the FHA encourages and rewards voluntary municipal compliance. The Act encourages compliance by compelling COAH to establish and periodically update presumptive constitutional housing obligations for each municipality and to identify the permissible means by which a town's proposed affordable housing plan, housing element, and implementing ordinances can satisfy its obligation. The Act rewards compliance in two ways: (1) by providing a period of immunity from civil lawsuits to towns participating in the administrative process for demonstrating constitutional compliance (the exhaustion-of-administrative-remedies requirement); and, (2) for a town whose fair share housing plan secures substantive certification from COAH, by providing a period during which the municipality's implementing ordinances enjoy a presumption of validity in any ensuing exclusionary zoning litigation.

[Mount Laurel IV at 4]

Thus, under the Mount Laurel IV process, rooted in the FHA and its system of incentives, a municipality that filed voluntarily and ultimately proceeded in good faith as it attempted to secure court-approval of its HEFSP, was immune to builder's remedies and site-specific relief and thus: "[o]nly after a court has had the opportunity to fully address constitutional compliance and has found constitutional compliance wanting shall it permit exclusionary zoning actions and any builder's remedy to proceed in a given case." Id. at 36. The review process was thus intentionally rooted in the FHA:

> Second, it bears emphasizing that the process established is not intended to punish the towns represented before this Court, or those that are not represented but which are also in a position of unfortunate uncertainty due to COAH's failure to maintain the viability of the administrative remedy. Our goal is to establish an avenue by which towns can demonstrate their constitutional compliance to the courts through submission of a housing plan and use of processes, where appropriate, that are similar to those which would have been available through COAH for the achievement of substantive certification. Those processes include conciliation, mediation, and the use, when necessary, of special masters. The end result of the processes employed by the courts is to achieve adoption of a municipal housing element and implementing ordinances deemed to be presumptively valid if thereafter subjected to challenge by third parties. Our approach in this transition is to have courts provide a substitute for the substantive certification process that COAH would have provided for towns that had sought its protective jurisdiction. And as part of the court's review, we also authorize, as more fully set forth hereinafter, a court to provide a town whose plan is under review immunity from subsequently filed challenges during the court's review proceedings, even if supplementation of the plan is required during the proceedings.
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> [Id. at 23-24].

In the case at bar, the Township voluntarily petitioned this Court via Declaratory Judgment Action and received immunity as a result. It participated in the process and ultimately reached a global settlement with Fair Share Housing Center as to how it would comply with its constitutional obligations under the Mount Laurel doctrine. It is for that very reason – its

continued voluntary compliance – that it is not at risk of losing its discretion in how to zone for its fair share.

Hartz's argument, by necessity, requires this Court to rule that the FHA's core incentive, the primary driver of the entire statute, simply doesn't apply to unmet need. According to Hartz, if there is unmet need, regardless of the municipality's voluntary compliance, it forfeits all discretion to the Court as to whether it should be zoned and if so, how it should be zoned. Not only that, this Court should impose the density on the developer's wish-list and "disregard" COAH's regulations on vacant land adjustments, and not trouble itself, "with what COAH actually did." Hartz Brief at 11; Bernard Report at 13. Finally, the Court would have to preclude the Town from classifying this site as a site capable of creating a realistic opportunity in the form of an "area that may develop or redevelop" and therefore generate an RDP. See N.J.A.C. 5:97-5.2(c)(6). In other words, it would have to completely negate the entire structure, design and intent of the Fair Housing Act and warp all RDP and unmet need standards to foster a backdoor builder's remedy against the will of the Township. As demonstrated in Point I.B below, this argument would not only violate the FHA, but also require the Court to impose more onerous fair share standards adjustments than those that predated the FHA.

B. Hartz Fatally Ignores The Statutory Mandate For Reasonable Fair Share Numbers And Realistic Adjustments To Those Reasonable Numbers

In response to the excessive fair share burdens generated by the AMG Realty Co. v. Warren, 207 N.J. Super. 388 (Law 1984) ("AMG"), the Legislature went to great lengths to reduce the fair share burdens on municipalities. AMG, decided in July of 1984, one year before former Governor Kean signed the FHA into law, marked a turning point in the evolution of the Mount Laurel doctrine by tackling the most difficult issue facing the trial judges in the wake of Mount Laurel II: namely, what was an appropriate methodology by which the fair share of any municipality could be determined. The AMG formula created fair share burdens that the public

viewed as so grossly excessive that it created the impetus for a legislative solution. See John M. Payne, Politics, Exclusionary Zoning and Robert Wilentz, 49 Rutgers L. Rev. 689, 694-95 (1997). The Appellate Division itself noted that the AMG decision created the groundswell that culminated in the enactment of the FHA. See In re Declaratory Judgment Actions filed by Various Municipalities, Cty. Of Ocean, 446 N.J. Super. 259, 282 (App. Div. 2016) "**Responding to the significantly high fair share obligations in the aftermath of AMG Realty, the Legislature enacted the FHA, finding that one of the "essential ingredients" to its response was "the establishment of reasonable fair share housing guidelines and standards.**" N.J.S.A. 52:27D–302(d)." (emphasis added).

Notably, however, even the AMG decision recognized that many municipalities lacked sufficient land to address the fair share quotas generated by the AMG formula and thus, municipalities could adjust their fair share based upon a lack of developable land. See AMG, 207 N.J. Super at 428-431.[2] Not even the excessive AMG decision, which spurred "the reasonable fair share guidelines and standards" objective of the FHA, envisioned that a land-poor municipality would not only have to address its adjusted number, but also an immutable "unmet need" obligation over and above the adjusted number that could only be satisfied by the dictates of the trial judge over the choices of the municipality. A treatise published in 1987 and referenced by the New Jersey Supreme Court twice describes the practice of how land-poor municipalities were treated prior to the enactment of the FHA:

> **If a municipality simply lacks the vacant developable land to absorb the obligation the court would otherwise impose**, the court will not expect the

[2] The AMG decision adjusted the fair share of land poor municipalities down to the number reflecting the capacity of the municipality to address its obligation through traditional inclusionary zoning (20 percent set-asides). In an effort to compensate for the loss of fair share to land-poor municipalities unable to meet the number generated by the fair share formula, the AMG formula artificially inflated each municipality's fair share obligations by 20%. Id. at 428.. Given the Legislature's goal of providing relief from excessive fair share obligations, it comes as no surprise that COAH never incorporated any such artificial adjustment. Indeed, the Legislature's express intent appeared to be to reject any such notion: **"a recognition that the sum of the parts need not equal the whole."** Edwards Cert. at Exhibit A, page 11,

> municipality to tear down existing structures to enable the municipality to satisfy its full obligation. Mount Laurel II at 301 n. 51. Rather, **the court will reduce the municipality's obligation to a number the municipality can accommodate on existing vacant developable land**. AMG at 455.
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> [See Edwards Cert. at Exhibit B (Surenian, Jeffrey R., "Mount Laurel II and the Fair Housing Act," published July 1987 at page 236 (emphasis added).]

Thus, Hartz argument necessarily requires this Court to conclude not only that the FHA imposed greater fair share obligations on land-poor municipalities than existed prior to the enactment of the FHA, but also that the FHA's restoration of home rule powers is void if a town lacks sufficient land to meet the quota generated by the fair share formula.

To advance its objective of establishing reasonable fair share housing guidelines and standards, the Legislature defined the prospective need "based on development and growth which is reasonably likely to occur" rather than based upon theory. See N.J.S.A. 52:27D-304 (j). The Legislature also called upon COAH to "adopt criteria and guidelines" to reduce the burdens created by the fair share formula in a myriad of ways. See generally N.J.S.A. 52:27D- 307). Most notably, the Legislature required COAH to establish standards to "[a]dopt criteria and guidelines for . . . **[the] [m]unicipal adjustment of the present and prospective fair share based upon available vacant and developable land** . . . whenever . . . **[v]acant and developable land is not available in the municipality**" (N.J.S.A. 52:27D-307c.2). The entire FHA is entirely devoid of the phrase or concept unmet need. The FHA envisioned that the adjusted number of the land-poor municipality would become its new fair share – not that the number generated by the fair share formula would be immutable and that the only question would be how much of the formula based number would be RDP and how much would be unmet need. Thus, if a municipality had an obligation of 100, but only enough land to do 20, its new fair share was 20 pursuant to the FHA. Under the plain language of COAH's enabling statute, the adjustment to a municipality's fair share due to lack of vacant land, and thus the number of

affordable housing units a municipality was required to create a realistic opportunity for was adjusted if a municipality lacked sufficient land to meet its full number. Unsurprisingly then, this is exactly how the "Vacant Land Adjustment" regulations functioned in COAH's Round 1 regulations – as Mr. Bernard himself has acknowledged.

Round 1 did, however, expressly include redevelopment areas as part of its definition of vacant: "Land suitable for redevelopment or infill at higher densities." N.J.A.C. 5:92-1.3.

In Round 2, on March 15, 1993, COAH introduced the concept of "unmet need" in conjunction with the adoption of Round 2 regulations. See 25 N.J.R. 1121 ("Subchapter 4 introduces the concept of realistic development potential.") Ibid. ("[M]unicipalities seeking an adjustment will be required to 'capture' a contribution toward the housing obligation as development and redevelopment occur in the municipality." (emphasis added)).

Consistent with the proposition that municipalities will capture a contribution as they develop or redevelop, the Round 2 regulations, quoted **in full** below -- and not in fragments suiting one's needs -- gave COAH, and by extension the courts, the discretion as to whether or not to require municipalities to take any of one, or combination of, proscribed measures beyond satisfaction of the adjusted number or RDP to address the so-called "unmet need". It did not mandate overlay zoning and it certainly did not enable COAH to unilaterally dictate the location and density for those zones:

> (h) If the RDP described in (f) above is less than the precredited need minus the rehabilitation component, the Council shall review the existing municipal land use map for areas that may develop or redevelop. Examples of such areas include, but **are not limited to**: a private club owned by its members; publicly owned land; downtown mixed use areas; high density residential areas surrounding the downtown; areas with a large aging housing stock appropriate for accessory apartments; and properties that may be subdivided and support additional development. After such an analysis, the Council **may** require at least any **combination of** the following in an effort to address the housing obligation:
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> 1. Zoning amendments that permit apartments or accessory apartments;

> 2. Overlay zoning requiring inclusionary development **or** the imposition of a development fee consistent with N.J.A.C. 5:93-8; In approving an overlay zone, the Council may allow the existing use to continue and expand as a conforming use, but provide that where the prior use on the site is changed, the site shall produce low and moderate income housing or a development fee; or
>
> 3. Zoning amendments that impose a development fee consistent with N.J.A.C. 5:93-8.

[N.J.A.C. 5:93-4.2(h) (emphasis added)]

Thus, COAH could, or could not require zoning amendments to permit accessory apartments, overlay zoning, a development fee ordinance, a combination of those things, or none of those things. Notably, as to overlay zoning, the regulation itself provides "[i]n approving an overlay zone". COAH obviously wouldn't have to approve an overlay zone if it was tasked with selecting it in the first place and dictating its density (such a regulation would have clearly violated its enabling statute).

Against this backdrop and given such wide discretion as to whether to require anything or nothing at all towards capturing unmet need, COAH granted substantive certification, pursuant to the Round 2 regulations, without requiring any overlay zoning at all, including, but not limited to, towns such as Chatham, New Providence, Leonia and Teterboro. See Exhibit C.

In its second attempt at Round 3 regulations COAH was more elaborate in its discussion of calculating RDP. In this regard, N.J.A.C. 5:97-5.2 is devoted exclusively to that calculation (as it relates to the prior round obligation, which had been previously governed by N.J.A.C. 5:93-4.2, the regulation at dispute), while N.J.A.C. 5:97-5.3 is devoted to unmet need. Under COAH's various iterations of regulations, a Vacant Land Adjustment first begins with a land inventory. In essence, the land inventory is aimed at capturing all sites that create a realistic opportunity for the construction of inclusionary development during the compliance period, i.e., the sites that will redevelop and are suitable for inclusionary development. Those parcels are then run through

various other filters, a density is applied to the remaining land parcels and finally, a 20% set aside is presumed to generate the RDP. Like N.J.A.C. 5:93, N.J.A.C. 5:97 utilizes this model.

N.J.A.C. 5:97-5.2(a) expressly defines the section's purpose: "standards and procedures in this section **shall** be used to determine the RDP for a municipality requesting a vacant land adjustment of its prior round obligation." Subsection (b) then provides that it is the municipalities' burden to demonstrate a lack of land and to identify sites that are "realistic for inclusionary zoning". That standard is important in the case at bar because the Township and FSHC are proposing the Hartz site expressly to create a realistic opportunity for the construction of affordable housing. Critically, section (c) then includes the mandatory land inventory for purposes of calculating RDP – as in its prior round predecessor, so highly relied upon by Hartz, Section (c)(4) requires the submission of "[a]n inventory of sites that are devoted to a specific use which involves relatively low-density development and could create an opportunity for affordable housing if inclusionary zoning was in place. Such sites include, but are not limited to: a golf course not owned by its members; a farm in Planning Areas 1 or 2; a driving range; nursery; and a nonconforming use." Hartz may very well fit into this category as an empty, vacant under-utilized use -- however, that is not the only category of land inventoried in the RDP section of N.J.A.C. 97.

N.J.A.C. 5-97:5.2(c)(6) requires "An inventory of any areas in the municipality that may develop or redevelop," including, "any parcel(s) that has the potential to be redeveloped." Therefore, even the site does not qualify as a site that is devoted to a specific use which involves relatively low-density development and could create an opportunity for affordable housing if inclusionary zoning was in place, the site could still contribute to the RDP if it presents a realistic opportunity, is likely to redevelop and is suitable for inclusionary development. These facts render the site "realistic site for inclusionary development".

After the sites are identified in subsections (c)(1)-(6), subsection (d) then provides the standards to remove acreage from the gross land inventory mandated by N.J.A.C. 5:97-5.2(c).

To eliminate any ambiguity, N.J.A.C. 5:97:5.2(e) then provides:

> (e) The Council shall review the existing land use map, tax map, master plan(s) and land inventory to determine consistency with this section and **reserves the right to include additional vacant and non vacant sites that were excluded by the municipality.** Such examples include those listed in (c)4 above. In the case of non vacant sites pursuant to (c)4 above, the Council may request a letter from the owner of the site indicating the site's availability for inclusionary development.

Here, the building is vacant, the site is underutilized, it is relied upon to create a realistic opportunity by the municipality, the settlement envisions redevelopment, the Township included it in its VLA and the owner has already "indicat[ed] the site's availability for inclusionary development."

Finally, it should be noted that N.J.A.C. 5:97-6.6 expressly references New Jersey's Local Redevelopment and Housing Law, N.J.S.A. 40A:12A-1 et seq. and provides that it can be utilized as a method to create a realistic opportunity for the construction of affordable units – exactly as the Township proposes to do in its Settlement Agreement with FSHC. Indeed, those regulations also permit bonus credits for units achieved through redevelopment, demonstrating COAH's policy emphasis to encourage this type of mechanism.

C. Mount Laurel IV Supports Approval Of The Township's Settlement

The FSHC Settlement Agreement, if approved, would resolve the Township's DJ Action globally. Cranford brought that DJ Action pursuant to Mount Laurel IV. In addition to the procedural guidance articulated in Point I.A above and supplemented below, Mount Laurel IV also provides guidance to this Court as to how it should evaluate settlements substantively as it processes declaratory judgment actions.

Relevant to this objection, the Supreme Court provided:

1. Municipalities are entitled to "like treatment" to what they would have received at COAH (Mount Laurel IV at 28);

2. Municipalities should not be "punished" for COAH's failures: "it bears emphasizing that the process established is not intended to punish the towns represented before this Court, or those that are not represented but which are also in a position of unfortunate uncertainty due to COAH's failure to maintain the viability of the administrative remedy. Our goal is to establish an avenue by which towns can demonstrate their constitutional compliance to the courts through submission of a housing plan and use of processes, where appropriate, that are similar to those which would have been available through COAH for the achievement of substantive certification."; Id. at 23;

3. A municipality is entitled to an opportunity to have its plan/settlement approved before even getting to the stage where site-specific relief can sought via a builder's remedy in a separate legal action: "Only after a court has had the opportunity to fully address constitutional compliance and has found constitutional compliance wanting shall it permit exclusionary zoning actions and any builder's remedy to proceed." Id. at 29.

4. Courts should utilize the prior round regulations, but may use Round 3 regulations to the extent not expressly invalidated by higher courts: "Second, many aspects to the two earlier versions of Third Round Rules were found valid by the appellate courts. In upholding those rules the appellate courts highlighted COAH's discretion in the rule-making process. Judges may confidently utilize similar discretion when assessing a town's plan, if persuaded that the techniques proposed by a town will promote for that municipality and region the constitutional goal of creating the realistic opportunity for producing its fair share of the present and prospective need for low- and moderate-income housing." Mount Laurel IV at 30; See also id. at 33 ("[L]ike the previously mentioned areas left to COAH's discretion, and others not directly precluded by the Appellate Division's decisions or ours remain legitimate considerations for the *Mount Laurel* judges when evaluating the constitutionality and reasonableness of the plans they are called upon to review).

5. Finally, the Court should review the plan as a whole to determine reasonableness, but should encourage an expeditious resolution of the case: "The above examples of approved actions from the earlier appellate decisions are cited to guide the *Mount Laurel*-designated judges that will hear the actions pertaining to a town's housing plan. We emphasize that the courts should employ flexibility in assessing a town's compliance and should exercise caution to avoid sanctioning any expressly disapproved practices from COAH's invalidated Third Round Rules. 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." Id. at 33.

In sum, Point I.A demonstrates that the Legislature designed the Fair Housing Act, upon which the Supreme Court relied so heavily in Mount Laurel IV, to advance a primary objective:

to empower municipalities willing to comply voluntarily to decide how to address their fair share obligations as may be adjusted. Municipalities that elected to comply voluntarily owed developers committed to providing affordable housing no more than a consideration of their proposals to provide affordable housing.

Point I.B demonstrates that the FHA requires "reasonable" fair share standards and adjustments that are in direct contrast to the unreasonable fair share obligations generated by the AMG decision. In re Declaratory Judgment Actions filed by Various Municipalities, Cty. Of Ocean, 446 N.J. Super. 259, 282 (App. Div. 2016). Those adjustments did not envision an unmet need in the statute itself, but COAH has treated redevelopment in several different ways in its various regulations.

Finally, Point I.C demonstrates that the municipality is entitled to pursue approval from this Court and that this Court maintains discretion to utilize COAH's regulations in a manner that fosters compliance and the production of housing regardless of the demands of any developer. Hartz asks this Court to violate each of these mandates in a tangled web of mismatched standards and unsustainable, self-serving interpretations of those standards, which are examined in Point III below.

POINT II: THE SETTLEMENT IS FAIR AND REASONABLE TO THE INTEREST OF LOW- AND MODERATE-INCOME HOUSEHOLDS

A. Every Legal Standard For Evaluating Settlements Weighs In Favor Of Approving The Township's Agreement With FSHC

In Morris County Fair Housing Council v. Boonton Twp. 197 N.J. Super. 359, 369-71 (Law Div. 1984) ("Morris County Fair Housing Council"), Judge Skillman articulated the standards and policy rational supporting for fairness hearings. In that case, Judge Skillman emphasized that settlement is not only generally preferred, but is particularly important in Mount Laurel cases because prompt resolution fosters prompt construction of affordable housing:

> Our courts have long endorsed the policy of encouraging the settlement of litigation. *Judson v. Peoples Bank & Trust Co.,* 25 *N.J.* 17, 35, 134 *A.*2d 761 (1957); *Honeywell v. Bubb,* 130 *N.J.Super.* 130, 136, 325 *A.*2d 832 (App.Div.1974). Settlements permit parties to resolve disputes on mutually acceptable terms rather than exposing themselves to the adverse judgment of a court. Settlements also save parties litigation expenses and facilitate the administration of the courts by conserving judicial resources.
>
> These policies favoring settlement are operative in *Mount Laurel* litigation. The Court observed in *Mount Laurel II* that "[t]he length and complexity of [*Mount Laurel*] trials is often outrageous, and the expense of litigation is so high that a real question develops whether the municipality can afford to defend or the plaintiffs can afford to sue." 92 *N.J.* at 200, 456 *A.*2d 390. Consequently, the Court expressed a desire "to **simplify litigation in this area" and "to encourage voluntary compliance with the constitutional obligation."** *Id.* at 214, 456 *A.*2d 390. In a similar spirit, it said that "the *Mount Laurel* obligation is to provide a realistic opportunity for housing, not litigation." *Id.* at 352, 456 *A.*2d 390. **The settlement of *Mount Laurel* litigation is a mechanism for addressing these concerns; it will avoid trials, save litigation expenses, provide a vehicle for consensual compliance with *Mount Laurel* and result in the construction of housing for lower income persons rather than interminable litigation**.
>
> [Morris County Fair Housing Council at 366-367]

Here, the settlement accomplishes all of the goals articulated by Judge Skillman and those referenced of the Supreme Court in Mount Laurel II. This is best illustrated by Hartz's convoluted arguments, which seek to warp this complicated area of the law into a backdoor builder's remedy.

Those arguments are not only complicated, but illustrate how a zealous developer can commandeer a case and conjure years of litigation as opposed to the production of housing. In one submission Hartz somehow manages to simultaneously argue that: 1) its site is vacant; 2) its site is not vacant; 3) the site is suitable and they're ready, willing and able to construct multifamily housing; 4) the site doesn't generate RDP even suitable and ready for multifamily development; 5) If the site does generate RDP, it should be based on their calculation, not ours; 6) the Court shouldn't worry about what COAH actually did; 7) The Court should worry about what COAH did and said regarding comments and responses and one or two select sentences

from N.J.A.C. 5:93-4.2; 7) Prior Round regulations should control; 8) Round 1 (and Round 3) regulations relative to RDP don't count; 9) The Court shouldn't worry about N.J.A.C. 5:93-4.2(h) if it interprets that regulation to have any meaning at all; 10) The Court shouldn't worry about how credits have been dealt with in the FHA relative to adjustments; 11) The Town's VLA violates the FHA even though unmet need isn't in the FHA and hadn't been invented at its inception; 12) The Court should examine pre-FHA cases to decide these issues of unmet need even though unmet need did not exist until nearly a decade after the FHA. To avoid litigation and uncertainty, the housing advocates and the Township settled the docket in a fashion that will ensure the production of affordable housing and to avoid litigious interference from entities like Hartz.

Judge Skillman then articulates that there is a danger in approving a settlement between a municipality and a private developer, like Hartz, because entities like Hartz are often not concerned with the production of affordable housing on a whole, but rather have a direct financial interest in obtaining their own zoning. Thus, a municipality and a developer could effectively collude in agreeing to a lower overall fair share number in exchange for the developer obtaining the requested zoning. Id. at 368.

Conversely, however:

> The danger of entering a judgment of compliance which does not adequately protect the interests of lower income persons is substantially reduced when a *Mount Laurel* claim has been brought by the Public Advocate or other public interest organization, since it may be assumed that generally a public interest organization will only approve a settlement which it conceives to be in the best interests of the people it represents. However, even a public interest organization may incorrectly evaluate the strengths and weaknesses of its claim or be overly anxious to settle a case for internal organizational reasons.
>
> [Id. at 368]

Hartz attempts to flip this policy rationale on its head by effectively arguing nothing short of rezoning them to suit their financial interests, in the manner the see fit, can ever be fair and reasonable.

Critically, Judge Skillman then provides that the purpose of these hearings is not adjudication on the merits – it is not a plenary trial – the evaluation is to measure the strengths and weaknesses of the parties and assess whether, given those strengths and weaknesses, the settlement is fair and reasonable given the earlier policy considerations favoring settlement:

> The hearing on the proposed settlement is not a plenary trial and the court's approval of the settlement is not an adjudication of the merits of the case. *Armstrong v. Milwaukee Bd. of School Directors,* 616 *F.*2d 305, 314-315 (7 Cir.1980); *Flinn v. FMC Corp.,* 528 *F.*2d 1169, 1172 (4 Cir.1975), *cert.* den. 424 *U.S.* 967, 96 *S.Ct.* 1462, 47 *L.Ed.*2d 734 (1976). Rather, it is the court's responsibility to determine, based upon the relative strengths and weaknesses of the parties' positions, whether the settlement is "fair and reasonable," that is, whether it adequately protects the interests of the persons on whose behalf the action was brought. *Armstrong v. Milwaukee Bd. of School Directors, supra; Cotton v. Hinton,* 559 *F.*2d 1326, 1330 (5 Cir.1977). Moreover, the nature and extent of the hearing required to determine whether the settlement is "fair and reasonable" rests within the sound discretion of the court. *Cotton v. Hinton, supra* at 1331; *Patterson v. Stovall,* 528 *F.*2d 108 (7 Cir.1976); *Flinn v. FMC Corp., supra* at 1173.
>
> [Id. at 370].

A developer may argue that an RDP on a site should be premised at 30 units to the acre while a municipality may disagree and instead argue that that same site should presume a density at 6, 8, 10 or 12 units per acre. Both sides may have credible experts and professionals who simply disagree on the merits. If a municipality and housing advocate wish to avoid such uncertainty, they may settle at 14, 16 or even 18 units per acre in recognition of the "relative strengths and weaknesses" of the case, other items contained in the global settlement and overall risk assessment. Not only is this acceptable, it is encouraged.

This is expressly the case relative to the off-the-top fair share number and the RDP (which under the FHA becomes the new fair share – see Point I.B above):

> The conclusion that a judgment of compliance may be entered without making a fair share determination does not mean that information relating to fair share is irrelevant in reviewing a proposed settlement. To the contrary, **the range of possible fair shares** which the court might allocate to a municipality if the case were fully litigated ordinarily will be a significant consideration. *See Protective Comm. v. Anderson,* 390 *U.S.* 414, 424-425, 88 *S.Ct.* 1157, 1163, 20 *L.Ed.*2d 1 (1968); *Armstrong v. Milwaukee Bd. of School Directors, supra,* 616 *F.*2d at 314. There are a number of other factors which also should be taken into consideration, such as the **anticipated time it would take to conclude the litigation if there were no settlement** and **whether the proposed settlement will result in the expeditious construction of a significant number of lower income housing units**. The weight that may be assigned to any of these or other factors will depend upon the particular circumstances of the settlement proposal.
>
> [Id. at 372 (emphasis added)].

In East/West Venture, the appellate division reinforced and articulated several such factors in the context of a builder's remedy settlement, those relevant to the current settlement are: 1) The fair share number and rationale for the affordable housing units to be provided must be considered by evaluating the municipality's fair share allocation under alternative methodologies; 2) Any other contributions made by the municipality or FSHC must be considered; and 3) Other components of the Agreement that contribute to the municipality's satisfaction of its Mount Laurel obligation. E./W. Venture v. Borough of Fort Lee, 286 N.J. Super. 311, 328, 669 A.2d 260, 268 (App. Div. 1996)

In the case at bar, Cranford had a 2013 Judgment of Compliance and Repose which contemplated a Round 3 RDP of only five units:

> When Cranford Township's Third Round (post-1999) fair share housing obligation is formally quantified by the COAH or a lawfully designated successor entity, Defendants shall amend Cranford Township's Housing Element and Fair Share Plan to address any unmet need resulting from the assignment of a Third Round housing obligation in excess of the five unit realistic development potential (RDP) provided for in its Housing Element and Fair Share Plan. No later than one calendar year after the *COAH* or a lawfully designated successor entity has taken formal action quantifying Cranford Township's Third Round (post-1999) fair share housing obligation, Defendants shall apply to the COAH (or its successor entity) or the Court,

> as may be authorized by law, for approval of such amended Housing Element and Fair Share Plan and shall diligently prosecute that application.
>
> [Edwards Cert. at Exhibit D]

It then filed its Declaratory Judgment Action in 2018. That DJ Complaint contained an adopted Housing Element and Fair Share Plan, which was reviewed and preliminarily supported by the then-Master, Betsy McKenzie, P.P., A.I.C.P. and which increased the Township's RDP to 85. The Township then negotiated a settlement with FSHC, which was finalized in under two years after filing and that provides for significantly more housing than was envisioned in prior documents.

That Settlement is fairly summarized as follows:

1. Cranford's fair share obligations prior to the VLA are those extrapolated from the Mercer County decision: Rehabilitation obligation of 85, Prior Round of 148 and Round 3 of 440.

2. The Township has fully satisfied its prior round obligation, which Hartz does not appear to contest.

3. The Township is entitled to a VLA relative to its Round 3 obligation, which results in an RDP of 131.

4. In addition, the Township agrees to do an additional 20 hard units on top of the RDP and the prior round obligation.

5. The 131-unit RDP plus the 20 hard units results in an unmet need of 289.

6. Since the Township was nearly built out at the time of the 2013 JOR and because the Court envisioned a Round 3 RDP at that time, the Township's Settlement VLA accounts for all redevelopment and changes in circumstances that have occurred since 2013. In other words, the Township's VLA is that approved by the Court in 2013 plus all "Cherry Hill" sites having occurred subsequent to that JOR, which is required by the holding of that case.

7. To address its RDP, the Township proposes credits from 11 projects that are already completed or under construction for a total of 69 units, plus 13 rental bonus credits for those projects.

8. In addition, the Township proposes 7 additional projects/mechanisms to create an additional 88 units plus applicable bonus credits.

9. Altogether, the Settlement Agreement requires the Township to create a realistic opportunity for 157 units and 33 bonus credits for an RDP of 131 units.

10. For the unmet need of 289, the Township modifies and doubles the density of the overlay zones in the Downtown Core, permitting up to 35 units per acre, and surrounding areas and adds two additional sites that are not contiguous with those areas. In addition, the Township commits to adopting a mandatory set aside ordinance, which will capture additional affordable housing in the event of future multifamily developments.

It is difficult to argue that the terms above are unfair or unreasonable to region's low- and moderate-income households. Pursuant to East/West Joint Venture, which provides significant housing, contributes significantly more than its RDP, meets all the micro-requirements, has a smaller rental bonus cap than the law allows, provides extensive overlay zoning, a surplus over RDP and even a mandatory set aside ordinance.

The Township's RDP accounts for all RDP-generating events going back to the 2013 JOR. As it relates to RDP, the Township has a heighted obligation and must create a realistic opportunity for those units during the compliance period. The Settlement requires the Township to not only address its entire RDP, but it also requires it to create a realistic opportunity for an additional 20 hard units (no bonuses). Indeed, even if the Township is successful in its appeal, which challenges the imposition of that obligation on the basis that the Township was entitled to claim rental bonus credits in the prior round for constructed rental units, the Township is still committed to providing the compliance mechanisms in the Settlement Agreement.

In short, the Settlement is fair and reasonable to the interest of the region's low- and moderate-income households on every conceivable level. It commits the Township to a large RDP plus an additional 20 hard units. It envisions comprehensive overlay zoning of up to 35 units per acre, which concentrates high density development in the downtown core and lessens density as the zones approach single family. It requires additional mechanisms to address unmet need including a requirement to capture additional affordable housing for all future qualifying

multifamily developments. It settles the litigation in under two years and given the relative strengths and weaknesses of the case, leans more in favor of the positions advocated by affordable housing advocates. It avoids lengthy delay, numbers trials, paper and litigation and fosters prompt voluntary compliance.

B. The Fairness Determination Is Not An Appropriate Forum For A Request For Site Specific Relief

Hartz's position that the Court should unilaterally modify the agreement to a) change the site's classification from RDP to unmet need; b) misinterpret COAH's Round 2 regulations in a fashion that cedes all zoning discretion for unmet need to the Court; c) requests the Court to declare the settlement unfair and unreasonable unless and until it gets its site-specific relief, is outside the scope of this Fairness Hearing. At the Fairness Hearing, the inquiry before the Court is whether or not the settlement agreement is fair and reasonable to the protected class, the region's low- and moderate-income households. Morris County Fair Housing Council v. Boonton Tp., 197 N.J.Super. 359 (Law Div.1984), aff'd o.b., 209 N.J.Super. 108 (App. Div. 1986) and East/West Venture v. Bor. of Fort Lee, 286 N.J.Super. 311 (App. Div. 1996). For Hartz to sustain its argument, it would have to ignore the direct authority to utilize redevelopment in the manner in which the Township proposes in its Settlement Agreement with Fair Share Housing Center.

The Court's role is to evaluate the settlement agreement, as written, and to render a binary opinion as to whether the agreement is fair and reasonable, or not. Nothing in the seminal cases of Morris Cty. Fair Hous. Council v. Boonton Twp., 197 N.J. Super. 359 (Law. Div. 1984), aff'd, 209 N.J. Super. 108 (App. Div. 1986) or E./W. Venture v. Borough of Fort Lee, 286 N.J. Super. 311 (App. Div. 1996) contemplates that the Court can unilaterally grant site-specific relief and substantively modify a settlement the way Hartz's is seeking to do by way of objection. Indeed, those cases provide ample support for the opposite conclusion.

As to Morris County Fair Housing Council, the Court described the interplay between site-specific relief, in the context of a pending builder's remedy case, and the impact of a fairness determination in that context as follows:

> . . . Therefore, a developer who has a separate *Mount Laurel* action pending may not exercise veto power over a proposed settlement between the municipality and other litigants by insisting upon his right to "builder's remedy." *See City of Paterson v. Paterson General Hospital, supra; cf. Penson v. Terminal Transport Co., supra,* 634 *F.*2d at 996 . . .
>
> Morris Cty. Fair Hous. Council v. Boonton Twp., 197 N.J. Super. 359, 373 (Law. Div. 1984), aff'd, 209 N.J. Super. 108 (App. Div. 1986).

Here, Hartz does not have a builder's remedy claim (or any claim for that matter), does not have an agreement with the Township and cannot "veto" this Agreement to have their site be included at its proposed density in a fashion akin to a builder's remedy.

Similarly, in East/West Joint Venture, the Appellate Division described the narrow inquiry at a fairness hearing, as follows:

> . . . "The hearing on the proposed settlement is not a plenary trial[.]" *Id.* at 370. Rather, the court should determine, "based upon the relative strengths and weaknesses of the parties' positions, whether the settlement is 'fair and reasonable,' that is, whether it adequately protects the interests of the persons on whose behalf the action was brought." *Ibid.* . . .
>
> E./W. Venture v. Borough of Fort Lee, 286 N.J. Super. 311, 326–27 (App. Div. 1996).

In sum, for the reasons articulated in Point II.A above, the Settlement Agreement is fair and reasonable on its face and should be approved by this Court. In the unlikely event that the Court does not find the agreement to be fair and reasonable, the remedy is to reject the settlement, not to grant Hartz the site-specific relief it so brazenly requests.

POINT III: THIS COURT SHOULD REJECT HARTZ'S EFFORTS TO SECURE A BACKDOOR BUILDER'S REMEDY BY FALSELY CLAIMING ITS SITE QUALIFIES AS AN UMET NEED SITE WHEN ITS SITE IS AN RDP SITE; AND, EVEN IF *ARGUENDO* THE HARTZ SITE DID QUALIFY AS AN UNMET NEED SITE, THE TOWNSHIP STILL HAS EVERY RIGHT TO COMPLY AS IT DEEMS FIT

Hartz knows full well that if this Court deems its site to contribute to the RDP, the Township has every right to satisfy the RDP the site generates without including the site in its plan:

> The municipality may address its RDP through any activity approved by the Council, pursuant to N.J.A.C. 5:93-5. The municipality need not incorporate into its housing element and fair share plan all sites used to calculate the RDP if the municipality can devise an acceptable means of addressing its RDP. The RDP shall not vary with the strategy and implementation techniques employed by the municipality.
>
> N.J.A.C. 5:93-4.2 (g).

Therefore, to extinguish the Township's right to comply in the manner it deems appropriate, Hartz argues that its site is really an unmet need site; and that, as such, the Court a) has the power to compel the Township to utilize the site in the manner Hartz deems fit; and b) must use its power to do just that.

This argument is fraught with frailties. First, any interpretation of COAH regulations that strips the municipality of the power to decide how to comply undermines rather than advances one of the primary goals of the FHA, the restoration of home rule (see Point I.A. above). Second, any interpretation of COAH's vacant land adjustment regulations that fails to identify sites that contribute to the RDP that are "realistic for inclusionary development" undermines rather than advances the purpose of the process COAH established to determine the RDP of a municipality. Third, the building is vacant and the site arguably underutilized as it is. Fourth, since the Cherry Hill case imposed an obligation on Cranford to account for a changed circumstance such as the availability of the Hartz site for inclusionary development (which was not available when Judge Chrystal determined that Cranford's RDP was 5), the Court should not punish the Township for addressing the changed circumstances by stripping the Township of its power to control the zoning of the Hartz site.

Even assuming *arguendo* that the Hartz site qualified as an unmet need site, the Township has every right to exclude the site from its plan by fashioning a plan to satisfy the number of affordable units the site could have generated if appropriately zoned for inclusionary development. Any other reading completely negates N.J.A.C. 5:93-4.2(g).

In any event, the Township's application for approval of its agreement with Fair Share Housing Center requires this Court to answer a simple question: whether the agreement is fair and reasonable to low- and moderate-income households. For the reasons set forth in Point II, it clearly is. Therefore, regardless of whether the Court agrees that the Hartz site is an RDP or unmet need site, there is no credible question that the settlement is fair and reasonable to low- and moderate-income households.

The following analysis establishes the bases for these conclusions.

A. The FHA, COAH's Interpretation of Its Regulations And The Cherry Hill Case All Support The Township's Right To Implement The Affordable Housing Plan The Township Deems Best For The Community

1. Hartz's interpretation of applicable laws empowers it to obtain a builder's remedy in contravention of the Legislation this Court has an obligation to honor

When the Legislature enacted the FHA, it declared and determined the affordable housing policies of our state and conferred "primary jurisdiction" on COAH to implement those policies. N.J.S.A. 52:27D-304(a). When the Supreme Court, with the greatest of enthusiasm, declared the FHA constitutional, it made clear that it was willing to step aside and defer to its co-equal branch of government. See generally Mount Laurel III. That branch could not have made its intent clearer. The Legislature sought to restore home rule that had suffered such damage through the avalanche of builder's remedy actions brought pursuant to Mount Laurel II. Indeed, to restore home rule, the Legislature went to great lengths to suppress the builder's remedy to the maximum extent possible. See supra at Point I.A. Consequently, any interpretation of COAH

regulations that strips a municipality of the power to decide how to comply undermines rather than advances one of the primary objectives of the FHA.

Notwithstanding the Legislature's clear intent to restore home rule to the maximum extent possible, Hartz, by its objection, seeks to eviscerate Cranford's home rule by seeking the functional equivalent of a builder's remedy: namely, by seeking to commandeer how the Township satisfies its obligations over the will and rights of its citizenry.

If this Court succumbs to Hartz's demands, this Court would violate its obligation to advance the will of the Legislature. In this regard, trial judges have an obligation to 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).

Consistent with these principles, the Supreme Court's emphasis on deference to the Legislature in the Mount Laurel jurisprudence could not be more pronounced. See S. Burl. Cty. NAACP v. Mount Laurel Tp., 119 N.J.Super. 164, 177 (Law. Div. 1972), modif. sub nom. S. Burl. 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***." 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***...."); Mount Laurel III, supra, 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 Mount Laurel IV, supra, 221 N.J. at 6, 27, 28 and 29 (wherein the Supreme Court in one of its more recent pronouncements repeatedly pledges fidelity to the will of the Legislature in the continuation of a 35 year tradition).

Given the Supreme Court's repeated and unwavering deference to the Legislature over the past 35 years, this Court must display no less of deference to the Legislature. Therefore, instead of empowering Hartz to impose its will on Cranford, this Court should empower the Township to decide the best plan for its community. Anything less undermines the Legislation that all branches of the judiciary have an obligation to advance.[3]

2. Sites likely to redevelop, such as the Hartz site, should contribute to the municipality's RDP, not its unmet need

In N.J.A.C. 5:93-4.1 (b), COAH set forth the purpose of the procedures it spelled out in N.J.A.C. 5:93-4.2 for a land poor municipality to obtain a vacant land adjustment from the number generated by the fair share formula. More specifically, COAH defined the purpose of the process as follows:

> Where a municipality attempts to demonstrate that it does not have the capacity to address the housing obligation calculated by the Council, **the municipality shall identify sites that are realistic for inclusionary development in order to calculate the realistic development potential (RDP) of the community, in accordance with N.J.A.C. 5:93-4.2. . . .**
>
> [N.J.A.C. 5:93-4.1(b) (emphasis added).]

Accord N.J.A.C.5:97-5.2 (b).[4] The significance of this provision cannot be overemphasized. Indeed, every interpretation of the RDP calculation must be seen through the prism of what

[3] As further proof that Hartz seeks to violate the will of the Legislature, it bears emphasis that the Legislature directed COAH to devise standards to empower land poor municipalities to adjust their "present and prospective fair share based upon vacant and developable land. . ." See N.J.S.A. 52:27D-307 c. (2) (f). Hartz does not seek to satisfy the Township's present and prospective fair share as defined by the FHA. It seeks to satisfy an obligation in excess of the obligation that the Legislature deemed appropriate for land poor municipalities. By so doing, Hartz seeks to exceed the obligations imposed by Legislation this Court has an obligation to advance.

[4] N.J.A.C.5:97-5.2 (b) provides as follows:

> (b) The municipality shall be responsible for demonstrating that the municipal response to its housing obligation is limited by the lack of land capacity. **The municipality shall identify sites that are realistic for inclusionary development in order for the Council to calculate the municipality's RDP.** The vacant land adjustment, or unmet need, is the difference between the prior round affordable housing obligation and the RDP. Municipalities shall provide a response to the unmet need in accordance with N.J.A.C. 5:97-5.3.
>
> [Emphasis added].

COAH was seeking to accomplish by providing land-poor municipalities with a procedure by which they could secure an adjustment to their fair share to a number that was "realistic".

Vacant sites generally qualify as "sites that are realistic for inclusionary development". N.J.A.C. 5:93-4.1 (b). In this regard, N.J.A.C. 5:93-4.2(d) provides that "The Council shall review the existing land use map and inventory **to determine which sites are most likely to develop for low and moderate income housing. All vacant sites shall initially be presumed to fall into this category**. . . . " . By targeting sites which are "most likely to develop for low and moderate income housing" as sites that should generate an RDP, COAH advanced the purpose of its regulations i.e., to identify "sites that are realistic for inclusionary development." Compare N.J.A.C. 5:93-4.2(d) with N.J.A.C. 5:93-4.1 (b).

In its Round 2 regulations, COAH also provided that another category of sites could contribute to the RDP: namely, sites "devoted to a specific use which involves relatively low-density development would create an opportunity for affordable housing if inclusionary zoning was in place" N.J.A.C. 5:93-4.2(d). Accord N.J.A.C. 5:97-5.2(c)(4). By also targeting sites "that are devoted to a specific use which involves relatively low-density development would create an opportunity for affordable housing if inclusionary zoning was in place", COAH advanced the purpose of its regulations again i.e., to identify "sites that are realistic for inclusionary development". Compare N.J.A.C. 5:93-4.2(d) with N.J.A.C. 5:93-4.1 (b). By its own admission, the Hartz site is probably underutilized -- it is a vacant building on a large parcel.

Finally, based upon Fair Share Housing Center v. Cherry Hill, 173 N.J. 393 (2002) (hereinafter "the Cherry Hill case"), courts, developers and municipalities throughout the state treat developed sites capable of creating a realistic opportunity for affordable housing if rezoned

for inclusionary development as contributing to the RDP. In this regard, Mr. Bernard himself certified as follows:

> When an owner/developer offers to redevelop a site for inclusionary development, COAH and the courts have determined that the site offers a realistic opportunity to provide affordable housing. Thus, the potential affordable housing yield of these sites is added to the realistic development potential.
>
> [See Edwards Cert. at Exhibit E (Certification of Arthur Bernard, dated January 2, 2018, paragraph 36)]

For ease in reference, this category of sites shall be referenced as "sites likely to redevelop". It makes perfect sense to include "sites likely to redevelop" in the land inventory contributing to the RDP of land-poor municipalities. As recited by the Supreme Court in this case, **"[t]he Council's administration of vacant land adjustment [for] municipalities has always allowed for changes in the RDP calculation due to changed municipal circumstances."** Id. at 413. By targeting sites such as the Garden State Racetrack that are likely to redevelop as a result of a changed circumstances, COAH advanced the purpose of its regulations yet again i.e., to identify "sites that are realistic for inclusionary development." Compare Id. with N.J.A.C. 5:93-4.1 (b) and N.J.A.C. 5:93-5.2 (b).

As to this last category of sites contributing to the RDP-sites likely to redevelop, Hartz makes much of the fact that COAH regulations do not identify such sites as contributing to the RDP. Although the Round 2 regulations adopted in 1994 do not specify this new category of sites, COAH explained its practice in the Cherry Hill case issued eight years after the adoption of the Round 2 regulations when, as noted above, it said that **"[t]he Council's administration of vacant land adjustment [for] municipalities has always allowed for changes in the RDP calculation due to changed municipal circumstances."** See Fair Share Housing Center v. Cherry Hill, 173 N.J. 393, 413 (2002).

Certainly, when the Supreme Court remanded the Cherry Hill case to the trial judge, the trial judge determined the RDP for the Racetrack. More specifically, the trial judge approved of an agreement to set the RDP for the site at 285:

> "The affordable housing obligation of the GSP remains at 285 units and Cherry Hill Township shall receive a minimum of 285 credits from its development: however, the satisfaction of that obligation will be changed as follows:"
>
> [Edwards Cert. at Exhibit F, page 8].

By the same token, this Court should determine the RDP for the Hartz site.

Although the Supreme Court required Cherry Hill to satisfy the RDP the Racetrack generated on site, the Court was clear that it was only imposing that obligation based upon the facts and circumstances of that case:

> **Our holding here does not suggest that every available site in a municipality seeking substantive certification must be used for affordable housing**. However, as COAH asserts in its brief, a Township cannot be granted substantive certification until COAH has determined that the Township is able to satisfy its allocated fair share obligation. The substantive certification process requires consideration of all appropriate sites in the municipality.
>
> [Cherry Hill, 173 N.J. at 415-16]

Indeed, to require the municipality to rezone the site for inclusionary development to satisfy the RDP the site generated would extinguish COAH's policy embodied in N.J.A.C. 5:93-4.2(g), which preserves the right of a municipality to choose how to satisfy the RDP a site generates. Moreover, the overarching emphasis of our Supreme Court has always been on deference to the FHA and the COAH regulations implementing it.

Finally, the instant case is distinguishable from the Cherry Hill case. Cherry Hill had no plan to address the RDP the Racetrack generated and indeed contended that it had no obligation other than to collect and expend a developer fee from the project. In stark contrast, Cranford has a plan to address the RDP the Hartz site generated, which even includes use of the Hartz site - an RDP and compliance mechanisms which are memorialized in an agreement with FSHC.

Therefore, while the Supreme Court imposed an obligation on Cherry Hill to satisfy the RDP the Racetrack generated on the site, no such requirement is appropriate here.

3. Since the Cherry Hill case imposed an obligation on the Township to recalibrate its RDP, the Court should not punish the Township for fulfilling its obligation by stripping it of its power to control the zoning of the Hartz site

Judge Chrystal entered a Judgment of Compliance and Repose ("JOR") in May of 2013 during a twilight zone period in the evolution of the Mount Laurel doctrine. By the point of the entry of the JOR in 2013, COAH had adopted the second iteration of COAH Round 3 regulations; the Appellate Division had invalidated many of the regulations; and various parties had successfully applied to the Supreme Court to reverse the Appellate Division decision and briefed the matter. The Supreme Court did not decide the case until September of 2013. In re Adoption of N.J.A.C. 5:96 & 5:97, 215 N.J. 578, 584-86 (2013).

Under the circumstances, Judge Chrystal proceeded reasonably. She approved an affordable housing plan that satisfied the Township's prior round obligation. She assumed that the Township would receive an obligation for Round 3 and that it would lack sufficient land to address that number -- and so she determined that the Township would be entitled to adjust its obligation down to an RDP of 5. See paragraph 10 of "FINAL JUDGMENT OF COMPLIANCE" ("JOR"), dated May 22, 2013. She then required the Township to return to Court within "one calendar year after the COAH or a lawfully designated successor entity has taken formal action quantifying Cranford Township's Third Round (post-1999) fair share housing obligation . . ." Thus, she granted the Township a JOR until December 31, 2018. See JOR, paragraph 9.

As we all know, COAH never adopted a valid set of Round 3 regulations; the Township applied to Judge Kenny to modify the JOR; and Judge Kenny directed the Township to file a Mount Laurel IV DJ Action before the immunity from the JOR expired on December 31, 2018.

In addition, Judge Jacobson issued a fair share methodology opinion in 2018 by which the Township could extrapolate its fair share based on that opinion.

As a result of the foregoing events, the Township's Round 3 fair share exceeded 5 and, based upon the Cherry Hill case, the Township had an obligation to account for changed circumstances since Judge Chrystal determined that the Township's RDP for Round 3 would be 5. The most noteworthy changed circumstance was Hartz proposing to redevelop its land as an inclusionary project and its use becoming vacant. Like the Racetrack in the Cherry Hill case, the Hartz parcel was developed when the trial judge first determined that the Township's RDP was 5. However, just as the availability of the Racetrack parcel following the RDP determination in that case constituted a changed circumstance that required Cherry Hill to recalibrate its RDP, the availability of the Hartz site following the determination of Cranford's RDP required Cranford to recalibrate its RDP. Cranford did just that and entered into an agreement with FSHC based upon the Township's acceptance of an RDP for that site.

For Cranford to have ignored that a site that was unavailable when Judge Chrystal assigned the Township an RDP of 5 was now available would have violated the Township's obligation to address the changed circumstance -- the availability of the Hartz site. However, the Township did not ignore the changed circumstance. Rather, to its credit, it calculated an RDP for the site and fashioned a plan to address it. This is also true of other changes in circumstances for which the Township captured affordable housing for subsequent to 2013, which is fatal to Hartz's "credits off the top" argument as discussed below. The Township then consummated an agreement with FSHC that addressed an RDP, which uses 2013 as the starting point and accounts for all changes in circumstances during the protection period of 2013 to 2018 as required by Cherry Hill – FSHC deemed this methodology and the overall RDP appropriate.

Having now accepted an obligation created by the availability of the Hartz parcel, it would be entirely inappropriate for the Township to suffer prejudice for fulfilling its obligations. The Supreme Court faced an analogous situation in Mount Laurel II as the following passage illustrates:

> It is nonsense to single out inclusionary zoning (providing a realistic opportunity for the construction of lower income housing) and label it "socio-economic" if that is meant to imply that other aspects of zoning are not. Detached single family residential zones, high-rise multi-family zones of any kind, factory zones, "clean" research and development zones, recreational, open space, conservation, and agricultural zones, regional shopping mall zones, indeed practically any significant kind of zoning now used, has a substantial socio-economic impact and, in some cases, a socio- economic motivation. It would be ironic if inclusionary zoning to encourage the construction of lower income housing were ruled beyond the power of a municipality because it is "socio-economic" when its need has arisen from the socio-economic zoning of the past that excluded it**. Looked at somewhat differently, having concluded that the constitutional obligation can sometimes be satisfied only through the use of these inclusionary devices, it would take a clear contrary constitutional provision to lead us to conclude that that which is necessary to achieve the constitutional mandate is prohibited by the same Constitution. In other words, we would find it difficult to conclude that our Constitution both requires and prohibits these measures.**
>
> [Mount Laurel II, 92 N.J. at 272-73 (emphasis added)]

By the same token, having determined that the availability of the Hartz parcel constitutes a changed circumstance that warrants an increase in the Township's RDP and having fashioned a plan to satisfy the increased RDP, the Township should be commended, not castigated, for accepting and addressing an RDP for the site. The Township's position is correct on the merits, but it doesn't need to be in order for the agreement to be fair and reasonable. Certainly Hartz takes a position that the Township feels utterly lacks merit, but the Township settled on reasonable grounds, which are favorable to the protected class – particularly given the complexity and variability of a trial.

B. Even If Arguendo The Hartz Site Qualified As An Unmet Need Site, The Township Should Have No Lesser Of A Right To Comply Without The Site Than If The Court Treated the Site As A Site Generating An RDP

Notwithstanding the foregoing, Hartz argues that its site does not contribute to the Township's RDP and that, therefore, the Township has no right to exercise its rights under N.J.A.C. 5:93-4.2 (g) to determine how to satisfy the RDP the site generates without using the site. In this regard, nobody disputes that "[t]he municipality need not incorporate into its housing element and fair share plan all sites used to calculate the RDP if the municipality can devise an acceptable means of addressing its RDP." Id.

The argument that characterizing its site as an unmet need site gives the Township lesser rights to decide how it wishes to comply is an absolute perversion of the law. The foundation of the Mount Laurel doctrine – as designed by the Supreme Court in Mount Laurel II and by the Legislature in the FHA – is to incentivize voluntary compliance. See Mount Laurel II at 214 ("Our rulings today have several purposes. **First, we intend to encourage voluntary compliance** with the constitutional obligation . . . "). See also N.J.S.A. 52:27D-303 (". . . The Legislature declares 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.") The Legislature then designed a scheme that rewarded municipalities for voluntarily bringing themselves under the protective umbrella of COAH's jurisdiction and complying under that umbrella. See N.J.S.A. 52:27D-309 and 316. See also Mount Laurel IV at 3 (providing that "the FHA encourages and rewards voluntary municipal compliance.")

The primary incentive for voluntary compliance with the Mount Laurel mandate is the municipality's ability to choose how to comply in a manner that it determines to be in the best interests of its community . J.W. Field Co., Inc. v. Tp. of Franklin, 204 N.J. Super. 445, 456 (Law Div. 1985). Similarly, the FHA safeguards the rights of a municipality that has sought to

comply, through the administrative process created by that Legislation, to choose how to comply. Indeed, such a municipality owes a developer that has expressed a commitment to provide affordable housing ***nothing more than a consideration*** of its site. N.J.S.A. 52:27D-310 (f).

If a developer with a developed site can force the municipality to rezone that site for inclusionary development in the face of the municipality fashioning a plan of its choosing to create the number of affordable units the site would generate if rezoned for inclusionary development at a density the Master deemed to be appropriate that would, in effect, be the functional equivalent of awarding Hartz a builder's remedy. As such, it would violate the FHA which sought to thwart the builder's remedy and restore home rule. The award of a builder's remedy would also undermine COAH regulations which sought to protect the right of a municipality to decide how to comply in a fashion it deemed to be in the best interest of the community. Granting a builder's remedy to a developer against a town with immunity defeats the whole point of immunity – to safeguard the municipality's right to choose. Granting a builder's remedy under the current circumstances also undermines the settlement with FSHC which, upon approval, will bring this case to a conclusion and trigger the implementation of an approved plan.

The argument that a developer of a developed site is entitled to a builder's remedy to address the unmet need whereas clearly the developer would have no right to a builder's remedy to address the RDP is absurd on its face. From the perspective of low- and moderate-income households, such households benefit far more if a site generates an RDP than if it just contributes to the unmet need. For example, if a site generates an RDP of 50, the municipality has a constitutional obligation to create a realistic opportunity for satisfaction of that 50 obligation. If the 50 is unmet need, a municipality has no obligation to create a realistic obligation for that number. This explains why the studies of Mr. Bernard himself demonstrate that the statewide

response to the unmet need has been so epically ineffective. Since low- and moderate-income households clearly benefit more if a site generates an RDP than if it contributes to the unmet need, it would turn the principles embodied in the FHA and COAH regulations on their head to make land poor municipalities vulnerable to builder's remedies to address their unmet need since they have full control to decide how to satisfy their RDP. At the very least, a settlement with FSHC that treats an unmet need site as an RDP site is fair and reasonable to low- and moderate-income households because it does more to address their obligations than if the site is treated as an unmet need site.

POINT IV: THE BALANCE OF THE HARTZ ARGUMENTS LACK MERIT AND HIGHLIGHT FURTHER THE REASONS THIS COURT SHOULD APPROVE THE FSHC SETTLEMENT AGREEMENT

In addition to the arguments addressed above, Hartz sprinkles in various residual policy requests. It asks the Court to resolve ("residual arguments"), which are not only inappropriate given the Supreme Court's holding in Mount Laurel IV (see Point I.C), but which also highlight the appropriateness of the Township's Settlement and once again, demonstrate that the agreement is a fair and reasonable. For purposes of convenience for the Court, each such argument is extrapolated from scattered points in the brief, distilled and summarized, then addressed in summary fashion below.

Residual Argument I: Credits should be deducted off-the-top before determining whether the municipality had sufficient land to address its post-credited fair share and COAH's refusal to interpret the law this way in the 1995 Paramus case was "illegal rule-making" according to Art Bernard and should be ignored.

Response: Hartz's expert is not a lawyer, yet asks this Court to "ignore what COAH actually did" based upon his interpretation of the law, or what it should be. Forgetting for a second whether or not the issue requires the Court to become a policy-maker/replacement agency for COAH, the argument fails for at least five reasons. First, whether or not Hartz's position is meritless or not, the Township's agreement to do what COAH did, how the law has been interpreted by the agency with primary jurisdiction, in its settlement with the most zealous housing advocate in the state, is at the very least, fair and reasonable. Second, as Art Bernard acknowledges, this method has been accepted by courts across the state in approving these post-Mount Laurel IV settlements. Third, the argument fatally ignores that such an interpretation

would dis-incentivize voluntary compliance, in violation of the Fair Housing Act, because it would create a scenario where a land-poor municipality secured little or any benefit from having provided affordable housing. Fourth, it ignores, or at best glosses over the fact that the Township both accounted for changes in circumstance and utilized credits on new post-2013 developments to account for them. It is not as if the Township used its Round 3 credits without accounting for such sites in its calculation of RDP. Finally, it ignores the unusual procedural circumstances created by COAH's failure and the resulting gap period. N.J.A.C. 5:93 did not account for a 16-year gap and the definition of prospective need in the FHA didn't account for that situation, either.

Residual Argument II: The 6 acres from PSE&G should not be removed from the Hartz Site and the Township's surplus shouldn't be counted or be able to offset it in the event that PSE&G falls through.

Response: The Township's 2018 Declaratory Judgment Action and HEFSP includes a letter from PSE&G expressing interest to purchase 10 acres of land from Hartz for public purposes. PSE&G and Hartz have had negotiations regarding the acquisition, but Hartz has an interest in delaying those negotiations for purposes of leveraging the Township in this DJ Action. The Township's Settlement Agreement cuts through this problem in three ways. First, it contemplates the ability of the Township to condemn the property, which could obviate the issue by putting the Township in control of negotiating the sale. Second, in terms of calculating RDP, it provides that the 6 acres (not 10) will be removed from the land inventory, but will come back online in one year in the event that the land is not utilized for that public purpose. This same concept is embodied in COAH's regulations, albeit, relative to open space acquisition. Third, the Settlement Agreement requires the Township to create a realistic opportunity for a number in excess of its RDP, which can immediately address the additional RDP when and if the 6 acres comes online. This compromise is legally sound and fair and reasonable.

As to the argument that you cannot generate a surplus in RDP, the argument is easily dispensed with by a simple hypothetical. Assume that a town had an RDP of 20 generated from a 10-acre site at 10 units per acre (20% of 100 = 20). Assume that the town obtains 9% tax credits and the site is instead constructed as 100 affordable units. Under that scenario, the Township would have calculated RDP based upon the VLA procedures, then it would have solved for the RDP plus created a realistic opportunity for an additional 80 units. This is consistent with the FHA, which did not contemplate unmet need and N.J.A.C. 5:92-4.2(g), it incentivizes municipalities to create a realistic opportunity for as many units as possible with creative solutions to obtain more than the land constraints would normally require and is fair and reasonable to the interest of the region's low- and moderate-income households.

Residual Argument III: N.J.A.C. 5:92-4.2(g) (and by extension all other iterations of regulations containing the same principle) should be effectively invalidated by this Court because of the made up "Shell Game" term and argument coined by Hartz's attorney.

Response: Hartz doesn't hide it, it comes right out and says that N.J.A.C. 5:92-4.2(g) should be ignored by this Court if it is read to have any meaning at all. Hartz understands full well what the regulation means, yet it attempts to argue that the regulation is somehow subject to interpretation so that it can ask this Court to interpret it in its favor. What it's really asking the Court to do, is to substitute its own policy for that of COAH in contravention of the Supreme

Court's clear waning in Mount Laurel IV not to do so. Id at 29. Hartz knows full well that it is asking this Court to disregard the mandates of the Supreme Court.

The concept contained in N.J.A.C. 5:93-4.2(g) is the only way for a Vacant Land Town to maintain home rule powers relative to creating realistic opportunity for its RDP. It simply provides that just because a site generates an RDP, that doesn't mean the site needs to be utilized to address the RDP. If this weren't the case, the municipality would have no choice but to zone every site that generates RDP for inclusionary development. In effect, every vacant parcel would get a builder's remedy, regardless of voluntary compliance, or not. Obviously, this would violate the entire structure and purpose of the FHA and would defy basic logic.

Instead, COAH permitted the RDP to be addressed via any approved compliance mechanism, including 100% affordable sites.[5] Thus, in the above hypothetical creating an RDP of 20, assume the same facts except that instead of five sites generating an RDP of 20, there were 5 sites each generating an RDP of 20, for a total RDP of 100. Assuming the same facts, the town would have satisfied its entire RDP on only one of the four sites and would thus need not utilize the remaining for sites for affordable housing. Any other result destroys home rule, the incentive system under the FHA and the plain meaning of N.J.A.C. 5:93-4.2(g). It's obvious why Hartz asks this Court to invalidate that concept of law, but it is equally obvious why the Court should completely ignore the argument. At the very least, doing what the law permits and requires is fair and reasonable.

Residual Argument IV: Pre-FHA law somehow precludes this Court from approving the Settlement Agreement.

Response: It isn't exactly clear, but Hartz attempts to cite Mount Laurel I and II for the proposition that this result is somehow precluded under those cases. Hartz seems to ignore, or has forgotten, that the Supreme Court enacted the FHA in response to these cases and radically changed the affordable housing laws of our state to the anguish of avaricious developers seeking maximum profit and housing advocates. In Mount Laurel III, the Supreme Court not only rejected the claims that the FHA was unconstitutional, but also declared the Act constitutional. In Mount Laurel III, the Supreme Court acknowledged and accepted that the legislature wanted the courts out of the field of affordable housing and for a new entity, COAH, to take charge of implementing the policies embodied in the FHA. Mount Laurel III at 63. Thus, any conflict between the holdings of the Mount Laurel decisions and the Fair Housing Act, such as how the act defines the constitutional obligations and the adjustments thereto, are arguments that would require a time machine to effectively resolve in Hartz's favor. That ship sailed, over three decades ago. The FHA envisions adjustments to the fair share and COAH has implemented procedures for those adjustments. As articulated above, the Township's agreement with FSHC follows those standards and is fair and reasonable to the interests of the region's low- and moderate-income households.

Residual Argument V: The Township's RDP mechanisms are unrealistic and its response to unmet need insufficient.

[5] For that matter, when COAH adopted this regulation in 1994, municipalities had even more flexibility in that they could address half of their fair share through regional contribution agreements (RCAs). N.J.S.A. 52:27D-312. The Legislature did not invalidate RCAs until 2008 when it adopted the so-called Roberts Bill.

Response: The specific RDP and unmet need mechanisms are addressed in the expert report of Frank Banisch, P.P. submitted with this response. However, many of the RDP mechanism arguments suffer from the same infirmity, which is perhaps best illustrated by the Wells Fargo argument. The Township is in active negotiations for the development of that site. The parameters for the treatment of that site in the FSHC settlement agreement did not draw an objection from the owner, who is represented and who has participated as an interested party in this matter. That is not a coincidence – the parties discussed a concept plan consistent with that language. By the time of the Compliance Hearing, the Township envisions an agreement with Wells Fargo. Even if it didn't have such an agreement and thus couldn't claim bonuses, the agreement could still nonetheless be fair and reasonable given the surplus of housing created in the FSHC settlement relative to RDP.

As described above, this is a Fairness Hearing; it is not a Compliance Hearing. At a Compliance Hearing, which will occur some months after the date of the Fairness Hearing, the Court will evaluate the Housing Element and Fair Share Plan ("Plan") to determine whether that Plan creates a realistic opportunity for the construction of the municipality's fair share of the regional need.

The bifurcated nature of the Compliance Hearing and the Fairness Hearing in the context of post-Mount Laurel IV settlements means that what may not today technically create a realistic opportunity may still, nonetheless, be deemed fair and reasonable because it is contemplated and required that by the time of the Compliance Hearing, it will create the requisite realistic opportunity. To the extent it does not, for whatever reason, Hartz, or any other interested party, can object on the grounds that the project does not create the requisite realistic opportunity at the time of compliance and the township can respond as it deems fit keeping in mind that the goal is to facilitate voluntary municipal compliance, not builder's remedy litigation.

Residual Argument IV: The Township's calculation of density for Hartz is insufficient.

Response: COAH's decisions in the Atlantic Highlands, Haddonfield and Montvale cases honors one of the primary objectives of the FHA: preserving the right of municipalities to choose how to comply. In these cases, much to Art Bernard's chagrin, a developer with a developed site sought to redevelop the site as an inclusionary project. Instead of compelling the municipality to adopt an overlay zone on the developed site to address the municipality's unmet need, COAH permitted the municipality to accept an RDP for the site, to address the RDP on the terms the municipality deemed fit and to exercise its right not to rezone the site of the developer that sought to elbow its way into the municipality's plan.

Mr. Bernard also relies on COAH's grant of substantive certification to the Fair Lawn and Wood Ridge cases.[6] However, these cases do not stand for the proposition that a

[6] Reading the COAH compliance report for Fair Lawn, provided as an exhibit to Mr. Bernard's report, reveals the cooperative process that was typical of COAH's review of petitions. Fair Lawn, was fully developed at the time of its petition and sought a vacant land adjustment. Fair Lawn's initial vacant land inventory revealed 12 potential sites, but Fair Lawn's planner eliminated 10 of the sites due to environmental constraints, like wetlands, flood plains, hazardous waste contamination or steep slopes, or because the site was adjacent to incompatible land uses. After Fair Lawn submitted its vacant land inventory, COAH staff members visited the municipality and reviewed the sites identified and excluded by Fair Lawn's planner. COAH staff requested additional information regarding one of the sites that Fair Lawn had excluded and, after such information was submitted, COAH staff members agreed with Fair Lawn's planner.

municipality must rezone a site for inclusionary development if the municipality volunteers to satisfy the RDP the site may generate.

Finally, the calculation of density is more than fair. The former Master had preliminarily approved an RDP for the site at 10 units per acre. Both the former and current planners for the Township support that conclusion. The site is surrounded by single family residential and all of the Township's planning documents envision center-based zoning where density is concentrated in the center and not in the location of the Hartz site.

Residual Argument V: The Township does not propose sufficient mechanisms to address unmet need.

Response: The Township's response to this argument is twofold

1. **COAH Used Its Discretion To Impose Unmet Need Obligations In A Very Unobtrusive Fashion**

Although COAH expanded its powers in Round 2 to impose an obligation for the unmet need, the standard was totally discretionary. After requiring municipalities to look for opportunities to develop and redevelop, N.J.A.C. 5:93-4.2 (h) provided that COAH "***may***" require a municipality entitled to a land use adjustment (i) to zone for apartments or accessory apartments; (ii) to adopt a development fee ordinance and/or (iii) to adopt an overlay on certain sections of the town to create an incentive to redevelop developed properties with some affordable housing. As acknowledged by Art Bernard himself in his March 2002 "comprehensive study" COAH was lenient in requiring mechanisms to address unmet need. Bernard Report at 15.

2. **The Township Is Entitled To "Like Treatment" To A Transferred Municipality And, Measured Against How COAH Used Its Discretion, The Township's Unmet Need Plan Passes With Flying Colors**

The Township is entitled to "like treatment" to a transferred municipality. Putting to the side that transferred municipalities had no unmet need responsibilities in Round 1, the studies of Ms. Lonergan and Mr. Bernard provide clarity as to what municipalities could have expected had COAH done its job. Measured against that yardstick, the Township's unmet need plan passes with flying colors. It permits densities of up to 35 units per acre and incorporates a lot of acreage and variety in uses in 5 different locations. In addition, the settlement requires a Mandatory Set aside Ordinance and Development Fee Ordinance.

In addition, COAH staff members questioned the accessibility of one of the two remaining sites and, after Fair Lawn's planner provided certain information to COAH, that site was also excluded as a developable site. Ultimately, only one site remained as being suitable for inclusionary development, and that site had been offered by an objector. As to that site, the McBride site, Fair Lawn had initially assigned it a range of densities and a range of set asides. The owner of the site objected, claiming that it was suitable for a higher density. The parties engaged in mediation, and the final density assigned to the site was within the range initially assigned by the municipality. The fact that the parties mediated an agreement further distinguishes it from the Hartz site.

CONCLUSION

For the aforementioned reasons, to be elaborated upon at the Fairness Hearing, the Court should declare that the Settlement Agreement is fair and reasonable to the interests of low and moderate-income households.

Jeffrey R. Surenian, Esq.

Dated: January 27, 2020

Michael J. Edwards, Esq.

Dated: January 27, 2020