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OF THE COMMITTEE ON OPINIONS

IN THE MATTER OF THE APPLICATION	: SUPERIOR COURT OF NEW JERSEY
OF THE TOWNSHIP OF SOUTH BRUNSWICK	: LAW DIVISION, MIDDLESEX COUNTY
FOR A JUDGMENT OF COMPLIANCE	: DOCKET NO. L-3878-15
AND REPOSE AND TEMPORARY IMMUNITY	:
FROM <u>MOUNT LAUREL</u> LAWSUITS	: **OPINION**

Decided on October 6, 2016

Donald J. Sears for the Township of South Brunswick.

Kevin D. Walsh and Adam Gordon for Intervenor Fair Share Housing Center, Inc.

Kenneth D. McPherson, Jr. for Intervenor South Brunswick Center, LLC (Waters, McPherson, McNeill, PC).

Robert A. Kasuba for Intervenor Avalon Bay Communities, Inc. (Bisgaier Hoff).

Henry L. Kent-Smith and Irina B. Elgart for Intervenor Richardson Fresh Ponds, LLC and Princeton Orchard Associates, LLC (Fox Rothschild LLP).

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WOLFSON, J.S.C.

I.   <u>INTRODUCTION</u>

After the Supreme Court determined that the adjudication of
a municipality's constitutional obligation to provide its fair
share of the region's need for affordable housing would be
removed from the Council on Affordable Housing ("COAH"), and
returned to the courts, <u>see</u> <u>In re Adoption of N.J.A.C. 5:96 &</u>
<u>5:97 by the N.J. Council on Affordable Housing</u>, 221 <u>N.J.</u> 1
(2015)(hereinafter "<u>Mount Laurel IV</u>"), designated trial courts
were once again tasked with the responsibility of calculating
the fair share obligation of any municipality that affirmatively
sought a judicial declaration that its housing element and fair
share plan satisfied its <u>Mount Laurel</u>[1] obligation.

In an effort to guide the designated trial courts in making
these determinations, the Supreme Court established specific
parameters and procedures to be followed, which included, <u>inter</u>
<u>alia</u>, the following:

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[1] <u>See</u> <u>Southern Burlington County NAACP v. Twp. of Mount Laurel</u>,
67 <u>N.J.</u> 151 (1975) (hereinafter "<u>Mount Laurel I</u>"); <u>Southern</u>
<u>Burlington County NAACP v. Twp. of Mount Laurel</u>, 92 <u>N.J.</u> 158
(1983) (hereinafter "<u>Mount Laurel II</u>"); <u>Hills Dev. Co. v.</u>
<u>Bernards</u>, 103 <u>N.J.</u> 1 (1986) (hereinafter "<u>Mount Laurel III</u>");
<u>Mount Laurel IV</u>, <u>supra</u>.

(1) Previous methodologies employed by COAH in its First and Second Round Rules should be used to calculate present and prospective statewide, regional and municipal affordable housing need, and municipalities should demonstrate to the court, computations of their respective obligations based on those methodologies; and

(2) Prior round (pre-2015) obligations were preserved and were not to be ignored or eradicated, and as such, that prior unmet need is to be used as the "starting point" for the court's ultimate determination of a municipality's total fair share responsibility. Mount Laurel IV, supra, 221 N.J. at 30; see also In Re Adoption of Hous. Element 444 N.J. Super. 163, 173 (Law Div. 2015)(Any interpretation of the Fair Housing Act and COAH regulations that ignores the prior round unmet need would be contrary to the Constitution and the Legislature's overarching intent to produce affordable housing).

The first municipality to have its fair share obligation adjudicated in this manner was South Brunswick. In Phase One of its bifurcated trial, it was necessary to develop and embrace a fair share methodology that was faithful to those clear and unequivocal mandates. To do so, I was required to draw upon the

expertise of several witnesses, all of whom identified the essential component parts of such a methodology, as well as the extrapolations needed in crafting one which adhered, as closely as possible, to the Supreme Court's directives in Mount Laurel IV, supra.

Following an eight-day trial, I issued a lengthy opinion, in which the expert testimony of Messrs. David McCue and Arthur Bernard along with that of Drs. David Kinsey and Peter Angelides was carefully analyzed. The gist of my credibility findings and substantive conclusions, which need not be recounted at length, was that Dr. Angelides was evasive, not credible, and that his proffered opinions were fundamentally flawed, inconsistent with common sense, and contrary to established COAH rules and judicial precedent. I also found as a fact that his proposed methodology, unlike that proffered by Dr. Kinsey, systematically failed to adhere to the Supreme Court's specific mandate, that "previous methodologies employed [by COAH] in the First and Second Round Rules should be used to establish present and prospective statewide and regional affordable housing need," Mount Laurel IV, supra, 221 N.J. at 30 (emphasis added and citation omitted), and as such, he was unable to "demonstrate to the court computations of housing need and municipal obligations based on those methodologies." Id. at 30.

In point of fact, I noted that Dr. Angelides' proposed methodology deviated from COAH's prior round rules on 26 separate occasions, even though comparable data was readily available, and replication was, therefore, possible. Because of these and his many other transgressions, I rejected his proffered methodology, characterizing it as a "result-oriented effort that was designed and crafted to reduce the projected prospective need on a statewide basis." See In re Application of South Brunswick for a Judgment of Compliance, No. L-3878-15 (July 21, 2016) (hereinafter the "South Brunswick Compliance" matter or the "Phase One Opinion"), slip opinion at 91.

Instead, I adopted a slightly modified version of Dr. Kinsey's proposed methodology which, in stark contrast to Dr. Angelides' approach, faithfully adhered to COAH's prior round rules. Using that methodology, South Brunswick's pre-credited prospective need obligation was calculated to be 1533 units while its present need obligation, using traditional COAH parameters, was determined to be 109 units.

However, as noted in my prior opinion, South Brunswick's gap or present need obligation was potentially subject to modification by virtue of the Appellate Division's decision in In Re Declaratory Judgment Actions filed by Various Municipalities, County of Ocean, 446 N.J. Super 259 (App. Div. 2016) (hereinafter the "Ocean County Appeal"), which was decided

after Phase One of South Brunswick's declaratory judgment case was tried, but before I issued my decision.

Finding that the "core principles" of Mount Laurel, supra, as codified by the FHA and articulated by the Supreme Court in Mount Laurel IV, supra, did not authorize "a retrospective new 'separate and discrete' affordable housing gap-period obligation," Ocean County Appeal, supra, 446 N.J. Super. at 293, the Appellate Division rejected the inclusion of a gap-period component of a municipality's prospective fair share obligation. Emphasizing that its holding "does not ignore housing need that arose in the gap period," id. at 293, that court explained that the calculation of a municipality's "present need" obligation, as distinct from its "prospective need" obligation, should encompass "low- and moderate-income households formed during the gap period in need of affordable housing," id. at 295, and that calculating the "scope" of that present need "should be dictated by identifiable housing need characteristics" as determined by the designated Mount Laurel judges "when examining the evidence presented." Id. at 294.

Based on those parameters, I invited supplemental briefing to address whether, and to what extent, COAH's traditional definition of present need had been modified or expanded by the Ocean County Appeal, and if so, whether and how any low and moderate income households that formed during the Gap Period,

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but were not already included as part of South Brunswick's indigenous need, could be "captured." Id. at 293-95.

Following those submissions, I held an evidentiary hearing to consider the issues. However, after that hearing was concluded, but before these issues were decided, the Supreme Court granted Intervenor Fair Share Housing Center's motion for leave to appeal, and in doing so, stayed the judgment of the Appellate Division, _____ N.J. _____ (2016), thereby limiting its precedential effect on the designated Mount Laurel judges.

Nonetheless, South Brunswick asserts, at least in part, that the reasoning and rationale offered in the Ocean County Appeal supports its contention that there is no gap period obligation and offers, as an alternative argument, that even if there was such an obligation, the intervenors' proposed methodology for its calculation is flawed. Both of those arguments will be addressed, respectively, below.

II. GAP PERIOD NEED

To calculate the affordable housing need that arose during the Gap Period, Dr. Kinsey employed the same methodology that he used previously to determine prospective need; a methodology that this Court substantially accepted in South Brunswick Compliance, supra, as credible, grounded in reliable data, and

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consistent with COAH's prior round methodologies.[2] By contrast, as part of a calculated effort to reduce statewide and municipal affordable housing need, Dr. Angelides impermissibly deviated from established COAH practices in his assessment of affordable housing need generated during the Gap Period.[3]

Dr. Kinsey and Dr. Angelides diverged significantly in several principal components of their Gap Period methodologies. Rather than engaging in a prolonged analysis of each step of

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[2] Dr. Kinsey's original calculations included the affordable housing need that arose during the Gap Period as part of his two part calculation of prospective need that covered both: (i) the Gap Period obligation, ranging from 1999 to 2015; and (ii) a projection of affordable housing need over the next ten years, from 2015 to 2025. Dr. Angelides' original methodology did not, although he ultimately proffered one under protest, discussed infra, as a result of my rejection of South Brunswick's initial position that no gap period obligation existed. However, after the Appellate Division rendered its judgment in the Ocean County Appeal, supra, I excluded any consideration of a Gap Period obligation in Phase One of my Opinion. Accordingly, the propriety of including a gap period component, or the methodology to be used to calculate it, was never adjudicated. Given the Supreme Court's subsequent stay of the Ocean County Appeal, the determination of whether and to what extent a gap period obligation exists, and if so, how it is to be calculated, is now ripe for adjudication.

[3] Without waiving the Township's rights to assert that neither the FHA, COAH, nor judicial precedent authorize or permit a separate and discrete gap period obligation,(an argument accepted by the Appellate Division in the Ocean County Appeal, supra, but stayed by the Supreme Court), Dr. Angelides developed and proffered a methodology to calculate the affordable housing need that arose during the Gap Period in accordance with the requirements of In re Adoption of Hous. Element, 444 N.J. Super. 163, 173 (Law Div. 2015).

their respective methodologies, this Opinion will address the primary areas of divergence, and compare their respective approaches to the Supreme Court's directives in Mount Laurel IV.

For the reasons articulated below, I am satisfied that a municipality's fair share obligation includes the affordable housing need that arose during the gap period, and that Dr. Kinsey's methodology for calculating South Brunswick's Gap Period obligation, detailed below, faithfully adheres to COAH's rules and past practices, is consistent with judicial precedent, and as such, is accepted.

A.   **Identify the Housing Region**

The first step in determining the affordable housing need that arose during the Gap Period is to identify the applicable housing region for South Brunswick. In both the First and Second Rounds, Middlesex County was located in Region 3, which consists of Middlesex, Hunterdon, and Somerset counties.[4] As illustrated in the Phase One Opinion, since both Drs. Kinsey and Angelides adopted COAH's housing region determination, South Brunswick is properly designated as part of Region 3.

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[4] See N.J.S.A. 52:27D-304(b) (defining "housing region" as a "geographic are of not less than two, nor more than four contiguous, whole counties which exhibit significant social, economic and income similarities, and which constitute to the greatest extent practicable the primary metropolitan statistical areas" as defined by the United States Census Bureau prior to the enactment of the FHA).

B.   Determine the Applicable Time Period

The second step in determining South Brunswick's fair share of the region's affordable housing need is to determine the applicable time period. The appropriate period for the purposes of the Gap Period calculation is 1999 to 2015; i.e., the sixteen-year period commencing upon the end of the projection period for COAH's Second COAH's Second Round fair share obligations – July 1, 1999 continuing through the years that COAH failed to adopt valid Third Round Rules, and culminating with the effective date of the Supreme Court's decision on March 10, 2015, reinstating jurisdiction of municipalities' fair share affordable housing obligations in the trial courts.

C.   Determine the Regional Population in 1999 and 2015

To determine the regional population in 1999 and 2015, Dr. Kinsey used the official U.S. Census Bureau total population estimates for New Jersey as of July 1, 2015. However, because COAH's prior round methodology requires a breakdown of population by county and age groups, and that breakdown data was not yet available for the 2015 year at the time Dr. Kinsey employed his methodology, Dr. Kinsey had to extrapolate for the 2014-2015 year. Dr. Kinsey chose to allocate by county and age group the estimated statewide population total for the 2015 year, based on the most recent 2014 data prepared by the U.S. Census Bureau and published by the New Jersey Department of

Labor and Workforce Development ("NJDOLWD"). Specifically, Dr. Kinsey added the most recent one-year change estimates by county and age cohort from July 1, 2013 to July 1, 2014 as a proxy for 2014-2015 population change, and then adjusted that number to ensure that the statewide totals comported with the U.S. Census Bureau's statewide 2015 population estimate.

As indicated in the Phase One Opinion, although Dr. Angelides sought to follow COAH's prior round methodology by averaging the population projections of the Historic Migration model and the Economic Demographics model, his approach is unreliable, because: (i) the Historic Migration model no longer projects population by county and age cohort; and (ii) Dr. Angelides' approach is overly dependent on a significant number of assumptions. See South Brunswick Compliance, supra, slip op. at 39.

Accordingly, the Court accepts Dr. Kinsey's determination that the regional population total in 1999 was 1,156,672 persons, and that the regional population total in 2015 was 1,300,287 persons.

D.   **Calculate Headship Rates**

The third step in determining the Township's Gap Period need is to calculate "headship rates" over the Gap Period. As illustrated in the Phase One Opinion, "a headship rate measures the probability that a person in a specific age group will form

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a household." South Brunswick Compliance, supra, slip op. at

40. Headship rates vary according to social, economic, and

demographic factors, as well as among different age cohorts. In

the Phase One Opinion, the Court indicated that Dr. Angelides

embraced Dr. Kinsey's approach for calculating headship rates as

of 2015, a time period encompassing the Gap Period. See id. at

41. Accordingly, the Court accepts Dr. Kinsey's approach to

calculating headship rates for the Gap Period.

E.   **Calculate the Low and Moderate Income Households that Formed During the Gap Period**

The fourth step in determining the affordable housing need

that arose during the Gap Period is to calculate the number of

low and moderate income households that formed from 1999 to

2015. The starting point in that calculation is to determine

the applicable income limits. In that regard, "the

establishment of low and moderate income limits is the

cornerstone for any fair share calculation . . . ." South

Brunswick Compliance, supra, slip op. at 46. In determining the

applicable income limits, the Court is guided by the definitions

of low and moderate income households provided by the FHA.

Specifically, the FHA defines low and moderate income housing as

follows:

> "Low income housing" means housing affordable
> according to federal Department of Housing and Urban
> Development or other recognized standards for home
> ownership and rental costs and occupied or reserved

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for occupancy by households with a gross household income equal to 50% or less of the median gross household income for households of the same size within the housing region in which the housing is located. N.J.S.A. 52:27D-304(c).

"Moderate income housing" means housing affordable according to federal Department of Housing and Urban Development or other recognized standards for home ownership and rental costs and occupied or reserved for occupancy by households with a gross household income equal to more than 50% but less than 80% of the median gross household income for households of the same size within the housing region in which the housing is located. N.J.S.A. 52:27D-304(d).

While FHA permits "other recognized standards" to be used to calculate income limits, according to its former Executive Director, Mr. Bernard, COAH followed the regional income limits published by HUD, along with the PUMS data, to calculate the number of low and moderate income households. See 5/11/16T 249:7-25.

Dr. Kinsey specifically used COAH's regional income limits to calculate the number of low and moderate income households that formed over the Gap Period. Indeed, when asked on direct examination how his methodology for calculating income limits compared to COAH's, Dr. Kinsey testified as follows:

MR. GORDON: And how does your calculation income limits similar to or different than the prior round methodologies calculation?

DR. KINSEY: It's identical, the same methodology. The same methodology, same data sources, same steps.

MR. GORDON: And -- and how does this differ – differ from what Econsult did?

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DR. KINSEY: Econsult took a very different approach, Your Honor. Econsult used the sample from the ACS, the PUMS data, which is very fine grained, but a sample. And it queried households and their incomes, and it calculated by region, aggregating by region, all the households by their income, and it found what was the mathematical median, half above, half below, in that region. And from that mathematical median, it then calculated what was 80 percent of the median, median household income, which under the COAH rules, and the Fair Housing Act, that definition is the top of the low and moderate income range. Although the COAH rule makes it clear that it's not the mathematical median. Rather, it's the procedure spelled out by COAH, in its rule, which relies upon HUD data and calculations that is to be used to calculate regional income limits.

MR. GORDON: Other than different from the prior round methodology, are there -- are there any other reasons why you would not adopt Econsult's approach, or – or would you adopt Econsult's approach, if it wasn't part of the prior methodology?

DR. KINSEY: No, I would not adopt -- adopt Econsult's methodology. And there are at least two reasons. First, the COAH/HUD based approach is grounded, very well grounded, in Federal and State law, in Federal and State Agency rules, or housing programs across the country. With my colleague, Alan Mallach, we did a rough calculation, an estimate of how many housing units in this country are subject to the -- the HUD family income limits, trying scrupulously not to double count. And so, we came up what's shown on Slide 27, in total about seven million units nationwide. This same chart is in my report which has the notes indicating the source of each of the data and each of the asterisks that are -- that are on the PowerPoint version here. So, I made clear where -- where we got the data for each of these numbers. So, that's the first reason. So, all these other programs use it. It's well established. And not only housing programs, but I think the U.S. Department of Veterans Affairs uses it for some disability housing benefits. There are a variety of programs. The U.S. Department of Agriculture as noted here had several housing programs. So, it's very widely used. So, that's the first reason -- that -- not reason – not using it. And then secondly, I would imagine there would be confusion by affordable housing developers, and property

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managers, if there were two different sources of data used for income qualifying households. So, if the Econsult approach is to be used for calculating need, then it would be incongruous not to use it for qualifying people for affordable housing units. However, if that were done -- I think we touched upon this last week -- it would put developers, particularly those with low income housing tax credits, at a huge risk of losing . . . .

[5/9/16T 24:8-27:1].

After defining the income limits, Dr. Kinsey relied upon actual data, using the American Community Survey ("ACS"), to determine the low and moderate income households in both 1999 and 2015. On direct examination, Dr. Kinsey explained that his use of actual data to determine the number of low and moderate income households that formed over the Gap Period was derivative of COAH's process during the 1993-94 mini-gap:

MR. GORDON: In your calculations, did you do a separate calculation for the gap period and for the next ten years?

DR. KINSEY: Yes.

MR. GORDON: And you -- and so, you are able to break out-- break out separate calculations for those --

DR. KINSEY: Yes, and using the same methodology --

MR. GORDON: Okay.

DR. KINSEY: -- the same data.

MR. GORDON: And are -- for the period that is the gap, what -- what kinds of data are -- are you using for -- I'm not asking for the specific data sources, but --

DR. KINSEY: Sure.

MR. GORDON: -- you know, broadly, what kind of data do you use for the gap period?

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DR. KINSEY: So, there, Your Honor, we have a great advantage, because the gap has already happened. So, we have actual data, what actually happened in terms of population, households, demolitions, all the key inputs to methodology. There are a few cases where we have data that only goes to 2014, not all the way to 2015. And so, figure out what's the appropriate projection for that just one year period. But there's actual data. There's two censuses, 2000, 2010 census. There are estimates made by the U.S. Census Bureau. There's a lot of actual data in it and I referred to it throughout as actual data, as opposed to projections.

* * *

MR. GORDON: And how does that use of actual data and projections data relate to this second round methodology?

DR. KINSEY: Well, again, it's exactly what COAH did, because it was looking into the future, and it also looked to the past, because it -- it was looking back to what happened. COAH -- COAH was -- developed the second round rules, second round methodology, in 1993, 1994. The second round began July 1st, 1993. But COAH did not propose second round rules until -- I believe it was a little bit later.

THE COURT: About six months later.

DR. KINSEY: In 1993, and then it had to go through a re-proposal, or chose to go through a re-proposal, and only adopted the second round rules effective June 1994. And as part of the prior -- the second round methodology, there was a recalculation of what was prospective need for the first six years, and that was called, Prior Cycle Prospective Need, and it's a component of the second round methodology.

MR. GORDON: You know, I mean, and for this prior second prospective need that COAH used -- actual data, or projective data?

DR. KINSEY: Again, it had the advantage of having -- the past having had happened. So, it used actual data on the -- the key data points of households, and secondary sources that went back and looked at what had actually transpired.

[5/5/16T 132:11-135:2].

Once he had these data points, Dr. Kinsey was able to calculate the difference over those sixteen years to determine the number of low and moderate income households that formed over the Gap Period. In that regard, Dr. Kinsey testified to his process as follows:

> MR GORDON: And -- and so, once you had these income limits established, how did you calculate how – how much the increase in low and moderate income households would take?
>
> DR. KINSEY: Well, it's a process of calculating low and moderate income households as of day one, and then in the case of the gap period, you would have actual data using the ACS to get up to the 2014 that we can use to calculate the low to moderate income households, and get in all those categories. And then we make a flat line projection for one year, 2014 to [2015], and have numbers which are aggregated by region for low and moderate income households, 2015, and we subtract low and moderate income households in 1999, and the difference is the net increase in the low and moderate income households during that sixteen year period.
>
> [5/9/16T 27:14-28:5].

By contrast, Dr. Angelides rejected COAH's approach, choosing instead to rely upon a methodology proposed by a Special Master in a case from another vicinage. This deviation from Mount Laurel IV's directive, that COAH's previously accepted methodologies be used in calculating a Township's affordable housing need, was perhaps, more than others, particularly troubling:

> MR. BUCCA: All right. And so you performed that calculation.

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DR. ANGELIDES: I did.

MR. BUCCA: All right. And how did you go about performing the gap period allocation -- the gap period analysis?

DR. ANGELIDES: So the gap period analysis, the guidance that we followed -- we did this for the Ocean County case.

THE COURT: Why would you follow an Ocean County case when I wrote an opinion that governs Middlesex County?

DR. ANGELIDES: We -- we also -- we were looking for methodology. There was a methodology in the Ocean County case.

* * *

MR. BUCCA: Where did you get this methodology from?

DR. ANGELIDES: This was the methodology suggested by Special Master Reading in the Ocean County case.

[5/3/16T 25:17-26:21].

As referenced in the Phase One Opinion, Dr. Angelides also strayed from COAH/HUD's established income limits for low and moderate income households in favor of his own, unique approach to calculating those income limits. To that end, Dr. Angelides took issue with COAH's definition of median income, arguing that it did not comport with the mathematical definition of "median," and thus, did not provide accurate results. However, the calculus that Dr. Angelides devised as a replacement for the COAH/HUD standards suffers from the same flaws as other parts of his methodology; namely, that it is inconsistent with COAH's prior round methodologies, fails to use the most recent and reliable data available, and omitted pertinent data points.

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Additionally, one of the more vexing flaws of Dr.

Angelides' Gap Period methodology was the rather remarkable

failure to account for renters:

> MR. GORDON: And what about your -- the gap period model,
> did they look at actual -- does that look at actual data on
> rents throughout the State during the gap period or does it
> just assume that the same thing happened everywhere in the
> State as to rents during the gap period?
>
> DR. ANGELIDES: That I need to check on. I don't think it's
> in here. So, I can't recall at this point.
>
>   * * *
>
> MR. GORDON: So, rent -- rental units are most of the units
> in New Jersey that are occupied by low and moderate income
> households and you can't recall how your methodology treats
> them; correct?
>
> DR. ANGELIDES: In the gap period, yes. Correct.
>
> [5/4/16T 97:15-98:10].

Given that the majority of low to moderate income households in

New Jersey, in fact, occupy rental units, Dr. Angelides' failure

to account for renters is simply inexplicable.

Moreover, his omissions extended to other areas as well.

For instance, he failed to consider the actual number of

households with significant assets, both at the start and the

end of the Gap Period, even though actual data existed to enable

those determinations to be easily made. Indeed, Dr. Angelides

admitted as much when pressed on cross-examination:

> MR. GORDON: As to the gap period calculation, did you look
> at the actual number of households with significant assets
> at the start of the gap period and at the end of the gap

period?

DR. ANGELIDES: No.

MR. GORDON: Why not?

DR. ANGELIDES: So the gap period calculation -- that's the next slide I think? No. We just used, you know, here's the number -- the incremental households and we applied the current numbers for --

MR. GORDON: I thought you testified one of the advantages or differences for the gap period was the actual data were available, correct?

DR. ANGELIDES: Yeah, that's true.

MR. GORDON: So in this case there were actual data available from the start and the end of the gap period that you didn't use, correct? For the start of the gap period that you didn't use in your calculation.

DR. ANGELIDES: That's correct.

[5/3/16T 241:1-19]

Yet another critical flaw in Dr. Angelides' methodology

results from his decision to decrease the Gap Period obligation

of South Brunswick by 2,680 houses, based on the unsubstantiated

assumption that this number of low and moderate income

households that formed over the Gap Period would be captured in

South Brunswick's present need obligation. This reduction in

Gap Period need, based on a purported "overlap," is, once again,

reflective of his pattern of departing from COAH's prior round

methodologies when doing so results in a lower obligation:

> MR. GORDON: So there is something on -- on this slide -- I think we've gone over most of the steps on this slide, but there's a -- a step on this slide that hasn't come up

before now called the -- the present need overlap.

DR. ANGELIDES: That is correct.

MR. GORDON: Could you -- could you explain -- well, first, does -- does the present need overlap apply only to the gap period?

DR. ANGELIDES: Yes.

MR. GORDON: And what is the present need overlap?

DR. ANGELIDES: Well, the idea is that a low and moderate income household that -- a net increase in low and moderate income households on the gap period that live in deficient housing would be counted in present need. So because the present need takes place at the end of the gap period, the beginning of the prospective need period. So something -- a household that exists and came into existence in the gap period and lives in deficient housing would be captured twice, once in present need and once in the gap need.

MR. GORDON: Part of the prior round methodology?

DR. ANGELIDES: No.

[5/4/16T 162:10-163:7]

Indeed, Dr. Angelides acknowledged the downward impact of

his departure:

MR. GORDON: What is the prior cycle prospective need in the second round methodology?

DR. ANGELIDES: Prior cycle -- prospective need that arose under the previous rounds.

MR. GORDON: And what were the dates for that previous round?

DR. ANGELIDES: The first round was '87 to '93.

MR. GORDON: And would there have been a present need overlap for that time period, under your theory of present need overlap?

DR. ANGELIDES: If the present need was calculated as of --

THE COURT: '99?

DR. ANGELIDES: -- '93.

MR. GORDON: About 1993, yes. Yes.

DR. ANGELIDES: Yes.

MR. GORDON: So there would have been an -- an overlap under your theory of the -- of the overlap as of 1993, but COAH did not choose to include it in its rules, correct?

THE COURT: Or exclude it.

MR. GORDON: Or exclude it. They -- COAH did not exclude the overlap in its rules, correct?

DR. ANGELIDES: That's correct.

MR. GORDON: And this -- this departure from the prior round methodology increased the gap period (inaudible) decreased the gap period, did it?

DR. ANGELIDES: Decreased.

[5/4/16T 164:2-165:8].

Dr. Angelides' deviation from COAH's prior round

methodologies was also factually confirmed by Mr. Bernard,

COAH's Executive Director during the development, drafting and

implementation of the First and Second Round Rules:

MR. KENT-SMITH: Okay. Can you describe to the Court then what other aspects of the Econsult methodology that you found questionable when you reviewed that?

MR. BERNARD: Well, questionable, the first issue, which to some extent has been corrected as Mr. Bucca pointed out, was their reluctance -- their position on the gap period.

MR. KENT-SMITH: Mmm-hmm.

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MR BERNARD: Now, they've -- they've -- they've -- they've published gap-period allocations now, but -- but along with that they have promoted a new concept that wasn't part of the prior-round housing obligation, that there's this overlap between the gap period and the present need, that in other words that these households that -- all these households that formed during that gap period, '99 to 2015, perhaps a significant – the theory -- their theory is that a significant percentage of them found -- are living in substandard housing and therefore would be picked up in present need and shouldn't be included during the -- in the gap-period calculation.

MR. KENT-SMITH: Now, you in hearing Dr. Angelides' testimony and the testimony of Dr. Kinsey were aware of this debate about this overlap in that present-need count. Can you provide this Court with your analysis and opinion regarding that overlap --

MR. BERNARD: Well, I had done --

MR. KENT-SMITH: -- if you --

MR. BERNARD: -- my own analysis several months ago and concluded that there was no significant overlap. And my analysis is -- was very --

THE COURT: That there was no significant overlap?

MR. BERNARD: No significant overlap.

* * *

MR. BERNARD: My conclusion is that there's no evidence of -- of any significant overlap at all.

[5/11/16T 236:11-237:14; 240:21-241:1] (emphasis added).

While Dr. Kinsey mirrored COAH's prior round methodology, using actual data and COAH/HUD's income limits, Dr. Angelides' declined to do so, using instead, an approach which ignored actual data, thereby rendering his methodology unreliable, inconsistent with COAH's prior rounds, and contrary to the core

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principles of the Mount Laurel doctrine. Accordingly, Dr.

Kinsey's calculation that 14,361 low and moderate income

households formed during the gap period is accepted, and will be

included as a component part of South Brunswick's fair share

obligation.[5]

**F.   Pool and Reallocate Regional Growth in Low and
       Moderate Income Households Below Age 65**

COAH's Second Round methodology included a provision for

reallocating prospective need in regions where the share of low

and moderate households over the age of sixty-five was projected

to decrease, while the share of those under the age of sixty-

five was projected to increase. See 5/9/16T 30:4-25. In that

regard, Dr. Kinsey explained that COAH previously reallocated

need for Region 3:

> DR. KINSEY: And there are also some regions that had
> substantial increases in jobs. And COAH made the choice to
> reallocate some of the growth and population of seniors
> using the standard cutoff of age sixty five to those
> regions where the younger component of the population,
> those sixty five and presumed to be more workers than in
> the over sixty five age category, had growth.
>
>   * * *
>
> DR. KINSEY: COAH did that analysis. . . . And if we look at
> region three . . . what COAH did is used the same job
> survey factor to compare the regional share of jobs based
> on ratables -- by municipality compare it to the regional
> share. And found that compared to other regions, region

_____

[5] 184,462 (2015 low and moderate income households) – 170,101
(1999 low and moderate income households) = 14,361 (the increase
in low and moderate income households over the Gap Period in
Region 3).

three was one where the below thirty five population had increased, below thirty five, low and moderate income population had increased. And so, therefore, there was a reallocation by COAH . . . .

* * *

DR. KINSEY: So, in this region, the reallocation process increased, in effect, the allocation of low and moderate income households.

THE COURT: This is what COAH did?

DR KINSEY: This is what COAH did in the second round.

[5/9/16T 30:17-31:24].

While Dr. Kinsey excluded the reallocation factor in his prospective need calculation,[6] he determined that reallocation for the Gap Period was necessary because "in the gap period there was, indeed, the change that was the concern for COAH, namely that the . . . below aged sixty five [low and moderate income] household[s] increased." 5/9/16T 32:4-8.

Conversely, despite the growth of low and moderate income households under the age of sixty-five, Dr. Angelides did not reallocate South Brunswick's Gap Period need, in direct contravention of COAH's prior round practice.

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[6] Specifically, Dr. Kinsey concluded that reallocation of prospective need was inappropriate because the share of low and moderate income households over the age of sixty-five was projected to increase from 2015 to 2025, while the share of such households under the age of thirty-five was projected to decrease.

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Accordingly, because Dr. Kinsey's approach faithfully

adheres to COAH's prior round methodologies, I have included

this reallocation as a necessary component of the approved fair

share methodology, which results in a Gap Period need, after

reallocation, of 18,179 units.

G.   Allocation Factors

The next component of the fair share methodology is to

apply the following allocation factors, used by COAH in the

Second Round, to the Gap Period need calculation:

   (1) Calculate the equalized non-residential valuation
        (ratables) factors;

   (2) Calculate the undeveloped land factor; and

   (3) Calculate the differences in household income factor.

Because I have previously analyzed the divergent approaches

taken by Drs. Kinsey and Angelides regarding these factors in

Phase One of my initial opinion, they need be addressed only

briefly, below.

**1.   Calculate The Equalized Non-residential Valuation
        (Ratables) Factors**

In its First Round, COAH used several allocation factors,

including the current covered employment and the change in that

covered employment. However, because of the "zip code problem,"

in its Second Round, COAH abandoned employment-related factors

in favor of using non-residential retables as a surrogate to

calculate employment and employment growth within a

municipality.

Dr. Kinsey adhered strictly to COAH's use of non-

residential ratables as an allocation factor in his Gap Period

approach.

> DR. KINSEY: Now, the first factor I used is the non-residential ratables change. That's what COAH used in the second round. Again, the same concept. It's the shares of the -- South Brunswick's share of the region's change was 0.0862.
>
> [5/5/16T 146:3-7].

Dr. Angelides, on the other hand, chose to ignore the use

of non-residential ratables as a surrogate for employment

growth, and instead used two employment-related allocation

factors, which he called employment level share and employment

change share, an approach which was previously rejected as

inappropriate:

> DR. KINSEY: Econsult used two factors concerning employment, not factors, not techniques, not data used by COAH in the second round, which Econsult called employment level share, and employment change share. In the numbers I've listed there for the employment level share, .44, and for employment change share, I believe Your Honor -- Your Honor commented on Dr. Angelides.
>
> THE COURT: Zero.
>
> DR. KINSEY: And I believe he was testifying that it was zero.
>
> [5/5/16T 146:8-16].

Mr. Bernard was also critical of Dr. Angelides' decision to

disregard COAH's use of non-residential ratables, explaining

that in his opinion, ratables were the best surrogate available for calculating employment and employment growth within a municipality. In particular, Mr. Bernard "questioned" Dr. Angelides' position that South Brunswick experienced zero job growth over the Gap Period, [5/24/16T 19:24-20:3], and characterized his approach as "going backwards," in a way that would revive and exacerbate many of the difficulties COAH had encountered, (including the previously discussed "zip code" problem) and sought to address and correct.

Predictably, Dr. Angelides' disregard of COAH's Second Round methodology suppressed South Brunswick's Gap Period need. While it is conceivable that COAH might, at some future time, reconsider its approach, until it does so, I am bound by the Supreme Court's directive to the designated Mount Laurel judges that COAH's previous methodologies for calculating affordable housing need, must, where it is feasible to do so, be followed. Therefore, to the extent that Dr. Angelides deviated from that framework, irrespective of the sources or reasons for doing so, that approach is at odds with, and unsanctioned by, Mount Laurel IV. Consequently, I have embraced Dr. Kinsey's use of non-residential ratables as a surrogate for employment, including his conclusion that South Brunswick's share of non-residential ratable growth is .086164517 (or, 8.6164517%).

2.   Calculate The Undeveloped Land Factor

The next allocation factor, calculating South Brunswick's undeveloped land factor, requires a determination of whether the Township has the physical capacity to absorb and provide for affordable housing, which, in turn, requires an assessment of the potentially developable land in the Township.

To calculate the undeveloped land factor, Dr. Kinsey, adhering strictly to COAH's Second Round methodology, used satellite and aerial imagery from the New Jersey Department of Environmental Protection, as well as data from Rowan University. Dr. Kinsey's use of satellite and aerial imagery, in addition to being consistent with COAH's prior round methodologies, was the most accurate and efficient method of identifying undeveloped land. As a result of his analysis, Dr. Kinsey determined that approximately 1,000,000 acres of land remain undeveloped in New Jersey.

By contrast, Dr. Angelides deviated significantly from COAH's prior round methodologies in determining the undeveloped land factor. Specifically, Dr. Angelides sought to identify all of the Township's "vacant," developable land through the use of MOD-IV data, a source of property tax information. Both Dr. Kinsey and Mr. Bernard were critical of Dr. Angelides' use of property tax records to identify undeveloped land, arguing that MOD-IV data, in addition to being less reliable than satellite

and aerial imagery, had the adverse effect of eliminating a substantial amount of acreage that was under-utilized, or capable of being developed, thereby lowering South Brunswick's fair share number. Accordingly, because Dr. Kinsey followed COAH's prior round methodologies, and used more accurate and reliable data for calculating undeveloped land, I have accepted his approach, which yielded an allocation factor for South Brunswick's undeveloped land of .101856321 (or, 10.1856321%).

3. Calculate The Differences In Household Income Factor

The final allocation factor requires an evaluation of the Township's fiscal capacity to absorb affordable housing, which is measured by calculating the "household income difference" factor. The household income difference factor measures the comparative wealth of different townships within a region, with lower income townships receiving lesser assignments, and higher income townships absorbing a greater share of this factor.

As explained in the Phase One Opinion, Drs. Kinsey and Angelides basically used the same methodology for determining the household income factor, a methodology that is consistent with COAH's Second Round Rules. Nevertheless, while Dr. Kinsey used 2010-2014 ACS Survey data, Dr. Angelides used less current 2009-2013 ACS data, without offering any explanation for doing so. Therefore, because Dr. Kinsey's calculation is based on

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more current data, the Court accepts his determination that

South Brunswick's household income difference factor is

.036042548 (or, 3.6042548%).

4. **Exempt Qualifying Urban Aid Municipalities From The Gap Period Allocations**

In both its First and Second Round methodologies, COAH

declined to allocate any prospective need obligation to the

designated Urban Aid Municipalities. While Dr. Kinsey adhered

to COAH's practice by exempting Urban Aid Municipalities, Dr.

Angelides did not, allocating a portion of the existing and

projected need to several Urban Aid Municipalities in the State.

Because Dr. Angelides' decision to allocate an affordable

housing need to Urban Aid Municipalities is inconsistent with

COAH's prior practices, I have rejected it as inappropriate.

See South Brunswick Compliance, slip op. at 59.

5. **Calculate the Average Allocation Factor to Distribute Low and Moderate Income Housing Need by Municipality**

Both Drs. Kinsey and Angelides agree that once the three

allocation factors have been determined, the next step is to

calculate the "average" of those factors by adding them together

and dividing the sum by three. See 5/9/16T 65:1-12. Consistent

with Dr. Kinsey's calculation, South Brunswick's "averaged" allocation factor is .074687795.[7]

6. Calculate Gross Gap Period Need

The final step is to calculate the Township's gross Gap Period need, which is determined by multiplying the regional prospective need number and the average allocation factor. Because the Court has accepted Dr. Kinsey's calculation of both the regional prospective need and the average allocation factor, I have concluded that South Brunswick's allocated Gap Period need is 7.47% of the 18,179 low and moderate income units that formed over the Gap Period, which, before adjusting for secondary sources, is 1,358 units.[8]

H. Adjust for Secondary Sources of Demand and Supply

The final step in determining the Township's Gap Period obligation is to adjust the number of low and moderate income households that formed over the Gap Period for secondary sources of supply and demand. In this regard, both parties relied on conversions and demolitions.

1. Conversions

In adjusting for secondary sources of supply and demand,

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[7] .086164517 (nonresidential valuation factor) + .101856321 (undeveloped land factor) + .036042548 (household income difference factor) = .22406337 / 3 = .074687795.
[8] 18,179 (regional gap period need) x .074687795 (average allocation factor) = 1,358 units.

the number of conversions that occurred during the Gap Period had to be analyzed. Conversions occur when a residential property is altered or "converted" into multiple housing units, which, unlike demolitions, increase the number of affordable housing units, thereby reducing the obligation.

In addressing this issue, both experts generally followed the same methodology in calculating conversions, but in doing so, they opted to use different data sources. While Dr. Kinsey and COAH both used building permits, Dr. Angelides used "certificates of occupancy", apparently because of his personal view that their use would be more accurate, although he offered no evidence to substantiate that belief:

MR. GORDON: It's not the method that COAH used, though.

DR. ANGELIDES: Except for the certificate of occupancy, which I know is a -- an -- well, I -- I view the -- the change in data source or building as improving in the accuracy. And we kept the method as close as possible.

MR. GORDON: Did you consider any other changes to the conversion methodology?

DR. ANGELIDES: No.

MR. GORDON: So, you made one change that reduced the need, but you didn't consider making any other changes at all?

DR. ANGELIDES: When we talked through the methodology, nothing else came to mind as obvious change that would be an improvement.

***

MR. GORDON: Let me -- let me say this as to the gap period, since that's a period that already happened. You

testified that there were 70 conversions affordable to LMI
people in South Brunswick during the gap period.

DR. ANGELIDES: Okay.

MR GORDON: Do you think there actually were 70 conversions
in South Brunswick that made housing available to low and
moderate income people during the gap period?

DR. ANGELIDES: That is the result of the -- of the method.
I have not personally gone to every household in New Jersey
and tried to understand, you know, specifically what -- or
in -- in South Brunswick to figure out, you know,
conversions directly. So.

MR GORDON: And you haven't -- have you done any
investigation specific in South Brunswick as to whether
that number is accurate?

DR. ANGELIDES: No.

[5/4/16T 32:1-33:18].

Dr. Angelides' flawed conversion analysis, like many of his

other proposals, would have inappropriately reduced South

Brunswick's affordable housing need, and as such, is rejected.

Instead, Dr. Kinsey's calculation that 32 conversions occurred

in South Brunswick during the Gap Period is accepted.

2.   Demolitions

In COAH's prior round methodologies, it accounted for

demolitions of affordable housing by increasing a municipality's

housing obligation for each demolished unit. COAH determined

the number of demolitions in a municipality by looking to the

number of demolition permits issued therein. Dr. Kinsey

likewise reviewed the number of demolition permits issued from

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1999 to 2015, as recorded by the Department of Community

Affairs, to determine the number of demolitions impacting low

and moderate income households over the Gap Period.

In an inexplicable rejection of COAH's methodology, Dr.

Angelides decided to use HUD's "Components of Inventory Change"

data to estimate the number of demolished units that were

actually occupied by low and moderate income households.

Whether or not Dr. Angelides' use of this data source would be

reasonable or defensible in another context, his deviation from

COAH's established methodology was particularly troubling,

especially given his candid acknowledgement that calculating

demolitions in the manner prescribed by COAH was, in fact,

achievable. See 5/2/16T 144:19-145:7. Because Dr. Angelides

needlessly diverged from COAH's prior methodology, his approach

is rejected. Instead, the methodology embraced by COAH, and

adhered to by Dr. Kinsey, will be utilized, resulting in my

conclusion that 48 demolitions occurred during the Gap Period.

I.   Calculation Summary

Consistent with the foregoing, I accept Dr. Kinsey's

methodology for calculating South Brunswick's Gap Period

obligation, which yields 1,374 units.[9]

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[9] 1,358 (gross Gap Period need) – 32 (conversions) + 48
(demolitions) = 1,374 Gap Period units for South Brunswick. See
also Appendix I, attached hereto.

J.   Adjust for Caps

Any adjustment to South Brunswick's Gap Period obligation
based upon the availability and applicability of regulating
"caps" will be addressed during the compliance phase of the
trial, as indicated in my initial Opinion. See South Brunswick
Compliance, supra, slip op. at 87.

**III. THE RATIONALE OF THE OCEAN COUNTY APPEAL AND ITS POTENTIAL
EFFECT ON CALCULATING AFFORDABLE HOUSING NEED**

Although I have rejected South Brunswick's method of
calculating its Gap Period obligation, the Township asserts,
alternatively, that neither the FHA, COAH regulations nor
judicial precedent authorize the inclusion of a separate and
discrete Gap Period obligation in the first instance, and that
the Appellate Division's analysis in the Ocean County Appeal is
persuasive on this point. As such, it is incumbent on me to
consider the rationales offered there, especially since the
Supreme Court, in its consideration of the merits of that case,
may yet embrace them.

**A.   South Brunswick's Affordable Housing Need in the
Absence of a Separate and Distinct Gap Period
Obligation**

In the Ocean County Appeal, the Appellate Division rejected
as an unauthorized intrusion into the exclusive sphere of policy
making, a retrospective "new 'separate and discrete' "gap
period" obligation being added to a municipality's prospective

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need calculation, Ocean County Appeal, supra, 446 N.J. Super. at
267, concluding that whether to include such an obligation "is
best left for consideration by the Legislative and Executive
branches . . . ." Id. at 295. In its view, since the FHA
unambiguously "defines prospective need not by looking
backwards, but rather as a [forward] 'projection of housing
needs based on development and growth which is reasonably likely
to occur in a region or a municipality,'" (id. at 282) (emphasis
in original), the inclusion of such a gap-period requirement
"would inevitably add a new requirement not previously
recognized under the FHA." Id. at 284.

While the intervenors criticize the underpinning of the
Appellate Division's decision - that neither the FHA nor COAH
regulations historically authorized or contemplated a "backward"
look at the Gap Period - as inaccurate, they also contend that
such a conclusion, even if true, is the result of mere
happenstance, rather than conscious design, since neither the
Legislature nor COAH could have reasonably foreseen that COAH
would cease to function.[10] Accordingly, they posit that COAH was

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[10] See In re Monroe Tp. Housing Element, 442 N.J. Super. 565, 578
(2015), aff'd. o.b., 442 N.J. Super, 563 (App. Div.
2015)("[W]hether calculated or not, the resultant dismantling of
COAH and its ultimate collapse could not reasonably have been
foreseen by the Legislature and was, for all intents and
purposes, without precedent in the annals of New Jersey
administrative law.").

precluded from doing precisely that which it was created to do –
project affordable housing need from 1999-2009 (Round 3), and
then once again from 2009 to 2019 (Round 4). Cf. In re Adoption
of Hous. Element, supra, 444 N.J. Super. at 171 ("[H]ad COAH
functioned as intended, Third Round rules would have been
adopted in 1999, Fourth Round rules would have been adopted in
2009, and Fifth Round rules would have been adopted in 2019.").

The better approach, they contend, is to craft a
methodology that tracks "as closely as possible" the "probable"
manner in which COAH would, if faced with a 16 year Gap Period,
address the problem. Mount Laurel IV, supra, 221 N.J. at 6; see
also In re Adoption of Hous. Element, supra, 444 N.J. Super. at
171. And in this regard, they point out that COAH has, in fact,
specifically confronted and addressed the "look back" or "Gap
Period" phenomenon, and has expressly rejected the notion that a
future projected cycle period could "ignore the inactivity that
characterized the prior cycle." N.J.A.C. 5:93 (App. A), 26
N.J.R. 2300(a), 2348 (June 6, 1994).

Because COAH had failed to timely adopt its Second Round
Rules (i.e., by June of 1993), and did not do so until June,
1994, a one-year gap resulted during which no housing obligation
was being imposed on municipalities. Addressing this newly
formed (but, as yet, unsatisfied) affordable housing need, COAH

characterized a municipality's failure to address this gap-

period obligation as unacceptable, stating:

> [P]eople are forced into more crowded housing or are
> obliged to pay more than 28 percent of their income
> for housing. Housing need is falsely reduced, and
> simultaneously the affordable housing situation
> worsens if no new housing is built. A new calculation
> period could ignore the inactivity that characterized
> the prior cycle. This should not be allowed to happen.
>
> [N.J.A.C. 5:93 App. A, 26 N.J.R. 2300(a), 2348 (June
> 6, 1994)].

In response to a public comment, COAH made it clear that

its policy decision to "re-capture" any unaddressed need that

accumulated during the one year (1993-1994) gap period, was

purposeful:

> COMMENT: The Council should do something to correct
> the way the certification periods are overlapping.
> Otherwise, a municipality has no incentive to petition
> for substantive certification.
>
> RESPONSE: The Council's methodology is cumulative.
> Thus a municipal obligation does not disappear when
> the municipality fails to address it.
>
> [25 N.J.R. 5763(a), 5784 (December 20, 1993)].

Mr. Bernard, COAH's Executive Director at the time,

testified that COAH's policy decision in this regard was

"unambiguous." Explaining that a town's affordable housing need

is "cumulative," he was adamant that any unaddressed affordable

housing need that accumulated between 1993 (when the Second

Round cycle was supposed to begin) and 1994 (when the Second

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Round Rules were actually adopted), had to be included in the

calculation of the town's fair share obligation:

> [W]ith the Second Round Rules, you know, [COAH]
> published and issued a paper, we had public hearings,
> we fielded comments, we organized those comments for
> the board, and one of the key issues, if not the most
> -- the key -- the most key issue, was whether the
> [1987 to 1993] portion of the housing obligation was
> going to be eliminated and replaced by the [1993 to
> 1999] housing obligation or whether the housing need
> was going to be cumulative and include [1987] --
> though 1999. And there were a lot of comments after
> COAH made a decision to -- well, in effect, COAH made,
> I think, an unambiguous decision to -- that the need
> was going to be cumulative.

> [8/18/16T 140:8-20].

Moreover, given the Supreme Court's similar pronouncement

that the "The Mount Laurel obligation to meet the prospective

lower income housing need for the region is, by definition, one

that is met year after year, through the years of the particular

projection. . . ," (Mount Laurel II, supra, 92 N.J. at 218-19),

they argue that eliminating the need allocation that COAH would

have projected, results in an unconstitutional dilution of that

obligation, (ibid.), an especially ironic result, given the

Appellate Division's apparent recognition that municipalities

are entitled to "credits" for any low- and moderate-income units

actually constructed during that same Gap Period. See Ocean

County Appeal, 446 N.J. Super. at 294, n. 14.

Nonetheless, the Appellate Division was quick to emphasize

that its holding did not "ignore" housing needs "that arose in

the gap period" or a municipality's obligation "to otherwise satisfy its constitutional fair share obligations," id. at 293-94 (emphasis added), pointing out that: (1) the accrued need generated during the Gap Period was only "partially" included in COAH's traditional notion of "present need" - i.e., unique dilapidated and/or overcrowded units; (2) the "scope" of those low and moderate income households formed during the Gap Period still in need of affordable housing "can be captured in a municipality's calculation of present need," id. at 295 (emphasis added); and (3) any such determination should be made by the reviewing Mount Laurel judge using "identifiable housing need characteristics." Id. at 294 (emphasis added).

For the reasons that follow, I am satisfied that the Appellate Division's decision in the Ocean County Appeal, by its own terms, neither "ignored" nor "eradicated" any "unmet need" that may have accrued during the Gap Period. Instead, in pointed terms, it specifically "emphasiz[ed]" to the contrary. See id. at 293-94 ("[O]ur 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.").

South Brunswick, however, rejects the notion that the "scope of present need", or evidence relating to "identifiable housing need characteristics" is even relevant to determining whether the need that accrued during the Gap Period was included

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in the "new" present need calculation, and as such, the town opted not to recall Dr. Angelides to testify. Instead, it relied exclusively on its legal interpretation of the Ocean County Appeal -- that: (1) no separate and distinct Gap Period obligation exists; (2) COAH's traditional definition of "present need" was left intact and undisturbed; and (3) any need that accrued between 1999 and 2015 was co-extensive with, and already reflected in, the Township's present, indigenous need obligation. To hold otherwise, it claims, would: (1) violate the FHA; (2) undermine the core principles of Mount Laurel; and (3) result in an unconstitutional "instru[sion] into the policy-making arena." See Ocean County Appeal, supra, 446 N.J. Super. at 290-91.

Predictably, the intervenors disagreed. In their view, the Appellate Division's specific use of such words and phrases as: (1) "partially included," id. at 294; (2) "new calculation of present need," ibid. (emphasis added); and (3) "identifiable low- and moderate income households formed during the gap period can be captured," ibid. (emphasis added), to name a few, confirms that the Appellate Division intended to include, as part of the "scope" of present need, any unmet need that accrued during the Gap Period, but was not already reflected in South Brunswick's indigenous need calculation. Compare, 25 N.J.R.

5763(1), 5784, supra, and N.J.A.C. 5:93 (App. A), 26 N.J.R. 2300(a), 2348, supra.

Distilled to its essence, the intervenors view the Ocean County Appeal to be an accounting exercise, which requires the trial court to: (1) identify those low and moderate income households in need of affordable housing that formed during the Gap Period; (2) remove them from what would have been part of South Brunswick's prospective need from 1999 going forward (had COAH not ceased to function); (3) allocate them into a new present need calculation; and (4) exclude any overlapping units - e.g., those already encompassed in COAH's traditional definition of present need. Id. at 294 (any housing need accruing during the Gap Period is only "partially included" in overcrowded or deficient housing units that, for the most part, make up the balance of the "new" calculation of present need).

Any contrary interpretation would, in the view of the intervenors, unconstitutionally dilute the town's affordable housing obligation and "eradicate" the significant need that accumulated during the prior sixteen-year period - an unprecedented and unauthorized consequence. See Mount Laurel IV, supra, 221 N.J. at 30 ("[P]rior unfulfilled housing obligations should be the starting point for a determination of a municipality's fair share responsibility"); see also In re Adoption of Hous. Element, supra, 444 N.J. Super. at 173

("[M]unicipal fair share obligation must, in some fashion, include the unmet need that accumulated during the prior sixteen year gap period")(emphasis added). I agree.

Accordingly, and subject, of course, to the Supreme Court's resolution of the issue, I cannot abide the Township's unduly restrictive view that a municipality's indigenous present need obligation is co-extensive with, and "completely captured" in any unmet need that may have accrued during the Gap Period. Indeed, if that were truly the import of the Ocean County Appeal, that court could easily have said as much, simply by pointing out in plain language, for example, that: (1) any such prior unmet need was, in fact, already accounted for in COAH's traditional definition of present or indigenous need; (2) any unmet need "was", (not "can be") "captured"; or (3) was "completely", (not "partially") "encompassed" by COAH's traditional calculation of present need. It did not do so.

Moreover, that court's reference, that as many as 90,000 affordable units may have been constructed during the Gap Period, (Ocean County Appeal, supra, 446 N.J. Super at 294, n. 14), (and the concomitant implication that such facts, if proven, would impact the "new" calculation of present need") (ibid), would have been superfluous and without legal significance, unless there existed an accrued need, against which "credits" for those units constructed between 1999 and

2015 could be taken. Indeed, it would be jarringly anomalous

for South Brunswick to receive credits against its 2015 to 2025

fair share obligation for units constructed during the Gap

Period, if the "new calculation of present need" did not include

any of the households formed during the Gap Period, that were in

need of, and still require adequate affordable housing.

Accordingly, South Brunswick's reading of the Ocean County

Appeal is rejected. Not only is it inconsistent with the

specific language of that decision, but, the Township's

interpretation, if embraced, would, in my view, seriously

undermine the "core" principles of the Mount Laurel doctrine

itself. See In re Adoption of Hous. Element, N.J.A.C. 5:96, 215

N.J. 578, 588 (main purpose of the FHA and the Mount Laurel

decisions is to fulfill a constitutional, moral, and general

welfare obligation to provide housing to the less fortunate in

our society); see also In re Adoption of House. Element, supra,

444 N.J. Super. at 173 (interpreting the FHA and COAH

regulations so as to ignore the unmet need that had been

accumulating between 1999 and 2015, "would be squarely at odds

with the Constitution and the Legislature's overarching intent

to produce affordable housing".); cf. Calton Homes, Inc. v.

Council on Affordable Hous., 244 N.J. Super. 438, 460-61 (App.

Div. 1990)(cautioning against interpreting regulations so as to

result in a "diluting effect" of the Constitutional obligation).

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B.   Using Identifiable Housing Need Characteristics to Calculate the Scope of the New Present Need

By its express terms, the Ocean County Appeal, supra, would require the designated Mount Laurel judges to "capture" the unmet need that formed from 1999 to 2015 as part of the town's present need calculation using "identifiable housing need characteristics" supported by the evidence presented. Id. at 294, (emphasis added). That evidence would include, but is not limited to, whether households that formed during the Gap Period should be added to, or subtracted from, the calculated affordable housing need, due to changes in income, loss of jobs, changes in household size, or relocation out of state. See id. at 294.

Given the Appellate Division's recognition that "housing need from the gap period" would be "partially included" in the "new calculation of present need," id. at 294, an evidentiary hearing was required in order to ascertain the "scope" of that present need using "identifiable housing need characteristics" as might be found in my examination of the evidence presented. Ibid.

C.   The Evidentiary Hearing – Calculating "New" Present Need

Since the Township declined to offer any testimony or other evidence relating to the scope of the "new" present need calculation, the record before me consisted of the testimony of

Dr. David Kinsey and Mr. Art Bernard, both of whom were previously accepted as experts in affordable housing and fair share methodologies in Phase One of the trial. See, Phase One Opinion, supra, slip op. at 23-26.

However, after the hearing was completed, but before my decision was rendered, the Supreme Court granted Intervenor's motion for leave to appeal in the Ocean County Appeal, and stayed the judgment of the Appellate Division.

Accordingly, at this juncture, it would be premature to calculate a revised present need obligation. Instead, whether, and the manner in which such a calculation should be made, must abide the Supreme Court's review and resolution of the Ocean County Appeal.

IV.   CONCLUSION

To comply with the Supreme Court's unequivocal mandate that the designated Mount Laurel judges follow COAH's prior methodologies as closely as possible in calculating a municipality's fair share obligation, I needed to resolve two distinct issues left unaddressed in Phase One of my opinion: (1) whether, and to what extent South Brunswick's fair share obligation included the affordable housing need that accrued

during the Gap Period; and (2) if so, how best to quantify that obligation.

With regard to the first issue, I am satisfied that the affordable housing need that accrued during the 16 year Gap Period must be included as a component part of South Brunswick's fair share obligation. This conclusion is consistent with both COAH's prior treatment of the unmet need that arose during the 1993 and 1994 mini-gap period, and the Supreme Court's admonition that prior (pre-2015) round obligations were "preserved" and were not to be "ignored or eradicated", but rather should be used as the "starting point" in calculating a municipality's fair share responsibility.

In resolving the second issue, I was guided by the credible testimony and expertise of Dr. Kinsey, who adhered as closely as possible to COAH's prior round methodologies, employed actual data when it was available, and used the most recent and reliable data sources when it was not. I rejected the opinions proffered by Dr. Angelides, in his original testimony, as result-oriented and inconsistent with COAH's prior practices, and also because he omitted pertinent data points, made too many assumptions, and too often failed to use the most recent,

available data, rendering his testimony, in my view, not credible.[11]

Accordingly, I am entirely satisfied: (1) that a significant affordable housing need arose during the Gap Period; (2) that this need is a necessary component of South Brunswick's fair share calculation; and (3) that South Brunswick's corresponding gap period obligation is 1,374 units. Any adjustment to that calculation, or its implementation, whether based on phasing, regulatory "caps" or otherwise, will be addressed, as needed, during the compliance phase of these proceedings, or revisited, as may be required by the Supreme Court's resolution of the Ocean County Appeal.

Intervenor Fair Share Housing Center shall submit an appropriate form of order under the Five Day Rule incorporating this opinion by reference and which sets South Brunswick's Gap Period obligation at 1,374 units.

Costs to Defendant-Intervenors.

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[11] My detailed view of the credibility of the various expert witnesses was previously discussed in Section III.C ("Summary of Witness Credibility") as well as elsewhere throughout the Phase One Opinion. Those credibility findings, along with the reasons offered to support them, need not be recounted at length, but rather, are specifically incorporated herein by reference. See, e.g., slip op. at 87.

Third Round Prospective Need, 1999-2015 Calculations Summary, Township of South Brunswick, Middlesex County, NJ, September 2016		
PROSPECTIVE NEED, 1999-2015 (affordable housing units)		
Step	**Sources and Calculations**	**Result**
PHASE ONE: CALCULATE REGIONAL PROSPECTIVE NEED		
1	Identify the 'housing region"	Report, pp. 23-24	COAH Housing Region 3 West Central: Hunterdon, Somerset, and Middlesex Counties
2	Determine the population projection period	Report, p. 25	1999-2015
3	Determine the regional population 1999 and 2015 (persons)	Model: Tabs 1d. &1e.	1,156,672 (1999); 1,300,287 (2015)
4	Identify and remove 2000 and 2014 "group quarters" population from total population	Model: Tab 1h.	
5	Calculate 2000 and 2014 headship rates	Model: Tab 1g.	
6	Estimate 1999 LMI HH	Model: Tab 1d.	170,101
7	Calculate 2015 low and moderate income households	Model: Tabs 1b. & 1f.	184,462
8	Project 2025 low and moderate income households [Not relevant for 1999-2015 model]		
9	Calculate the regional increase in low and moderate income households, 1999-2015	Step 7 - Step 6 = 184,462 - 170,101 = 14,361	14,361
10	Pool and reallocate projected regional growth in low and moderate income households below age 65	Model: Tab 1a	18,179

11	Determine regional prospective need (units)	Step 10	18,179
	PHASE TWO: ALLOCATE MUNICIPAL PROSPECTIVE NEED		
12	Exempt Qualifying Urban (Municipal) Aid municipalities from housing need allocations	Not applicable	Not applicable
13	Calculate the equalized nonresidential valuation (ratables) factor	Model: Tab 3, A275:T275	0.086164517
14	Calculate the undeveloped land factor	Model: Tab 4, A275:H275	0.101856321
15	Calculate the differences in household income factor	Model: Tab 5, B275:P275	0.036042548
16	Calculate average allocation factor to distribute regional low and moderate income housing need by municipality	(Step 13 + Step 14 + Step 15)/3 = (0.086164517 + 0.101856321 +0.036042548)/3 = 0.074687795	0.074687795
17	Calculate gross municipal prospective need municipality (units)	Step 11 x Step 16 = 18,179 x 0.074687795 = 1,358	1,358
	PHASE THREE: ADJUST FOR SECONDARY SOURCES OF DEMAND AND SUPPLY		
18	[Filtering: Removed from April 2016 Model at the request of the Court]		
19	Estimate residential conversions affecting low and moderate income households (units)	Model: Tab 8, A275:I275	32
20	Estimate demolitions affecting low and moderate income households (units)	Model: Tab 6, A321:AD321	48
21	Calculate prospective need by municipality (units)	Step 17 - Step 19 + Step 20 = 1358 - 32 + 48 = 1,374	1,374
	PHASE FOUR: ADJUST FOR CAPS		
22	Calculate the 20% cap and, if applicable, reduce prospective need (units)	Model: Tab 1999-2025 Mid Co. Pros. Need, I24	Not applicable

23	Calculate the prospective need obligation (net) by municipality (units)	Step 21	1,374
24	Calculate the 1,000 unit cap and, if applicable, reduce the net prospective need obligation	To be determined after verification of credits by the Court	To be determined after verification of credits by the Court

Notes:

A	For a description and explanation of each of the steps and data sources used to reach the determinations in this table, see "NEW JERSEY FAIR SHARE HOUSING OBLIGATIONS FOR 1999-2025 (THIRD ROUND) UNDER MOUNT LAUREL IV FOR MIDDLESEX COUNTY," dated April 21, 2016, prepared by David N. Kinsey, PhD, FAICP, PP, for and in collaboration with Fair Share Housing Center ("Report").
B	For the data and calculations that are the source of the determinations in this table, see the Excel workbook with linked worksheets that provide the data, data sources, and calculations used to compute 2015 Present Need, 1987-1999 Prior Round obligations, and 1999-2015 net Prospective Need allocations using the Prior Round methodology, FSHC R3 Model - Middlesex County – April 2016, submitted April 21, 2016 ("Model").
C	The 20% cap of 3,100 units is shown in the Model as applicable to the Township's combined 1999-2015 and 2015-2025 obligation, including filtering. Because the combined 1999-2015 and 2015-2025 obligation not including filtering is below 3,100 units (1,374 + 1,533 = 2,907), the cap is not applicable in this version of the calculation requested by the Court.

Prepared by David N. Kinsey, PhD, FAICP, PP, Kinsey & Hand, Princeton, NJ, September 27, 2016