AAMHMT PROPERTY LLC, Plaintiff-Respondent, vs. TOWNSHIP OF MIDDLETOWN; MIDDLETOWN TOWNSHIP COMMITTEE; Defendants-Appellants. -and- MIDDLETOWN TOWNSHIP PLANNING BOARD; and B. DUVA DEVELOPMENT, LLC, Defendants.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-000844-24T2 **CIVIL ACTION** ON APPEAL FROM: SUPERIOR COURT, LAW DIVISION, MONMOUTH COUNTY DOCKET NO. MON-L-2588-23 SAT BELOW: HON. LINDA GRASSO-JONES, J.S.C.

BRIEF ON BEHALF OF DEFENDANTS-APPELLANTS TOWNSHIP OF MIDDLETOWN AND MIDDLETOWN TOWNSHIP COMMITTEE

SPIRO HARRISON & NELSON LLC
Brian M. Nelson, Esq. (Id #01352003)
Dana Citron, Esq. (Id #016962005)
200 Monmouth Street, Suite 310
Red Bank, NJ 07701
(732) 784-1470
bnelson@shnlegal.com
dcitron@shnlegal.com
Attorneys for Defendants-Appellants, Township of Middletown and Middletown Township Committee

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PRELIMINARY STATEMENT

This case presents a conflict between three state constitutional interests: the judicially-created Mount Laurel doctrine, a municipality's inherent and sovereign power of eminent domain, and a municipality's power to redevelop blighted properties, which is well-settled in New Jersey jurisprudence. The court below created new law, holding that when a municipality is deemed non-compliant under the Mount Laurel doctrine, it automatically forfeits its authority to properly exercise its condemnation or redevelopment powers to advance sound land use planning principles. In so holding, the court improperly enjoined Defendants-Appellants Township of Middletown and Middletown Township Committee (together, "Middletown" or the "Township") from taking ***any*** action towards the condemnation or redevelopment (even in the absence of condemnation) of the subject property (the "Property") until a determination is made in Plaintiff-Respondent AAMHMT Property LLC's ("Plaintiff") builder's remedy litigation. The court below erroneously held that it can erase a municipality's condemnation and redevelopment powers whenever the municipality is non-compliant with Mount Laurel so long as the court believes the municipality's proposed public use is not as beneficial as affordable housing.

First, the court erred by finding that Plaintiff met its burden of proving the prerequisites for injunctive relief by clear and convincing evidence.

Second, the court below incorrectly applied New Jersey's eminent domain laws. A municipality can exercise discretion in its decision to use its eminent domain power so long as it has proffered a legitimate public use and has exercised good faith. In such case, Supreme Court authority precludes the court from interfering with the municipality's exercise of its discretion. Here, however, the court created new law, holding that, regardless of whether a legitimate public use and good faith exist, a municipality that is constitutionally non-compliant under Mount Laurel loses its power of eminent domain. There is no exception in our jurisprudence for its holding that if a municipality is non-compliant with Mount Laurel, it forfeits its condemnation and redevelopment powers explicitly embedded in our state's constitution.

Third, the trial court erroneously weighed Middletown's proposed public use of commercial redevelopment against Plaintiff's proposed residential use and held that any residential development which includes an affordable component must prevail. Under the court's ruling, so long as the court believes a municipality's proposed public use is not as beneficial as an inclusive residential housing development, the municipality cannot even attempt to exercise its constitutional rights of eminent domain and redevelopment. This

ruling conflicts with the State Constitution and laws that grant municipalities the authority to make decisions regarding condemnation and redevelopment, as well as Supreme Court precedent that forbids a court from considering a property owner's proposed competing use when the property owner lacks the power to condemn.

Finally, the trial court erred by prospectively enjoining governmental action rather than allowing them to be taken, challenged, and decided on their merits in the normal course. Under the court's ruling, a property owner need not even defend against a condemnation or redevelopment action because the court's Order prospectively blocks Middletown from even *filing* for condemnation or taking *any* a governmental action to advance redevelopment. The municipality loses its constitutional grant of authority without briefing, legal argument, or a hearing on the merits of those claims, which defies the principles of our justice system.

PROCEDURAL HISTORY

On May 17, 2024, the trial court entered an Order in this builder's remedy action holding that Middletown is not constitutionally compliant with its Mount Laurel Third Round obligation under In re N.J.A.C. 5:96 & 5.97, 221 N.J. 1 (2015). (Da1-Da3). On June 7, 2024, Plaintiff filed an Order to Show Cause, seeking to enjoin Middletown from (1) taking any condemnation-

related action with respect to the Property, (2) designating a redeveloper for the Property, and (3) granting any type of development approval for any land for any purpose other than for inclusionary housing. (Da4-Da8).

On July 8, 2024, the Court enjoined Middletown from taking any further action toward condemnation and designating a redeveloper for the Property pending resolution of this builder's remedy lawsuit or final determination of the requested injunctions. (Da9-Da11; 1T[1]). The court denied reconsideration of that Order on October 4, 2024. (Da12-Da13; 2T[2]). On November 21, 2024, this Court granted Middletown's motion for leave to appeal. (Da14-Da15).

STATEMENT OF FACTS

A. Middletown's Has Been Building and Facilitating the Development of Affordable Housing for Forty Years.

Middletown is economically diverse, and its varied housing stock reflects Middletown's efforts over decades to provide a range of housing opportunities. (See Da26). In the early years of Mount Laurel, between 1985 and 1995, Middletown authorized the development of supportive housing, single-family affordable housing, and senior rental units. (Da47). Its Housing Authority continues to operate over 440 units constructed prior to 1980 and occupied by low- and moderate- income residents. (Da48).

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[1] "T1" refers to Transcript of Order to Show Cause, July 5, 2024.
[2] "T2" refers to Transcript of Motion for Reconsideration, October 4, 2024.

On March 14, 1994, the New Jersey Council on Affordable Housing ("COAH") granted the Township Cycle 1 substantive certification, reflecting COAH's determination that Middletown's Housing Element and Fair Share Plan accorded with the Fair Housing Act and COAH's regulations. (Da48). Middletown proactively and voluntarily implemented its then-current plan, facilitating the development of affordable housing through the early 2000s. (Da48). Middletown also spent millions of dollars entering into Regional Contribution Agreements ("RCAs"), which were permitted by the Fair Housing Act prior to 2005. (Da49).

On December 20, 2005, Middletown first petitioned for Cycle III substantive certification based on the original version of COAH's third round regulations that were later invalidated. (Da50). On December 31, 2008, Middletown filed for substantive certification under COAH's revised Cycle III regulations. (Da50). COAH granted Middletown full substantive certification for its Cycle III plan and concluded that Middletown's plan created a surplus of 105 affordable housing credits. (See Da50.) On October 14, 2009, Middletown became one of only 68 municipalities in the State to be granted full Third Round substantive certification. (Da50). Middletown continued to implement its affordable housing plan for the Third Round and rehabilitated 86

substandard, existing single-family dwellings occupied by low- and moderate-income households. (Da51; Da52).

In 2015, Middletown voluntarily filed a Declaratory Judgment action under Docket No. L-2539-15 as permitted for municipalities who received substantive certification from COAH before its Third Round Rules were invalidated. Middletown hoped to reach an agreement with the Fair Share Housing Center ("FSHC"), and the parties met on numerous occasions to discuss potential properties for inclusionary development. (Da53). When the parties could not reach an agreement, Middletown withdrew from this voluntary process in 2019. (See Da53). Middletown did not withdraw due to any refusal to provide affordable housing, as demonstrated by Middletown's actions in facilitating numerous inclusionary and 100% affordable projects after filing its Declaratory Judgment action. (Da53-Da56). Consistent with its past practice, Middletown continued to facilitate the construction of affordable housing. (See Da53-Da56). Middletown's ongoing efforts and goals are reflected in its March 2023 Master Plan Reexamination Report & Amended Housing Master Plan Element and Open Space, Recreation and Conservation Master Plan Element (the "MPRR"), which outlines its process for determining land most appropriate for construction of low- and moderate- income housing,

including the promotion of mixed-use development to encourage sustainability and smart growth. (Da25; Da35).

B. The Property

One of the affordable housing developments that Middletown facilitated is at the Circus Liquors site, which is the subject of this appeal. As will be discussed in further detail herein, the Circus Liquors site has been subdivided into two parcels: a Residential Tract and a Commercial Tract. The precise subject of this litigation is the Commercial Tract of the Circus Liquors site, known as Block 825, Lot 55.01 on the Township tax maps (the "Property"), on which Plaintiff seeks to build an inclusionary residential development. The Property is currently owned by Mountain Hill, LLC ("Mountain Hill"), and Plaintiff is the contract-purchaser of the Property.

The dispute over developing this Property dates back to 1992, long before Plaintiff sought to purchase this site and use it for inclusionary housing[3]. See id. at 153-56. On June 12, 1992, the New Jersey State Planning Commission prepared the New Jersey State Development and Redevelopment Plan, "Communities of Place," which designated this area along State Highway

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[3] The development of the Circus Liquors site was mired in litigation for decades. Many of the background facts have been set forth in prior reported judicial opinions, as issues concerning this site have been before the Appellate Division on five occasions from 2002 through 2008. See Mountain Hill, L.L.C. v. Twp. of Middletown, 403 N.J. Super. 146, 152-53 (App. Div. 2008) (reciting litigation history), certif. denied, 199 N.J. 129 (2009).

35 and Kings Highway East in Middletown as "a future regional center for dense, **mixed-use** development." Id. at 153 (emphasis added). In 1993-1994, Middletown's Planning Board amended its Master Plan and adopted a zoning ordinance to embrace "the town-center concept advocated by the State" and designate a large swath of land (including the area along State Highway 35) as part of a Planned Development zone. Id. at 154. Between 1993 and 1999, the property owners, with the encouragement of municipal officials, acquired another 50 to 52 contiguous acres for the Town Center project. Ibid. All of this property was transferred to Mountain Hill, the current owner of this parcel. See ibid.

Mountain Hill unveiled a concept plan for a Town Center project in early 2000, consisting of 1,700,000 square feet of retail and office space and over 400 residential units, including 25 affordable housing units. Id. at 155-57. That proposed mixed-use development, however, did not move forward.

In late 2008, Middletown added the Circus Liquors site in its Third Round Housing Element and Fair Share Plan, and Mountain Hill agreed to provide inclusionary housing as part of its project. (Da56; Da60-Da62).

In 2009, Middletown created a single Planned Development zone which encompassed the Circus Liquors site and included both commercial and residential uses with a 25% set aside for affordable housing. (Da56-Da57;

Da63-Da73). Economic conditions in 2009 were not favorable for development, and the properties remained stagnant until 2015, when buyers emerged to purchase the site.

On July 1, 2015, the Planning Board adopted a Resolution granting general development plan approval ("GDP") to Village 35, LP, the then-contract purchaser for the commercial portion of the Circus Liquors site, the Property that is the subject of this lawsuit. (Da57; Da74-Da89). Around that time, Toll Brothers was identified as the contract purchaser for the residential portion of the Circus Liquors site. (Da57; Da74-Da89). As part of negotiations with Mountain Hill, the owner of both portions, Middletown commenced the redevelopment process to facilitate the negotiated mixed-use development. (Da57).

In furtherance of the redevelopment project, on December 18, 2017, Middletown adopted Resolution No. 17-294, which designated the Circus Liquors site as an area in need of redevelopment. (Da57; Da90-Da96). On August 20, 2018, Middletown enacted Ordinance No. 2018-3232, which adopted the Circus Liquors Redevelopment Plan ("Redevelopment Plan") and memorialized the carefully-negotiated compromise with the Property owner and contract purchasers to maintain both residential inclusionary development and commercial development on the Property. (Da58; Da97-Da144).

Importantly for this lawsuit, the Redevelopment Plan required a minor subdivision of the Circus Liquors site into a "Commercial Tract" fronting Route 35 and a "Residential Tract" behind the Commercial Tract. (Da111). The Redevelopment Plan contemplated 320 townhouse units and 80 multifamily units with a 20% set-aside for affordable multi-family housing on the Residential Tract. (Da117). The Commercial Tract was to be developed with commercial uses, highlighting the importance of a pedestrian-friendly, walkable, bikeable area offering food and beverage, entertainment, grocery, restaurants, cafes, and essential services to complement the Residential Tract, including its affordable housing, as well as nearby neighborhoods. (Da114-Da116, Da121). To be clear, Middletown adopted the Redevelopment Plan requiring commercial uses on the Commercial Tract five years before Plaintiff proposed to build an inclusionary residential development on the Property.

As required by the Redevelopment Plan, on January 9, 2019, the Planning Board adopted Resolution No. 2018-105, which approved the "minor subdivision" of the Circus Liquors site into a "Residential Tract" and a "Commercial Tract." (Da58; Da145-Da156). This minor subdivision officially created what had already been memorialized in the Planned Development zone and the newly adopted Redevelopment Plan.

In 2019, Middletown designated Toll Brothers as the redeveloper of the Residential Tract. (Da159). That residential development is comprised of 280 market rate townhouse units and 70 affordable rental units and is nearly complete. Development of the Commercial Tract, however, stalled due to COVID-19, and Mountain Hill let the Property remain stagnant through 2023. (Da58).

By letter dated July 13, 2023, Plaintiff first identified itself as the contract purchaser of the Property/Commercial Tract and requested to "meet with the Township to discuss amending the Redevelopment Plan or rezoning of the Property to allow for an inclusionary development." (Da173-Da175). Plaintiff did not propose any commercial development on this Commercial Tract. (Da173-Da175). Because the Property sat stagnant for the previous five years and Plaintiff was unwilling to consider commercial development on the Commercial Tract, Middletown began evaluating options to protect the Redevelopment Plan and enable the Property to be developed with commercial uses to complement the nearly-completed Residential Tract, as had been carefully negotiated. (See Da176-Da177).

On August 17, 2023, Plaintiff filed a builder's remedy lawsuit to rezone the Property to construct an inclusionary residential development. (Da178-

Da199).[4] However, Middletown did not have knowledge that the lawsuit was filed until Plaintiff's counsel emailed a courtesy copy of the Complaint on August 21, 2023 at 10:48p.m. (Da200). The lawsuit was not formally served on Middletown until August 25, 2023. (Da178).

Prior to receiving Plaintiff's email with the Complaint, on August 21, 2023, Middletown adopted Resolution No. 23-228, which authorized the Township to undertake a preliminary investigation as to whether the Property satisfies the criteria for designation as an area in need of redevelopment for condemnation purposes. (Da176-Da177).

On February 20, 2024, Middletown adopted Resolution No. 24-95, which designated the Property as an area in need of redevelopment for condemnation purposes. (Da201-Da205). That same day, the Township adopted Resolution No. 24-96, which authorized Middletown to begin the process of identifying a qualified redeveloper for the redevelopment of the Property[5]. (Da209-Da210).

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[4] Plaintiff amended its Complaint on September 27, 2023, December 3, 2023, and March 23, 2024.

[5] On August 21, 2023, Middletown conditionally designated B. Duva Development, LLC as the redeveloper for the Commercial Tract, subject to the entry of an acceptable Redevelopment Agreement. (Da206-Da208.) However, Middletown never entered into a Redevelopment Agreement with B. Duva, and its conditional redeveloper designation expired after 90 days. At no time has Plaintiff applied to be the designated redeveloper of the Property.

To date, Middletown has not issued a Request for Expressions of Interest ("RFEI") to qualified redevelopers for the redevelopment of the Property. Middletown has taken no further steps towards condemnation or redevelopment of the Property as would be required by the Eminent Domain Act ("EDA") to commence condemnation. See N.J.S.A. 20:3-6. Middletown has not conducted an appraisal to determine its fair market value. Middletown has not authorized acquisition nor made any good faith offer to acquire the Property. To be clear, the only action taken by Middletown has been designating the Property as an area in need of redevelopment, which merely makes the Property *eligible* for condemnation under the LRHL, and that occurred 10 months ago. In short, condemnation is not imminent.

C. The Builder's Remedy Litigation

On May 17, 2024, the court entered an Order holding that Middletown is not constitutionally compliant with its Mount Laurel Third Round obligation under In re N.J.A.C. 5:96 & 5.97, 221 N.J. 1 (2015). (Da1-Da3).

On June 7, 2024, Plaintiff filed an Order to Show Cause, seeking to enjoin Middletown from (1) taking any condemnation-related action with respect to the Property, (2) designating a redeveloper for the Property under the LRHL, and (3) granting any type of development approval for any land for any purpose other than for inclusionary housing. (Da4-Da8).

In its decision on the record on July 5, 2024, the trial court enjoined Middletown's rights to pursue eminent domain and redevelopment because Middletown has been deemed non-compliant with its Mount Laurel obligation and because Plaintiff proposed to build an inclusionary project. (1T51:17-20; 54:21-25; 28:10-16; 29:1-4).

During oral argument, the court recognized that Middletown's purpose for condemnation would be to implement its Redevelopment Plan, which provides for commercial uses on the Property that would complement the residential development on the adjacent parcel. (1T25:15-26:23). The court found that it was "really clear" that for years before Plaintiff was involved, Middletown had an agreement in place for this Property with the current Property owner to develop the Property with commercial uses, and that Middletown was not trying to make this Property unavailable for inclusionary housing. (1T25:25-26:8; 28:7-24).

The court, however, found that Middletown's purpose in condemning the property is "not for a public use, but for a private use," for something that is not "generally considered to be a public interest kind of thing." (1T24:2-25:4). The Court contrasted commercial redevelopment with a hospital or open space, which the Court said are generally considered to be more in the public interest. (1T24:5-12; 51:11-16). In addressing Middletown's argument that

redevelopment and the revitalization of deteriorating areas are valid public uses for which condemnation is authorized, the court stated that Plaintiff "could knock down . . . the broken-down stuff that's on the property. . . . The concept is it will go away if it gets developed for Mount Laurel inclusive housing. So, Middletown's goal will be satisfied. It's just what will go there is not what Middletown wanted." (1T25:15-25).

The court ultimately held that Plaintiff met its burden of proving the factors required under Crowe v. DeGioia, 90 N.J. 126 (1982), by clear and convincing evidence. (1T52:9-14). The court found that the prospective use for the property was important in its determination, stating, "If a hospital were going there . . . open space is important but it's not being condemned for open space. You know, if a hospital or a school were going there, [but] it's going to be condemned for commercial development?" (1T51:11-16).

The court held that Plaintiff made a showing of irreparable harm, although acknowledged that "technically . . . money damages isn't an irreparable harm" but could potentially affect Plaintiff from moving forward with the development of the Property. (1T52:15-17). The court held that "unless the developer has all of the money themselves, and they are just taking it out of their piggy bank to build this," Plaintiff would need lending from a bank. (1T52:17-19). The court held that "any lender is going to know" if

Middletown takes steps toward condemnation, which could "cast a shadow potentially on being able to move forward with development." (1T52:24-53:1). The court held that "while it technically is a money issue, it's bigger than that I think. It's the potential for being able to move forward with development of a project. Nothing has been approved yet and no determination has been made that the property is appropriate for the development of affordable housing but I think that they have satisfied the first principle." (1T53:2-9).

In its discussion of whether the legal right underlying Plaintiff's claim is unsettled, the court held that the law under the Mount Laurel doctrine is "pretty clear." (1T53:23-25). However, the court earlier had made the finding that the law under these particular set of facts was not clear; there is no case law that says a court can preemptively enjoin a municipality that is not constitutionally compliant under Mount Laurel from taking any steps towards a potential condemnation of property that is the subject of a builder's remedy lawsuit. Indeed, the court found that, "[n]one of the cases that were cited to me were directly on point on this, and the cases that were cited to have very big differences." (1T51:17-52:3).

The court did not specifically address the likelihood of success on the merits and recognized that the outcome of Plaintiff's builder's remedy claim was uncertain, stating that "with reference to the builder's remedy . . . "the

developer doesn't get everything they want. They may not get anything that they want. It may not be that this property can be developed for affordable housing, but the determination made that Middletown isn't constitutionally compliant . . . sort of gets you over that hump to the next stage." (1T53:25-54:7). The court further stated that there was no argument from Middletown that the Property is "environmentally not appropriate [or] that nothing can be built there." (1T53:10-22).

Finally, the court held that the balance of the relative hardships weighed in favor of Plaintiff, holding that if Middletown were to move forward with condemnation, it will potentially negatively affect Plaintiff's ability to secure financing and to proceed with their builder's remedy claim. (1T54:8-55:7).

On July 8, 2024, the court entered an Order consistent with its oral decision. (Da9-Da11). On July 29, 2024, Middletown filed a Motion for Reconsideration of the court's July 8, 2024 Order. (Da211-Da212). On October 4, 2024, the court below denied the motion for reasons stated on the record and filed an Order consistent therewith. (Da12-Da13; 2T).

In its oral decision, the court recognized there were no cases on point that address condemnation of a property that is subject to a builder's remedy lawsuit in a municipality that is not constitutionally compliant. (2T22:14-21). In denying reconsideration, the court held that "Middletown had plans for this

[Property] to be a commercial development for ages, they zoned it for [] commercial" and "basically the Court is going to be tasked with deciding whether the property should be rezoned to provide for multi-family housing." (2T19:2-9). The court held that, "I think there are certain things that happened when you were constitutionally non-compliant and a builder's remedy action has been filed . . . and one of those things is, you cannot move ahead with condemning that property." (2T19:16-24). This appeal follows.

ARGUMENT

I. THE COURT BELOW ABUSED ITS DISCRETION BY GRANTING INJUNCTIVE RELIEF BECAUSE PLAINTIFF FAILED TO SATISFY THE CROWE FACTORS. [Da9-Da11; Da12-Da13]

This is an appeal from a court's order granting injunctive relief and denial of a motion for reconsideration of that order. A trial court's decision to issue a preliminary injunction will be overturned on appeal if it results from an abuse of discretion. Waste Mgmt. of N.J., Inc. v. Morris Cnty. Mun. Utils. Auth., 433 N.J. Super. 445, 451, 456 (App. Div. 2013). Although this standard "defies precise definition," the inquiry "requires consideration of the trial judge's explanation as well as the legal grounds upon which the decision was based." Id. at 455. A court abuses its discretion when its decision is made without a rational explanation, inexplicably departs from established policies, or rests on an impermissible basis. Ibid. Reversal is proper when of trial

court's order "was not premised upon consideration of all relevant factors, was based upon consideration of irrelevant or inappropriate factors, or amounts to a clear error in judgment." McDaniel v. Man Wai Lee, 419 N.J. Super. 482, 498 (App. Div. 2011) (quoting Masone v. Levine, 382 N.J. Super. 181, 193 (App. Div. 2005)) (internal quotation marks omitted).

A trial court's decision to deny a motion for reconsideration is also reviewed under the abuse of discretion standard. Branch v. Cream-O-Land Dairy, 244 N.J. 567, 582 (2021).

Interlocutory injunctive relief may be granted only when (1) the plaintiff has no adequate remedy at law and the irreparable injury to be suffered in the absence of an injunctive is substantial and imminent; (2) the plaintiff's claim is based upon a settled legal right and has demonstrated a reasonable probability of success on the merits of its claim; (3) a balancing of the equities weighs in the plaintiff's favor; and (4) the public interest will not be harmed. Waste Mgt., 433 N.J. Super. at 451-52 (App. Div. 2013) (citation omitted); Crowe, 90 N.J. at 132-34 (summarizing the fundamental principles in justifying issuance of injunctive relief). A party seeking the extraordinary relief of a preliminary injunction is required to prove each of these elements by clear and convincing evidence. Waste Mgt., 433 N.J. Super. at 452.

This Court has held that a judge's failure to consider and evaluate each and every Crowe factor constitutes an abuse of discretion. Id. at 455-46.

This Court owes no deference to a lower court's factual findings and legal conclusions if they are "'so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice.'" Griepenburg v. Twp. of Ocean, 220 N.J. 239, 254 (2015) (quoting Rova Farms Resort, Inc. v. Investors Ins. Co., 65 N.J. 474, 484 (1974)).

A. The Court Below Erred by Finding Irreparable Harm.

It is a "fundamental principle[]" that "a preliminary injunction should not issue except when necessary to prevent irreparable harm." Crowe, 90 N.J. at 132. A plaintiff must demonstrate that the harm is imminent, concrete, and non-speculative. Subcarrier Commc'ns., Inc. v. Day, 299 N.J. Super. 634, 638 (App. Div. 1997). The likelihood that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs against a claim of irreparable harm. Delaware River & Bay Auth. v. York Hunter Constr., 344 N.J. Super. 361, 365 (Ch. Div. 2001) (citing Sampson v. Murray, 415 U.S. 61, 90 (1974)). In fact, "[t]he availability of adequate monetary damages belies a claim of irreparable injury." Id. at 364-65 (citation omitted). In other words, plaintiff must have no adequate remedy at law. Subcarrier Commc'ns., 299 N.J. Super. at 638.

Here, the trial court found irreparable harm based on its belief that, if Middletown took steps toward condemnation, it potentially could affect Plaintiff's ability to secure lending, which could then affect Plaintiff's ability to move forward with development of its inclusionary project:

> [T]echnically, you know, money damages isn't an irreparable harm, but I think that the ability to move forward, unless the developer has all of the money themselves, and they are just taking it out of their piggy bank to build this, you're going to banks . . . the fact that the public entity is moving ahead with condemnation . . . any lender is going to know about that and I think it does cast a shadow potentially on being able to move forward with development.
>
> So, while it technically is a money issue, it's bigger than that I think. It's the potential for being able to move forward with development of a project. Nothing has been approved yet and no determination has been made that the property is appropriate for the development of affordable housing, but I think that they have satisfied the first principle.
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> [1T52:15-53:9 (emphasis added).]

The court's decision on the motion for reconsideration reiterated that the developer or property owner should not "have to deal with a condemnation proceeding," including the preparation for it. (2T18:1-9; 14:11-15:4).

1. **Any potential harm is speculative and not imminent.**

The trial court abused its discretion in finding imminent, irreparable harm based on its belief that, *if* Middletown takes steps toward condemnation,

it *may* affect Plaintiff's ability to secure lending – *if* Plaintiff needs lending at all – and therefore "cast[s] a shadow *potentially* on being able to move forward with development," while also acknowledging that "nothing has been approved yet" and "no determination has been made that the Property is appropriate for the development of affordable housing." (1T52:15-53:9) (emphasis added). The court's decision inexplicably departs from established law that a plaintiff must demonstrate that the harm is imminent, concrete, and non-speculative to justify injunctive relief. Subcarrier Commc'ns., 299 N.J. Super. at 638.

The court's reasoning in finding irreparable harm rests purely on speculation and theoretical scenarios. The court was not presented with any evidence (much less clear and convincing evidence) that Plaintiff needed financing from lenders for its proposed project or that financing would be jeopardized if an injunction were not granted. Simply stated, there is no evidence in the record to support the court's conclusion. Because the court's finding is "'so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice'" this Court owes no deference to it. See Griepenburg, 220 N.J. 239, 254 (2015) (quoting Rova Farms, 65 N.J. at 484).

Moreover, the court's own finding shows that the potential harm was not imminent, acknowledging that "[n]othing has been approved yet and no

determination has been made that the property is appropriate for the development of affordable housing." (1T53:5-7).

The EDA mandates a multi-step process before a condemnation and redevelopment project could proceed, and Middletown has taken no further steps towards condemnation or redevelopment as would be required by the EDA. See N.J.S.A. 20:3-6. For example, Middletown has not issued a RFEI to qualified redevelopers for the redevelopment of the Property, has not authorized or conducted an appraisal to determine its fair market value, has not adopted an ordinance to authorized acquisition, has not made any good faith offer to commence negotiations to acquire the Property, and has not filed a condemnation complaint. Accordingly, the evidence cannot support that Plaintiff faces imminent harm.

2. **Any potential harm is reversible, and an injunction is not necessary to maintain the status quo.**

Moreover, any steps toward condemnation would be reversible, and therefore, cannot constitute irreparable harm. If Middletown were to begin the process toward condemnation, Plaintiff can challenge the validity of those actions and the condemnation court can void those actions if Middletown is found to lack the authority to condemn the Property.

"The Eminent Domain Act recognizes that, even after a public entity files a declaration of taking, N.J.S.A. 20:3-17, deposits the estimated just

compensation, N.J.S.A. 20:3-18, and takes title to and possession of the property, N.J.S.A. 20:3-19, the condemnor's right to exercise the power of eminent domain may be challenged and judicially undone." Essex Cty. Voc. Schs. of Educ. v. New United Corp., Nos. A-4402-11T2, A-1873-12T2, 2014 N.J. Super. Unpub. LEXIS 786, at *10-11 (App. Div. April 8, 2014) (citing N.J.S.A. 20:3-22 and 3-24). "In such instances, and where condemnations are thereafter abandoned, the usual remedies sought by condemnees merely involve the reallocation of attorneys' fees and expenses to make them whole." Id., at *11. "[U]nder the express legislative language, a condemnee that is restored to title because of a condemnor's fatal gaffe is entitled to payment for (1) damages sustained . . . as a result of the action of the condemnor, (2) expenses, (3) reasonable costs, disbursements and expenses actually incurred, and (4) reasonable attorney, appraisal, and engineering fees." Id. at *13 (internal quotation marks omitted). In New United, the Law Division dismissed the condemnation after the filing of a declaration of taking, ordered the public entity to discharge its declaration of taking and notice of lis pendens, and provided for the return its deposit that was held in escrow by the Clerk of the Superior Court. Id. at *5-6. In other words, any of the steps in the condemnation process, including the filing of the declaration of taking, can be undone using the procedures set forth in the EDA.

In addition, there is no need for a preliminary injunction to maintain the status quo because the EDA already provides for such protections. First, the EDA permits the condemnation court to stay a condemnor from taking possession of the property when the validity of the taking is challenged. Twp. of Readington v. Solberg Aviation Co., 409 N.J. Super. 282, 326 (App. Div. 2009) ("The filing an action that challenges the condemnor's authority to condemn can affect the right to possession since N.J.S.A. 20:3-19 clearly authorizes a court to stay the taking of possession upon good cause shown."). In such case, a court may postpone physical occupancy of the property by the condemnor until the court has ruled on the validity of proposed taking. Ibid. Such action maintains the status quo of the property, and in turn, allows no harm to befall Plaintiff in the interim, much less irreparable harm.

Second, although the "EDA vests title in the condemnor immediately upon the filing of a declaration of taking and the payment of compensation . . . it confers only a defeasible title on the condemnor when the validity of the taking is challenged." Id. at 327 (citation omitted) (finding instructive decisions construing federal Declaration of Taking Act which hold that the government takes only defeasible title when the validity of a taking is challenged); see also New United, 2014 N.J. Super. Unpub. LEXIS 786, at *22. A "defeasible title" is "[o]ne that is liable to be annulled or made void,

but not one that is already void or an absolute nullity." Solberg Aviation, 409 N.J. Super. at 327 n.9 (quoting Black's Law Dictionary 418 (6th ed. 1990)).

Therefore, if Middletown were to commence condemnation proceedings, and Plaintiff initiates a challenge, Middletown would hold only a defeasible title to the Property as a fiduciary because title could revert back to the owner. See New United, 2014 N.J. Super. Unpub. LEXIS 786, at *22-23. New United holds that,

> [I]n order to potentially restore a condemnee to the condition of its property that was enjoyed when government seized title, and to avoid (or minimize) the payment of damages under Section 24, a condemnor is obliged to act prudently to avoid waste, mismanagement, or self-dealing. Thus, any deterioration in the condition or value of the taken property, other than through normal wear and tear or the result of market conditions, becomes the responsibility of the condemning authority. Moreover, it is not just responsible for active, as opposed to passive, harm that is caused during its reign of title. . . . Failures to so act may expose the condemnor to significant damages if a condemnee can prove that the damage occurred during the condemnor's ownership. . . .
>
> [Id. at *23-24.]

Because a defeasible title may revert back to a condemnee, the condemnor owes a special a duty of care, including maintaining the status quo at the Property and avoiding any harm. See ibid.

In light of the above, the trial court erred by finding irreparable harm as to an injunction against condemnation because any steps to be taken toward condemnation are reversible. Moreover, a preliminary injunction is not necessary to maintain the status quo, as the status quo can be preserved in the condemnation proceeding.

The trial court also erred by failing even to evaluate irreparable harm as to the injunction against redevelopment efforts, which the court also granted. As explained in Section IV of this brief, Plaintiff faced no irreparable harm requiring an injunction against redevelopment efforts because Rule 4:69 sets forth the established process to challenge government actions, including for redevelopment. Namely, the proper procedure is to allow Middletown to, first, *take the action*, and *then* Plaintiff can challenge that action by filing an action in lieu of prerogative writs under Rule 4:69. Such challenge can then be adjudicated on the merits rather than prospectively enjoining the government action before it has even been taken.

3. **Plaintiff can be remedied by compensatory or other corrective relief.**

Next, there is no irreparable harm because there is a likelihood that "adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation," as well as the "availability of adequate monetary damages." Sampson, 415 U.S. at 90; see also Delaware

River & Bay Auth., 344 N.J. Super. at 364-65. If Middletown begins the condemnation process and a court later holds the taking is *invalid*, then the taking will be voided, title will revert to Plaintiff, and Plaintiff will receive its escrowed funds as well as any permitted damages. In the alternative, if Middletown begins the condemnation process and a court holds that the taking is *valid*, then just compensation will be awarded for the Property. Because the condemnation proceeding will provide adequate monetary compensation either way, there can be no irreparable injury. See id. at 365.

For all the above reasons, this Court should find that the trial court abused its discretion when it held that Plaintiff met its burden of proving irreparable harm because the potential harm is speculative, not imminent, reversible, and can be remedied by compensatory relief.

B. The Court Below Erred by Finding a Well-Settled Legal Right and Likelihood of Success on the Merits.

In determining whether a party has demonstrated a reasonable likelihood of success on the merits, our courts consider "whether the legal or equitable principles upon which the claim is based are doubtful or unsettled, or whether the material facts are in dispute, or both." Waste Mgt., 433 N.J. Super. at 452 (citation omitted). This inquiry requires an examination of whether Plaintiff demonstrated that the material facts favored its position. See id. at 452-53.

In analyzing whether the legal right underlying Plaintiff's claim is settled, the trial court held that the law under the Mount Laurel doctrine is "pretty clear." (1T53:23-25). However, the court had already acknowledged that the law under these particular set of facts is not clear, stating that, "[n]one of the cases that were cited to me were directly on point on this, and the cases that were cited to have very big differences," meaning the cases did not "involve a municipality that has been found to be not constitutionally compliant . . . and where you have a developer who is ready, willing and able to come forward with development that will include affordable housing." (1T51:17-52:8). In its decision on the motion for reconsideration, the court reiterated that there was no known case law which addresses the issue in dispute. (See 2T22:14-21).

Indeed, there is no case law holding that a court can enjoin a municipality from taking any steps towards a potential condemnation or redevelopment merely because that municipality has been deemed non-compliant under the Mount Laurel doctrine and there is a proposal to build an inclusionary development on the property. Insofar as the court acknowledged that there is no case law addressing the legal issue before it, the trial court's contradictory finding that the law was "pretty clear" is without support and is clearly erroneous.

Moreover, the court below erred by failing to ev aluate the likelihood of success on the merits. The court did, however, acknowledge that the outcome of Plaintiff's builder's remedy claim was uncertain, stating that "with reference to a builder's remedy . . . the developer doesn't get everything they want. They may not get anything that they want. It may not be that this property can be developed for affordable housing, but the determination made that Middletown isn't constitutionally compliant . . . sort of gets you over that hump to the next stage." (1T53:25-54:7). The court further stated that there was no argument from Middletown that the Property is "environmentally not appropriate [or] that nothing can be built there." (1T53:19-22). However, the court below erroneously "made no findings on the pivotal factual issues." Waste Mgt., 433 N.J. Super. at 455 n.3.

In its decision on the motion for reconsideration, the court reiterated its finding and contrasted this case to a related builder's remedy action in which the trial court *did not* enjoin Middletown from moving forward with condemnation proceedings because Middletown's position is that the property is environmentally sensitive and should not be developed. (2T10:5-16). In that case, however, Middletown seeks to condemn the environmentally-sensitive property for open space; therefore, it is unlike the facts here, where Middletown seeks to condemn to implement its longstanding Redevelopment

Plan that requires development of the Property with commercial uses to complement the adjacent inclusionary residential development that now exists.

In a builder's remedy lawsuit, a developer will be entitled to a builder's remedy only if: "(1) it succeeds in Mount Laurel litigation; (2) it proposes a project with a substantial amount of affordable housing; and (3) the site is suitable, that is, the municipality does not meet its burden of proving that the site is environmentally constrained or construction of the project is contrary to sound use planning." Mount Olive Complex v. Twp. of Mount Olive, 340 N.J. Super. 511, 525 (App. Div. 2001); In re Twp. of Bordentown, 471 N.J. Super. 196, 221-22 (App. Div. 2022) (citation omitted). The parties are currently litigating the second and third prongs of the builder's remedy lawsuit and Middletown disputes that the Property is suitable for Plaintiff's proposed inclusionary residential development.

Plaintiff presented no competent evidence, let alone clear and convincing evidence, demonstrating its likelihood of success on the merits of its builder's remedy lawsuit – meaning the suitability of the Property. The court did not explain why it seems to have found in favor of Plaintiff on the likelihood-of-success factor when it expressly did not find that Plaintiff was likely to prevail in the site suitability phase of the builder's remedy lawsuit. Instead, the court found it was unclear who would prevail, stating that "[i]t

may not be that this property can be developed for affordable housing." (1T53:25-54:7).

The trial court appeared to erroneously shift the burden to Middletown to disprove Plaintiff's likelihood of success of the builder's remedy claim, in other words, that Middletown should have presented evidence that the Property was not suitable. The court stated, "I haven't heard anything indicating, other than that the town wants this to be commercial, that it's environmentally not appropriate, that nothing can be built here." (1T53:19-22). The trial court appeared to reiterate in its decision on the motion for reconsideration that Middletown should have presented evidence that the Property is not suitable. (2T10:5-16).

However, it is not *Middletown's* burden to establish each of the Crowe factors by clear and convincing proof; it is *Plaintiff's* burden to show a reasonable probability of success on the merits, for which it offered no competent evidence. Moreover, Middletown did not have expert reports at the time that Plaintiff filed its Order to Show Cause. The trial court's Case Management Order set the deadline for Middletown's expert reports at November 4, 2024. Therefore, Middletown could not have provided this information to the court at the time of the Order to Show Cause.

Because the trial court abused its discretion by finding that the law was "pretty clear" while also finding that there is no case law on point is lacking in a rational explanation and failing to properly evaluate the likelihood of success on the merits factor, this Court should reverse. See Waste Mgt., 433 N.J. Super. at 445-46.

C. The Court Below Erred in Finding the Harm to Plaintiff Outweighed the Harm to Middletown.

In balancing the hardships, the trial court found that the harm to Plaintiff outweighed the harm to Middletown. (1T54:8-55:7). Specifically, the court found that the potential hardship to Plaintiff would be the potential inability to secure financing if Middletown takes steps toward condemnation. (1T55:1-7). The court did not find any harm to Middletown except that, "I guess there are some old barns or something on that property that need to be knocked down, but they have been standing there for I guess a really long time, they can continue to stand there." (1T54:17-20).

First, the court below erred because its stated potential harm to Plaintiff – its potential ability to secure lending – is not irreparable harm. See infra. Point I.A. As previously stated, Plaintiff did not present any evidence it needed financing from lenders or that its financing would be jeopardized if an injunction was not granted. The court's finding is wholly unsupported by the evidence and rests purely on speculation.

Further, the court below erred by not considering the harm to Middletown as the Township is losing its constitutional right to redevelopment as well as redevelopment opportunities in the Property, where there is great interest and has sat stagnant and blighted for years. Middletown is also harmed in its inability to serve the public interest by revitalizing the Property with commercial development that will improve the quality of life for its residents and spur new job growth and business opportunities. The Commercial Tract was to be developed with commercial uses, highlighting the importance of a pedestrian-friendly, walkable, bikeable area offering food and beverage, entertainment, grocery, restaurants, cafes, and essential services to the residents of the Residential Tract, which includes affordable housing, and other nearby neighborhoods. (Da114-Da116, Da121). The court failed to consider that the Circus Liquors Site was only subdivided as into two parcels to further its Redevelopment Plan, which included both commercial and residential uses with a 25% set aside for affordable housing.

The court erroneously prioritized a potential inclusionary development under Mount Laurel over Middletown's well-settled, longstanding right to exercise its eminent domain and redevelopment powers without any legal authority to establish that preference.

Because the trial court abused its discretion by considering harm to Plaintiff that was not presented by Plaintiff and is unsupported by the evidence, and failed to evaluate the potential harm to Middletown, this Court should reverse. See Waste Mgt., 433 N.J. Super. at 445-46.

D. There is No Evidence of Harm to the Public Interest.

Despite Plaintiff's argument in the proceedings below, there is no irreparable harm to people in need of affordable housing posed by this case. This scenario would be different if Middletown sought to condemn land that already contained an affordable housing development, and such property was at risk of being destroyed or substantially impaired. See Waste Mgmt. 433 N.J. Super. at 454. However, there is no harm in the instant case where the Property is stagnant, vacant and blighted.

Moreover, the court below erred by failing to consider Middletown's public interest in redeveloping blighted areas, improving the quality of life for its residents and spurring business opportunity and job growth. A municipality acts within the public interest when it establishes a redevelopment plan that is balanced and integrated for the benefit of its residents and addresses the needs of that particular area. See Wilson v. City of Long Branch, 27 N.J. 360, 380 (1958). It is in the public interest to allow Middletown to provide the necessary community infrastructure to support the inclusionary residential

development that is already being built on the Residential Tract per the Redevelopment Plan. Indeed, "[t]he success of the Legislature's primary goal of providing housing will obviously be hampered if plaintiff is denied the requisite powers to assure the availability of support services necessary to the livability of the residential area." N.J. Hous. & Mort. Fin. Agency v. Moses, 215 N.J. Super. 318, 324 (App. Div. 1987); see also Levin v. Twp. Comm. of Bridgewater Twp., 57 N.J. 506, 539 (1971).

In light of the above errors, standing alone as well as their cumulative effect, this court should find that the court below abused its discretion by granting the preliminary injunction. Reversal is proper because the trial court's determinations were not premised upon consideration of all relevant factors, were based upon consideration of irrelevant or inappropriate factors, and/or amounted to a clear error in judgment. McDaniel, 419 N.J. Super. at 498 (citing Masone, 382 N.J. Super. at 193). In the alternative, this court should remand to the trial court to reevaluate the Crowe factors.

II. THE COURT BELOW ERRED IN ITS INTERPRETATION OF EMINENT DOMAIN LAW AND BY CREATING NEW LAW THAT HAS NO SUPPORT IN NEW JERSEY JURISPRUDENCE. [Da9-Da11; Da12-Da13]

"Eminent domain is the power of the State to take private property for public use. . . . It is a right founded on the law of necessity which is inherent in sovereignty and essential to the existence of government[.]" Twp. of W.

Orange v. 769 Assocs., LLC, 172 N.J. 564, 571 (2002) (quotation omitted); see also State v. Lanza, 48 N.J. Super. 362, 369-70 (Law Div.1957) (noting that eminent domain is an inseparable attribute of sovereignty that has been allotted to the legislative branch since the time of the Magna Carta), aff'd, 27 N.J. 516 (1958). The New Jersey Constitution Article I, ¶ 20 recognizes that private property may be condemned for "public use."

The EDA establishes the procedures that govern eminent domain actions. N.J.S.A. 20:3-6. "Ordinarily where the power to condemn exists the quantity of land to be taken as well as the location is a matter within the discretion of the condemnor." Tex. E. Transmission Corp. v. Wildlife Pres., Inc., 48 N.J. 261, 269 (1966); see City of Trenton v. Lenzner, 16 N.J. 465, 473 (1954). Moreover, "[i]t is well-established that a reviewing court will not upset a municipality's decision to use its eminent domain power 'in the absence of an affirmative showing of fraud, bad faith or manifest abuse.'" Mt. Laurel Twp. v. MiPro Homes, LLC, 379 N.J. Super. 358, 375 (App. Div. 2005) (quoting Twp. of W. Orange, 172 N.J. at 571). "'Courts will generally not inquire into a public body's motive concerning the necessity of the taking.'" Ibid. (quoting Borough of Essex Fells v. Kessler Inst. for Rehab., Inc., 289 N.J. Super. 329, 337 (Law Div.1995)).

A. The Trial Court Erred by Finding Middletown's Proposed Redevelopment was not a Public Use and Enjoining Middletown from Condemnation and Redevelopment Efforts.

The trial court erred in finding that Middletown's purpose in seeking to condemn the Property, i.e., to implement its Redevelopment Plan, is a "private use," which finding the New Jersey Constitution. The court stated that "Middletown is looking to condemn the property for essentially – not for a public use, but for a private use," for something that is not "generally considered to be a public interest kind of thing." (1T24:2-25:4). The court acknowledged that prior to Plaintiff's interest in the Property, Middletown had agreed with the current Property owner that the Property would be redeveloped with commercial uses to complement the adjacent parcel that was being developed with residential housing. (1T50:1-4; 51:3-4; 25:15-26:23). The court focused on the prospective use for the Property, noting the result could have been different if Middletown were condemning for a hospital, a school or open space rather than for commercial redevelopment. (1T51:11-16; 2T14:11-24).

This Court reviews questions of law de novo, as the "trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference." Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995).

The LRHL and the New Jersey Constitution grant municipalities like Middletown the authority to revitalize decaying and disintegrating residential, commercial and industrial areas. N.J.S.A. 40A:12A-4; N.J. Const. art. VIII, § 3, ¶ 1 (1947); 62-62 Main St., L.L.C. v. Mayor & Council of Hackensack, 221 N.J. 129, 134, 144 (2015). Under New Jersey law, redevelopment, itself, is a public use for which condemnation may be used. See Wilson, 27 N.J. at 371 (holding redevelopment serves purposes "intimately related to the public health, welfare and safety.").

Our Constitution expressly provides that the "redevelopment of blighted areas" is a "public purpose," and that private property may be taken to achieve that end. 62-64 Main, 221 N.J. at 134, 144 (citation omitted). "The evident goal of Article VIII, Section 3, Paragraph 1 (Blighted Areas Clause) is to give municipalities the means to improve the quality of life of their residents and to spur business opportunity and job growth." Id. at 134.

"If town officials decide that an area is in need of redevelopment, the governing body may go forward and adopt a redevelopment plan for the area." Id. at 173 (Rabner, C.J. dissenting); N.J.S.A. 40A:12A-7(a). "The municipality can then 'proceed with the clearance, replanning, development and redevelopment of the area designated in that plan.'" Id. at 173 (quotation omitted); N.J.S.A. 40A:12A-8. "In particular, the town can condemn and

acquire private property under the Eminent Domain Act to carry out the redevelopment plan." 62-64 Main, 221 N.J. at 173; N.J.S.A. 40A:12A-8(c) (citing N.J.S.A. 20:3-1 to -50).

In Wilson, the Supreme Court expressly rejected the idea that a municipality engaging in redevelopment takes property for *private* use for the pecuniary profit of private individuals. 27 N.J. at 376. The Court explained that the "acquisition is not for the use of a private corporation (if one is engaged); rather, such corporation is used to accomplish the public purpose." Ibid. "[T]he private developer is really the instrumentality used to accomplish the public purpose." Levin, 57 N.J. at 543.

Moreover, New Jersey courts recognize that redevelopment for public benefit includes commercial uses. An entire area sometimes needs "redesigning so that a balanced, integrated plan could be developed for the region, including not only new homes but also schools, churches, parks streets, and shopping centers" to control "the cycle of decay" and prevent the "birth of future slums." Wilson, 27 N.J. at 380 (quoting Berman v. Parker, 348 U.S. 26 (1954)). Providing community infrastructure to support residential development is essential. See N.J. Housing, 215 N.J. Super. at 324 ("The success of the Legislature's primary goal of providing housing will obviously be hampered if plaintiff is denied the requisite power to assure the availability

of support services necessary to the livability of the residential area."); see also Levin, 57 N.J. at 539.

It was error to hold that Middletown's purpose for redevelopment was a "private use" simply because its purpose was commercial redevelopment instead of for open space or a hospital. The trial court's belief that open space or a hospital constitutes a public purpose for eminent domain purposes, while commercial redevelopment does not, is contrary to law. Middletown has proffered a legitimate public use in its aim to acquire the Property for redevelopment purposes, and the trial court should not have denied Middletown its constitutional rights to redevelopment and eminent domain based on that erroneous belief. See N.J. Const. art. VIII, § 3, ¶ 1 (1947).

B. The Trial Court Erred by Erasing Constitutional Rights to Eminent Domain and Redevelopment when a Municipality is Non-Compliant with Mount Laurel Requirements.

This Court should further find that the trial court erred because it did not defer to Middletown's exercise of discretion in its use of its eminent domain power given the absence of fraud, bad faith or manifest abuse. MiPro, 379 N.J. Super. at 375; Twp. of W. Orange, 172 N.J. at 571.

The court below found no evidence of bad faith or an improper motive. The trial court specifically stated that it was not accepting or relying on an argument that Middletown was "being vindictive or bad or going after . . . this

property because [Plaintiff] want[s] to put affordable housing there." (1T50:24-51:3). The court found that it was "really clear" that for years before Plaintiff was involved, Middletown had a plan in place for this Property and an agreement with the current owner to develop it with commercial uses. (1T28:7-24). Thus, this is not a case in which a condemnation action ostensibly brought for a legitimate public purpose was actually brought for a discriminatory reason or other improper motive. See MiPro 379 N.J. Super. at 377. Because Middletown has shown a legitimate public purpose and because there is no bad faith or improper motive, the trial court should have deferred to Middletown's exercise of discretion in its use of its eminent domain power rather than enjoining condemnation altogether.

The trial court acknowledged that there were no cases directly on point with the facts at hand. (1T51:17-52:8; 2T14:3-5). The court, therefore, created new law, holding that if a town is constitutionally non-compliant, it loses its power of eminent domain regardless of whether a legitimate public purpose and lack of bad faith exist. (2T14:11-15:4). There is no exception in our jurisprudence for the trial court's finding that if a municipality is constitutionally non-compliant with the Mount Laurel doctrine then it essentially forfeits its constitutional powers of eminent domain and redevelopment even when the municipality has a legitimate public purpose and

acts in good faith. (1T51:17-20, 54:21-25; 2T14:11-15:4, 19:10-21, 22:14-21). Our jurisprudence does not support the court's holding, especially under the heightened standard for granting injunctive relief.

The trial court's ruling goes beyond what Mount Laurel provides - which is that a finding of non-compliance renders Middletown vulnerable to a builder's remedy lawsuit through which the Property could be rezoned. Instead, the Court's ruling holds that a finding of non-compliance strips Middletown of inherent powers granted to it by the Constitution to exercise eminent domain and redevelop blighted properties.

There are three competing constitutional rights at play. One is the judicially-created Mount Laurel doctrine, under which Plaintiff proceeds. The other two are (a) Middletown's constitutional "right of eminent domain [which] is of very ancient origin . . . , is inherent in all governments and requires no constitutional provision to give it force," and (b) Middletown's constitutional right to redevelopment, which entitles Middletown to revitalize areas in need of redevelopment for the public welfare. Valentine v. Lamont, 13 N.J. 569, 575 (1953); N.J. Const. art. VIII, § 3, ¶ 1.

The court below erroneously held that Middletown's constitutional right to use eminent domain for a public purpose and right to redevelopment can be trumped by Mount Laurel. See Valentine, 13 N.J. at 575. The trial court further

erred by prioritizing Plaintiff's request for a builder's remedy over Middletown's constitutional rights, on a motion for injunctive relief, without any law supporting that result. No case holds that Middletown loses its right to eminent domain just because it may lack sufficient affordable housing for the Third Round. Nor does any case hold that Middletown's constitutional right to exercise its redevelopment powers must yield to Plaintiff's pursuit of a builder's remedy or that Mount Laurel trumps all other constitutional rights. In fact, our Supreme Court has indicated that the constitution may permit the builder's remedy to have a less prominent status than as presently exists. In re Adoption of N.J.A.C. 5:96, 215 N.J. 578, 610-11 (2013) (stating that not "all aspects to the remedy fashioned in Mount Laurel II [are] indispensable components of a remedy for the future" and that "[o]ne can envision alternative approaches that, perhaps, might relegate a builder's remedy to a more reserved status among available solutions to encouragement of construction of affordable housing, reducing the political turmoil that has plagued voluntary compliance with the constitutional goal of advancing the delivery of affordable housing.").

Because the court below created new law on an application that requires proof of a well-settled right by clear and convincing evidence, this Court should reverse.

III. THE COURT BELOW ERRED BY WEIGHING THE PARTIES' COMPETING USES AND NOT DEFERRING TO MIDDLETOWN'S PROPOSED USE. [Da9-Da11; Da12-Da13]

The trial court's effort to make new law that prioritizes Mount Laurel above other constitutional rights conflicts with Supreme Court precedent that precludes weighing of competing public purposes in condemnation. The court below erred by weighing Plaintiff's proposed use for the Property (market rate residential development with some affordable housing) against Middletown's proposed use (redevelopment for commercial purposes to complement the ongoing inclusionary residential development) and ruling that Plaintiff's use should prevail. The trial court's decision violates the separation of powers, existing law that grants municipal entities the authority to make determinations regarding condemnation and redevelopment, and Supreme Court precedent that forbids a property owner from proposing a competing use to undermine the municipality's exercise of discretion.

The trial court essentially held that because Middletown is constitutionally non-compliant, the court could step into the Township Committee's shoes, weigh the proposed competing uses for the Property, and decide that Plaintiff's proposed use should prevail. Neither the weighing of competing uses nor the lack of deference to Middletown's Redevelopment Plan is permitted by our Legislature or the law.

"[T]he LHRL sets forth the powers of a municipal entity to determine that an area is in need of redevelopment and to carry out a redevelopment plan." Vineland Constr. Co. v. Twp. of Pennsauken, 395 N.J. Super. 230, 250 (App. Div. 2007). Once an area is designated as in need of redevelopment, "the public purpose of the Township's redevelopment determination [is] unassailable." Id. at 252. "Further, having adopted a redevelopment plan, [a] Township [is] entitled to exercise its broad statutory powers under the LRHL to designate a private developer and to condemn property in furtherance of its plan." Ibid. "The judicial prerogative does not allow for second guessing the decisions of legislative bodies. So long as those decisions are in accordance with law, factually supported, and not arbitrary, capricious or in bad faith, they are entitled to judicial deference." Id. at 260.

Because Middletown has designated the Property as an area in need of redevelopment in 2017 pursuant to N.J.S.A. 40A:12A-5 and adopted an accompanying redevelopment plan in 2018 pursuant to N.J.S.A. 40A:12A-7, the court below erred by overriding Middletown's decision to redevelop the Property for commercial purposes.

Moreover, our Supreme Court has expressly ruled that a property owner cannot challenge a public entity's exercise of eminent domain by arguing that the owner's proposed use would better serve the public interest than the

condemning authority's proposed use. Norfolk S. Ry. Co. v. Intermodal Props., LLC, 215 N.J. 142, 162-64 (2013). The only exception to this rule is when the property owner has already devoted its property to a worthy public purpose and the property owner also has the power to condemn. Id. at 163. This is known as the prior public use doctrine. Id. at 162-63. Our Supreme Court clarified that a property owner cannot avail itself of the protections of the prior public use doctrine merely because the property is already being used for a worthy public purpose; it must also have the power to condemn. Id. at 163-64; see Wildlife Pres., 48 N.J. at 268-69 ("denying 'public-spirited' conservation group protection of prior public use doctrine for private land voluntarily devoted to use as wildlife preserve because conservation group did not also have condemnation authority.").

Importantly, the Supreme Court found that "if the prior public use doctrine does not apply, 'no comparative evaluation of two public uses, one existing and one proposed, need be undertaken in order to determine which should prevail as the paramount use.'" Norfolk S. Ry., 215 N.J. at 163 (quoting Wildlife Pres., 48 N.J. at 273). "Therefore, an owner cannot look to the prior public use doctrine to defend against a condemnation action absent a pre-existing, public use coupled with the power of eminent domain, nor may it

suggest that there is a potential or future proposed use that might be more beneficial than the proposed use put forth by the condemnor." Ibid.

Here, the prior public use doctrine does not apply: First, Plaintiff's interest in developing inclusionary housing (**if** it wins the builder's remedy) is not a pre-existing use. Second, and more fundamentally, Plaintiff is a private entity and lacks the power to condemn. Accordingly, the trial court was not allowed to undertake a comparative evaluation of competing uses to determine whether Plaintiff's use should prevail as the paramount use or examine whether a potential or future use might be more beneficial than Middletown's proposed redevelopment use. Ibid.

Because Middletown has proffered a legitimate public use and has exercised good faith, the court below erred by interfering with its exercise of discretion in its decision to use its eminent domain power. Therefore, this Court should reverse.

IV. THE COURT BELOW ERRED BY PROSPECTIVELY ENJOINING THE GOVERNMENTAL ACTIONS RATHER THAN ALLOWING THEM TO BE ADJUDICATED AND DECIDED ON THEIR MERITS. [Da9-Da11; Da12-Da13]

The trial court erred by *prospectively* enjoining Middletown from taking efforts toward condemnation and from designating a redeveloper for the Property, which effectively grants Plaintiff's challenges before any government action has been taken. Instead, the court should have denied

Plaintiff's application, leaving Plaintiff free to challenge any future governmental action *once it is taken* (***if*** it is taken).

In general, "courts are reluctant to enjoin litigation prospectively." Deland v. Twp. of Berkeley Heights, 361 N.J. Super. 1, 19 (App. Div. 2003) (holding court should not have enjoined Berkeley Heights from pursuing eminent domain action). *If* Middletown files to condemn the Property, then the condemnation proceeding is the right forum to adjudicate whether the condemnation can, or cannot, proceed. Any argument by Plaintiff disputing the validity of a potential condemnation should be made in the condemnation action, if one is filed. See id. at 21-22 ("the claim that Berkeley Heights brought the eminent domain action in bad faith . . . can be raised in that action."). Likewise, *if* Middletown designates a redeveloper for the Property other than Plaintiff, then an action in lieu of prerogative writs to challenge that governmental action is the right forum to debate that governmental action. The trial court erred by enjoining these actions prospectively based on a request from Plaintiff, who is not even the record owner of the Property.

Generally, there are only two categories of litigation that may be enjoined: (1) when a claim has already been heard and decided, or (b) when the claim is pending or is about to be instituted in another forum whose jurisdiction is "superior or prior." Ibid. There is no precedent allowing a court

to issue an injunction based on the circumstances presented in this case. By enjoining those claims prospectively, the trial court effectively granted Plaintiff's challenges before Middletown even filed a condemnation complaint or taken any redevelopment action, and without any argument, briefing, or hearing on the merits of such challenges.

The trial court's decision did not merely postpone the exercise of Middletown's right to redevelop and condemn, it erased those rights entirely unless a builder's remedy is decided in Middletown's favor. Middletown is losing redevelopment opportunities in the interim. Therefore, this Court should reverse the grant of the preliminary injunction.

CONCLUSION

For all the foregoing reasons, Middletown respectfully requests that this Court reverse the July 8, 2024 Order enjoining Middletown from pursuing potential condemnation and redevelopment activities and the October 4, 2024 Order denying Middletown's motion for reconsideration. In the alternative, this court should remand to the trial court to reevaluate the Crowe factors.

SPIRO HARRISON & NELSON LLC
Attorneys for Defendants-Appellants Township of Middletown and Middletown Township Committee

Dated: February 5, 2025

By:_____
DANA CITRON, ESQ.

FAIR SHARE HOUSING CENTER
510 Park Boulevard
Cherry Hill, New Jersey 08002
P: (856) 665 – 5444
F: (856) 663 – 8182
Fair Share Housing Center
By: Ariela Rutbeck-Goldman, Esq. (209022016)
arielarutbeck@fairsharehousing.org
Joshua D. Bauers, Esq. (174532015)
joshbauers@fairsharehousing.org

AAMHMT PROPERTY LLC, **Plaintiff-Respondent,** **vs.** **TOWNSHIP OF MIDDLETOWN; MIDDLETOWN TOWNSHIP COMMITTEE.** **Defendants-Appellants.** **MIDDLETOWN TOWNSHIP PLANNING BOARD; B. DUVA DEVELOPMENT, LLC., and FAIR SHARE HOUSING CENTER,** **Defendants.**	Superior Court of New Jersey Appellate Division Docket No. A-000844-24T2 CIVIL ACTION On Appeal From: Law Division, Monmouth County Docket No. MON-L-2588-23 Sat Below: Hon. Linda Grasso-Jones, J.S.C. **CIVIL ACTION** **(Mount Laurel)**

FAIR SHARE HOUSING CENTER'S BRIEF IN OPPOSITION TO THE TOWNSHIP'S APPEAL OF THE TRIAL COURT'S ORDER CONTINUING TEMPORARY RESTRAINTS AND MOTION FOR RECONSIDERATION OF THAT ORDER

Dated: March 7, 2025

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PRELIMINARY STATEMENT

The Mount Laurel doctrine's overriding aim is to provide housing that is affordable to New Jersey's working families. In order to achieve that aim, Mount Laurel requires that each municipality expeditiously take the necessary steps to create a realistic opportunity for its fair share of the regional need for affordable housing.

Despite the clarity of the aim, the promise of Mount Laurel has often been frustrated by some municipalities' determination to avoid compliance with their constitutional obligations at all costs. As the New Jersey Supreme Court explained in Mount Laurel II, to allow towns to evade their obligations without recourse would subvert Mount Laurel by leading not to housing but to process, paper, and interminable delay. Worst of all, it would continue to deny lower-income households' access to the opportunity live in safe, decent, affordable housing and would deny them equal treatment under New Jersey's Constitution.

The present matter involves a town that, after voluntarily withdrawing its declaratory judgment action seeking a judgment of repose and immunity from builder's remedy lawsuits, has been deemed constitutionally noncompliant in the order of magnitude of at least 600 units for its Third Round Mount Laurel obligation. This case implicates complicated and somewhat interrelated areas of law: redevelopment, condemnation, and Mount Laurel. But the reason why these

areas are so interrelated here is because Middletown has sought to use discretionary rights (redevelopment and condemnation) to defeat its constitutional obligations (Mount Laurel). In other words, Middletown has sought to sidestep the well-established Mount Laurel builder's remedy process by using redevelopment and condemnation, maintaining that, because redevelopment can serve a public purpose, its use of such – even in the midst of an ongoing builder's remedy case – is unassailable. Middletown's zoning has been deemed unconstitutional: a finding of constitutional noncompliance means that the zoning scheme has not provided a realistic opportunity for the creation of affordable homes to address their regional fair share. The Township's circular logic in asking this court to affirm that unconstitutional zoning scheme is reminiscent of the practices at issue in the original Mount Laurel I case fifty years ago.

The trial court correctly saw through Middletown's actions and temporarily limited the Town's ongoing redevelopment and condemnation efforts in the instant builder's remedy case. In doing so, the court properly balanced the traditional factors used to assess a preliminary injunction, while highlighting the specific, unique posture of this case. The court noted that there is no case directly on point, temporarily limiting a town's condemnation efforts – in the middle of a builder's remedy case – with respect to a certain property, when that property can yield a

substantial amount of affordable housing toward a town's undisputed constitutional shortfall.

The reason for the dearth of caselaw is because no town has been as brazen as Middletown in its attempts to bypass the Mount Laurel process. Middletown stands alone among New Jersey's largest suburban municipalities in simply opting out of the voluntary compliance process — a path that other municipalities do not choose precisely because of the threat of builder's remedies. A decision in Middletown's favor would gut the builder's remedy set forth in Mount Laurel II and consistently applied as a reward against recalcitrant municipalities statewide. This court should affirm the trial court's orders granting temporary relief and denying Middletown's appeal in the strongest possible terms.

STATEMENT OF FACTS AND PROCEDURAL HISTORY[1]

Mt. Laurel and Background History of Builder's Remedies

In the late 1960s, leaders of the centuries-old Black community in Mount Laurel Township, which originated with people escaping from slavery on the Underground Railroad, attempted to construct thirty-six garden apartments to replace existing dilapidated housing such as converted chicken coops. Southern Burlington County v. Tp. of Mt. Laurel, 67 N.J. 151, 169 (1975) (Mount Laurel I).

[1] The statement of facts and procedural history are combined because they are inextricably intertwined.

The Township rejected the application. After this rejection, several named plaintiffs and several organizations including the Southern Burlington County Chapter of the NAACP, the Camden County NAACP, and the Camden County C.O.R.E. filed a lawsuit against Mount Laurel Township challenging its exclusionary zoning ordinance. As a result of this litigation, the New Jersey Supreme Court recognized the right of New Jerseyans to be free from exclusionary zoning practices that "perpetuate[d] social and economic segregation." Id. at 193. The court required municipalities to create realistic opportunities "at least to the extent of the municipality's fair share of the present and prospective regional need." Id. at 174. In so doing, the court held:

> It is elementary theory that all police power enactments, no matter at what level of government, must conform to the basic state constitutional requirements of substantive due process and equal protection of the laws. These are inherent in Art. I, par. 1 of our Constitution, the requirements of which may be more demanding than those of the federal Constitution. It is required that, affirmatively, a zoning regulation, like any police power enactment, must promote public health, safety, morals or the general welfare. (The last term seems broad enough to encompass the others). Conversely, a zoning enactment which is contrary to the general welfare is invalid.
>
> [Id. at 175.]

The Supreme Court continued that the courts may "exercis[e] the *full panoply of equitable powers* to remedy the situation" where a municipality fails to

meet its inclusionary zoning obligation. Mount Laurel I, 67 N.J. at 215 (emphasis added). However, without an effective remedy, the Mount Laurel doctrine is essentially meaningless.

Builder's remedies were first introduced in 1977, looked upon as an instrument which created "an incentive for the institution of socially beneficial but costly litigation such as […] Mt. Laurel." Oakwood at Madison v. Township of Madison, Inc., 72 N.J. 482, 550-51 (1977). The remedy was created as "a device that rewards a plaintiff seeking to construct lower income housing for success in bringing about ordinance compliance through litigation." Allan-Deane Corp. v. Bedminster, 205 N.J. Super. 87, 138 (Law Div. 1985).

Despite both the obligations announced in Mount Laurel I and the creation of the remedy, however, the years which followed saw "many municipalities failing to comply with their clear mandate of Mt. Laurel I." Holmdel Builder's Ass'n v. Township of Holmdel, 121 N.J. 550, 555 (1990). In response to the widespread level of non-compliance still within the state, the Supreme Court of New Jersey in Mount Laurel II looked to clarify and reaffirm the constitutional mandates set forth in Mount Laurel I. S. Burlington County NAACP v. Mount Laurel, 92 N.J. 158 (1983). One essential way the court did this was by shedding more light on the builder's remedy process.

The court began by describing the remedy as "one of many controversial aspects of the Mount Laurel doctrine." 92 N.J. at 279. Despite this, the opinion continued by explaining that the general experience since Madison "demonstrated […] that builder's remedies must be made more readily available to achieve compliance with Mt. Laurel." Ibid. With this in mind, the court laid out the process by which these remedies would be awarded, stating "where a developer succeeds in Mount Laurel litigation and proposes a project providing a substantial amount of lower income housing, a builder's remedy *should be granted* unless the municipality establishes that because of environmental or other substantial planning concerns, the plaintiff's proposed project is clearly contrary to sound land use planning." Id. at 279-280 (emphasis added). The court "emphasize[d] that the builder's remedy should not be denied solely because the municipality prefers some other location for lower income housing, even if it is in fact a better site." Id. at 280.

Our Supreme Court has continuously pointed to the need for builders' remedies as a tool to achieve municipal compliance with Mount Laurel. In Toll Bros. v. Twp. of West Windsor, a case that the Court specifically took to reevaluate whether builder's remedies were still needed, the Court emphatically answered yes. The West Windsor Court observed and reflected on the COAH process – which at that point was still operating as intended – and pointed out that only 271 out of 521

municipalities, or fifty-two percent, were actually engaged in the COAH process. The court remarked that "that statistic [and the specifics of the West Windsor case] demonstrate a continued need for the builder's remedy." 173 N.J. 502, 563 (2002). In a builder's remedy lawsuit, a developer will be entitled to a builder's remedy if "(1) it succeeds in Mount Laurel litigation; (2) it proposes a project with a substantial amount of affordable housing; and (3) the site is suitable, that is, the municipality does not meet its burden of proving that the site is environmentally constrained or construction of the project is contrary to sound use planning." Mount Olive Complex v. Twp. of Mount Olive, 340 N.J. Super. 511, 525 (App. Div. 2001); In re Twp. of Bordentown, 471 N.J. Super. 196, 221-22 (App. Div. 2022) (citation omitted).

In addition, our courts have stressed the need for builder's remedies as a tool for compliance even when the town agrees to comply after the suit is filed. Specifically, "a developer may be entitled to a builder's remedy, even if a municipality has begun moving toward compliance before or during the developer's lawsuit, *provided the lawsuit demonstrates the municipality's current failure to comply with its affordable housing obligations*" Cranford Dev. Assocs., LLC v. Twp. of Cranford, 445 N.J. Super. 220, 231 (App. Div. 2016) (emphasis added). In that case, the Appellate Division noted that "a trial court has authority to

mold the builder's remedy" because it is a 'dynamic' and 'flexible proceeding'" (id. at 237, quoting Toll Bros., 173 N.J. at 510, 574).

In resuming its pre-1985 role to ensure the vindication of the constitutional rights of low- and moderate- income families across the state, the Supreme Court in Mount Laurel IV further repeated that a builder's remedy is part of a "range of remedies available to cure the violation" and "remedial of constitutional rights" (In re Adoption of N.J.A.C. 5:96 & 5:97, 221 N.J. 1, 15, 37 (2015) (Mount Laurel IV). The Court held that the remedy is only appropriate "after a [trial] court has had the opportunity to fully address constitutional compliance and has found constitutional compliance wanting," meaning that only a municipality that satisfies its Mount Laurel obligation "obtain[s] immunity from a builder's remedy" (id. at 35).

In 2024, the Legislature, after nearly a decade of a court-driven process, answered the Supreme Court's call for alternative approaches to implementing Mount Laurel by passing the first comprehensive legislation since 1985 to do just that. See N.J.S.A. 52:27D-302 et seq. The Law codifies the builder's remedy as a consequence for voluntary noncompliance. It specifically defines "builder's remedy" as a "court-imposed, site-specific relief for a litigant who seeks to build affordable housing for which the court requires a municipality to utilize zoning techniques, such as mandatory set-asides or density bonuses, including techniques which provide for the economic viability of a residential development by including

housing that is not for low- and moderate-income households." N.J.S.A. 52:27D-304(o); see also id. at (u), defining "[e]xclusionary zoning litigation" as "litigation to challenge the fair share plan, housing element, or ordinances or resolutions implementing the fair share plan or housing element of a municipality based on alleged noncompliance" with the Fair Housing Act or the Mount Laurel doctrine, "which litigation shall include . . . litigation seeking a builder's remedy." Over 440 municipalities have filed a binding resolution with the new Affordable Housing Dispute Resolution Program established by the Law, and commenced a declaratory judgment action accepting, or challenging, their Fourth Round present need and prospective need obligations as estimated by the Department of Community Affairs pursuant to the new law. Middletown has not. The deadline for municipalities to opt in to the Program was January 31, 2025.

Middletown's History of Non-Compliance with its Constitutional Mt. Laurel Obligations

On July 8, 2015, Middletown filed a declaratory judgment complaint seeking to comply with its Third Round (1999-2025) affordable housing obligation (the "DJ Action") and obtained temporary immunity from exclusionary zoning lawsuits like the instant builder's remedy litigation. In July 2019, Middletown sought the voluntarily dismissal of the DJ Action, which was granted by way of an Order of Dismissal entered on July 19, 2019 (the "Dismissal Order"). (Ja9). The Dismissal Order expressly revoked Middletown's temporary immunity without

prejudice to any party's ability to file a subsequent action to seek or enforce compliance, such as a builder's remedy action. (Id.). Middletown's officials called the Mount Laurel process "unfair" and publicly criticized the Township's affordable housing obligation. (Ja12).

In March 2023, the Middletown Planning Board adopted the 2023 Master Plan Reexamination Report. The Reexamination Report, which amended the Township's Housing Element and Fair Share Plan (HEFSP), identified several potential redevelopment opportunities without explaining how those projects would provide for affordable housing.

The Property at issue is located in the Circus Liquors Redevelopment Plan ("Redevelopment Plan"), which serves as an overlay for the underlying PD Planned Development Zone. Although the PD Zone permits a variety of residential and non-residential uses, including the construction of townhouses and multi-family housing, there is no affordable housing set-aside requirement and the density is limited to 4.5 units per acre. Middletown has fought development of this property for years, despite not having an approved plan for affordable housing.

Middletown's Steps toward Condemnation Amid this Builder's Remedy Case

In July 2023, after the Township adopted the Reexamination Report, Plaintiff AAMHMT sent the Township a letter identifying itself as the contract purchaser of the Property and requested a meeting to discuss Plaintiff's proposal to

build an inclusionary development on the Property and the rezoning that would be required. (Da173). Ensuing discussions made clear that the Township would not rezone the Property for a multifamily inclusionary development. On August 17, 2023, Plaintiff filed the instant action seeking a determination that the Township was in violation of its Third Round Mount Laurel obligation and seeking an award of a builder's remedy, including the right to construct an inclusionary development with a substantial set-aside for affordable housing. After amending the complaint in September and December 2023, Plaintiff filed its Third Amended Complaint on March 28, 2024 to include additional facts and claims relating to recent actions in furtherance of the Township's efforts to condemn the Property. The Third Amended Complaint is the operative Complaint in this action.

On August 21, 2023—less than one week after Plaintiff filed the initial complaint in this action, and only one month after receiving Plaintiff's inquiry letter—Middletown adopted Resolution No. 23-228, which authorized the Board to undertake a preliminary investigation to determine whether the Property should be designated an "area in need of redevelopment" for condemnation purposes. (Da176). A companion resolution, No. 23-227, purported to designate Duva Development, LLC, as the designated redeveloper of the property. (Da206). On September 18, 2023, the Township Committee enacted Ordinance No. 2023-3390, which purported to amend the Redevelopment Plan to require that a site plan

application could not be submitted to the Planning Board unless the applicant was designated as the redeveloper by the Township. (Ja52).

On February 7, 2024, the Planning Board held a hearing and, despite Plaintiff's substantial objection, recommended that the Property be designated as a Condemnation Redevelopment Area. On February 20, 2024, by Resolution No. 24-95, the Township adopted the recommendation of the Planning Board and determined that the Property is an area in need of redevelopment for condemnation purposes under the Local Redevelopment and Housing Law (LRHL), N.J.S.A. 40A:12A-1 et seq. (Da201). A companion Resolution, No. 24-96, passed that same day, authorizes the Township Administrator, "in conjunction with the Township's redevelopment professionals, to prepare and issue" a Request for Expressions of Interest (RFEI) "to solicit proposals from qualified redevelopers, which shall be returnable approximately 90 days from its date of issuance." (Da209).

The Noncompliance Order and Order to Show Cause

On May 17, 2024, the trial court entered an order finding that Middletown is not compliant with its Third Round Mount Laurel obligation ("the Non-Compliance Order") (Da1). Middletown's undisputed Prior Round Obligation is approximately 1,561 units. The Township's Third Round Obligation is

approximately 1,026 units.[2] The Non-Compliance Order found that the Township is short its constitutional obligation by at least 602 units.[3] That Middletown is constitutionally noncompliant by a minimum of at least 602 units is undisputed in this litigation.

On June 7, 2024, Plaintiff filed an Order to Show Cause, seeking to enjoin Middletown from (1) taking any condemnation related action with respect to the Property, (2) designating a redeveloper for the Property under the LRHL, and (3) granting any type of development approval for any land for any purpose other than for inclusionary housing. (Da4-Da8). On June 18, 2024, the trial court entered an Order to Show Cause with Temporary Restraints, which enjoined Middletown

[2] Most New Jersey municipalities filed declaratory judgment actions and voluntarily satisfied their Third Round Mount Laurel obligations through settlement, pursuant to which they obtained final judgments of compliance and repose from exclusionary zoning lawsuits. Middletown is an outlier with respect to its Third Round obligation. As discussed above, Middletown has also chosen to not participate in the Fourth Round process pursuant to N.J.S.A. 52:27D-302 et seq.

[3] Middletown estimates its shortfall to be 602 units, while Plaintiff estimates the Township's shortfall to be as high as 983 units. The trial court did not make a specific finding of fact as to the exact number of Middletown's shortfall, but for purposes of this appeal, the fact that it is short a minimum of 602 units is not disputed.

from taking any further action with respect to the condemnation and redevelopment of the Property.

On July 5, 2024, the trial court heard oral argument. In its oral decision, the court noted the "special position" AAMHMT now inhabits as a builder's remedy plaintiff, where Middletown voluntarily abandoned its DJ Action and has been judged to be significantly noncompliant (IT49:23). The court noted that the Township could have chosen to be "in the driver's seat," but by withdrawing the DJ Action, Middletown declared, "we're going to step out of the driver's seat. We are not driving this bus. And what happens is… I have three builder's remedy lawsuits." (id. at 48:24-49:1). As a general matter, the trial court weighed whether the town should "be allowed to go ahead with condemnation when . . . the town is not constitutionally compliant with its third-round obligation" (id. at 51:18-20). The court noted that "[n]one of the cases that were cited . . . were directly on point" because they did not 'involve a municipality that has been found to be not constitutionally compliant . . . where you have a developer who is ready, willing and able to come forward with development that will include affordable housing" (id. at 52:5-8).

With respect to the Crowe v. DeGoia factors (90 N.J. 126 (1982)), the trial court found that Plaintiff had met its burden for a preliminary injunction by clear and convincing evidence. For the first prong, irreparable harm, the court noted that,

while "money damages isn't an irreparable harm," potential lenders for the development would know about Middletown's declaration of taking in a condemnation proceeding should it be allowed to proceed, and this would "cast a shadow . . . on being able to move forward with development" (id. at 52:15-16, 24-53:1). The court stated that Plaintiff's claim was not unsettled pursuant to the second Crowe factor, because "the legal right and the legal obligations under the Mount Laurel doctrine are pretty clear" once the determination had already been made that Middletown was not constitutionally compliant (id. at 53:24-25). The court also noted that it had not "heard anything indicating, other than that the town wants this to be commercial, that it's environmentally not appropriate, that nothing can be built here. Obviously, the town wants something to be built here of a commercial nature" (id. at 53:19-23). The court emphasized that, although the developer might not get "everything they want" or even "anything that they want" in the ensuing case proceeding, the procedural posture of the action after the Non-Compliance Order was such that Middletown "absolutely cannot condemn property where a builder says I want to build a residential housing project with an affordable housing component" (id. at 54:2, 2-3, 22-23).

In limiting Middletown from taking further action or effort towards designating a redeveloper for the property, the court held that this relief was granted for the same reasons, noting that "the structure of how a Mount Laurel case

moves forward, which is different [than a lot of other lawsuits] as specifically laid out by the New Jersey Supreme Court" (id. at 55:20-23). When asked whether it was correct that, "[i]n a sense there was a deal with the developer, a contract and the current developer" and the "current plaintiff wants to mess that up, right?" Middletown's attorney answered, "[g]enerally, yes" (id. at 26:4-9).

The court then denied Plaintiff's request to restrain the Township from granting any type of development approval for any parcel of land for any purpose aside from an inclusionary development, determining essentially that that remedy would be overbroad because Middletown was a "really big town" and there were all sorts of developments going on (id. at 47:19-20). At the same time, the court acknowledged that "no municipality in its right mind will allow a residential development to go in without an affordable housing component" (id. at 58:14-16). The trial court thereafter entered an Order on Return Date of OTSC, granting a preliminary injunction limiting Middletown from taking any further action or effort towards the condemnation of the Property, and taking any further action or effort towards designating a redeveloper for the Property pursuant to the LHRL (see Da9-Da11). The court specifically required such restraints to remain in place until the later of either the court's determination of whether plaintiff was entitled to a builder's remedy, or the court's determination of whether plaintiff was entitled to an order permanently enjoining defendants from condemning the Property.

Middletown moved for reconsideration. In the ensuing oral argument, the Court outlined the procedure of a builder's remedy case: once a finding has been made that Middletown is not constitutionally compliant, "the burden shifts over to the municipality . . . to show that the property is for either environmental reasons or . . . clearly contrary to sound land use planning" (2T:9:25-10:3-4). In balancing the harms to the parties, the Court noted that there were other places in town that it can seek to use its condemnation powers for commercial use, but that the way to achieve immunity from builder's remedy suits was to "file the DJ action and you follow through" (id. at 15:21-22). The court noted that it did not have "any cases in front of [the court] that anyone can point to as an example that says if you are constitutionally non-compliant, you can condemn property where a builder's remedy lawsuit has been filed and where you have been found to be constitutionally non-compliant, which would have the result of making that property unavailable for the development of affordable housing" (id. at 22:15-21).

The trial court denied the motion for reconsideration. This court then granted Middletown's motion for leave to appeal from the denial of the motion for reconsideration. Fair Share Housing Center now asks this court to affirm the decisions of the trial court and deny Middletown's appeal.[4]

[4] FSHC's involvement in this matter comes by way of intervention into two, previously consolidated builder's remedy matters, filed by Adoni Property Group ("Adoni") and Plaintiff, AAMHMT Property, Inc. ("AAMHMT"). On October 18,

LEGAL STANDARDS

The standard of review for grant or denial of a stay issued by a trial court is abuse of discretion. See Horizon Health Ctr. V. Felicissimo, 135 N.J. 126, 137 (1994); Rinaldo v. RLR Inv., LLC, 387 N.J. Super 387, 395 (App. Div. 2006); Nat'l Starch & Chem. Corp. v. Parker Chem. Corp., 219 N.J. Super. 158, 162 (App. Div. 1987). "New Jersey has long recognized, in a wide variety of contexts, the power of the judiciary to 'prevent some threatening, irreparable mischief, which should be averted until opportunity is afforded for a full and deliberate investigation of the case.'" Crowe v. De Gioia, 90 N.J. 126, 132 (1982). "Indeed, the point of temporary relief is to maintain the parties in substantially the same condition 'when the final decree is entered as they were when the litigation

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2023, FSHC filed a Motion to Intervene in the Adoni Property Group builder's remedy case ("Adoni Matter"), Docket No.: MON-L-1260-23. On November 17, 2024, the Adoni matter was partially consolidated with the instant AAMHMT builder's remedy case ("AAMHMT matter"), Docket No.: MON-L-2588-23. On December 1, 2023, the court granted FSHC's motion for intervention and to file Cross Claims in the Adoni Matter. FSHC subsequently filed an accompanying Answer with Cross Claims in the Adoni matter on December 11, 2023. After the court granted FSHC intervention by consent in the AAMHMT matter on February 8, 2024, FSHC again filed an Answer with Cross Claims, which was amended and filed most recently on April 17, 2024. The Non-Compliance Order was entered in both the AAMHMT and Adoni Matters. Although this court denied Middletown's motion for leave to appeal in the Adoni matter, FSHC maintains that the Adoni case, inasmuch as it is referenced in the trial court's oral decision, is properly part of the record in the instant matter. Thus, FSHC respectfully submits that this court can consider Middletown's strategy of using condemnation to subvert its affordable housing obligations as part of a larger pattern.

began.'" Id. at 134. Equitable remedies are designed to be both broad and flexible, such that they can be tailored to redress even the most complicated grievances. Banach v. Cannon, 356 N.J. Super. 342, 361 (Ch. Div. 2002).

Before granting interim injunctive relief, a court must consider: (1) whether the injunction is "necessary to prevent irreparable harm;" (2) whether "the legal right underlying the claim is unsettled;" (3) whether the applicant has made "a preliminary showing of a reasonable probability of ultimate success on the merits;" and (4) "the relative hardship to the parties in granting or denying [injunctive] relief." Crowe v. De Gioia, 90 N.J. 126, 132–134 (1982). The moving party has the burden to prove each of the Crowe factors by clear and convincing evidence. Brown v. City of Paterson, 424 N.J. Super. 176, 183 (App. Div. 2012). Further, "when a case presents an issue of 'significant public importance,' a court must [also] consider the public interest in addition to the traditional Crowe factors." Garden State Equal. v. Dow, 216 N.J. 314, 321 (2013).

A request for a stay pending the disposition of a claim on its merits "is flexible; it should be exercised whenever necessary to serve the ends of justice, and justice is not served if the subject-matter of the litigation is destroyed or substantially impaired during the pendency of the suit." Waste Mgmt. of N.J., Inc. v. Morris Cnty. Mun. Utils. Auth., 433 N.J. Super. 445, 453 (App. Div. 2013) (quotation omitted). "This less rigid approach, for example, permits injunctive

relief preserving the status quo even if the claim appears doubtful when a balancing of the relative hardships substantially favors the movant, or the irreparable injury to be suffered by the movant in the absence of the injunction would be imminent and grave, or the subject matter of the suit would be impaired or destroyed" (id. at 454). Put differently, "[a] court may issue an interlocutory injunction on a less than exacting showing if necessary to prevent the subject matter of the litigation from being destroyed or substantially impaired." Waste Mgmt., 399 N.J. Super. at 534 (quotation omitted).

Motions for reconsideration are governed by R. 4:49-2, which provides that the decision to grant or deny a motion for reconsideration rests within the sound discretion of the trial court. Reconsideration should be used only where the court has expressed its decision based upon a palpably incorrect or irrational basis, or it is obvious that the court either did not consider, or failed to appreciate the significance of probative, competent evidence. See, e.g., Pitney Bowes Bank, Inc. v. ABC Caging Fulfillment, 440 N.J. Super. 378 (App. Div. 2015).

LEGAL ARGUMENT

THE TRIAL COURT PROPERLY GRANTED INJUNCTIVE RELIEF TO PREVENT THE IRREPARABLE HARM CAUSED BY MIDDLETOWN'S DISREGARD FOR ITS MOUNT LAUREL COMPLIANCE [Da9-Da11; Da12-Da13]

Middletown argues against the trial court's finding of irreparable harm for several different reasons that should be rejected outright. First, Middletown argues that the harm caused by its actions was only monetary, which cannot serve as a basis for a finding of irreparable harm. Next, Middletown argues that any harm is reversible and thus cannot constitute a basis for preliminary relief. In minimizing its extraordinary actions to circumvent the Mount Laurel process, Middletown asks this court to reverse the trial court's well-reasoned finding, made soundly within its discretion. The trial court took Middletown's actions seriously, and this court should similarly reject Middletown's diminishment of its extraordinary steps to fly in the face of its constitutional obligation.

First, the trial court correctly found that temporarily limiting certain powers of Middletown was necessary to prevent the irreparable harm to New Jersey's low- and moderate-income families, the beneficiaries of the fifty-year-old Mount Laurel doctrine.

Affordable housing is not built overnight. But the groundwork for building such housing—and for enforcing the Mount Laurel obligation more generally—follows a methodical process so that affordable homes are actually built. The

Supreme Court in Mount Laurel II set forth the consequences of allowing towns to evade their Mount Laurel obligations: "unless a strong judicial hand is used, Mount Laurel will not result in housing, but in paper, process, witnesses, trials and appeals" (92 N.J. at 199). Each step along the process plays a critical role in ensuring that affordable housing actually gets created, and that each municipality in the state of New Jersey provides a realistic development opportunity for its fair share of affordable housing in accordance with the original principles set forth in Mount Laurel I.

Here, the parties were turning toward the "suitability" phase of a builder's remedy case; a discovery schedule had been set for the court to determine whether the Property was suitable for affordable housing. The irreparable harm from Middletown's actions here inures not only to low- and moderate- income households – who would continue to face "process, paper, and interminable delay" based on the Township's actions – but also to the entire Mount Laurel process statewide. As discussed further infra, the seriousness of the chilling effect cannot be overstated.

Middletown, in attempting to justify the actions that it took, in reality describes the carefully thought-through, deliberate processes it undertook to block

Plaintiff's development.[5] As one example, Middletown admits that it received notice of Plaintiff's intent to build Mount Laurel housing on the Property (in July 2023), and rejected the offer "[b]ecause the Property sat stagnant for the previous five years and Plaintiff was unwilling to consider commercial development on the Commercial Tract" (Db13). Not only did Middletown reject the offer, but it took several steps further to protect its own unconstitutional zoning scheme. In its own words, Middletown "began evaluating options to *protect the Redevelopment Plan and enable the Property to be developed with commercial uses* to complement the nearly-completed Residential Tract, as had been carefully negotiated." (Ibid.) (emphasis added).

This "evaluat[ion]" of "options to protect the Redevelopment Plan" may have technically begun a week before the builder's remedy case was formally filed (though the Township was clearly on notice of the possibility of the action from the July 2023 letter and ensuing conversations), but each step taken by the Township thereafter officially took place during the builder's remedy case. On February 20, 2024, Middletown adopted Resolution No. 24-95, which designated the Property as an area in need of redevelopment for condemnation purposes. (Da201-Da205).

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[5] Middletown argues, at some points in the appeal, that it has not done anything toward a taking; at other points, the Township asserts that that the trial court impeded on its constitutional right to a taking. Under either theory, Middletown has decided to skirt the Supreme Court derived process for adjudicating Mount Laurel obligations.

That same day, the Township adopted Resolution No. 24-96, which authorized Middletown to begin the process of identifying a qualified redeveloper for the redevelopment of the Property.[6] (Da209-Da210).

The significance of this cannot be overstated. Middletown admits that its goals were to "enable the Property to be developed with commercial uses to complement the nearly-completed Residential Tract," (Db11) and the steps it took toward actualizing those goals are not in dispute. It is bewildering that Middletown asserts, in other points of its brief, that the steps it took toward condemnation were somehow negligible or correctable (see Db23-Db26), or that, "[i]n short, condemnation is not imminent." (Db13). Condemnation involves multiple steps, but Middletown's assertion that it is not trying to actually condemn the property should be dismissed outright.

Middletown further argues that it was simply following procedures pursuant to the Eminent Domain Act, and that Plaintiff "faced no irreparable harm requiring

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[6] Pursuant to the Local Redevelopment and Housing Law, N.J.S.A. 40A:12A-1, et seq. (the "LRHL"), a municipality must identify whether a redevelopment area designation shall authorize the town to use the power of condemnation under the LRHL or not authorize it to use the power of condemnation. N.J.S.A. 40A:12A-6(a). In the instant matter, Plaintiff has vigorously opposed the Planning Board's determination that the Property meets the requirements for designation as a Condemnation Redevelopment Area and has proffered an expert report by David Roberts, AICP/PP, LLA, LEED AP ND, the author of "The Redevelopment Handbook, A Guide for Rebuilding New Jersey's Communities," contesting as much. Middletown does not address Plaintiff's objections in this appeal.

an injunction against redevelopment efforts because Rule 4:69 sets forth the established process to challenge government actions, including for redevelopment" (Db34). However, none of the cases cited by Middletown are directly on point, because they are not builder's remedy actions. Indeed, Deland v. Berkeley Heights, 361 N.J. Super. 1, 18-19 (App. Div. 2003), provides support for Plaintiff and FSHC's position by stating the court's decision to permit a municipality to exercise eminent domain over a site that proposed to provide affordable housing may be different if the court was "confronted with a municipality that is seeking to undermine its capacity to satisfy its Mount Laurel obligations by acquiring land suitable for high-density residential development for another purpose." Borough of Essex Fells v. Kessler, 289 N.J. Super. 329 (Law Div. 1995), is concerned with whether the proceeding was brought in bad faith, for the sole purpose of developing land into a nursing facility.

Next, the Township either significantly misreads Mount Laurel Twp. v. Mipro Homes, 379 N.J. Super. 358 (App. Div. 2005), aff'd, 188 N.J. 531 (2006), or intentionally contorts its facts. There, the court affirmed the Township of Mount Laurel's right to condemn property which had received final subdivision approval for the development of non-affordable, single-family homes. The Appellate Division in Mipro emphasized the particular facts of Mount Laurel's land use history and purpose for condemnation: the town had been the defendant in the

leading early exclusionary zoning cases in this State (see discussion, supra) and, as a result of zoning changes from that litigation along with the town's limited financial resources, had been "prevented . . . from preserving a significant amount of land for open space" (379 N.J. Super. at 362). The court recited a lengthy history of the Legislature's recognition of the public interest in acquiring land for open space through various statutes, including the New Jersey Green Acres Land Acquisition Act of 1961, the Municipal Trust Fund Act, and the Garden State Preservation Trust Act, noting that there were "multiple statutory enactments that confer authority upon municipalities to acquire land by eminent domain for preservation of open space and land conservation" (id. at 372).

In upholding Mount Laurel's condemnation of the property, Judge Skillman made clear in dicta that the case was different than Kessler, 289 N.J. Super. 329, which "affirmed dismissal of an action to condemn land on which the owner planned to construct a residential development that would have provided multi-family housing affordable to middle-income families." Judge Skillman continued to explain that if the case involved affordable housing, the result likely would have been different:

> "If Mount Laurel had attempted to condemn Mipro's property when its predecessor in title planned to construct an assisted living facility [which would have included units affordable to low-and moderate-income residents], a similar finding might have been warranted.

> However, Mipro's plan to construct a development of single-family homes that will be affordable only to upper-income families would not serve a comparable public interest."
>
> [379 N.J. Super at 377.]

The Supreme Court called Judge Skillman's decision a "thoughtful and well-written opinion." Mount Laurel Twp. v. MiPro Homes, L.L.C., 188 N.J. at 533.

The case at hand operates in an entirely different universe from Mipro. Mipro was concerned with a municipality's power to condemn property for open space even when its true goal was to slow down residential development in the municipality. Crucially, there is absolutely no indication in Mipro that Mount Laurel was noncompliant in its constitutional obligations toward affordable housing; indeed, there are factual findings to the contrary, noting that Mount Laurel's desire to purchase open space stemmed in large part *from* its compliance with its constitutional obligations (379 N.J. Super. at 362, noting that the town's overlay zoning as a result of its exclusionary zoning litigation, as well as the town's limited financial resources, "prevented the municipality from preserving a significant amount of land for open space from the mid 1980s to the late 1990s"). The court's recitation of the specific facts of that case, and differentiation of it from the facts of Kessler, demonstrates the importance of carefully examining the facts of each matter when determining the appropriateness of a town's condemnation efforts. Indeed, the court's dicta in Mipro is informative here: that a similar finding

to that in Kessler may have been warranted if Mount Laurel was seeking to condemn property with proposed affordable housing units. See id. at 377.

Middletown argues that "no case holds that Middletown loses its right to eminent domain just because it *may* lack sufficient affordable housing for the Third Round" (Db44) (emphasis added). However, this misreads the record and the actions taken by the trial court. First, the trial court did not find that Middletown, hypothetically, may lack sufficient affordable housing for the Third Round. The trial court made a factual finding that the Township lacked sufficient affordable housing, by many hundreds of homes. Middletown does not dispute this fact. And even then, the trial court did not hold that Middletown "loses its right to eminent domain," (ibid.) or "erase a municipality's condemnation and redevelopment powers" (id. at 1). Instead, after considering the factual history and procedural posture of the case, the trial court temporarily limited Middletown's right to use eminent domain with respect to the Property, so that the next stage of the builder's remedy suit could progress.

In sum, there is a reason for the scarcity of case law: no town has been brazen enough to sidestep their Mount Laurel obligation in the way that Middletown now proposes, because of the solid Supreme Court law on the availability of the builder's remedy. In the face of this fact, the trial court was well

within its discretion to find that a preliminary injunction was necessary to prevent imminent harm based on the unique factual circumstances present.

The Trial Court Correctly Evaluated the Settled Nature of the Claim, the Likelihood of Success on the Merits, and Preserved the Status Quo in Temporarily Limiting Certain Actions After Middletown was Deemed Constitutionally Non-Compliant.

The trial court correctly considered the settled nature of the claim, Plaintiff's likelihood of success on the merits, and also preserved the status quo in granting preliminary relief.

With respect to the settled nature of Plaintiff's claim and the likelihood of success on the merits, the court described the "legal obligations under the Mount Laurel doctrine" as "pretty clear" – and they are (IT53:24-25). One need only glance at the long line of Supreme Court, Appellate Division, and trial court cases to see that the standards for a builder's remedy are well-settled and beyond dispute (see, e.g., Mount Laurel IV, 221 N.J. at 14, noting that only a municipality that satisfied its Mount Laurel obligations "obtain[s] immunity from a builder's remedy;" West Windsor, 173 N.J at 563, outlining the "continued need for the builder's remedy;" In re Twp. of Bordentown, 471 N.J. Super. at 221-22, repeating standards for succeeding in a builder's remedy case; Allan-Deane, 205 N.J. at 138, describing the remedy as "a device that rewards a plaintiff seeking to construct

lower income housing for success in bringing about ordinance compliance through litigation").[7]

In addition, even if the merits of the case were less clear, the trial court would have been well within its discretion to issue preliminary relief to preserve the status quo. In Brown v. City of Paterson, the Appellate Division explained that when an interlocutory injunction "is merely designed to preserve the status quo," the court "may take a less rigid view than it would after a final hearing." Brown v. City of Paterson, 424 N.J. Super. 176, 183 (App. Div. 2012) (quotation omitted). "In acting only to preserve the status quo, the court may 'place less emphasis on a particular Crowe factor if another greatly requires the issuance of the remedy.'' Ibid. (emphasis added). Moreover, the Appellate Division has held that "doubt

[7] The trial court had already determined that the first prong of the builder's remedy—that Middletown was not in constitutional compliance—was met. Nor does Middletown suggest that Plaintiff's project would not create "substantial" housing for lower-income individuals as required by the second prong. Middletown instead states that the trial court did not make an express finding as to the site suitability according to the third prong of the builder's remedy test. The trial court was not required to have a plenary hearing or mini-trial to find that there was a likelihood of success here. Mount Laurel II is clear that "a builder's remedy *should be granted* unless the municipality establishes that because of environmental or other substantial planning concerns, the plaintiff's proposed project is clearly contrary to sound land use planning." 92 N.J. at 279-280. The trial court in the instant action emphasized that Middletown had not raised any issues about environmental or other planning concerns, and that it was clear that Middletown wanted to build something on the property – just not affordable housing (see IT53:19-23). All these observations are components of the trial court's finding as to likelihood of success.

about a suit's merits does not entirely preclude the entry of an interlocutory injunction designed to preserve the status quo," Waste Management of New Jersey, Inc., 399 N.J. Super. at 535, and continued:

> So long as there is some merit to the claim, a court may consider the extent to which the movant would be irreparably injured in the absence of pendente lite relief, and compare that potential harm to the relative hardship to be suffered by the opponent if an injunction preserving the status quo were to be entered. If these factors strongly favor injunctive relief, the status quo may be preserved through injunctive relief even though the claim on the merits is uncertain or attended with difficulties.
>
> [Ibid.].

The trial court here correctly preserved the status quo. During the course of this builder's remedy action alone, Middletown continually advanced its stated goal of "evaluating options to protect the Redevelopment Plan and enable the Property to be developed with commercial uses" (Db11), with utter disregard for the builder's remedy process. On August 21, 2023—less than one week after the initial filing in this action—Middletown adopted Resolution No. 23-228, which authorized the Board to undertake a preliminary investigation to determine whether the Property should be designated an "area in need of redevelopment" for condemnation purposes. (Da181). One month after that, the Township Committee enacted Ordinance No. 2023-3390, purporting to amend the Redevelopment Plan

to require that a site plan application cannot be submitted to the Planning Board unless the applicant is designated as the redeveloper by the Township.

The Township's actions continued into 2024. On February 7, 2024, the Planning Board held a hearing and, despite Plaintiff's substantial objection, recommended that the Property be designated as a Condemnation Redevelopment Area. Two weeks later, the Township adopted the recommendation of the Planning Board and determined that the Property is an area in need of redevelopment for condemnation purposes. A companion Resolution, passed that same day, authorized the Township Administrator to issue an RFEI from potential redevelopers.

In sum, the Township was rapidly moving forward with its plan for redevelopment of the Property in the midst of this builder's remedy action. The trial court was well within its discretion in finding that a preliminary injunction was necessary to preserve the status quo in the face of Middletown's flagrant disregard for the builder's remedy process.[8]

[8] In fact, Middletown's position will not change between now and when a final order in the action is rendered because the Property will remain in its current state until Plaintiff is awarded a builder's remedy. Middletown is seeking to condemn the Property so that it can be redeveloped as a commercial shopping center, but according to its own papers, it will not seek further action on the redevelopment right now.

Middletown Chose to Relinquish Control Over Certain Powers When It Made the Voluntary Decision to Stop Pursuing Immunity from Builder's Remedy Cases.

As the trial court correctly concluded, the Township could have chosen to be "in the driver's seat," but by withdrawing the DJ Action, Middletown declared, "we're going to step out of the driver's seat. We are not driving this bus." (1T48:24-49:1). At the reconsideration hearing, the court again noted that "Middletown did not have to withdraw its declaratory judgment action when it couldn't reach an agreement" with FSHC; there could have been a contested hearing. (2T15:24-16:1). There are consequences for that voluntary decision made by Middletown. One of the consequences of that decision is that now the builder's remedy case continues to the next phase. The "[j]udicial management of a Mount Laurel trial," which is to be construed as just as "important to the constitutional obligation" as the Supreme Court's "substantive rulings," must be allowed to proceed. Mount Laurel II, 92 N.J. at 199. Indeed, the Legislature has recently reinforced the builder's remedy as a consequence of not participating voluntarily in enacting the latest amendments to the Fair Housing Act. See N.J.S.A. 52:27D-304(o); (u).

Again, the universe Middletown is operating in is one of a builder's remedy – the constitutional compliance mechanism envisioned and emphasized by our Courts. In a builder's remedy case, the "remedy should not be denied solely

because the municipality prefers some other location for lower income housing, even if it is in fact a better site." Mount Laurel II, at 280. While Middletown still has the opportunity at a later point in the action to argue that the site is not suitable, it has a heavier burden than if it had "filed the DJ action" and "follow[ed] through."

The Trial Court Properly Balanced the Harms and Protected the Public Interest by Situating Middletown's Right to Exercise Certain Powers Pursuant to the LHRL within its Constitutional Mount Laurel Obligation.

Finally, the trial court correctly considered the remainder of the Crowe factors – including balancing of the harms, and the "public importance" factor – when determining that injunctive relief was warranted in this particular situation. "When a case presents an issue of 'significant public importance,' a court must [also] consider the public interest in addition to the traditional Crowe factors." Garden State Equal. v. Dow, 216 N.J. 314, 321 (2013).

With respect to Middletown's purported harm and its relation to the public interest, Middletown claims that it sought to use its redevelopment powers to redevelop land it had long sought to use as commercial space. Nowhere does Middletown concretely describe the harm that would befall it should it wait another few months for the next phase of the builder's remedy action to proceed, when it had waited – by its own admission – over a decade to redevelop the site. Although before this court, Middletown describes its harm as its "inability to serve

the public interest by revitalizing the Property with commercial development that will improve the quality of life for its residents and spur new job growth and business opportunities," (Db34), the trial court in no way *determined* at this stage of the proceedings that Middletown could not revitalize the Property. The trial court simply found, for Middletown to be able to remove one property from consideration as to its large shortfall in its constitutional compliance, when there was a ready and willing developer for affordable housing on that property, would sidestep the well-established builder's remedy process. The trial court balanced the fact that Middletown can use its condemnation powers for commercial use elsewhere, and could even make the arguments that the tract was not appropriate for residential use – only commercial use – at a later point in the same builder's remedy proceeding.[9] Unlike what Middletown would like this court to believe, the trial court did not make any finding that Mount Laurel trumped other constitutional rights. It temporarily limited certain actions to allow the next phase of a builder's remedy lawsuit to proceed.

[9] Although Middletown disputes the suitability of the Property for residential development, the underlying zone for the Property permits multifamily residential development. Additionally, the commercial redevelopment sought by Middletown indicates that there are no significant physical or environmental restraints which would render the Property unsuitable. The trial court recognized as such, noting that it had not "heard anything indicating, other than that the town wants this to be commercial, that it's environmentally not appropriate, that nothing can be built here" (1T53:19-25).

On the other hand, the trial court appropriately heeded "[t]he public policy of this State," which has "long been that persons with low and moderate incomes are entitled to affordable housing." Homes of Hope, Inc. v. Eastampton Twp. Land Use Plan. Bd., 409 N.J. Super. 330, 337 (App. Div. 2009). The New Jersey Supreme Court has "recognized that the furnishing of housing for minority or underprivileged segments of the population inherently served the public welfare." Homes of Hope, Inc. v. Mount Holly Zoning Bd. Of Adjustment, 236 N.J. Super. 584, 588 (Law. Div. 1989) (quotation marks omitted). "It is plain beyond dispute that proper provision for adequate housing of all categories of people is certainly an absolute essential in promotion of the general welfare required in all local land use regulation." Mount Laurel I, 67 N.J. at 179.

In Mount Laurel II, the New Jersey Supreme Court discussed the importance of affordable housing actually being built, and the need for strong judicial management to ensure it happens:

> The obligation is to provide a realistic opportunity for housing, not litigation. We have learned from experience, however, that unless a strong judicial hand is used, Mount Laurel will not result in housing, but in paper, process, witnesses, trials and appeals.
>
> We intend by this decision to strengthen it, clarify it, and make it easier for public officials, including judges, to apply it.
>
> [92 N.J. at 199.]

The Court continued:

> Judicial management of a Mount Laurel trial, however, is as important to the constitutional obligation as our substantive rulings today. Confusion, expense, and delay have been the primary enemies of constitutional compliance in this area. This problem needs the strong hand of the judge at trial as much as the clear word of the opinion on appeal.
>
> [Id. at 292.]

Here, the trial court correctly used a "strong hand,"—a strong but even hand—to judicially manage the Mount Laurel trial, by balancing the harms on each side and considering the public interest at hand. Its proper decision temporarily limiting the actions of Middletown with respect to the Property should be allowed to stand.

A Decision in Middletown's Favor Would Have Significant, Widespread Effects of Weakening the Enforcement of Municipalities' Constitutional Mount Laurel Compliance Statewide.

Despite Middletown's contention that the trial court created new law, Middletown's position itself is what stands directly contrary to well-settled New Jersey precedent. As described above, builder's remedies were first introduced in 1977, looked upon as an instrument which created "an incentive for the institution of socially beneficial but costly litigation such as […] Mt. Laurel." Madison, 72 N.J. at 550-51. The necessity of the builder's remedy to effectuate the Mount Laurel obligation has been consistently reinforced in every level of court of this

state. This accords with the age-old maxim that "wherever a legal right has been infringed a remedy will be given," Thompson v. City of Atlantic, 386 N.J. Super. 359 (App. Div. 2006).

Middletown's logic is reminiscent of the original Township of Mount Laurel's reasoning in Mount Laurel I. The town there had its own explanation for its unconstitutional zoning. Indeed, most towns do. The end result of Mount Laurel litigation often involves a town changing that zoning. In that sense, all builder's remedy litigation could be seen as a plaintiff seeking to "mess . . . up" a town's unconstitutional zoning (IT:26:3-9). At oral argument, Middletown admitted that it did not desire for its potentially unconstitutional zoning to be "messed up" by the builder's remedy lawsuit. It sought to proceed toward the path of condemnation and use the property as a commercial tract, but faced the hurdle of a builder's remedy lawsuit on that exact property. Not to be dissuaded, Middletown sought to use the LHRL as a creative way to skirt the process. Middletown asks this court to affirm its circular logic: to allow it, the constitutionally-noncompliant town, to be the arbiter of what constitutes a public purpose, and to use its redevelopment powers in an unfettered manner to advance that goal. Similar to the rejection of the Township of Mount Laurel's original zoning scheme by the state's Supreme Court in Mount Laurel I, this court should emphasize that Middletown's discretionary rights are subject to its constitutional obligations.

Allowing the Township to proceed down the redevelopment and condemnation path in the midst of a builder's remedy action would create a chilling effect on builder's remedy actions across the state. There would be nothing to stop municipalities from waiting for a determination of noncompliance, and then condemning the property to render the builder's remedy lawsuit moot. Our courts have consistently held that "a developer may be entitled to a builder's remedy, even if a municipality has begun moving toward compliance before or during the developer's lawsuit, provided the lawsuit demonstrates the municipality's current failure to comply with its affordable housing obligations." Cranford, 445 N.J. Super. at 231 (App. Div. 2016). If a developer may be entitled to a builder's remedy even if a municipality has begun moving toward compliance, so much more so for if a municipality has faced the entire process with flagrant disregard.

This court should reaffirm the trial court's granting of temporary relief in its entirety.

THE TRIAL COURT PROPERLY DENIED MIDDLETOWN'S MOTION FOR RECONSIDERATION [Da12-Da13]

Middletown urges this court to reverse the trial court's decision denying reconsideration. As acknowledged by Middletown in its briefing, the appellate court accords substantial deference to the trial court's findings of fact provided that they are supported by adequate, substantial and credible evidence, and also give

deference to the trial court's conclusions and discretionary determinations that flow from them.

Middletown's arguments in this regard are largely parallel to the contentions discussed earlier. Middletown does not argue that the trial court overlooked controlling decisions – only that it disagreed with the court's decision. As noted above, the trial court carefully considered the facts of this case – including the long, torturous history of the site; Middletown's significant noncompliance with its Third Round obligation after withdrawing from the DJ action; and Middletown's steps toward condemnation within the context of this builder's remedy action.

In its decision denying reconsideration, the trial court repeatedly relied on the unique facts of Middletown's constitutional violation and the significant shortfall of 602 units. After balancing the equities, the trial court re-emphasized the factual findings made previously, noting again that any harm to the protected class resulting from the potential condemnation or redevelopment of the Property outweighed the potential harm to Middletown. In balancing the harms to the parties, the Court noted that there were other places in town that the town can seek to use its condemnation powers for commercial use, but that the way to achieve immunity from builder's remedy suits was to "file the DJ action and you follow through" (2T at 15:21-22). The court noted that it did not have "any cases in front of [it] that anyone can point to as an example that says if you are constitutionally

non-compliant, you can condemn property where a builder's remedy lawsuit has been filed and where you have been found to be constitutionally non-compliant, which would have the result of making that property unavailable for the development of affordable housing" (id. at 22:15-21). FSHC asks that this court affirm the trial court's denial of Middletown's motion for reconsideration.

CONCLUSION

For the reasons described above, FSHC respectfully requests that this court affirm the trial court's orders in their entirety.

Respectfully submitted,

/s/ Ariela Rutbeck-Goldman, Esq.

Counsel for Fair Share Housing Center

Dated: March 7, 2025

c: All counsel of record via eCourts and email

AAMHMT PROPERTY LLC, Plaintiff-Respondent, v. TOWNSHIP OF MIDDLETOWN; MIDDLETOWN TOWNSHIP COMMITTEE; Defendants-Appellants -and- MIDDLETOWN TOWNSHIP PLANNING BOARD; and B. DUVA DEVELOPMENT, LLC, Defendants.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-000844-24T2 CIVIL ACTION ON APPEAL FROM: SUPERIOR COURT, LAW DIVISION, MONMOUTH COUNTY DOCKET NO.: MON-L-2588-23 SAT BELOW: HON. LINDA GRASSO-JONES, J.S.C.

BRIEF ON BEHALF OF PLAINTIFF-RESPONDENT AAMHMT PROPERTY, LLC

HUTT SHIMANOWITZ & PLOCKER, P.C.
Bryan D. Plocker, Esq. (#028172000)
459 Amboy Avenue
Woodbridge, NJ 07095
P: (732) 634-6400
F: (732) 634-0718
Attorneys for Plaintiff-Respondent
AAMHMT Property, LLC
bplocker@huttshim.com

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PRELIMINARY STATEMENT

The Township of Middletown ("Middletown" or the "Township") should not be permitted to use its redevelopment condemnation powers to thwart this builder's remedy lawsuit seeking to bring the Township into compliance with its constitutional obligation to create a realistic opportunity for affordable housing. This is especially true where the trial court has already determined that the Township is in significant violation of its third-round constitutional obligation to provide its fair share of affordable housing by at least 602 units.

The Mount Laurel doctrine imposes a constitutional obligation on municipalities to create a realistic opportunity for their fair share of affordable housing. For that obligation to have meaning, our Supreme Court has consistently recognized for decades that a strong judicial hand and the imposition of broad equitable remedies would be required. The "teeth" of the Mount Laurel doctrine takes the form of a builder's remedy -- a necessary tool to not only bring violating towns into compliance, but to result in the actual development of inclusionary housing for those families in need. As a builder's remedy plaintiff which has proven Middletown's substantial noncompliance, plaintiff AAMHMT Property, LLC ("Plaintiff") stands in the shoes of a protected class of individuals who have been deprived of affordable housing in Middletown. Every day that passes without the

construction of much needed affordable housing constitutes irreparable harm to the region's low and moderate income households.

In this appeal, Middletown takes the position that it may condemn the subject builder's remedy site for a commercial project. Middletown takes this position even after it abandoned its prior effort to achieve voluntary compliance and knowingly relinquished its immunity from inclusionary zoning lawsuits. If this Court accepts Middletown's position, then the Court will be creating a huge disincentive to any property owner or developer to even consider filing a builder's remedy claim, thereby weakening over 40 years of Mount Laurel precedent.

The trial court recognized this when it enjoined Middletown from taking any further steps towards condemnation or redevelopment. Notably, the trial court emphasized that injunctive relief was warranted due to the degree of the Township's noncompliance after it relinquished its right to "drive the bus" by choosing to dismiss its prior voluntary compliance efforts. Middletown incorrectly alleges that the trial court made "new law." To be clear, the trial court took into consideration the specific facts of this matter, including Middletown's significant compliance deficiency, the benefit of the much-needed inclusionary housing outweighing the Township's desired commercial development, and any potential harm that the condemnation process would have not necessarily on Plaintiff, but on the protected class Plaintiff represents.

Middletown's legal argument is inherently flawed because it analyzes its eminent domain and redevelopment powers in a vacuum and fails to engage in the balancing test required for the adjudication of an application for injunctive relief and the purposes of the builder's remedy to enforce the Mount Laurel doctrine. The Township glosses over its significant noncompliance and fails to address the extreme adverse consequences the specter of condemnation under the present circumstances has on long-established Mount Laurel precedent. Furthermore, Middletown wrongfully assumes that its designation of the subject builder's remedy site as an "area in need of redevelopment" for condemnation purposes was proper. Middletown fell woefully short of demonstrating that the property qualified as an "area in need," which Plaintiff demonstrated to the Township in excruciating detail.

Plainly, the irreparable harm to builder's remedy plaintiffs and the protected class is real, Plaintiff is likely to prevail on its claims for a builder's remedy and challenge to the redevelopment designation for the property, and Middletown's substantial constitutional violation heavily tips the balance of hardships in Plaintiff's favor. This was repeatedly recognized by the trial court in barring Middletown from proceeding with its condemnation and redevelopment efforts.

The trial court's granting of injunctive relief should be affirmed.

STATEMENT OF FACTS AND PROCEDURAL HISTORY[1]

A. Middletown's Abandonment of its Effort to Voluntarily Comply with its Third Round Affordable Housing Obligation

On March 10, 2015, the Supreme Court issued an Opinion and Order divesting the Council on Affordable Housing of jurisdiction over municipal efforts to comply with the Fair Housing Act's requirements for the period of 1999 to 2025 (the "Third Round") and established a judicial process by which towns could voluntarily seek compliance through the filing of a declaratory judgment litigation. See In re Adoption of N.J.A.C. 5:96 and 5:97 by the New Jersey Council on Affordable Housing, 221 N.J. 1 (2015) ("Mount Laurel IV"). In accordance with Mount Laurel IV, Middletown filed a declaratory judgment complaint on July 8, 2015 in Docket No. MON-L-2539-15 (the "DJ Action") and was provided with temporary immunity from exclusionary zoning lawsuits like the instant builder's remedy litigation.

In July 2019, Middletown sought the voluntary dismissal of its DJ Action, which was granted by way of an Order of Dismissal entered on July 19, 2019 (the "Dismissal Order"). (Ja10). The Dismissal Order expressly provides that "the temporary immunity granted to Middletown from exclusionary zoning actions by the Court… expires with the dismissal of this action," and that "this dismissal is without prejudice to the rights of Middletown or any other party with respect to the

[1] The Statement of facts and procedural history are combined because they are inextricably intertwined.

ability to file a subsequent action that either seeks to enforce compliance with the Mount Laurel doctrine or acknowledge compliance with that doctrine." (Id.). Regarding the dismissal, the Township's Administrator said, "We basically think the process is unfair. We've built more than our fair share of affordable housing so far… We just decided we're not going to play this anymore." (Ja13). Middletown's Mayor called the affordable housing compliance process "egregiously unfair" and said, "[i]t's time legislators step up to the plate and take us out of these unfair, court-mandated housing regulations." (Id.).

Since the Township dismissed the DJ Action, the Legislature did "step up to the plate," but to affirm the Mount Laurel doctrine and address municipalities' fair share obligations moving forward, which resulted in a 346-unit prospective need obligation for Middletown in connection with the period 2025-2035 (the "Fourth Round"). [2] That obligation is separate and apart from the Township's shortfall of at least 602 units for the Third Round, which has already been determined by the trial court in this matter. Upon information and belief, since the Dismissal Order, the

[2] On March 20, 2024, the Legislature amended the Fair Housing Act, N.J.S.A. 52:27D-301, et seq., pursuant to which the Department of Community Affairs ("DCA") calculated Middletown's Fourth Round prospective need obligation to be 346 units. (https://nj.gov/dca/dlps/pdf/FourthRoundCalculation_Methodology.pdf). Although Middletown could have taken action to accept or challenge the DCA's calculation by February 3, 2025, it is believed that the Township took no action whatsoever. (https://www.njcourts.gov/courts/civil/affordable-housing/monmouth). As such, Middletown, does not have any immunity from exclusionary zoning litigation for the Fourth Round. See N.J.S.A. 52:27D-304.1(f)(1).

Township has not filed any action to "acknowledge compliance" with its Third Round obligation.

B. The Property

The real property which forms basis of this builder's remedy litigation is located at 761-653 Route 35 and designated as Block 825, Lot 55.01 (formerly Lots 53-57, 58-68, 69.01, 72-79, and 81) on Middletown's official tax map (the "Property"). (Ja456-457). Plaintiff is the contract purchaser for the Property, which is approximately 51.913 acres and located along Route 35 between Kings Highway and Kanes Lane. (Id.). At all times relevant herein, the Property was predominantly vacant land with the Circus liquor store and five preexisting single-family homes located on portions of the Property. (Id.).[3] In 2018, the Property was placed in the Circus Liquors Redevelopment Plan ("Redevelopment Plan"), which serves as an overlay zone for the underlying PD Planned Development Zone ("PD Zone"). (Da103).

The PD Zone, with a minimum tract size of 20 acres, permits a variety of residential and non-residential uses. Townhouses and multi-family housing are permitted uses and a density of 4.5 units per acre is permitted. (Ja6). However, there is no affordable housing set-aside requirement in the PD Zone. (Id.). The

[3] Upon information and belief, the Circus liquor store relocated from the Property to a nearby strip mall on January 27, 2025.

Redevelopment Plan only permits residential development on an adjacent parcel, which is being developed by Toll Brothers and is under construction. Despite Middletown's desire to see a commercial redevelopment on the Property and its redevelopment efforts in that regard, a commercial development has not come to fruition. (Db11).

C. The Instant Builder's Remedy Litigation

On March 22, 2023, the Middletown Planning Board (the "Planning Board") adopted the 2023 Master Plan Reexamination Report (the "Reexamination Report"), which amended the Township's Housing Element and Fair Share Plan (the "Housing Plan"). (Da16). However, the Housing Plan contained insufficient details and failed to set forth a realistic plan for the construction of affordable housing within the Township to satisfy its Third Round obligation, as ultimately determined by the trial court in determining Middletown's noncompliance. (Ja441; Da1).

In response to the Reexamination Report, Plaintiff sent the Township a letter dated July 13, 2023 identifying itself as the contract purchaser of the Property, and requested a meeting to discuss Plaintiff's proposal to build an inclusionary development on the Property and the rezoning that would be required. (Da173). Informal discussions between Plaintiff and Middletown ensued, but it became clear that that Township had no willingness or desire to rezone the Property for a

multifamily inclusionary development notwithstanding its significant compliance deficiency. (Ja457).

Plaintiff filed its initial Complaint in this matter on August 17, 2023 seeking a determination that Middletown is in violation of its Third Round Mount Laurel compliance obligation, and seeking the rezoning of the Property to develop the Property with an inclusionary development -- a builder's remedy. (Da179). As a result of the Township's efforts to frustrate Plaintiff's development of the Property, as set forth below, Plaintiff filed a First Amended Complaint on September 27, 2023, a Second Amended Complaint on December 4, 2023, and a Third Amended Complaint on March 28, 2024. (Ja20).

On April 26, 2024, Special Adjudicator Joseph Burgis, PP, AICP issued his initial Special Adjudicator Report (the "Burgis Report") on the issue of compliance. (Ja441). The Burgis Report engages in a detailed analysis of the Township's credit worthy projects, ultimately concluding that the Township has a substantial shortfall: "I preliminarily find that the Township can be considered to have satisfied its Prior [Second] Round Obligation, but that the Township's satisfaction of its Third Round Obligation is deficient by approximately 600 to 850 credits." (Ja448).

On May 17, 2024, the trial court entered an Order determining Middletown's Third Round constitutional obligation to be 1,026 units, and that Middletown is noncompliant (the "Noncompliance Order"). (Da1). The Noncompliance Order

states that the Township estimates its shortfall to be at least 602 units, while Plaintiff estimates the Township's shortfall as high as 983 units (without yet determining the worthiness of credits claimed by the Township). (Id.). Regardless, Middletown acknowledged that it had not met its Third Round obligation by at least 602 units -- a substantial margin. The trial court then set a discovery schedule with respect to the suitability of the Property for an inclusionary development, which discovery is ongoing. (Ja471).

D. Middletown's Efforts to Frustrate Plaintiff's Development of the Property

During the pendency of this matter, Middletown engaged in conduct designed to circumvent the ramifications of a potential builder's remedy by: (1) designating a different developer as redeveloper of the Property; and (2) dubiously declaring the Property to be an "area in need of redevelopment" for condemnation purposes, despite the lack of any evidence to support such a designation and an overwhelming record to the contrary.

On August 21, 2023, thirty-nine (39) days after Plaintiff offered the Property as an inclusionary development, Middletown adopted Resolution No. 23-227, which designated B. Duva Development, LLC ("Duva") as the designated redeveloper of

the Property (the "Redeveloper Resolution").[4] (Da206). The Redeveloper Resolution provided that Duva and the Township had 90 days (from August 17) to enter into a redeveloper agreement with Duva, which apparently did not happen. (Id.). Upon information and belief, when the Township adopted the Redeveloper Resolution, Duva had no rights, contractual or otherwise, with respect to the Property. (Ja456).

On September 18, 2023, the Township Committee adopted Ordinance No. 2023-3390, which amended the Redevelopment Plan for the Property (the "Plan Amendment Ordinance"). (Ja53). Among other things, the Plan Amendment Ordinance amended the Redevelopment Plan to require that "[a] site plan application cannot be submitted to the Planning Board unless the applicant is designated as the redeveloper by the Township." (Id.). Accordingly, the Plan Amendment Ordinance prevented Plaintiff, the only entity with contractual rights to develop the Property, from submitting a site plan application to the Planning Board. (Id.).

The Township did not enter into a redevelopment agreement with Duva. As a result, the Township had to restart the redeveloper designation process. On February 20, 2024, the Township adopted Resolution 24-96, which authorized and directed the Township Administrator to prepare and issue a Request for Expressions of Interest to solicit proposals from qualified redevelopers for the redevelopment of the

[4] Although Plaintiff named Duva as an interested party in this matter, Duva failed to appear, resulting in the entry of default on January 31, 2024. (Trans. ID LCV2024274918).

Property, which was returnable in 90 days (the "New Redeveloper RFEI Resolution"). (Da209). Notably, the New Redeveloper RFEI Resolution does not even identify the type of development which the potential designated redeveloper would be building. (Id.). Counsel for Plaintiff sent a letter in advance of and appeared at the September 18, 2023 Township Committee meeting and sent a letter in advance of the February 20, 2024 meeting objecting to the actions being taken by Middletown. (Ja450; Ja453). The Township adopted the New Redeveloper RFEI Resolution over those objections. (Da209).

Pursuant to the Local Redevelopment and Housing Law, N.J.S.A. 40A:12A-1, et seq (the "LRHL"), a town must identify whether a redevelopment area designation shall authorize the town to use the power of condemnation ("Condemnation Redevelopment Area") under the LRHL, or to proceed with redevelopment without using the power of condemnation ("Non-Condemnation Redevelopment"). N.J.S.A. 40A:12A-6(a). When Middletown originally designated the Property as a redevelopment area in 2017, the Township designated the Property as a Non-Condemnation Redevelopment Area, meaning that the Township was not authorized to use the power of condemnation under the LRHL. (Da98; Da100).

On August 21, 2023, thirty-nine (39) days after Plaintiff's July 13 letter offering the Property as an inclusionary development, Middletown also adopted Resolution No. 23-228, which authorized the Planning Board to undertake a

preliminary redevelopment investigation of the Property to determine if it warrants being designated as an "area in need of redevelopment" for condemnation purposes (the "Condemnation Resolution"). (Da176). The Condemnation Resolution authorized the Township to investigate whether the Property meets the redevelopment criteria under the LRHL and to allow the Township to use the power of eminent domain. (Id.).

On February 7, 2024, in furtherance of the efforts started by the Condemnation Resolution, the Planning Board held a hearing for the purpose of determining whether to recommend to the Township Committee that the Property be designated as a Condemnation Redevelopment Area. In advance of the hearing, Plaintiff obtained a copy of a report prepared for Middletown by Francis Reiner, LLC, PP of DMR Architects titled "Report of Preliminary Investigation for Determination of an Area in Need of Redevelopment" dated January 2024 (the "AINR Report"). (Ja105). The AINR Report concluded that the Property qualified as an "area in need of redevelopment because the Property satisfied N.J.S.A. 40A:12A-5(a) and (d). (Id.).

Plaintiff appeared and presented a substantial objector's case. (Ja329). Counsel for Plaintiff provided the Planning Board with a copy of a February 7, 2024 letter objecting to the AINR Report's conclusion that the Property qualified as an area in need of redevelopment. (Ja205). The letter enclosed: (a) an October 2023 report prepared for Plaintiff entitled "Planning Evaluation - Determination of an

Area in Need of Redevelopment" (the "Planning Evaluation Report") prepared by David Glynn Roberts, AICP/PP, LLA, LEED AP ND of dgRoberts Planning & Design, LLC (Ja209); and (b) a February 6, 2024 Memorandum prepared by Mr. Roberts in response to the AINR Report (the "Roberts Memorandum"). (Ja285). Mr. Roberts is one of the most experienced and well-respected figures on redevelopment. (Ja283). The Planning Evaluation Report and the Roberts Memorandum provided a detailed analysis for each of the 26 tax lots which then comprised the Property, pursuant to which Mr. Roberts conclusively demonstrated that the Property did not qualify as an "area in need" under LRHL redevelopment criteria "(a)" or "(d)". (Ja209; Ja285).

Specifically, Mr. Roberts, through his reports and testimony before the Planning Board, concluded that "substantial evidence" did not exist to demonstrate that the Property's conditions are "substandard, unsafe, unsanitary, dilapidated, or obsolescent," as required under the LRHL at N.J.S.A. 40A:12A-5(a), and that the AINR Report does not document any fire, building, or health code violations that would substantiate the Property's alleged substandard conditions. (Ja282; Ja289).

Likewise, Mr. Roberts concluded with respect to criteria (d) that the AINR Report falls far short of the "substantial evidence" standard because it fails to demonstrate that certain specified problems exist and that they cause actual detriment or harm "to the safety, health, morals, or welfare of the community." (Id.).

Mr. Roberts also demonstrated that the AINR Report's reliance that maintenance was required for some of the structures on the Property, which included an operating liquor store and inhabited single-family homes, fell far short of proving actual detriment, as required by the LRHL and caselaw. (Id.).

At the conclusion of the hearing, despite overwhelming evidence to the contrary, the Planning Board unanimously recommended that the Township designate the Property as a Condemnation Redevelopment Area. (Ja411). The Planning Board acted after denying the Property owner's request for an adjournment of the hearing so that it could retain its own expert and without asking Mr. Roberts a single question, despite his extensive testimony. (Ja438).

On February 20, 2024, the Township Committee accepted the Planning Board's recommendation and adopted Resolution No. 24-95, which declared the Property to be a Condemnation Redevelopment Area pursuant to N.J.S.A. 40A:12A-5(a) and (d) (the "Second Condemnation Resolution"). (Da201). Counsel for Plaintiff sent a letter in advance of the February 20, 2024 meeting and again noted its objections to the Planning Board's recommendation in addition to the Township Committee adopting the Second Condemnation Resolution. (Ja453).

The operative Complaint in this matter asserts actions in lieu of prerogative writs challenging all of the foregoing actions by the Middletown and the Planning Board, including the adoption of the Second Condemnation Resolution. (Ja20).

E. The Preliminary Injunction against Middletown

On June 7, 2024, after the trial court entered the Noncompliance Order determining that Middletown had failed to constitutionally comply with its Third Round Mount Laurel obligation by at least 602 units, Plaintiff filed an Order to Show Cause seeking temporary and preliminary restraints. On June 18, 2024, the trial court entered an Order to Show Cause with Temporary Restraints, which enjoined Middletown from taking any further action with respect to the condemnation and redevelopment of the Property. (Ja500). On the July 5, 2024 return date, the trial court issued an oral decision and on July 8, 2024 entered an Order on Return Date of OTSC, pursuant to which the court granted a preliminary injunction continuing the restraints against Middletown regarding its ability to condemn or redevelop the Property. (Da9).

In its oral decision, the Court grasped the very purpose of this public interest litigation and the "special place" Plaintiff now inhabits in light of Middletown's significant noncompliance and voluntary decision to abandon its DJ Action:

> Part of the way I describe the Mount Laurel process, as I see it anyway, is a public entity, **a municipality can choose to be in the driver's seat, and they do that by filing the DJ action but going through with it**.
>
> * * *
>
> [Y]ou can continue on with your DJ action and have a hearing and Fair Share [Housing Center] can oppose the arguments and the evidence that's presented by the municipality. … You can have a hearing. Middletown presents an expert who tells me why it should be 600

> [units]. Fair Share can present an expert saying why it should be 800. And I would make a decision.
>
> * * *
>
> **But when a municipality either files a DJ and chooses not to pursue it, or doesn't file a DJ, the municipality is saying we're going to step out of the driver's seat. We are not driving this bus. And what happens is what I have here which is now I guess three builder's remedy lawsuits.**

(1T47:25-49:1) (emphasis added).

The trial court also recognized the significance of its entry of the Noncompliance Order insofar as it enhanced Plaintiff's status as a builder's remedy plaintiff -- a representative of the protected class in need of the inclusionary housing for which Middletown has failed to provide a realistic opportunity:

> **[U]ntil I know that Middletown is not constitutionally compliant with this third-round obligation, you are just like everyone else**. You are every other builder who wants to build something that the property is not zoned for that. Like I said, file your request for a use variance and see what happens, which very well might be granted or not, but you don't have any special place.
>
> **You do now have a special place, because you are the representative of individuals, but that's as I view the role of the builder's remedy plaintiff**,… I don't care if you client makes money, the concept is **your client is saying I can build affordable housing… there that includes housing for people who are in need of affordable units, and that puts the builder in a special position**. I think the New Jersey Supreme Court recognizes that in having the DJ versus builder's remedy structure set up.

(1T49:6-25) (emphasis added).

In denying Middletown's motion for reconsideration, the trial court again highlighted Middletown's violation of the rights of low- and moderate-income households:

> And we use this, you know, constitutionally compliant language, it's, you know, sounds kind of pretty, kind of low key and maybe soft peddling it, what it means is **Middletown has violated the rights of low- and moderate-income households, to have a place to live in Middletown. That's what it means**.

(2T9:3-8) (emphasis added).

The trial court fully recognized that Middletown has the right to condemn real property and designate property as areas in need of redevelopment, but also noted that the Township has a **constitutional** obligation to provide for its fair share of affordable housing under the Mount Laurel doctrine and Fair Housing Act. When weighing the Crowe v. DeGioia factors used to determine whether preliminary relief should be granted, the Court was careful to note that Middletown's significant noncompliance and its own abandonment of the DJ Action heavily swung the equities and balance of hardships in favor of Plaintiff. The court was careful to hold that it was applying the standards applicable to injunctive relief, not adjudicating Middletown's condemnation and redevelopment rights in a vacuum as if its affordable housing compliance status was not at issue. (2T11:9-15:10).

ARGUMENT

I. THE TRIAL COURT'S GRANTING OF INJUNCTIVE RELIEF SHOULD BE AFFIRMED.

Middletown acknowledges that it has a constitutional obligation to provide its fair share of affordable housing and does not dispute that it is in violation of its constitutional obligation for the Third Round by at least 602 units. Although the Township recognizes that this matter "presents a conflict between three state constitutional interests," (Db1) Middletown addresses its eminent domain and redevelopment powers in a vacuum while blatantly ignoring the Mount Laurel precedent which imposes the constitutional affordable housing obligation on municipalities, and on which Plaintiff's claim for a builder's remedy is based. Middletown does not even cite the Mount Laurel Supreme Court decisions in attempting to discredit the trial court's granting of injunctive relief in favor of Plaintiff, which preserves the Property while the remainder of this public interest litigation is adjudicated.

Importantly, Middletown misrepresents that the trial court made "new law" by preserving the Property which serves as the very subject matter of this action. Contrary to Middletown's characterization, the trial court did not hold that all noncompliant municipalities are prohibited from condemning property which is the subject of a builder's remedy lawsuit, but instead examined the facts which are specific to this matter. While recognizing Middletown's general powers of eminent domain and redevelopment, the trial court also properly considered:

- Middletown's constitutional noncompliance with the Mount Laurel doctrine;

- the significant degree of the Township's noncompliance (at least 602 units);

- Middletown's voluntary dismissal of the DJ Action, pursuant to which the Township knowingly relinquished its immunity from inclusionary zoning lawsuits and lost the right to fully control its zoning for inclusionary housing, including for the Property;

- the "special place" Plaintiff now holds in this public interest litigation where Plaintiff stands in the shoes of the protected class of individuals who have been denied a realistic opportunity for affordable housing in Middletown; and

- the commercial nature of the redevelopment desired by Middletown for the Property compared to the inclusionary development which would result from the awarding of a builder's remedy.

By taking all of these factors into account in granting injunctive relief in favor of Plaintiff, the trial court did not abuse its discretion.

Middletown fails to reconcile the foregoing in attempting to refute the trial court's granting of injunctive relief under Crowe v. De Gioia, 90 N.J. 26 (1982). As set forth therein, "New Jersey has long recognized, in a wide variety of contexts, the power of the judiciary to 'prevent some threatening, irreparable mischief, which should be averted until opportunity is afforded for a full and deliberate investigation of the case.'" Id. at 132 (quoting Thompson v. Paterson, 9 N.J. Eq. 624-25 (1854)). "Indeed, the point of temporary relief is to maintain the parties in substantially the

same condition 'when the final decree is entered as they were when the litigation began.'" Id. at 134 (quoting Peters v. Pub. Serv. Corp. of N.J., 132 N.J. Eq. 500, 511 (Ch. 1942), aff'd, 133 N.J. Eq. 283 (1943)).

To obtain a preliminary injunction, the Court must evaluate whether: (1) Plaintiff has a reasonable probability of success on the merits in accordance with well-settled legal principles; (2) Plaintiff will suffer irreparable harm absent an injunction; and (3) the balance of the equities weighs in Plaintiff's favor. See id. at 132-33. In cases such as this one, where the public's interest is squarely at issue, the Court should also consider the impact on the public's interest in determining whether to issue an injunction. See Waste Mgmt. of N.J., Inc. v. Union Cty. Utils. Auth., 399 N.J. Super. 508, 520-21 (App. Div. 2008).

Equitable remedies are designed to be both broad and flexible, such that they can be tailored to redress even the most complicated grievances:

> [C]ourts of equity and their remedies are distinguished for their flexibility, their unlimited variety, their adaptability to circumstances and the natural rules which govern their use. There is in fact no limit to their variety in application; the court of equity has the power of devising its remedy and shaping it so as to fit the changing circumstances of every case and the complex relations of all the parties.

Banach v. Cannon, 356 N.J. Super. 342, 361 (Ch. Div. 2002) (quotation marks omitted).

Importantly, "a court may take a less rigid view" of the Crowe factors and the general rule that *all* factors favor injunctive relief "when the interlocutory injunction

is merely designed to preserve the status quo." Waste Mgmt. of New Jersey, Inc. v. Morris Cnty. Mun Utils. Auth., 433 N.J. Super 445, 453 (App. Div. 2013) (emphasis in original). A prime example is "where the subject matter of the litigation would be destroyed or substantially impaired if a preliminary injunction did not issue." Id. (quoting Gen. Elec. Co. v. Gem Vacuum Stores, Inc., 36 N.J. Super. 234, 237 (App Div. 1955)). New Jersey courts "have recognized the important role the public interest plays when implicated" and "have held 'that courts, in the exercise of their equitable powers, may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved.'" Waste Mgmt., 433 N.J. Super. at 454 (quoting Waste Mgmt. of New Jersey, Inc. v. Union Cnty. Utils. Auth., 399 N.J. Super. 508, 520-21 (App. Div. 2008) (internal quotation marks omitted). In other words, a court may give less weight to certain Crowe factors if the conduct sought to be enjoined could result in the destruction of the very subject matter on which a complaint is based, especially where the public interest is implicated like the instant matter.

Although there is no case which has squarely addressed the issue at bar, injunctive relief may be appropriate to enjoin a significantly noncompliant municipality -- like Middletown -- from condemning a property designed to provide a high-density residential development. Deland v. Twp. of Berkeley Heights, 361 N.J. Super. 1, 18-19 (App. Div. 2003). In determining that Berkeley Heights should

not have been enjoined from acquiring the plaintiff's property by eminent domain, the Deland court noted that Berkeley Heights was **in compliance with its Mount Laurel obligations and had a judgment of repose from Mount Laurel lawsuits**. Id. at 18. The Deland court was careful to distinguish:

> Berkeley Heights **has complied with its *Mount Laurel* obligations** under the 1995 order extending the period of repose from *Mount Laurel* litigation…. **Consequently, we are not confronted with a municipality that is seeking to undermine its capacity to satisfy its Mount Laurel obligations by acquiring land suitable for high-density residential development for another purpose**.

Id. at 18-19 (emphasis added). Even though the property at issue in Deland was part of the town's affordable housing compliance plan, Berkeley Heights had fulfilled its constitutional obligation by utilizing other sites. Accordingly, the Deland court sanctioned the municipality's condemnation of the property for a different public use, but required the property to remain in the compliance plan and retain its multi-family zoning for valuation purposes. No members of the protected class were harmed.

Judge Skillman's decision in Mount Laurel Twp. v. MiPro Homes, L.L.C., 379 N.J. Super. 358 (App. Div. 2005) also supports the continuation of restraints against the condemnation of Plaintiff's property. There, the Court affirmed a municipality's right to condemn property which had received final subdivision approval for the development of **non-affordable, single-family homes**. In

upholding the municipality's condemnation of the property, Judge Skillman made clear:

> This is not a case such as Kessler Institute, supra, 289 N.J. Super. 329, in which the court dismissed an action to condemn property on which the owner planned to construct medical rehabilitation and nursing facilities, **or the unreported opinion of this court relied upon by respondents that affirmed dismissal of an action to condemn land on which the owner planned to construct a residential development that would have provided multi-family housing affordable to middle-income families. In those cases, the condemnees' proposed uses impacted significant public interests, and the courts found abuses of the eminent domain power in the municipalities' attempts to prevent those uses**. If Mount Laurel had attempted to condemn MiPro's property when its predecessor in title planned to construct an assisted living facility on the site, a similar finding might have been warranted. However, Mipro's **plan to construct a development of single-family homes that will be affordable only to upper-income families would not serve a comparable public interest**.

Id. at 376-77 (emphasis added). The Supreme Court affirmed the entirety of Judge Skillman's Appellate Division opinion as a "thoughtful and well-written opinion." Mount Laurel Twp. v. MiPro Homes, L.L.C., 188 N.J. 531, 533 (2006).

Here, it must be recognized that Plaintiff's willingness to develop an inclusionary development on the Property impacts a significant public interest, especially in a town that is in significant violation of its constitutional obligation to zone for the development of affordable housing. The trial court did not ignore Middletown's rights to condemn and redevelop property, but rightfully considered the Township's failure to meet its constitutional obligation and the impact that failure has on the protected class.

In other words, the trial court engaged in a balancing test to determine whether to grant injunctive relief, as it was required to do under Crowe. In doing so, the court factored Middletown's voluntarily withdrawal from the DJ Action which made the Township vulnerable to the instant builder's remedy suit, Middletown's constitutional violation in failing to properly zone to allow the development of affordable housing, the magnitude of Middletown's noncompliance (they were not merely a few units short, but at least 602), and the commercial (as opposed to a more inherently beneficial) nature of Middletown's alternate development plans. Moreover, the trial court took note that this is a public interest litigation in which Plaintiff represents the interests of the protected class of individuals in need of low- and moderate-income housing.

A. Standard of Review

"An appellate court applies an abuse of discretion standard in reviewing a trial court's decision to grant or deny a preliminary injunction." Rinaldo v. RLR Inv., 387 N.J. Super. 387, 395 (App. Div. 2006). "A court abuses its discretion when its 'decision is made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis." State v. Chavis, 247 N.J. 245, 257 (2021) (quoting State v. R.Y., 242 N.J. 48, 65 (2020)). In determining whether an abuse of discretion exists, a reviewing court "examines whether there are good reasons for an appellate court to defer to the particular decision at issue." State

v. R.Y, 242 N.J. at 65 (quoting Flagg v. Essex Cnty. Prosecutor, 171 N.J. 561, 571 (2002)). "When examining a trial court's exercise of discretionary authority, we reverse only when the exercise of discretion was 'manifestly unjust' under the circumstances." Newark Morning Ledger Co. v. N.J. Sports & Exposition Auth., 423 N.J. Super. 140, 174 (App. Div. 2011) (quoting Union Cnty. Improvement Auth. v. Artaki, LLC, 392 N.J. Super. 141, 149 (App. Div. 2007)). "Judicial abuse of discretion is tantamount to harmful error, i.e., error clearly capable of producing an unjust result." Cmty. Hosp. Grp. Inc. v. More, 365 N.J. Super. 84, 94 (App. Div. 2003).

As set forth below, the trial court record soundly supports the granting of injunctive relief in favor of Plaintiff and barring Middletown from taking any further action towards the commercial redevelopment and condemnation of the Property while this matter is pending, as any such action would (a) clearly produce an unjust result to the protected class and (b) cause an extreme chilling effect on inclusionary zoning litigation against significantly noncompliant municipalities. Accordingly, before addressing the individual Crowe factors, it is critical to understand the importance of the Mount Laurel doctrine and the consequences which result from a municipality's constitutional noncompliance.

B. The Mount Laurel Doctrine

In S. Burlington N.A.A.C.P. v. Mount Laurel Twp., 92 N.J. 158 (1983) ("Mount Laurel II"), the New Jersey Supreme Court reaffirmed its holding in S. Burlington N.A.A.C.P. v. Mount Laurel Twp., 67 N.J. 151 (1983) ("Mount Laurel I") that every municipality has a **constitutional** obligation to provide its fair share of affordable housing. Zoning ordinances which fail to address a town's fair share are unconstitutional:

> The constitutional basis for the *Mount Laurel* doctrine remains the same. The constitutional power to zone, delegated to the municipalities subject to legislation, is but one portion of the police power and, as such, must be exercised for the general welfare. When the exercise of that power by a municipality affects something as fundamental as housing, the general welfare includes more than the welfare of that municipality and its citizens: it also includes the general welfare -- in this case the housing needs -- of those residing outside of the municipality but within the region that contributes to the housing demand within the municipality. Municipal land use regulations that conflict with the general welfare thus defined abuse the police power and are unconstitutional. In particular, those regulations that do not provide the requisite opportunity for a fair share of the region's need for low and moderate income housing conflict with the general welfare and violate the state constitutional requirements of substantive due process and equal protection.

Mount Laurel II, 92 N.J. at 208-09 (citing Mount Laurel I, 67 N.J. at 174 and 181) .

"The public policy of this State has long been that persons with low and moderate incomes are entitled to affordable housing." Homes of Hope, Inc. v. Eastampton Twp. Land Use Plan. Bd., 409 N.J. Super. 330, 337 (App. Div. 2009). The New Jersey Supreme Court has "recognized that the furnishing of housing for minority or underprivileged segments of the population inherently served the public

welfare." Homes of Hope, Inc. v. Mount Holly Zoning Bd. of Adjustment, 236 N.J. Super. 584, 588 (Law. Div. 1989) (quotation marks omitted). "It is plain beyond dispute that proper provision for adequate housing of all categories of people is certainly an absolute essential in promotion of the general welfare required in all local land use regulation." Mount Laurel I, 67 N.J. 151, 179 (1975).

In Mount Laurel I, the Supreme Court held that the courts may "exercis[e] the full panoply of equitable powers to remedy the situation" where a municipality fails to meet its inclusionary zoning obligation. Mount Laurel I, 67 N.J. at 215. Subsequently, a builder' remedy was recognized as a valid means to accomplish compliance, but was generally discouraged. See Oakwood at Madison, Inc. v. Madison Twp., 72 N.J. 481, 551-52 (1977). In Mount Laurel II, the Supreme Court gave the builder's remedy "teeth" to ensure the actual construction of affordable housing, and the need for strong judicial management:

> The obligation is to provide a realistic opportunity for housing, not litigation. We have learned from experience, however, that unless a strong judicial hand is used, Mount Laurel will not result in housing, but in paper, process, witnesses, trials and appeals. We intend by this decision to strengthen it, clarify it, and make it easier for public officials, including judges, to apply it.

92 N.J. at 199. The Court continued:

> Judicial management of a Mount Laurel trial, however, is as important to the constitutional obligation as our substantive rulings today. Confusion, expense, and delay have been the primary enemies of constitutional compliance in this area. This problem needs the strong

> hand of the judge at trial as much as the clear word of the opinion on appeal.

Id. at 292.

In light of the foregoing, the Supreme Court in Mount Laurel II clarified and established the procedure for builder's remedy litigation, which provides for a court-ordered rezoning of a plaintiff's property, notwithstanding the current zoning or the municipality's otherwise constitutional right to have the property zoned differently. Id. at 279-292.[5] The extent of a municipality's prior compliance or current efforts to comply are irrelevant; a town's compliance is determined at the time of filing of the builder's remedy complaint. See Cranford Dev. Assocs., LLC v. Twp. of Cranford, 445 N.J. Super. 220, 230-31 (App. Div. 2016) ("a developer may be entitled to a builder's remedy, even if a municipality has begun moving toward compliance before or during the developer's lawsuit, provided the lawsuit demonstrates the municipality's current failure to comply with its affordable housing obligations").

If the court has determined that a municipality is in violation of its constitutional obligation, then "a builder's remedy should be granted unless the municipality establishes that because of environmental or other substantial planning concerns, the plaintiff's proposed project is clearly contrary to sound land use planning." Id. at 279-80. A "builder's remedy should not be denied solely because

[5] The municipal zoning power is granted by the New Jersey Constitution, Sec. VI, ¶ 2, by way of the Municipal Land Use Law, N.J.S.A. 40:55D-62.

the municipality prefers some other location for lower income housing, even if it is in fact a better site." Id. at 280.

Once the trial court determines constitutional noncompliance, the town in violation must revise its zoning ordinance to satisfy its Mount Laurel obligation. Id. at 281. Mount Laurel II established the process by which trial courts could appoint special adjudicators[6] to assist the parties and the court in connection with the town's adoption of compliant zoning, including the suitability and rezoning of the builder's remedy site, after which the adjudicator would present his/her recommendations to the court. Id. at 281-84.

Notably, Mount Laurel II mandates that exclusionary zoning litigations, like the instant builder's remedy matter, "are intended to achieve compliance with the Constitution and the Mount Laurel obligations without interminable trials and appeals…. We intend by our remedy to conclude in one proceeding, with a single appeal, all questions involved." Id. at 290. The builder's remedy cause of action and procedure was reaffirmed by the Supreme Court in Toll Bros., Inc. v. Twp. of W. Windsor, 173 N.J. 502 (2002).

[6] Mount Laurel II employs the term "Special Master." Pursuant to the Notice to the Bar issued by the Acting Administrative Director of the Courts dated April 5, 2024, the Supreme Court adopted the term "Special Adjudicator" as a replacement for "Special Master."

In Mount Laurel IV, the Supreme Court provided most municipalities with an opportunity to seek voluntary compliance with their Third Round affordable housing obligation by filing a declaratory judgment complaint in the Law Division. Mount Laurel IV, 221 N.J. at 5-6. The Court "emphasize[d] that courts should employ flexibility in assessing a town's compliance and should exercise caution to avoid sanctioning any expressly disapproved practices from COAH's invalidated Third Round Rules." Id. at 33. Mount Laurel IV also held that "courts should endeavor to secure, whenever possible, prompt voluntary compliance from municipalities in view of the lengthy delay in achieving satisfaction of towns' Third Round obligations." Id.

Those municipalities which filed declaratory judgment actions received temporary immunity from exclusionary zoning lawsuits. Id. at 26. However, immunity was not a continuing guarantee and could be revoked if a town "abuses the process for obtaining a judicial declaration of constitutional compliance." Id. When the goal of achieving compliance "cannot be accomplished, with good faith effort and reasonable speed, and the town is determined to be constitutionally noncompliant," the court could allow builder's remedy suits to proceed, notwithstanding the town's prior compliance efforts or status with COAH. Id. at 33-34.

Indeed, remedies to address noncompliant municipalities may be varied, even for a town which sought to maintain its declaratory judgment action, but which continually failed to offer in good faith a compliant housing plan. See In re Matter of the Application of Twp. of S. Brunswick, Docket No. A-3344-20, 2023 WL 4485406, at *21-*24 (N.J. App. Div. 2023) (affirmance of trial court's decision to revoke immunity, grant all intervenor developers a builder's remedy, and employ special hearing officers -- not the town's Planning Board -- to hear the builder's remedy site plan applications); see also Cranford Dev., 445 N.J. Super. at 232-34 (affirmance of trial court's appointment of a special hearing officer in lieu of Planning Board to hear builder's remedy site plan application).

Here, Middletown's DJ Action languished in the trial court for four years without achieving Third Round constitutional compliance. The Township affirmatively dismissed its effort to achieve voluntary compliance, fully aware that it would lose its immunity from inclusionary zoning lawsuits like the instant matter and the consequences that could flow from that decision in accordance with the foregoing Mount Laurel precedent.

It is now the tenth year since Middletown filed the DJ Action, and the Township is no closer to achieving compliance. Instead of presenting a housing element and fair share plan for consideration by the court, Middletown waxes poetic about its prior round compliance efforts, incredulously portraying itself as a

champion of inclusionary housing. The Township cannot dispute that it is in significant violation of its Third Round obligation, which the Special Adjudicator and the trial court have already determined. It is against this backdrop that Middletown now seeks to proceed towards a condemnation of the Property on which Plaintiff proposes to develop an inclusionary development, despite the long-standing and continually affirmed precedent of the Mount Laurel doctrine. Like the trial court, this Court must consider this established precedent in evaluating the Crowe factors and affirming the preliminary injunction granted in favor of Plaintiff -- which maintains the integrity of the Mount Laurel doctrine and preserves the status quo by protecting the very subject matter of this builder's remedy lawsuit.

C. Plaintiff is Likely to Succeed on the Merits of its Claims

A moving party does not need to demonstrate with absolute certainty that it will undoubtedly win after a trial on the merits. Marilyn Manson, Inc. v. N.J. Sports & Exposition Auth., 971 F. Supp. 875, 883 (D.N.J. 1997). Rather, there must only be a reasonable probability of eventual success.

Middletown misrepresents the trial court's analysis of the law at issue which governs Plaintiff's **underlying** claims. (Db29). There is no lack of clarity regarding the law governing a builder's remedy claim and whether a redevelopment designation is proper under the LRHL -- the underlying claims which should be analyzed under Crowe. The trial court merely noted that there is a lack of judicial

precedent on all fours regarding the ability of a municipality to condemn the property which is the subject of a builder's remedy claim where the municipality has been judged to be in significant violation of its constitutional obligation to provide a realistic opportunity for the development of affordable housing. Although there may be a paucity of case law to assist the court in applying the Crowe factors to the current facts, the law applicable to Plaintiff's underlying claims for relief is well settled.

1. The Property Does not Qualify as an Area in Need of Redevelopment

The Planning Board's determination that the Property meets the requirements for designation as a Condemnation Redevelopment Area was not supported by "substantial evidence" which is required to exist in the record and Middletown's adoption of the Second Condemnation Resolution was arbitrary, capricious, and unreasonable. In Malanga v. Twp. of W. Orange, 253 N.J. 291 (2023), the Supreme Court recently revisited the strict requirements for a property to qualify as "blighted," and thus eligible to be deemed an area in need of redevelopment. There is no question that Middletown woefully failed to satisfy this established precedent, as determined by Mr. Roberts.

New Jersey Municipalities can take "blighted areas" for the purpose of redevelopment. New Jersey Constitution, Article VIII, Section 3, Paragraph 1. The LRHL was enacted to provide a framework for redevelopment and give meaning to

the term "blighted." See Malanga, 253 N.J. at 309 (citing Gallenthin Realty Dev., Inc. v. Borough of Paulsboro, 191 N.J. 344, 357 (2007)). Pursuant to the LRHL, a property may be designated as an area in need of redevelopment, hence blighted, only if satisfies at least one of certain enumerated conditions in N.J.S.A. 40A:12A-5. Here, the Township relied upon conditions (a) and (d):

> a. The generality of buildings are substandard, unsafe, unsanitary, dilapidated, or obsolescent, or possess any of such characteristics, or are so lacking in light, air, or space, as to be conducive to unwholesome living or working conditions.
>
> ***
>
> d. Areas with buildings or improvements which, by reason of dilapidation, obsolescence, overcrowding, faulty arrangement or design, lack of ventilation, light and sanitary facilities, excessive land coverage, deleterious land use or obsolete layout, or any combination of these or other factors, are detrimental to the safety, health, morals, or welfare of the community.

Establishing these conditions requires a significant, "substantial evidence" standard under the relevant case law. In Malanga, the Supreme Court held that a determination of an area in need of development must be "supported by substantial evidence on the record." 253 N.J. 291, 314 (2023) (quotation marks omitted). "The governing body must 'rigorously comply with the statutory criteria' to determine whether property is in need of redevelopment." Id. (citing 62-64 Main Street, L.L.C. v. Mayor and Council of the City of Hackensack, 221 N.J. 129, 156 (2015)). The LRHL also requires that the change from a Non-Condemnation Redevelopment Area to a Condemnation Redevelopment Area, as was the case here must be analyzed under

current conditions, and not the conditions at the time of the prior redevelopment designation. N.J.S.A. 40A:12A-6(d)(5)(g).

As it relates to criteria "a" under the LRHL, there must be "substantial evidence" indicating that the property's conditions are "substandard, unsafe, unsanitary, dilapidated, or obsolescent" as per N.J.S.A. 40A:12A-5(a). See Malanga, 253 N.J. at 314. To designate a property for redevelopment under subsection (d), a municipality must demonstrate that certain specified problems exist and that they cause actual detriment or harm. Malanga, 253 N.J. at 297. The Malanga Court emphasized that "subsection (d) does not presume harm; it requires a showing of actual detriment." Id. at 313. The Court defined the term "[d]etriment" as "any loss or harm suffered by a person or property." Id. at 319 (quotation marks and alteration marks omitted).

As was the case in Malanga, in which the property at issue was an operating public library, the Property at the time Middletown adopted the Second Condemnation Resolution contained an operating liquor store and some occupied single-family homes, with a majority being vacant land, and was in the process of being privately redeveloped by Plaintiff as contract purchaser which, in and of itself, should have vitiated or even eliminated any legitimate suggestion that the Property could be blighted. Indeed, the LRHL specifically provides that it was intended to permit municipal agencies to use their extreme redevelopment and eminent domain

powers only in instances where the efforts of private enterprise have failed. See N.J.S.A. 40A:12A-2(a), which clarifies that the LRHL is intended to permit forcible redevelopment where the circumstances present "are not likely to be corrected or ameliorated by private effort." Accordingly, to proceed with a valid redevelopment project under the LRHL, the record must have substantial evidence (1) that private efforts have failed, (2) that there is actual blight, and (3) that the blighted conditions have caused actual detriment or harm. There was no condition which rendered the Property "obsolescent," "dilapidated," or any other term used in the LRHL which was "detrimental to the safety, health, morals, or welfare of the community." This was plainly demonstrated by Mr. Roberts, and the Planning Board record is completely devoid of any credible evidence to the contrary.

The AINR Report and related testimony at the hearing fell far short of meeting the substantial evidence standard. For example, as outlined in the Roberts Memorandum, the AINR Report did not document any fire, building, or health code violations that would substantiate the Property's alleged substandard conditions. (Ja285). Contrary to Malanga, the AINR Report lacks any substantial evidence demonstrating that the Property's condition caused actual detriment to the community. (Ja105). Merely enumerating the need for maintenance or repair of the remaining structures on the Property falls short of proving actual detriment. This point was reinforced by Malanga, which clarified that "needed repair work does not

necessarily establish actual harm." 253 N.J. at 322. Moreover, the police calls and incidents cited in the AINR Report cannot be directly linked to the Property's layout or condition. (Ja287) These shortfalls are detailed extensively in the Roberts Memorandum and were testified to by him at the February 7, 2024 hearing. (Ja330).

When faced with this damning counter evidence, the Planning Board tellingly chose not to question Mr. Roberts or to elicit rebuttal testimony from Mr. Reiner. (Ja405). Having failed to meet the evidentiary standard established by the New Jersey Supreme Court, Plaintiff is likely to succeed on its claim that Defendants' adoption of the Condemnation Resolutions was arbitrary, capricious, and/or unreasonable, thereby invalidating Middletown's ability to condemn the Property.

2. Plaintiff is Likely to Prevail on its Builder's Remedy Claim

Plaintiff is likely to prevail on its claim for a builder's remedy. Middletown has already been judged to be constitutionally noncompliant by at least 602 units, and discovery regarding the suitability of the Property for an inclusionary development has been exchanged. Although Middletown disputes the suitability of the Property for residential development, the underlying zone for the Property permits multifamily residential development and the commercial redevelopment sought by Middletown is clearly indicative that there are no significant physical or environmental restraints which would render the Property unsuitable. The Township merely does not want to see a residential development on the Property, which is

irrelevant in determining site suitability and in granting a builder's remedy. The entire purpose of the remedy in a builder's remedy claim is to impose a rezoning a municipality otherwise does not desire, despite its constitutional right to zone. The parties have exchanged discovery regarding the suitability of the Property for an inclusionary development, with Plaintiff providing extensive professional reports in support of the Property's suitability, including reports rebutting purported concerns raised by Middletown. The Special Adjudicator has yet to weigh in on these expert submissions, and presumably will not be tasked to do so until this appeal is resolved.

With respect to site suitability, "a builder's remedy should be granted unless **the municipality establishes** that because of environmental or other substantial planning concerns, the plaintiff's proposed project is clearly contrary to sound land use planning." Mount Laurel II at 279-80. For Middletown to allege that **Plaintiff** did not present any competent evidence regarding the suitability of the Property for an inclusionary development (Db31) is disingenuous because Mount Laurel II clearly places that burden on the Township. The trial court did not "erroneously shift" the burden to Middletown, as alleged by the Township. (Db32). Middletown shows a complete disregard Mount Laurel precedent by completely failing to recognize the constitutional obligations imposed by Mount Laurel I or Mount Laurel II, or to even cite to those cases in attempting to justify its position under Crowe.

Although the trial court did not engage in a painstaking analysis of the likelihood of success prong, it found, "I haven't heard anything indicating, other than that the town wants this to be commercial, that it's environmentally not appropriate, that nothing can be built here. Obviously, the town wants something to be built here of a commercial nature, and I think the legal right and the legal obligations under the Mount Laurel doctrine are pretty clear." (1T53:19-25).

In denying reconsideration, the trial court squarely recognized that Middletown has the obligation to prove that the Property is not suitable:

> The municipality has the burden, and the burden shifts over to the municipality, to show that the property is for either environmental reasons or otherwise developing it substantial planning concerns. The municipality needs to show that the plaintiff's proposed project is clearly contrary to sound land use planning.

(2T9:23-10:4).

Now, the Special Adjudicator must evaluate the parties' submissions, meet with the parties, and eventually provide a recommendation on suitability to the trial court, as required by Mount Laurel II. Of course, the trial court recognized that the suitability phase of this builder's remedy case must proceed and that a finding of suitability was not guaranteed. However, when considering the record, Plaintiff is likely to succeed in demonstrating that the Property is suitable for an inclusionary development and its entitlement to a builder's remedy. Regardless, as set forth above, a court may give less weight to the likelihood of success prong of Crowe

where the subject matter of the litigation would be destroyed without the protection of injunctive relief. See Waste Mgmt. 433 N.J. Super at 453.

In light of Middletown's judicially determined significant noncompliance and the likelihood that the Property is suitable for a residential inclusionary development, there is a great likelihood that the trial court will award Plaintiff a builder's remedy and require Middletown to rezone the Property.

D. Plaintiff, Including the Protected Class, Will Suffer Irreparable Harm

With respect to irreparable harm, it is important that this is a public interest litigation in which Plaintiff is a representative of the protected class of those New Jersey families in need of inclusionary housing. Any irreparable harm analysis should not only be viewed by the Court with respect to the effect condemnation has on Plaintiff as a developer, but on the protected class in this public interest litigation and on the integrity of the builder's remedy process. As the trial court held, Plaintiff is in a "special position" because Middletown has been adjudged noncompliant and Plaintiff is a developer seeking to build the inclusionary housing for which Middletown failed to zone. If Middletown is permitted to take the Property, there will be no housing developed -- the ultimate irreparable harm to the protected class -- thereby neutering 50 years of Mount Laurel precedent.

Although the trial court partially focused on what appeared to be monetary related harm (ability of Plaintiff to obtain lender financing), the court recognized

that the bigger issue was "the potential for being able to move forward with development of a project." (1T53:3-5). The trial court rightfully recognized that, under the Mount Laurel doctrine, Plaintiff has a "special place, because you are the representative of individuals" and Plaintiff "is saying I can build housing… there that includes housing for people who are in need of affordable units, and that puts the builder in a special position." (1T:14-23). It is the protected class in need of affordable housing who will suffer harm if Middletown is allowed to leave open even the possibility of condemnation. No amount of compensation to Plaintiff will bring Middletown closer to compliance and allow for the development of housing of which the protected class has been deprived.

Middletown is intent on moving forward with condemnation and the commercial redevelopment of the Property, despite its significant constitutional violation. Allowing the Township to proceed down that path flies in the face of everything the Mount Laurel doctrine supports, including the need for a strong hand in judicial management of builder's remedy cases, and would create a chilling effect on inclusionary zoning litigation. If Middletown, or any municipality without immunity which is judged to be significantly non-compliant, were simply able to condemn a property while facing a builder's remedy lawsuit, thus effectively mooting that lawsuit, then a disastrous precedent would be established. Municipalities would simply wait until a developer or property owner brought a

builder's remedy lawsuit, wait to see if the court deemed them non-complaint in their obligations, and then move to condemn the property through eminent domain, thus rendering that very builder's remedy lawsuit moot. If permitted, no developer or property owner would contemplate undertaking the very involved builder's remedy and development approval process when the rug could be pulled out from under them at any time. Such a result was in no way contemplated by the Supreme Court, especially in a municipality which affirmatively withdrew from the voluntary compliance process and has a 602-unit (or more) shortfall. The ability to move forward with a builder's remedy claim is essential, and could not happen if injunctive relief did not issue.

Middletown completely fails to address the impact of the Mount Laurel doctrine and the imminent harm the specter of condemnation has on the protected class and the builder's remedy process. Importantly, the trial court specifically noted that generally "Middletown has a constitutional right to condemn property." (2T11:25-12:1). However, the court made clear that the Township's right to condemn cannot be viewed in a vacuum when evaluating the Crowe factors in light of the Township's significant noncompliance: "[i]t's a matter of Mount Laurel law… It's that there is other legislation, which is the New Jersey Fair Housing Act." (2T11:23-12:6). Unlike Middletown, the trial court evaluated both sides of the equation, as it should have done under a Crowe analysis.

Middletown completely misses that point that the injunction at issue serves to protect the viability of the Property as an inclusionary development under the Mount Laurel doctrine in a municipality that has been judged to be significant noncompliant with its constitutional obligations. As the trial court plainly put it, "Middletown has violated the rights of low- and moderate-income households, to have a place to live in Middletown. That's what [constitutionally noncompliant] means." (2T9:6-8).

Middletown advocates for the injunction to be lifted and the builder's remedy litigation to continue, during which the Township would be able to initiate condemnation proceedings at any time. In other words, Middletown would have Plaintiff fight in a second litigation while the builder's remedy suit is pending. That contradicts the Mount Laurel doctrine's principle that a "strong judicial hand" must be used to "provide a realistic opportunity for housing, not litigation" and to avoid "confusion, expense, and delay," which the Supreme Court deemed the "primary enemies of constitutional compliance." Mount Laurel II at 199, 292. The Township ignores these salient principles, instead arguing that irreparable harm does not exist because Plaintiff will have rights under the Eminent Domain Act in an eventual condemnation, including the right to potentially receive monetary damages. (Db23-27). Middletown severely misunderstands that the purpose of the injunction is to avoid such a proceeding entirely by preserving the Property as an inclusionary

housing site while the remainder of this builder's remedy action is litigated. Absent injunctive relief, Plaintiff and the protected class will suffer irreparable harm.

E. The Balancing of the Hardships Greatly Favors Plaintiff

The trial court balanced Middletown's powers of condemnation and redevelopment against the Township's constitutional obligation to provide for its fair share of inclusionary housing. Here, the balance of hardships heavily weighs in Plaintiff's and the protected class's favor.

In examining the relative hardships, the trial court heavily relied upon the fact that Middletown was not only noncompliant, but that the magnitude of noncompliance was so significant in a municipality which was not even close to offering sites for the development of inclusionary housing. After withdrawing the DJ Action, the Township put forth no concrete affordable housing plan, which served as a red flag for the trial court. (2T15:14-17:17).

Contrary to Middletown's assertion, the trial court did not unilaterally amend the New Jersey Constitution and its ruling does not affect all municipalities. The trial court rightfully considered Middletown's right to engage in condemnation and redevelopment activities, but balanced those rights against the Township's constitutional obligation to enact the zoning ordinances necessary to provide its fair share of affordable housing:

> It's that as a matter of Mount Laurel law – and… I know that… Middletown has a constitutional right to condemn property, but

> Middletown is not sort of noticing that… it's not the judiciary… plowing through and not enforcing… Middletown's legislative right to pursue condemnation. It's that there is other legislation, which is the New Jersey Fair Housing Act, N.J.S.A. 52:27D-303 et seq, and it says… under Section 302, the Legislature finds that the New Jersey Supreme Court, through its rulings in Mount Laurel I and Mount Laurel II, has determined that every municipality in a growth area has a constitutional obligation to provide through its land use regulations a realistic opportunity for a fair share of its region's present and prospective needs for housing for low- and moderate-income families.

(1T11:23-12:15).

Considering Middletown's failure to comply and knowing withdrawal from the voluntary compliance declaratory judgment process, the trial court noted that Middletown's own conduct made it vulnerable to a builder's remedy. The Township gave up its right to "drive the bus" and control its own zoning -- exactly what is happening now. Middletown should not be surprised that it has lost its right to control the development of the Property while this matter is pending. If the trial court deems the site suitable, then Plaintiff will be awarded a builder's remedy. Middletown is facing no harm because it had every reason to expect the situation in which it has placed itself. If the site for some reason is deemed not suitable, then the worst harm suffered by Middletown is that any condemnation efforts would be delayed during the pendency of the builder's remedy litigation.

Almost 10 years has passed since the Supreme Court established a procedure for municipalities to comply with the Third Round, and Middletown is no closer to compliance now than it was when it chose to withdraw from the process 5 years ago.

The protected class continues to suffer harm insofar as Middletown's zoning ordinances are in violation of the New Jersey constitution, and allowing Middletown to exclude the Property from consideration for affordable housing will continue to cause great harm. Plaintiff has offered the Property for an inclusionary development and has filed a builder's remedy litigation in which Middletown has been deemed significantly noncompliant. The balance of hardship overwhelmingly favors Plaintiff and the protected class it represents.

F. Preserving the Subject Matter of this Action and Maintaining the Status Quo

The trial court has already deemed Middletown to be non-compliant in its Third-Round affordable housing obligations. Now, the remaining question to be settled, prior to determining whether Plaintiff is entitled to a builder's remedy, is whether the Property is suitable for an inclusionary housing development. Site suitability discovery is ongoing, and the Special Adjudicator must evaluate the parties submissions, meet with the parties, and advise the Court as to whether Plaintiff is entitled to a builder's remedy.

In issuing its July 8, 2024 Order, the trial court merely maintained the status quo until a determination can be made regarding the suitability of the property. The preliminary injunction issued here preserved the subject matter of Plaintiff's builder's remedy litigation -- the Property on which Plaintiff proposes an inclusionary housing development in a municipality that has shirked its Third Round

Mount Laurel obligation. The Mount Laurel doctrine is clear that Plaintiff is the standard bearer for the protected class of New Jersey citizens in need of affordable housing, and that a builder's remedy litigation is very much a public interest matter.

Middletown does not dispute that its third-round affordable housing deficit is at least 602 units. Importantly, the Third Round began in 2000, and the Supreme Court in 2015 established the declaratory judgment process designed to bring municipalities into compliance -- almost 10 years ago -- and Middletown is no closer to satisfying its constitutional obligation. See Mount Laurel IV.

In granting preliminary restraints, this Court was clearly concerned with the large, unmet deficiency in Middletown's affordable housing obligation, Middletown's lack of immunity due to its voluntary withdrawal from its own declaratory judgment action, and the Township's clear intent to move down the path of condemnation and redevelopment in connection with the Property -- even after Plaintiff filed its Complaint in this matter.

Simply put, if the Property is condemned, Plaintiff's builder's remedy claim would be placed in jeopardy and the Property faces the threat of removal as a site on which to develop inclusionary housing in a town with a 602 affordable unit shortfall. Such a result makes zero sense and would serve to eviscerate the Mount Laurel doctrine. For that reason alone, the trial court's injunction should stand because it maintains the status quo by preserving the very subject matter of Plaintiff's builder's

remedy Complaint. As the trial court recognized, there is no precedent upholding the condemnation of a potential affordable housing site which "involve a municipality that has been found to be not constitutionally complaint for the current round and where you have a developer who is ready, willing and able to come forward with development that will include affordable housing." (1T52:4-8).

No matter how this Court reviews the Crowe factors, which are nonetheless satisfied, at the very minimum this matter presents a situation where the trial court was justified to enter restraints to simply maintain the status quo by protecting the eligibility of the Property for an inclusionary development -- the very subject matter of Plaintiff's builder's remedy action -- so this matter may proceed to conclusion.

When taking all of the foregoing into consideration, the Court rightfully maintained the status quo and preserved the Property, the very subject matter of this builder's remedy action in which Middletown has been deemed significantly noncompliant. The trial court's injunction should be affirmed.

II. THE TRIAL COURT DID NOT ERR IN WEIGHING PLAINTIFF'S PROPOSED INCLUSIONARY DEVELOPMENT AGAINST MIDDLETOWN'S COMMERCIAL REDEVELOPMENT.

Middletown repeatedly relies upon condemnation and redevelopment law in a vacuum in support of its shock and awe that the trial court used its equitable powers to preserve the Property in a significantly noncompliant town which has failed to even offer a housing plan for judicial consideration. Although there is no case law

which has definitively held a noncompliant municipality may be enjoined from condemning a builder's remedy site, Deland and MiPro suggest that condemnation under such circumstances should be scrutinized. Furthermore, Middletown cannot cite to any precedent which supports condemnation of a builder's remedy site.

Middletown, in attempting to argue that its redevelopment rights trump any obligation it may have under the Mount Laurel doctrine, incorrectly presumes that its redevelopment designation was proper. Notwithstanding that faulty presumption, none of the case law cited by Middletown involved a pending builder's remedy lawsuit in a significantly noncompliant town, and is thus readily distinguishable.

In Vineland Constr. Co. v. Twp. of Pennsauken, 395 N.J. Super. 230 (App. Div. 2007), relied upon by Middletown, the redevelopment designation was unchallenged and deemed valid, and the plaintiff only challenged the redeveloper designation for its property. The municipality's affordable housing status was not at issue and a competing constitutional interest was not implicated. Likewise, Norfolk S. Ry. Co. v. Intermodal Props., LLC, 215 N.J. 142 (2013) (property owner could not argue that its use for commuter parking was more compatible with the public interest than the intermodal freight facility operated by the condemning railway company), did not involve a competing constitutional obligation for the taking party.

If Middletown was constitutionally compliant with its affordable housing obligation and assuming that the Property was properly declared an area in need of

redevelopment, then the Township would obviously have much discretion in choosing the public use for which the Property would be utilized. However, Middletown cannot in good faith allege that it may employ its otherwise constitutional rights to condemnation and redevelopment in an effort to completely ignore its significant constitutional violation of the Mount Laurel doctrine. The trial court recognized these competing constitutional rights and obligations, and properly utilized the Crowe factors to preserve the Property as a viable builder's remedy site. Middletown's significant violation of its constitutional obligation weighed heavily in the trial court's decision to grant injunctive relief, and more than enough evidence exists to support the trial court's ruling. When evaluating the facts under the Crowe factors, it is clear that the granting of injunctive relief in favor of Plaintiff and the protected class was not "manifestly unjust under the circumstances."

The trial court's injunction should be affirmed.

CONCLUSION

For all of the foregoing reasons, the trial court's granting of injunctive relief should be affirmed, and Middletown should be enjoined from taking any further action towards the condemnation and redevelopment of the Property.

HUTT SHIMANOWITZ & PLOCKER, P.C.
Attorneys for Plaintiff AAMHMT Property, LLC

By:/s/ *Bryan D. Plocker*
BRYAN D. PLOCKER

Dated: March 7, 2025

AAMHMT PROPERTY LLC, Plaintiff-Respondent, vs. TOWNSHIP OF MIDDLETOWN; MIDDLETOWN TOWNSHIP COMMITTEE; Defendants-Appellants. -and- MIDDLETOWN TOWNSHIP PLANNING BOARD; and B. DUVA DEVELOPMENT, LLC, Defendants.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-000844-24T2 **CIVIL ACTION** ON APPEAL FROM: SUPERIOR COURT, LAW DIVISION, MONMOUTH COUNTY DOCKET NO. MON-L-2588-23 SAT BELOW: HON. LINDA GRASSO-JONES, J.S.C.

REPLY BRIEF ON BEHALF OF DEFENDANTS-APPELLANTS TOWNSHIP OF MIDDLETOWN AND MIDDLETOWN TOWNSHIP COMMITTEE

SPIRO HARRISON & NELSON LLC
Brian M. Nelson, Esq. (Id #01352003)
Dana Citron, Esq. (Id #016962005)
200 Monmouth Street, Suite 310
Red Bank, NJ 07701
(732) 784-1470
bnelson@shnlegal.com
dcitron@shnlegal.com
Attorneys for Defendants-Appellants, Township of Middletown and Middletown Township Committee

Dated: March 21, 2025

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PRELIMINARY STATEMENT

In its Opposition, Plaintiff-Respondent AAMHMT Property LLC ("Plaintiff") does not refute the arguments made by Defendants-Appellants Township of Middletown and Middletown Township Committee (together, "Middletown" or the "Township"). Plaintiff downplays the trial court's errors by focusing on Middletown's non-compliance with the Mount Laurel doctrine. But a finding of non-compliance merely makes a municipality vulnerable to a builder's remedy lawsuit – it does not eliminate the municipality's constitutional rights to redevelop or condemn property for redevelopment purposes. Middletown's non-compliance also does not override the Crowe factors that Plaintiff must satisfy to obtain injunctive relief.

When the trial court preemptively *enjoins* governmental actions rather than letting the Township take those actions and be challenged in the normal course, the trial court upends the judicial process. Plaintiff's arguments – including those based on Middletown's non-compliance – should be raised as legal arguments in opposition to a condemnation proceeding if one is filed, or in an action in lieu of prerogative writs to challenge a redevelopment action. Neither the Constitution nor our legal system lets the trial court paralyze Middletown's governing body by *enjoining* governmental actions before they

are taken, especially when the proposed governmental actions are expressly authorized by the Constitution.

PROCEDURAL HISTORY & STATEMENT OF FACTS

Middletown relies upon the procedural history and statement of facts set forth in its brief previously filed in this matter.

LEGAL ARGUMENT

I. THE COURT BELOW ABUSED ITS DISCRETION BY GRANTING INJUNCTIVE RELIEF BECAUSE PLAINTIFF FAILED TO SATISFY THE CROWE FACTORS. [Da9-Da11; Da12-Da13]

A. The Court Below Erred by Finding Irreparable Harm.

Plaintiff concedes that the trial court found irreparable harm arising from monetary harm and Plaintiff's potential difficulty in obtaining lender financing. (Pb40). Plaintiff further argues that this issue implicates its ability to move forward with its builder's remedy claim. (Pb41-Pb42). But Plaintiff never presented any evidence to the lower court that it needed financing from lenders for its proposed project or that financing would be jeopardized if an injunction were not granted. Accordingly, the court's decision was an abuse of discretion as it did not rely on facts in the record. The court's finding is "'so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice.'" See

Griepenburg v. Twp. of Ocean, 220 N.J. 239, 254 (2015) (quoting Rova Farms Resort, Inc. v. Investors Ins. Co., 65 N.J. 474, 484 (1974)).

Moreover, Plaintiff cannot dispute that the court abused its discretion in finding imminent, irreparable harm based on speculation and hypothetical scenarios. The court found that, *if* Middletown takes steps toward condemnation, it *may* affect Plaintiff's ability to secure lending – *if* Plaintiff needs lending at all – and therefore "cast[s] a shadow *potentially* on being able to move forward with development," while also acknowledging that "nothing has been approved yet" and "no determination has been made that the Property is appropriate for the development of affordable housing." (1T52:15-53:9 (emphasis added)). Under the Eminent Domain Act ("EDA"), multiple governmental actions would need to occur before Middletown could even file a condemnation complaint, and none of those actions have occurred at this time.[1] (See 1T27:3-12; 1T39:17-40:23). The court's own decision and the EDA demonstrate that any purported harm is not imminent, concrete, and non-speculative. Subcarrier Commc'ns., Inc. v. Day, 299 N.J. Super. 634, 638 (App. Div. 1997).

[1] Even if Middletown files a condemnation complaint, the condemnation court still has to decide that Middletown has the authority to take the Property.

Plaintiff also does not – because it cannot – dispute that any harm is reversible and can be remedied by monetary damages. If Middletown were to take steps toward condemnation, Plaintiff could challenge those actions and the condemnation court can void those actions if it finds that Middletown lacks authority to condemn the Property (based on Mount Laurel or otherwise). Every step in the condemnation process, including the filing of the declaration of taking, can be undone using the procedures set forth in the EDA. See Essex Cty. Voc. Schs. of Educ. v. New United Corp., Nos. A-4402-11T2, A-1873-12T2, 2014 N.J. Super. Unpub. LEXIS 786[2], at *10-11 (App. Div. April 8, 2014) ("[T]he [EDA] recognizes that, even after a public entity files a declaration of taking, deposits the estimated just compensation, and takes title to and possession of the property, the condemnor's right to exercise the power of eminent domain may be challenged and judicially undone.") (citing N.J.S.A. 20:3-22 and 3-24). The condemnee will be restored to title and will be entitled to any damages, expenses, reasonable costs and fees. Id. at *13.

Consequently, no irreparable harm exists because the alleged harm is not in the record, is speculative, and can be redressed by monetary damages. See Crowe v. DeGioia, 90 N.J. 126, 132-133 (1982). If Middletown begins the

[2] A copy of this unpublished opinion is included with Defendant-Appellant's Appendix at Da213-Da226.

condemnation process, Plaintiff can raise all of its objections in that proceeding. If Middletown files a declaration of taking, and if the condemnation court then holds the taking is *invalid*, then the taking will be voided, title will revert to Plaintiff, and Plaintiff will receive its escrowed funds as well as any permitted damages. In the alternative, if Middletown begins the condemnation process and a court holds that the taking is *valid*, then just compensation will be awarded for the Property. Because the condemnation proceeding, if one is filed, will provide adequate monetary compensation either way, there can be no irreparable harm. See ibid.

For the same reason, an injunction is not necessary to maintain the status quo or preserve the subject matter of the builder's remedy lawsuit. (Pb47). The status quo can be preserved in the condemnation proceeding because the EDA explicitly allows the condemnation court to stay a condemnor from taking possession of the property when the validity of the taking is challenged. Twp. of Readington v. Solberg Aviation Co., 409 N.J. Super. 282, 326 (App. Div. 2009). This procedure maintains the status quo of the property and allows no harm to befall Plaintiff in the interim, much less irreparable harm.

Lastly, an injunction is not necessary to avoid establishing bad precedent. (Pb41). Crowe requires each injunction to be decided on a case-by-case basis based on the facts before the court. In this case, the trial court

disregarded Crowe and essentially granted an injunction because Middletown is non-compliant and Plaintiff had filed a builder's remedy. The Property is subject to a redevelopment plan that Middletown *negotiated with the current Property owner*, which requires commercial uses at the Property. For 16 years, the Property has been slated for commercial use to complement the inclusionary residential development that is nearly complete on the adjacent parcel. These facts are unique and unlikely to recur in other cases.

B. The Court Below Erred by Finding a Well-Settled Legal Right and Likelihood of Success on the Merits.

Plaintiff cannot demonstrate a well-settled legal right when it concedes that no case holds that a court can enjoin a non-compliant municipality from pursuing condemnation or exercising redevelopment rights merely because someone proposes to build an inclusionary development on the site. (Pb21). The court's contradictory finding that the law was "pretty clear" lacks support. (1T53:19-25). Mount Laurel II settles only that Plaintiff can *request* a builder's remedy. S. Burlington N.A.A.C.P. v. Mt. Laurel Twp., 92 N.J. 158 (1983) ("Mount Laurel II"). It does not "settle" that Plaintiff is entitled to a builder's remedy for this Property.

Plaintiff also concedes that the court below failed to evaluate the likelihood-of-success factor. (Pb39). This Court has held that a judge's failure to evaluate every Crowe factor is an abuse of discretion. Waste Mgmt. of N.J.,

Inc. v. Morris Cnty. Mun. Utils. Auth., 433 N.J. Super. 445, 455-56 (App. Div. 2013). Based on this factor alone, reversal is required.

Moreover, Plaintiff presented no evidence, much less clear and convincing evidence, demonstrating its likelihood of success on the merits of its builder's remedy lawsuit, i.e., that the Property is suitable. The court did not explain why it found in Plaintiff's favor regarding a likelihood-of-success when it did not state its reasons for doing so on the record and when Plaintiff presented no evidence to satisfy its burden.

To be clear, this was *Plaintiff's* burden on Plaintiff's application for injunctive relief. Plaintiff's Opposition conflates the burden of proof in a builder's remedy with the burden of proof for each Crowe factor on a preliminary injunction application. (Pb38). Plaintiff incorrectly asserts that the burden of proof vis-à-vis the likelihood-of-success factor lies with Middletown. The law is clear that the burden rests on the party seeking a preliminary injunction to prove each element by clear and convincing evidence. Waste Mgmt., 433 N.J. Super. at 452. Accordingly, *Plaintiff* had to demonstrate by clear and convincing proof that it was likely to succeed on its builder's remedy claim, specifically, the suitability of the Property. Plaintiff did not offer any competent evidence to the court below on this point.

Like Plaintiff, the trial court also appeared to erroneously shift the burden to Middletown to disprove Plaintiff's likelihood of success of the builder's remedy claim, suggesting that Middletown should have presented evidence that the Property was not suitable. (see 1T53:19-22; 2T10:5-16). The court stated, "I haven't heard anything indicating, other than that the town wants this to be commercial, that it's environmentally not appropriate, that nothing can be built here." (1T53:19-22). The court's burden-shifting in Plaintiff's application for injunctive relief is legally incorrect requiring reversal.

C. The Court Below Erred by Finding that the Harm to Plaintiff Outweighed the Harm to Middletown.

Plaintiff argues that, in balancing the hardships, the court below relied upon Middletown's non-compliance with Mount Laurel. (Pb44-Pb46). Plaintiff's argument ignores the trial court's decision. The court held that the balance of the relative hardships weighed in Plaintiff's favor because, if Middletown were to proceed with condemnation, it will potentially negatively affect Plaintiff's ability to secure financing and proceed with its builder's remedy claim. (1T54:8-55:7). That holding cannot stand, for two reasons. First, Plaintiff did not present any evidence that it needed financing from lenders or that its financing would be jeopardized if an injunction were not granted. As noted earlier, the court's finding is "'so manifestly unsupported by

or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice.'" See Griepenburg, 220 N.J. at 254 (quoting Rova Farms, 65 N.J. at 484).

Second, the court abused its discretion by failing to consider any harm to Middletown. Specifically, the court failed to consider that Middletown is: (1) being denied its Constitutional right to redevelopment, (2) losing redevelopment opportunities for the Property, and (3) harmed by being unable to serve the public interest by revitalizing the Property with commercial development to improve residents' quality of life and spur new job growth and business opportunities. The court below failed to consider that the Circus Liquors Site was subdivided into two parcels to further Middletown's Redevelopment Plan, *to which the current Property owner agreed*, which required commercial uses on the Property fronting the highway and an inclusionary residential development on the immediately adjacent parcel, which is being built. The court's failure to consider any harm to Middletown in balancing the hardships was an abuse of discretion and should be reversed.

II. THE COURT BELOW ERRED IN ITS INTERPRETATION OF EMINENT DOMAIN LAW AND BY CREATING NEW LAW THAT LACKS SUPPORT IN NEW JERSEY JURISPRUDENCE. [Da9-Da11; Da12-Da13]

Plaintiff does not address the arguments in Point II of Middletown's brief that the trial court erred by (1) finding that Middletown's proposed use

was not a public use, and (2) failing to defer to Middletown's exercise of discretion in its use of eminent domain.

First, Plaintiff does not – because it has no legal basis to – dispute the well-established principle that New Jersey law treats redevelopment for commercial purposes exactly the same as it treats a proposed park or hospital in terms of justifying condemnation for a public use. (Db 38-Db41). The court below erroneously held that Middletown's purpose for condemnation was a "private use" because the court considered commercial redevelopment to be unlike open space or a hospital. (1T51:11-16). The trial court's belief that commercial redevelopment does not constitute a public purpose in the eminent domain context disregards Supreme Court doctrine. (Db 38-Db41), Middletown has proffered a legitimate public use in potentially acquiring the Property, i.e., redevelopment, and the trial court should not have denied Middletown its constitutional rights to redevelopment and eminent domain. See 62-62 Main St., L.L.C. v. Mayor & Council of Hackensack, 221 N.J. 129, 144, 156 (2015); N.J. Const. art. VIII, § 3, ¶ 1 (1947).

Along the same lines, Supreme Court precedent holds that courts must defer to municipal discretion in their use of its eminent domain, provided there is no fraud, bad faith or manifest abuse. Mt. Laurel Twp. v. MiPro Homes, LLC, 188 N.J. 531, 536 (2006); Twp. of W. Orange v. 769 Assocs., LLC, 172

N.J. 564, 571 (2002). Again, the trial court ignored Supreme Court precedent. The court created new law stating that if a town is constitutionally non-compliant, then it loses its powers to even pursue eminent domain and redevelopment, regardless of whether a legitimate public purpose and lack of bad faith exist. (Pb18-Pb24; 1T51:17-20; 1T54:21-25; 2T14:11-15:4; 2T19:10-21; 2T22:14-21). The trial court's ruling goes beyond what Mount Laurel provides - which is that a finding of non-compliance renders Middletown vulnerable to a builder's remedy lawsuit through which the Property could be rezoned. Instead, the court ruled that Middletown's non-compliance strips it of inherent powers granted by the Constitution, to exercise its redevelopment and condemnation rights. The trial court cannot use the Mount Laurel doctrine to rewrite the Constitution.

III. THE COURT BELOW ERRED BY WEIGHING THE PARTIES' COMPETING USES AND NOT DEFERRING TO MIDDLETOWN'S PROPOSED USE. [Da9-Da11; Da12-Da13]

The trial court ignored additional Supreme Court cases when it weighed the parties' competing uses for the Property and held that Plaintiff's proposed use is more beneficial. The most Plaintiff can argue in trying to support the trial court's decision is that those Supreme Court cases did not involve the Mount Laurel doctrine. (Pb48-Pb49).

Our Supreme Court has expressly ruled that a property owner cannot challenge a public entity's exercise of eminent domain by arguing that the owner's proposed use would better serve the public interest than the public entity's proposed use. Norfolk S. Ry. Co. v. Intermodal Props., LLC, 215 N.J. 142, 162-64 (2013). The only exception to this rule is when the property owner has already devoted its property to an existing public purpose, and the property owner also has the power to condemn. Id. at 163. "[A]bsent a pre-existing, public use coupled with the power of eminent domain," the courts are foreclosed from weighing competing public interests. Ibid.

Here, the prior public use doctrine does not apply because Plaintiff's interest in developing affordable housing is not a pre-existing use, and more fundamentally, Plaintiff is a private entity and lacks the power to condemn. In other words, Supreme Court doctrine does not permit Plaintiff to challenge Middletown's exercise of eminent domain by arguing that its proposal to build affordable housing on the property would better serve the public interest than Middletown's desire to condemn to revitalize blighted land. To that end, the Court is foreclosed from undertaking a comparative evaluation of the competing public uses to determine which should prevail.

Norfolk Southern does not differentiate between "constitutional" interests and non-constitutional interests, but, even if it did, Middletown's

interest in redevelopment is also of constitutional dimension. (Pb49). Contrary to Plaintiff's argument, it is irrelevant that Norfolk Southern does not involve Mount Laurel. (Pb49). Norfolk Southern holds that the courts should not weigh competing interests, yet that is exactly what the trial court did. See Norfolk S. Ry. Co., 215 N.J. at 164. Because Middletown has proffered a legitimate public use and has exercised good faith, the court erred in failing to defer to Middletown's intent to condemn to redevelop the Property for commercial purposes.

IV. THE COURT BELOW ERRED BY PROSPECTIVELY ENJOINING THE GOVERNMENTAL ACTIONS RATHER THAN ALLOWING THEM TO BE ADJUDICATED AND DECIDED ON THEIR MERITS. [DA9-DA11; DA12-DA13]

Plaintiff does not address Middletown's Point IV, that the trial court erred by preemptively enjoining condemnation and redevelopment. See Deland v. Twp. of Berkeley Heights, 361 N.J. Super. 1, 19 (App. Div. 2003) (explaining that "courts are reluctant to enjoin litigation prospectively").

Generally, there are only two categories of litigation that may be enjoined: (1) when a claim has already been heard and decided, or (b) when the claim is pending or is about to be instituted in another forum whose jurisdiction is "superior or prior." See ibid. There is no precedent allowing a court to issue an injunction based on the circumstances presented in this case.

When a municipality takes governmental action and a party objects, the proper procedure is for the party to challenge the action under Rule 4:69 or, for condemnation, to file an objection in the condemnation proceeding, which is expedited. See Twp. of W. Orange, 172 N.J. at 567.

The validity of the governmental action is then adjudicated on the merits after briefing, legal argument, and a hearing. Here, the trial court's injunction subverts that process entirely. In direct violation of Deland's proscription against enjoining litigation prospectively, the trial court essentially granted Plaintiff's challenges to governmental action by tying Middletown's hands before Middletown even took the actions to be challenged, without briefing, legal argument, or a hearing on the merits.

Tellingly, Plaintiff fills its appeal brief with substantive arguments against potential condemnation and redevelopment of the Property.[3] (Pb12-Pb13; Pb33-Pb37). Plaintiff's substantive arguments opposing condemnation and redevelopment are immaterial because they address the *merits* of governmental actions that the trial court precluded Middletown from taking. For example, the MiPro case that Plaintiff cites arose when a property owner objected to a condemnation once it was filed; here, the trial court prevented

[3] Middletown briefed these substantive arguments extensively below. The trial court neither considered nor made findings regarding these arguments; it focused only on Middletown's non-compliance.

Middletown from even filing a condemnation suit. The trial court should have denied the injunction and let Plaintiff raise these substantive arguments in a prerogative writ action *if* Middletown takes steps toward redevelopment, or in a condemnation proceeding *if* Middletown pursues condemnation. (Pb12-Pb14; Pb33-Pb37).

CONCLUSION

The trial court imposed the extraordinary remedy of an injunction that strips Middletown from exercising powers granted to it under the State Constitution. In doing so, it disregarded multiple Supreme Court cases as well as Middletown's Constitutional rights. It also dispensed with due process, essentially granting Plaintiff's challenges to governmental action before Middletown has even taken those actions, without briefing, legal argument or a hearing on the merits of those challenges. For the reasons set forth herein and in Middletown's initial brief, this Court should reverse. Alternatively, this Court should remand to the trial court to reevaluate the Crowe factors.

SPIRO HARRISON & NELSON LLC
Attorneys for Defendants-Appellants Township of Middletown and Middletown Township Committee

Dated: March 21, 2025 By:_____
DANA CITRON, ESQ.