

ECONSULT SOLUTIONS, INC. RESPONSE TO FSHC/KINSEY AND BERNARD REPORTS ON IDENTIFIED PRESENT NEED

August 16, 2016

REPORT SUBMITTED BY:

Econsult Solutions
1435 Walnut Street
Philadelphia, PA 19102



Peter A. Angelides, Ph.D., AICP
Principal

A handwritten signature in black ink that reads 'Peter A. Angelides'.

INTRODUCTION

This report is submitted to the Superior Court of New Jersey Law Division – Middlesex County in accordance with the Court's amended case management order of July 18, 2016. That order provided for the submission of expert reports and legal arguments by July 21, 2016, on "whether and to what extent South Brunswick's present need obligation was modified by the Ocean County Appeal." It further provides that all responses to these reports shall be submitted on or before August 16, 2016.

In my capacity as an expert for South Brunswick, I submitted to the Court a certification on July 21st detailing my position that the Ocean County Appeal decision issued by the Appellate Court did not in any way modify the present need calculation for South Brunswick, and was entirely consistent with the fair share methodology prepared by Econsult Solutions, Inc. (ESI). On the same day, briefs, certifications and reports were submitted to the Court by Richardson Fresh Ponds and Princeton Orchards Associates and their expert Art Bernard, and by Fair Share Housing Center (FSHC) and their expert, Dr. David Kinsey. Dr. Kinsey's report contained a methodology and resulting calculation for a new category of affordable housing need, termed "Identified Present Need." Mr. Bernard's report purports to do the same.

This report represents a response to the methodology and calculations advanced by Dr. Kinsey and Mr. Bernard for the calculation of identifiable present need. This report supplements a response submitted by South Brunswick Township, which explores many of the issues addressed here in greater detail. It remains my position that the Appellate Court decision clearly does not re-define the definition of Present Need, nor require any modification to the existing Present Need methodology or calculation.

The report proceeds in three sections as follows:

- *Context of Identified Need:* This section demonstrates that the Appellate Division did not overrule the Supreme Court and require a new methodology for the Present Need through its use of the term "identifiable need." On the contrary, in using the term it adopted terminology used by Special Master Reading and ESI to describe categories of need that are quantified within the existing FHA and prior round framework. This framework explicitly does not include those households that currently live in sound housing.
- *Cost-Burdened Households within the Fair Share Methodology:* This section documents that the issue of the inclusion of cost-burdened households living in sound housing has been repeatedly considered and rejected by the courts (including in [Mount Laurel IV](#)) and COAH throughout the history of the fair share process. Dr. Kinsey's and Mr. Bernard's inclusion of these households in their calculations of identified present need is without basis or precedent.
- *Flaws in Kinsey/FSHC and Bernard Calculations of "Identified Present Need":* Setting aside the inappropriateness of proposing a new category and methodology for calculating Present Need, this section reviews a number of flaws in the methodology and calculations offered by Dr. Kinsey and Mr. Bernard, relative to the standard that they create and seek to fulfill.



CONTEXT OF "IDENTIFIED NEED"

The opening sentence of Dr. Kinsey's July 21 report declares (correctly) that "The Supreme Court directed in Mount Laurel IV that the Prior Round methodology be used to calculate municipal Present Need." As detailed in my July 21st certification to the Court, the Present Need calculation within the Fair Share methodology has always quantified the number of low and moderate income (LMI) households living in deficient housing as of a fixed point in time. While the specific metrics of deficiency have changed over time, the categorical and conceptual definition has not.

Despite acknowledging this clear instruction from the Supreme Court, both Dr. Kinsey's and Mr. Bernard's reports proceed to re-define the calculation of present need, introducing a new standard and methodology heretofore unseen in the fair share process. The inescapable conclusion is that Mr. Bernard, Dr. Kinsey and FSHC believe that the Appellate Division decision has overruled the Supreme Court with respect to the appropriate calculation of Present Need.

This conclusion is not stated directly in the Kinsey report (since of course it appears nowhere in the Appellate Court decision) but there is no other way to reconcile Dr. Kinsey's decision to set forth a new and unprecedented Present Need methodology that he attributes on page 1 of his report to the "current state of law". Rather, the argument presented in support of this contention is based on repeated references to a single sentence pulled out of context from a 53 page Appellate Division opinion that is unflinchingly deferential to statute and precedent and explicitly narrowly tailored. Understood in the proper context, the Appellate Court's use of the term "identified need" does not conflict with but instead affirms Mount Laurel IV and the established definitions of Present and Prospective Need.

The Appellate Division did not coin a new phrase or create a new category of fair share obligations through its use of the term "identifiable housing need" (51) and "identified low and moderate-income households formed during the gap period and in need of affordable housing" (53). Rather, the term is clearly adopted and cited from the reports and analysis of Ocean County Special Master Richard Reading, which are relied on in the Superior Court decision under review by the Appellate Court. Special Master Reading, in turn, adopts and utilizes the term in the same context as it is used by ESI in submissions to the Superior Court.

The qualifier of "identifiable" need is specifically used by ESI to distinguish those categories of LMI households that are quantified as part of the fair share process, based on the Fair Housing Act and the prior round methodologies, from those that are not. This framework is explained in detail in our December 8th submission in Ocean County regarding gap period methodology, our *Need and Obligations* report originally published December 30th, and is repeated and clarified in our February 8th *Analysis of the Gap Period* report.

ESI uses the term "identifiable existing need" and "FHA framework" to distinguish theoretical definitions of housing "need" from those identified as relevant to the calculation of affordable housing need and obligations under the Fair Housing Act, pursuant to the Mt. Laurel constitutional obligation.

[ESI February 8th Analysis of the Gap Period, p. 6]



Further, these reports explicitly apply this framework to demonstrate that those households emerging during the gap period that currently live in sound housing do not represent a currently identifiable need. Our December 8th report states with respect to these households:

...those LMI households that are living in sound housing units as of the beginning of the upcoming period **do not represent an identifiable affordable housing need** for that period (4).

...this household **does not represent an identifiable need for the upcoming cycle within the Present Need and Prospective Need framework set forth in the FHA**. This is confirmed by straightforward logic – since the household currently resides in a sound housing unit, construction or rehabilitation of an additional unit of affordable housing is not required to accommodate it (7)

[ESI December 8th Response to Ocean County Third Case Management Order, emphasis added]

This delineation and terminology was explicitly adopted and affirmed by Special Master Richard Reading in his December 29th report to the Court, which uses the term “identifiable” need on several occasions with precisely this context and meaning. This report, its rationale and its language was then explicitly relied on and cited by the Appellate Court decision.

Special Master Reading’s December 29th report first correctly articulates ESI’s position as follows:

It is Econsult’s position that there is no identifiable need within the FHA framework that could be quantified and addressed through the calculation of an additive, retrospective need for the gap period.

[Reading December 29 Report, p. 12]

Then, in the “Summary and Conclusions” of that report, the Special Master adopts this framework and term within his conclusions, writing with respect to gap period households:

These households would be partially included by the LMI households in overcrowded or deficient housing units that are encompassed in the new calculation of Present Need. **Those LMI households that have occupied sound (non-deficient) housing units are already housed and would not represent an identifiable need.**

[Reading December 29 Report, p. 14, emphasis added]

This passage from the December 29 Reading report is directly cited by the Appellate Court in its first usage of the phrase “identifiable” housing need, on page 51:

Mr. Reading...also stated that housing need from the gap period would be "partially included" by those living in "*over[]crowded or deficient housing units that are encompassed in the new calculation of [p]resent [n]eed.*" Therefore, the scope of present need should be dictated by **identifiable** housing need characteristics as found by the reviewing Mount Laurel judge when examining the evidence presented.

[Appellate Court decision, p. 51, emphasis added]



The passage from Special Master Reading cited by the Appellate Division clarifies specifically those households from the gap period that are included in the present need – those that are currently living in deficient housing. There is no mystery as to whether the term “identifiable housing need” also encompasses those households currently living in sound units. Indeed, it is stated plainly in *the very next sentence* of the cited Reading report (shown above), which states that “those LMI households that have occupied sound (non-deficient) housing units are already housed and would not represent an identifiable need.”

This citation from the Appellate Division on page 51 also makes plain the meaning of the Appellate Division’s language on page 53 to which Mr. Bernard, Dr. Kinsey and FSHC have tethered their justification to introduce an entirely new category and methodology for calculating Present Need. When the Appellate Division writes that “identified low and moderate-income households formed during the gap period in need of affordable housing can be captured in a municipality’s calculation of present need” (53) it clearly echoes its own citation on page 51 (shown above) to Special Master Reading’s conclusion that “housing need from the gap period would be ‘partially included’ by those living in ‘overcrowded or deficient housing units that are encompassed in the new calculation of present need.’” Again, this citation directly precedes Special Master Reading’s explicit statement that those households in non-deficient units “would not represent an identifiable need.”

It is clear from this context that the Appellate Division’s statement that these households “can be included” in present need does not represent a sweeping reversal of the Supreme Court’s dictate to utilize the prior round methodology to calculate the Present Need, as claimed by Mr. Bernard, Dr. Kinsey and FSHC. Instead, it is simply an affirmation of the unambiguous statement by Special Master Reading that some gap period LMI households (those living in deficient units) are by definition included in the Present Need. These households “can” be included in Present Need because they *already are* included (as is made clear by the Special Master’s repeated discussion of the potential “overlap” between any separate and discrete gap period obligation and the Present Need).

Understood in context, the term “identified need” specifically and explicitly does not include existing households that are living in sound housing. Indeed, the entire function of the word “identified” is to distinguish between the generic term “need,” which could be defined in any of a number of ways in a broad policy context, and those categories of need which have historically been defined and quantified as part of the Fair Share process. As established in ESI’s prior reports and reviewed in detail in the section that follows, existing LMI households that are cost-burdened but live in sound housing have always fallen outside of need as defined within the fair share process.



COST-BURDENED HOUSEHOLDS WITHIN THE FAIR SHARE METHODOLOGY

The “Identified Present Need” methodology submitted by the intervenors consists largely of calculating the incidence of cost burden among LMI households and applying that proportion to the incremental population growth observed during the gap years. This approach results in defining cost-burdened households living in sound housing as part of the Present Need. As such, it is entirely contrary to the history and precedent of fair share methodologies, which have never included cost-burden households as a category of need or as a consideration in any calculation factor.

The question of the inclusion of cost-burdened households within the Present Need was first considered and rejected in the *AMG Realty vs. Warren Twp* decision. After the implementation of the Fair Housing Act and the creation of COAH, this practice was specifically considered and maintained by COAH in each iteration of its methodology. The practice has been challenged in court and repeatedly upheld, up to and including by the Supreme Court in Mount Laurel IV. This clear precedent, which is acknowledged by Dr. Kinsey, is reviewed briefly below.

Further, this precedent has several specific rationales, which are reviewed below. Judge Serpentelli’s AMG opinion offers several conceptual and logistical justifications for the exclusion of cost-burdened households in sound housing from the quantification of need, and COAH specifically addresses their rationale for continuing this practice in their response to comments on the Round 1 methodology. Further, these households are fundamentally different from those quantified in the Present Need and Prospective Need in the important respect that they already live in sound housing. Importantly, these households are not excluded specifically because they are cost-burdened. Rather, they are not included in the fair share obligation because they do not represent one of the established categories of quantified need.

Exclusion of Cost-Burden: History and Precedent

The question of whether cost-burdened households represent a component of the Present Need has been explicitly considered by both the Courts and COAH on numerous occasions throughout the history of the fair share methodology. In each instance, cost-burden has been unambiguously excluded from consideration as part of the calculation of Present Need, and this practice has been upheld by the Courts up to and including Mount Laurel IV.

The *AMG Realty vs Warren Twp* decision, which predated the institution of the Fair Housing Act and the creation of COAH and established a methodology for the calculation of fair share need, explicitly considered and rejected the inclusion of cost-burdened LMI households occupying sound units within the Present Need.¹ The Round 1 methodology approved by COAH maintained this precedent. When commenters questioned this determination, COAH’s response explicitly noted that “the Council’s definition is in keeping with the Court’s approach to low and moderate income housing need.”² This

¹ See below for further discussion of the rationale for this decision set forth by Judge Serpentelli in AMG.

² The full comment and answer, which appears in 18 N.J.R. 1529, reads:

approach was maintained by COAH in all subsequent definitions of Present Need, which has been consistently quantified based solely on the number of LMI households estimated to be living in deficient units as of a defined point in time.

The determination to exclude cost-burden has been challenged through the legal process, and has repeatedly been found permissible. Most recently, the Supreme Court addressed the issue explicitly in Mount Laurel IV, affirming the Appellate Division's finding in its implementation instructions:

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

[Mt Laurel IV at 45]]

Thus, legal precedent and COAH practice are in complete alignment in the omission of cost-burdened households in sound housing units from the quantification of the Present Need. Indeed, the cost burden status of LMI households appears nowhere as a calculation factor in the quantification of need in the prior round methodologies that serve as the basis for defining fair share need (as per Mount Laurel IV).

Dr. Kinsey's comprehensive fair share methodology report, which he and FSHC continue to maintain represents an appropriate methodology and calculation of obligations, confirms this precedent clearly:

Present Need measures only existing substandard housing that is occupied by LMI HH. It does not include the nearly one million existing LMI HH in New Jersey who are considered cost-burdened, since **COAH excluded cost-burdened households and their affordable housing needs from Present Need municipal housing obligations under the Fair Housing Act, a determination upheld by the Supreme Court...**

...cost-burden by itself is not a sufficient criterion for including households in the Present or Prospective Need.

[FSHC R3 Update Report, Middlesex County, April 21, 2016, emphasis added, p. 13]

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

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

Despite this clear statement, Dr. Kinsey's "identifiable present need" methodology report cites two references to cost burden in the Prior Round methodology. As is made clear by Dr. Kinsey's own prior statements, neither of these examples relate to any step in the calculation and quantification of fair share need:

The term 'affordable housing' is clearly defined in New Jersey law. Under the Prior Round methodology, 'Affordable means a sales price or rent within the means of a low or moderate income household as defined in N.J.A.C. 5:93-7.4.' That COAH rule in turn caps the monthly housing cost for an owner-occupied affordable unit...Affordable housing also generally requires decent and sound housing that is not overcrowded, some but not all of which is accounted for in Indigenous Present Need.

In light of the admonition in Mount Laurel IV to follow the Prior Round methodology, it is relevant that COAH, in adopting its Second Round methodology in 1994, stressed that it would not be fair for LMI HH to be 'forced into more crowded housing....or obligated to pay more than 28 percent of their income for housing' where affordable housing need from a prior time period has not been met.

[Kinsey Identifiable Present Need Report, p. 10-11]

In the first instance, Dr. Kinsey cites affordability standards related to compliance with fair share obligations. These affordability standards are not applied to quantify and ascribe a need to cost-burdened households anywhere in the prior round methodology. In the second instance, Dr. Kinsey cites a discussion of the appropriateness of maintaining assigned unfilled obligations from a prior round. These obligations were prospective in nature when they were first calculated (in Round 1), and at no point was the cost-burden status of these households calculated or used to describe and quantify this need. Thus, despite these justifications, Dr. Kinsey's "identified present need" method is unique and unprecedented in its application of affordability standards to define and quantify need within the fair share methodology.

Exclusion of Cost-Burden: Rationale

Importantly, the exclusion of cost-burdened status as a component of the fair share calculation is supported not only by precedent but by sound rationale. In *AMG Realty*, Judge Serpentelli explicitly considers and rejects the notion of including cost-burdened households in the quantification of the Present Need. His opinion includes a comprehensive rationale for this determination, including a mix of practical and methodological considerations:

In the first instance, it must be recognized that many people do not fully report their income. Second, there are many people who by choice are willing to pay a disproportionate amount of their income for housing. Third, there is a considerable housing "mismatch." On the one hand, some rental units which meet the affordability standards are occupied by families not in a lower income category. On the other hand, lower income families are occupying units which they cannot afford. If the families and units could be matched up, more affordable units, particularly for moderate income households, could be occupied by needy families. Fourth, it must be recognized that many people of retirement age have developed substantial assets which allows them to acquire homes. However, based upon their reported income,



they could nonetheless fall into the category of financial need at least within the Mount Laurel II definition. Fifth, some argue that the needs of lower income households can be met more appropriately through income maintenance programs or other extended rent supplement programs rather than the construction of new housing. Sixth, many families in financial need are occupying substandard units thereby creating a duplication in the count of present need. For all of these reasons, it is most difficult to develop a trustworthy count of financial need which should be satisfied through Mount Laurel solutions. In summary, notwithstanding that there is some unmet need, the untrustworthiness of the data and the desire to avoid questionable assumptions compels me to not incorporate this category.

[AMG Realty Co vs. Warren Twp at 423, emphasis added]

ESI's February 8th Analysis of the Gap Period reviews each of these rationales, and demonstrates that each remains as valid today as when they were first offered by Judge Serpentelli.

Further, ESI's February 8th and March 24th gap reports make clear an important economic distinction between cost-burdened households formed during the gap period living in non-deficient housing and those households quantified in the Present and Prospective Need. The simple fact is that cost-burdened households already live in sound housing units, while those households quantified in Present Need and Prospective Need do not. Those households identified in the Present Need live in deficient units, while the Prospective Need represents household growth that is not yet in existence (and therefore not housed). Their circumstances are fundamentally different from those households that have found sound housing but are cost-burdened. As noted by Judge Serpentelli in AMG, these cost-burdened households ultimately represent an income problem, not a housing problem, as they live in sound housing units.

Importantly, it must be clarified that, contrary to the suggestions of FSHC,³ ESI has never suggested that the cost-burdened status represents a basis for the exclusion of an LMI household otherwise qualified as part of the need. Instead, we have maintained that cost-burden is neither a qualifying nor disqualifying characteristic – it appears nowhere in the calculation and quantification of the need within the established fair share methodologies. As we stated in our April 8th Response to Comments report:

LMI households emerging during the gap period who have found sound housing are not disqualified due to their cost-burden status. Rather, these households have not been qualified as part of the need in the first place, because they do not meet the definition of Present Need or Prospective Need.

[ESI April 8th Response to Comments, p. 82]

³ For example, Dr. Kinsey's April 21 methodology report writes "While cost burden by itself is not a sufficient criterion for including households in the Present or Prospective Need, nor is it historical practice, nor fair, to exclude households otherwise includable in Prospective Need the moment they become cost burdened."(p. 13, emphasis added)

FLAWS IN KINSEY/FSHC AND BERNARD CALCULATIONS OF “IDENTIFIED PRESENT NEED”

As previously established, the Appellate Court decision in the Ocean County appeal does not overrule the Supreme Court’s decision in Mount Laurel IV and require the calculation of a new category of fair share housing need, via a newly introduced methodology. Even if such a category were required to be calculated, however, the methodology and calculations submitted by Dr. Kinsey and Mr. Bernard contain significant flaws relative to the standard that Dr. Kinsey and Mr. Bernard seek to establish and fulfill. The section that follows details the standard for the calculations of “Identifiable Present Need” introduced by Dr. Kinsey and Mr. Bernard, and the flaws in the methodology they subsequently introduce relative to that standard.

Dr. Kinsey’s report defines his task in creating a methodology for calculating “Identified Present Need” as follows:⁴

In Ocean County Appeal, the Appellate Division spelled out a two-pronged standard for quantifying the Identified Present Need that “could be captured in a municipality’s calculation of the present need: (a) identified low- and moderate income households that formed during the gap period and (b) among that pool of LMI households, those LMI HH “in need of affordable housing”

[Kinsey Identified Present Need Report, p. 3]

First, we strongly dispute Dr. Kinsey’s contention that the Appellate Division sets such a standard, and note that he does not cite the opinion doing so, but instead (as described throughout this report) relies on a tortured interpretation of a single passage as overturning the Supreme Court’s dictate in Mount Laurel IV to utilize the prior round methodology to calculate the Present Need. As documented earlier in this report, in proper context, the term “identifiable need” is clearly understood to represent those categories of housing need included and quantified in the fair share process, not the volume of LMI households that can be identified, as suggested by Dr. Kinsey and Mr. Bernard.

Second, the calculation set forth by Dr. Kinsey, as well as that of Mr. Bernard, fails to appropriately and accurately satisfy even the standard he has created. The new methodology offered by Dr. Kinsey and Mr. Bernard broadly proceeds in the same four steps (though they rely on different data sources and in some cases different definitions):

1. First, they calculate the incremental growth in LMI households over the gap period.

⁴ Mr. Bernard’s pursues a similar methodology to Dr. Kinsey, but does not set forth in the same manner general principles to which an “Identified Present Need” methodology should adhere, based on his reading of the Appellate Court decision. He does describe his task as follows on page 1 of his “Identified Present Need” report:

The purpose of this report is to respond directly to the unique situation caused by COAH’s failure to quantify a housing need for the “gap period” and the Appellate Division’s decision that these needs may be captured as part of the present need. This report will discuss and quantify the identifiable low and moderate-income housing need formed between 1999-2015.

2. Next, they calculate the proportion of LMI households in each housing region which they deem to have “identifiable housing needs,” including those LMI households that are cost-burdened and in Dr. Kinsey’s case, those that live in overcrowded but not old housing units.
3. Next, they multiply this proportion by the calculated incremental household growth in each region, and define the result as the regional “Identifiable Present Need.”
4. This regional need is then allocated to municipalities based on the same allocation factors utilized elsewhere in Dr. Kinsey’s methodology for the allocation of Prospective Need.

Several clear methodological flaws exist in this approach, which are reviewed in turn in this section:

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

Most fundamentally, Dr. Kinsey’s methodology has unquestionably abandoned its professed fidelity to the prior round methodology and Mount Laurel IV decision by creating from scratch an additive category of affordable housing need and an entirely new methodology for its quantification.



Presents No Data Specific to Households Formed in the Gap Period

Dr. Kinsey's two-part standard states that it seeks to calculate the proportion of LMI households in need of affordable housing "among that pool" of LMI households that "formed during the gap period." Mr. Bernard seeks to do the same. Throughout the course of their methodology, however, neither expert offers any data or calculation that identifies housing need *specific to those households that formed during the gap period*. Instead, they apply an (erroneous) definition of housing need to the *entire population* of LMI households in New Jersey, and then apply these proportions to the net increase in households observed during the time period. Unquestionably, these calculations include many households that did not form during the gap period, but instead were in existence prior to 1999.

Dr. Kinsey attempts to address this point elliptically through an extended discussion on pages 5-8 of trends in household formation and "churn." Through this discussion, Dr. Kinsey seeks to demonstrate that "a majority of the total of 1,348,144 LMI HHs in New Jersey as of 2015 likely did not exist as LMI HHs in New Jersey in 1999" (8).

First, even if true, this statement does not deny or change the fact that a large number of households included in both Dr. Kinsey's and Mr. Bernard's calculation of housing "need" as of 2015 did in fact exist as of 1999, and did not form during the gap period. Second, this statement is not demonstrated conclusively by any evidence presented by Dr. Kinsey on pages 5-8, by Mr. Bernard, or by any known data source. Dr. Kinsey cites at different points the volume of households moving in and out of New Jersey during the gap period, but at no point acknowledges that these may in fact be the same households moving in and out one or more times (for example, a household that moves in to the state in 2002 and out of the state in 2010). Due to this dynamic, the sum of in and out migration cannot be compared to the total volume of households to offer any meaningful insight into the proportion that are new to the state over any given period. Dr. Kinsey effectively acknowledges this failure to demonstrate any precise quantification in his characterization of his claim as "likely."

Fundamentally, neither Dr. Kinsey's nor Mr. Bernard's calculations offer any data specific to the current housing conditions of households formed during the gap period, despite adopting this as the central charge of their methodology.

Introduces a New Measure of Housing Deficiency Unrecognized by COAH

Above and beyond the inclusion of cost-burdened LMI households living in sound housing, which is reviewed in depth in the previous section, Dr. Kinsey's identifiable need methodology introduces an additional category of housing need which has not previously been considered a deficiency by COAH. The Present Need calculation as executed by both FSHC and ESI utilized the indicators of housing deficiency defined by COAH in Round 3, in keeping with the directives of Mount Laurel IV. These indicators are the lack of adequate plumbing facilities, the lack of adequate kitchen facilities, and housing that is both overcrowded (as defined by occupants per room) and old (as defined by the construction date).

Dr. Kinsey continues to rely on these indicators for his calculation of "Indigenous Present Need." However, his calculation of "Identifiable Present Need" introduces an additional measure of deficiency



that was plainly not included by COAH in its definition of the category of housing deficiencies: housing that is overcrowded but not old.

Some LMI HH living in substandard or overcrowded housing are quantified in the calculation of Indigenous Present Need as of 2015...LMI HH living in newer overcrowded housing are not included, however. These households may be quantified....and have identifiable housing needs.

[Kinsey Identified Present Need Report, page 11]

Here, Dr. Kinsey states clearly that prior COAH practice (as reflected in the traditional calculation of Present Need) has not deemed overcrowded but newer housing to represent a housing deficiency that is quantified in the Present Need. Without basis or citation, Dr. Kinsey, nonetheless declares this category to be an “identifiable housing need” and proceeds to add these households to his calculation.

Dr. Kinsey’s position appears to be not only that the Appellate Court envisioned an additional component of need, but that the definition of that component was so broad as to encompass household types that were previously specifically not recognized as representing a deficiency by COAH. As with the inclusion of cost-burden, this interpretation willfully turns on its head the term “identifiable need,” which is specifically meant to distinguish between those categories of need quantified in prior COAH practice and those excluded.

Double-Counts Households in both Components of Present Need

The methodology employed by Dr. Kinsey and Mr. Bernard creates “identifiable present need” as a distinct category which is added to “indigenous present need.” In the framework offered by both experts, these elements are additive, meaning that a municipality must fulfill the sum of both. However, the design of the calculation is clearly such that the same LMI household will be included in both components, if that household was formed in the gap and is cost-burdened (placing them in the “Identifiable Present Need” calculation) and also lives in deficient housing (placing them in the “Indigenous Present Need” calculation). This represents a clear instance of double counting, assigning a municipal obligation of two units associated with just one household.

Dr. Kinsey appears to recognize this double counting issue, yet declines to correct it. He justifies this practice in footnote 26 of his report:

Over 95 percent of those LMI HHs living in unaffordable housing live in physically sound housing that is not covered by Indigenous Present Need. I have left in the small number of LMI HHs living in physically unsound housing that is also unaffordable since the mere remediation of the substandard condition by itself will not solve their identified housing problems.

[Kinsey Identified Present Need Report, Footnote 26, page 12]

Mr. Bernard’s methodology includes the same double counting issue, and cites a similar rationale for failing to correct it:



Even if there were an overlap caused by low and moderate-income households paying excessive housing costs living in substandard housing, it is my professional opinion, that such an overlap does *not* impact the obligation to address the “identified present need” with additional low and moderate income housing. Often, the present need is addressed through a rehabilitation program that brings a unit up to code. But bringing a housing unit up to code does not address the relationship between housing payments and gross incomes.

[Bernard Identified Present Need Report, page 9]

Thus, not only do Dr. Kinsey and Mr. Bernard acknowledge that double counting is taking place that they have nonetheless “left in,” but as shown in the passages above, they justify this decision by suggesting a redefinition of the established remedy for the Present Need. Present Need (and before it, “Indigenous Present Need,” a category which Dr. Kinsey re-introduces in his new methodology) has always been able to be satisfied by a municipality through either rehabilitation or new construction activities. In both of their reports, Dr. Kinsey and Mr. Bernard both break with this practice and declare that “mere remediation” is in their opinions insufficient for certain units included in the Present Need. Without any basis in precedent or prior COAH practice, they deem this remedy inappropriate, and deliberately assign an additional unit of “identifiable present need” for the same LMI household (in instances where the household is both living in deficient housing and cost-burdened).

Asserts Without Basis that “Identified Present Need” Represents a “New Construction” Obligation

As described above, different categories of municipal obligation are satisfied through different remedies, and in fact are treated differently in the application of municipal allocation caps. Not surprisingly, the Appellate Court decision does not specify whether the “identified present need” obligation constitutes a new construction obligation or whether it can be satisfied by rehabilitation, since of course the Appellate Court decision never contemplates the assignment of such an obligation in the first place. Undeterred, FSHC apparently interprets this category as a new construction obligation, writing in their July 21st brief to the Court that:

...there is no statutory limitation on construing present need to include a **new construction obligation** based on “identified low- and moderate-income households formed during the gap period in need of affordable housing”

[FSHC July 21st Brief in re Application of the Township of South Brunswick, emphasis added, p. 5]⁵

⁵ Mr. Bernard does not address this issue clearly nor set forth a complete methodology to which a 20% cap could be applied. It appears from Mr. Bernard’s justification for double counting cost-burdened households already in the Present Need detailed above that Mr. Bernard considers “Identified Present Need” to be a new construction obligation. However, at the conclusion of his report (on page 15), Mr. Bernard sums his calculated “Identifiable Present Need” for South Brunswick with the municipal Present Need calculated by Dr. Kinsey, making it unclear how these obligations are meant to be applied.

Thus, FSHC has without basis asserted that the traditional compliance remedy for Present Need, which gives the municipality the option of either rehabilitation or new construction, is not applicable to this calculation, and instead that municipality's should instead be mandated to fulfill this "identified present need" obligation through new construction.

It should also be noted that the 20% cap on municipal obligations limits the extent of new construction obligations relative to the existing housing stock, which "reflects a desire by COAH not to overwhelm local communities."⁶ Under the Prior Round methodologies, all new construction obligations for a municipality (including the re-allocated Present Need) were summed and that sum was subjected to the 20% allocation cap. If it is the contention of FSHC and Dr. Kinsey that the "Identifiable Present Need" component represents a new construction obligation, then Dr. Kinsey has clearly erred in his methodology by failing to sum the municipal "identifiable present need" obligation with the Prospective Need obligation before application of the 20% municipal allocation cap.⁷

Results in Highly Divergent Estimates

Despite the similarities in their approaches, the "Identified Present Need" estimates produced by Dr. Kinsey and Mr. Bernard yield highly divergent estimates at the regional and municipal level. Due largely to conflicting estimates yielded by two different data sources, the calculation produced by Mr. Bernard for South Brunswick (1,512 units) is more than twice as high as that produced by Dr. Kinsey (723 units).

While Mr. Bernard asserts on page 2 of his report that his estimate of LMI household growth from the gap period (1999 – 2015) is "remarkably close" to that of Dr. Kinsey, this alignment is only evident in the LMI household increment at the statewide level. Calculations of LMI household growth and proportions of households with "identified needs" diverge significantly by region, and accordingly, calculated obligations are not in alignment at the municipal level between the two methodologies (see Table 1).

⁶ The full citation, which clarifies COAH's rationale as it relates to a community's total housing stock, reads as follows in the Round 2 rules: The derivation of this limit reflects a desire by COAH not to overwhelm local communities....such that the community would experience 'drastic alteration' from these activities. 'Drastic alteration' has been defined as the doubling of a community's housing stock due to the presence of both inclusionary affordable housing and simultaneously delivered market units at a rate of 1:4. [26 N.J.R. 2350]

⁷ Dr. Kinsey's current calculated obligation for South Brunswick, including "identified present need," is currently below the threshold required to trigger the 20% cap. Nonetheless, his spreadsheet model incorrectly does not include this consideration, which could potentially be relevant in South Brunswick depending on the results of the various calculations.



TABLE 1: COMPARISON OF KINSEY AND BERNARD “IDENTIFIED PRESENT NEED” CALCULATIONS FOR SOUTH BRUNSWICK

	Kinsey	Bernard	Divergence (%)
Statewide LMI Household Growth, 1999-2015	95,586	96,150	1%
Region 3 LMI Household Growth, 1999-2015	14,361	26,438	84%
Region 3 % of LMI HH with “Identified Need”	67.1%	76.6%	14%
Region 3 “Identified Need”	9,682	20,243	109%
South Brunswick “Identified Need”	723	1,512	109%

Dr. Kinsey’s methodology relies primarily on U.S. Census Bureau data, including Census population estimates, American Community Survey data, and ACS Public Use Micro Sample (PUMS) data. Mr. Bernard by contrast relies on data published by the federal Department of Housing and Urban Development (HUD) as part of its Comprehensive Affordability Strategy (CHAS) data set, which itself relies on the American Community Survey as one of its key inputs.

Given the similar methodologies relied upon by Dr. Kinsey and Mr. Bernard, these divergent results are troubling, and certainly undermine Mr. Bernard’s claim that his results are “remarkably similar” to Dr. Kinsey’s in any meaningful sense. Indeed, at the regional and municipal level, the results produced by these methodologies are in clear contradiction to one another, with Mr. Bernard’s methodology yielding an obligation for South Brunswick more than twice that yielded by Dr. Kinsey’s methodology.