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**IN THE MATTER OF THE APPOINTMENT OF THE COUNCIL ON AFFORDABLE HOUSING BY GOVERNOR PHILLIP MURPHY**

Superior Court, Appellate Division
Docket No.: A-000050-22

Civil Action

# *AMICUS CURIAE* BRIEF OF FAIR SHARE HOUSING CENTER IN RESPONSE TO THE APPELLANTS' BRIEF SEEKING TO COMPEL THE GOVERNOR TO APPOINT COAH MEMBERS

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## PRELIMINARY STATEMENT

Fair Share Housing Center (FSHC) respectfully submits this brief as proposed *amicus curiae* in response to the appeal filed by the Appellant Municipalities.[1] This case concerns the future of access to affordable housing in New Jersey and the system by which the constitutional rights of lower-income people enshrined in the Mount Laurel doctrine and the Fair Housing Act (FHA) will be enforced.

The case raises substantial questions about New Jersey's future: Will the state continue to foster economic and racial integration or fall back on old patterns of discrimination and exclusion? Will it maintain the current framework for developing affordable housing, which stands as a national model, or will it abandon it in the midst of an ongoing crisis of insufficient and unaffordable housing?

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[1] The appeal was initially filed on September 7, 2022 by the Boroughs of Beach Haven (Ocean County), Montvale (Bergen County), and Sayreville (Middlesex County), and the Townships of Bordentown (Burlington County), Chatham (Morris County), Cranford (Union County), East Hanover (Morris County), Egg Harbor (Atlantic County), Fairfield (Essex County), Freehold (Monmouth County), Jackson (Ocean County), Mahwah (Bergen County), and Readington (Hunterdon County). Since the original filing, the following municipalities have joined as appellants: Township of West Caldwell (Essex County), Township of Hillsborough (Somerset County), and Township of Warren (Somerset County).

The Appellant Municipalities challenge the Governor's alleged refusal to appoint new members to the Council on Affordable Housing (COAH). COAH is the administrative agency that failed for over a decade to implement its statutory mandates under the FHA and that the Supreme Court ultimately divested of primary responsibility for oversight of Mount Laurel enforcement because it had become "nonfunctioning." In re N.J.A.C. 5:96 & 5:97, 221 N.J. 1, 5 (2015) (Mount Laurel IV).

The administrative system the Appellant Municipalities seek to return to is a broken one that failed for over fifteen years to adequately safeguard the constitutional rights of the Mount Laurel protected class. In comparison, the current system of court oversight drawn from the FHA, which the Supreme Court set forth in Mount Laurel IV, has been a success for the production of affordable housing in New Jersey.

In fact, since 2015, the judiciary has approved municipal fair share plans at a rate nearly twice what COAH managed even during its functional years, before the agency descended into complete disorder. Between the Second Round years of 1993 and 1999, COAH granted final substantive certification to 137 municipalities' affordable housing plans, averaging

certifications at a rate of approximately 23 per year.[2] During the "gap period," between 2000 and 2015, COAH issued only 68 substantive certifications, amounting to a glacial pace of approximately four per year.[3] In comparison, the judiciary has approved approximately 340 settlements to resolve Mount Laurel declaratory judgment actions filed by municipalities between 2015 and 2022, averaging approximately 48 per year.[4] Put in constitutionally-relevant terms, the current court-supervised system has provided a far more "realistic opportunity" for affordable housing in New Jersey than the administrative system ever did under COAH.

This court should reject the Appellant Municipalities' effort to turn back the progress that has been made.

## FACTS AND PROCEDURAL HISTORY[5]

For decades, the New Jersey Supreme Court has recognized a constitutional guarantee that municipalities across the state must provide

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[2] Council on Affordable Housing, *Municipal Participation in the Second Round*, N.J. Dep't of Comty. Affairs, https://www.nj.gov/dca/divisions/lps/hss/transinfo/reports/secondround.xls.

[3] Council on Affordable Housing, *Towns Certified under the Revised Third Round Rules*, N.J. Dep't of Comty. Affairs, https://www.nj.gov/dca/divisions/lps/hss/transinfo/reports/certified.xls.

[4] N.J. Legislature, Public Hearing Transcripts 2022, "Committee Meeting of Assembly Housing Committee," 45-46 (September 15, 2022), https://pub.njleg.state.nj.us/publications/public-hearings/22/aho09152022.pdf.

[5] These sections are combined for the convenience of the court as they are inextricably intertwined.

lower-income people a realistic opportunity of access to affordable housing. See, e.g., Mount Laurel IV, 221 N.J. at 4; S. Burlington Cty. NAACP v. Mount Laurel, 92 N.J. 158, 222 (1983) (Mount Laurel II); Mount Laurel I, 67 N.J. at 174. "Determining if an opportunity is 'realistic' requires application of a practical and objective standard; the court must decide 'whether there is in fact a likelihood—to the extent economic conditions allow—that the lower income housing will actually be constructed.'" In re Twp. of Bordentown, 471 N.J. Super. 196, 219 (App. Div. 2022) (quoting Mount Laurel II, 92 N.J. at 221-22); see also Alexander's Dep't Stores v. Paramus, 125 N.J. 100, 109 (1991) ("municipal land-use regulations must provide a realistic, not just a theoretical, opportunity for the construction of lower-income housing.").

In 1985, in response to the Mount Laurel line of cases, the Legislature passed the FHA, codified at N.J.S.A. 52:27D-301 to -329.19. See Hills Dev. Co. v. Bernards, 103 N.J. 1, 19 (1986). The FHA created COAH and directed it to "determine statewide needs for low- and moderate-income housing and to evaluate proposals by municipalities to meet their fair share obligations." Alexander's Dep't Stores, 125 N.J. at 109; see N.J.S.A. §§ 52:27D-307(c), 52:27D-313, 52:27D-314.

While the FHA largely shifted responsibility for overseeing municipal compliance with Mount Laurel from the judiciary to COAH, it maintained a

parallel process of judicial review through declaratory judgment actions. See, e.g., N.J.S.A. § 52:27D-313(a); Hills Dev. Co., 103 N.J. at 63; Mount Laurel IV, 221 N.J. at 4 ("Under the FHA, towns are free to remain in the judicial forum should they prefer it as the means to resolve any disputes over their constitutional obligations."). During COAH's period of operation, that judicial-review process was utilized by scores of towns across New Jersey; indeed of the 16 towns that filed this appeal, six were under court, and not COAH, jurisdiction in the Prior Round.[6]

Not long after its passage, the FHA was challenged by several parties who claimed that the new statutory framework would not adequately protect the constitutional interests enshrined in the Mount Laurel doctrine. See Hills Dev. Co., 103 N.J. at 21. The Supreme Court rejected that challenge, concluding that deference was owed to the Legislature and that the new statutory regime should be given a chance to work. See id. at 21-26. Nevertheless, the Court forewarned that if "as predicted by its opponents, the

[6] Council on Affordable Housing, *Municipal Participation in the Second Round*, N.J. Dep't of Comty. Affairs, https://www.nj.gov/dca/divisions/lps/hss/transinfo/reports/secondround.xls. To promote fairness and consistency between the administrative and judicial forums, court proceedings following passage of the FHA were required to "conform wherever possible to the decisions, criteria, and guidelines of [COAH]." Hills Dev. Co., 103 N.J. at 63.

Act, despite the intention behind it, achieves nothing but delay, the judiciary will be forced to resume its appropriate role." Id. at 23.

The FHA initially required COAH to determine municipal fair share obligations for periods of six years, which were later extended in 2002 to periods of ten years, commonly referred to as "rounds." N.J.S.A. § 52:27D-307(c). Municipalities that adequately demonstrated to COAH that they had a plan to satisfy their fair share obligation could receive "substantive certification," which would render their housing elements and fair share plans presumptively valid against constitutional challenges for the duration of the round. See N.J.S.A. § 52:27D-313, 317. Similarly, municipalities that secured a judgment of repose through the courts received legal protection from builder's remedy suits and constitutional challenges for the applicable round. See N.J.S.A. § 52:27D-313; Toll Bros. v. Twp. of W. Windsor, 173 N.J. 502, 514 n.3 (2002).

COAH adopted its First Round of regulations in 1986 and Second Round regulations in 1994. See 18 N.J.R. 1267(a) (June 16, 1986) (codified at N.J.A.C. 5:91); 18 N.J.R. 1527(a) (Aug. 4, 1986) (codified at N.J.A.C. 5:92); 26 N.J.R. 2300(a) (June 6, 1994) (codified at N.J.A.C. 5:93). However, after the agency's Second Round rules expired in 1999, COAH "failed twice to adopt updated regulations (Third Round Rules) for the present period of

municipal housing obligations." Mount Laurel IV, 221 N.J. at 3. COAH's continual failure to adopt valid regulations resulted in fifteen years of litigation and delay, during which low-income people, municipalities, and affordable housing developers were left waiting without guidance as to how to calculate and address New Jersey's affordable housing needs. See, e.g., id. at 7-11; In re N.J.A.C. 5:96 and 5:97, 215 N.J. 578, 586 (2013); In re N.J.A.C. 5:96 and 5:97, 416 N.J. Super. 462, 471, 487, 511 (App. Div. 2010); In re Adoption of N.J.A.C. 5:94 and 5:95, 390 N.J. Super. 1, 86-87 (App. Div. 2007); In re Six Month Extension, 372 N.J. Super. 61, 95-96 (App. Div. 2004). During that period, "[f]ew ordinances were adopted, and even fewer new developments approved," as "[e]ssentially, the whole statewide process was stayed for fifteen years."[7] The agency's inaction led thirty municipalities to pass resolutions urging COAH to adopt valid Third Round rules. Mount Laurel IV, 221 N.J. at 15.

For lower-income people, the halt to new affordable housing in New Jersey was acutely painful. Their experiences were captured in a series of video interviews by the Housing and Community Development Network of New Jersey, a statewide association of community-based non-profit housing

[7] Peter Buchsbaum, *Affordable Housing and the Mount Laurel Doctrine: Lessons Learned*, 57 Willamette L. R. 201, 208 (2021).

organizations, recorded around 2010. As Aminah, a mother of five who had struggled with homelessness explained, "I've been waiting for a home I can afford for over fifteen years… I can't afford sky-high rent."[8] Another young woman, Heather, described her ten-year journey to secure a safe and affordable home after she and her sister were orphaned and forced to live for over eight years in a motel.[9] FSHC filed its motion with the Supreme Court to enforce litigants rights on behalf of these and other lower-income people whose constitutional rights had been unjustly deferred by COAH's chronic failure to adopt valid Third Round regulations, in the case that ultimately became Mount Laurel IV.

In 2015, faced with clear evidence that COAH had no intention of carrying out its statutory mandate to regulate affordable housing, the Supreme Court issued its landmark Mount Laurel IV decision, in which it "(1) recognized COAH to be a nonfunctioning agency; (2) eliminated the FHA's exhaustion-of-administrative-remedies requirement and reopened the courts to Mount Laurel litigants; and (3) provided a process by which a town might obtain the equivalent of substantive certification for its fair share

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[8] *Aminah*, Housing and Community Development Network NJ, YouTube (Sept. 19, 2010), https://youtu.be/nOVHhS0S9Wk.

[9] *Heather*, Housing and Community Development Network NJ, (Sept. 24, 2010), https://youtu.be/Qc0kXKWvLIs.

housing plan and avoid exclusionary zoning actions, after a court assessed the town's fair share responsibility." In re Decl. Judgment Actions, 227 N.J. 508, 523 (2017); see Mount Laurel IV, 221 N.J. at 5-6, 17-20.

The Court found that "the administrative forum is not capable of functioning as intended by the FHA," and "the FHA's exhaustion-of-administrative-remedies requirement has been rendered futile." Mount Laurel IV, 221 N.J. at 19. It therefore ordered lower courts "to hear and decide actions addressing municipal compliance with constitutional Mount Laurel obligations." Id. at 51.

Under the Mount Laurel IV framework, municipalities may seek a declaratory judgment from the Superior Court as the "judicial equivalent of substantive certification and accompanying protection as provided under the FHA." Id. at 6; In re Decl. Judgment Actions, 227 N.J. at 515. In effect, the Mount Laurel IV framework expanded the already existing responsibility of the courts to decide Mount Laurel cases under the FHA, while suspending COAH's administrative role in that process.

While the Supreme Court noted that its ruling in Mount Laurel IV "does not prevent either COAH or the Legislature from taking steps to restore a viable administrative remedy that towns can use in satisfaction of their constitutional obligation," Mount Laurel IV, 221 N.J. at 34, the Court did not

order the legislative or executive branches to take any action to reinvigorate the administrative process, nor did it place a time limit on the suspension of the administrative-exhaustion requirement. To the contrary, the Court provided in the order accompanying the decision that "[t]he FHA's exhaustion-of-administrative-remedies requirement is dissolved until further order of the Court." Id. at 35.

In reviewing municipal fair share plans, the Court directed trial courts to "follow certain guidelines 'gleaned from the past'. . . using the methodologies set forth in COAH's First and Second Round rules," In re Decl. Judgment Actions, 227 N.J. at 515 (quoting Mount Laurel IV, 221 N.J. at 29-30). Trial courts may also consider Third Round rules that have not been invalidated by the appellate courts and may "evaluate municipal compliance using discretion similar to that afforded to COAH in the rulemaking process." Id. at 515-16.

To protect the interests of third parties who might be impacted by the declaratory judgment process, most notably the Mount Laurel protected class, the Supreme Court directed trial courts to provide FSHC and other interested parties notice and an opportunity to be heard in all declaratory judgment actions concerning municipal fair share plans. Mount Laurel IV, 221 N.J. at 23. As a result, FSHC has participated in each of the over 340 declaratory

judgment proceedings that have been filed in the Superior Court since 2015. From that vantage point, FSHC has observed that the court-supervised process that the Supreme Court fashioned in Mount Laurel IV has been a notable success.

As a retired judge and special master involved in the process observed in a recent law review article, the Mount Laurel IV framework of judicial oversight established a four-prong check on the implementation of municipal housing obligations, to ensure constitutional compliance:

> 1. In every case, input from FSHC and any interested parties, including builders who might want their land included in a plan.
> 2. Review by the court masters.
> 3. Independent review of the plans by the Mount Laurel judges.
> 4. Opportunities for broader public involvement, including at municipal-level proceedings for adoption of master plan elements and ordinances and a fairness hearing process before the court based upon the settlement of class actions at which anyone impacted by a municipal plan could be heard. In addition, there was always the backup of a builder's remedy lawsuit for towns which did not proceed in good faith.
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> [Buchsbaum, supra n.4, at 213.]

At the time that Mount Laurel IV was decided, even traditional opponents of the Mount Laurel doctrine expressed openness to returning oversight of Mount Laurel cases to the courts. For example, then-president of the New Jersey League of Municipalities, Brian Wahler, opined that the new

framework "can't be any worse than what we have right now" under COAH, adding, "[i]t's ironic that the court had to step in again when the governor and the Legislature could have figured this out."[10] Similarly, then-State Senate President Steve Sweeney acknowledged the need for judicial intervention, observing that "it was up to the court to rule because the Legislature tried to enact a new system but [Governor] Christie vetoed it."[11]

To this day, the need for affordable housing remains acute in New Jersey. As of 2020, there were approximately 274,000 low-income households unable to access housing that they could afford.[12]

Despite the ongoing need for affordable housing a half decade after the Supreme Court first decided Mount Laurel I, many municipalities still lack the political will to support affordable housing in the absence of robust legal enforcement and "Not in My Backyard" (NIMBY) groups continue to oppose affordable housing in their communities.[13] In the context of these challenges,

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10 Colleen O'Dea, *NJ Supreme Court Decision on Affordable Housing Explained*, WHYY (Mar. 11, 2015), https://whyy.org/articles/nj-supreme-court-decision-on-coah-explained/.

11 Id.

12 Nat'l Low Income Housing Coalition, *The Gap: A Shortage of Affordable Homes*, App'x A (Apr. 2022), available at https://nlihc.org/gap.

13 See, e.g., In re Twp. of S. Brunswick, 448 N.J. Super. 441, 451 (Super. Ct. Middlesex Cty. 2016) (noting that "South Brunswick was not proceeding in good faith, and was 'determined to be non-compliant.'"); Ashley Balcerzak, *Packing More Punch: NJ Groups That Oppose Affordable Housing Projects Wield New Tools*, The Bergen Record (Sept. 12, 2022),

the court-supervised system that has operated since 2015 has meaningfully increased municipal accountability and promoted the production of affordable housing across New Jersey. Indeed, in a recent article published by the League of Municipalities, two attorneys who regularly represent municipalities in Mount Laurel proceedings opined:

> Having cases handled by Superior Court Judges in the vicinage in which the municipality is situated has significant advantages. These judges have local knowledge that can be helpful in not only determining fair share obligations, but also in identifying Third Round compliance mechanisms that make sense for that community. They are also less bureaucratic than COAH; and decisions by the courts are made in open court, not following closed session conferences from which the public is excluded.[14]

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https://www.northjersey.com/story/news/state/2022/09/12/nj-affordable-housing-projects-opposed-nonprofits-llc/65472691007/ ("Deciding where to build affordable housing in New Jersey rarely goes smoothly, and residents who oppose projects with low-income units have been growing even more organized."); Justin Musella, *Mount Laurel Doctrine Puts New Jersey's Suburbs Under Attack*, The Bergen Record (Mar. 28, 2022), https://www.northjersey.com/story/opinion/2022/03/28/mount-laurel-doctrine-attacks-new-jerseys-suburbs/7147856001/ (opinion piece by Council Member from Parsippany).

[14] Linda A. Galella & Michael W. Herbert, *As Fourth Round of Affordable Housing Obligations Nears, Municipalities Should Plan Accordingly*, NJ Municipalities (Nov. 2022), https://njlm.org/ArchiveCenter/ViewFile/Item/1544.

In short, as a remedy to the constitutional harm that arose from COAH's dereliction of duty, the court-supervised process has been highly effective.

## ARGUMENT

### I. The Court-Supervised Process Ordered in Mount Laurel IV is of Constitutional Dimension and Protects the Interests of Lower-Income People in Need of Affordable Housing

When the Supreme Court decided Mount Laurel IV, shifting primary responsibility for overseeing Mount Laurel compliance from COAH to the courts, it noted that the relief it ordered was "remedial of constitutional rights" of lower-income people. Mount Laurel IV, 221 N.J. at 20.

Finding that "[c]onstitutional compliance presently cannot be evaluated under COAH's jurisdiction," and the "FHA's exhaustion-of-administrative-remedies requirement has been rendered futile," the Court observed that "[u]nder our tripartite form of government, the courts always present an available forum for redress of alleged constitutional violations." Id. at 19-20.

The Court was crystal clear that given the choice between an inoperative statutory framework and a constitutional right, the constitutional guarantee of a realistic opportunity of affordable housing must carry the day. Echoing its earlier decision in Hills Dev. Co. v. Bernards, the Court

explained that where the "FHA proves that it achieves nothing but delay, the courts would resume their role in affordable housing litigation." Id. at 20.

Against this backdrop, it is clear that this court cannot do as the Appellant Municipalities suggest and simply set aside the constitutional issues in this case in favor of a purely statutory analysis. The current framework for judicial oversight of the Mount Laurel process arose as a constitutional remedy to shortcomings of the administrative and statutory regimes under which COAH operated. Any modification to that framework must therefore ensure that there are continued protections for the constitutional interests of lower-income New Jerseyans, not simply reinstate a broken administrative framework under COAH.

## II. The Abolition of COAH Case Has Little Bearing on This Case

The Appellant Municipalities place heavy reliance on the case of In re Plan for Abolition of the Council on Affordable Hous., 214 N.J. 444 (2013) (Abolition of COAH), arguing that it is "dispositive" of their application. (Pet'r Br. at 46.) However, that case concerned the interpretation of a statute—the Reorganization Act—that is plainly not at issue in this proceeding.

Both the majority and the dissent in the Abolition of COAH case made clear that their analyses were focused on the scope of powers granted to the

Governor by the Legislature under the Reorganization Act. See 214 N.J. at 467 ("At the heart of this case is a question of statutory interpretation: whether an independent agency like COAH is subject to the Reorganization Act."); id. at 488 (Patterson, J., dissenting) ("I do not share the majority's conclusion that the Legislature intended to exclude 'in but not of' agencies from the Reorganization Act.").

In this case, there is no allegation that the Reorganization Act has any relevance to the Governor's purported refusal to appoint COAH members. The Governor's appointment power derives from entirely different legal sources and therefore implicates wholly different considerations from those at issue in the Abolition of COAH case.

There are, moreover, several key substantive differences between the altered Mount Laurel enforcement framework that Governor Christie advocated in the Abolition of COAH case and the court-supervised framework outlined by the Supreme Court in Mount Laurel IV, which the Appellant Municipalities now challenge. Specifically, whereas Governor Christie sought to transfer Mount Laurel enforcement responsibilities to the Department of Community Affairs despite the agency having no such authority under the FHA, see 214 N.J. at 448; N.J.S.A. § 52:27D-301 et seq., the courts have always been explicitly authorized by the FHA to review and

approve municipal fair share plans, see N.J.S.A. § 52:27D-313. Moreover, as discussed above, the relief granted in Mount Laurel IV was "remedial of constitutional rights" and was necessitated by the fact that COAH had become "nonfunctioning." 221 N.J. at 5, 20. There was no comparable constitutional interest identified in the Abolition of COAH case as the basis for Governor Christie's proposed deviation from the FHA.

In light of these substantial distinctions, the Appellant Municipalities' heavy reliance on the Abolition of COAH case is clearly misplaced.

## III. The "Urgency" of the Municipalities' Application is Contrived

The Appellant Municipalities insist that "there is an urgency to seat COAH" now because of the approaching start of the Fourth Round housing cycle in July 2025. (Pet'r Br. at 25.) However, neither Supreme Court precedent nor the text of the FHA support their view.

The Supreme Court plainly did not time-limit the relief it ordered in Mount Laurel IV or establish an expiration date for the court-supervised process at the end of the Third Round. See 221 N.J. at 6, 35 (dissolving the FHA's exhaustion-of-administrative-remedies indefinitely until further order of the Court). In fact, the Court noted that "the courts always present an available forum for redress of alleged constitutional violations or, alternatively, for towns seeking affirmative declarations that their zoning

actions put them in compliance with Mount Laurel obligations." Id. at 20; see also N.J.S.A. § 52:27D-313 (including judicial review as an avenue for establishing constitutional compliance under the FHA).

Similarly, as the Governor correctly notes in his brief, the only timeline that the FHA sets forth concerning the appointment of COAH members relates to the initial cohort of members appointed immediately following the FHA's enactment. N.J.S.A.§ 52:27D-305; (see Gov. Br. at 3). There is no other statutory requirement that would suggest that subsequent appointments must be completed within the timeframe that the Appellant Municipalities demand.

## CONCLUSION

For the reasons discussed above, FSHC respectfully submits that this court should deny the application of the Appellant Municipalities.

Dated: April 28, 2023

Respectfully submitted,
FAIR SHARE HOUSING CENTER

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