

FAIR SHARE HOUSING CENTER

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Via eCourts and Electronic Mail

Hon. Thomas C. Miller, A.J.S.C. (ret.)
Affordable Housing Dispute Resolution Program
Richard J. Hughes Justice Complex
P.O. Box 037
Trenton, New Jersey 08625

**Re: IMO the Application of the Township of Toms River,
Docket No. OCN-L-000331-25**

Dear Judge Miller and Members of the Program:

Please accept this letter as Fair Share Housing Center's ("FSHC") challenge to the Township of Toms River's ("Township" or "Toms River") Fourth Round Housing Element and Fair Share Plan ("HEFSP"), adopted on June 18, 2025, and filed in the above-captioned matter on June 20, 2025, pursuant to the Fair Housing Act, P.L. 2024, c.2 ("FHA"), and Administrative Directive #14-24 ("Directive"). This letter is provided in accordance with N.J.S.A. 52:27D-304.1(f)(2)(b) to challenge Toms River Township's HEFSP due to the Township's noncompliance with the FHA and the Mount Laurel doctrine, which protect the constitutional rights of low- and moderate-income New Jerseyans.

Based on the deficiencies in Toms River's HEFSP and its failure to provide a realistic opportunity for its fair share of the regional need for affordable housing, the Program should deny the Township's request for a Compliance Certification and the Township's immunity from builder's remedy litigation/exclusionary zoning lawsuits should be terminated until it is determined to come into constitutional compliance.

The Township finds itself, yet again, in territory where it has taken actions not taken by any other municipality in the state of New Jersey. The Township has unilaterally and without leave of court or any other authority, simply reduced its Third Round obligations in the new fair share plan. It has done so, not because there is legal authority to justify this action, but to achieve Toms Rivers's singular goal in this process – to construct zero new affordable homes in the Fourth Round in a municipality of nearly 100,000 people that is the government and health care center of Ocean County. Toms River's actions in this regard are outrageous and should be treated as such by the Program and the court.

FSHC notes that there are currently pending motions on Toms River's attempt to retroactively adjust its obligation and block affordable housing on a site approved by prior court order pending before the Hon. Sean D. Gertner, J.S.C. In addition, Judge Gertner is still handling the Township's failure to produce a fully compliant Third Round plan and comply with conditions of past orders of the court. Judge Gertner has appointed the Hon. Mark A. Troncone, J.S.C. (ret.) to mediate aspects of these pending matters. There is substantial intersection between this challenge and these matters, as described further below.

As explained in greater detail below, to resolve this challenge and come into compliance, the Township must: (1) revise its Housing Element and Fair Share Plan to provide sufficient documentation to demonstrate a realistic opportunity on all sites that meets the Township's actual, not wished-for, fair share obligation; (2) identify realistic sites for affordable housing in accordance with the applicable standards, put back in sites from the Third Round that were illegally removed, and remove sites that are unrealistic; and (3) commit to revise its HEFSP, ordinances, resolutions, affirmative marketing plan, spending plan, and program manuals to comply with applicable law.

FACTS AND PROCEDURAL HISTORY

Toms River has taken many steps to avoid having to construct any new affordable homes in the Fourth Round.

In accordance with the deadlines established in P.L. 2024, c2., the Township along with at least 400 other municipalities filed resolutions of participation with the Affordable Housing Dispute Resolution Program (“Program”) establishing its Fourth Round Present and Prospective Need. Most of New Jersey’s municipalities simply utilized the calculations completed by the Department of Community Affairs outright. A smaller subset of towns utilized the baseline calculation done by DCA, but modified it in some way to adjust the developable land in a particular municipality. Only one town, however, refused to utilize the DCA’s calculation at all. In fact, this town undisputably utilized a formula and methodology not authorized by the statute. That one town is Toms River.

Toms River initially attempted to calculate its Fourth Round fair share obligations utilizing the formula, not from the Amended Act, but from a piece of proposed legislation that has never been acted on by the Legislature. This proposed legislation would have apparently resulted in Toms River’s obligations for the Fourth Round to include a Prospective Need of only 149. A true calculation of Toms River’s Prospective Need for the Fourth Round under the Amended Act is 649.

This outrageous attempt to utilize an unauthorized formula to lower its Fourth Round obligations was roundly rejected by the Program via a recommendation from Hon. Julio Mendez, whose recommendation was accepted via an order of Hon. Sean Gertner, J.S.C. on May 1, 2025.

When it became clear that this maneuver failed, the Township then attempted to withdraw from the Program, which was opposed by FSHC and rejected by the Program and court.

After its attempt to withdraw were rejected the Township concocted a new plan.

Instead of attempting to use an unreasonably low calculation for the Fourth Round, the Township decided it would simply attempt to decrease its Third Round obligation by a whopping 285 units. The Township also blocked an already-approved development that was part of its Third Round settlement from moving forward by rescinding various approvals from the development without seeking leave of the trial court to amend its prior settlement. See Toll Bros. v. Tp. of West Windsor, 334 N.J. Super. 77 (App. Div. 2000) (invalidating municipal attempt to rescind zoning on site approved as part of prior Mount Laurel court order).

Thus, the Township filed a motion for this relief on May 21, 2025. In its motion, the Township argues that the Township's settlement agreement with FSHC somehow permits the Township to reduce its Third Round fair share obligations, despite no language in the agreement indicating this is the case. This motion, of course, as designed was filed too late to be heard before the Township adopted its Fourth Round fair share plan.

Instead of taking a reasonable step under the circumstances and simply noting the motion and reserving its rights to amend the plan in the event the Township prevailed on its motion, the Township simply proceeded as though it had already prevailed on the motion and changed its Third Round fair share obligations downward by hundreds of units.

FSHC ultimately filed a cross-motion to the Township's absurd motion.¹ The motion was argued before Judge Gertner on July 14, 2025 who reserved decision and referred the matter to Hon. Mark A. Troncone, J.S.C. (ret.) for mediation.

ARGUMENT

¹ FSHC's Cross-Motion brief is attached hereto as Exhibit A, and incorporates the arguments therein by reference to the extent anything in the Township's HEFSP constitutes an argument for why the Township's Third Round obligation should be reduced to 1,000 and why the Township was not allowed to remove the site that was part of the Third Round settlement.

I. The Township's immunity from exclusionary zoning litigation should be revoked.

Municipalities have always been encouraged to come into “prompt voluntary compliance.” This is typically enabled via rewarding municipalities engaging in good faith with immunity from builders remedy litigation. This most carefully discussed in the Supreme Court’s decision in Mount Laurel IV wherein the court enabled municipalities to receive immunity while demonstrating compliance. In re N.J.A.C. 5:96 & 5:97, 221 N.J. 1, 33 (2015)(Mount Laurel IV). This case also enabled judges to use immunity as a means to gain “prompt voluntary compliance” from municipalities.

Immunity, however, was always designed to be temporary. A municipality was expected to move with “good faith” and “reasonable speed” and immunity is to be revoked when municipalities engage in delay. Ibid. The Mount Laurel IV court was further buttressing existing case law on immunity. In J.W. Field v. Twp. of Franklin, the court encouraged granting a municipality immunity from future lawsuits, but only conditioned on a municipality stipulating noncompliance and seeking approval of a specific fair share obligation. 204 N.J. Super. 445, 456 (Law Div. 1985). FSHC’s preference is to avoid litigation and to support efforts at prompt voluntary compliance, but in some situations, encouraging developers to pursue compliance by incentivizing their assistance at overcoming a municipality’s obstructive conduct is also necessary, and, as recognized by case law, also often appropriate. Judge Serpentelli in J.W. Field, supra, 204 N.J. Super. at 454, recognized that an adversarial proceeding that includes opponents to the municipality has important benefits and that builder’s remedy litigation is helpful to obtain compliance. “Experience has . . . demonstrated . . . that there is a limit to the number of plaintiffs needed to vindicate the constitutional obligation and that excessive plaintiffs can emasculate the municipal planning options.” Ibid. Judge Serpentelli also found that in some instances where there

is a proceeding with no plaintiffs, a municipality has no incentive to actually comply. “Without the exposure to multiple builder’s remedies, however, the municipality has little incentive to take advantage of these mechanisms. Thus the prospect of multiple builder’s remedies will tend to encourage voluntary compliance.” Ibid.

The legislature also demanded a limited timeframe for immunity in the Amended Act. Municipalities would be granted an initial immunity while participating in the Program process and meeting the deadlines, but that immunity must be revoked if a municipality is abusing the process. The Amended Act was clear that “program may also terminate immunity if it finds that the municipality is not determined to come into constitutional compliance at any point in the process.” N.J.S.A. 52:27D-304.1(f)(2)(b).

Here, the Township has demonstrated that it is not interested in coming into compliance and instead is utilizing the Program process to shield itself in immunity while it flagrantly violates Mount Laurel and the Amended Act. The Township has unilaterally just changed its Third Round obligation downward despite a binding settlement agreement with FSHC and a Third Round judgment of repose setting its Third Round obligations and plan. To be sure, the Township does not change its obligation for the Third Round in a minimal way, but instead changes its obligation by almost 300 units. It literally wipes approximately 22% of its Third Round obligation off the books. The Township did not do this for any other reason than because it wants to find a way to provide no new affordable homes during the Fourth Round. It is hard to imagine a more glaring demonstration of abusing the process.

The Township is simply not proceeding in good faith and has not demonstrated that it actually intends to come into compliance and thus the Program should revoke the Township's immunity.

II. Objective Compliance Standard

When there is a challenge to a municipality's HEFSP, the program "shall apply an objective assessment standard to determine whether a municipality's housing element and fair share plan is compliant with the 'Fair Housing Act,' P.L. 1985, c.222 (C.52:27D-301 et al.) and the Mount Laurel doctrine." N.J.S.A. 52:27-304.2(b) (emphasis added).

The New Jersey Supreme Court defined the "objective" standard in Mount Laurel II:

Satisfaction of the Mount Laurel obligation shall be determined solely on an objective basis: if the municipality has in fact provided a realistic opportunity for the construction of its fair share of low- and moderate-income housing, it has met the Mount Laurel obligation to satisfy the conditional requirement; if it has not, then it has failed to satisfy it. Further, whether the opportunity is 'realistic' will depend on whether there is in fact a likelihood – the extent economic conditions allow – that the lower income house will actually be constructed.

[S. Burlington Cnty. NAACP v. Mount Laurel, 92 N.J. 158, 220-22 (1983) (Mount Laurel II) (footnotes omitted).]

The Court was clear that "[t]he municipal obligation to provide a realistic opportunity for low and moderate income housing is not satisfied by a good faith attempt. The housing opportunity provided must, in fact, be the substantial equivalent of the fair share." Id. at 216. The Court was also clear that "it is the municipality" that must "prove every element of compliance." Id. at 306. The statute demands the same actual compliance as Mount Laurel II. In addition to the specific incorporation of the "objective" standard into the text of the statute, the findings of the statute state that "The Legislature declares that the 'Fair Housing Act,' P.L.1985, c.222 (C.52:27D-301 et al.),

as amended and supplemented by P.L.2024, c.2 (C.52:27D-304.1 et al.), is intended to implement the Mount Laurel doctrine.” N.J.S.A. 52:27D-302(p). And notably, unlike in the numbers phase of the Program, the Legislature required proof of objective compliance even absent a challenge, highlighting the importance of this standard. The Program “shall apply an objective standard” to determine whether the HEFSP “enables the municipality to satisfy the fair share obligation, applies compliant mechanisms, meets the threshold requirements for rental and family units, does not exceed limits on other unit or category types, and is compliant with the “Fair Housing Act,” P.L.1985, c.222 (C.52:27D-301 et al.) and the Mount Laurel doctrine.” N.J.S.A. 52:27-304.2(b). This objective standard, which has been interpreted through decades of case law and regulatory development, provides the appropriate basis for the review of this challenge.

III. The Township’s Third Round obligation is 1,285 and not 1,000 as claimed in the Township’s fair share plan.

It is undisputed that the Township’s Third Round obligations as set forth in the Third Round settlement agreement between the Township and FSHC is 1,285. This obligation is established in the Township’s Third Round conditional judgment of repose.

The Legislature was clear that the beginning point any Fourth Round plan is an “assessment of the degree to which the municipality has met its fair share obligation from the prior rounds of affordable housing obligations as established by prior court approval, or approval by the council.” N.J.S.A. 52:27D-304.1(f)(2)(a)(emphasis added).

The Township’s Third Round court approval and judgment of repose has established the Township’s Third Round Prospective Need as 1,285. The Program does not have the authority or the ability to sanction the Township utilizing a different obligation from this.

IV. The Township must demonstrate how it addresses every element of compliance for the Third Round.

As the Township accurately reflects in its fair share plan, the Township and FSHC entered into a consent order earlier this year to catalog the final steps the Township must take to definitively demonstrate compliance with the Third Round obligations. As the fair share plan indicates, there are not minimal steps left to take. In fact, as recently as the filing of the fair share plan, there were nineteen (19) conditions the Township needed to take to address its Third Round obligations. Some of these have been taken and some of these have still not been taken.

The Program should demand that the Township finalize these conditions before any Fourth Round compliance certification may be entered.

The Program may also not approve a Fourth Round HEFSP that removes the Capodagli site that the Township rescinded its actions on despite it being part of the Third Round settlement. *Toll Bros. v. Tp. of West Windsor*, 334 N.J. Super. 77 (App. Div. 2000).

V. The Township's Fourth Round fair share plan is hundreds of units short of its fair share obligations.

As a result of the Township's unauthorized adjustment of its Third Round obligation from 1,285 to 1,000 the Township has moved hundreds of credits from its Third Round compliance to the Fourth Round. These credits should all be required to be moved back in accordance with the Third Round judgment of repose.

When the Meadow Green, JSM Route 66, K. Hovnanian Bimini Dr., 1606 Lakewood, Gabrielle Run, Kaplan/Camelot, Legion Court, Residence Club at Cox Crossing, and Hooper-Caudina sites are all moved back to the Third Round compliance, the Township's Fourth Round plan is at least two-hundred (200) units short. This is even assuming that the Township's proposed extension of expiring controls should be eligible for credit, which will be discussed further below.

VI. The Township must provide much more information before credit may be granted for any of the proposed extension of expiring controls.

A. The Township must provide additional information for the proposed extension of controls on for-sale units.

To address its Fourth Round obligation the Township relies, in part, on a program to extend expiring controls on thirteen (13) for-sale affordable housing units built in 2004 at the Woods at Massachusetts site. To receive credit for this type of program the Township should be required to address how this program meets the requirements for extension of expiring controls in both the COAH regulations (N.J.A.C. 5:97-6.14) as well as the updated UHAC regulations from HMFA.

The COAH regulations generally address the required documentation and some criteria for which developments are eligible. Those criteria are as follows:

- The Township must show that the unit meets the criteria for prior-cycle or post-1986 credits. N.J.A.C. 5:97-6.14(a)(1).
- The Township must show that the affordability controls are actually scheduled to expire during the compliance period. N.J.A.C. 5:97-6.14(a)(2)
- The Township must show that the unit to be extended has received a “continuing certificate or occupancy” or a statement that the unit meets all code standards. N.J.A.C. 5:97-6.14(a)(3).
- The Township must show that all units which need rehabilitation or repair to receive a certificate of occupancy and/or to be brought up to code will receive the required rehabilitation. N.J.A.C. 5:97-6.14(a)(4).
- The Township must provide a written commitment from the owner to extend the controls, or evidence that the controls have been extended in accordance with UHAC. N.J.A.C. 5:97-6.14(b)(2).
- The Township must provide the proposed or filed deed restriction for the extended controls. N.J.A.C. 5:97-6.14(b)(3).
- Where the Township has identified that units to be extended will need rehabilitation the Township must provide particulars for the rehabilitation program including: a pro forma of the costs for the rehab, documentation of the source of funding, a resolution of intent to fund those rehab costs, a rehab manual, an affirmative marketing plan, and an administrative agent to oversee the program. N.J.A.C. 5:97-6.14(c).

In addition, in accordance with A4/S50, the UHAC regulations now have more specific and updated requirements specifically as to funding extension of expiring controls. The UHAC rules now require the municipality to “exercise the right of first refusal to extend the affordability controls” by electing via municipal ordinance to extend the controls “not later than 180 days prior

to the end of the affordability control period.” N.J.A.C. 5:80-26.6(h). The municipality must also contribute funds to the preservation of units by paying “at least \$20,000 . . . to support the preservation.” The municipality must also demonstrate that the affordability period including the initial period and the extended period shall equal at least sixty (60) years. N.J.A.C. 5:80-26.6(a)(3).

Here, the Township has provided very little information on this program other than a quick paragraph in the HEFSP and the original deed restrictions. The Township should provide the required information before this program can be approved.

B. The Township cannot receive a credit for an extension of an extension of controls on Highland Plaza.

One of the sites for which the Township seeks extension of controls credit, 110 units at Highland Plaza, was already approved for such credit in the Third Round. The proposed extension of controls does not qualify for credit, especially under the Amended Fair Housing Act.

The Amended Fair Housing Act provides that “The agency, in consultation with the department, shall establish requirements and controls to ensure the maintenance of housing assisted under P.L.1985, c.222 (C.52:27D-301 et al.) as affordable to low- and moderate-income households for a period of not less than 40 years for newly created rental units, 30 years for for-sale units, and 30 years for housing units for which affordability controls are extended for a new term of affordability, provided that the minimum extension term may be limited to no less than 20 years as long as the original and extended terms, in combination, total at least 60 years.” N.J.S.A. 52:27D-321(f).

Here, Highland Plaza was built in 1984, had 30 years of affordability controls through 2014, and received credit from the trial court under the then-extant law for another 20 year affordability extension from 2014 to 2034. The Legislature changed that law in the Amended Fair Housing Act, and now extensions only receive credit if the original term plus the extension total sixty years. While FSHC does not seek to revisit the trial court's prior grant of extensions of expiring controls credit for the first extension in 2014, the Township plainly cannot receive three credits for the same unit. Nor can it receive credit for a 20-year extension when it is on top of the last extension that was also twenty years — in effect, the combination of these two terms is only 40 years, or 20 years short of the statutory minimum of 60 years. Thus, 110 credits of the Township's plan towards the Fourth Round are on their face noncompliant with the FHA.

C. The Township must provide additional information for the proposed extension of controls on rental units.

To address its Fourth Round obligation the Township relies, in part, on a program to extend expiring controls on 125 rental affordable housing units built in 1995 at the Hope's Crossing development and 48 rental affordable housing units at Villages at Bey Lea². To receive credit for this type of program, in addition to for Highland Plaza if somehow the Township were permitted to seek credit for an extension of an extension, the Township should be required to address how this program meets the requirements for extension of expiring controls in both the COAH regulations (N.J.A.C. 5:97-6.14) as well as the updated UHAC regulations.

The COAH regulations generally address the required documentation and some criteria for which developments are eligible. Those criteria are as follows:

² The Township's HEFSP on page 49 states that these units were built between December 2020 and January 2021, but this appears to be an error and that these units may have been built in 2000-2001. The Township should clarify when these units were built.

- The Township must show that the unit meets the criteria for prior-cycle or post-1986 credits. N.J.A.C. 5:97-6.14(a)(1).
- The Township must show that the affordability controls are actually scheduled to expire during the compliance period. N.J.A.C. 5:97-6.14(a)(2)
- The Township must show that the unit to be extended has received a “continuing certificate of occupancy” or a statement that the unit meets all code standards. N.J.A.C. 5:97-6.14(a)(3).
- The Township must show that all units which need rehabilitation or repair to receive a certificate of occupancy and/or to be brought up to code will receive the required rehabilitation. N.J.A.C. 5:97-6.14(a)(4).
- The Township must provide a written commitment from the owner to extend the controls, or evidence that the controls have been extended in accordance with UHAC. N.J.A.C. 5:97-6.14(b)(2).
- The Township must provide the proposed or filed deed restriction for the extended controls. N.J.A.C. 5:97-6.14(b)(3).
- Where the Township has identified that units to be extended will need rehabilitation the Township must provide particulars for the rehabilitation program including: a pro forma of the costs for the rehab, documentation of the source of funding, a resolution of intent to fund those rehab costs, a rehab manual, an affirmative marketing plan, and an administrative agent to oversee the program. N.J.A.C. 5:97-6.14(c).

In addition, in accordance with A4/S50, the UHAC regulations now have more specific and updated requirements specifically as to funding extension of expiring controls. The UHAC rules now require the municipality to “exercise the right of first refusal to extend the affordability controls” by electing via municipal ordinance to extend the controls “not later than 180 days prior to the end of the affordability control period.” N.J.A.C. 5:80-26.12(f). The municipality must also contribute funds to the preservation of units by paying “at least \$12,000 per restricted unit” where a payment in lieu of taxes has been granted or extended, or “at least \$17,500 per restricted unit” where a payment in lieu of taxes has not been granted or extended. N.J.A.C. 5:80-26.12(f)(4). The municipality must also demonstrate that the affordability period including the initial period and the extended period shall equal at least sixty (60) years. N.J.A.C. 5:80-26.12(f)(2).

Here, the Township has provided very little information on this program other than a quick paragraph in the HEFSP and the original deed restrictions. The Township should provide the required information before this program can be approved.

VII. The Township's HEFSP contains additional flaws that should be addressed by the Program.

As discussed earlier, it is the municipality that must demonstrate every element of compliance. See Mount Laurel II, *supra*, 92 N.J. at 306. FSHC has identified the following additional items that must be addressed by the Program before the Township can be deemed to have complied with Mount Laurel.

1. The Township should provide an explanation as to how it addresses the various minimums and maximums, including the very-low-income requirements and family requirements.
2. The Township should be required to include the following affordable housing set-aside requirement language in each site specific ordinance:
 - A. Twenty percent (20%) of the residential units shall be restricted to low and moderate income households. Fractions of .49 or less may be rounded down; fractions of .50 or more shall be rounded up.
 - B. All affordable housing units shall comply with the Township's affordable housing regulations in its Affordable Housing Ordinance, as well as the NJ Fair Housing Act (N.J.S.A. 52:27D-301 et seq.), and the Uniform Housing Affordability Control Rules (N.J.A.C. 5:80-26.1 et seq.). This shall include but is not limited to:
 - i. The requirement that at least thirteen percent (13%) of the affordable units within each bedroom distribution shall be required to be for very low income households earning thirty percent (30%) or less of median income,
 - ii. Appropriate bedroom distribution of 1-, 2-, and 3-bedroom units,
 - iii. Recording of appropriate affordability controls of not less than forty (40) years for rental units and not less than thirty (30) years for sale units, and
 - iv. Minimum unit sizes by square footage for affordable housing units.
 - v. The affordable units shall be affirmatively marketed in accordance with UHAC and applicable law. The affirmative marketing shall include the community and regional organizations identified by the Township, and it shall also include posting of all affordable units on the New Jersey Housing Resource Center website in accordance with applicable law.
 - C. The affordable units shall be integrated with the market-rate units, and the affordable units shall not be concentrated in separate building(s) or in separate area(s) or floor(s) from the market-rate units. In buildings with multiple dwelling units of similar tenure, this shall mean that the affordable units shall be generally distributed within each

building with market units. The residents of the affordable units shall have full and equal access to all of the amenities, common areas, and recreation areas and facilities as the residents of the market-rate units. The affordable units shall be the same type of housing unit as the market rate units, meaning that a market rate building available to families shall not be developed to provide age-restricted housing units.

- D. Construction of the affordable units in inclusionary developments shall be phased in compliance with N.J.A.C. 5:93-5.6(d).
- 3. The Township's Spending Plan should be required to be updated in accordance with the forthcoming regulations at N.J.A.C. 5:99.
- 4. The Township should update its Affordable Housing Ordinance, Development Fee Ordinance, Affirmative Marketing Plan, and other administrative documents in accordance with the forthcoming regulations at N.J.A.C. 5:80-26.1, et seq, and N.J.A.C. 5:99 after they are adopted and before March 15, 2026.

For the foregoing reasons FSHC urges the Program to reject Toms River Township's request for a compliance certification until it addresses the flaws in its plan and documentation identified above.

Thank you for your attention to this matter. As noted above, part of FSHC's challenge is as to the failure to provide sufficient information and documentation to support its plan in compliance with the FHA and Mount Laurel; FSHC reserves its rights to provide supplemental responses in response to further submissions by the Township.

Respectfully,



Joshua D. Bauers, Esq.
Counsel for Fair Share Housing Center

c: eCourts Service List