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Planning Board of Township of Wayne

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION – PASSAIC COUNTY

IN THE MATTER OF THE :
APPLICATION OF THE TOWNSHIP :
OF WAYNE, a Municipal Corporation :
of the State of New Jersey, and the :
PLANNING BOARD of the :
TOWNSHIP OF WAYNE, :
Plaintiffs/Petitioners. :

DOCKET NO. PAS-L-2396-15

Civil Action

(Mt. Laurel)

**NOTICE OF MOTION FOR ORDER
GRANTING EXTENSION OF
TEMPORARY IMMUNITY FROM
EXCLUSIONARY ZONING SUITS
PREVIOUSLY GRANTED TO THE
TOWNSHIP OF WAYNE**

TO: SEE ATTACHED SERVICE LIST

PLEASE TAKE NOTICE that on Friday, September 30, 2016, the undersigned attorneys for Plaintiff/Petitioners, the Township of Wayne ("Wayne"), and the Planning Board of the Township of Wayne ("Planning Board"), of Passaic County, shall make

application to the Superior Court of New Jersey, Law Division, Passaic County, before Hon. Thomas F. Brogan, J.S.C., for an Order as follows:

1. Granting Wayne and the Planning Board an extension of the temporary immunity from third party lawsuits and preventing any exclusionary zoning actions (a/k/a builder remedy suits), from proceeding through the latter of December 15, 2016, or the date of the Case Management Conference next following December 15, 2016, or such other time as the Court deems appropriate.

2. Granting such other and further relief as the Court deems just and equitable in the matter.

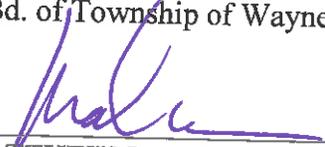
In support of the applications contained herein, Wayne and the Planning Board shall rely upon the Certification of Caroline Reiter, P.P., AICP, from the firm of Christopher P. Statile, P.A., Professional Engineers & Planners, as well as the Brief in support of the applications of Wayne and the Planning Board.

Oral argument is specifically requested in connection with the applications contained herein.

FIORELLO, PUCCIO & FIORELLO LLC
Attorney for Plaintiff/Petitioner Township of Wayne

By: 
JOHN FIORELLO

CAVALIERE & CAVALIERE, P.A.
Attorney for Plaintiff/Petitioner
Planning Bd. of Township of Wayne

By: 
MATTHEW J. CAVALIERE

DATED: August 31, 2016

Wayne Twp Mt. Laurel DJ Action Service List Rev 2016-08-31 Page 1

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Wayne Twp Mt. Laurel DJ Action Service List Rev 2016-08-31 Page 2

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Vergano, Hon. Christopher P. Mayor Township of Wayne 475 Valley Road Wayne, New Jersey 07470-3582	Margiotta, Paul V. RMC Municipal Clerk Township of Wayne 475 Valley Road Wayne, New Jersey 07470-3582	Bellet, Neal Municipal Administrator Township of Wayne 475 Valley Road Wayne, New Jersey 07470-3582

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SUPERIOR COURT OF NEW JERSEY
LAW DIVISION – PASSAIC COUNTY
DOCKET NO. PAS-1-2396-15

IN THE MATTER OF THE :
APPLICATION OF THE TOWNSHIP :
OF WAYNE, a Municipal Corporation :
of the State of New Jersey, :
Plaintiff/Petitioner. :

Civil Action
(Mt. Laurel)

**CERTIFICATION IN SUPPORT OF
MOTION TO EXTEND IMMUNITY
FROM EXCLUSIONARY**

ZONING

ACTIONS

CAROLINE REITER, P.P. AICP, OF Christopher P. Statile, PA, Professional Engineers and Planners, 3 Fir Court, Oakland, New Jersey 07436, of full age, does hereby certify and say as follows:

1. I am a licensed professional planner, licensed to practice in the State of New Jersey. I attach my current curriculum vitae.
2. My professional practice includes a significant amount of Mt. Laurel/Affordable Housing matters. I am currently acting as Special Planner for Mt. Laurel Matters for the above Petitioner, the Township of Wayne, and have been so engaged since in or

- about January 2016. I also serve a similar capacity for other municipalities in northern New Jersey. I was engaged as an 'outside' consultant to work with the township's planner and staff in developing the township's 'new' Third Round Mt. Laurel Plan.
3. I make this Certification in support of the Petitioner's application for an order continuing Builder's Remedy Immunity in the above matter, and to report to the Court the Township's efforts toward, and status of the Township's Mt. Laurel Plan.
 4. According to my review of the Township's file on the matter, on or about July 2, 2015, the Township filed its action for declaratory judgment, in accordance with the precepts of the New Jersey Supreme Court's ruling in IMO Adoption of N.J.A.C. 5:96 and 5:97, 221 N.J. 1 (2015) (In Re: COAH 2015).
 5. In August, 2015, the Township timely filed its motion seeking immunity from Builder's Remedy Actions, pending adoption and approval of its Plan, as permitted and addressed In Re: COAH 2015. That application contained certifications of Wayne's long time (since 1998) planner, John Szabo (who has recently retired, effective the end of June, 2016) dated 07-2-15 and 07-31-1507-31-15, and various exhibits. Mr. Szabo's certification and the exhibits are incorporated herein by reference.
 6. That application for immunity was granted by the Court, by way of a series of Orders of the Court (Judge Thomas F. Brogan, PJSC, presiding) dated 10-21-15, 11-09-15 and 11-20-15. Those orders also granted Intervenor status to several parties.
 7. That immunity was further addressed and continued by way of Case Management Order dated 02-03-16. As of the 02-03-16 Order, there were three (3) Intervenors who were granted Intervenor status: AvalonBay (contract purchaser of the 'Kearfott' property), Wayne Property Holdings, LLC (owner of the GAF property) and K. Hovnanian (contract purchaser of the Rockledge property).
 8. The 02-03-16 Order also appointed Christine A. Nazzaro-Cofone as the Court's Special Master.

Status of the Statewide, Regional and Municipal Mt. Laurel Obligation Determination.

9. As of this Certification date, the methodology to be used to determine, and the actual determination of, the statewide Mt. Laurel obligation has not yet been established. Thus Wayne's Mt. Laurel obligation has not yet been defined, and as a result, its Plan cannot yet be finalized.
10. Wayne Township is one of approximately 290 municipalities that pooled their resources and engaged an expert, Econsult to study the matter and produce a report recommending an appropriate methodology and appropriate Mt. Laurel obligations. Originally the municipal consortium group had commissioned Rutgers University (Dr. Robert Burchell), Center for Urban Policies, but Rutgers bowed out as a result of health problems that arose for Dr. Burchell. Another study, prepared by Dr. David Kinsey, was commissioned by the Fair Share Housing Center. As of this writing, these are the two studies (as revised) which address methodology and determination of Mt. Laurel Obligation that are being presented for consideration by the Courts.
11. Several litigations, mostly lying in mid-Jersey, are currently taking place which are intended to address the state-wide obligation methodology, and there is currently one litigation (which addressed the question of the so called gap period during which the Mt. Laurel Third Round Rules were to have been adopted and implemented) which was recently decided by the Appellate division, (In Re Declaratory Judgment Actions Filed by Various Municipalities, County of Ocean, Pursuant to the Supreme Court's Decision in In Re Adoption of N.J.A.C. 5:96, Docket No. A-3323-15T1 (N.J. App. Div. 2016)) and which is now on its way to the New Jersey Supreme Court. and therefore the Township, like the balance of the State, is not in a position to define its prospective need obligation.
12. The Planning Community expects that, ultimately, the determination will not be final until reviewed by the New Jersey Supreme Court, and thus none of the municipal plans will be able to be finalized, in a real sense, until then.

Wayne Township Prior Obligation, and Previously Proposed Third Round Plan

13. As set forth in Mr. Szabo's certifications of 07-2-15 and 07-31-15, Wayne Township's Mt. Laurel Plan has been under the auspices of COAH since the mid-1990s. Its initial, First Round repose was by way of Court Order dated 09-10-1993, later amended by Order dated 03-20-1995 reflecting amendments to the Plan Certified by COAH. Following the 1993 Order, the township submitted itself to COAH and has remained under COAH, uninterrupted, since that time.
14. Wayne's initial Third Round Plan was timely submitted to COAH in 2005, ('2005 Third Round Plan') following COAH's adoption of the Third Round Rules. In 2008, COAH substantially revised its Third Round Rules, and in response, Wayne timely submitted to COAH its revised Third Round Plan ('2008 Third Round Plan'). Objections were filed by several interested parties, who sought to be included in the Plan, and thus, following various mediation and related, Wayne revised its Third Round Plan ('2010 Third Round Plan'), which revision received the endorsement of COAH staff, and was awaiting consideration by the COAH Commissioners when Courts invalidated the then COAH Third Round ('Growth Share') Rules.
15. The 2010 Third Round Plan reflected a Third Round prospective need obligation of 394 units and a present (formerly known as 'rehabilitative') need obligation of 23 units. The 2010 Plan also reflected a prior round (Second Round 'Sub Cert' having been granted by COAH on 07-10-1996) prospective need obligation of 1,158 units and a present need (formerly called "Rehabilitation Need") of 59 units. The Plan also reflected that Wayne had been granted (by COAH, and then approved by the Court) a Vacant Land Adjustment ('VLA') of 265 units which effectively reduced the township's prior round prospective need obligation to 893 units. COAH regulations required, and COAH determined that Wayne had fully "addressed" (in other words, satisfied) the "Unmet Need" otherwise created by the granting of the VLA by implementing other Affordable Housing mechanisms that were permitted under COAH Rules.

16. Thus, the 2010 Plan reflected that Wayne had fully satisfied, and in fact ‘over-satisfied’, its prior Round obligation and had a credit of 98 age-restricted units available to be applied toward the Third Round obligation.

17. The 2010 Third Round Plan called for the following:

a. Group Homes	20 units
b. Application of credits from Prior Rounds	98 units
c. Municipal sponsored housing project	185 units
d. Bonus credits for rental units	<u>91 units</u>
e. Total	394 units

18. Significantly, the proposed municipally sponsored housing project was to be located on a tract of land owned by Wayne and located on Route 23 North.

19. While Wayne’s Plan was awaiting action by the COAH Commissioners, the Court disallowed the Third Round Rules. COAH failed to adopt replacement rules, and, in March 2015, the New Jersey Supreme Court ordered that, unless and until COAH took action, or the Legislature took action, the Courts would become, and would be, the primary body to address municipal compliance with municipal Fair Share obligation.

Wayne Township’s Efforts Since Last Case Management Order

20. Wayne created a Mt. Laurel Plan Committee consisting of the Mayor, Wayne’s Director of Planning and Zoning, Wayne’s Director of Public Works, attorneys Fiorello and Cavaliere, Wayne Council President, and the undersigned. That committee has been meeting regularly, usually twice a month, throughout the year.

21. Wayne has continued to participate in the Municipal Consortium Group and its efforts to settle upon the appropriate methodology to determine the Third Round need amounts.

Major Set Backs—Loss of The Wayne Route 23 Property

22. During the prior phase of the Mt. Laurel Third Round (i.e. prior to the invalidation of the Growth Share Rules), the Township had included in its plan, and proposed, a Township-owned and sponsored, affordable housing development to be located on

Route 23 North, near the West Belt roadway. That project was the main feature of the Plan and was intended to consist of 185 affordable units; the units were intended to be rental units, which, under COAH Rules, would have also been entitled to bonus credits.

23. In preparation for development of the Route 23 site, the Township had previously sought and obtained from the NJ DEP a freshwater wetland delineation (LOI) of that site, and undertook other various preparations for development of that project. During the delay in resolving upon the Third Round Rules, the LOI expired. Following usual procedures for municipal engagement of professional services, in late 2015, Wayne engaged an engineering and architectural firm, LSEA Corporation, 150 River Road, Bldg. E, Suite E2, Montville, NJ, to prepare engineering plans for development of the site. In conjunction with that engagement, Wayne also engaged a wetlands expert, Amy Greene, to re-study the property as part of an intended application to the NJ DEP for a new LOI. That process required several months.
24. Also during the time period during which the Third Round Rules were in flux, the NJ DEP (following the lead of FEMA) revised its flood mapping for the State, largely as a result of the 2012 Superstorm Sandy.
25. The new LOI study for the Rt. 23 site found that the amount of the wetlands on the site had significantly increased. In addition, and very significantly, a large amount of the property became designated as flood zone under the post-superstore Sandy rules. The combination of the additional wetlands and the additional flood plain substantially decreased the amount of the site that was eligible to be used for development.
26. As a result, in April of this year, and after months of work and substantial expense, the engineering study revealed that there was too little developable property, and too low of a housing unit yield, to be meaningful or practical, and the site had to be abandoned from consideration in the Township's current Mt. Laurel Plan. In as much as the Route 23 property was the major feature of the township's intended Third Round Plan, this presented a very major setback to the township's efforts.

Major Set Backs—Illness & Retirement

27. For many years, the township's primary attorney for Mt. Laurel matters has been John Fiorello. Mr. Fiorello became township attorney in the mid-1990's at the tail-end of Wayne's First Round. Even after leaving that position, he continued as Special Mt. Laurel Counsel, and represented the township in its Second and Third Round Plans, and was heavily involved in helping to formulate those plans. In December, 2015, he suffered an injury that caused a serious health problem, and which required hospitalization, surgery, an extended convalescence, and a doctor ordered slow and limited return to work. As a result, Wayne all but lost the benefit of Mr. Fiorello from March until June; he was permitted to resume work but only on a limited basis.
28. In early June, 2016, just as Mr. Fiorello was returning to work, John Szabo, Director of Planning and Zoning, announced he would retire effective at the end of June.
29. Mr. Szabo had been the township's planner since 1998, and was the chief architect of the township's various Third Round Plans and was and was expected to be the chief architect of the 2016 Third Round Plan. He had been charged with the primary responsibility for development of the 2016 Third Round Plan. Mr. Szabo retired as announced, and to date the township is sans a Planner. Assistant Planner, Linda Lutz, who heretofore had not been involved in the township's Mt. Laurel Plan(s), was named Acting Planner in or about early August, 2016.

Wayne Township's New Project—Valley Road Extension

30. Upon the loss of the Wayne Route 23 Project, Wayne moved immediately to re-assess its position. The Township undertook a study of all other municipal-owned properties for the purpose of identifying and evaluating possible replacement properties. This evaluation also included various Wayne owned properties that had been listed on Wayne 'ROSI' inventory, (Recreation and Open Space Inventory) including investigation of removal of properties from the ROSI Inventory (which would have to be approved by the State.) After several weeks of study, the Township was preliminarily satisfied as to the feasibility and wisdom of utilizing a site located on the

Valley Road Extension near Nevins Road and therefore authorized engineering work to continue on that feasibility study.

31. That property consists of approximately 10 acres and is not on the township's ROSI Inventory. The Township, (after utilizing the State required RFP process) engaged Whitman Engineering of Cranbury, NJ to evaluate the property and prepare development plans. That evaluation was fairly involved, time consuming and expensive.
32. After determining that the property was feasible, various development configurations were generated and evaluated, and only within the last two weeks, the determination was made as to the viability of including the property, and a particular configuration, in the 2016 Plan. As currently envisioned, that development will be a municipally sponsored, all-Mt. Laurel project and will yield approximately 200 rental units, including a section devoted to special needs housing.
33. At the same time, and in conjunction with the evaluation of the Valley Road property for inclusion in the Plan, Wayne contacted, and consulted with several other towns and otherwise gathered information as to the similar projects developed in those towns. To that end, Wayne also contacted and consulted with a major non-profit agency to begin discussions for development and/or operation of a portion of the planned development by a specialist non-profit organization. Those talks are continuing. The identity of the agency is not public, and therefore, upon advice of counsel, is not identified herein, but instead is offered to be disclosed in-camera to the Court and/or Special Master, if directed by the Court.

Wayne Township's Efforts Since Last Case Management Order—VLA

34. A significant component to Wayne's 2016 Third Round Plan will be the township's Vacant Land Adjustment ("VLA"). VLAs were recognized and permitted under COAH's Second Round Rules, were continued as part of the COAH Third Round Rules, and were not part of the Third Round Rules that were disallowed by the March 2015 Supreme Court Ruling. *In the Matter of the Adoption of N.J.A.C. 5:96 and 5:97 by 11 the New Jersey Council on Affordable Housing*, 221 N.J. 1 (2015). It has been

generally agreed within the Planning Community that the VLAs continue to be available.

35. The VLA analysis in a municipality as large (25+ sq. miles) and as diverse as Wayne township is a significant, and time consuming process and which required identifying and assessing all qualifying vacant land parcels and as well as non-vacant parcels that are ripe for redevelopment. The analysis included determining environmental and other development constraints for each potential parcel. That evaluation is in its final stage and is expected to be submitted to the Court's Special Master for review within the next two to three weeks along with Wayne's progress report to Master, which will include potential affordable housing mechanisms proposed by the Township.

Submission of Matrix to Court's Special Master & Mediation with Intervenors

36. In accordance with the Court's Case Management Orders, the township submitted its Third Round Matrix to the Court's Special Master for review.
37. In accordance with the Court's Case Management Orders, the township, and the three (3) Intervenors met for mediation with the Court's Special Master, Christine A. Nazzaro-Cofone. That mediation took place with Ms. Cofone on April 7, 2016. In attendance were various attorneys and representatives of Intervenors AvalonBay, K-Hovnanian, and Wayne Property Holdings (GAF). AvalonBay and K-Hovnanian presented and discussed proposed plans for inclusion of their respective properties in Wayne's 2016 Plan. GAF advised, at that time, that it did not have any specific plan either generated or 'in mind'.
38. Since that time, Wayne has been advised by the owners of the Kearfott property, which had been under contract of sale to AvalonBay, that the AvalonBay contract had expired, was not renewed by the owner, and that the property owner had decided to, and was preparing to move forward with a plan to use the property consistent with its present commercial zoning. The owner advised that inclusion of the property in Wayne's 2016 Plan was no longer a consideration. As a result, there have been no further discussions with AvalonBay.
39. Discussions have continued in earnest with K-Hovnanian and with GAF.

40. In response to critique offered by the township, K-Hovnanian has submitted revised plans for the Rockledge property, which plans are considered by the township to be in serious consideration for Plan inclusion.
41. The township has had on-going meetings and communications with GAF, which continue to date. GAF generated proposed development plans for the property which were presented and assessed by the township. Based upon critique offered by the township and further discussions with GAF, GAF is currently revising its plans and has advised the township to expect the revisions before the end of this month. That plan was received on August 24th, and is now being reviewed,

Consideration of Other Properties

42. The township has also had, and continues to have, serious and on-going, meetings and communications with several other owners and/or contract purchasers of several significant township located properties for the purpose of exploring inclusion of their properties in Wayne's 2016 Plan. The identities of the properties and/or parties are not public, and therefore, upon advice of counsel, are not identified herein, but instead are offered to be disclosed in-camera to the Court and/or Special Master, if directed by the Court.
43. Those property owners have provided preliminary concept plans and discussions are continuing in earnest.
44. The township believes that the combination of the above will permit it to satisfy its Third Round Mt. Laurel obligation.
45. I 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.

Dated: 8/29/16

Caroline Reiter
CAROLINE REITER

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION – PASSAIC COUNTY

IN THE MATTER OF THE
APPLICATION OF THE TOWNSHIP
OF WAYNE, a Municipal Corporation
of the State of New Jersey, and the
PLANNING BOARD of the
TOWNSHIP OF WAYNE,
Plaintiffs/Petitioners.

DOCKET NO. PAS- L-2396-15

Civil Action

(Mt. Laurel)

BRIEF IN SUPPORT OF MOTION OF THE
TOWNSHIP OF WAYNE TO EXTEND IMMUNITY
FROM EXCLUSIONARY ZONING ACTION

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Planning Board of Township of Wayne

JOHN FIORELLO, ESQ.
On The Brief

INTRODUCTORY STATEMENT

This Motion seeks an Order continuing the Mt. Laurel builder's remedy immunity of Wayne pursuant to and in accordance with IMO the Adoption of *N.J.A.C. 5:96 & 5:97* By COAH, 221 N.J. 1(2015). This request seeks continuation of immunity consistent with the requests that have been generally made by other municipalities similarly situated and which have been granted in other vicinages throughout the State.

Since the last occasion when the Court addressed the status of Wayne's efforts to develop a "new" Third Round Mt. Laurel Plan, and despite several serious setbacks as well as the fact that the State wide Mt. Laurel obligation, and hence Wayne's obligation, remain unsettled and the subject of ongoing litigation, some of which ("gap period" issue) are currently before the New Jersey Supreme Court for determination. Wayne has continued to demonstrate good faith and has continued to move forward to develop its Third Round Plan. More importantly, in terms of meeting the criteria for continued immunity, there is no set of facts that is presentable by any party that would defeat the presumption in favor of immunity that is enjoyed by the Township of Wayne.

PROCEDURAL HISTORY AND STATEMENT OF FACTS

The Court is respectfully referred to the CERTIFICATION IN SUPPORT OF MOTION TO EXTEND IMMUNITY FROM EXCLUSIONARY ZONING ACTIONS OF CAROLINE REITER, P.P. AICP, Wayne Township's Mt. Laurel Planner, wherein she sets forth the operative procedural history and facts supporting Wayne's application for an extension of immunity.

ARGUMENT

POINT I

THIS COURT HAS AN OBLIGATION, AS A MATTER OF LAW, TO PRESUME THAT THE TOWNSHIP AND ITS PLANNING BOARD ARE ACTING "FAIRLY AND WITH PROPER MOTIVES AND FOR VALID REASONS," THEREBY IMPOSING THE BURDEN ON ANYONE WHO WOULD CHALLENGE THESE GOVERNMENTAL ENTITIES TO OVERCOME THE PRESUMPTION OF VALIDITY TO WHICH THEY ARE ENTITLED.

A. *Presumption of Validity*

Courts must presume that a municipality "will act fairly and with proper motives and for valid reasons." *Kramer v. Bd. of Adjustment, Sea Girt*, 45 N.J. 268, 296-97 (1965); *see also Fanelli v. City of Trenton*, 135 N.J. 582, 589 (1994). In matters involving local land use and zoning issues, "the ultimate interests of effective zoning will be advanced by permitting the action of the municipal officials to stand, in the absence of an **affirmative showing** that it was **manifestly an abuse of their discretionary authority.**" *Ward v. Scott*, 16 N.J. 16, 23 (1954). "Even when doubt is entertained as to the wisdom of the action, or as to some part of it, there can be no judicial declaration of invalidity in the absence of **clear abuse of discretion by the public agencies involved.**" *Id.* At 23; *Reinauer Realty Corp. v. Paramus*, 34 N.J. 406, 416 (1961).

B. *An Interested party Who Would Seek To Divest The Township And Planning Board of Immunity Has The Heavy Obligation to Overcome the Presumption To Which These Governmental Entities are entitled.*

A "natural corollary to the presumption of validity of governmental action" is that "the objector must carry the burden of demonstrating" that the municipal body acted in bad faith. *Berninger v. Bd. of Adj. of Midland Park*, 254 N.J. super. 401, 407 (App. Div. 1991)

aff'd sub nom, *Beringer v. Bd. of Adj. of Bor. Of Midland Park*, 127 N.J. 226 (1991) (emphasis added); see also *Cell South*, 172 N.J. at 81 ("Because a board's actions are presumed valid, the party 'attacking such action (has) the burden of proving otherwise.") (quoting *New York SMSA Ltd. P'ship v. Bd. of Adj. of Tp. of Bernards*, 324 N.J. Super. 149, 163 (App. Div.) certif. denied, 162 N.J. 488 (1999)).

In consequence of the foregoing, it is submitted that the Court has an obligation to presume that the Township of Wayne and its Planning Board are acting "fairly and with proper motives and for valid reasons." Anyone who would contend otherwise has a heavy burden of proof to overcome.

POINT II

PURSUANT TO MOUNT LAUREL IV AND OTHER WELL-ESTABLISHED LEGAL PRINCIPLES, THIS COURT CAN ONLY "WITHDRAW" THE TOWNSHIP'S IMMUNITY IF AN INTERESTED PARTY OR INTERVENOR CARRIES ITS BURDEN BY PROVING THAT WAYNE TOWNSHIP IS "DETERMINED" TO BE CONSTITUTIONALLY NONCOMPLIANT."

Consistent with the principles established in Point I, the purpose of the FHA and COAH's longstanding rules and policies, the Supreme Court made very clear in Mount Laurel IV that it would only permit litigation against a municipality as a last resort. In this regard, the very purpose of the FHA is to resolve exclusionary zoning issues **without litigation**. See *N.J.S.A. 52:27D-303* (providing that "the State's preference of the resolution of existing and future disputes involving exclusionary zoning is the mediation and review process set forth in this act **and not litigation**"). (emphasis added). Accordingly COAH's regulations effectively protected towns from exclusionary lawsuits unless an objector proved egregious municipal conduct so extreme as to warrant

"accelerated denial of substantive certification." See *N.J.A.C.* 5:91-10.2. In all cases, the burden lies upon a challenger to overcome the presumption of validity and good faith afforded to all municipalities.

Consistent with these principles, the Supreme Court ruled that a municipality would have to demonstrate that a municipality "abused" immunity to warrant losing it.

We repose such flexibility in the Mount Laurel-designated judges in the vicinages, to whom all Mount Laurel compliance-related matters will be assigned post-order, and trust those courts to assiduously assess whether immunity, **once granted, should be withdrawn if a particular town abuses the process for obtaining a judicial declaration of constitutional compliance.** Review of immunity orders therefore should occur with periodic regularity and on notice.

(Mount Laurel IV, 221 N.J. at 26 (emphasis added)).

Thus, the Supreme Court correctly placed the burden on a challenger to demonstrate an abuse that would warrant the immunity to be "withdrawn."

Indeed, the Court also assisted trial courts by defining what is meant to "abuse the process" which would call for the divestment of immunity. Specifically, the Supreme Court ruled that exposure to Mount Laurel litigation will only be considered if someone demonstrates that the municipality is "**determined to be constitutionally noncompliant.**" Thus, immunity should remain in place unless the burden is met. Specifically, the Court stated:

Beyond those general admonitions, the courts should endeavor to secure, whenever possible, prompt voluntary compliance from municipalities in view of lengthy delay in achieving satisfaction of towns' Third Round obligations. If that goal cannot be accomplished, with good faith effort and reasonable speed, **and the town is determined to be constitutionally noncompliant,** then the court may authorize exclusionary zoning actions seeking a builder's remedy to proceed against the towns either that had substantive certification granted from COAH under earlier iterations of Third Round Rules or that had

held "participating status before COAH until this action by our Court lifted the FHA's exhaustion-of-administrative-remedies requirement.

[*Id.* At 33-34]

Pursuant to this passage and the various legal principles articulated above, one thing is clear and beyond debate: Maintaining immunity cannot be conditioned on a repeated and ongoing demonstration of good faith by the municipality. In fact, the opposite is true. Immunity must remain in effect unless and until someone satisfies its burden by proving to the Court's satisfaction that the town **"is determined to be constitutionally noncompliant.** *Ibid.*

Thus, Wayne Township's immunity should remain in place and be extended absent a showing that Wayne is "determined to be noncompliant," which is entirely consistent with well-established principles of law provided above.

POINT III

NO INTERESTED PARTY HAS COME FORWARD OR MET ITS HEAVY BURDEN TO PROVE THAT WAYNE TOWNSHIP IS "DETERMINED TO BE CONSTITUTIONALLY NONCOMPLIANT."

Wayne Township filed its DJ Action on July 2, 2015. Although three developers subsequently moved to intervene in this case, none of them or any other interested party has made any kind of showing that Wayne Township is "determined to be noncompliant." Since no challenger has demonstrated that Wayne Township is determined to be constitutionally noncompliant, it is respectfully submitted that this Court should not take the radical action of stripping the Township and its Planning Board of immunity. In fact, it is respectfully submitted that the Court should extend the Township's immunity.

In any event, as explained in Point IV, no interested party can meet the heavy burden of proving that Wayne Township is determined to be constitutionally noncompliant.

POINT IV

NO INTERESTED PARTY CAN MEET ITS HEAVY BURDEN TO PROVE THAT THE TOWNSHIP IS "DETERMINED TO BE CONSTITUTIONALLY NONCOMPLIANT."

No interested party can meet the heavy burden of proving that Wayne Township is **determined to be noncompliant** because the Township is indeed determined to comply voluntarily.

As to Round 3, the Court is referred to the Certification of its Mt. Laurel Planner Caroline Reiter, submitted with the Township of Wayne's Notice of Motion for an Extension of Immunity. The Court is also respectfully referred to the Certifications of the Township's Municipal Planner John P. Szabo dated March 31, 2015 and July 2, 2015 and previously submitted to the Court as well as the facts submitted and exhibits submitted to the Court with Wayne's Notice of Motion for a grant of immunity from exclusionary zoning actions and prohibiting intervenors from contesting Wayne Township's site selections and/or methods of compliance and other relief.

The actions of Wayne as set forth in its original complaint and the Certification of its then principal planner in connection therewith as well as the Certifications and exhibits submitted to the Court in the Township's Motion for an Order Granting Immunity, which immunity was granted in the Court's Supplemental Order of November 9, 2015 as amended in its Order of November 20, 2015 wherein, initially, immunity was granted until March 15, 2016. However, in the Case Management Order of the Court dated February 3, 2016,

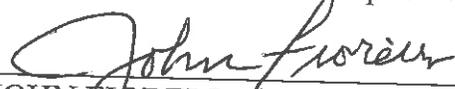
the immunity granted to Wayne from builders' remedy lawsuits or other third party lawsuits was extended through May 5, 2016.

The Township's efforts and activity to satisfy its third round Mt. Laurel obligations, have been set forth in the Certification of its Mt. Laurel Planner, Caroline Reiter, and indicate the significant actions that have been taken and are continuing on behalf of the Township.

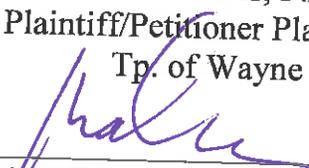
CONCLUSION

In light of the above, this Court must presume that the Township is acting in good faith. Consequently, any challenger carries the heavy burden to prove that the Township is "determined to be constitutionally noncompliant" to warrant the radical step of divesting the Township and its Planning Board of Immunity. Therefore, the Court should not divest the Township of its immunity but, instead, the immunity should be extended and the Court should permit Wayne Township to achieve compliance voluntarily. Finally, the Court should establish appropriate dates for a review of the progress of the Township of Wayne in meeting its Mt. Laurel obligations and to review the immunity granted by the Court, following notice to all interested parties.

FIORELLO, PUCCIO & FIORELLO LLC
Attorney for Plaintiff/Petitioner Tp. of Wayne

By: 
JOHN FIORELLO

CAVALIERE & CAVALIERE, P.A.
Attorney for Plaintiff/Petitioner Planning Board
Tp. of Wayne

By: 
MATTHEW J. CAVALIERE

DATED: August 31, 2016

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Attorney for Plaintiff/Petitioner
Planning Board of Township of Wayne

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION – PASSAIC COUNTY

IN THE MATTER OF THE	:	
APPLICATION OF THE TOWNSHIP	:	DOCKET NO. PAS- L-2396-15
OF WAYNE, a Municipal Corporation	:	
of the State of New Jersey, and the	:	Civil Action
PLANNING BOARD of the	:	(Mt. Laurel)
TOWNSHIP OF WAYNE,	:	<u>ORDER</u>
Plaintiffs/Petitioners.	:	

THE WITHIN matter having come before the Court on Motion by Fiorello, Puccio & Fiorello LLC (John Fiorello, Esq., appearing) on behalf of Plaintiff/Petitioner, Township of Wayne ("Township"), and Cavaliere & Cavaliere, P.A. (Matthew J. Cavaliere, Esq., appearing) on behalf of Plaintiff/Petitioner Township of Wayne Planning Board (collectively, "Township Petitioners"), for an Order extending the temporary immunity from a builder's remedy lawsuit or other third-party lawsuits until November 30, 2016, which immunity was initially granted to Wayne in the Order of November 9, 2015 and

extended in the Case Management Order dated February 3, 2016, and for good cause having been shown;

It is on this _____ day of _____, 2016, **ORDERED** as follows:

1. Wayne is hereby granted an extension of temporary immunity from a builder's remedy suit or other third party lawsuits until the latter of December 15, 2016, or the date of the Case Management Conference next following December 15, 2016.

2. A Case Management Conference will be held on _____, to address all pertinent issues.

IT IS FURTHER ORDERED that counsel for Wayne shall serve a true copy of the within Order upon all counsel/interested parties within _____ days of counsel's receipt of the Order.

HON. THOMAS F. BROGAN, PJ.CV.

PAPERS CONSIDERED

NOTICE OF MOTION
MOVANT'S AFFIDAVIT OR CERTIFICATION
MOVANT'S BRIEF
NOTICE OF CROSS-MOTION
RESPONDENT'S AFFIDAVIT OR CERTIFICATION
RESPONDENT'S BRIEF
MOVANT'S REPLY
OTHER _____

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Planning Board of Township of Wayne

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION – PASSAIC COUNTY

IN THE MATTER OF THE	:	
APPLICATION OF THE TOWNSHIP	:	DOCKET NO. PAS- L-2396-15
OF WAYNE, a Municipal Corporation	:	
of the State of New Jersey, and the	:	Civil Action
PLANNING BOARD of the	:	(Mt. Laurel)
TOWNSHIP OF WAYNE,	:	<u>CERTIFICATION OF SERVICE</u>
Plaintiffs/Petitioners.	:	

JOHN FIORELLO, of full age, certifies as follows:

1. I am an Attorney-At-Law of the State of New Jersey and I represent Plaintiff/Petitioner Township of Wayne in connection with the above referenced matter. I am submitting this Certification on behalf of the Plaintiffs/Petitioners Township of Wayne and Planning Board of the Township of Wayne.

2. I have caused to be sent to all those on the attached Service List, except those who are employees and elected or appointed officials of Plaintiff/Petitioner Township of Wayne or of the Plaintiff/Petitioner Planning Board of the Township of Wayne, letter dated August 31, 2016, sent by ordinary mail, advising that the Motion of Plaintiffs/Petitioners for an extension of immunity pending case disposition is scheduled to be heard on September 30, 2016 at 9:00 a.m., before Hon. Thomas F. Brogan, J.S.C. A copy of said letter is annexed hereto.

3. With regard to those on the Service List who are appointed or elected officials of the Township of Wayne or the Planning Board of the Township of Wayne, service has been effected via E-mail.

I 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.

DATED: August 31, 2016


JOHN FIORELLO

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FILE NO 10682

August 31, 2016

TO: ALL ON ATTACHED SERVICE LIST

RE: **NOTICE OF MOTION FOR ORDER EXTENDING
IMMUNITY OF TOWNSHIP OF WAYNE AND
PLANNING BOARD OF TOWNSHIP OF WAYNE
DOCKET NO. PAS-L-2396-15**

This is to give you Notice that the Township of Wayne and the Planning Board of the Township of Wayne have filed a Notice of Motion for an Order granting an extension of temporary immunity from exclusionary zoning suits previously granted to the Township of Wayne together with the Certification in support of the Motion of Caroline Reiter, P.P., A.I.C.P., dated August 29, 2016, Brief in support of said Motion and proposed form of Order under Docket No. PAS-L-2396-15. Copies of the foregoing documents can be obtained as follows:

The Motion and supporting documents may be downloaded from the Wayne Township website by way of the following link:

[http:// waynetownship.com/Motion to Continue Mt Laurel Immunity August 16.pdf](http://waynetownship.com/Motion to Continue Mt Laurel Immunity August 16.pdf)

or may be accessed from the township's website as follows:

Go to the Wayne township website at: www.waynetownship.com
Go to "Public Notices" (under "Quick Links" which appears on the left side of the home screen)
Look for document dated 9/xx/2016 and entitled: Motion to Continue Mt Laurel Immunity August 2016

This Notice is sent to you pursuant to the Decision of the Supreme Court of New Jersey *In the Matter of the Adoption of the N.J.A.C. 5:96 and 5:97 by the New Jersey Council on Affordable Housing, 221 N.J. 1(2015).*

Very truly yours,

JOHN FIORELLO, ESQ.
Attorney for Township of Wayne

MATTHEW J. CAVALIERE, ESQ.
Attorney for Planning Bd. of Tp. of Wayne

By: 
JOHN FIORELLO

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Presiding Judge of Civil Division
Superior Court of New Jersey
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Wayne Twp Officials/Employee List Service By Electronic Transmittal	BLANK	BLANK
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