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July 8, 2015

**Via Hand Delivery**

Clerk

Superior Court of New Jersey

Essex County, Law Division

465 Dr. Martin Luther King Jr. Blvd.

Newark, NJ 07102

**Re: Application of the Township of Nutley for a Determination of Mount Laurel Compliance**  
**Docket No.: ESX-L-\_\_\_-15**  
***Our File No.: 475-004***

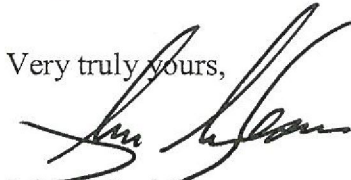
Dear Sir or Madam:

This firm represents Petitioner, the Township of Nutley ("the Township"), in the above-captioned matter. Enclosed for filing are an original and two (2) copies of: (i) a Case Information Statement; (ii) Complaint for Declaratory Judgement; (iii) Notice of Motion for Temporary Immunity; (iv) Brief; (v) Certification of Paul Ricci, P.P., A.I.C.P., with annexed exhibits; (vi) proposed Form of Order; and (vii) Certification of Service.

Kindly return a stamped, filed copy of each in the enclosed self-addressed, stamped envelope. You may charge our Account No. 142409 for this filing.

Please contact me if you require anything further.

Very truly yours,



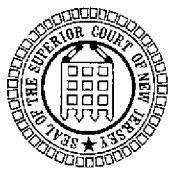
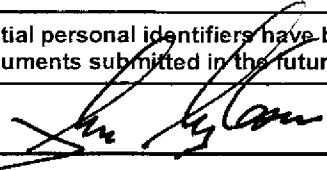
John P. Inglesino

JPI/dwo

Encls.

cc: Service List

**Appendix XII-B1**

|                                                                                                                                                                                                                                                                                                                                         |                                                                                                                                                                                                                                                                                             |                                                                                                                                                                                                                                                       |                                                                                                   |                                                              |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------|--------------------------------------------------------------|
|                                                                                                                                                                                                                                                        | <b>CIVIL CASE INFORMATION STATEMENT</b><br><b>(CIS)</b>                                                                                                                                                                                                                                     |                                                                                                                                                                                                                                                       | <b>FOR USE BY CLERK'S OFFICE ONLY</b>                                                             |                                                              |
|                                                                                                                                                                                                                                                                                                                                         | Use for initial Law Division<br>Civil Part pleadings (not motions) under <i>Rule 4:5-1</i><br><b>Pleading will be rejected for filing, under <i>Rule 1:5-6(c)</i>,<br/>         if information above the black bar is not completed<br/>         or attorney's signature is not affixed</b> |                                                                                                                                                                                                                                                       | PAYMENT TYPE: <input type="checkbox"/> CK <input type="checkbox"/> CG <input type="checkbox"/> CA |                                                              |
|                                                                                                                                                                                                                                                                                                                                         |                                                                                                                                                                                                                                                                                             |                                                                                                                                                                                                                                                       | CHG/CK NO.                                                                                        |                                                              |
|                                                                                                                                                                                                                                                                                                                                         |                                                                                                                                                                                                                                                                                             |                                                                                                                                                                                                                                                       | AMOUNT:                                                                                           |                                                              |
|                                                                                                                                                                                                                                                                                                                                         |                                                                                                                                                                                                                                                                                             |                                                                                                                                                                                                                                                       | OVERPAYMENT:                                                                                      |                                                              |
|                                                                                                                                                                                                                                                                                                                                         |                                                                                                                                                                                                                                                                                             | BATCH NUMBER:                                                                                                                                                                                                                                         |                                                                                                   |                                                              |
| ATTORNEY / PRO SE NAME<br>John P. Inglesino                                                                                                                                                                                                                                                                                             |                                                                                                                                                                                                                                                                                             | TELEPHONE NUMBER<br>(973) 947-7111                                                                                                                                                                                                                    |                                                                                                   | COUNTY OF VENUE<br>Essex <span style="float:right;">▼</span> |
| FIRM NAME (if applicable)<br>Inglesino, Webster, Wyciskala & Taylor, LLC                                                                                                                                                                                                                                                                |                                                                                                                                                                                                                                                                                             |                                                                                                                                                                                                                                                       | DOCKET NUMBER (when available)                                                                    |                                                              |
| OFFICE ADDRESS<br><br>600 Parsippany Road, Suite 204<br>Parsippany, NJ 07054                                                                                                                                                                                                                                                            |                                                                                                                                                                                                                                                                                             |                                                                                                                                                                                                                                                       | DOCUMENT TYPE<br>Declaratory Complaint                                                            |                                                              |
|                                                                                                                                                                                                                                                                                                                                         |                                                                                                                                                                                                                                                                                             |                                                                                                                                                                                                                                                       | JURY DEMAND <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO                   |                                                              |
| NAME OF PARTY (e.g., John Doe, Plaintiff)<br><br>Township of Nutley                                                                                                                                                                                                                                                                     |                                                                                                                                                                                                                                                                                             | CAPTION<br><br>In the Matter of the Application of the Township of Nutley for a<br>Determination of Mount Laurel Compliance                                                                                                                           |                                                                                                   |                                                              |
| CASE TYPE NUMBER<br>(See reverse side for listing)<br><br>303                                                                                                                                                                                                                                                                           | HURRICANE SANDY<br>RELATED?<br><input type="checkbox"/> YES <input checked="" type="checkbox"/> NO                                                                                                                                                                                          | IS THIS A PROFESSIONAL MALPRACTICE CASE? <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO<br>IF YOU HAVE CHECKED "YES," SEE N.J.S.A. 2A:53A-27 AND APPLICABLE CASE LAW<br>REGARDING YOUR OBLIGATION TO FILE AN AFFIDAVIT OF MERIT. |                                                                                                   |                                                              |
| RELATED CASES PENDING?<br><input type="checkbox"/> YES <input checked="" type="checkbox"/> NO                                                                                                                                                                                                                                           |                                                                                                                                                                                                                                                                                             | IF YES, LIST DOCKET NUMBERS                                                                                                                                                                                                                           |                                                                                                   |                                                              |
| DO YOU ANTICIPATE ADDING ANY PARTIES<br>(arising out of same transaction or occurrence)?<br><input type="checkbox"/> YES <input checked="" type="checkbox"/> NO                                                                                                                                                                         |                                                                                                                                                                                                                                                                                             | NAME OF DEFENDANT'S PRIMARY INSURANCE COMPANY (if known)<br><br><input type="checkbox"/> NONE<br><input type="checkbox"/> UNKNOWN                                                                                                                     |                                                                                                   |                                                              |
| <b>THE INFORMATION PROVIDED ON THIS FORM CANNOT BE INTRODUCED INTO EVIDENCE.</b>                                                                                                                                                                                                                                                        |                                                                                                                                                                                                                                                                                             |                                                                                                                                                                                                                                                       |                                                                                                   |                                                              |
| CASE CHARACTERISTICS FOR PURPOSES OF DETERMINING IF CASE IS APPROPRIATE FOR MEDIATION                                                                                                                                                                                                                                                   |                                                                                                                                                                                                                                                                                             |                                                                                                                                                                                                                                                       |                                                                                                   |                                                              |
| DO PARTIES HAVE A CURRENT, PAST OR<br>RECURRENT RELATIONSHIP?<br><input type="checkbox"/> YES <input checked="" type="checkbox"/> NO                                                                                                                                                                                                    |                                                                                                                                                                                                                                                                                             | IF YES, IS THAT RELATIONSHIP:<br><input type="checkbox"/> EMPLOYER/EMPLOYEE <input type="checkbox"/> FRIEND/NEIGHBOR <input type="checkbox"/> OTHER (explain)<br><input type="checkbox"/> FAMILIAL <input type="checkbox"/> BUSINESS                  |                                                                                                   |                                                              |
| DOES THE STATUTE GOVERNING THIS CASE PROVIDE FOR PAYMENT OF FEES BY THE LOSING PARTY? <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO                                                                                                                                                                               |                                                                                                                                                                                                                                                                                             |                                                                                                                                                                                                                                                       |                                                                                                   |                                                              |
| USE THIS SPACE TO ALERT THE COURT TO ANY SPECIAL CASE CHARACTERISTICS THAT MAY WARRANT INDIVIDUAL MANAGEMENT OR<br>ACCELERATED DISPOSITION<br><br>This is a Mount Laurel (affordable housing) matter, through which the Township of Nutley is seeking to comply with its<br>constitutional affordable housing "fair share" obligations. |                                                                                                                                                                                                                                                                                             |                                                                                                                                                                                                                                                       |                                                                                                   |                                                              |
|  DO YOU OR YOUR CLIENT NEED ANY DISABILITY ACCOMMODATIONS?<br><input type="checkbox"/> YES <input checked="" type="checkbox"/> NO                                                                                                                    |                                                                                                                                                                                                                                                                                             | IF YES, PLEASE IDENTIFY THE REQUESTED ACCOMMODATION                                                                                                                                                                                                   |                                                                                                   |                                                              |
| WILL AN INTERPRETER BE NEEDED?<br><input type="checkbox"/> YES <input checked="" type="checkbox"/> NO                                                                                                                                                                                                                                   |                                                                                                                                                                                                                                                                                             | IF YES, FOR WHAT LANGUAGE?                                                                                                                                                                                                                            |                                                                                                   |                                                              |
| I certify that confidential personal identifiers have been redacted from documents now submitted to the court, and will be<br>redacted from all documents submitted in the future in accordance with <i>Rule 1:38-7(b)</i> .                                                                                                            |                                                                                                                                                                                                                                                                                             |                                                                                                                                                                                                                                                       |                                                                                                   |                                                              |
| ATTORNEY SIGNATURE:                                                                                                                                                                                                                                  |                                                                                                                                                                                                                                                                                             |                                                                                                                                                                                                                                                       |                                                                                                   |                                                              |

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Derek W. Orth, Esq. (001152013)

Attorneys for Petitioner,

The Township of Nutley

IN THE MATTER OF THE  
APPLICATION OF THE TOWNSHIP  
OF NUTLEY FOR A  
DETERMINATION OF MOUNT  
LAUREL COMPLIANCE,

Petitioner.

SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION: ESSEX COUNTY

MOUNT LAUREL ACTION

Docket No.: ESX-L-\_\_\_\_-15

**COMPLAINT FOR DECLARATORY  
JUDGMENT**

Plaintiff, the Township of Nutley (the "Township"), a municipal corporation and body politic organized under the laws of the State of New Jersey, with offices located at 149 Chestnut Street, Nutley, the County of Essex, New Jersey, 07932, by way of Complaint for Declaratory Judgment states:

**Jurisdiction**

1. Jurisdiction is established pursuant to the New Jersey Declaratory Judgment Act, N.J.S.A. 2A:16-50, et seq.
2. Jurisdiction is further established as a result of the March 10, 2015 Supreme Court ruling in In re Adoption of N.J.A.C. 5:96 and 5:97 ex rel. New Jersey Council on Affordable Housing, 221 N.J. 1 (2015) (the "2015 Case").

## **Background**

3. In the seminal 1975 decision of S. Burlington Cnty. N.A.A.C.P. v. Mount Laurel Twp., 67 N.J. 151 (1975), cert. den. 423 U.S. 808 [hereinafter "Mount Laurel I"], the Supreme Court declared that the State Constitution requires each municipality to "plan and provide, by its land use regulations, the reasonable opportunity for an appropriate variety and choice of housing, including . . . low and moderate cost housing, to meet the needs, desires and resources of all categories of people who may desire to live within its boundaries."

4. In 1983, the Supreme Court affirmed its holding in Mount Laurel I and created a procedure to enforce its mandate *vis a vis* the "builder's remedy," by which builders could file suit for the opportunity to construct housing at higher densities than a municipality would otherwise allow. See S. Burlington Cnty. N.A.A.C.P. v. Twp. of Mount Laurel, 92 N.J. 158 (1983)[hereinafter "Mount Laurel II"].

5. On or about July 2, 1985, in response to Mount Laurel II, the Legislature enacted the Fair Housing Act, N.J.S.A. 52:27(D)-301 to 329.4 ("FHA"), which codified the Mount Laurel doctrine, established the Council of Affordable Housing ("COAH"), and provided municipalities with a voluntary administrative process through which they could satisfy their Mount Laurel obligations in lieu of litigating exclusionary zoning lawsuits in the courts.

6. As the sole agency in charge of administering the FHA, COAH was vested with primary responsibility for assigning and determining municipal affordable housing obligations by (i) dividing the State into housing regions; (ii) estimating the present and prospective need for low and moderate income housing at both the State and regional levels; and (iii) adopting criteria and guidelines that would enable a municipality to determine its fair share of its region's present and prospective housing need. N.J.S.A. 52:27(D)-307.

7. In addition, under the FHA, one of COAH's responsibilities is to adjust municipal fair share based upon available vacant and developable land, infrastructure considerations or other environmental factors, and to ensure that the pattern of development throughout the State was not inconsistent with the planning designations adopted by the State Planning Commission pursuant to N.J.S.A. 52:18A-199(a).

8. Municipalities could elect to participate in the administrative process overseen by COAH by adopting and filing a Housing Element and Fair Share Plan ("HEFSP") with COAH that addressed the municipal present and prospective housing needs with particular attention to low and moderate income housing. N.J.S.A. 52:27D-310.

9. Any municipality that filed a HEFSP with COAH could thereafter petition COAH for substantive certification of its HEFSP and land use ordinances or institute an action for declaratory judgment granting it repose in the Superior Court. N.J.S.A. 52:27(D)-313 to -314.

10. If COAH determined that the petitioning municipality's HEFSP was consistent with its rules and criteria, not inconsistent with the achievement of the low and moderate housing income housing needs of the region, and made achievement of the municipality's fair share of low and moderate income housing realistically possible, then COAH was required to issue a substantive certification of the petitioning municipality's HEFSP. Id.

11. Upon a municipality's receipt of substantive certification of its HEFSP or entry of a Judgment of Compliance and Repose, said municipality's land use ordinances were rendered presumptively valid in any exclusionary zoning litigation for a set period of time. N.J.S.A. 52:27(D)-309 to -316.

### **The First and Second Round Rules**

12. In accordance with its legislative mandate, COAH adopted First Round and Second Round rules establishing municipalities' affordable housing obligations for two (2) six-year periods, from 1987 to 1993, and from 1993 to 1999, respectively. N.J.A.C. 5:92-1.1 to 18.20; N.J.A.C. 5:93-1.1 to 15.1.

13. Under the First Round Rules, COAH utilized several surrogates to establish present need, such as overcrowding, age of unit, and lack of plumbing, kitchen or heating facilities as indicators of dilapidated housing. N.J.A.C. 5:92. The excess present need in urban aid municipalities was reallocated to all municipalities within the regional growth area. Cost-burdened households were not a component of present need, and prospective need was calculated through statistical analysis designed to project the number of low and moderate income households that would form between 1987 and 1993. Prospective need was then allocated to all municipalities within each region, excepting urban aid municipalities, based on employment within the municipalities, projected employment within the municipality, the percentage of the municipality in a growth area, and the municipality's wealth. Id.

14. The First Round methodology utilized by COAH resulted in a total statewide present and prospective need for the years 1987 to 1993 of approximately 200,000 units, but after factoring in secondary sources of housing supply and demand, this amount was reduced to 147,707 units.

15. Under the Second Round Rules, COAH continued to utilize the same methodology previously employed under the First Round Rules. For a variety of reasons, including information gleaned from the 1990 Census which indicated that there were considerably fewer substandard units occupied by low and moderate income households than prospectively anticipated during the

First Round period, the total statewide affordable housing need for the Second Round was reduced to approximately 86,000 affordable units. County of Morris v. Riverview Condos., Inc., 304 N.J. Super. 322, 336-67 (App. Div. 1997), certif. denied, 152 N.J. 364 (1998).

16. Under the Second Round Rules, COAH also permitted municipalities to reduce their fair share figures with a variety of credits and adjustments, including: (i) credits for affordable housing constructed between 1980 to 1986, N.J.A.C. 5:93-2.15, -3.2; (ii) credits for substantial compliance, N.J.A.C. 5:93-3.6; (iii) a potential two-for-one credit for rental housing, N.J.A.C. 5:93-5.15; and (iv) adjustments for municipalities that lacked sufficient vacant land or sufficient access to water and sewer, N.J.A.C. 5:93-4.2, -4.3. In addition, municipalities were permitted to satisfy up to twenty-five percent (25%) of their fair share obligation through age-restricted affordable housing. N.J.A.C. 5:93-5.14.

17. The First and Second Rules were subject to several legal challenges, most of which were unsuccessful. See, e.g., Carlton Homes, Inc. v. Council on Affordable Hous., 244 N.J. Super. 438 (App. Div. 1990), certif. denied, 127 N.J. 326 (1991) (upholding regulations that permitted municipalities to receive credit for accessory apartments, granting bonus credits for rental units, refusing to reallocate credits granted to one (1) municipality to increase the fair share of other municipalities in the region, amongst others); Van Dalen v. Washington Township, 120 N.J. 234 (1990) (upholding COAH's decision to rely on planning designations in the State Development Guide Plan); Township of Bernards v. Dep't. of Cmty. Affairs, 233 N.J. Super. 1 (App. Div.); certif. denied, 118 N.J. 194 (1989) (upholding a municipality's wealth as a valid allocation factor to increase fair share).

### **Third Round Rules**

18. In October 2003, after a long period of inexplicable delay, COAH first proposed Third Round substantive and procedural rules. See 35 N.J.R. 4636(a); 35 N.J.R. 4700(a).

19. Those rules remained un-adopted for nearly one year and, in August 2004, COAH re-proposed both the substantive and procedural Third Round Rules and adopted the same on December 20, 2004 (the "2004 Third Round Rules").

20. The 2004 Third Round Rules were designed to permit municipalities to meet a cumulative fair share obligation beginning in 1987 and ending on January 1, 2014. There were three (3) major components of this cumulative fair share, including: (i) a rehabilitation obligation (previously known as a municipality's indigenous need in the prior Rounds); (ii) a prior round obligation (from 1987 to 1999), satisfaction of which was governed by the Second Round Rules; and (iii) a growth share obligation, which was calculated based upon housing need generated by projected statewide job growth and residential growth from 1999 through 2014. The condensed delivery period for the 2004 Third Round Rules was set for ten (10) years, from January 1, 2004 to January 1, 2014.

21. Under the 2004 Third Round Rules, COAH estimated that there were approximately 60,000 substandard units statewide in need of rehabilitation, 40,000 of which were occupied by low and moderate income households. COAH reduced the rehabilitation share with two (2) calculations, including a reallocated present need credit of approximately 8500 units and a spontaneous rehabilitation credit of approximately 7300 units, thus arriving at an actual statewide rehabilitation share of approximately 25,000 units.

22. COAH also calculated the statewide new construction obligation for the prior round component as approximately 77,500 units, and estimated that of these units, approximately 45,000 new units had already been built.

23. Using population projections from the Office of Smart Growth, now the Office of Planning Advocacy, COAH estimated that the State's expected population growth would equate to approximately 335,096 new households, approximately forty percent (40%) of which (or 140,365 households) would be in need of affordable housing. By reducing this figure through secondary sources of supply and demand, i.e., filtering, spontaneous rehabilitation, residential conversions, etc., COAH arrived at an adjusted projected total statewide need of 52,726 affordable units.

24. COAH then apportioned each municipality's growth share of the 52,726 new units identified in the adjusted need calculation by mandating the development of one (1) affordable unit for every eight (8) new market rate residential units projected, plus one (1) affordable unit for every twenty-five (25) newly created job. N.J.A.C. 5:94-2.1(d). In lieu of each municipality tracking new jobs or additional jobs created within their borders, COAH determined that various categories of new construction would create varying numbers of jobs, depending upon the category, or use group, of the construction, and assigned set figures for employment growth. Id.

25. As such, under the growth share methodology employed for the 2004 Third Round Rules, municipalities were not required to provide a specific predetermined number of affordable housing units, but instead were only mandated to provide additional affordable housing if job or residential growth actually occurred in the municipality.

26. The 2004 Third Round Rules were challenged and, on January 25, 2007, the Appellate Division invalidated various aspects of those regulations and remanded considerable

portions of the rules to COAH with the direction to adopt revised rules. In re Adoption of N.J.A.C. 5:94 & 5:95, 390 N.J. Super. 1, (App. Div.), certif. denied, 192 N.J. 71 (2007) (the “2007 Case”).

27. On January 22, 2008, COAH proposed and published revised Third Round Rules in the New Jersey Register. 40 N.J.R. 237.

28. On May 6, 2008, COAH adopted the revised Third Round Rules and advised that the new regulations would be published in the June 2, 2008 New Jersey Register, thereby becoming effective.

29. On May 6, 2008, COAH simultaneously proposed amendments to the revised Third Round Rules it had just adopted. Those amendments were published in the June 16, 2008 New Jersey Register, 40 N.J.R. 3373 (Procedural N.J.A.C. 5:96); 40 N.J.R. 3374 (Substantive N.J.A.C. 5:97). Those amendments were later adopted on September 22, 2008, and made effective on October 20, 2008 (the “2008 Third Round Rules”).

30. COAH’s 2008 Third Round Rules presented a modified growth share approach that relied upon projections of the number of housing units that would be built, and the number of jobs that would result from new non-residential development, in each municipality between 1999 and 2018. N.J.A.C. 5:97-2.2(d), -2.4(a).

31. Based upon these projected growth figures, COAH assigned each municipality a housing obligation proportional to the projected growth within the municipality. Specifically, COAH mandated the construction of one (1) affordable unit for every five (5) units of projected market rate units, and one (1) affordable unit for every sixteen (16) jobs projected to be created. N.J.A.C. 5:97-2.2(d).

32. COAH also attempted to address the major deficiency identified in the 2004 Third Round Rules, i.e., that municipalities could avoid providing affordable housing by adopting land

use regulations that restricted growth, by directing municipalities to continue to provide a realistic opportunity for affordable housing even if the actual growth share obligation was less than the projected growth share obligation. N.J.A.C. 5:97-2.2(e), -2.4.

33. However, while the 2008 Third Round Rules ostensibly required municipalities to plan in accordance with their projected growth, it still based municipalities' actual obligation on actual growth and, further, permitted municipalities to request a waiver from a specific requirement of the Rules at any time. N.J.A.C. 5:96-15.1.

### **The Transfer of Jurisdiction to the Courts**

34. N.J.A.C. 5:96 and 5:97, as adopted in 2008, were subsequently challenged in an appeal entitled In the Matter of the Adoption of N.J.A.C. 5:96 and 5:97 by the New Jersey Council on Affordable Housing, 416 N.J. Super. 462 (App. Div. 2010) (the "2010 Case"). In its October 8, 2010 decision, the Appellate Division determined, amongst other things, that the 2008 modified growth share methodology was invalid, and directed COAH to adopt revised Third Round rules utilizing methodologies similar to the ones utilized in the First and Second Rounds, i.e., for the period of 1987 through 1999.

35. On September 26, 2013, the Supreme Court affirmed the Appellate Division's invalidation of the third iteration of the Third Round Rules, sustained its determination that the growth share methodology was invalid, and ordered COAH to adopt new regulations by February 26, 2014, based upon the methodology utilized in the First and Second Rounds. In the Matter of the Adoption of N.J.A.C. 5:96 and 5:97 by the New Jersey Council on Affordable Housing, 215 N.J. 578 (2013) (the "2013 Case").

36. On March 14, 2014, the Court granted COAH's motion for an extension of the time frame to promulgate a third iteration of Third Round Rules, subject to certain conditions.

Specifically, the March 14, 2014 ruling directed COAH to meet firm deadlines for the adoption of the revised Third Round Rules and for each interim rule-making step required by the Administrative Procedure Act, N.J.S.A. 52:14B-1 to -24, and further indicated that the Court would entertain applications to lift the administrative protections afforded to municipalities if COAH remained non-compliant.

37. On April 30, 2014, COAH's board met and voted to propose its new Third Round Rules. The proposed Third Round Rules were subsequently published in the New Jersey Register on June 2, 2014, and public hearings were held on the matter.

38. On October 20, 2014, COAH's board met again to vote on the third iteration of the Third Round Rules, but deadlocked 3-3 on the vote and consequently failed to adopt the proposed Rules.

39. Due to COAH's failure to adopt the revised regulations and subsequent inaction, Fair Share Housing Center ("FSHC"), a party in both the 2010 and 2013 Cases, filed a motion to enforce litigant's rights with the New Jersey Supreme Court.

40. On March 10, 2015, the New Jersey Supreme Court issued its decision on FSHC's motion to enforce litigant's rights, found that COAH's administrative process had become non-functioning and, consequently, returned primary jurisdiction over affordable housing matters to the trial courts. In re Adoption of N.J.A.C. 5:96 and 5:97 ex rel. New Jersey Council on Affordable Housing, 221 N.J. 1 (2015) (the "2015 Case").

41. In so doing, the Supreme Court established a fluid transitional process for municipalities, like the Township, that had previously participated in good faith in COAH's administrative process. This process explicitly permits such municipalities to file a declaratory judgment action in Superior Court seeking to declare their HEFSPs as being constitutional

compliant and seeking similar protections that municipalities would have received if they had voluntarily participated in COAH's administrative process.

42. In explaining the transitional process contemplated, the Supreme Court equated these "Participating Municipalities," including the Township, to those municipalities in 1985 that had sought to transfer jurisdiction from the Court to the newly created COAH and switch the forum from a judicial one to an administrative one under N.J.S.A. 52:27D-316.

43. The Supreme Court also explicitly authorized the Mount Laurel courts 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 said proceedings.

44. The Supreme Court further held that municipalities which had achieved Third Round substantive certification should deserve an advantage in the contemplated litigation, and directed the trial courts to be generously inclined to grant applications for immunity from exclusionary zoning actions while the declaratory judgment action remained pending with the court.

45. As to the "Participating Municipalities," the Supreme Court declared that such towns should receive similar insulating protections from exclusionary zoning actions as those afforded to municipalities under the FHA that had their exclusionary zoning lawsuits transferred to COAH when the Act was passed.

46. Although the Supreme Court declined to adopt a specific methodology or formula to calculate the Third Round affordable housing obligations of the municipalities and instead left that determination to the fifteen (15) designated Mount Laurel Judges, it did provide some guidance by reiterating its endorsement of the previous methodologies employed in the First and Second Round Rules as the template to establish Third Round affordable housing obligations, and

as detailed above, by treating Participating Municipalities filing Declaratory Judgment actions in the same way that the 1985 FHA treated municipalities transitioning from the judicial to the administrative process.

### **The Township's Historical Compliance with Its Mount Laurel Obligations**

47. The Township is located in the northeast quadrant of Essex County in close proximity to New York City. As an Essex County municipality, the Township is located within COAH's Region II, which also includes the Counties of Morris, Union, and Warren. It is bounded by U.S. Route 21 to the east and the Garden State Parkway to the west, with a population of approximately 27,000 residents.

48. The Township accommodates a wide variety of housing types, including single-family, two-family and multi-family, as part of its residential land use plan. Approximately seventy-seven percent (77%) of the Township's total land area is dedicated to residential land use.

49. The Township is an established suburban residential community, or "bedroom community," for the more urban areas of northern New Jersey and New York City. The Township is renowned for maintaining one of the most extensive public park systems in Essex County, which accounts for approximately six percent (6%) of its land use.

50. The Township has long focused on providing affordable housing to persons of low and moderate income. Under COAH's First Round Rules, the Township was assigned an estimated allocation of 608 units, adjusted by a series of credits to 396 units. Of these 396 units, 263 were identified as indigenous need, while the remaining 133 units were comprised of the Township's fair share of the regional need.

51. Under COAH's Second Round Rules, the Township was assigned a cumulative (1987-1999) prior round obligation of twenty-nine (29) units, taking into account certain bonuses

and reductions. In 1998, the Township prepared and adopted a Second Round HEFSP, and subsequently petitioned COAH for substantive certification.

52. As set forth in the Second Round petition, the Township fully satisfied its cumulative prior round obligation, with 195 units of surplus credits, as follows:

- a. Nutley Parkside Apartments, 8 eligible age-restricted credits for a 133-unit development;
- b. Center for Family Support group home, 5 eligible family rental credits;
- c. Arc of Livingston Community Residence, 5 family rental credits;
- d. Project Live I group home, 3 family rental credits;
- e. Rental bonus credits, 8 eligible credits from the group homes identified above; and
- f. Surplus credits, 195-unit surplus of age-restricted housing credits available for application to the Township's Third Round obligations, subject to certain restrictions.

53. By resolution dated September 2, 1998, the Township's Second Round HEFSP received substantive certification from COAH.

54. While COAH delayed adopting Third Round Rules, in 2004, the Township filed a motion to extend its Second Round substantive certification and was granted extended certification by COAH on February 9, 2005.

55. On June 21, 2005, the Township submitted a development fee ordinance and a resolution requesting COAH's review and approval of the ordinance.

56. On December 20, 2005, while the Township's proposed development fee ordinance was pending with COAH, the Township filed its first Third Round petition for substantive certification of its HEFSP prepared in accordance with the 2004 Third Round Rules.

57. Although no objections to the Township's petition were filed, as a result of the ongoing litigation regarding the 2004 Third Round Rules, the Township's first Third Round petition was never certified by COAH.

58. By resolution dated March 9, 2006, COAH approved the Township's proposed development fee ordinance with minor revisions, thereby creating a dedicated revenue source for affordable housing and establishing the Township's Affordable Housing Trust Fund.

59. In 2008, COAH adopted its second iteration of the Third Round Rules, and assigned to the Township the following obligations under the modified growth share methodology: (i) a 66-unit rehabilitation obligation; (ii) a previously-satisfied 29-unit prior round obligation; and (iii) a 114-unit modified growth share obligation.

60. The Township promptly prepared a revised Third Round HEFSP and, on July 13, 2009, petitioned COAH for substantive certification.

61. In its HEFSP, the Township requested a reduction of its 66-unit rehabilitation obligation to fifty (50) total units based upon an exterior housing survey which indicated that there were only twenty-four (24) units in need of rehabilitation in the Township, plus credit for twenty-six (26) units that were previously rehabilitated by the Township since April 1, 2000. The Township then proposed to satisfy its remaining 24-unit rehabilitation obligation through its continued participation in the Essex County Home Improvement Program.

62. The Township proposed to satisfy its 114-unit modified growth share obligation through the following means:

- a. 29 surplus credits from prior rounds;
- b. 3 family rental credits from an existing three-bedroom rental group home;
- c. 8 credits from a proposed special needs rental group home;
- d. 47 credits from a proposed 47-unit family rental site; and
- e. 29 family rental bonus credits from a proposed family rental site.

63. In summary, the Township proposed to provide 116 units of low and moderate income housing, thereby exceeding its unchallenged Round Three projected growth share obligation by two (2) units.

64. In conjunction with its petition for Third Round substantive certification, the Township also submitted a Spending Plan to COAH for review and approval.

65. While the Township's petition lay dormant with COAH, the Township amended its development fee ordinance and received COAH approval of the same on February 8, 2010.

66. In consultation with COAH's staff, the Township also updated and revised its Spending Plan and submitted same for approval on January 17, 2012. The 2012 Spending Plan detailed the following revenues:

- a. \$68,624.26 in collected revenues as of December 31, 2010;
- b. \$74,480.59 in additional revenue through 2018; and
- c. \$143,104.85 in total projected revenue through 2018.

67. The Township's 2012 Spending Plan also proposed the following expenditures through 2018:

- a. \$42,931.46 for affordability assistance;
- b. \$28,620.97 in administrative expenses; and
- c. \$71,552.42 in rehabilitation expenses.

68. By letter dated February 6, 2012, COAH approved the Township's 2012 Spending Plan.

69. Due to pending litigation regarding the 2008 Third Round Rules, the Township's revised petition for substantive certification of its 2009 Third Round HEFSP was never certified by COAH prior to the invalidation of the 2008 Third Round Rules.

### **COUNT ONE**

#### **(DECLARATORY RELIEF, CONSTITUTIONAL COMPLIANCE)**

70. The Township repeats and realleges each and every allegation previously set forth in this Complaint as if set forth at length herein.

71. Pursuant to the Declaratory Judgments Act, N.J.S.A. 2A:16-50, et seq., and the 2015 Case, the Township has a right to a declaratory judgment verifying and confirming the Township's full compliance with its constitutional affordable housing obligations..

**WHEREFORE**, Petitioner, the Township of Nutley, respectfully requests that the Court enter an Order:

- a. Exercising jurisdiction over the compliance by the Township with its constitutional affordable housing obligations;
- b. Declaring that the Township has fully discharged its constitutional affordable housing obligations and is granted protection and repose against exclusionary zoning litigation;
- c. Issuing the Township a Judgment of Compliance and Repose for a period of no less than ten (10) years from its date of entry; and
- d. Granting the Township such additional relief as the Court deems equitable and just.

## **COUNT TWO**

### **(FIVE MONTH PERIOD OF TEMPORARY IMMUNITY TO PREPARE A HOUSING ELEMENT AND FAIR SHARE PLAN)**

72. The Township repeats and realleges each and every allegation set forth in the preceding Paragraphs as if set forth herein at length.

73. In the 2015 Case, the Supreme Court equated participating municipalities who file Declaratory Judgment actions, such as the Township, to those municipalities who transferred their litigated cases to COAH shortly after the passage of the FHA and were entitled under N.J.S.A. 52:27D-316 to a five (5) month period from the date of transfer or the date of the promulgation of criteria and guidelines by COAH, whichever occurred later, to prepare a HEFSP.

74. The Supreme Court in the 2013 Case and in the 2015 Case declined to establish a specific methodology or formula to calculate Third Round affordable housing obligations of the municipalities and instead left that determination to the 15 Mount Laurel Judges, directing that the methodology or formula established should be similar to that employed in the First and Second Round rules.

75. As a result of the Supreme Court's actions in the 2013 Case and the 2015 Case, there are insufficient criteria and guidelines established by the Court at this time for the Township to prepare a compliant HEFSP which this Court could evaluate to determine its constitutional compliance.

76. In the 2015 Case, the Supreme Court afforded wide discretion to the fifteen (15) Mount Laurel Judges in addressing these Declaratory Judgment actions and enabled the trial judges specifically to grant municipalities a five (5) month period within which to prepare a compliant HEFSP in accordance with the approved methodology and formula established by said trial judges.

77. By equating these Participating Municipalities to those municipalities who in 1985 transferred their litigated cases from the Court to COAH, and then had a five (5) month period from the date of transfer or the date that guidelines and regulations were adopted by COAH, whichever was later, the Township is entitled to the opportunity to prepare and adopt a HEFSP within five (5) months from the date that the Court establishes the methodology and formula which will quantify the affordable housing obligation of the Township and allow for the preparation and adoption of a constitutionally compliant HEFSP.

**WHEREFORE**, Petitioner, the Township of Nutley, respectfully requests that the Court enter an Order:

- a. Granting the Township a five (5) month period from the date that a methodology or formula is established by this Court, or otherwise, to prepare a constitutionally compliant HEFSP that incorporates the formula and methodology approved by this Court; and
- b. Granting such additional relief as the Court deems equitable and just.

### **COUNT THREE**

#### **(REQUEST FOR IMMUNITY)**

78. The Township repeats and realleges each and every allegation set forth in the preceding Paragraphs as if set forth herein at length.

79. In the 2015 Case, the Supreme Court afforded Participating Municipalities who filed Declaratory Judgment actions seeking to verify and confirm their constitutional compliance with their affordable housing obligations the right to seek temporary immunity from third party lawsuits while pursuing these Declaratory Judgment actions and the development of compliant HEFSPs.

80. The Township, by virtue of the filing of the within action, is eligible to seek and obtain immunity from third party lawsuits while pursuing its Declaratory Judgment action pursuant to the 2015 Case.

**WHEREFORE**, Petitioner, the Township of Nutley, respectfully requests that the Court enter an Order:

- a. Granting temporary immunity from third party lawsuits against the Township from the date of the filing of the instant Declaratory Judgment action until this Court issues a Final Judgment of Compliance and Repose to the Township for its HEFSP formulated, adopted and approved in accordance with the applicable formula and methodology established by this Court; and
- b. Granting such additional relief as the Court deems equitable and just.

#### **COUNT FOUR**

##### **(AMENDMENTS TO APPROVED SPENDING PLANS)**

82. Petitioner, the Township of Nutley, repeats and realleges each and every allegation set forth in the Preceding Paragraphs as if set forth herein at length.

83. As a result of the 2015 Trust Fund Case, and on information and belief, COAH has been divested of, and/or has relinquished jurisdiction over approval of any amendments to the Township's Spending Plan.

84. On February 6, 2012, COAH approved the Township's revised 2012 Spending Plan, but the Township anticipates that it may desire to amend said Spending Plan to fund the development of affordable housing throughout the pendency of this litigation.

85. It is also anticipated that, as part of the mechanism to satisfy the Township's affordable housing obligations, as determined by this Court, an amendment to the 2012 Spending Plan previously approved by COAH may be required.

86. The Township desires that this Court assume jurisdiction to approve any such amendment to its 2012 Spending Plan in order to effectuate and implement its HEFSP approved by this Court and any future amendments pending any reversion of jurisdiction to COAH, so as to allow the Township the ability to utilize and expend its Affordable Housing Trust Funds to advance its affordable housing plans and satisfy its affordable housing obligation.

**WHEREFORE**, Petitioner, the Township of Nutley, respectfully requests that the Court enter an Order:

- a. Assuming and asserting jurisdiction for the approval of any amendment to the Spending Plan previously approved by COAH in the same manner as COAH would have considered and approved such amendments; and
- b. Granting such additional relief as the Court deems equitable and just.

**DESIGNATION OF TRIAL COUNSEL**

Pursuant to R. 4:25-4, notice is hereby given that John P. Inglesino, Esq., is designated as trial counsel for Petitioner, the Township of Nutley, in the above captioned matter.

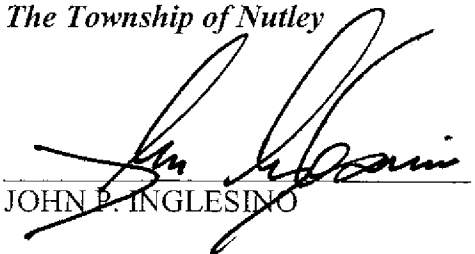
**CERTIFICATION PURSUANT TO R. 4:5-1**

Pursuant to R. 4:5-1, I hereby certify that the matter in controversy is not the subject matter of any other action pending in any Court or of a pending arbitration or administrative proceeding, and that no other action or arbitration or administrative proceeding is contemplated, except that Petitioner has previously submitted a Petition for Third Round Substantive Certification to the New Jersey Council on Affordable Housing, who, as a result of the 2015 Case, has been divested of jurisdiction which has been assumed by this Court as a result of the filing of the within Declaratory Judgment action.

I hereby certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

INGLESINO, WEBSTER,  
WYCISKALA & TAYLOR, LLC  
*Attorneys for Petitioner,  
The Township of Nutley*

By:

  
JOHN P. INGLESINO

Date: July 8, 2015