



# TOWNSHIP OF SOUTH BRUNSWICK

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September 18, 2015

Via email and regular mail

Honorable Douglas K. Wolfson, J.S.C.  
Superior Court of New Jersey  
Middlesex County Courthouse  
56 Paterson Street  
P.O. Box 964  
New Brunswick, NJ 08903-0964

Re: In the Matter of the Adoption of the Monroe Township  
Housing Element and Fair Share Plan and Implementing Ordinances  
Docket No. MID-L-3365-15  
Our File No. L1347

Dear Judge Wolfson:

During oral argument on the 1,000-unit cap issues held on September 17, 2015, the Court sought input from all parties as to the procedure to be followed in applying the 1,000-unit cap. I am concerned that my response to the Court's inquiries was unclear, incomplete and inarticulate, leaving a wrong impression on the Court and the parties to these matters. In the event my impression of my response is accurate, I wish to take this opportunity to clarify my statements to the Court.

Several parties to these actions have urged the Court to apply the ten-year period applicable to the 1,000-unit cap in increments beginning in 1999. This would result in a 2,600-unit cap. In order for the Court to follow this recommendation, the Court would have to disregard the clear and unambiguous language of N.J.S.A. 52:27D-307(e) as well as N.J.A.C. 5:93-14.1. In my statements to the Court wherein I suggested the Court had discretion to require more than 1,000 units in a town that would otherwise be subject to the 1,000-unit cap, it was not my intention to convey to the Court that it had discretion to completely disregard the statutory and regulatory requirements for application of the 1,000-unit cap. If my comments conveyed that impression, I apologize to the Court and the parties. I believe the Court must follow the statutory and regulatory requirements for application of the cap. Built into both, however, is a level of discretion that resolves both the disparity and dilution concerns expressed by the Court in Calton Homes v. Council on Affordable Housing, 244 N.J. Super. 438 (App. Div. 1990), cert. den. 127 N.J. 326 (1991).

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It is my position that the process to be followed in applying the 1,000-unit cap in the unique circumstances the parties find themselves in regarding the protracted Third Round is as follows:

## DETERMINE FAIR SHARE

- 1) Calculate “pre-credited need” as per N.J.A.C. 5:93-2.13 (which includes all three components of the fair share calculation, including prior round need from the First and Second Round, present and prospective need for the entire Third Round).
- 2) Subtract from the “pre-credited need” all reductions permitted by the Second Round Rules (including all units/credits produced/received by a municipality to address the First and Second Round (prior round) need).
- 3) The resulting number equals the “calculated need” pursuant to N.J.A.C. 5:93-2.17 (Third Round fair share).

## 1,000-UNIT CAP ANALYSIS

- 4) If the Third Round fair share amount is greater than 1,000 units, the municipality is entitled to the 1,000-unit cap pursuant to N.J.S.A. 52:27D-307(e) and N.J.A.C. 5:93-14.1. This results in a Third Round fair share obligation of 1,000 units.
- 5) If there is an objection by an interested party to application of the 1,000-unit cap, the Court must hold an evidentiary hearing, based upon the facts and circumstances of the affected municipality, as to whether it is likely that the municipality, through its zoning powers, could create a realistic opportunity for more than 1,000 units within the next ten-year period. This shall be determined by an analysis of how many residential Certificates of Occupancy (C.O.’s) were issued in the ten-year period immediately preceding the municipality’s application for declaratory judgment.

### If Less Than 5,000 C.O.’S

- 6) If it is determined by the Court that the municipality issued less than 5,000 residential C.O.’s over the preceding ten years, by the plain language of the statute and regulation, the municipality cannot create a realistic opportunity for more than 1,000 units in the next ten years. As such, the 1,000-unit cap remains since, if there is no realistic opportunity for more than 1,000 units over the next ten years, the municipality should never have been required to do more in the first place. In this regard, the 1,000-unit cap merely reflects the reality of the “facts and circumstances” within that municipality and adjusts the obligation to a realistic number.

### If More Than 5,000 C.O.’S

- 7) If the municipality has issued more than 5,000 residential C.O.’s in the preceding ten years, the municipality can create a realistic opportunity for more than 1,000 units in the next ten years. Under these circumstances, pursuant to the statute and regulation, a municipality that otherwise would have been subject to the 1,000-unit cap can be required to create more than 1,000 units

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over the next ten years, since there is a realistic opportunity to do so based upon the criteria set forth in the statute and regulation.

## Determining Amount In Excess Of 1,000

- 8) In the event it is found that the municipality can create a realistic opportunity for more than 1,000 units over the next ten years, the Court must then analyze the specific conditions within the municipality, performing an adjustment based upon the factors set forth in N.J.S.A. 52:27D-307 (c) (2) as well as N.J.A.C. 5:93-4.1, et seq. Based upon this analysis, the Court can exercise its discretion to require additional units, above the 1,000-unit cap, in order to reflect the realistic opportunity for housing within the municipality.
- 9) Whether the municipality remains subject to the 1,000-unit cap, or is required to provide for more than 1,000 units, the Court's analysis should be designed to determine the realistic opportunity for creating affordable housing within the individual municipality. This should result in both a realistic and reasonable fair share obligation.

## SUBTRACT THIRD ROUND ACTIVITY

- 10) Once the fair share obligation has been adjusted based upon the 1,000-unit cap analysis, activity that has been completed toward satisfying the municipality's Third Round obligation is deducted from the Third Round fair share obligation, resulting in a net remaining obligation for the remainder of the Third Round.

I respectfully submit to the Court that the above outlined procedure is consistent with the Court's holding in In Re Application of Township of Jackson, 350 N.J. Super. 369 (App. Div. 2002), in that it deducts "prior round" (First and Second Round) activity prior to application of the 1,000-unit cap; resolves the disparity and dilution concerns expressed in Calton Homes, supra.; is consistent with the requirements of N.J.S.A. 52:27D-307 and N.J.A.C. 5:93-14.1; and successfully balances the competing interests of providing affordable housing without drastic alterations to a municipality. If any of my comments in response to the Court's questions during oral argument conveyed a contrary impression, I apologize for any inconvenience this may have caused.

Thank you for your continued considerations in this matter.

Respectfully submitted,

*/s/ Donald J. Sears*

Donald J. Sears  
Director of Law

DJS/lw

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