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Attorney for Plaintiff/Petitioner,

IN THE MATTER OF THE  
APPLICATION OF THE  
TOWNSHIP OF CLARK, A  
MUNICIPAL CORPORATION OF  
THE STATE OF NEW JERSEY,

Plaintiff/Petitioner.

SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION –  
UNION COUNTY  
DOCKET NO.

CIVIL ACTION  
(Mount Laurel)

**COMPLAINT FOR DECLARATORY  
JUDGMENT**

Plaintiff Township of Clark (“Clark”), a municipal corporation and body politic organized under the laws of the State of New Jersey, with offices located at 430 Westfield Avenue, Clark, New Jersey 07066, by way of Complaint for Declaratory Judgment says:

**Jurisdiction**

1. Jurisdiction is established pursuant to the New Jersey Declaratory Act, N.J.S.A. 2A:16-50, et seq.
2. Jurisdiction is further established as a result of the Supreme Court Decision, In the Matter of the Adoption of N.J.A.C. 5:96 and 5:97 by the New Jersey Council on Affordable Housing, 221 N.J. 1 (2015) (the “2015 Case”).

### Background and Prior Round Obligations

3. In 1975 the Supreme Court of New Jersey in South Burlington County N.A.A.C.P. v. Township of Mount Laurel, 67 N.J. 151 (1975), ruled that the developing municipalities in the State of New Jersey exercising their zoning power, in general, had a constitutional obligation to provide a realistic opportunity for the construction of their fair share of the region's low and moderate income housing needs.
4. In 1983, the Supreme Court refined that constitutional obligation in South Burlington County N.A.A.C.P. v. Township of Mount Laurel, 92 N.J. 158 (1983), to apply to those municipalities having any portion of their boundaries within the growth area as shown on the State Development Guide Plan.
5. In 1985, the New Jersey Legislature adopted, and the Governor signed, the Fair Housing Act ("FHA") N.J.S.A. 52:2D-301 et seq. which transformed the judicial doctrine which became known as the "Mount Laurel doctrine" into a statutory one and provided an alternative administrative process in which municipalities could elect to participate in order to establish a Housing Element and Fair Share Plan ("HEFSP") that would satisfy its constitutional obligation by creating an administrative agency known as the Council on Affordable Housing ("COAH") to develop regulations to define the obligation and implement it.
6. COAH proceeded to adopt regulations for first round obligations applicable from 1987 to 1993 and second round obligations that created a cumulative obligation from 1987 to 1999.
7. In order to comply with the first round obligations, Clark Township adopted an Amended Housing Element and Fair Share Plan in September 1997 (Exhibit A attached).
8. In order to comply with the second round obligations, Clark Township adopted an Amended Fair Share Plan on December 11, 2001 (Exhibit B attached).

### Third Round Obligation

9. COAH first proposed third round substantive and procedural rules in October, 2003. 35 N.J.R. 4636(a); 35 N.J.R. 4700(a).

10. Those rules remained un-adopted and COAH re-proposed both the substantive and procedural third round rules (N.J.A.C. 5:94 and 5:95) in August of 2004 and adopted the same effective on December 20, 2004. (the "2004 Regulations")

11. In order to comply with the proposed third round procedure, Clark Township adopted an Amended Housing Element and Fair Share Plan in June 2004 along with ordinances 4-20 and 4-21 on December 20, 2004. (Exhibit C attached).

12. The 2004 Regulations were challenged and on January 25, 2007, the Appellate Division invalidated various aspects of those regulations and remanded considerable portions of the rules to COAH with direction to adopt revised rules. In the Matter of the Adoption of N.J.A.C. 5:94 and 5:95 by the New Jersey Council on Affordable Housing, 390 N.J. Super. 1 (App. Div.), certif. denied, 192 N.J. 72 (2007) (the "2007 Case").

13. On January 22, 2008, COAH proposed and published revised third round regulations in the New Jersey Register. 40 N.J.R. 237.

14. On May 6, 2008, COAH adopted the revised third round regulations and advised that the new regulations would be published in the June 2, 2008 New Jersey Register, thereby becoming effective.

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

16. Clark Township actively engaged COAH throughout the third round period. COAH sent as Premediation Report to Clark on August 9, 2006 and Clark responded on November 13, 2006. In addition, Clark adopted an amended Housing Element and Fair Share Plan on October 26, 2006, along with Ordinances 06-20 and 06-117 on November 20, 2006 (Exhibit D attached).

Clark continued its best efforts to comply with the rules. On August 20, 2007 Clark responded to COAH's Compliance Mechanism report of April 25, 2007. Clark Township adopted a Housing Element and Fair Share Plan on March 12, 2009. The Township also responded to objector concerns in a letter to COAH dated 19 October 2009. (Exhibit E attached)

17. Clark Township has been active implementing the 2009 Housing Element and Fair Share Plan which was adopted. Woodcrest at Clark, a multi-family development located at 1245 Westfield Avenue, was approved by the Planning Board in 2009. Three hundred and twenty seven units of rental housing with a twenty percent set aside for affordable housing, a total of sixty five units, were approved by the Planning Board. As of this date, two hundred twenty of these units have been completed and have been issued Certificates of Occupancy including sixty five affordable units. The remaining units are presently under construction and are expected to be completed in the near future.

Further, the Township of Clark adopted a non-residential development fee ordinance in 2009. As of this date, the sum of two hundred twenty seven thousand eight hundred eighty five dollars has been set aside for affordable housing programs such as housing rehabilitation; preservation; accessory apartments; market to affordable and other local and regional housing programs. (Exhibit F attached).

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

18. N.J.A.C. 5:96 and 5:97 as adopted in 2008 were challenged in an appeal entitled In the Matter of the Adoption of N.J.A.C. 5:96 and 5:97 by the New Jersey Council on Affordable

Housing, 416 N.J.Super. 462 (App. Div. 2010) (the “2010 Case”). In its October 8, 2010 decision, the Appellate Division determined, among other things, that the growth share methodology was invalid and that COAH should adopt regulations utilizing methodologies similar to the ones utilized in the first and second rounds, i.e. 1987-1999.

19. On September 26, 2013, the Supreme Court of New Jersey affirmed the Appellate Division’s invalidation of the third iteration of the third round regulations, sustained their determination that the growth share methodology was invalid, and directed COAH to adopt new regulations based upon the methodology utilized in the first and second rounds. In the Matter of the Adoption of N.J.A.C. 5:96 and 5:97 by the New Jersey Council on Affordable Housing, 215 N.J. 578 (2013) (the “2013 Case”).

20 COAH proceeded to propose such regulations in accordance with the schedule and amended schedule established by the New Jersey Supreme Court in the 2013 Case.

21. On October 20, 2014, COAH deadlocked with a 3-3 vote and failed to adopt the revised third round regulations.

22. Due to COAH’s failure to adopt the revised regulations and subsequent inaction, Fair Share Housing Center (“FSHC”), a party in the 2010 Case and the 2013 Case, filed a motion with the New Jersey Supreme Court to enforce litigant’s rights.

23. On March 10, 2015 the New Jersey Supreme Court issued its decision on FSHC’s motion to enforce litigant’s rights. The Supreme Court in the 2015 Case found that the COAH administrative process had become non-functioning and, as a result, returned primary jurisdiction over affordable housing matters to the trial courts. In the Matter of the Adoption of N.J.A.C. 5:96 and 5:97 by the New Jersey Council on Affordable Housing, 221 N.J. (2015) (the “2015 Case”).

24. In doing so, the Supreme Court established a transitional process for municipalities, like the Township of Clark, that participated in the administrative process before COAH to file a

declaratory judgment action with the trial courts seeking to declare their HEFSPs as being constitutionally compliant and seeking similar protections to those that the participating municipalities would have received if they had continued to proceed before COAH.

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

26. While the Supreme Court in the 2015 Case declined to adopt a specific methodology or formula to calculate the third round affordable housing obligations of the municipalities and instead left that determination to the 15 Mount Laurel Judges (one in each vicinage), it did provide some guidance by reiterating its endorsement of the previous methodologies employed in the First and Second Round Rules as the template to establish third round affordable housing obligations, and as abovementioned, by treating Participating Municipalities filing Declaratory Judgment actions in the same way that the 1985 FHA when originally enacted on July 2, 1985 treated municipalities transitioning from the judicial to the administrative process.

27. In light of the decisions in the 2013 Case and the 2015 Case, the Township of Clark is currently engaged in and has directed its Planner to prepare a revised HEFSP that will result in compliance by the Township of Clark with its constitutional affordable housing obligations.

### COUNT ONE

#### (DECLARATORY RELIEF, CONSTITUTIONAL COMPLIANCE)

28. The Township of Clark repeats, reiterates, and incorporates each and every allegation as set forth in Paragraphs 1-27 of this Complaint as if the same were fully set forth

herein at length.

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

**WHEREFORE**, Plaintiff/Petitioner, the Township of Clark, respectfully seeks that the Court grant the following relief:

- a. An Order exercising jurisdiction over the compliance by the Township of Clark with its constitutional affordable housing obligations; and
- b. An Order declaring that the Township of Clark has fully discharged its constitutional affordable housing obligations and is granted protection and repose against exclusionary zoning litigation.
- c. A Judgment of Compliance and Repose for a period of ten (10) years from its date of entry.
- d. An Order granting such additional relief as the Court deems equitable and just.

**COUNT TWO**

**(FIVE MONTHS TO PREPARE HEFSP)**

30. The Township of Clark repeats, reiterates, and incorporates each and every allegation as set forth in Paragraphs 1-29 as if the same were fully set forth herein at length.

31. In the 2015 Case, the Supreme Court equated participating municipalities who file Declaratory Judgment actions such as the instant one to those municipalities who were involved in litigated matters in 1985 when the Fair Housing Act was adopted and successfully transferred their litigated cases to COAH and were entitled under N.J.S.A. 52:27D-316 to a five month period from the date of transfer or the date of the promulgation of criteria and guidelines by COAH, whichever occurred later to prepare its HEFSP.

32. The Supreme Court in the 2013 Case and in the 2015 Case declined to establish a specific methodology or formula to calculate third round affordable housing obligations of the municipalities and instead left that determination to the 15 Mount Laurel Judges (one in each vicinage), directing that the methodology or formula established should be similar to that employed in the first and second round rules.

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

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

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

**WHEREFORE**, Plaintiff/Petitioner, the Township of Clark respectfully seeks that the Court grant the following relief:

a. An Order granting the Township of Clark a five month period from the date that a methodology or formula is established by this Court, or otherwise, to prepare a constitutionally

compliant HEFSP that incorporates the formula and methodology approved by this trial court or otherwise.

- b. An Order granting such additional relief as the Court deems equitable and just.

### **COUNT THREE**

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

36. The Township of Clark repeats, reiterates, and incorporates each and every allegation as set forth in Paragraphs 1-35 as if the same were fully set forth herein at length

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

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

**WHEREFORE**, Plaintiff/Petitioner, the Township of Clark respectfully seeks that the Court grant the following relief:

- a. An Order granting temporary immunity from third party lawsuits against the Township of Clark from the date of the filing of the instant Declaratory Judgment action until this Court issues a Final Judgment of Compliance and Repose to the Township of Clark for its HEFSP formulated, adopted and approved in accordance with the applicable formula and methodology established by this Court.

- b. An Order granting such additional relief as the Court deems equitable and just.

## COUNT FOUR

### (JURISDICTION OVER UNAPPROVED SPENDING PLAN)

39. The Township of Clark repeats, reiterates, and incorporates each and every allegation set forth in Paragraphs 1-38 as if the same were fully set forth herein at length.

40. On April 9, 2015 the Appellate Division issued a Decision divesting COAH of jurisdiction to administratively effect a forfeiture of Affordable Housing Trust Funds not spent or committee in accordance with the requirements of the FHA and enjoining COAH from taking any such administrative action. In re Failure of Council on Affordable Housing to Adopt Trust Fund Commitment Regulations, 2015 WL 1582908 (App. Div. 2015) (the "Trust Fund Case").

41. In the Trust Fund Case the Appellate Division further transferred jurisdiction over such actions and matters to the 15 Mount Laurel Judges designated to hear the Declaratory Judgment Actions regarding compliance with affordable housing obligations as set forth in the 2015 Case.

42. On information and belief, COAH has taken the position that it no longer has jurisdiction to approve Spending Plans that are pending before it.

43. The Township of Clark adopted an ordinance on May 4<sup>th</sup>, 2009 entitled "AN ORDINANCE AMENDING AND SUPPLEMENTING THE PREVIOUSLY ADOPTED ORDINANCE NUMBER 02-05 AND 06-20 ENTITLED 'AN ORDINANCE TO ESTABLISH COLLECTION, RETENTION, AND USE OF DEVELOPMENT FEES IN, BY, AND FOR THE TOWNSHIP OF CLARK, COUNTY OF UNION AND STATE OF NEW JERSEY.'" The Township of Clark's spending plan as set forth hereinabove has not been approved by COAH and without COAH's approval and authorization the Township of Clark is prevented from expending affordable house trust funds to advance the purposes of affordable housing in the Township.

44. In light of COAH's inaction on its Spending Plan, the Township of Clark seeks to have this Court, in conjunction with processing the instant Declaratory Judgment action, approve the Spending Plan of the Township of Clark ( Exhibit F attached) that has been pending before COAH and further, to assume jurisdiction over any amendment to said Spending Plan once approved in order to give the Township of Clark the ability to properly utilize and expend Affordable Housing Trust Funds collected for the purposes of advancing and satisfying its affordable housing obligation.

**WHEREFORE**, Plaintiff/Petitioner, the Township of Clark respectfully seeks that the Court grant the following relief:

- a. An Order approving the Spending Plan of the Township of Clark heretofore pending before COAH.
- b. An Order continuing the jurisdiction of this Court to consider and approve any amendments to the Approved Spending Plan.
- c. An Order granting such additional relief as the Court deems equitable and just.

**DESIGNATION OF TRIAL COUNSEL**

Pursuant to R. 4:25-4, notice is hereby given that Joseph J. Triarsi, Esq., Attorney for the Plaintiff/Petitioner, the Township of Clark, is designated as trial counsel in the above captioned matter.

Triarsi, Betancourt, Wukovits & Dugan, LLC  
Attorney for Plaintiff  
Township of Clark

Dated: July 7, 2015

Joseph J. Triarsi, Esq.  
of Counsel

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

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

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

Triarsi, Betancourt, Wukovits & Dugan, LLC  
Attorney for Plaintiff  
Township of Clark

Joseph J. Triarsi, Esq.  
Of Counsel

Dated: July 7, 2015