SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3344-20

IN THE MATTER OF THE APPLICATION OF THE TOWNSHIP OF SOUTH BRUNSWICK FOR A JUDGMENT OF COMPLIANCE AND REPOSE AND IMMUNITY FROM MOUNT LAUREL LAWSUITS.

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Argued May 23, 2023 – Decided July 12, 2023

Before Judges Geiger, Susswein and Berdote Byrne.

On appeal from the Superior Court of New Jersey, Law Division, Middlesex County, Docket No. L-4433-17.

Marguerite M. Schaffer argued the cause for appellant/cross-respondent Township of South Brunswick (Schaffer Shain Jalloh PC, attorneys; Donald J. Sears, on the briefs).

Thomas F. Collins, Jr. argued the cause for appellant/cross-respondent Township of South Brunswick Planning Board (Vogel, Chait, Collins & Schneider, PC, attorneys; Thomas F. Collins, Jr. and Thomas J. Molica, Jr., of counsel and on the briefs).

Kenneth D. McPherson, Jr. argued the cause for respondent/cross-appellant South Brunswick Center LLC (Waters, McPherson, McNeill, PC, attorneys; Kenneth D. McPherson, Jr., of counsel and on the briefs; Mark J. McPherson and Natasha Montalvo, on the briefs).

Adam M. Gordon argued the cause for respondent Fair Share Housing Center (Fair Share Housing Center, attorneys; Adam M. Gordon, of counsel and on the brief).

Richard J. Hoff, Jr. argued the cause for respondent AvalonBay Communities, Inc. (Bisgaier Hoff, LLC, attorneys; Richard J. Hoff, Jr., and Danielle N. Kinback, on the brief).

Bryan D. Plocker argued the cause for respondents Windsor Associates and Monmouth Mobile Home Park Land Development, Inc. (Hutt & Shimanowitz, attorneys, join in the briefs of respondents Fair Share Housing Center, K. Hovnanian New Jersey Operations, LLC and AvalonBay Communities, Inc.).

John A. Sarto argued the cause for respondent American Properties at South Brunswick, LLC (Giordano, Halleran & Ciesla, PC, attorneys, join in the briefs of Fair Share Housing Center, K. Hovnanian Shore Acquisitions, LLC, and AvalonBay Communities, Inc.).

Henry L. Kent-Smith argued the cause for respondent K. Hovnanian New Jersey Operations, LLC (Fox Rothschild, LLP, attorneys; Henry L. Kent-Smith, on the brief).

Richard J. Allen, Jr. argued the cause for amicus curiae New Jersey League of Municipalities and New Jersey

Institute of Local Government Attorneys (Kipp & Allen, LLC, attorneys; Richard J. Allen, Jr., on the brief).

PER CURIAM

In this Third Round Mount Laurel IV[1] declaratory judgment action, plaintiffs, Township of South Brunswick (Township) and Township of South Brunswick Planning Board (Board), appeal a final judgment of compliance and repose of the Township's 2019 Amended Third Round Housing Element and Fair Share Plan (HEFSP). The Board adopted the plan "under protest" following a series of rulings by the trial judge,[2] wherein the judge: (1) determined that the 1,000-unit cap on affordable housing obligations[3] set forth in N.J.S.A. 52:27D-307(e) applied to separate ten-year periods within the twenty-six years (1999-2025) encompassing the gap period and the prospective need period, rather than the entirety of that period, resulting in a 2,600-unit cap; (2) ruled that those municipalities qualifying for the 1,000-unit cap for the current prospective need period (2015-2025) could address their affordable housing need attributable to

[1] In re N.J.A.C. 5:96 & 5:97 (Mount Laurel IV), 221 N.J. 1 (2015).

[2] Four different judges presided over this case at various points.

[3] See S. Burlington Cnty. NAACP v. Twp. of Mount Laurel (Mount Laurel I), 67 N.J. 151 (1975).

the gap period in equal shares over the Third, Fourth and Fifth Rounds; (3) determined that any credits to which a municipality was entitled must be applied first to reduce its gap period need obligation and then to its prospective need obligation; (4) revoked the Township's immunity from builder's remedy lawsuits[4]; and (5) determined the Township's pre-credited and uncapped Third Round fair share obligation totaled 3,016 units, comprised of 109 present need (rehabilitation) units, 1,374 gap period units, and 1,533 prospective need units.

A second judge molded the Township's obligation by: (1) reducing the number of needed gap period units by 124 credits and directing that the remaining 1,250 gap period units be addressed by the Township over the course of Third, Fourth, and Fifth Rounds, at a rate of 417 units per round; and (2) capping the number of prospective need units at 1,000 in accordance with

[4] A "builder's remedy lawsuit" is filed by a real estate developer to compel a municipality to allow the construction of a large, multi-family housing structure or complex that includes some affordable housing units. See In re Twp. of Bordentown, 471 N.J. Super. 196, 221 (App. Div. 2022) ("A builders remedy provides a developer with the means to bring 'about ordinance compliance through litigation.'" (quoting Mount Olive Complex v, Twp. of Mount Olive, 356 N.J. Super. 4500, 505 (App. Div. 2003))). "A builder's remedy should be granted if: (1) the 'developer succeeds in Mount Laurel litigation'; (2) the developer 'proposes a project providing a substantial amount of lower income housing'; and (3) the developer's proposal is not 'contrary to sound land use planning.'" Id. at 221-22 (footnote omitted) (quoting S. Burlington Cnty. NAACP v. Mount Laurel (Mount Laurel II), 92 N.J. 158 (1983)).

N.J.S.A. 52:27D-307(e). The Township's current Third Round fair share obligation stands at 109 present need units, which the Township does not dispute and has already fulfilled, 417 gap period units, and 1,000 prospective need units. Although the Township disputes the pre-capped number of prospective units needed, it does not dispute at least 1,000 units are needed, leaving its additional unadjusted 1,374-unit gap period obligation as the primary issue.

In this appeal, plaintiffs argue that the first judge's rulings are tainted by an appearance of impropriety due to his prior representation of a former owner of respondent South Brunswick Center LLC's (SBC) property and his personal connections to a developer uninvolved in this matter. Plaintiffs also argue the judge erred in: (1) his interpretation of N.J.S.A. 52:27D-307(e); (2) revoking the Township's immunity from builder's remedy lawsuits; and (3) authorizing Special Hearing Officers (SHO) to conduct hearings and issue recommendations to the court for the approval of builder's remedy site plans in place of the Board. Plaintiffs further argue that the judge who presided over the later compliance hearings on South Brunswick's 2019 HEFSP erred in granting final site plan approval to SBC given the excessive number of exceptions from Residential Site Improvement Standards (RSIS) incorporated in that plan.

SBC cross-appeals from orders entered on December 5, 2018, November 27, 2019, and July 6, 2021, contending the orders improperly permitted the Township and Board to appeal the 2019 HEFSP.

Respondent-intervenor Fair Share Housing Center (FSHC) supports the decisions rendered by the trial court. Respondents AvalonBay Communities, Inc. (AvalonBay) and K. Hovnanian New Jersey Operations, LLC (Hovnanian), developers of properties included in the Township's 2019 HEFSP, which have since received final site plan approval, also support the trial court's decisions. AvalonBay and Hovnanian assert that because plaintiffs have not challenged any aspect of their respective approvals, any such challenge must be deemed waived.

Amicus curiae New Jersey League of Municipalities and New Jersey Institute of Local Government Attorneys argue the trial court erred by: (1) failing to apply the 1,000-unit cap in the manner prescribed by the Legislature; (2) failing to follow the fair share methodology mandated by the Supreme Court; (3) applying an incorrect standard to revoke the Township's immunity from builder's remedy lawsuits; and (4) granting intervenor status to third parties contrary to the Supreme Court's mandate in Mount Laurel IV.

Considering the record, the arguments raised by the parties on appeal, and the applicable legal principles, we affirm in part and reverse in part.

PRIOR MOUNT LAUREL OBLIGATION COMPLIANCE

On August 3, 1987, the Council on Affordable Housing (COAH) granted substantive certification to the Township's First Round (1987-1993) HEFSP, which addressed the 669 units (66 present need (rehabilitation)/603 prospective need) of low- and middle-income housing deemed its fair share obligation for that round. On February 4, 1998, COAH granted substantive certification to the Township's Second Round (1987-1999) HEFSP, which addressed its assigned fair share obligation of 937 low- and middle-income housing units (95 rehabilitation/842 new construction) for that round. The Township satisfied its First and Second Round obligations, leaving a credit of four units to be applied to the Third Round.

In 2004, COAH revised its substantive rules for calculating Mount Laurel obligations for the Third Round, incorporating a new "growth share" methodology. 36 N.J.R. 5895(a) (Dec. 20, 1994). In December 2005, the Township petitioned for substantive certification of its Third Round HEFSP, which was prepared in accordance with COAH's revised rules. Before COAH acted upon the Township's plan, we invalidated COAH's growth share methodology and other new rules and directed COAH to adopt revised rules. In re N.J.A.C. 5:94 & 5:95, 390 N.J. Super. 1 (App. Div. 2007).

"COAH's third round substantive rules [were] designed to permit municipalities to meet a cumulative fair share beginning in 1987 and ending on January 1, 2014." Id. at 27 (citing N.J.A.C. 5:94-1.1(d)). We explained:

> There are three major components: (1) a municipality's "rehabilitation share" based on the condition of housing revealed in the data gathered for the 2000 Census, previously known as a municipality's indigenous need; (2) a municipality's unsatisfied prior round obligation (1987 through 1999), satisfaction of which will be governed by the second round rules; and (3) a municipality's "growth share" based on housing need generated by statewide job growth and residential growth from 1999 through 2014. N.J.A.C. 5:94-1.2. The "delivery period" for the growth share obligation is ten years, from January 1, 2004 to January 1, 2014.
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> [Ibid. (citing N.J.A.C. 5:94-1.1(d)).]

The Township prepared an amended Third Round HEFSP consistent with COAH's further revised Third Round rules, which proposed 984 units of affordable housing (36 rehabilitation/948 new construction). The Township then petitioned for substantive certification on December 31, 2008. Before COAH could certify the amended plan, we invalidated COAH's revised Third Round rules. In re N.J.A.C. 5:96 & 5:97, 416 N.J. Super. 462 (App. Div. 2010). The Supreme Court affirmed as modified the invalidation of COAH's growth share-based, revised Third Round rules and directed COAH to assess Mount Laurel obligations for the Third Round in a manner consistent with the

methodology utilized in the First and Second rounds. In re N.J.A.C. 5:96 & 5:97, 215 N.J. 578, 586, 620 (2013).

When COAH failed to adopt acceptable revised Third Round rules, the Supreme Court, in Mount Laurel IV, held that "the courts may resume their role as the forum of first instance for evaluating municipal compliance with Mount Laurel obligations" and adopted an orderly procedural mechanism for towns to obtain the equivalent of substantive certification for their fair share housing plans and avoid exclusionary zoning lawsuits. 221 N.J. at 5-6, 19-20. The civil actions authorized by Mount Laurel IV were to be assigned to Mount Laurel-designated judges. Id. at 33, 36.

THE PRESENT DECLARATORY JUDGMENT ACTION

On July 1, 2015, the Township, in accordance with Mount Laurel IV, filed a declaratory judgment complaint (DJ action) seeking a judgment of compliance, repose, and temporary immunity from builder's remedy lawsuits based on its compliance plan. In its complaint, the Township contended it took steps to produce affordable housing, earning 584 credits for units built or approved, including the 4 carry-over credits.

On July 31, 2015, the first judge entered orders permitting the FSHC and several private developers to intervene in the DJ action. Separate actions

previously filed by SBC and other developers seeking residential housing-related relief were administratively consolidated with the DJ action.

Following the Supreme Court's decision in Mount Laurel IV, several municipalities, including South Brunswick, moved "for a declaration that their respective fair share numbers should be capped at 1,000 units in accordance with the Fair Housing Act (FHA)," N.J.S.A. 52:27D-301 to -329.4 and COAH's existing regulations. In re Hous. Element for Monroe Twp., 444 N.J. Super. 163, 165 (Law Div. 2015). The first judge consolidated the pending declaratory judgment actions for oral argument only. Id. at 166 n.1. The case presented issues concerning:

> (1) the availability, applicability, and manner of implementation of the "1,000–unit cap" as to each municipality's respective Third Round obligations; (2) whether and to what extent those obligations must address, in the aggregate, both the unmet need for lower income housing that had been generated between 1999 and today (the "gap period"), as well as their fair share of the region's prospective need for such housing as calculated from today through 2025; and (3) how credits for affordable units constructed during those prior cycles shall be applied.
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> [Id. at 166.]

On October 5, 2015, the judge issued an opinion interpreting N.J.S.A. 52:27D-307(e), which affected South Brunswick's DJ action. He determined

that the statutory 1,000-unit cap on Mount Laurel development "within ten years from the grant of substantive certification" applied to the separate 10-year gap and prospective need periods, resulting in a 1,600-unit cap for the 16-year gap period (1999-2015), plus an additional 1,000-unit cap for the ten-year prospective need period (2015-2025), resulting in an aggregate 2,600-unit cap for the Third Round gap and prospective need periods. Id. at 172-77.

The judge also ruled that municipalities qualifying for the 1,000-unit cap for the current prospective need period (2015-2025) could address their affordable housing need attributable to the gap period in equal shares over the Third, Fourth, and Fifth Rounds, and that any credits must be applied first to reduce the municipality's gap period need obligation and then to its prospective need obligation. Ibid.

On November 9, 2015, the Township submitted a draft Third Round HEFSP to the court. After participating in a court-ordered meeting with the intervenor-developers, the Township submitted revised draft HEFSPs in December 2015 and January 2016. The draft plans were not approved.

The Township's subsequent February 11, 2016 HEFSP set forth three alternative proposals, which varied depending on whether the Township's fair share obligation totaled 379 units, 1,000 units, or 1,553 units, with only the last

proposal including 300 units on SBC's property (with 100 units being inclusionary[5]). The court conducted a hearing on February 19, 2016, rejected the latest proposals, and revoked the Township's immunity from builder's remedy liability. The court further directed that: (1) its rulings were stayed until the May 2, 2016 trial date for all aspects of the Township's fair share obligation; (2) the trial would include any builder's remedy claims filed in accordance with the order; and (3) in the interim, the Township could submit a revised HEFSP creating a "realistic opportunity for addressing its fair share obligation in order to attempt to demonstrate to the [c]ourt . . . that this order should be reconsidered and immunity reinstated."

The Township submitted a new proposal on April 13, 2016, which encompassed 960 new units and 320 bonus credits[6] for a total of 1,350 units (70

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[5] In this context, "inclusionary" refers to units providing affordable housing to low- and moderate-income households. Toll Bros. v. Twp. of W. Windsor, 173 N.J. 502, 511 n.1 (2002). "Inclusionary zoning" is the principal form of inclusionary housing, which "refers to a wide range of strategies that localities implement to increase housing opportunities for low- and moderate-income residents." Inclusionary Zoning and Mixed-Income Communities, Evidence Matters (Off. of Pol'y Dev. & Rsch., U.S. Dep't of Hous. & Urb. Dev.), Spring 2013, at 17, 22 n.1 (citing Alan Mallach, Inclusionary Housing Programs: Policies and Practices 2 (1984)).

[6] Under the Second Round rules, two-for-one bonus credits apply to family rental units up to 25% of the overall affordable housing obligation. See N.J.A.C. 5:93-5.15(a), (b), (d)(1) and (d)(3)."

present need units, 280 gap period units, and 1,000 prospective need units). The plan included 500 units on SBC's property, 75 of which were to be inclusionary. The Township submitted a further amended draft Third Round HEFSP on April 20, 2016. This proposal included 1,027 new units and 341 bonus credits for a total of 1,368 units, of which 1,124 were gap period units and 237 were prospective need units. The plan again included 500 units on SBC's property, with 75 being inclusionary. The court was not satisfied with these revised plans and the Township's immunity from builder remedy lawsuits remained revoked. The Township requested a stay of the ruling and continued immunity pending the outcome of an appeal involving various Ocean County municipalities. The trial court declined to stay its ruling and we denied the Township's motion for leave to appeal.

On May 3, 2016, AvalonBay, the purchaser of the 26.55-acre "Pulte property," filed a builder's remedy lawsuit against the Township. On February 28, 2017, Hovnanian, the contract purchaser of a 19.35-acre tract, filed its builder's remedy lawsuit against the Township. SBC, the owner of 480 acres of undeveloped land in South Brunswick, had also filed a builder's remedy complaint in December 2014 as part of its prior litigation against the Township.

The trial to determine the proper methodology to be used in calculating Township's Third Round fair share obligation, the actual calculation of that obligation, and how best to achieve constitutional compliance, took place in May 2016. The parties agreed to postpone testimony related to the appropriateness of the proposed builder's remedy sites until after the Township's obligation was resolved.

At trial, the Township presented expert testimony from Peter Angelides, Ph.D., senior vice president of Econsult Corporation. FSHC presented expert testimony from David Kinsey, Ph.D., a licensed public planner, and Daniel McCue, a senior research associate at the Harvard University Joint Center for Housing Studies. Art Bernard, P.P., a former COAH Director, testified as an expert for Hovnanian.

The methodologies for calculating the Township's fair share obligation proposed by Angelides and Kinsey varied greatly and yielded widely disparate obligation totals. Specifically, Angelides opined that the Township's fair share housing obligation was comprised of 130 present need units, 269 prospective need units, and 1,009 gap period units for a total of 1,408 units.

Kinsey testified that the Township's fair share housing obligation was comprised of 109 present need units, 1,533 prospective need units, and 1,374

gap period units. While Kinsey used some actual data in calculating the gap period need, the bulk of his analysis tracked the multi-step prospective need analysis. He explained:

> For the Gap Period, this methodology specifically follows the methodology used by COAH in 1994 to recalculate Prospective Need from 1987 through 1993. COAH called that recalculation the "Prior Cycle Prospective Need." The methodology for this retrospective analysis back to 1999 is similar to that for the Prospective Need analysis for 2015-2025. Consistent with COAH's "Prior Cycle Prospective Need" calculation in 1994, the princip[al] distinctions between the calculations from 1999-2015 and from 2015-2025 are the data sources available. As a retrospective analysis, [low- and moderate-income] housing need for the Gap Period can be calculated using data on the changes that actually occurred in [low- and moderate-income households] in New Jersey, as well as what actually happened in New Jersey municipalities and regions in terms of population change, changes in housing stock, changes in ratables, and changes in [household] income, while the prospective analysis of Prospective Need necessary relies on projections into the future. The methodology for calculating Prospective Need, 2015-2025, is similar to the methodology for calculating need for the Gap Period, 1999-2015. The major difference is that projections must be made through 2025, based on the available data, rather than relying on data that record what actually happened during 1999-2015 in New Jersey in terms of demography and housing stock.

On July 11, 2016, six weeks after the conclusion of the trial, we issued our opinion in In re Declaratory Judgment Actions filed by Various

Municipalities, County of Ocean (County of Ocean), 446 N.J. Super. 259 (App. Div. 2016). We held: (1) the court erred in requiring that municipalities undertake a new "separate and discrete" gap period calculation not authorized under the FHA; (2) a gap period need could not be incorporated into a prospective need analysis because, by its statutory definition, prospective need could not involve a retrospective calculation; (3) because Mount Laurel IV did not include a new methodology for calculating additional housing obligations during the gap period, such details, unresolved by COAH through replacement Third Round rules, were best left to the Legislative and Executive branches of government where "important public policy considerations [could] be fairly, fully, and openly debated"; (4) the identifiable housing need that arose during the gap period could be captured by a municipality's present need obligation; and (5) the "identified low- and moderate-income households formed during the gap period in need of affordable housing can be captured in a municipality's calculation of present need." Id. at 281-95.

In reaching these conclusions, we noted the Legislature amended the FHA "twelve times during the gap period," but had not imposed a retrospective "separate and discrete" gap-period obligation, nor had this court or the Supreme Court. Id. at 295. We did not comment on the trial court's interpretation of the

cap statute imposing a single cap of 1,000 units to all present, gap, and prospective need units combined, or its phasing directive allowing the deferment of some gap units to the Fourth Round.

On July 21, 2016, the trial court issued an opinion in this matter, relying largely upon the testimony of Kinsey, which held the Township was required to provide 109 present need units and 1,533 prospective need units in order to fulfill its Third Round fair share obligation. In re Twp. of S. Brunswick, 448 N.J. Super. 441, 455, 468 (Law Div. 2016). The court did not determine the Township's gap period obligation.

The trial court found that, in accordance with Supreme Court directives in Mount Laurel IV, Kinsey had faithfully followed COAH's prior round methodologies in performing his calculations, id. at 456-64, while Angelides repeatedly deviated from COAH's prior round methodologies, id. at 465.

The court gave "great weight" to Kinsey's testimony because it was "credible and forthright as well, reflecting his deep, possibly unparalleled understanding of the Mount Laurel doctrine," and was "persuasive." Ibid. The court found "McCue answered all questions directly and candidly, was knowledgeable, and had no apparent bias or motive to 'shade' his testimony. His testimony was consistent with common sense, supported by reliable data, and

generally believable in all respects." Ibid. The court likewise found Bernard's testimony to be "highly credible and persuasive." Ibid.

In contrast, the court found Angelides's testimony to be "evasive, far less credible on matters of importance, and frequently contrary to established COAH rules and judicial precedent." Ibid. The court elaborated:

> Angelides' testimony was evasive, far less credible on matters of importance, and frequently contrary to established COAH rules and judicial precedent. In point of fact, Angelides deviated from COAH's prior round methodologies on twenty-six occasions, (each of which lowered South Brunswick's obligation) often when comparable data was readily available and replication was possible. This repeated refusal to adhere to COAH's established methodologies, see Mount Laurel IV, 221 N.J. at 30, and his inability to demonstrate computations related to housing need and municipal obligations "based on those methodologies," ibid., resulted in my rejection of his testimony.
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> [Ibid.]

The court also explained: (1) its reasons for revoking the Township's immunity from builder's remedy lawsuits; and (2) its intention to prioritize the multiple builder's remedy lawsuits filed against the Township "through an interactive process, guided primarily by equitable considerations," including which projects were more likely to result in actual construction, the availability

of infrastructure, and the property's environmental suitability and compatibility with neighboring land uses. Id. at 448-52, 467.

Regarding revoking the Township's immunity, the court reasoned:

> [B]ecause of the Township's systematic "abuses" of the declaratory judgment process, and the revocation of its immunity, the Township stands in a far less favorable position than it would have had it proceeded "with good faith" and with "reasonable speed." See [Mount Laurel IV, 221 N.J.] at 26, 33. Instead of being given an opportunity to "supplement" and remedy perceived deficiencies in its housing element and fair share plan, while, at the same time, retaining its "immunity" from builder remedy lawsuits, a more intrusive, less deferential approach is warranted.
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> Unfortunately, the path chosen by the Township: (1) measured by its insistence on including in its plans mechanisms that were inconsistent with COAH regulations and judicial precedent; and (2) marked by its steadfast refusal to make the necessary modifications, caused me to conclude that South Brunswick was "determined to be constitutionally non-compliant," resulting in a concomitant loss of its immunity, id. at 33, and giving rise to the last of the novel issues to be resolved.
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> [Id. at 466.]

Due to the Township's failure to embrace its affordable housing obligation and instead pursuing a "path of resistance, resulting in a loss of immunity," the court held that "the elements of its affordable housing plan will not be those selected by its elected and appointed representatives, but instead, will be those

designed and implemented by third parties, the Special Master, and the [c]ourt." Id. at 468.

In its August 8, 2016 order, the trial court reopened the case to address whether the present need had to be adjusted considering our opinion in County of Ocean. The court ordered the defendant-developers to submit site suitability information to the Special Master. The court denied the Township's subsequent motion for reconsideration.

At the reopened trial, the Township elected not to present any testimony, taking the position that there was no separate gap period obligation and that any need that arose during the gap period and continued to exist was already captured in the calculation of present need. Apart from the FSHC, no other party offered expert testimony regarding a modified calculation of present need.

Kinsey testified on behalf of FSHC that he had devised a modified methodology to calculate "identified" present need (as opposed to "indigenous" (rehabilitation) present need) in accordance with our opinion in County of Ocean. He calculated: (1) 95,586 new low- and middle-income households formed in New Jersey from 1999 to 2015; (2) 63,717 of those households remained, of which 56,000 were cost-burdened by paying too much for their housing and 7,000 were overcrowded; and (3) after applying the average of three

traditional prospective need allocation factors, the fair share identified present need projection for Region 3, which included the Township, was 9,862 housing units, and the fair share identified present need projection for the Township was 723 housing units. After further reducing this amount by 83 overlapping rehabilitative need units, Kinsey opined the Township's modified total present need was 749 housing units (640 identified present need units (to be constructed) and 109 indigenous/rehabilitation housing units).

On September 7, 2016, the Supreme Court granted FSHC's motion for leave to appeal and stayed our judgment in County of Ocean. In re Declaratory Judgment Actions filed by Various Munics., Cnty. of Ocean. 227 N.J. 355 (2016). On September 8, 2016, the Township requested the trial court to withhold its decision on the Township's gap period obligation pending the Supreme Court decision in the accelerated appeal. The trial court denied the request. The trial court issued an October 6, 2016 opinion and subsequent order, which held the Township had a separate gap period obligation of 1,374 units of inclusionary housing. It emphasized that our ruling in County of Ocean had limited precedential value given the stay imposed by the Supreme Court and also rejected the Township's interpretation of that opinion.

Next, the court observed that during his initial May 2016 trial testimony, Kinsey had calculated the Township's separate gap period obligation utilizing the same methodology he had used to calculate the Township's prospective need obligation, which methodology the court had previously accepted as credible, reliable, and consistent with COAH's prior methodologies. In contrast, Angelides, "as part of a calculated effort to reduce statewide and municipal affordable housing need, impermissibly deviated from established COAH practices in his assessment of affordable housing need generated during the Gap Period," just as he had in calculating the Township's prospective need obligation.

The court accepted Kinsey's original conclusion that the Township's gap period obligation was 1,374 units. The court omitted any mention of Kinsey's August 18, 2016 testimony, where he opined that considering our opinion in County of Ocean, the Township's allocated share of existing cost-burdened households (identified present need) was 640 units, and added to the indigenous present need of 109 units resulted in a total present need obligation of 749 units. The court indicated that "at this juncture, it would be premature to calculate a revised present need obligation. Instead, whether, and the manner in which such

a calculation should be made, must abide the Supreme Court's review and resolution" of the County of Ocean appeal.

Meanwhile, on August 29, 2016, the court consolidated the pending builder's remedy lawsuits into the DJ action. On October 14, 2016, the judge advised that, given the Township's bad faith, the site plan hearings on all proposed inclusionary developments would be heard by SHOs, not the Board. The court cautioned that if a developer obtained site plan approval and decided to obtain building permits, it would be proceeding at its own risk because, under Mount Laurel II, the Township could adopt a Third Round HEFSP under protest and then appeal all of the interlocutory rulings made in the case.

On October 21, 2016, the judge issued an order in accordance with the guidelines adopted in Cranford Development Associates, LLC v. Township of Cranford, 445 N.J. Super. 220 (App. Div. 2016), directing that SHOs conduct hearings on public notice as to "all aspects of each Builder's site plan application" and render a recommendation "as to whether the [c]ourt should enter an order and judgment approving, denying or approving with conditions each site plan application." Under the order, the Township was authorized to conduct a substantive review of the submissions involving professionals, the builders were required to provide expert testimony in support of their plans, the

Township was permitted to cross-examine the builders' experts and present its own witnesses, the public was allowed to comment on the plans, and the SHO was authorized to appoint independent experts. The order also specified:

> B. The Builder site plan application shall be deemed a fully conforming "as of right" application in accordance with proposed zoning regulations the Builder shall submit with its site plan submission, which shall be deemed to be the standards applicable to the Builder's proposed site plan. The Builders are encouraged to incorporate existing Township standards for similar types of housing as is reasonably practicable. The Special Master may make such recommendations as to the proposed zoning regulations as she deems appropriate for the protection of the public health, safety and welfare and in furtherance of sound land use planning principles. The [SHO] shall review each site plan application and shall grant preliminary and final site plan approval, with or without conditions, unless the [SHO] concludes that the site plan application is clearly contrary to sound land use planning principles or environmental concerns. Compliance with [RSIS] shall be dispositive as to all residential design elements governed by the RSIS.

On January 18, 2017, the Supreme Court affirmed, as modified, our ruling in County of Ocean. In re Declaratory Judgment Actions filed by Various Munics., Cnty. of Ocean. 227 N.J. 508 (2017) (Mount Laurel V). The Court determined that "towns are constitutionally obligated to provide a realistic opportunity for their fair share of affordable housing for low- and moderate-income households formed during the gap period and presently existing in New

Jersey." Id. at 529. According to the Court, "the need of presently existing low- and moderate-income households formed during the gap period must be captured and included in setting affordable housing obligations for towns that seek to be protected from exclusionary zoning actions under the process this Court has set up while COAH is defunct." Ibid.

Noting that "present need" was not defined in the FHA and had historically been based only on "essentially substandard and overcrowded existing housing units," id. at 527, the Court newly announced that:

> [I]n determining municipal fair share obligations for the Third Round, the trial court must employ an expanded definition of present need. The present-need analysis must include, in addition to a calculation of overcrowded and deficient housing units, an analytic component that addresses the affordable housing need of presently existing New Jersey low- and moderate-income households, which formed during the gap period and are entitled to their delayed opportunity to seek affordable housing. The trial courts must take care to ensure that the present need is not calculated in a way that includes persons who are deceased, who are income-ineligible or otherwise are no longer eligible for affordable housing, or whose households may be already captured through the historic practice of surveying for deficient housing units within the municipality.
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> [Id. at 531.]

In March 2017, the Township filed a motion to vacate the trial court's rulings, dismiss all builder's remedy lawsuits with prejudice, and for a trial de novo on its fair share obligation, based upon the first judge's alleged ties to a non-party private developer, contending that relationship created a conflict of interest and an appearance of impropriety. In July 2017, a different judge denied the motion. We denied the Township's motion for leave to appeal.

More than eighteen months later, in October 2018, another judge heard oral argument on the Township's motion for reconsideration and to vacate the interlocutory decisions made by the first judge. The Township sought, in part, for the trial court to impose the gap period obligation recommended by Kinsey in August 2016. FSHC opposed the motion, maintaining that vacating the prior gap period ruling was unwarranted because: (1) Kinsey's August 2016 opinion was never intended to quantify the entire accumulated gap period need; and (2) Kinsey's opinion did not address the Supreme Court's subsequent holding in Mount Laurel V. The judge denied reconsideration.

Next, the Township sought reconsideration of the statutory cap decision, noting the trial court in Mount Laurel V had interpreted the statute in accordance with the Township's position, and that between 2005 and 2015, there were only

1,082 certificates of occupancy issued in the Township, and just 2,288 between 1999 and 2015. The court indicated this issue should be raised on appeal.

The Township also requested reconsideration of the prospective need obligation imposed by the trial court because: (1) while the court had found the statewide prospective need obligation was 138,471, a different judge in another Mount Laurel case had found that it was only 73,209; and (2) the same experts (Kinsey and Angelides) had testified in both cases, but the courts had reached opposite reliability and credibility findings. While acknowledging that both could not be right, the court denied reconsideration because of the credibility findings made by the first judge. The court also denied the Township's request to reconsider the decision to strip the Township of immunity from builder's remedy lawsuits.

On December 5, 2018, the court established the Township's net affordable housing obligation, after applying all permissible credits. The court found: (1) the present need for 109 units had already been satisfied by way of 95 credits and fourteen other completed rehabilitations; (2) the prospective need was 1,533 units, which was capped at 1,000; and (3) the remaining gap period need was 1,250 units (1,374 units minus 124 credits). The court directed that the gap period obligation be implemented equally over three ten-year planning cycles

with 417 units allotted to each. Thus, the Township's net Third Round obligation was 1,516 units (1,417 plus 109). The court ordered the Township to submit a compliant HEFSP by March 2019. Although presently appealed by SBC, the order did not address whether the Township could file its plan "under protest."

The Township's 2019 Amended Third Round HEFSP

After several extensions, the Township submitted a final amended Third Round HEFSP "under protest," which included ten developer sites. The court conducted a compliance hearing in September 2019, and issued an order of conditional compliance on November 27, 2019. The order restored the Township's immunity from builder's remedy lawsuits but required that the Township meet certain conditions before a final judgment could be entered.

In accordance with the order, the Board held three meetings in May and June 2020 and passed "under protest": (1) Ordinance 2020-8 creating the "Third Round Affordable Housing District and Rezoning Certain Builder's Remedy Properties"; and (2) a final amended Third Round HEFSP. The Township's resolution adopting the HEFSP stated:

> But for the [c]ourt's December 5, 2018, order, the individual sites set forth in the plan may or may not have been included in the Township's plan. As such, the [Township] and the [Board] continue to assert their ongoing objections to the court's finding of bad faith, revocation of temporary immunity, determination of

> the Township['s] fair share obligation, the grant of builder's remedy suits claims as well as the process outlined in the [c]ourt's October 21, 2016, order on how such suits and claims must be handled.
>
> The Township and Planning Board reserve all rights they may have to contest any and all rulings by the [c]ourt as well as all such suits and claims for builder's remedy relief by way of further motion and or appeal and nothing contained herein is intended to nor shall it be construed to waive any and all such rights in any way and the Township agrees with the plan that is being submitted under protest.

The court held a final compliance hearing in October 2020, and found that all requirements for entry of final judgment were satisfied.

The Site Plan Approvals

Meanwhile, on September 8, 2020, the court issued an order granting SBC conditional site plan approval. Following hearings in December 2019 and January 2020, the court granted preliminary and final major site plan and subdivision approval to Hovnanian for the construction of 99 market and 30 affordable townhomes, plus 4 units in a group home on another site. In February 2021, the court entered an order approving AvalonBay's site plan application.

The Final Orders

In March 2021, the court ordered the Township to pay attorney's fees and costs to FSHC in the amount of $602,259. In April 2021, the court ordered the

Township to reimburse its affordable housing trust fund in the amount of $1,354,642.

On July 6, 2021, the court entered a final judgment of compliance and repose. The judgment recognized that the plan had been adopted by the Board and endorsed by the Township "under protest." The judgment stated it "shall not affect any right the [T]ownship may have to challenge [the court's] orders [in this case] and any provision of its Plan in any appeal of this Final Judgment."

The trial court denied the Township's motion to stay the builder's remedy proceedings pending appeal. We likewise denied the Township's motion to stay those proceedings.

The Township appealed from the judgment. We permitted the Board to participate as a co-appellant. SBC cross-appealed the orders entered on December 5, 2019, November 27, 2019, and July 6, 2021. Defendants New Village Associates and Richardson-Fresh Ponds LLC/Princeton Orchards Associates, LLC settled with the Township and did not participate in this appeal.

We granted the New Jersey League of Municipalities and the New Jersey Institute of Local Government Attorneys permission to appear as amicus curiae. We denied AvalonBay's motion for summary disposition but granted Hovnanian's motion to accelerate the appeal.

The Township raises the following points for our consideration:

> I. IT WAS IMPROPER FOR [THE FIRST JUDGE] TO HANDLE THE CASES DUE TO A CONFLICT OF INTEREST AND/OR AN APPEARANCE OF IMPROPRIETY AND, AS A RESULT, ALL DECISIONS, ORDERS, AND/OR CONSEQUENCES FLOWING THEREFROM SHOULD BE VACATED.
>
> > A. [The First Judge] Should Have Recused Himself from the SBC Case.
> >
> > > I. Legal Standard
> > >
> > > II. [The First Judge's] prior representation advocating for the development of the SBC property.
> > >
> > > III. The Case Management Conference in the SBC Lawsuit.
> > >
> > > IV. Oral Argument on the Moton for Recusal.
> >
> > B. [The First Judge's] Handling of the [Declaratory Judgment] Action Presented a Clear Appearance of Impropriety Due to His Bias in Favor of Private Developers.
>
> II. [THE FIRST JUDGE] IMPROPERLY FOUND BAD FAITH AND MISTAKENLY REVOKED THE TOWNSHIP'S IMMUNITY FROM BUILDER'S REMEDY LAWSUITS.
>
> III. LEAVE TO RELY UPON THE BRIEF OF CO-APPELLANT SOUTH BRUNSWICK PLANNING BOARD SHOULD BE GRANTED.

The Board raises the following points for our consideration:

> I. THE LEGISLATURE INTENDED TO CAP THE FAIR SHARE OF ALL MUNICIPALITIES AT 1,000 UNITS UNLESS MORE 5,000 [CERTIFICATES OF OCCUPANCY] HAD BEEN ISSUED SINCE THE MUNICIPALITY SOUGHT APPROVAL OF ITS PLAN; AND [THE FIRST JUDGE'S] 1,000-UNIT CAP DECISION CLEARLY VIOLATED THE LEGISLATURE'S INTENT.
>
> > A. An Examination Of The Plain Language Of The FHA Unambiguously Demonstrates That The Legislature Intended To Cap A Municipality's Entire "Fair Share" At 1,000 Units During the 10 Years Following The Approval Of A Municipality's Affordable Housing Plan.
> >
> > B. Even Assuming The Plain Language Of The FHA Was Ambiguous, A Consideration Of Extrinsic Aids Further Demonstrates That The Legislature Intended To Impose An Obligation No Greater Than 1,000-Units For A Municipality's Entire Fair Share For 10 Years From The Approval Of The Plan.
> >
> > C. Applying The Cap Statute As Intended Eliminates The Need For A Complex And Lengthy Fair Share Methodology Trial Because The Fair Share Produced By The Formula Generates A Fair Share In Excess of 1,000-Regardless Of Whether The Court Were To Embrace The Formula Advocated By Any Party Or That Endorsed By [The First Judge].
> >
> > C. [The First Judge's] 1,000-Unit Cap Decision Plainly Violates The Cap Statue (i) By Applying The Cap To Different Components Of The Fair

Share Rather Than To The Fair Share, Which Includes All Components and (ii) By Deferring A Portion Of The Number Generated By A Fair Share Formula To Another Day Through Phasing.

II. [THE FIRST JUDGE] IMPROPERLY IMPOSED A PROCESS FOR GRANTING BUILDER'S REMEDY SITE PLAN APPROVALS THAT PREJUDICED THE TOWNSHIP, PLANNING BOARD AND THE PUBLIC; ALL APPROVALS OBTAINED AS A RESULT THEREOF SHOULD BE REVERSED AND VACATED.

III. THE TRIAL COURT, WITHOUT AN ADEQUATE RECORD, IMPROPERLY ALLOWED EXCESSIVE NUMBERS OF DE MINIMUS EXCEPTIONS TO RSIS REQUIREMENTS IN THE SOUTH BRUNSWICK CENTER, LLC, SITE PLAN APPLICATION APPROVAL; THE RSIS REGULATIONS ARE THE MINIMUM STATEWIDE STANDARDS FOR ALL RESIDENTIAL DEVELOPMENTS INCLUDING MT. LAUREL DEVELOPMENTS; ALLEGATIONS OF "SOUND PLANNING" DO NOT OVERIDE RSIS.

IV. NOT ONLY DID [THE FIRST JUDGE] ISSUE A SERIES OF DECISIONS IN THE SOUTH BRUNSWICK CASE IN CLEAR VIOLATION OF HIS OBLIGATION TO MAINTAIN AN APPEARANCE OF IMPARTIALITY IN HIS ZEST TO SHAPE THE LAWS ON AFFORDABLE HOUSING, BUT ALSO HIS DECISIONS WERE CLEARLY WRONG.

A. The Court Should Reverse The [First Judge's] Rulings Granting Motions By Developers To Intervene Because Authorizing Developers To

Become Parties In Lawsuits Against Municipalities Entitled To Immunity Eviscerates The Protections Conferred By Immunity Orders.

B. This Court Should Reverse [The First Judge's] 1,000-Unit Cap Decision Because He Improperly Interpreted The 1,000-Unit Cap Legislation So As To Deprive Municipalities Of The Very Benefit The Legislature Intended.

C. This Court Should Reverse [The First Judge's] Decision To Strip South Brunswick Of Immunity.

D. If This Court Reaches The Issue Of Whether The [First Judge's] Fair Share Opinions Are Valid, It Should Reverse Them.

In its cross-appeal, SBC raises the following point:

THE ORDERS CROSS-APPEALED ALLOW THE TOWNSHIP TO APPEAL AND RESIST IMPLEMENTATION OF ITS OWN COMPLIANCE PLAN DEFEATING THE PURPOSE OF A MOUNT LAUREL IV [DECLARATORY JUDGMENT] ACTION[,] WHICH IS TO PROVIDE IMMUNITY FROM BUILDER'S REMEDIES AS INCENTIVE TO FINAL VOLUNTARY SATISFACTION OF THE CONSTITUTIONAL OBLIGATION TO BUILD AFFORDABLE FAMILY HOUSING.

A.

We begin our discussion with a brief review of the evolution of the Mount Laurel doctrine and the statutory codification of the doctrine. In 1975, our Supreme Court prohibited the discriminatory use of zoning powers and

mandated that developing municipalities act affirmatively "to afford the opportunity for decent and adequate low- and moderate-income housing," commensurate with "the municipality's fair share of the present and prospective regional need therefor." Mount Laurel I, 67 N.J. at 187-88. In 1983, the Court reaffirmed the constitutional requirement that towns provide "a realistic opportunity for the construction of [their] fair share of the present and prospective regional need for low and moderate income housing." Mount Laurel II, 92 N.J. at 205. Political inertia followed. This led to the Court fashioning a judicial remedy, which included a "builder's remedy" allowing builders to file suit to permit construction of housing at higher densities than the municipality would otherwise allow. Mount Laurel II, 92 N.J. at 279-81, 289-91.

"In response, the Legislature enacted the FHA, which created COAH and vested primary responsibility for assigning and determining municipal affordable housing obligations in that body." Mount Laurel IV, 221 N.J. at 7 (citing N.J.S.A. 52:27D-305, -307). COAH was charged with determining regional housing needs and certifying fair share plans. In re Adoption of Amends. to N.J.A.C. 5:93-1.3, 339 N.J. Super. 371, 384 (App. Div. 2001) (citing N.J.S.A. 52:27D-305(a), -307, -314). COAH was required to adopt regulations that established and updated statewide affordable housing need, assign each

municipality an affordable housing obligation, and "identify the delivery techniques available to municipalities in addressing the assigned obligation." Mount Laurel IV, 221 N.J. at 7 (citing N.J.S.A. 52:27D-307, -308). "The FHA includes a process for substantive certification, which, if granted, renders a municipality's housing element and ordinances presumptively valid in any exclusionary zoning litigation for a finite period." Id. at 7-8 (citing N.J.S.A. 52:27D-313, -317); see also Hills Dev. Co. v. Twp. of Bernards, 103 N.J. 1, 19-20, 33-35 (1986) (describing the certification process).

COAH did not meet the 1999 deadline for promulgating the Third Round Rules. Mount Laurel IV, 221 N.J. at 8. The later adopted Third Round Rules were invalidated by a series of Appellate Division opinions.[7] COAH's failure to properly adopt acceptable Third Round Rules continued for years thereafter.

In response to FSHC's motion to enforce litigant's rights pursuant to Rule 1:10-3, the Court acknowledged that COAH was "not capable of functioning as intended by the FHA due to the lack of lawful Third Round Rules assigning constitutional obligations to municipalities." Mount Laurel IV, 221 N.J. at 19. The Court held "that [trial] courts may resume their role as the forum of first

[7] See In re Six Month Extension of N.J.A.C. 5:91-1, 372 N.J. Super. 61, 95-96 (App. Div. 2004); In re N.J.A.C. 5:94 & 5:95, 390 N.J. Super. at 86-87; In re N.J.A.C. 5:96 & 5:97, 416 N.J. Super. at 471.

instance for evaluating municipal compliance with Mount Laurel obligations" and adopted an orderly procedural mechanism for towns to obtain the equivalent of substantive certification for their fair share housing plans and avoid exclusionary zoning lawsuits. Id. at 5-6, 19-20.

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. Additionally, "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." Ibid. The Court issued an accompanying order enumerating the relief it granted. Id. at 34-36. The civil actions authorized by Mount Laurel IV were to be assigned to Mount Laurel-designated judges. See id. at 33, 36.

In a subsequent interlocutory appeal, the Court considered whether "the pent-up need that arose for persons in low- and moderate-income households formed during the years since the expiration of COAH's (Second Round Rules) may be assessed as part of a municipality's third cycle housing obligation and captured under a present-need analysis." Mount Laurel V, 227 N.J. at 513. Present need is not defined in the FHA. Id. at 527. It had been based on

"essentially substandard and overcrowded existing housing units" without focusing "on households eligible for affordable housing." Id. at 513.

The Court concluded "that the need of presently existing low- and moderate-income households formed during the gap period must be captured and included in setting affordable housing obligations for towns that seek to be protected from exclusionary zoning actions under the process this Court has set up while COAH is defunct." Id. at 529. The Court held "towns are constitutionally obligated to provide a realistic opportunity for their fair share of affordable housing for low- and moderate-income households formed during the gap period and presently existing in New Jersey." Ibid. To that end:

> The present-need analysis must include, in addition to a calculation of overcrowded and deficient housing units, an analytic component that addresses the affordable housing need of presently existing New Jersey low- and moderate-income households, which formed during the gap period and are entitled to their delayed opportunity to seek affordable housing.
>
> [Id. at 531.]

Mindful of these principles, we consider the issues raised in this appeal.

B.

A trial court's final determination in a non-jury case is "subject to a limited and well-established scope of review." Seidman v. Clifton Sav. Bank, S.L.A.,

205 N.J. 150, 169 (2011). Appellate courts "give deference to the trial court that heard the witnesses, sifted through the competing evidence, and made reasoned conclusions." Griepenburg v. Twp. of Ocean, 220 N.J. 239, 254 (2015). "Reviewing appellate courts should 'not disturb the factual findings and legal conclusions of the trial judge' unless convinced that those findings were 'so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice.'" Ibid. (quoting Rova Farms Resort, Inc. v. Invs. Ins. Co., 65 N.J. 474, 484 (1974)). We do not, however, owe any special deference to "[a]trial court's interpretation of the law and the legal consequences that flow from established facts," Manalapan Realty, L.P. v. Twp. of Manalapan, 140 N.J. 366, 378 (1995), which we review de novo, Griepenburg, 220 N.J. at 254.

C.

We first address whether the first judge's rulings should be vacated due to an alleged conflict of interest related to SBC's property or because his relationship with an uninvolved developer created an appearance of impropriety.

In the 1980's, years prior to his appointment to the bench in 1991, the first judge represented Rieder Land Technology (Rieder), then-owner of the SBC

property, in its unsuccessful attempt to develop the property as a mixed-use residential and commercial development centered around a new train station.

In 1994, the Board granted preliminary subdivision approval to Rieder's successor-in-interest, Jersey Center/Fidoreo Inc., to develop the property with 6,430,000 square feet of office space. In 1998, SBC acquired the property and all related approvals. SBC began to build certain elements of the infrastructure needed to support the intended construction on the site.

In 2013, SBC applied for rezoning of its property from office research to a zone that would permit a mixed-use development of 150,000 square feet of commercial space and a 1,000-home residential community. In 2014, the Board, while agreeing that the property was not properly zoned, recommended denying the request and revisiting the matter in a few years when the Township's master plan would be reviewed.

SBC subsequently filed a complaint against the Township in June 2014 seeking, among other things, an injunction directing the Township to forthwith address the merits of its rezoning application. The complaint noted SBC's proposed development included an affordable housing component.

During an informal conference with counsel in August 2014, the first judge asked if the site was the Rieder property and disclosed that he represented

Rieder in the 1980's. According to the Township, the judge then advised SBC's counsel that he could not grant the relief sought based on SBC's complaint, but that if "SBC filed an amended complaint alleging a Mount Laurel 'Builder's Remedy' lawsuit, he could grant the relief sought."

After the Board definitively denied SBC's rezoning application, SBC filed a motion for leave to amend its complaint to add a builder's remedy claim. Despite the Township's opposition and cross-motion seeking protection from all builder's remedy lawsuits because it was under COAH's jurisdiction, the judge granted SBC's motion on December 19, 2014.

Meanwhile, in November 2014, Township counsel requested a conference to discuss the judge's prior involvement with SBC's property and possible conflict of interest. Although the judge initially scheduled a conference for December 18, 2014, his law clerk subsequently advised the parties the day before that the judge had canceled the conference as he believed it was unwarranted, but that the Township could file a motion for recusal if it disagreed. The Township subsequently moved for recusal.

The motion was heard on January 9, 2015. The judge found Township counsel's comparison "laughable," emphasizing that Rieder had sought to build

6,490,000 square feet of office space, 700 residential units, 179,100 square feet of retail and a 350-room hotel with a restaurant.

The judge noted: (1) he represented Rieder for less than two years; (2) his knowledge of the property was not relevant to this case; (3) he did not believe Rieder and the Township were ever at odds over the proposed development, describing the negotiations as a "lovefest" as the Township unequivocally wanted the train station; (4) even if there had been some dispute, no one could reasonably believe that events dating back to 1989 could have a bearing on this litigation; and (5) there were layers of other ownership and different applications in the interim.

He expressed astonishment that counsel raised statements he made in chambers to SBC's counsel, noting that such conversations commonly took place regarding how best to handle a case. The judge commented it was "starting to look like" a calculated effort. He rejected the notion that he disfavored municipalities because he had represented builders more than municipalities.

The judge explained that informing counsel he could not order the relief sought in the complaint—rezoning the site for mixed use—and that an amended complaint that included a builder's remedy claim would be needed, did not mean

that the developer was entitled to that relief, or even if entitled, that such relief would be granted for this site.

The judge further noted that the Township had never lost a case before him. Nonetheless, counsel maintained that it appeared the judge had a specific bias as to this particular property. The judge disagreed and denied recusal, finding that there was not even a "scintilla of an appearance of impropriety," and no reasonable person would conclude that he was biased in favor of SBC.

More than two years later, in March 2017, the Township moved to: (1) vacate the first judge's 2015 and 2016 rulings; (2) dismiss the builder's remedy lawsuits with prejudice; and (3) for a trial de novo on its fair share obligation, based upon the judge's alleged ties to a non-party private developer, which the Township maintained created an appearance of impropriety. Specifically, the Township alleged that: (1) by the time it filed its declaratory judgment complaint in 2015, the first judge and his wife had been the recipients of between twenty-five and thirty vacations to Florida and the Bahamas paid for, in whole or in part, by developer Jack Morris and his company Edgewood Properties, Inc.; (2) prior to his reappointment as a judge in 2013, the judge represented various Morris-owned entities; and (3) when he retired in 2016, he returned to private practice and served as general counsel of Edgewood Properties, Inc..

On July 13, 2017, a different judge denied the motion. In his oral decision, the judge considered the motion as a review of interlocutory orders to which the Rule 4:42-2 interest of justice standard applied. He observed that the allegations implicated Rule 1:12-1(e) and (f) and Code of Judicial Conduct Canons 1, 2, 3 and 5. The judge explained the issue was whether a reasonable, fully informed person would question the first judge's impartiality in his handling of the case or think that his decisions were tainted by an appearance of impropriety.

The judge reasoned that even if he were to accept the Township's allegations as true, its motion must still be denied. He found the timing of the Township's motion "highly problematic and novel." He explained that "[t]ypically, a recusal application is made before the judge that is presiding over the matter." The judge noted that in 2015, the Township previously unsuccessfully moved for recusal in a related matter, and we denied leave to appeal. He further noted the Township did not move before the first judge for recusal,

> even after it learned or could have learned of the additional facts it now brings before this [c]ourt. Almost all of the factual allegations were known or could have been known by South Brunswick while the case was pending before [the first judge], yet they waited until almost a year after the main trial in this matter took place and after [the judge] stepped down from the [b]ench to bring this application. If [the first

> judge's] appearance of impropriety was so obvious or his decision subject to an appearance of bias as South Brunswick claims the application to recuse should have been made at that time. This is not the proper procedure to bring such an application and frankly impacts the credibility of the arguments made before this [c]ourt.

The judge denied the motion, reasoning:

> [T]he facts that are not disputed show the following. Mr. Morris and his companies are not involved in South Brunswick in any capacity. He and his companies are not a party or intervenor in South Brunswick's [DJ] action. [Neither] [h]e, his companies, nor his counsel have appeared in any capacity in that case and there is no indication anywhere in the record that Mr. Morris and his companies have a site being considered by the [T]ownship with respect to it Affordable Housing obligations. The simple significant fact is that Mr. Morris and his companies have nothing to do with the [rulings] that South Brunswick wants this [c]ourt to vacate. The undisputed record also shows that [the first judge] did, in fact, recuse himself from any matters involving Mr. Morris and Edgewood [Properties, Inc.]

He found that neither Rule 1:12-1 nor the Code of Judicial Conduct precluded the first judge from presiding over this matter, and that a "reasonable fully informed person would not doubt or question [the first judge's] impartiality."

In its reply brief, the Township contends for the first time that the first judge's bias was evident in his order that required the Township to reimburse its affordable housing trust fund in the amount of $1,354,642.78. Because the issue

has not been properly addressed by the parties in this appeal, we decline to consider this argument, which we deem waived.[8]

Rule 1:18 requires every judge to abide by the Code of Judicial Conduct. DeNike v. Cupo, 196 N.J. 502, 516 (2008). Both Canon 3 of the Code of Judicial Conduct and Rule 1:12-1 focus directly on the subject of disqualification. "Judges shall disqualify themselves in proceedings in which their impartiality might reasonably be questioned . . . ." Code of Jud. Conduct r. 3.17(B). A judge "shall be disqualified on the court's own motion and shall not sit in any matter" "when there is any . . . reason which might preclude a fair and unbiased hearing and judgment, or which might reasonably lead counsel or the parties to believe so." R. 1:12-1(g). "Any party, on motion made to the judge before trial or argument and stating the reasons therefor, may seek that judge's disqualification." R. 1:12-2.

"Our rules . . . are designed to address actual conflicts and bias as well as the appearance of impropriety." State v. McCabe, 201 N.J. 34, 43 (2010).

[8] "Raising an issue for the first time in a reply brief is improper." Borough of Berlin v. Remington Vernick Eng'rs, 337 N.J. Super. 590, 596 (App. Div. 2001). An issue not raised in an initial appellate brief is not properly before the court. Bernoskie v. Zarisnki, 344 N.J. Super. 160, 166 n.2 (App. Div. 2001). By failing to raise this argument in its initial brief, the Township waived this contention. See Bacon ex rel. G.P. v. N.J. Dep't of Educ., 443 N.J. Super. 24, 38 (App. Div. 2015).

Judges "must avoid all impropriety and appearance of impropriety." Ibid. (quoting DeNike, 196 N.J. at 514). "A movant need not show actual prejudice; 'potential bias' will suffice." Goldfarb v. Solimine, 460 N.J. Super. 22, 31 (App. Div. 2019). "In other words, judges must avoid acting in a biased way or in a manner that may be perceived as partial." DeNike, 196 N.J. at 514. However, "bias is not established by the fact that a litigant is disappointed in a court's ruling on an issue." State v. Marshall, 148 N.J. 89, 186 (1997).

A judge need not "withdraw from a case upon a mere suggestion that he is disqualified." Panitch v. Panitch, 339 N.J. Super. 63, 66 (App. Div. 2001). However, it is not necessary "to prove actual prejudice on the part of the court." Id. at 67. "Thus, without any proof of actual prejudice, 'the mere appearance of bias may require disqualification.'" State v. Presley, 436 N.J. Super. 440, 448 (App. Div. 2014) (quoting Panitch, 339 N.J. Super. at 67). "However, before the court may be disqualified on the ground of an appearance of bias, the belief that the proceedings were unfair must be objectively reasonable." Ibid. (quoting Marshall, 148 N.J. at 279). The question is whether "a reasonable, fully informed person would have doubts about the judge's impartiality." Ibid. (quoting DeNike, 196 N.J. at 517).

Motions for disqualification "are entrusted to the sound discretion of the judge and the judge's decision is subject to review for abuse of discretion." McCabe, 201 N.J. at 45 (citing Panitch, 339 N.J. Super. at 66, 71); accord Chandok v. Chandok, 406 N.J. 595, 603 (App. Div. 2009). We review de novo whether the judge applied the proper legal standard. McCabe, 201 N.J. at 45.

Plaintiffs argued the first judge erred in refusing to recuse himself because of conflict of interest or that a reasonable person could have an objectively reasonable belief that he might be biased against them based on his prior relationship with developers and the property. Plaintiffs argue second recusal motion judge erred in denying recusal based on an appearance of impropriety. For the reasons expressed by the judges who denied the recusal motions, we disagree.

The second recusal motion was procedurally flawed and untimely. "Motions for disqualification must be made directly to the judge presiding over the case." McCabe, 201 N.J. at 45 (citing R. 1:12-2; Magill v. Casel, 238 N.J. Super. 57, 63 (App. Div. 1990)). The motion should have been filed before the first judge rendered his decisions and been decided by that judge before he retired in 2016. Plaintiffs learned of the facts they relied upon long before the motion was filed in March 2017. By then the first judge had retired. Another

judge was assigned to hear the motion. The second recusal motion was clearly untimely.

Both recusal motions were substantively without merit. Morris and his companies were not involved in the subject property, were not a party or intervenor in the Township's declaratory judgment action, and there was no indication in the record that Morris or his companies had a site being considered by the Township with respect to its affordable housing obligations. A trial judge is not required to disqualify himself under Rule 1:12-1 because he previously represented a non-party predecessor-in-title to the subject real estate. Zucker v. Silverstein, 134 N.J. Super. 39, 49 (App. Div. 1975). Here, the judge recused himself from any matters involving Morris and Edgewood Properties, Inc.

Nor was the first judge required to recuse himself pursuant to Rule 1:12-1(e) for being "interested in the event of the action." Morris and his companies had no interest whatsoever in this case and nothing to gain from the purported acts of generosity. The first judge's connection to Morris would not cause a reasonable, informed person to have doubts about the judge's impartiality.

Our review of the record convinces us that the facts relied upon by plaintiffs, including the first judge's comments and rulings, did not display any indication of bias against the Township. Indeed, the judge entered several orders

that were favorable to the Township. The fact that we reverse certain aspects of the first judge's rulings (see infra at Section D), is not based on conflict of interest or an appearance of impropriety. Nor should our partial reversal be viewed as evidence of partiality. An error by the trial court "does not necessarily justify an inference of bias and will not, by itself, furnish a ground for disqualification." Marshall, 148 N.J. at 276; see also State v. Walker, 33 N.J. 580, 591 (1960) (holding that reversal of judgment in previous proceedings is insufficient ground for disqualification on remand). Ordinarily, "the fact that a court is overruled or overrules its own prior ruling is entitled to no weight in deciding whether that court is biased against the party harmed by the error." Marshall, 148 N.J. at 276-277. We are unpersuaded that the first judge's rulings constitute evidence of bias.

Finally, the fact that the judge was hired shortly after his retirement by a developer that was not involved in the case or any of the projects involved, did not create a conflict of interest or an appearance of an impropriety. Judges routinely accept employment by law firms or companies following their retirement. Here, any discussion or negotiation of that employment did not constitute a cause for disqualification as the employer was not a "party, attorney or law firm involved in the matter." R. 1:12-1(f).

We discern no abuse of discretion or legal error. Plaintiffs' motions to vacate the adverse rulings based on conflict of interest or the appearance of an impropriety were properly denied. The record demonstrates there was no conflict of interest. Nor would a reasonable, fully informed person have an objectively reasonable belief that the judge was biased against municipalities.

D.

We next address plaintiffs' argument regarding the first judge's interpretation of N.J.S.A. 52:27D-307(e) as applied to the twenty-six-year gap period and prospective periods. Plaintiffs contend that: (1) the plain language of the statute unambiguously reflects the Legislature's intention to cap a municipality's entire fair share obligation at 1,000 units during the ten years following the approval of a municipality's HEFSP; (2) even if there were some ambiguity in the language of the statute, extrinsic aids support the conclusion that the Legislature never intended to impose a fair share obligation in excess of 1,000 units; (3) the Legislature avoided the possible unconstitutionality of the statute by imposing a bright-line test that would allow for a fair share obligation in excess of 1,000 units in certain instances; and (4) there is no statutory authority for the phasing approach adopted by the first judge to accommodate the gap period share of the Township's affordable housing obligation. Plaintiffs

also assert that their interpretation of the statute "eliminates the debate over the correct fair share formula" because both the Township's formula and the formula urged by the FSHC generate a fair share obligation above 1,000 units.

In its opposing brief, FSHC contends: (1) the Township's interpretation of N.J.S.A. 52:27D-307(e) is unconstitutional; (2) the first judge's cap decision comported with Mount Laurel V which mandated the inclusion of quantifiable gap period need as part of a municipality's present need obligation; (3) the Court in Mount Laurel V cited the judge's decision with approval; and (4) In re Township. of Jackson, 350 N.J. Super. 369, 377 (App. Div. 2002), rejected the municipality's contention that the aggregate number of units allocated to a municipality as its fair share could never exceed 1,000 under the cap statute.

SBC endorses the first judge's interpretation of N.J.S.A. 52:27D-307(e), maintaining that plaintiffs' position would eliminate all of the Township's accumulated gap period need. SBC also supports the fair share obligation imposed by the judge.

"The role of a court in statutory interpretation 'is to determine and effectuate the Legislature's intent.'" Marino v. Marino, 200 N.J. 315, 329 (2009) (quoting Bosland v. Warnock Dodge, Inc., 197 N.J. 543, 553 (2009)). "[I]n performing this task, 'we look first to the plain language of the statute, seeking

further guidance only to the extent that the Legislature's intent cannot be derived from the words that it has chosen.'" Ibid. (quoting Pizzullo v. N.J. Mfrs. Ins. Co., 196 N.J. 251, 264 (2008)). We read "the words chosen by the Legislature in accordance with their ordinary meaning." Ibid. (citing Bosland, 197 N.J. at 553). "We will not 'rewrite a plainly-written enactment of the Legislature [or] presume that the Legislature intended something other than that expressed by way of the plain language.'" Ibid. (quoting O'Connell v. State, 171 N.J. 484, 488 (2002)). "[I]f the plain language of a statute is not clear or if it is susceptible to more than one possible meaning or interpretation, courts may look to extrinsic secondary sources to serve as their guide," such as legislative history, press releases and statement of sponsors of enacted bills, "but we do not resort to such tools unless needed." Ibid.

N.J.S.A. 52:27D-307(e) provides in pertinent part:

> No municipality shall be required to address a fair share of housing units affordable to households with a gross household income of less than 80% of the median gross household income beyond 1,000 units within ten years from the grant of substantive certification, unless it is demonstrated, following objection by an interested party and an evidentiary hearing, based upon the facts and circumstances of the affected municipality that is likely that the municipality through its zoning powers could create a realistic opportunity for more than 1,000 low and moderate income units within that ten-year period. For the

> purposes of this section, the facts and circumstances which shall determine whether a municipality's fair share shall exceed 1,000 units, as provided above, shall be a finding that the municipality has issued more than 5,000 certificates of occupancy for residential units in the ten-year period preceding the petition for substantive certification in connection with which the objection was filed.

Because the plain language of the statute is clear and unambiguous, we need not delve into extrinsic secondary sources to interpret it.

N.J.S.A. 52:27D-307(e) is intended to apply to a municipality's entire "fair share obligation." Twp. of Jackson, 350 N.J. Super. at 375-76. The statute "caps a municipality's 'fair share' obligation at 1,000 units 'within six years from the grant of substantive certification, unless it is demonstrated, following . . . an evidentiary hearing . . . that it is likely that the municipality through its zoning powers could create a realistic opportunity for more than 1,000 low and moderate income units within that six-year period.'" Id. at 371.

In 1994, COAH adopted substantive rules governing municipal affordable housing obligations for the period 1987-1999, which stated:

> No municipality shall be required to address a fair share beyond 1,000 units within six years from the grant of substantive certification, unless it is demonstrated, following an objection and an evidentiary hearing, based upon the facts and circumstances of the affected municipality that it is likely that the municipality through its zoning powers could create a realistic

> opportunity for more than 1,000 low and moderate income units within the six year period. The facts and circumstances which shall determine whether a municipality's fair share shall exceed 1,000 units shall be a finding that the municipality has issued more than 5,000 certificates of occupancy for residential units in the six[-]year period preceding the petition for substantive certification.
>
> [N.J.A.C. 5:93-14.1, 26 N.J.R. 2342 (June 6, 1994).]

In an advisory opinion, COAH interpreted N.J.S.A. 52:27D-307(e) to mean "the 1,000 unit cap applied to a municipality's 'calculated need,' not its pre-credited need; that is, if, after applying applicable credits and reductions, Jackson's fair-share number is more than 1,000, 'it is capped at 1,000.'" Twp. of Jackson, 350 N.J. Super. at 371-72.

In October 2015, the first judge issued an opinion interpreting N.J.S.A. 52:27D-307(e). In re Hous. Element for Twp. of Monroe, 444 N.J. Super. 163 (Law Div. 2015). The judge considered the opinion to be binding in this matter. In that case, the judge held the statutory 1,000-unit cap was intended to apply to separate ten-year periods over the term of the gap and prospective periods, resulting in a 1,600-unit cap for the sixteen-year gap period (1999-2015), plus an additional 1,000-unit cap for the ten-year prospective period (2015-2025), resulting in a 2,600-unit cap for the Third-Round gap and prospective periods. Id. at 172-78.

In so ruling, the judge explained: (1) the constitutional obligation to provide affordable housing is a "bedrock principle" that is "imperative"; (2) "[w]hile municipalities might be blameless for COAH's inaction, the failures of that agency neither relieved nor absolved municipalities from fulfilling (or at least attempting to fill) their respective fair share responsibilities"; (3) "these constitutional obligations have been accumulating for the past sixteen years with little evidence of significant statewide compliance"; and (4) "[i]nterpreting the FHA and COAH regulations so as to ignore that unmet need would be squarely at odds with the Constitution and the Legislature's overarching intent to produce affordable housing." Id. at 172-173.

The judge recognized that "the Legislature intended the 1,000-unit cap to be applied to a single ten-year compliance period." Id. at 172. Nevertheless, considering the Legislature's concomitant concern that municipalities are not subjected to "onerous fair share burdens that could cause a 'radical transformation,'" id. at 167 (citing Mount Laurel II, 92 N.J. at 219), and "striking an equitable balance between . . . competing imperatives and policies," id. at 174, the judge further ruled that municipalities qualifying for the 1,000-unit cap for the current prospective need period (2015-2025) could address their affordable housing obligation attributable to the gap period in equal shares over

the Third, Fourth and Fifth Rounds, and that any credits to which a municipality was entitled must be applied first to reduce its gap period need obligation and then to its prospective need obligation, id. at 176, 178.

Here, the judge erred in redefining the statutory cap as applicable every ten years at a rate of 100 units each year so as to allow for the imposition of an additional (unadjusted) 1,374-unit fair share obligation upon the Township where: (1) N.J.S.A. 52:27D-307(e) ties the cap to the ten years following substantive certification; and (2) other language in N.J.S.A. 52:27D-307(e) authorizes the imposition of an obligation in excess of the 1,000-unit cap only upon consideration of the number of certificates of occupancy issued by a municipality in the preceding ten years. Here, the Township issued only 1,082 certificates of occupancy between 2005 and 2015, and only 2,288 between 1999 and 2015, far less than the 5,000 required in a ten-year period to hurdle the 1,000-unit cap under the statute.

We reject FSHC's assertion that Township of Jackson and the COAH decision it addressed resolved how to interpret N.J.S.A. 52:27D-307(e) as to gap period need. Rather, in Township of Jackson, we affirmed COAH's directive that for purposes of its Second Round obligation, the 1,000-unit cap applied to the municipality's "calculated need," after application of all available credits and

reductions, and not to its pre-credited need. 350 N.J. Super. at 371-74. COAH's underlying decision also instructed that although the Second Round regulatory formula factored in "prior cycle prospective need," a separate statutory cap still applied to the calculated needs from the First and Second Rounds.

The judge also erred in ordering a phased approach to the Township's gap period obligation in the absence of statutory or regulatory authority. When the Legislature adopted the cap statute, it simultaneously repealed N.J.S.A. 52:27D-323, which had permitted municipalities to phase the delivery of affordable units. Additionally, the gap period obligation to be phased under the judge's ruling is considerable, particularly when added to an already maxed-out prospective need obligation. Phasing would potentially impact the municipality for decades without reference to changing demographics or housing needs.

In general, adopting procedures to handle the backlog are within the province of the Legislature, after consideration of the factors it deems relevant. For these reasons, we reject the judge's interpretation of N.J.S.A. 52:27D-307(e).

E.

The Township contends the judge erred in finding bad faith on its part and in revoking its immunity from builder's remedy lawsuits. We are unpersuaded.

In Mount Laurel IV, the Court authorized the return of judicial oversight of municipal fair share housing obligations by way of township-initiated declaratory judgment actions and adopted rules governing these proceedings. 221 N.J. at 21-34. The Court encouraged trial courts "to secure, whenever possible, prompt voluntary compliance from municipalities in view of the lengthy delay in achieving satisfaction of towns' Third Round obligations." Id. at 33. But when "that goal cannot be accomplished, with good faith effort and reasonable speed, and the town is determined to be constitutionally noncompliant," trial courts were given discretion to allow builder's remedy suits to proceed against those towns, even if they "had substantive certification granted from COAH under earlier iterations of Third Round Rules or "held 'participating' status before COAH" until "the FHA's exhaustion-of-administrative- remedies requirement" was lifted. Id. at 33-34.

The Court explained that immunity from builder's remedy lawsuits was meant to be temporary, and towns "should have no more than five months in which to submit their supplemental housing element and affordable housing plan. During that period, the court may provide initial immunity preventing any exclusionary zoning actions from proceeding." Id. at 27-28. The Court stressed:

> If a town elects to wait until its affordable housing plan is challenged for constitutional compliance, immunity

> requests covering any period of time during the court's review shall be assessed on an individualized basis. The five-month protected period for submitting a housing element and plan, identified earlier, has no parallelism in this setting. In determining whether to grant such a town a period of immunity while responding to a constitutional compliance action, the court's individualized assessment should evaluate the extent of the obligation and the steps, if any, taken toward compliance with that obligation. In connection with that, the factors that may be relevant, in addition to assessing current conditions within the community, include whether a housing element has been adopted, any activity that has occurred in the town affecting need, and progress in satisfying past obligations.
>
> Thus, in all constitutional compliance cases to be brought before the courts, on notice and opportunity to be heard, the trial court may enter temporary periods of immunity prohibiting exclusionary zoning actions from proceeding pending the court's determination of the municipality's presumptive compliance with its affordable housing obligation. Immunity, once granted, should not continue for an undefined period of time; rather, the trial court's orders in furtherance of establishing municipal affordable housing obligations and compliance should include a brief, finite period of continued immunity, allowing a reasonable time as determined by the court for the municipality to achieve compliance.
>
> [Id. at 28 (emphasis added).]

As we have noted, the Township submitted four draft Third Round HEFSPs to the trial court between August 2015 and February 2016. During a hearing on February 19, 2016, the court expressed frustration with the

Township's inability to arrive at a realistic plan that did not rely upon excessive senior housing, 100% inclusionary developments, tax credits, and low density, and settle with the FSHC as had so many other municipalities. The court observed that the Township could not avoid some gap period obligation, and that any attempt to rely upon the original Econsult report finding no gap period need would constitute bad faith. The court emphasized that FSHC was settling at numbers "significantly lower than the Kinsey numbers" because it did not want endless litigation and would settle with the Township if it proposed a realistic plan.

Later in the hearing, during a colloquy with the court, the Special Master commented that if the Township did not choose the intervenor's site, it should not choose "sites that still rely on the tax credit program." Rather, "sites that have a realistic opportunity to create affordable housing" should be chosen. The Special Master opined that a plan proposing 100% affordable single-family homes was not reasonable. Nor did she find a 33% set aside for age-restricted single-family housing realistic.

The court found the Township's progress over the prior seven months had been "miniscule" and revoked its immunity. Nonetheless, the court stayed its ruling until April 15, 2016 (and later May 2, 2016), and directed that, in the

interim, the Township could submit a revised HEFSP creating a "realistic opportunity for addressing its fair share obligation in order to attempt to demonstrate to the court that this order should be reconsidered and immunity reinstated." The Township submitted revised plans, but the court found them unacceptable, and the stay expired.

In Mount Laurel IV, the Court entrusted Mount Laurel-designated judges "to assiduously assess whether immunity, once granted, should be withdrawn if a particular town abuses the process for obtaining a judicial declaration of constitutional compliance." 221 N.J. at 26. The Court admonished Mount Laurel-designated judges to

> endeavor to secure, whenever possible, prompt voluntary compliance from municipalities in view of the lengthy delay in achieving satisfaction of towns' Third Round obligations. If that goal cannot be accomplished, with good faith effort and reasonable speed, and the town is determined to be constitutionally non-compliant, then the court may authorize exclusionary zoning actions seeking a builder's remedy to proceed against towns . . . .
>
> [Id. at 33.]

Thus, aside from being temporary in nature, immunity from builder's remedy lawsuits is properly revoked where the town did not act "with good faith effort and reasonable speed." Ibid. Additionally, "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., 445 N.J. Super. at 231 (citing Toll Bros., 173 N.J. at 560).

The court provided a detailed explanation for his decision to revoke the Township's immunity from builder's remedy lawsuits. In re Twp. of S. Brunswick, 448 N.J. Super. 441, 449-51, 466 (App. Div. 2016). After providing significant additional time to the Township, the court found "the Township's plan showed little or no improvement. Many of the plan's component parts were unrealistic or impractical. Still others were contrary to valid COAH regulations and/or judicial precedent." Id. at 449. Despite affording the Township yet more time, the court found:

> the Township's plan was still inconsistent with COAH regulations and judicial precedents, and did not address even its own estimated fair share number. For example, it continued to include multiple 100% affordable housing projects, despite the limited availability of tax credits available through [the Department of Housing and Urban Development's] Low-Income Housing Tax Credit program. And, despite an oversupply of senior citizen housing in New Jersey generally, see N.J.S.A. 45:22A-46.3(e), (h) (age-restricted housing market is over-supplied), the plan included excessive age-restricted units, contrary to the 25% limitation embodied in N.J.A.C. 5:93-5.14.

> Similarly inappropriate was a proposed inclusionary development that was comprised not of traditional, multi-family units, but rather, only of age-restricted, single family, detached homes. Even more problematic was the Township's insistence on a [33%] set-aside for low- and moderate-income units, instead of the 15-20% set-asides traditionally sanctioned by COAH and the courts.
>
> Equally problematic was a proposed inclusionary development that was limited to a gross density of 2.8 units per acre. Given the internal subsidies need to justify the economics of such developments, and the minimum densities typically demanded and approved by COAH and the courts (six or more units/acre), this proposal too, was ill-conceived.
>
> [Id. at 450.]

With regard to the excessive age-restricted units proposed by the Township, the court further noted that even after the Township's request for a waiver of the 25 percent cap was denied, "the Township insisted on violating the 25 percent cap on age-restricted units." Id. at 450, n.2. See also In re N.J.A.C. 5:94 & 5:95, 390 N.J. Super. at 80 (declaring expansion of the age-restricted cap from 25 percent to 50 percent in N.J.A.C. 5:94-4.19 invalid and that "the prior age-restricted cap of [25 percent] should remain in place pending further agency action").

As we have noted, the court found "the path chosen by the Township," "measured by its "insistence on including mechanisms in its plans that were

inconsistent with COAH regulations and judicial precedent" and "marked by its steadfast refusal to make necessary modifications," causing it to conclude that the Township "was 'determined to be constitutionally non-compliant,' resulting in a concomitant loss of its immunity." Id. at 466 (quoting Mount Laurel IV, 221 N.J. at 33).

For these reasons, we find no merit in the Township's argument. The court's findings are amply supported by the record and consonant with applicable legal principles. We discern no abuse of discretion and affirm the revocation of the Township's immunity from builder's remedy lawsuits.

F.

Plaintiffs also argue the court erred by assigning the hearings on all builder's remedy site plan applications to SHOs. On that basis, they contend that the site plan approvals granted to SBC, Hovnanian and AvalonBay must be reversed. We disagree.

"The court's authority to appoint Special Masters in Mount Laurel cases is well established." Cranford Dev., 445 N.J. Super. at 232. In accordance with the guidelines set forth in Cranford Development, id. at 232-34, the court ordered that in place of the Board, a SHO would conduct the hearings as to "all aspects of each Builder's site plan application for the purpose of rendering a

recommendation to the [c]ourt as to whether the [c]ourt should enter an order and judgment approving, denying or approving with conditions each site plan application." The court specified that the Board and its experts would have the opportunity to review the plans, make comments, cross-examine the applicant's experts at the hearing, and offer its own expert testimony. To facilitate the Board's review, the court ordered each builder to post a professional review escrow fee for the review of its site application with its initial submission and allowed the Board to make supplemental escrow requests to the builder and Special Master.

The court rejected the notion that its ruling was punitive. It noted while the Board was "not going to be the forum of first instance in terms of viewing any site plan," the Board would still be involved.

In Cranford Development, we affirmed the grant of a builder's remedy to the plaintiff-developer after finding the Township had a substantial unmet housing obligation, its fair share housing plan was seriously deficient, and it had not negotiated in good faith with the developer prior to filing the builder's remedy complaint. 445 N.J. Super. at 224-29. We also affirmed the trial court's discretionary decision to appoint a SHO to oversee final site plan approval where: (1) the defendant-Township had agreed to the same process as to a

different builder's remedy site plan approval; (2) the defendant- Township failed to object to the instant appointment before the trial court; (3) such appointments were authorized by the Supreme Court in Mount Laurel II; (4) the appointment was warranted by the defendant-Township's record of obstructing affordable housing projects and its planning board's past hostility to a more limited affordable housing plan at the same location proposed by the plaintiff-developer's predecessor-in-title; and (5) the defendant-Township subsequently attempted to delay the plaintiff-developers' project by refusing to grant needed permits and was likely to continue throwing up municipal regulatory "hurdles" for the plaintiff-developer to overcome. Id. at 232-34.

We emphasized that in accordance with the Court's directive in Mount Laurel II, the appointed examiner makes use of the planning board's expertise and experience in making his or her determination, and the planning board was not excluded from the proceedings before the hearing examiner, but instead was to be provided with copies of the developer's plans and all supporting documents and was to be allowed to participate in the hearings. Id. at 233-34.

Considering the trial court's findings that the Township and its Board had acted in bad faith in failing to put together an entire, realistic Third Round HEFSP despite numerous opportunities to do so, which is supported by the

record, we reject plaintiffs' contention that the court abused its discretion in concluding that it would be improvident to leave builder's remedy site plan approval solely to the Board. Trial courts have broad remedial power to enforce municipal Mount Laurel obligations. Mount Laurel II, 92 N.J. at 285-90. Given the conduct of the Township and Board, the court's decision to appoint the SHO was justified in this case. See Cranford Dev., 445 N.J. Super. at 232-33 (approving the use of a SHO "given the Township's record of obstructing affordable housing projects").

Importantly, the order appointing the SHO required that copies of applications be submitted to the Board's attorney and planner. An additional eleven copies of the applications were required to be provided to the Township's Planning Department. Accordingly, ample copies of applications were available for review by Board members and professionals.

The order also provided that "[t]he Township shall conduct a substantive review of the builder's submission, and may engage the Planning Board, Township staff and other Township professionals in the review of the Builder's submission as the Township deems appropriate." The record shows the Board availed itself of that opportunity. For example, in response to the AvalonBay application, the Township and Board professionals prepared numerous review

memos, including engineering memos by its sewer engineer, civil engineer, and traffic engineer. The Township and Board also presented four days of testimony by four planning professionals and two engineers. The Township's "attorney and the Board's attorney cross-examined AvalonBay's witnesses. By any measure, the Township and Board were not excluded from the proceedings before the SHO.

Considering the degree of participation of the Township and Board permitted by the order, and their substantial involvement in the hearings pursuant to the order, we discern no abuse of discretion in appointing the SHO to oversee the site plan applications.

G.

Plaintiffs further assert that the court allowed an excessive number of de minimis exceptions to RSIS requirements in the SBC site plan approval. Specifically, they argue that SBC was improperly permitted to construct: (1) substandard streets within each neighborhood that directly abutted the open carports located at the rear of their multi-story residential buildings and thereby created an unsafe situation for cars and pedestrians; (2) one carport on each end of their residential buildings with one full wall completely blocking any view of approaching traffic on that side; and (3) support beams every few spaces within

the carports that encroached by nine inches into the RSIS-required nine-foot parking space width. We disagree.

At the SBC site plan hearings before the SHO between May 2018 and July 2019, testimony revealed that the proposed development was to have: (1) 10 separate neighborhoods set on 157 acres of a 428-acre site; (2) approximately 139 residential buildings containing 1,800 units (including one 120-unit age-restricted building); (3) a host of community amenities within each neighborhood; and (4) a central clubhouse, outdoor pool, and other recreational amenities. All residential buildings included both market and lower income units. Most of the units had a designated carport space, except: (1) in age-restricted building which had a regular outdoor parking lot; and (2) for certain units in two of the neighborhoods that had garages with driveways.

Robert S. Larsen, SBC's architect, and William Iafe, SBC's licensed engineer/planner and project manager, testified that the access to most of the units/parking spaces was not designed to RSIS residential access street standards, but as a series of parking lots in accordance with RSIS parking lot standards, pursuant to N.J.A.C. 5:21-4.16. They acknowledged that the carports were directly on the 24-foot-wide two-way access way with head-in parking,

often on both sides of the access way, and that there were no sidewalks in between the carports and the access way.

The Township's civil engineer, Kenneth Zielinski, testified that the access ways in the neighborhoods should have been classified as streets and designed to meet RSIS standards for residential access streets with nonparallel, on-street parking. Such streets have a 50-foot right of way including the parking spaces and a 24-foot wide cartway, and minimum 4-foot-wide sidewalks on both sides. Zielinski maintained that major safety issues were implicated because the carports were presently adjacent to the travel way. He also noted that there were support columns within the open carport area, roughly every two spaces, and that they encroached nine inches into the parking spaces. Additionally, the end spaces had a wall on one side thereby precluding any ability to see on that side when backing out. Henry D. Bignell, the Township's licensed professional planner, agreed that the design of the carports and access ways created a hazard for the residents of the development.

The SHO appointed Matthew Seckler, P.E., as an independent traffic engineer to assist in the resolution of the carport/access way issue. Seckler testified that a redesign of the neighborhoods was not necessary considering the low traffic volume, that de minimis exceptions were appropriate and that the

addition of windows would solve the line-of-sight issue with the carports on either end of each residential building.

The SHO issued proposed findings and recommendations, and a final resolution approving the site plan. In particular, the SHO found the grant of de minimis exceptions as to the internal roadways (driveways and aisles) was warranted because, as confirmed by Seckler, the internal roadways were associated with relatively low traffic volumes and that for such low volume areas, a redesign to impose uniform offsets, "clear zones," or sidewalks was not warranted. She deemed the interior vehicle circulation, parking areas, parking aisles, and driveways soundly planned, noting that SBC had agreed to add windows to the end walls of its residential buildings to enable a line of sight for those residents using the end carports.

Since 1997, the RSIS regulations have been mandatory for subdivisions and site plans involving residential construction. Northgate Condo. Ass'n, Inc. v. Borough of Hillsdale Plan. Bd., 214 N.J. 120, 144 (2013). A failure to abide by the RSIS is treated as a violation of the Municipal Land Use Law, N.J.S.A. 40:55D-1 to -163. Ibid. (citing N.J.A.C. 5:21-9(a)).

N.J.A.C. 5:21-3.1(a) provides that de minimis exceptions from the requirements of the RSIS may be granted when reasonable and within the

general purposes and intent of the standards, if literal enforcement is impracticable or will cause undue hardship because of peculiar conditions pertaining to the development in question. Examples of de minimis exceptions include reducing the number of parking spaces and the size thereof. N.J.A.C. 5:21-3.1(f). In turn, the municipal approving authority's grant of a de minimis exception must be based on a finding that it: (1) is consistent with the intent of the Site Improvement Act; (2) is reasonable, limited, and not unduly burdensome; (3) meets the needs of public health and safety; and (4) takes into account existing infrastructure and possible surrounding future development. N.J.A.C. 5:21-3.1(g).

A "residential access" street "[p]rovides frontage for access to lots and carries traffic with destination or origin on the street itself. Designed to carry the least amount of traffic at the lowest speed." N.J.A.C. 5:21-4.1, Table 4.2. The average daily traffic must be no more than 1,500 trips. A residential access street with nonparallel parking must have a 24-foot-wide travel way and the perpendicular parking spaces must be 18 feet long with curbs and sidewalks on either side of the street. N.J.A.C. 5:21-4.2, Table 4.3.

Pursuant to N.J.A.C. 5:21-4.15, each off-street parking space shall measure 9 feet wide by 18 feet long. "Access to parking lots shall be designed

so as not to induce queues on travel ways, and to provide adequate pedestrian circulation and safety. There shall be adequate provision for ingress to and egress from all parking spaces to ensure ease of mobility, ample clearance, and safety of vehicles and pedestrians." N.J.A.C. 5:21-4.16(b). Aisles providing direct access to individual parking stalls must be 24 feet wide. N.J.A.C. 5:21-4.16(c), Table 4.5.

Based on the size of the project and the testimony of Steckler, which the SHO clearly found persuasive, we discern no abuse of discretion in allowing the de minimis exceptions and approving the site plan. We concur that a redesign of the entire development was not warranted where the traffic volume was anticipated to be very low, and SBC had agreed to install windows to resolve line of sight issues. Accordingly, we affirm the approval of the site plan.

H.

In its cross-appeal, SBC argues the trial court erred in permitting the Township to appeal its own compliance plan because it afforded "the Township an undue shield for inclusionary housing resistance." We disagree. "The municipality may elect to revise and its land use regulations and implement affirmative remedies 'under protest.' If [it does] so, it may file an appeal when the trial court enters final judgment of compliance." Mount Laurel II, 92 N.J. at

285. The Township was properly permitted to appeal a plan submitted under protest.

I.

Plaintiff's and amicus curiae argue the court erred by permitting several private developers, including AvalonBay and SBC, to intervene in the case, thereby eviscerating the Township's immunity from builder's remedy lawsuits. Plaintiffs contend that by allowing developers to intervene, they improperly secured the functional equivalent of a builder's remedy. Amicus curiae contend that the developers had only "limited party" status under Mount Laurel IV, which did not rise to the level required for intervention. We disagree.

Intervention is governed by Rule 4:33-1, which provides:

> Upon timely application anyone shall be permitted to intervene in an action if the applicant claims an interest relating to the property or transaction which is the subject of the action and is so situated that the disposition of the action may as a practical matter impair or impede the ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

"A motion for leave to intervene should be liberally viewed." Pressler & Verniero, Current N.J. Court Rules, cmt. 1 on R. 4:33-1 (2023) (citing Allstate N.J. Ins. Co. v. Neurology Pain, 418 N.J. Super. 246, 254 (App. Div. 2011)).

Applying these standards, we discern no abuse of discretion or error. The developers had a sufficient interest in the action that was not adequately represented by existing parties. Indeed, amicus curiae acknowledges "that a property owner/developer has an interest in the development rules that affect a particular piece of property, even its own . . . ." Moreover, as we have explained, the trial court properly revoked the Township's immunity from builder's remedy lawsuits. Accordingly, we affirm the challenged orders permitting private developers to intervene.

J.

To the extent we have not specifically addressed any of appellants' or cross-appellant's remaining arguments, we conclude they lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

In sum, we affirm each of the trial court's challenged rulings except for the first judge's decision interpreting N.J.S.A. 52:27D-307(e) and his related directive authorizing phasing over the Third, Fourth and Fifth Rounds. The plain language of the statute unambiguously reflects the Legislature's intention to cap a municipality's entire fair share obligation at 1,000 units during the ten years following the approval of a municipality's HEFSP. The only way to surmount the cap is by a showing, not made in this case, that the municipality

issued more than 5,000 certificates of occupancy for residential units in the 6-year period preceding the petition for substantive certification. To the extent N.J.S.A. 52:27D-307(e) absolves a municipality of its responsibility to address pent-up gap period need, as is the case here, it is a matter within the province of the Legislature.

In light of our ruling, we draw no conclusion as to the propriety of the gap period need obligation assigned to the Township by the first judge. We remand the matter to the trial court for the Township to submit for approval a revised Third Round HEFSP reflecting a reasonable opportunity for the development of a statutorily capped 1,000 total units of low- and moderate-income units within the Township.

Affirmed in part, reversed in part, and remanded. We do not retain jurisdiction.