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<p>IN THE MATTER OF THE APPLICATION OF THE TOWNSHIP OF SOUTH BRUNSWICK FOR A JUDGMENT OF COMPLIANCE AND REPOSE AND TEMPORARY IMMUNITY FROM <u>MOUNT LAUREL</u> LAWSUITS</p>	<p>SUPERIOR COURT OF NEW JERSEY LAW DIVISION MIDDLESEX COUNTY</p> <p>DOCKET NO.: MID-L-003878-15</p> <p>CIVIL ACTION – <u>MOUNT LAUREL</u></p>
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**BRIEF IN RESPONSE TO INTERVENORS’  
POSITION ON PRESENT NEED**

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Donald J. Sears, Esq.  
Of Counsel and on the brief

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## STATEMENT OF PROCEDURAL HISTORY

As a result of the Appellate Division's decision in In Re Declaratory Judgment Actions Filed by Various Municipalities, County of Ocean, \_\_\_\_ N.J. Super. \_\_\_\_ (App. Div. 2016)(Docket No. A-3323-15T1, approved for publication July 11, 2016) (In re Ocean County), this court entered an Amended Case Management Order dated July 18, 2016, which required submissions "on whether and to what extent South Brunswick's present need obligation was modified by the Ocean County appeal and if so, to what extent." The parties were directed to submit expert reports and/or legal argument on this question on or before July 21, 2016. The Township submitted its legal memorandum along with a certification of Dr. Peter Angelides of Econsult Solutions, Inc. (Econsult); Fair Share Housing Center (FSHC) submitted its legal memorandum with a certification and report of Dr. David Kinsey (Kinsey) (whose certification indicated that he was also retained by AvalonBay Communities); and Richardson Fresh Ponds – Princeton Orchards (Richardson) submitted its legal argument with a report by Mr. Art Bernard (Bernard).

On July 21, 2016, this court rendered its written opinion establishing the Township's Present Need obligation as 109, subject to possible adjustment in light of the decision in In Re Ocean County, supra.

Pursuant to the Amended Case Management Order, responsive submissions were permitted to be submitted on or before August 16, 2016, with a hearing scheduled on this issue on August 18, 2016.

## STATEMENT OF FACTS

In re Ocean County, supra, is a comprehensive and sound 53-page published opinion that found, without question, that there could be no judicially created retrospective obligation

calculated for the Gap Period and imposed upon municipalities. Id. at 50-51. As clear as the opinion is, however, the intervenors in this case assert that the decision in In re Ocean County should be interpreted to require this court to calculate a Gap Period need as a part of the Present Need. In their efforts to circumvent the force of the Appellate Division's clear ruling that trial judges **do not** have the authority to impose an obligation beyond the Present and Prospective Need, and invalidation of the imposition of a retrospective Gap Period obligation, they have twisted and misinterpreted a few sentences in In re Ocean County to support a position that is diametrically inconsistent with their previous Gap Period arguments and the actual holding in In re Ocean County.

This new legal argument regarding Present Need therefore must be scrutinized in a factual *and* legal context. The factual context is that Econsult, Kinsey and Bernard in this case, as well as Ocean County Special Master Richard Reading (Reading) in the Ocean County group of cases, all issued comprehensive expert reports setting forth their positions on the definition of "Present" and "Prospective" Need, and the role of the Gap Period in calculating the magnitude of the two categories of Mount Laurel need. Importantly, the Appellate Division had the benefit of these reports, and indeed refers to them throughout its decision in In re Ocean County. Therefore, to understand the appellate panel's rationale and the substantive bases for its rulings, it is important to understand the reports considered. Accordingly, this Statement of Facts will detail the positions of each expert regarding "Present Need," "Prospective Need," and the role of the "Gap Period Need" vis-à-vis each of these two categories.

Prior to In re Ocean County, all the experts agreed that, in accordance with the guidance provided by the Supreme Court in In Re Adoption of N.J.A.C. 5:96 and 5:97 by N.J. Council on Affordable Housing, 221 N.J. 1 (2015) (Mount Laurel IV), the Present Need was an estimation

of the number of deteriorated or overcrowded units occupied by low and moderate income households at a fixed point in time.<sup>1</sup> Consistent with Southern Burlington County N.A.A.C.P. v. Mount Laurel Township, 92 N.J. 158, 285 (1983) (Mount Laurel II) and COAH's regulations, the Supreme Court therefore defined the Present Need in a manner synonymous with the term "indigenous need," which did not include any retroactive component. Naturally, with such clear guidance from our highest Court, all experts agreed with this definition. Accordingly, the experts all honored this definition when actually calculating the Present Need. Thus, even the most zealous and self-confident expert prudently avoided any attempt to redefine the Present Need to include a retrospective component.

For context, it is important to note that Econsult coined the phrase "identifiable need" or "identified need" to refer to lower income households that formed during the Gap Period that reside in deteriorated or overcrowded units at the time of the Present Need calculation. This term of art is very significant, because Reading adopted the term and its meaning, as did the Appellate Division in the passages in In re Ocean County that the intervenors now misconstrue in an effort to convince this court to likewise misinterpret the opinion.

### *Summary of the Kinsey Reports*

Kinsey submitted a series of expert reports on behalf of FSHC which (1) defined "Present Need;" (2) defined "Prospective Need;" (3) proffered strident positions on the best approach to defining and calculating the "Gap Period Need;" and (4) proffered an equally strident position on whether the Gap Period involved any "overlapping" between Present and Prospective Need.

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<sup>1</sup> In this regard, in Mount Laurel IV, the Supreme Court (1) directed trial judges to use standards from the First and Second Round Rules to define the Present Need; and (2) stated that trial judges should confine the Present Need to the indigenous need. See 221 N.J. at 31.

In sum, Kinsey made the following assertions:

1. **“Present Need”** is calculated using a *specific point in time*<sup>2</sup> and, consistent with COAH’s Prior Round Rules and Mount Laurel IV, is defined as "deficient housing units occupied by low and moderate income households within a municipality. . . ." See July 2015 Kinsey Report, p. 5-6 (quoting N.J.A.C. 5:93-1.3) (DA-7).
2. **“Prospective Need”** is “a projection of low and moderate income housing needs for a defined period in the future.” Id. at 9.
3. With regard to the **“Gap Period,”** Kinsey shifted among definitions and positions. See July 2015 Kinsey Report (asserting that the statewide “Prospective Need” spans 26 years, (1) reaching back 16 years to 1999 and (2) reaching forward ten years to 2025); see also January 2016 Report (DA-6)(erroneously concluding that his “26-year need calculation for 1999-2025 is the approach *required* by Mount Laurel IV”); and see March 2016 Report (P-52)(keeping the Gap Period in the “Prospective Need” calculations for the period 1999-2025, but dividing the “Prospective Need” into two distinct categories).
4. In addition, in his March 24, 2016 Report, Kinsey stridently asserted that there is no “overlap” among the Present and Prospective Need:

**The decline in Present Need over time using a consistent set of Census criteria show that there is no overlap between this calculation and Gap Period Prospective Need.** Furthermore, Prospective Need (Gap Period) is a calculation of [low and moderate income households] that formed in New Jersey during 1999-2015, including immigrants to New Jersey, newly forming young households, and existing [households] that became income qualified as [low and moderate income]. Present Need, by contrast, measures substandard housing that is occupied by [low and moderate income households]. Id. at 19-20 (emphasis added).

### ***Summary of the Bernard Reports***

On April 29, 2016, Art Bernard, P.P., submitted an expert report on behalf Richardson in which he made it very clear that Gap Period Need is not subsumed by Present Need. Indeed, after characterizing the idea as “nonsensical,” he emphatically asserts that both he and Kinsey/FSHC agree that “there is no evidence of a significant overlap between present need and

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<sup>2</sup> Kinsey shifted the actual “point in time” initially from 2010 and later to July 1, 2015.

the gap period obligation.” Bernard Report, April 29, 2016, p. 9-10 (DR-16). This is identical to the assertion he made in the Ocean County cases in his report dated April 8, 2016 (See Bernard Report, April 8, 2016, p. 9-10)(P-59).

The Appellate Division reviewed all of the experts reports in reaching its decision. One was Bernard’s report in the Ocean County cases dated December 15, 2015. In it, Bernard makes clear his position that the Gap Period calculation is very different than the Present Need:

### **THE GAP PERIOD NEED IS NOT SUBSUMED BY PRESENT NEED**

COAH has historically estimated present need through census counts of housing units. It is an estimate of the need to rehabilitate substandard housing occupied by low and moderate-income households. COAH's 2014 rule proposal based its count of housing units on the 2010 Census. *The calculation of the new housing required during the Gap Period (1999-2015) is based on an estimate of the increase in population. It is a calculation that is very different than the calculation of present need, since present need is based on a count of housing units and the Gap Period obligation is based on a count of people.* Bernard Report, December 15, 2015, p. 5 (emphasis added).

#### ***Summary of the Econsult Reports***

Econsult filed a series of expert reports which, like Kinsey, (1) defined “Present Need;” (2) defined “Prospective Need;” (3) proffered positions on the “Gap Period Need;” and (4) asserted that the Gap Period involved a level of “overlapping” between Present and Prospective Need. In sum, Econsult made the following conclusions:

1. “**Present Need**” is calculated using a *specific point in time* and “enumerates housing needs for low- and moderate-income (LMI) households currently living in deficient housing units.” See Econsult Report, December 30, 2015, p. 16 (P-4).

2. “**Prospective Need**” “enumerates housing needs for additional LMI households projected to be added over the ten year period.” *Id.* at 27.

3. With regard to the **Gap Period**, Econsult opined:

.....as of the start of the current period, all previous population and housing activity relevant to the calculation of housing need as per the FHA is captured within the upcoming Present Need calculation. Anticipated future growth over the period is captured in the Prospective Need calculation, while municipal compliance with legally assigned obligations is accounted for by using unfilled Prior Round obligations as the starting point for determining municipal obligations. Therefore, there is **no identifiable housing need** within the FHA framework that would be satisfied through the calculation of a **retrospective “need”** from the Gap Period, and the addition of any units emerging from a **retrospective calculation** attempting to capture “prospective need” from the Gap Period would improperly represent the affordable housing need that exists as of today. In sum, no legal affordable housing obligation or identifiable additive affordable housing need emerges from the “gap” period. *Id.* at 91 (emphasis added showing the basis for the Appellate Division’s reference to retrospective need).

4. With regard to the **“Overlap” issues**, Econsult stated:

- LMI households having come into existence during the Gap do not represent an **“identifiable need”** if they are living in sound housing (conversely, they would represent an **“identifiable need”** under Present Need if they were living in deficient housing): “Those LMI households that are living in sound housing units as of the beginning of the upcoming period do not represent an **identifiable affordable housing need for that period**, regardless of when they were added to the state’s population.” See Econsult Report, December 8, 2015, p. 4 (emphasis added showing the basis for the Appellate Division’s reference to “identifiable” or “identified need”).
- In this same December 8, 2015 Report, on page 7, Econsult first introduced the examples of the different types of households having formed during the Gap Period, but that may have found decent housing, moved, died, received more income, etc. When discussing those types of LMI households, not living in deficient units, Econsult stated: “[Such a household would] not represent an **identifiable need** for the upcoming cycle within the Present Need and Prospective Need framework set forth in the FHA. This is confirmed by straightforward logic – since the household currently resides in a sound housing unit, construction or rehabilitation of an additional unit of affordable housing is not required to accommodate it.” *Id.* at 7 (emphasis added showing the basis for the Appellate Division’s reference to “identifiable” or “identified need”).
- Econsult again reaffirmed this principle in its February 8, 2016 Report (P-5), on pages 6-7, rendering even more clear the meaning of the



term “identifiable need” in the “Categories of Affordable Housing Need:” **“ESI uses the term ‘identifiable existing need’ and ‘FHA framework’ to distinguish theoretical definitions of housing ‘need’ from those identified as relevant to the calculation of affordable housing need and obligations under the Fair Housing Act, pursuant to the Mt. Laurel constitutional obligation.** Individuals may vary on which households they would personally describe of as ‘in need’ of housing, and any of a number of standards, including cost-burden, could be reasonably introduced into such a conversation. **Fortunately, there is a clear standard and precedent as to which households do and do not constitute affordable housing need for which there is an obligation..”** Id. at 6. (emphasis supplied)

The Econsult report goes on to describe the **current housing circumstances** of the incremental LMI households added to New Jersey within this Gap Period in relation to the Present Need and Prospective Need framework:

- If they are LMI households currently living in deficient housing in New Jersey, those new households are captured within Present Need.
- **If they are LMI households currently living in adequate housing in New Jersey, they do not represent a currently “identifiable need.”** Id. at 7 (emphasis supplied).

The reports and the testimony of Angelides in this case were identical to that submitted in Ocean County and considered by the Appellate Division.

### *Summary of the Reading Reports*

The Appellate Division scrutinized Special Master Reading’s reports in analyzing the case before it. Reading issued his first Gap report on December 29, 2015. In that report, he concluded the following:

The inclusion of the prior 16 year “Gap Period” within prospective need is contrary to prior round methodologies, the language of the FHA and the history of determining affordable housing needs. The practical difficulties in identifying and quantifying residual unmet need from a prior period extended back 16-years was discussed in terms of the disposition of LMI housing needs that existed 5, 10 or 15 years in the past. These households would be partially included by the LMI households in overcrowded or deficient housing units

that are encompassed in the new calculation of Present Need. Those LMI households that have occupied sound (nondeficient) housing units are already housed and would not represent an *identifiable need*. Some LMI households formed during the Gap Period may no longer represent an affordable housing need due to a variety of reasons including death, changes in income, increase or decrease in household size, retirement and/or relocation outside of New Jersey. These practical difficulties and the dynamic, rather than static, nature of the housing market defy an empirical calculation of the affordable housing needs remaining from past years. Although it may be possible to generate an estimate of a residual need, such an estimate would be speculative, would still be contrary to prior round methodologies and would not be likely to be acceptable to the various parties of interest in this matter. See Reading Report, December 29, 2015, p. 14-15 (previously submitted to the court with the Township's July 21, 2016, letter memorandum).

After reviewing additional submissions from the parties, Reading issued a final Gap Period Report on February 17, 2016. In that report, he reversed his prior conclusion. Initially, he made clear that:

The calculation of the current needs of the affordable households formed during the sixteen year Gap Period is not a process that is imbedded in the Prior Round methodology, [and] is not a projected (Prospective) need...

Despite finding that a retrospective calculation is completely inconsistent with the Prior Round methodology, he inexplicably stated that such a calculation:

...should be undertaken as a separate and discrete component of affordable housing need... The continuing needs of LMI households formed during the Gap Period are different and distinct from the measurement of deficient housing units or the projection of future LMI households. Accordingly, the Gap Period would necessitate a different methodology than those used for Present and Prospective Need... If the legal arguments were to prevail that there is no legal obligation for the housing needs of LMI households formed during the Gap Period, then this assignment would stop there... Based upon all of the forgoing, it is recommended that the court consider the inclusion of the Gap Period, calculated distinctly and separately from Present and Prospective Need... Reading Report, December 29, 2016, p. 14-15, 19.

Thus, even after reversing his prior conclusion, and determining that a Gap Period obligation should be calculated, even Reading was convinced that this calculation was "distinct

and separate” from **both** the Present and Prospective obligation. The Ocean County court accepted his recommendation and imposed a “separate and discrete” Gap Period obligation on municipalities. The Appellate Division, however, disagreed that any such retrospective obligation could be imposed and reversed that decision.

### **LEGAL ARGUMENT**

Initially, the Township incorporates and reiterates the arguments made in its letter memorandum dated July 21, 2016, along with the Certification of Peter Angelides dated the same, both of which were already submitted to the court, Special Master and all counsel. Clearly, the Appellate Division’s decision in In Re Ocean County did not “redefine” what constitutes Present Need. Instead, in holding that there can be no judicially created retrospective obligation, the court pointed out that any affordable housing need that arose during the Gap Period is already adequately addressed in the calculation of the Present Need. No additional examination or analysis is therefore required or permitted as a matter of law.

### **POINT I – INTERVENORS SEEK TO HAVE THIS COURT IMPOSE A GAP PERIOD OBLIGATION BY MISCONSTRUING THE APPELLATE DIVISION’S DECISION**

The Appellate Division made abundantly clear that the “sole question on appeal [was] whether a retrospective gap-period obligation is authorized by the core principles of the Mount Laurel doctrine, as codified in the FHA, and In re N.J.A.C. 5:96 II.” In re Ocean County, supra., at 11. The central holding on this issue is clear and unmistakable:

There is no Gap Period obligation:

In sum, to impose a gap-period requirement would inevitably add a new requirement not previously recognized under the FHA. The Supreme Court has cautioned courts not to become a replacement agency for COAH in promulgating

substantive rules. Rather, based on COAH's inaction, courts must work within the provisions of the FHA and should employ the First and Second round methodologies to determine a municipality's compliance with its Mount Laurel obligations. Until COAH adopts Third Round Rules, or until the Legislature acts, the courts may not act as a legislature by imposing new, substantive obligations not recognized under the FHA. Id. at 11.

There cannot be a retrospective obligation:

Requiring municipalities to undertake a retrospective “separate and discrete” additional calculation for affordable housing need does not follow the First or Second Round Rules. It mandates an entirely new obligation unauthorized by the FHA. Id. at 16.

There cannot be a separate and discrete category of need:

[W]e conclude that the judge erroneously imposed a requirement that a municipality undertake a new, “separate and discrete” gap-period calculation—in addition to unmet prior round obligations, present, and prospective needs—to establish a municipality's fair share affordable housing obligation. Id. at 11.

At its core, the intervenors’ argument is that the Appellate Division **actually authorized** the imposition of a Gap Period obligation, despite 53 pages to the contrary. Selectively relying upon a few isolated passages taken completely out of context, they take the position that the Appellate Division intended to redefine the “Present Need” contrary to the guidance of the Supreme Court. They take this strained position even though the Appellate Division never stated that trial courts must now redefine the Present Need in a manner contrary to the direction of the Supreme Court guidance -- and even though the Present Need has always been based upon a point in time analysis.

Such a reading nullifies the entire opinion in favor of a few passages taken out of context. Indeed, such a reading effectively affirms the Ocean County trial court’s ruling instead of reversing it and remanding, as the Appellate Division clearly ordered. Id. at 53. Such an interpretation grossly distorts the Appellate Division’s decision to invalidate the imposition of a

retrospective obligation into one that **actually authorizes** the imposition of such an obligation as a component of “Present Need.” This requires the court to conclude that, although the Appellate Division found a retrospective obligation is contrary to the FHA, the Prior Round methodologies and the Supreme Court’s directive in Mt. Laurel IV, such an obligation nevertheless still must be calculated and added to Present Need. See FSHC Letter Memorandum dated July 21, 2016, p. 2-3; Richardson Letter Memorandum dated July 21, 2016, p.2.

Moreover, such an interpretation requires the use of a new and discrete methodology to determine the need that purportedly arose during the Gap – a methodology nowhere found in the Prior Round methodologies. In short, such an interpretation requires the wholesale rewriting of the definition of “Present Need” to include a “retrospective” obligation in violation of the point in time approach that both the Appellate Division and Supreme Court have consistently recognized and endorsed.

On at least two occasions, the Appellate Division rejected the efforts of FSHC to manipulate the language of the Supreme Court’s rulings to support an interpretation of those rulings contrary to what the Court actually held. To illustrate, FSHC selectively quoted the Supreme Court’s ruling in Mount Laurel IV to support its contention that the Supreme Court ruled that trial judges should use methodologies from Rounds 1 and 2 to impose an obligation for the Gap Period. An examination of the Supreme Court’s language reveals that it issued no such ruling. Mount Laurel IV, *supra.*, at 30. The Appellate Division saw right through FSHC’s attempt to mislead the Court by quoting only portions of the Mount Laurel IV passage and leaving out other parts from the quote. In re Ocean County, *supra.*, at 16.

In addition to manipulating the holding of Mount Laurel IV, FSHC did the same with respect to the holding of Mount Laurel II. In this regard, on page 219 of Mount Laurel II, the

Supreme Court included a paragraph in which it authorized trial judges to phase in obligations to ameliorate the burdens of excessive fair share quotas. FSHC plucked out language from this paragraph to support its contention that the Supreme Court in Mt. Laurel II intended the obligation to create affordable housing to perpetually accrue year after year ad infinitum. The Appellate Division again saw right through FSHC's efforts to manipulate the Supreme Court's rulings through selective quotes. See In re Ocean County, *supra.*, at 16-17. FSHC's quotes of only a few passages from the Appellate Division's much more extensive and thoughtful opinion represent yet another effort to manipulate the ruling of a court through the use of selective quotations.

The intervenors have asked this court to focus exclusively on the emboldened language in the following passages, and have failed even to attempt to reconcile how their strained reading of this language squares with the balance of the opinion:

**Finally, we emphasize that our holding today does not ignore housing needs that arose in the gap period or a municipality's obligation to otherwise satisfy its constitutional fair share obligations.** As Mr. Reading candidly acknowledged, “[low- and moderate-income] households formed during the gap period may no longer represent an affordable housing need due to a variety of reasons including death, changes in income, increase or decrease in household size, retirement and/or relocation outside of New Jersey.” However, he also stated that housing need from the gap period would be “partially included” by those living in “over[ ]crowded or deficient housing units that are encompassed in the new calculation of [p]resent [n]eed.” **Therefore, the scope of present need should be dictated by identifiable housing need characteristics as found by the reviewing Mount Laurel judge when examining the evidence presented.** In this context, the focus remains—as it has for the last forty years—on the constitutional obligation of realistically affording opportunities for construction of a municipality's fair share of present and prospective need for low- and moderate-income housing.

We reach our conclusion emphasizing: (1) the core of the Mount Laurel doctrine is a municipality “would satisfy [its] constitutional obligation by

affirmatively affording a realistic opportunity for the construction of its fair share of the present and prospective regional need for low[-] and moderate[-income] income housing,” Mount Laurel II, supra, 92 N.J. at 205 (emphasis added); (2) a realistic opportunity depends on “whether there is in fact a likelihood-to the extent economic conditions allow-that the lower income housing will actually be constructed,” id. at 222; (3) the FHA codified the core constitutional holding undergirding the Mount Laurel obligation, In re N.J.A.C. 5:96 I, supra, 215 N.J. at 584, and specifically defined “prospective need” as a forward projection of housing needs “based on development and growth ... [which is] reasonably likely to occur in a region or a municipality,” N.J.A.C. 5:92–1.3; (4) the FHA charged COAH with determining “State and regional present and prospective need for low[-] and moderate[-income] housing,” In re N.J.A.C. 5:96 I, supra, 215 N.J. at 589 (emphasis added); (5) although the Legislature amended the FHA twelve times during the gap period, it did not impose a retrospective “separate and discrete” gap-period obligation; (6) although the Appellate Division and the Supreme Court likewise had opportunities during the gap period to require a “separate and discrete” gap period obligation, such an obligation was not imposed, and instead remained steadfast to the FHA's focus on State and regional present and prospective need for low- and moderate-income housing; **(7) 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**; and (8) under our tripartite system of jurisprudence, imposing a “separate and discrete” gap-period obligation is best left for consideration by the Legislative and Executive branches of government where the issues can be fairly and fully debated in the public forum. In re Ocean County, supra., at 51-53 (emphasis added).

It is clear that the intervenors have attempted to isolate the language in bold because, when viewed in context, it simply cannot support their position that the Gap Period obligation should be reclassified from being part of the Prospective Need to being part of the Present Need. Their continued reliance upon only selective quotes from the decision is telling, and demonstrates that they know full well that a consideration of the decision in toto does not support their contention that the Appellate Division really intended to authorize the imposition of a retrospective obligation so long as that obligation was included in the Present Need instead of the Prospective Need.

**POINT II – THE APPELLATE DIVISION RECOGNIZED AND  
CONFIRMED USE OF THE ESTABLISHED DEFINITION OF PRESENT NEED**

In its opinion in In re Ocean County, the Appellate Division carefully reviewed the law on Present Need. Although Richardson specifically urges this court to disregard the established definition of Present Need, because “[p]resent need is not defined in the FHA,” Richardson Letter Memorandum dated July 21, 2016, p. 4, it is clear that the term has a well defined and accepted meaning. In Rounds 1 and 2, COAH defined the Present Need to include “the indigenous need” (lower income households living in deteriorated housing within any given community) and “the reallocated present need” (the municipality’s share of the present regional need for affordable housing). In both sets of Round 3 regulations COAH adopted in 1994 and 2008, COAH eliminated the reallocated present need from the Present Need and confined the Present Need to the indigenous need. FSHC challenged inter alia the exclusion of the reallocated present need following COAH’s adoption of both sets of regulations and the Appellate Division upheld the new approach to Present Need in the face of FSHC’s challenge. In re N.J.A.C. 5:94 & 5:95, 390 N.J. Super. 1, 58-59 (App. Div.), certif. den. 192 N.J. 71 (2007); In re N.J.A.C. 5:96 & 5:97, 416 N.J. Super. 462, 502 (App. Div. 2010), aff’d 215 N.J. 578 (2013); See also Mt. Laurel IV, supra. at 42-43.

The following passages from In re Ocean County reveal the depth of understanding that the court had of the term “Present Need”:

In the First Round Rules, COAH defined present need as “the total number of deficient housing units occupied by low[-] or moderate[-] income] households as of July 1, 1987.” Ibid. (quoting N.J.A.C. 5:92–1.3). COAH used several factors to establish present need, such as “overcrowding, age of unit, and lack of plumbing, kitchen or heating facilities as indicators of dilapidated housing.” Id. at 590–91.



.....

For the Second Round Rules, COAH used the same methodologies employed in the First Round Rules. Id. at 592.

.....

The [Third Round] rule proposal published in the New Jersey Register explained that a municipality's fair share for the period from 1987 through January 1, 2014, would be calculated using three criteria:

- (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...

.....

Our first remand to COAH with instructions to adopt revised rules occurred in 2007. In re N.J.A.C. 5:94, supra., 390 N.J.Super. at 47.

.....

Judge Cuff's opinion rejected appellants' arguments that the "rehabilitation share" of a municipality's affordable housing obligation, sometimes also referred to as present need, should include "cost burdened" low-and moderate-income households that reside in standard housing and households that lack permanent housing or live in overcrowded housing; that COAH's methodology for identifying substandard housing was "arbitrary and unreasonable"; that the [T]hird [R]ound [R]ules improperly eliminated the part of the first and second round methodologies that required reallocation of excess present need in poor urban municipalities to other municipalities in the region;

.....

[In 2010,] Judge Skillman upheld several of the regulations, however, such as the elimination of reallocated present need, id. at 500–02 (reasoning COAH possessed the authority to focus on municipalities' own obligations, see N.J.A.C. 5:97–2.4, rather than reallocating excess present need away from those overburdened with substantial housing)... In re Ocean County, supra., at 14-19

The above quotations clearly show that the Appellate Division fully understood the history and meaning of Present Need. Not once in its detailed discussion of the history of Present Need did it attempt to redefine Present Need. Thus, contrary to Kinsey’s assertion that “the Appellate Division spelled out a two-pronged standard for quantifying the Identified Present Need,” Kinsey Report, July 21, 2016, p. 3, the court did no such thing.

Moreover, on three separate occasions, the Appellate Division acknowledged that the Supreme Court had provided guidance to lower courts on how to calculate fair share obligations, including referencing the Supreme Court’s guidance on Present Need. See In re Ocean County, supra., at 8, 39, 41 and Footnote 12. The Appellate Division’s understanding of the Present Need – particularly when combined with the Supreme Court’s guidance on the Present Need in Mount Laurel IV, 221 N.J. at 31 – extinguishes the legitimacy of the claims by the intervenors that the Appellate Division intended to create a new definition of Present Need that would include a retrospective analysis in addition to a point in time analysis. Clearly, the Appellate Division never intended to create such a separate and discrete methodology to calculate the Gap and reintroduce it into a newly defined Present Need.

In addition, an examination of the laws the Appellate Division reviewed also demonstrates that it had a clear understanding that the approach to Present Need has always included a point in time analysis, and never included the retrospective analysis that the intervenors now seek to incorporate into the definition of Present Need. Thus, as the above quotes reveal, in Round 1, COAH picked a fixed point in time – “July 1, 1987” – and defined the Present Need based upon a snapshot at that point. In Round 2, COAH “used the same methodologies employed in the First Round Rules,” which means again it picked a point in time (July 1, 1993) and based its calculations on a snapshot at that point. See N.J.A.C. 5:93-2.1, -2.2

and Technical Appendix A; see also N.J.A.C. 5:93-4.3 and Appendix A and Appendix C. COAH took the same point in time approach in Round 3. See N.J.A.C. 5:97-2.2 and Appendix A. Consistent with this approach, every expert in the instant case has picked a point in time (July 1, 2015) and defined the Present Need as the number of lower income households residing in deficient or overcrowded housing units at that point in time.

The New Jersey Supreme Court in Mount Laurel IV embraced the position that the Appellate Division took with respect to the definition of Present Need, and provided clear guidance to lower courts as to how they were to approach the determination of Present Need. Mount Laurel IV, supra., at 31. Indeed, the Appellate Division recognized as much, stating that “the Supreme Court did not include a new methodology for calculating additional housing obligations during the gap period.” In re Ocean County, supra., at 39. Instead, as described by the Appellate Division, the Supreme Court:

[R]easserted that “previous methodologies employed in the First and Second Round Rules should be used to establish present and prospective statewide and regional affordable housing need.” Id. at 30 (emphasis added). As a result, municipalities were required to demonstrate to the court computations of housing need and municipal obligations “based on those methodologies.” Ibid. In re Ocean County, supra., at 40 (emphasis in original).

It is therefore abundantly clear that the Appellate Division had a full and complete understanding of the established definition of Present Need, and, following the direction of the Supreme Court, made clear that “[r]equiring municipalities to undertake a retrospective ‘separate and discrete’ additional calculation for affordable housing need does not follow the First or Second Round Rules. It mandates an entirely new obligation unauthorized by the FHA.” Id. at

43. It therefore cannot be credibly argued that the Appellate Division intended to redefine Present Need.

**POINT III – ADOPTING THE INTERVENORS’ INTERPRETATION  
OF THE APPELLATE DIVISION’S DECISION REQUIRES  
THIS COURT TO MAKE NEW POLICY**

As previously indicated, during the pendency of this matter all parties submitted calculations of Present Need and claimed to have done so in a manner consistent with the Prior Round methodology. Now, the intervenors seek to redefine their treatment of the Present Need in direct contravention of the guidance by the Supreme Court and the positions strenuously advocated by their own experts. To do so, each has to argue that the Appellate Division sought to create new policy by either: A) modifying the Prior Round methodology for calculating Present Need, or B) ignoring the Supreme Court’s requirement that calculations of Present and Prospective Need be based upon Prior Round methodologies. In other words, to justify their position, their experts now argue that the Appellate Division somehow authorized them to calculate Present Need in a manner inconsistent with Mount Laurel IV and/or the Prior Round methodology. Indeed, FSHC admits as much when it states “[a]dmittedly the calculation required to effectuate the Appellate Division’s direction differs from that calculation previously used by COAH.” FSHC Letter Memorandum dated July 21, 2016, p. 4.

Clearly, this urging to make new policy is as patently erroneous and legally unsustainable because this court and the Appellate Division are both bound by the Supreme Court and the FHA. The Appellate Division specifically and repeatedly pledged its deference to each. Indeed, the Appellate Division took great care **not** to redefine the Present Need in a way that would result in the addition of a separate and discrete calculation to the traditional definition of Present Need.:

A court-imposed “separate and discrete” retrospective gap-period calculation, on top of a town's existing and present and prospective fair share affordable housing obligations, would amount to the Court acting as a replacement agency for COAH, and would contravene the Court's unwillingness to decide unresolved policy issues relating to replacement Third Round Rules. Id. at 41.

Since COAH has never defined the Present Need so as to include a retrospective category in any of the Prior Round methodologies, this Court should not do so.

In sum, the Appellate Division clearly found that the FHA did not permit the imposition of a retrospective obligation. The intervenors’ interpretation of the holding, if embraced by this court, would require this court to ignore each and every principle holding and theme of the Appellate Division decision, completely disregard the Prior Round methodologies and create new affordable housing policy never before adopted by COAH or the courts.

**POINT IV – THE APPELLATE DIVISION FOUND THAT THE  
CALCULATION OF PRESENT NEED ALREADY ACCOUNTS FOR  
THE GAP PERIOD**

An examination of just the language relied upon by the intervenors reveals that, even with this limited focus, there is no legitimate basis to redefine the Present Need to include the Gap.

The language of the Appellate Division’s opinion reads as follows:

As Mr. Reading candidly acknowledged, “[low- and moderate-income] households formed during the gap period may no longer represent an affordable housing need due to a variety of reasons including death, changes in income, increase or decrease in household size, retirement and/or relocation outside of New Jersey.” However, he also stated that housing need from the gap period would be “partially included” by those living in “over[ ]crowded or deficient housing units that are encompassed in the new calculation of [p]resent [n]eed.” Therefore, the scope of present need should be dictated by **identifiable** housing need characteristics as found by the reviewing Mount Laurel judge when examining the evidence presented. In this context, the focus remains—as it has for the last forty years—on the constitutional obligation of realistically affording opportunities for construction of a municipality's

fair share of present and prospective need for low- and moderate-income housing. Id. at 51-52. (emphasis supplied).

Thus, the Appellate Division specifically embraced Reading's position that some of the LMI households created during the Gap Period would be identified and captured in Present Need, so long as they were living in "overcrowded or deficient housing units."

As detailed below, Econsult, Reading and hence the Appellate Division all referred to these lower income households that came into existence during the Gap Period and reside in deteriorated or overcrowded units as of July 1, 2015, as the "identified" households. The Appellate Division did not once discuss any other overlap between the Gap Period and Present Need – its discussion was limited to the "identifiable" need as articulated by Reading and Econsult. Of note is the fact that neither Reading nor the Appellate Division came up with the position on their own that these "identified households" would become part of the Present Need. Both before the Ocean County trial court and this court, and at the Appellate Division, the Township as well as the Ocean County municipalities specifically argued that the Present Need **already included** the "identified households" formed during the Gap. This was specifically noted by the Appellate Division. See In re Ocean County, supra., at 5.

It was and always has been the Township's position that some of the lower income households that came into existence during the Gap Period reside in deteriorated units as of July 1, 2015, and therefore are counted in the Present Need. This was confirmed by Reading, who initially observed that some households formed during the Gap may no longer be in need of housing "due to a variety of reasons including death, changes in income, increase or decrease in household size, retirement and/or relocation outside of New Jersey." However, to the extent that any such families are living in "overcrowded or deficient housing units" ("identified" or

“identifiable” households), they are captured by the Present Need calculation as determined under the Prior Round methodology. In re Ocean County, supra., at 24.

The intervenors go to great lengths to define the meaning of “identifiable housing need.” The term “identifiable need,” however, is a term of art that was first coined by Econsult, then adopted and acknowledged by Reading and finally embraced by the Appellate Division. More specifically:

- On Page 4 of Econsult’s December 8, 2015 Report, which was before both the Ocean County court and the Appellate Division, Econsult states that LMI households having come into existence during the Gap do not represent an **“identifiable need”** if they are living in sound housing (conversely, they would represent an **identifiable need** under Present Need if they were living in deficient housing): “Those LMI households that are living in sound housing units as of the beginning of the upcoming period do not represent an **identifiable affordable housing need** for that period, regardless of when they were added to the state’s population.” See December 8, 2015, Econsult report at 4 (emphasis added showing the basis for the Appellate Division’s reference to “identifiable” or “identified need”).
- In this same December 8, 2015 Report, on page 7, Econsult first introduced the examples of the different types of households having formed during the Gap Period, but that may have found decent housing, moved, died, received more income, etc. When discussing those types of LMI households not living in deficient units, Econsult stated: “[Such a household would] not represent an **identifiable need** for the upcoming cycle within the Present Need and Prospective Need framework set forth in the FHA. This is confirmed by straightforward logic – since the household currently resides in a sound housing unit, construction or rehabilitation of an additional unit of affordable housing is not required to accommodate it.” Id. at 7 (emphasis added showing the basis for the Appellate Division’s reference to “identifiable” or “identified need”).
- Econsult again reaffirmed this principle in its February 8, 2016 Report (P-5), which was before this court, the Ocean County court and the Appellate Division on pages 6-7, rendering it even more clear the meaning of the term “identifiable need” in the “Categories of Affordable Housing Need:” **“ESI uses the term ‘identifiable existing need’ and ‘FHA framework’ to distinguish theoretical definitions of housing ‘need’ from those identified as relevant to the calculation of affordable housing need and obligations under the Fair Housing Act,**

**pursuant to the Mt. Laurel constitutional obligation.** Individuals may vary on which households they would personally describe of as ‘in need’ of housing, and any of a number of standards, including cost-burden, could be reasonably introduced into such a conversation. **Fortunately, there is a clear standard and precedent as to which households do and do not constitute affordable housing need for which there is an obligation...** *Id.* at 6.

The Econsult report goes on to describe the **current housing circumstances** of the incremental LMI households added to New Jersey within this Gap Period in relation to the Present Need and Prospective Need framework:

- If they are LMI households currently living in deficient housing in New Jersey, those new households are captured within Present Need.
- **If they are LMI households currently living in adequate housing in New Jersey, they do not represent a currently “identifiable need.”** *Id.* at 7.

The Appellate Division then goes on to discuss 1) the municipal position as to the overlap between the Gap and the Present Need; 2) Econsult’s position as to the overlap between the Gap and Present need, specifically referencing “identifiable need” in that context; and 3) Reading’s position as to the overlap between the Gap and Present need, specifically referencing “identifiable need” in that particular context.

As better described by the Appellate Division:

Mr. Reading stated:

[The unmet need arising during the gap period] was discussed in terms of the disposition of [low- and moderate-income] housing needs that existed ... in the past. These households would be partially included by the [low- and moderate income] households in over[ ]crowded or deficient housing units that are encompassed in the new calculation of [p]resent [n]eed. Those [low- and moderate-income] households that have occupied sound (non-deficient) housing units are already [in] housing and **would not represent an identifiable need**. Some [low- and moderate-income] households formed during the gap period may no longer represent an affordable housing need due to a variety of reasons including death, changes in income, increase or decrease in household size, retirement



and/or relocation outside of New Jersey. ... Although it may be possible to generate an estimate of such a residual need, such an estimate would be speculative. [(Emphasis added).]

...

Econsult provided a comprehensive methodology for establishing the 1987–1999 prior round obligations, the 2015 present need, and the 2015–2025 prospective need. Econsult's methodology did not include calculations for the gap period. Econsult critiqued Dr. Kinsey's two alternatives. As to the first alternative, Econsult maintained essentially that gap-period low- and moderate-income households living in deficient housing would be encompassed in present need, while low- and moderate-income households living in adequate housing would not represent an identifiable need. As to the second alternative, Econsult reiterated its position that present need and prospective need combine to represent the entire fair share need of, in its opinion, Dr. Kinsey's calculation of retrospective or gap-period needs. Id. at 24, 26.

In the very next paragraph, the Court went on to again acknowledge that Reading agreed with Econsult's conclusion that some LMI households formed during the Gap would be identified and captured in Present Need:

In his February 17, 2016 report, Mr. Reading ... acknowledged that all parties agreed low-and moderate-income households were formed during the gap period and have secured housing, some of which were deficient or overcrowded, which would be reflected in present need. Id. at 26-27.

The term “identifiable need” as used by the court is particularly relevant: not only did the Appellate Division specifically point out that municipalities argued that some of the Gap need is identified and captured via Present Need; not only did the Appellate Division specifically highlight that Reading agreed; not only did the Appellate Division take the time to outline Econsult's' position; but also it specifically borrowed the term “identifiable” from its description of Econsult's position to make a very, very important distinction. “Identified” or “Identifiable” refers to the **only portion** of the opinion where this term is defined or given any context: specifically, with respect to Econsult's and Reading's position as to the overlap between Present

Need and the need arising from lower income households that came into existence during the Gap Period. The **ONLY** overlap discussed at all, in the entire opinion, and described specifically as “identifiable need,” refers to LMI households having formed during that Gap that are today -- at “present” -- residing in deficient housing.

That distinction provides insight as to what the Appellate Division meant when it included the two isolated passages that give rise to this dispute:

Therefore, the scope of present need should be dictated by **identifiable** housing need characteristics as found by the reviewing Mount Laurel judge when examining the evidence presented. In this context, the focus remains—as it has for the last forty years—on the constitutional obligation of realistically affording opportunities for construction of a municipality's fair share of present and prospective need for low- and moderate-income housing. Id. at 51-52 (emphasis added)

.....

(7) **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 53 (emphasis added).

Thus, the Appellate Division is simply and clearly stating that Gap Need “can” be identified and accounted for in the context of Present Need, so long as those LMI households are at present residing in deficient households as defined by the Prior Round methodologies and the Supreme Court in Mount Laurel IV. Accordingly, the Appellate Division found that the calculation of Present Need already accounts for any Gap Period need that remains unfulfilled. Thus, no additional obligation can or should be added to Present Need.

**POINT V – REDEFINING PRESENT NEED AS REQUESTED  
BY THE INTERVENORS REQUIRES THIS COURT TO IMPERMISSIBLY  
ENCROACH UPON THE LEGISLATURE’S AUTHORITY**

Nothing in the plain language of the FHA or the legislative history provides any basis for the argument that the Legislature intended to authorize a redefinition of Present Need to incorporate a retrospective component. The very foundation for both the municipalities’ appeal and the Appellate Division opinion was that the Legislature has defined the obligation, and it is not the role of the courts to redefine that obligation in a manner inconsistent with the plain language and intent of the FHA.

In this regard, the Appellate Division provided the following guidance which bears on this pending legal issue:

We emphasize that under our tripartite system of government, **the imposition of a new retrospective calculation, designed to establish affordable housing need during the gap period—a new methodology that essentially addresses “unresolved policy details of replacement Third Round Rules”—is best left for consideration by the Legislative and Executive branches of government**, where public policy issues associated with such an additional “separate and discrete” obligation can be fairly and fully debated in the public forum. The Legislature may craft new legislation addressing any gap period between housing cycles if that is the course it wishes to take. In re Ocean County, supra., at 8-9 (emphasis added)

The Appellate Division did not say a retroactive calculation is not acceptable with respect to Prospective Need under the FHA, but is with respect to the Present Need. Rather, it made clear that the imposition of **any** retroactive obligation is inconsistent with the FHA. It is inconsistent with the FHA if imposed under Prospective Need and it is inconsistent with the FHA if imposed under Present Need because any retroactive component “would inevitably add a new requirement not previously recognized under the FHA.” Id. at 35.

The intervenors attempt to persuade this court that “present” really means “past” need under the FHA. They seek to persuade this court that the Appellate Division, in stressing the plain meaning of the statute and deference to the Legislature, really meant that “present” presumes a retroactive obligation for the Gap Period. This court should reject such a farfetched argument out of hand. Indeed, the Appellate Division was clear that this was not the case:

Importantly, during the sixteen-year gap period, the Legislature amended the FHA twelve times. It did not amend the FHA, however, to require a retrospective determination of gap-period obligations. Failure to so amend the FHA does not amount to Legislative authorization to retroactively adopt a new methodology for calculating affordable housing gap-period needs, even if COAH's un-adopted Third Round Rules sought to encapsulate the gap period. See GE Solid State, *supra*, 132 N.J. at 312–13 (rejecting that the Legislature's failure to interfere with an administrative interpretation is proof that the agency's interpretation conforms with legislative intent or establishes legislative acquiescence); see also Airwork Serv. Div., Div. of Pac. Airmotive Corp. v. Dir., Div. of Taxation, 97 N.J. 290, 296 (1984) (explaining that administrative acquiescence is only relevant when “the Legislature's intent cannot otherwise be determined by a critical examination of the purposes, policies, and language of the enactment”). *Id.* at 34-35.

Again, the Appellate Division closed the door on the argument now advanced by the intervenors by barring the “establish[ment of] a new methodology that imposes retrospective calculations for determining affordable housing needs during the gap period, which would be in addition to satisfying prior round unmet present and prospective obligations[. This] is best left for consideration by the Legislative and Executive branches.” *Id.* at 45. Indeed, even if COAH resuscitated and sought to impose such an obligation, the Appellate Division has made clear that this would exceed the authority the FHA conferred on COAH, just as the Supreme Court had ruled that COAH exceeded the authority the Legislature had conferred on COAH to use a growth

share approach to determining the Round 3 obligations. See generally In re Adoption of N.J.A.C. 5:96 & 5:97 by N.J. Council on Affordable Housing, 215 N.J. 578 (2013).

If this was not clear enough, the Appellate Division emphasized the point again:

In sum, to impose a gap-period requirement would inevitably add a new requirement not previously recognized under the FHA. The Supreme Court has cautioned courts not to become a replacement agency for COAH in promulgating substantive rules. Rather, based on COAH's inaction, courts must work within the provisions of the FHA and should employ the first and second round methodologies to determine a municipality's compliance with its Mount Laurel obligations. Until COAH adopts Third Round Rules, or until the Legislature acts, **the courts may not act as a legislature** by imposing new, substantive obligations not recognized under the FHA. Id. at 35-36. (emphasis supplied).

.....

Whether to establish a new methodology that imposes retrospective calculations for determining affordable housing needs during the gap period, which would be in addition to satisfying prior round unmet present and prospective obligations, is **best left for consideration by the Legislative and Executive branches**. Id. at 45. (emphasis supplied).

Ultimately the intervenors seek to redefine Present Need in a manner contrary to the way the Legislature ever intended it to be defined and contrary to the way that COAH ever defined it. Indeed, they seek to define it in a way that the Legislature never authorized by imposing a retrospective obligation onto Present Need, an imposition that the Appellate Division specifically prohibited as outside the scope of the FHA. Nothing in the plain language of the FHA, the legislative history or any other source of extrinsic aid provides any basis for the proposition that the Legislature intended to authorize a redefinition of Present Need to incorporate a retrospective component. Thus, any decision by this court to impose such a retrospective obligation onto Present Need improperly encroaches upon the exclusive province of the Legislature.

**POINT VI – INTERVENORS SEEK TO IMPROPERLY INCLUDE  
COST-BURDENED HOUSEHOLDS IN PRESENT NEED**

The intervenors' efforts to have this court increase the Present Need obligation requires this court to improperly include cost-burdened households in the Present Need calculation. See FSHC Letter Memorandum dated July 21, 2016, p. 3-4; Kinsey Report dated July 21, 2016, p. 11-12; Bernard Report dated July 21, 2016, p. 3. They support this position by arguing that the Appellate Division's decision somehow has created two components of Present Need: 1) Indigenous Present Need and 2) Identified Present Need. See Kinsey Report dated July 21, 2016, p. 2. Nowhere in the Appellate Division's decision does the court state as much, and to conclude that this was the holding strains credibility, a full reading of the opinion, and flies in the face of the court's overall reasoning and ultimate decision, as outlined above. Despite this, the intervenors maintain that "LMI HHs living in newer overcrowded housing" and "LMI HHs paying more than 28 percent of income for homeowners or 30 percent of income for renters" are to be added to the Present Need obligation as "Identified Present Need." Kinsey Report dated July 21, 2016, p. 11-12. Thus, aside from the estimated 0.6% of LMI HHs formed during the Gap Period living in overcrowded housing built since 1965, the overwhelming majority of the purported Identified Present Need are the cost-burdened. This is completely contrary to the Prior Round methodology.

It is curious that, when FSHC sought to criticize an aspect of Econsult's analysis, it stated "we do not affirmatively seek the opportunity to go further down the path of addressing issues that have no basis in the Prior Round methodology and amount to novel and incorrect explorations in statistics that are detached from law." See Bernard Report dated July 21, 2016, Appendix 4 (FSHC letter dated February 10, 2016, p. 3). Now that the intervenors perceive an

opportunity to inflate the need and increase municipal obligations, however, they are all too willing to do so.

FSHC concedes that the Supreme Court has firmly established that “the Fair Housing Act vests in COAH the responsibility for determining whether identifiable financially-needy households are to be considered in the calculation of indigenous or regional need for affordable housing.” FSHC Letter Memorandum dated July 21, 2016, p. 7 (quoting In re Twp. of Warren, 132 N.J. 1, 14-15 (1993)). Contrary to the suggestion that this leads to the conclusion “that allocations of fair share obligations may include consideration of households that have not found homes they can afford,” id., the Supreme Court was making abundantly clear that this was a policy decision that the FHA authorizes COAH to determine. COAH has consistently decided in no uncertain terms that cost-burdened households are to be excluded from the fair share obligation. This court is required to follow this long established policy.

The intervenors and their respective experts all assert that many New Jersey households are cost-burdened. Further, the existence of cost-burdened households, and their purported increase in magnitude, is attributed by the intervenors to the administrative failings of COAH, and represent an “identifiable” unsatisfied affordable housing need from the Gap Period. They then attempt to quantify the number of cost-burdened households from the Gap Period, and consider all of them to represent Identified Present Need.

Preliminarily, all parties are in agreement that, as previously noted by Bernard, “the prior round methodologies do not include any households in the need because they are cost-burdened.” Bernard Report dated January 26, 2016, p. 12. In fact, starting with AMG Realty vs. Warren Township, 207 N.J. Super. 388 (Law Div.1984), continuing through each round (and proposed round) of COAH’s methodology, and affirmed in Mt. Laurel IV, it has been universally held that

cost-burdened households do not fall with the Present Need, and have never been a factor in the quantification of the need. The Supreme Court in Mt. Laurel IV addresses the subject of cost-burden as follows:

Five, in addressing the first iteration of the Third Round Rules, the Appellate Division also approved the “exclu[sion of] the cost burdened-poor from the present need or rehabilitation share calculation. In so doing, the appellate panel noted that pre-FHA courts had also allowed exclusion of the “cost-burdened poor” from the fair share formula. The court found that COAH’s decision to exclude the cost-burdened poor was a permissible exercise of discretion. Mt. Laurel IV, supra., at 45.

The potential inclusion of cost-burdened households in the fair share need was considered at length and rejected by Judge Serpentelli in AMG Realty, supra. The AMG opinion includes a comprehensive and well-reasoned explanation for the exclusion of cost-burdened households from the quantification of fair share need, including both practical/methodological considerations and conceptual reasons. As the court explained:

In the first instance, it must be recognized that many people do not fully report their income. Second, there are many people who by choice are willing to pay a disproportionate amount of their income for housing. Third, there is a considerable housing "mismatch." On the one hand, some rental units which meet the affordability standards are occupied by families not in a lower income category. On the other hand, lower income families are occupying units which they cannot afford. If the families and units could be matched up, more affordable units, particularly for moderate income households, could be occupied by needy families. Fourth, it must be recognized that many people of retirement age have developed substantial assets which allows them to acquire homes. However, based upon their reported income, they could nonetheless fall into the category of financial need at least within the Mount Laurel II definition. Fifth, some argue that the needs of lower income households can be met more appropriately through income maintenance programs or other extended rent supplement programs rather than the construction of new housing. Sixth, many families in financial need are occupying substandard units thereby creating a duplication in the count of present need. For all of these reasons, it is most difficult to develop a trustworthy count of financial need which should be satisfied through Mount Laurel solutions. In summary, notwithstanding that there is some unmet need, the untrustworthiness of



the data and the desire to avoid questionable assumptions compels me to not incorporate this category. AMG Realty, supra., at 423 (emphasis supplied).

Taken together, the variety of reasons set forth in the AMG decision illustrate why the incorporation of cost-burden into the fair share methodology is both unreliable from a calculation standpoint (instances 1, 3 and 6 above) and undesirable from a conceptual standpoint (instances 2, 4 and 5 above).

### **Cost-Burden: Calculation Problems**

Judge Serpentelli offers several reasons that the cost-burden calculation is methodologically problematic within the fair share calculation, including misreported income, duplication with the Present Need, and what he terms the “housing mismatch.” The issue of duplication with the Present Need has been addressed at length in Point IV, supra., and does not require additional comment, other than to note that the AMG Realty decision clearly recognizes that duplicative counting involving households already captured in Present Need is indeed possible and should be avoided.

Data offered by Bernard in his December 2015 report on the Gap Period illustrates the concept of “housing mismatch.” That report includes the following table on the proportion of households in various income bands that Bernard believes to be cost-burdened in 1992 and 2011:

<b>Income (% of Median)</b>	<b>Percentage of Cost Burdened Households</b>	
	<b>1992</b>	<b>2011</b>
<b>&lt;30%<sup>3</sup></b>		<b>80.1</b>
<b>&gt;30 and &lt;50%</b>	<b>68.0</b>	<b>83.2</b>
<b>&gt;50 and &lt;80%</b>	<b>30.0</b>	<b>61.7</b>
<b>&gt;80 up to 100%<sup>4</sup></b>	<b>14.2</b>	<b>46.0</b>

Bernard Report, December 2015, p. 4

Two clear points emerge from this statistical comparison. First, **not all LMI households are cost-burdened, and not all cost-burdened households are LMI.** According to Bernard’s calculations, 80 percent of households in the lowest income band are cost-burdened, 83 percent in the “>30 and <50%” of median income band are cost-burdened, and 62 percent of households in the moderate income band “>50 and <80%” are cost-burdened. Thus, many but not all LMI households are cost-burdened. Further, the data shows that 46 percent of households in the “>80 up to 100%” of median income band, which do not qualify as LMI, are cost-burdened (by inference, it is likely that some households above the median income are cost-burdened as well). This is important from a calculation standpoint because it indicates that cost-burden and LMI are not interchangeable – a given household that is in one category is not by definition in the other. Instead, as described in AMG Realty, there is a considerable “mismatch.” From the standpoint of incremental LMI households emerging during the Gap Period, the overlap with cost-burden is indeterminate.

Second, the chart shows that **the rate of cost-burden has increased far more rapidly for those households that are not LMI than for LMI households.** According to Bernard’s own calculations, the cost-burden proportion among households in the “>80 up to 100%” of median income band, who do not qualify as LMI, more than tripled between 1992 and 2011. Thus, while the intervenors present these data as evidence that COAH’s administrative failures are responsible for the increase in cost-burdened households, the data in fact show that the incidence of cost-burden has risen most rapidly for non-LMI households who are outside of the purview of COAH and the fair share framework.<sup>3</sup> Clearly, therefore, the cost-burdened status of

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<sup>3</sup> It should of course also be noted that the time period chosen covers seven years of the prior round, and that affordable housing has continued to be produced since 1999, further undermining the connection between the data presented and COAH’s administrative failings.

New Jersey's households are not solely tied to the effectiveness or ineffectiveness of the COAH process. Indeed, broader economic forces (such as the Great Recession that occurred during this period) are likely far more consequential. The attempt to attribute increases in cost-burden among LMI households to COAH's administrative failings is without basis, even in the data relied upon by the intervenors.

From an empirical standpoint, the questions of causality and attribution are impossible to disentangle. It simply cannot be determined exactly how many households would be in a different condition had COAH proceeded differently. What is clear, based on information presented by the intervenors' own experts, is that not all LMI households are cost-burdened, not all cost-burdened households are LMI, and that the rate of cost-burden among non-LMI households appears to be growing faster than the rate of cost-burden among LMI households. As indicated in Reading's report, any "residual need" arising out of the Gap Period as a result of cost-burden thus appears to "defy empirical calculation." See Reading Report, December 29, 2015, p. 15.

These facts clearly demonstrate that cost-burden impacts households both within and outside of the LMI segment of the population, and by definition impacts households entirely outside of the Mt. Laurel process. As a result, it cannot be said that these statistics (which show a lower increase in cost-burden among LMI households as compared to non-LMI households) serve as evidence of the consequences of COAH's failures.

On the contrary, as indicated by Econsult, "[e]mpirically, the question of the attribution of the increase in cost-burden to COAH's failings defies any practical calculation.... It is impossible to 'rewind the clock' and determine the extent to which housing development would

have been altered” had COAH successfully implemented rules in 1999. An appropriate analysis would have to address, at a minimum, questions such as:

- how many deed-restricted units would have been built during the Gap Period?
- how many fewer market rate units would have been built due to the financial implications of fair share requirements?
- how many private sector market units would have been displaced by deed-restricted activity?
- where and at what quality would these units have been built?
- what effect would these changes have had on local real estate markets?

These represent just a sampling of questions that would have to be addressed. The full range of implications is simply not known, and can only be answered speculatively due to the dynamic rather than static nature of housing markets. See Econsult Report, March 24, 2016, p. 25 (P-7).

The intervenors and their experts do not attempt to address these questions. They simply estimate the net increase in LMI households during the Gap Period, and attempt to determine households which were not “satisfied,” all of which represents cost-burdened households, and considers all of those households to represent Identified Present Need. There is no further effort to prove causality by COAH’s inactivity. This is understandable because attempts to determine the proportion of those identified households who are cost-burdened due to the failings of COAH would be entirely speculative. Conceptually, however, this omission is highly problematic, since the explicit rationale advanced for including these households in the first place is that they have been harmed by COAH’s administrative failings. Ignoring this attribution issue implicitly assumes that all of the cost-burdened Gap households would have been satisfied under a functioning COAH process, and have thus been directly harmed by COAH’s failings. This implicit assumption is made without any supporting evidence or empirical basis, and should be disregarded.

Instead of considering these factors, the intervenors and their experts choose to ignore them, and simply seem to assume as established fact a causal connection between COAH's administrative failings and the increase in cost-burdened households. According to Kinsey, "[t]he sharp increases in cost-burdened LMI HH are evidence of the repeated failures of COAH to adopt and enforce constitutional housing obligations." Kinsey January 6, 2016, Supplemental Report on Gap Period Need, p. 9. Bernard goes further and asserts that "all the housing needs of lower and moderate-income households have been ignored for 16 years." Bernard Report dated July 21, 2016, p. 4 (emphasis in original). These assertions have simply not been proven. Nevertheless, they continue to assert that the "need" attributed to cost-burdened LMI HHs should be added as Identified Present Need. Moreover, in answer to the question "What portion of the incremental LMI households emerging from the Gap Period that are cost-burdened are estimated to comprise this category?", the intervenors would apparently answer "all of them," as every cost-burdened incremental LMI household from 1999-2015 is included as "Identified Present Need" in their retrospective calculation.

Clearly, the intervenors have failed to demonstrate that cost-burdened LMI HHs should be included as Identified Present Need. The substantial case law, from AMG Realty through Mt. Laurel IV, which clearly and rightly exclude cost-burden from consideration in the calculation, undermine the very premise of this assertion. In addition, they have failed to demonstrate or offer any credible calculation on the degree to which COAH's administrative failures during the Gap Period have caused the current cost-burden circumstances of LMI households emerging during the Gap Period.

## **Cost-Burden: Conceptual Problems**

Judge Serpentelli also held that cost-burden is conceptually problematic as a part of the fair share calculation:

First, some people choose willingly to pay a larger percentage of their income on housing costs than industry standards say they “should” pay, most likely based on the value they place on housing as an amenity. This can be a matter of personal choice, and not a public policy issue, as people value goods, such as housing, differently from one person to another. It therefore does not imply that these people (LMI or not) are “in need” of housing. Further, the efforts by the intervenors to determine “cost-burden” do not account for all factors associated with housing decisions. Most notable among these is transportation costs. It may be rational and indeed less expensive for a person choosing between two housing options to pay a higher proportion of their income on housing in order to live close to their place of employment or close to public transit in order to save on transportation spending. Bernard opines that no one would “choose” to do this, but offers no data, proof or evidence to support his opinion. Indeed, he concedes that “we have no way of measuring choice.” Bernard Report July 21, 2016, p. 10. No proof is presented because, again, this type of lifestyle choice is not quantifiable. Any attempt to do so is pure speculation. Thus, the number of households that are in decent housing, but are “cost-burdened,” is not indicative of housing “need” requiring intervention.

Second, Judge Serpentelli rightly notes some households that appear in the cost-burden calculation may be retirees that have substantial housing assets already accumulated, and are not in need of housing. Bernard postulates that these seniors may someday need these assets “for an emergency,” such as paying for health care. Bernard Report dated July 21, 2016, p. 10. Although that may be true in some instances, the Mt. Laurel doctrine was never intended to provide

households with a comfortable retirement. Rather, in determining whether these households represent a “need,” the clear implication is that the methodology used to determine municipal obligations should not encourage the construction of homes for households that do not need them.

Finally, and most fundamentally, Judge Serpentelli rightly observes that the needs of cost-burdened lower income households may be “met more appropriately” through remedies other than the construction of new housing. This distinction goes to the heart of the conceptual problem with attributing a housing need to LMI households from a prior period who currently live in sound units. The intervenors concede that “...between 1999 and 2015...most low and moderate income households found sound housing...” Bernard Report dated July 21, 2016, p. 11. Above and beyond the fact that there is no legal basis in the FHA to attribute a need to these households, there are coherent policy reasons for not mandating such an additional housing obligation on top of the Present Need and Prospective Need. Constructing additional housing for people who **already have** adequate housing would be a waste of society’s scarce resources. Further, the mandated additional housing could easily impact the private market, driving many existing housing units to vacancy and demolition. In short, cost-burdened households do not suffer from a lack of housing. As indicated by Econsult, “while these households have an **income** need, they do not have a **housing** need, and thus any remedy is outside of the fair share affordable housing framework.” Econsult Report, March 24, 2016, p. 90 (P-8). The AMG Realty decision recognized this very point explicitly in its exclusion of the cost-burdened from the quantification of the need. The attempt to apply a housing solution to the income problems of Gap Period cost-burdened LMI households through the fair share process therefore directly contradicts the AMG opinion.

Aside from the legal precedent that universally excluded cost-burdened households, when COAH set forth rules for the calculation of Round 1 fair share obligations in 1987, it did the same. Indeed, it specifically excluded cost-burdened households from the Present Need, and in fact did not utilize cost-burden anywhere as a consideration in the fair share methodology. When commenters to the Round 1 rules objected to this determination, COAH explained its rationale as follows:

COMMENT: In determining need, the Council should include those households who are spending a disproportionate amount of their income on housing.

RESPONSE: The Council decided that present need should be a measure of low and moderate income households residing in deficient housing. Moreover this determination reflects the Council's statutory obligation to adopt criteria which make fulfillment of the municipal obligation realistically possible. To include within this estimate those low and moderate income households paying a disproportionate share of their income for housing would have resulted in a need that was beyond the possibility to implement during the six year certification period or during any period in the foreseeable future. Those households spending a disproportionate amount on sound housing exhibit an income problem as opposed to a housing problem. Moreover, the Council's definition of need is in keeping with the court's approach to low and moderate income housing need. See 18 N.J.R. 1529.

COAH thus directly considered and rejected the inclusion of cost-burdened households in not only the Present Need but in the entire fair share calculation. In doing so, it explicitly referenced consistency with the court's approach to this issue. Further, it referenced the statutory obligation (derived from the FHA) to make the fulfillment of the obligations "realistically possible," as opposed to "impossible to implement" as part of its rationale for choosing not to incorporate cost-burden households.

The policy determination to exclude cost-burden has been maintained by COAH in subsequent rounds and has been challenged through the legal process, where it has been found



permissible. See Mt. Laurel IV, supra. Thus, the question of whether cost-burden is a consideration within the fair share methodology has been explicitly considered, in detail, by both the courts and COAH, and has been rejected. This court must do the same, and refuse to include cost-burdened households in the Present Need calculations.

Further, and equally importantly, Gap Period households are not prospective. They exist as of today. It may be true that had Prospective Need been calculated at some point in the past, those households may have been included in that calculation. The fact remains, however, that as of today, these households currently have housing. In this regard they are in the same position as are LMI HHs formed before 1999 that currently exist. The courts and COAH have each considered whether cost-burdened LMI HHs should be included as part of the Present Need for affordable housing, as it exists today, along with those LMI HHs living in inadequate housing units. In each case, the answer has been no.

In summary, the increase in cost-burdened households in New Jersey represents the primary argument put forward by the intervenors as to how incremental LMI households emerging during the Gap Period and living in sound housing represent a currently “identifiable,” additive affordable housing need that should be added to the Present Need. As detailed above, this concept is without basis in precedent, unquantifiable (in particular as it relates to its relationship with COAH’s administrative failings), and has been previously considered and universally rejected by the courts and COAH for sound policy reasons. By all accounts, cost-burden has never been a consideration in the fair share methodology, let alone as a factor to justify a retrospective calculation based on a Prospective Need methodology to be added to Present Need.

The same parties who have heretofore argued that the Prior Round methodology is unassailable, and must be followed as exactly as possible, are now advancing the cost-burden as a relevant factor, despite its exclusion from Prior Rounds. Indeed, the standard suggested appears to be that cost-burden is a relevant consideration for those incremental LMI households emerging between 1999 and 2015, but for no other households before or after that time, even though those households are indistinguishable with regard to their current housing circumstances. As articulated in AMG Realty, cost-burden defies appropriate quantification within the fair share methodology, and therefore should be excluded from consideration. Moreover, as clearly noted by Judge Serpentelli in AMG Realty, there are a number of policy reasons why, even to the extent that cost-burden is quantifiable, it should not serve as a consideration in the fair share methodology. Including this broad category of households in the Present Need is certainly not a policy that has been advanced or required as part of any fair share methodology, and therefore should not be adopted by this court.

**POINT VII – IN THE EVENT THIS COURT DETERMINES IT MUST RECALCULATE PRESENT NEED AS REQUESTED BY THE INTERVENORS, THE CALCULATIONS USED BY THE INTERVENORS ARE INCORRECT**

In the event this court determines that it must recalculate Present Need in the manner requested by the Intevenors, the calculations set forth by Kinsey and Bernard fail to appropriately and accurately satisfy even the standard they have created. As indicated in the accompanying report prepared by Econsult in response to the Kinsey/Bernard calculations, which is incorporated herein by reference, their new methodology is flawed in a number of significant ways, resulting in unreliable calculations of Identified Present Need.

The Kinsey/Bernard methodology first calculates the incremental growth in LMI households over the Gap Period. It then calculates the proportion of LMI households in each

housing region, which they deem to have “identifiable housing needs,” including those LMI households that are cost-burdened and those that live in overcrowded but not old housing units. They then multiply this proportion by their calculation of incremental household growth in each region and define the result as the regional “Identifiable Present Need,” which is then allocated to municipalities based on the same allocation factors utilized elsewhere in the methodology for the allocation of Prospective Need.

As more fully described in the Econsult report, several clear methodological flaws exist in this approach, including:

- The calculation does not in fact identify households formed during the Gap Period who are currently cost-burdened. Instead, it identifies the incidence of cost burden among all LMI households in New Jersey, many of which formed prior to the Gap Period, and applies it to the net household growth. Neither Kinsey nor Bernard present any data specific to the current housing conditions of households formed during the Gap Period.
- Kinsey introduces an entirely new measure of housing deficiency, units which are overcrowded but not old, which is not recognized in any prior COAH calculation.
- By both Kinsey’s and Bernard’s own admission, the calculation represents a clear double count with the “indigenous present need” (i.e. the Present Need calculated in accordance with the Mount Laurel IV directive to follow the prior round methodology) to which it is meant to be added. They do not deny this overlap but seek to justify it by suggesting a change to the compliance regime through which Present Need has always been able to be satisfied.
- Kinsey and FSHC determine (absent any justification or citation) that “identified present need” like “re-allocated present need” represent an obligation to be fulfilled by new construction activity. Despite this, Kinsey’s methodology does not combine this obligation with the Prospective Need obligation for 2015-2025 and subject this combined obligation to the 20% cap on municipal new construction obligations, as would be appropriate.
- Despite their similar approaches, Kinsey and Bernard reach highly divergent results as to the “Identifiable Present Need” for Region 3 and for South Brunswick. These contradictory results at the regional and municipal level undermine Bernard’s claim that the results of his analysis are “remarkably close”

to those produced by Kinsey and demonstrates the unreliability of their methodology, since they reach wildly divergent conclusions.

As a result of these flaws in methodology, the intervenors propose an Identified Present Need that ranges anywhere from 723 to 1,512, ***representing an incredible 109% difference***. See Econsult Report, August 16, 2016, p. 15, Table 1. Any methodology that results in such wildly different conclusions cannot be accurate or reliable.

Indeed, the final results of this entire exercise in attempting to justify and calculate an Identified Present Need serve to emphatically reinforce the conclusions of both Judge Serpentelli and Reading, both of whom stated:

...it is most difficult to develop a trustworthy count of financial need which should be satisfied through Mount Laurel solutions. In summary, notwithstanding that there is some unmet need, the untrustworthiness of the data and the desire to avoid questionable assumptions compels me to not incorporate this category. AMG Realty, supra., at 423.

These practical difficulties and the dynamic, rather than static, nature of the housing market defy an empirical calculation of the affordable housing needs remaining from past years. Although it may be possible to generate an estimate of a residual need, such an estimate would be speculative....  
Reading Report, December 29, 2015, p. 14-15.

The untrustworthiness of the data, the questionable assumptions made by Kinsey and Bernard, the practical difficulties inherent in the housing market and the speculative nature of the estimates derived therefrom all lead to the inescapable conclusion that such estimates should be rejected as unreliable.

## CONCLUSION

For the foregoing reasons, it is respectfully requested that the court find that the Appellate Division did not redefine Present Need to include a retrospective obligation from the Gap Period. Even if it did, such a holding violates the FHA, the Prior Round methodology and the Supreme Court's holding in Mt. Laurel IV. Moreover, any attempt to calculate such an obligation results in speculative, unreliable, highly divergent estimates which should be disregarded. As a result, there is no need to recalculate or in any way add to the Township's Present Need obligation previously determined by the court.

Respectfully submitted,

TOWNSHIP OF SOUTH BRUNSWICK

*s/ Donald J. Sears*

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Donald J. Sears

Dated: August 16, 2016