

SUPERIOR COURT OF NEW JERSEY  
UNION COUNTY  
LAW DIVISION, CIVIL PART  
DOCKET NO. UNN-L-3759-08

CRANFORD DEVELOPMENT )  
ASSOCIATES, LLC, et al, )  
 )  
Plaintiffs, )  
 )  
vs )  
 )  
TOWNSHIP OF CRANFORD, et al )  
 )  
Defendants. )  
X-----X

Place: Courthouse Tower  
14th Floor  
2 Broad Street  
Elizabeth, New Jersey 07207

Date: September 19, 2017

BEFORE:

THE HONORABLE CAMILLE M. KENNY, J.S.C.

TRANSCRIPT ORDERED BY:

JEFFREY R. SURENIAN, ESQUIRE  
(Jeffrey R. Surenian And Associates, LLC)

APPEARANCES:

JEFFREY R. SURENIAN, ESQUIRE  
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(Jeffrey R. Surenian And Associates, LLC)  
Attorneys for The Township of Cranford.

STEPHEN EISDORFER, ESQUIRE  
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Attorney for Intervener Hartz Mountain Industries,  
et al.

ELIZABETH MCKENZIE, ESQUIRE  
Special Master.

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Sound Recorded By  
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I N D E X

ARGUMENT

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(The matter was called at 2:19 p.m.)  
THE COURT: Good afternoon, everyone. Please  
be seated.  
Well, today we have two motions. I have a  
motion -- I'm sorry. Let me just say Cranford  
Development Association versus Township of Cranford,  
Mayor and Council, et al, which is the old number. It's  
a Docket L-3759-08.  
Counsel, I'll take your appearances.  
MR. JEDZINIAK: Good afternoon, Your Honor.  
Michael Jedziniak from Jeffrey R. Surenian And  
Associates on behalf of the Township of Cranford.  
MR. SURENIAN: Jeffrey R. Surenian from  
Jeffrey R. Surenian And Associates on behalf of  
Cranford.  
MR. EISDORFER: Stephen Eisdorfer of the firm  
of Hill, Wallack, LLP on behalf of -- let me get the  
names right -- H-Cranford Conduit, LP; H-Cranford  
Credit, LP; and Hartz Mountain Industries. They are the  
proposed interveners. I'm going to refer to them as  
Hartz from here on in.  
THE COURT: Okay. So you filed a motion to  
intervene --  
MR. EISDORFER: That's correct.  
THE COURT: -- in this '08 case. So I spent

1 some time going through the eight, ten inches of papers  
2 that I've been sent on this matter, and as you know, it  
3 was Judge Chrystal who handled this matter initially, I  
4 thought very ably, gave a decision, granted immunity  
5 and repose Judgment until next year. Was it the end of  
6 the year, Mr. --

7 MR. SURENIAN: December 31st.

8 THE COURT: December 31st of 2018. The Town  
9 was not satisfied, appealed. She was upheld. Petition  
10 for certification denied. And then the Town said,  
11 "Well, here we are. We'll buy that property and do  
12 something different than what that builder did, was  
13 planning to do." And that's the Cranford Development  
14 Associates who have no longer -- I got a letter. They  
15 have no interest in this case whatsoever. They've sold  
16 their property to the Town of Cranford and have no  
17 interest in this action or in that land anymore, the  
18 Birchwood property; right?

19 MR. EISDORFER: That is correct, Your Honor.

20 MR. SURENIAN: Yes. If I could just out of  
21 detail, Your Honor, that I think is significant. Yes,  
22 that's true. We came to the point it was no secret that  
23 we always thought that the Court had upheld just too  
24 much density on that property and in accordance with  
25 the Judgment of Repose that contemplates that we

1 interact with the Master, we were straight up about  
2 that and that we intended to try to scale down the  
3 project. But our plan was that there would still be  
4 Affordable Housing on the project and we accepted the  
5 responsibility of making the shortfall. So we were very  
6 clear about that and very open about that, and, in  
7 fact, my predecessor Diane Dabulas, I just got an email  
8 from her this morning and she said, yes, she contacted  
9 Ms. McKenzie following the -- you know, once the Town  
10 started moving down this path to see if there were any  
11 concerns that the Master would have, knowing that we  
12 would need to proceed formally at some point. But we  
13 made sure that we communicated with the Master on this  
14 and so that if there were any concerns that we needed  
15 to address, that we would make sure that they are, in  
16 fact, addressed.

17 THE COURT: You know, I'm stepping into  
18 something that is now nine years old and I certainly  
19 have the level of detail and understanding that Judge  
20 Chrystal had and I certainly have not been able to get  
21 to that level of understanding. I was trying to  
22 procedurally understand your motion. It's a motion to  
23 amend a Judgment?

24 MR. SURENIAN: Yes.

25 THE COURT: Okay.

1 MR. SURENIAN: We have a Judgment of Repose  
2 that is based on certain circumstances. Since that time  
3 there have been changes of circumstances. One of the  
4 changes of circumstances is that we want to scale down  
5 what's happening on the CDA site. Another circumstance  
6 that has changed is that a site that was developed at  
7 the point that the RDP was set by Judge Chrystal at  
8 five has now become available for development. So  
9 rather than waiting around, we identified all the  
10 changed circumstances and we said let's address it all  
11 in one comprehensive plan amendment. And in addition to  
12 that, the Judgment of Repose provides that within one  
13 year from such time as the round three number is  
14 established we would have to come in with a plan  
15 amendment. We didn't want to wait until that time. We  
16 wanted to be proactive, we wanted to come in early and  
17 try to address it all at once.

18 And so we've chartered a course based upon  
19 the Judgment of Repose that would resolve all issues  
20 quickly and fairly and in accordance with all the due  
21 process that's required by an amendment to a Judgment  
22 of Repose which happens routinely. And in a COAH  
23 setting the amendment process is a parallel process. If  
24 we were at COAH instead of in Court, what we would do  
25 is we would say, "Here's what we have. We want to make

1 changes," and we would talk to COAH staff, we would get  
2 their input, and then we'd prepare a plan amendment and  
3 we would go. It's the same thing that happens in every  
4 Judgment of Repose. I've been doing this for over  
5 thirty years. I don't recall an instance where I went  
6 into Court to amend the terms of a Judgment of Repose  
7 without first speaking to the Master. It would have  
8 been irresponsible of me to go into Court and say,  
9 "Court, please approve this amendment," without at  
10 least getting some sense of the Master as to is this  
11 going to be a problem or not, because the reaction I  
12 would reasonably expect if I were to do that and the  
13 Master gave a laundry list of objections is, "Well,  
14 didn't you talk to the Master first?" And so we did the  
15 same thing here that we do routinely.

16 Now, to be clear, we all know, we all  
17 understand that when we go to the Master for guidance,  
18 it is, in fact, her job to provide that guidance and  
19 the Judgment of Repose contemplates that. But we know  
20 that all of this process is subject to asking for the  
21 Court to approve something, whether it's a Settlement  
22 Agreement, whether it's an amendment to a plan, or  
23 whatever it may be. And we know that the purpose of the  
24 notice is to solicit input from interested parties, one  
25 and all, and that the result of that input may result

1 in the Master saying, "Well, I know I gave you guidance  
2 A, B, and C, but I've heard the testimony, I've read  
3 the objections. I think you need to make further  
4 changes to your plan to or changes" --

5 THE COURT: All right. Can I just interrupt  
6 you for a second --

7 MR. SURENIAN: Sure.

8 THE COURT: -- because I want to understand  
9 what you're telling me.

10 MR. SURENIAN: Okay.

11 THE COURT: So you think that this procedure  
12 can be done -- your immunity expires in about fourteen  
13 months, fourteen to fifteen months -- and you think  
14 that this can be done in a way that would result in you  
15 being granted additional immunity going forward?

16 MR. SURENIAN: Yes, yes, yes.

17 THE COURT: But yet who's your adversary on  
18 this motion or is there any adversary? I mean, I know  
19 we have someone who wants to intervene --

20 MR. SURENIAN: Well --

21 THE COURT: -- but what does Fair Share have  
22 to say about it?

23 MR. SURENIAN: We did this on notice to  
24 everyone. So anyone who wanted to respond to this  
25 motion could come in and take whatever position they

1 wanted on it. Mr. Eisdorfer had every right to come in  
2 and say, "I represent Hartz. This is what I think." And  
3 so, you know, that's how we proceeded.

4 THE COURT: Yes, I didn't get anything from  
5 Fair Share. So I wasn't really certain. I see Mr. Walsh  
6 is here, but I guess you have no position.

7 MR. WALSH: I didn't file anything, Your  
8 Honor.

9 THE COURT: Okay.

10 MR. SURENIAN: But ultimately I think the  
11 point of this process is, you know, when it reaches the  
12 point where now we have some sense, it would be foolish  
13 for us to submit a plan amendment that we didn't think  
14 that the Master was amenable to or we weren't to  
15 prepared to disagree with the Master and try to  
16 persuade the Court otherwise. Typically what you do is  
17 you just -- even if you think you're right, you agree  
18 with the Master because you want to get it done and you  
19 don't want to spend a lot of money. And so -- but once  
20 -- but the process that we envision is now we're at the  
21 point where we have a plan amendment. You know, we've  
22 asked you to follow the same process that you would do  
23 as COAH.

24 THE COURT: Yes, but we're not COAH and COAH,  
25 you know, COAH is not here. This is a different

1 situation. If COAH did their job, you wouldn't be here.  
2 Okay.

3 MR. SURENIAN: Fair enough. Fair enough. But  
4 whether --

5 THE COURT: When the Mount Laurel case came  
6 out, when the Supreme Court came out -- what was it,  
7 it's now two and a half years ago -- when they came out  
8 with that they said, "Forget about COAH. It's going to  
9 the Judges and the Judges will do it."

10 MR. SURENIAN: Right, but regardless of --

11 THE COURT: So I don't really see that I have  
12 to do anything the way COAH did.

13 MR. SURENIAN: Well, you don't have to. But  
14 what COAH did is what -- there's a parallel process  
15 that happens in every Court proceeding, and the essence  
16 of the COAH process is notice and an opportunity to be  
17 heard. You're seeking the plan amendment, you've got to  
18 notify interested parties. If someone objects, someone  
19 objects, you've got to deal with those objections.  
20 They're valid, they're invalid. You need to make  
21 adjustments or you don't need to make adjustments. It's  
22 the --

23 THE COURT: So how do I -- procedurally you're  
24 saying you can make, say, a Rule 4:50 motion because  
25 there's a changed circumstance. But the changed

1 circumstance is you doing an end run basically around  
2 Judge Chrystal's -- the Town -- not you, but the Town  
3 doing an end run around Judge Chrystal's decision, and  
4 so that's a changed circumstance and so now, "Let us do  
5 something different" --

6 MR. SURENIAN: But --

7 THE COURT: -- "and get ourselves" -- I don't  
8 know what you've done. Honestly, I don't know what  
9 you've done since 2008. I don't know what you've done  
10 since her decision which must have been, what, 2011 --

11 MR. SURENIAN: 2013.

12 THE COURT: -- 2013 --

13 MR. SURENIAN: May 22nd.

14 THE COURT: That's when she issued her  
15 opinion?

16 MR. SURENIAN: That's when she issued the  
17 Judgment of Repose.

18 THE COURT: The Judgment of Repose. Okay.  
19 Whatever she's -- I don't know what you've done towards  
20 Affordable Housing since, and you may have done a lot.  
21 I see a lot of development in the Town.

22 MR. SURENIAN: Yes. As we said in our papers,  
23 we've satisfied all the conditions in the Judgment of  
24 Repose, we've done everything we were supposed to in  
25 the Judgment of Repose. It's not just this one issue

1 that now is going to generate twenty fewer projects  
2 that we think frankly we can cover with existing rental  
3 bonus credits in our plan. It's other things, as well.  
4 The biggest thing is Hartz arrives on the scene, has 35  
5 acres, say, "I'm available for development." What that  
6 means is that means we've got to figure out what's the  
7 RDP that's generated by that. It's changed  
8 circumstances. So we're doing our job. We're doing the  
9 right thing by saying -- there was another site that is  
10 headed towards redevelopment. It's not even redeveloped  
11 yet. It hasn't even been declared an area in need of  
12 redevelopment. We've said let's account for that, let's  
13 find some comprehensive way to deal with all this.  
14 Meanwhile we don't know what the round three number is.  
15 It was only January that we found out that the Supreme  
16 Court says there's a gap obligation, and we've tried to  
17 figure out what might that be. What happened in the  
18 Summit case? What happened in the Summit case is the  
19 Court and the parties figured out, well, whatever that  
20 number is, it's aspirational and we'll never get there  
21 but maybe there are things that we can do that would be  
22 a reasonable way to the extent practicable to address  
23 the unmet need. We've said let's try to figure this all  
24 out --

25 THE COURT: Who's going to help you?

1 MR. SURENIAN: Who's going to --

2 THE COURT: Who's going to help you? I mean,  
3 is it just going to be the Town and then the Court  
4 saying this sounds good?

5 MR. SURENIAN: Well, it's going to be as in  
6 application for any amendment of any plan for any  
7 application for approval of any plan, for any  
8 application for approval of any agreement. It's going  
9 to be notice and an opportunity to be heard. At the end  
10 of this process we have a plan amendment that the  
11 Master says, "I'm okay with proceeding in that way  
12 subject to, you know, I have to hear the testimony. If  
13 there's legitimate objections, obviously I need to be  
14 able to respond to that." And then we do -- whether  
15 you follow the COAH process or the Court process, it's  
16 identical in this respect; it requires notice and an  
17 opportunity to be heard. And so we would provide notice  
18 and opportunity to be heard and then any interested  
19 party could come in and could say, "I think it's great.  
20 I think it's terrible," and the Court would have to  
21 make a call.

22 I'll give you the perfect example. K.  
23 Hovnanian Shore Acquisition, Inc. versus Berkeley  
24 Township. What happened in that case? The developer  
25 filed a builders remedy suit. The municipality had an

1 immunity Order. The Municipality said, "I'm entitled  
2 to not be leveraged. I'm entitled to protection from  
3 these kinds of suits." The Judge dismissed the suit. He  
4 provided notice and an opportunity to be heard. K.  
5 Hovnanian Shore Acquisition, Inc. provided all their  
6 reasons why the Court should deny the Township's  
7 application for over 500 credits. And, in fact, I've  
8 submitted their summation. They set forth their  
9 position. They said, "We don't think you should give  
10 these credits. Here's why." At one point they said,  
11 "You know, I can't even evaluate this claim for credits  
12 unless I have access to confidential information."

13 The Judge said, "Well, here's an Order that  
14 will give you access to that confidential information."

15 And if you look at the transcript of Judge  
16 Serpentelli, he says, "Is there anything you need to be  
17 able to file a good objection, you just let me know and  
18 I'll make sure you get what you need."

19 He had a hearing. He heard from everyone. He  
20 made a call, and we moved on.

21 So the procedure we envision -- you'll hear  
22 ex parte in the brief, the most used word in the  
23 Hartz's brief. The procedure that we're proposing is  
24 not ex parte. The procedure that we're proposing is we  
25 want to come through the front door, we want to make an

1 application, we want to notify not only Hartz but any  
2 other interested party, anyone who wants to object --

3 THE COURT: So okay. So you've come here for  
4 Summit and you've come here for Berkeley Heights, and  
5 each time you filed a DJ action, you notified  
6 everybody. We had interveners in Berkeley Heights,  
7 certainly you saw today. Mr. Nolan was here. He saw it.

8 MR. SURENIAN: Yes.

9 THE COURT: We had interested parties in  
10 Summit who had things to say and Fair Share was  
11 involved, and we've come to resolutions. Right? Now, in  
12 this case -- and when you get your Judgment of Repose  
13 you'll get a lengthy Judgment of Repose; right --

14 MR. SURENIAN: Yes.

15 THE COURT: -- when we finalize those two  
16 cases.

17 MR. SURENIAN: Yes.

18 THE COURT: Here you want to do this in sort  
19 of a different way. You're calling it a motion on a  
20 2008 case but you still want -- you're saying it's  
21 going to be exactly the way it was, the way we did  
22 those other two towns?

23 MR. SURENIAN: Well, we're proceeding under  
24 the terms of the Judgment of Repose. What does the  
25 Judgment of Repose say? The Judgment of Repose says I'm



1 protected until December 31st, 2018. Paragraph nine.  
2 The Judgment of Repose says, "Elizabeth McKenzie,"  
3 paragraph seven, "shall continue to serve as the  
4 Special Master until further Order of the Court. She  
5 shall consult with the parties as required to  
6 facilitate the implementation of this Order."

7 So it is appropriate and it is the duty of  
8 the Master to consult with the parties, to be in touch  
9 with the parties as to how you are proceeding and how  
10 you are dealing with this Order. So we have kept her  
11 abreast as to what we're doing and how we're proposing  
12 to do it.

13 What's significant about that language is it  
14 is entirely appropriate that the Master should have  
15 that job. When you look at Mount Laurel II --

16 THE COURT: We're not going to argue about  
17 whether the Master has this job.

18 MR. SURENIAN: Right.

19 THE COURT: You know, however we proceed in  
20 this case, she's going to be part of it, I hope.

21 MR. SURENIAN: But you're asking for the  
22 process. You're asking for the process.

23 THE COURT: Okay.

24 MR. SURENIAN: And my point was the Order  
25 contemplates a process. The Order says to keep in touch

1 with the Master. The Order says, you know, there's  
2 going to be a round three obligation at some point and  
3 there may be more of an obligation, and when that  
4 happens, you know, come back within a year and amend  
5 your plan. Paragraph ten.

6 And paragraph eleven. "The Court retains  
7 jurisdiction of this matter for the limited purposes of  
8 enforcing this Final Judgment and other Orders entered  
9 by this matter." So the Court retained jurisdiction.  
10 So, you know, you have jurisdiction by virtue of  
11 paragraph eleven. And we're coming to you and we're  
12 saying there are multiple changed circumstances. Only  
13 one --

14 THE COURT: "For the limited purpose enforcing  
15 the Final Judgment of Compliance and all other Orders  
16 entered in this matter." That's what the Court retains  
17 jurisdiction for.

18 MR. SURENIAN: Right.

19 THE COURT: So you -- Mr. Surenian, I'm having  
20 a difficult time conceptualizing why I should let you  
21 proceed on motion for -- to ultimately let you get a  
22 Judgment of Repose for your Town, a Judgment of Repose  
23 for ten years under these circumstances working on a  
24 2008 case. I just, you know, because the Court retains  
25 jurisdiction for a limited purpose --

1 MR. SURENIAN: Well, one of the purposes that  
2 the Court --

3 THE COURT: -- when the Township's third  
4 round post 1999 Fair Share obligation is formally  
5 quantified by COAH -- which, forget about it, they're  
6 not going to do it, they haven't done it -- or a  
7 lawfully designated successor entity, I think that's  
8 me. You know, it's the Courts; right?

9 MR. SURENIAN: Yes.

10 THE COURT: We're the lawfully designated  
11 successor entity. Then you amend the housing and Fair  
12 Share plan to address on that need and things like  
13 that. But I don't know.

14 MR. SURENIAN: Well, I think what's not clear  
15 -- and I apologize if it's not clear -- is the motion  
16 is simply to set into process a procedure by which we  
17 will proceed efficiently to get this case to a Final  
18 Judgment dealing with not only what is expressly  
19 contemplated by this Judgment, you know, that there  
20 will be some third round number, but also changed  
21 circumstances that we have an obligation to address.

22 THE COURT: That you changed, the Town changed  
23 by buying the land from the developer who was supposed  
24 to develop that land.

25 MR. SURENIAN: There's four changed

1 circumstances --

2 THE COURT: Okay. Hartz is the -- okay -- you  
3 know, I understand.

4 MR. SURENIAN: -- only one of which involves  
5 twenty units. The three other do not involve the twenty  
6 units. And as to that twenty units we have pledged from  
7 the outset and believe we can probably satisfy that  
8 right now with what's in the plan.

9 THE COURT: So why don't you -- why wouldn't  
10 you simply be working with the Master and your planner,  
11 meeting with Hartz, as I think you've had some  
12 meetings, Fair Share, inviting them into the process to  
13 work on having a plan ready to go forward by December  
14 of 2018 so that you can just continue with your  
15 immunity --

16 MR. SURENIAN: Well --

17 THE COURT: -- and address going forward,  
18 going into the future and telling us what you've done  
19 on your last obligation?

20 MR. SURENIAN: -- Judge, frankly, we could do  
21 that.

22 THE COURT: Yes, I would like you to do that.

23 MR. SURENIAN: You know, we could wait until  
24 December --

25 THE COURT: You don't have to wait to work.

1 MR. SURENIAN: But the point of the matter is  
2 we don't have to wait until December, 2018.

3 THE COURT: But, you see, what I don't  
4 understand is why you're coming here now. I think you  
5 should be working on being prepared for your immunity  
6 expiring in 2018 and going through the process going  
7 forward, figuring out, I guess, what your gap period  
8 is. I mean, I don't know how we're going to do that  
9 otherwise.

10 MR. SURENIAN: Well, look, I don't deny that  
11 we have the right to wait. But when a municipality is  
12 being proactive --

13 THE COURT: Hmm-hmm.

14 MR. SURENIAN: -- it should be encouraged,  
15 with all due respect.

16 THE COURT: I do encourage you, but this is  
17 not the method I like in terms of encouraging you and I  
18 don't think it's going to be the fairest and most  
19 inclusive method.

20 Mr. Eisdorfer, you moved to intervene. They  
21 have a Judgment of Repose right now. How do you move to  
22 intervene on that?

23 MR. EISDORFER: Well, Your Honor, but they  
24 want something new. This is actually, this is, I think  
25 a unique proceeding. They come to you and say, "We want

1 you to determine what our third round housing  
2 obligation is, what part of it we can meet through our  
3 existing vacant land, what part of it is," quote,  
4 "unmet need that the gap between what we can meet with  
5 existing vacant land and our entire obligation. We want  
6 you to approve a plan and we want this all to happen  
7 sort of by us lobbying the Master and the Master will  
8 then tell you what would be a good thing to happen."

9 And so this is quite unique. I can't think of  
10 any -- "And we want a Judgment of Repose extending  
11 until 2025 coming out of this." So I think this is a  
12 quite unique proceeding, and the fundamental difference  
13 between the Town and my client is the Town says, "This  
14 is some kind of sui generis proceeding. It's not  
15 governed by the Court Rules."

16 My client says they come to Court. They are  
17 contested issues. How much vacant land does the Town  
18 have? How much of its need can it be met? A hotly  
19 contested issue and if you had any doubt about that,  
20 you should look at the last document that they filed  
21 which is a certification from their planner Michael  
22 Mistretta --

23 THE COURT: Right, where he denies everything  
24 that your planner said.

25 MR. EISDORFER: That's right, where he says

1 our guy is completely wrong --

2 THE COURT: Hmm-hmm.

3 MR. EISDORFER: -- and it's not for the Court  
4 to resolve this now. But what is clear is these are all  
5 contested issues. So the Town is going to ask the Court  
6 to resolve these contested issues, except they want to  
7 without the ordinary incidence of litigation.

8 Now, I think they have to be before the  
9 Court. I don't think that this is optional. They're  
10 currently in violation of the Court's Order on the CDA  
11 site. That's an Order that says that the site is to be  
12 developed for 360 units. They have acted to subvert  
13 that Order. They have made the developer an offer he  
14 couldn't refuse. And if you look at Mr. Mistretta's  
15 certification, Mr. Mistretta says, "Actually, we still  
16 don't know how we're going to solve that problem. We  
17 are going to reduce the number of low and moderate  
18 income units and we're still thinking about how we  
19 should solve that problem."

20 So at this point they can't simply ignore  
21 that Court Order. They can't say, "We're just going to  
22 sit quietly and think about how to solve it." Currently  
23 they're in violation of that Order. So they have to  
24 come back here. They have to come back to the Court and  
25 say, "Here's how we propose. Here's our excuse. Here's

1 our justification." I believe it's up to them to say  
2 whether it's excuse or justification. "Here is our  
3 excuse or justification for why we have violated the  
4 Court Order, and here is how we propose to deal with  
5 it." So at the very least they have to be here. They've  
6 got to be here for some kind of relief.

7 THE COURT: Or I mean, I suppose -- I mean, I  
8 suppose some developer, Fair Share, or someone could  
9 have come into Court and said -- and brought it to the  
10 Court's attention --

11 MR. EISDORFER: That's right.

12 THE COURT: -- because, frankly, I didn't  
13 know what was going on.

14 MR. EISDORFER: That's right.

15 THE COURT: You know, once in a while Judge  
16 Chrystal might say, "I don't know if anything has been  
17 built over there."

18 MR. EISDORFER: That's right. Well, you know--

19 THE COURT: We don't know the answer to that.

20 MR. EISDORFER: That's right. They did not  
21 volunteer to the Court that, "We have violated the  
22 Court Order."

23 THE COURT: So you could have come in if you  
24 wanted to, I guess, as an interested developer. Fair  
25 Share could have come in and said --

1 MR. EISDORFER: That's right.

2 THE COURT: -- "Judge, you granted this Order  
3 of Repose, but we want to sue them now because they  
4 haven't fulfilled that Order."

5 MR. EISDORFER: That's right.

6 THE COURT: They've subverted it, as you said.

7 MR. EISDORFER: That's right. So, Your Honor,  
8 my point is at this point they've got to be here. It's  
9 taken a while to come here, but they are right, they  
10 have to be here, they have to address that, they have  
11 to either get the Judgment amended or they have to get  
12 some kind of whole note that says, "It's okay that we  
13 violated the Court Order." They have to come here and  
14 say, "Not only do we want to do that, but we want to do  
15 something much more ambitious. We, in effect, want you  
16 to do a third round case and we want you to make all  
17 the determinations to be made in a third round case,"  
18 and these are all going to be contested. Every one of  
19 them is going to be a contested issue, and they said,  
20 "But we don't want to do this in accordance with the  
21 Rules of Court. We want" -- and they're pretty clear  
22 about it. They say, "We don't want a litigation  
23 oriented procedure," but when you come to Court, that's  
24 what you get. That's the nature of the Rules of Court.  
25 My clients say, "You've initiated a Court

1 proceeding that involves contested issues," contested  
2 issues which indisputably involve the fate of my  
3 client's property. My client is entitled to participate  
4 in that, is entitled under, you know, mandatory  
5 intervention, permissive intervention. Either way you  
6 analyze it, this is a proceeding that is going to  
7 determine important economic interests of my client.  
8 Under the Rules of Court my client is entitled to  
9 participate and we want to participate.

10 You know, I understand the Court's distaste  
11 for what seems to be an anomalous sort of proceeding.  
12 But we think that now that they're here the Court ought  
13 to convert the proceeding into one that is a fair and  
14 proper Court proceeding with contested issues that have  
15 to be resolved and that they be resolved in the  
16 ordinary way.

17 The Town says, "We might reach a settlement."  
18 And they might, they might reach a settlement with my  
19 client, they might reach a settlement with the  
20 invisible third party, Fair Share Housing, they might.  
21 But they haven't now. When they're at the point that  
22 they have a settlement and we say we can perhaps short-  
23 circuit the litigation because we have achieved a  
24 settlement, then that's great. Then they can come to  
25 the Court under Morris County Fair Housing Council

1           versus Boonton Township, the standard for settlement  
 2 for settlements in Mount Laurel cases, and go through  
 3 that process. But they say, "No, we don't want to  
 4 litigate. That's the only process we want. We want the  
 5 Court to treat this case as if it's already been  
 6 settled and limit us to that process."

7           And my clients say that's a denial of due  
 8 process. We're entitled to participate at a time when  
 9 participation is meaningful, not merely to come in  
 10 after the fact and attack a fait accompli after the  
 11 fact. We think that's sort of the essence of due  
 12 process.

13           And so my clients, in sum, my client's  
 14 position is they have to be here. We're not actually  
 15 averse to their being here and we're not actually  
 16 averse to their ambition to get a -- to have a third  
 17 round case, to have a case in which the Court  
 18 determines throughout whatever means are appropriate  
 19 the Town's third round housing obligation, determine  
 20 how much vacant land it has, and, therefore, how much  
 21 the Town has to affirmatively plan for to determine  
 22 what the unmet need is and, therefore, what the Town  
 23 has to plan under the standards set forth in Fair Share  
 24 Housing versus Cherry Hill. We're not averse to the  
 25 Town proceeding in that way, but we are adverse to

1           having it take place outside the Rules of Court and  
 2 with my client not participating.

3           Judge --

4           THE COURT: Okay. So wait. If I granted a  
 5 motion to intervene and allowed this motion to proceed,  
 6 I don't even understand where we are procedurally.

7           MR. EISDORFER: Your Honor, you are at the  
 8 beginning. This is -- you are at the beginning of  
 9 litigation which involves a number of issues, and the  
 10 Court would have to set a process that, you know --

11           THE COURT: I can't do this on motion. I think  
 12 you need to file a Declaratory Judgment action. I think  
 13 that's how this has to be. It makes no sense -- I've  
 14 been trying to wrap my head around this, and I can't  
 15 because it makes no sense to me to be proceeding by a  
 16 motion and saying, "Well, you know, you retained  
 17 jurisdiction in that Order. Judge Chrystal retained a  
 18 limited jurisdiction." We're starting out on something  
 19 brand new going forward to protect the Town to give the  
 20 Town immunity for an additional ten years in a very  
 21 cribbed way, I think. I don't think it's the right way  
 22 to do it. I'm not comfortable with it at all.

23           I don't know how does Fair Share get involved  
 24 if Fair Share -- if I say, if I grant this relief,  
 25 leave to amend your round three Judgment of Repose

1 directing the Master to review the RDP analysis and its  
 2 claims to credits and give me her recommendations about  
 3 that; directing the Master to -- directing the Town to  
 4 provide the Master with a preliminary plan on how to  
 5 address unmet need without prejudice to any position  
 6 the Township may have on the issue by a date the Master  
 7 specifies and ask her to provide me with  
 8 recommendations; require the Township to conform with  
 9 COAH's procedural regulations; guide the Township and  
 10 Master and interested parties. But, I mean, so how do  
 11 they know what's going on? If you're working with the  
 12 Master and the Master is giving you guidance or telling  
 13 you this, how do I hear from Mr. Walsh that, you know,  
 14 "Well, Judge, this additional ten years of repose that  
 15 they want, it's not suitable for us. We don't think it  
 16 complies with their obligation"?

17 MR. SURENIAN: The process that we propose  
 18 invites them to comment on the plan amendment. You  
 19 know, this is -- you know, this is not unusual. A  
 20 municipality amending an approved plan is not an  
 21 unusual thing.

22 THE COURT: But it's -- amending a plan is one  
 23 thing. Amending it so that you grant yourself an  
 24 additional ten years of immunity is a different thing.  
 25 That seems to me to start a whole new procedure.

1 MR. SURENIAN: Regardless of what relief I ask  
 2 for, I could ask for any relief and you could say,  
 3 "Surenian, you're nuts. I'm not going to grant you that  
 4 relief. You're not entitled to that relief." But the  
 5 procedure that we propose charts a course where we have  
 6 a way of addressing multiple changed circumstances, the  
 7 most significant of which is the availability of the  
 8 Hartz property. And then the process that this would  
 9 trigger in accordance with whether you're on a Mount IV  
 10 road or whether you're in a Morris County Fair Housing  
 11 Council road would be the identical process. There  
 12 would be four layers of protection in this process to  
 13 insure that before you make a decision you have  
 14 everything that you need. You would have, first, Fair  
 15 Share Housing Center participates. They've settled  
 16 scores of cases without intervening, scores of them,  
 17 and before this Court. And I've listed all those in my  
 18 certification. But they don't need to be a party to be  
 19 heard. Okay. That's level A.

20 Level B is you have the Master -- I'm sorry  
 21 -- level B is the procedure that we propose is going to  
 22 provide this over the top notice to every interested  
 23 party, is going to provide it to the Builders  
 24 Association, to Fair Share Housing --

25 THE COURT: Why wouldn't you just file a

1 Declaratory Judgment action?

2 MR. SURENIAN: Because we don't -- we have the  
3 right to do so under the four corners of our Judgment  
4 of Repose. Here's a Town with the Judgment of Repose  
5 saying there's multiple changed circumstances. I'm not  
6 waiting for someone to blow the whistle on me and say  
7 that I'm trying to avoid something. I'm coming through  
8 the front door. I'm telling you what the changed  
9 circumstances are, and here's how I propose to solve  
10 that. I'm going to ask you for an additional five years  
11 of protection and I'm going to provide notice. If Mr.  
12 Eisdorfer thinks that's a bad idea -- you can say ex  
13 parte all you want, but the process is designed to say,  
14 "Speak your piece."

15 THE COURT: How would he have gotten notice if  
16 he didn't represent those last people who were the  
17 plaintiffs in the case that you're moving under?

18 MR. SURENIAN: Because when we filed the  
19 motion we noticed everyone on the Supreme Court service  
20 list. So he was noticed three times.

21 MR. EISDORFER: Your Honor, there was never  
22 notice directed to Hartz.

23 THE COURT: That's what I mean.

24 MR. EISDORFER: Hartz had the good fortune  
25 that I got noticed. I was listed on the motion papers

1 as counsel for Cranford Development Association.

2 THE COURT: Because you were counsel for the  
3 last plaintiff.

4 MR. EISDORFER: And because as it happens, I'm  
5 also counsel to the Builders Association. But the  
6 Builders Association, I get notices in 330 cases; they  
7 all go into my trash can. So there was never notice  
8 directed at Hartz. Hartz had the good fortune that I  
9 got the --

10 THE COURT: They had you. Okay.

11 MR. EISDORFER: -- I got these papers and I  
12 said, "Ah, this is about Hartz."

13 MR. SURENIAN: Your Honor, the suggestion that  
14 we were trying to do this behind anyone's back is  
15 ludicrous. If you look at all the people we noticed --

16 THE COURT: You noticed a lot of people. You  
17 just have to notice the right people.

18 MR. SURENIAN: But we --

19 THE COURT: Okay. I mean, you could notice  
20 somebody that's --

21 MR. SURENIAN: -- everyone knows there's  
22 constructive notice. You know, let's say there's a  
23 notice in the newspaper and it's defective. When I show  
24 up at the meeting, well -- there was no intent to do  
25 this behind anyone's back.



1 THE COURT: Okay. So I don't know if there's  
2 any other Hartz out there in Cranford, but, you know --

3 MR. SURENIAN: The Morris County Fair Housing  
4 Council case sets the standard that we pledged to  
5 comply with. It says if you know someone that's  
6 committed to provide Affordable Housing, notice them.

7 THE COURT: Why didn't you notice Hartz then?

8 MR. SURENIAN: Well, we noticed Mr. Eisdorfer,  
9 Hartz's attorney, three times.

10 MR. EISDORFER: Your Honor --

11 THE COURT: Okay.

12 MR. SURENIAN: And he filed a --

13 THE COURT: And he filed a notice to  
14 intervene, but --

15 MR. SURENIAN: -- and he responded on time.

16 THE COURT: Fortunately for Hartz, they have  
17 Mr. Eisdorfer and he was alert, but --

18 MR. SURENIAN: Well, it was never our intent  
19 to do this behind Hartz's back. If you're representing  
20 a municipality and you notify the attorney for the  
21 developer three times and the developer files a timely  
22 response to it, you can feel pretty comfortable that  
23 they knew what was going on.

24 THE COURT: Okay.

25 MR. EISDORFER: Your Honor, counsel keeps

1 citing Morris County Fair Housing Council. The Morris  
2 County Fair Housing Council is in the context of a  
3 class action settlement, and that's not where we are  
4 here. That comes at the end of the litigation, not at  
5 the beginning. And so what counsel wants to do is take  
6 the process that after you've got a settlement that  
7 resolves the litigation and says to objectors, "If you  
8 now want to attack that settlement, you can." And he's  
9 now making that primary process. They don't have a  
10 settlement. What they have is a batch of contested  
11 issues which this Court is going to have to resolve,  
12 and I think the Court should resolve it. I understand  
13 where the Court is coming from and I'm very sympathetic  
14 to the Court not wanting to volunteer in this context.  
15 But I think the Court should take this, but I think the  
16 Court should convert it into a fair and appropriate  
17 process and not -- not the inappropriate process that  
18 the Town is -- the inappropriate and unfair process  
19 that the Town is proposing.

20 THE COURT: Let me ask the Special Master what  
21 she thinks.

22 You've participated in this case; right?

23 MS. MCKENZIE: Yes, I did, Your Honor.

24 THE COURT: And you were Special Master for  
25 Judge Chrystal.

1 MS. McKENZIE: Do you want me to just come up  
 2 and --  
 3 THE COURT: Sure, yes. This is very unusual.  
 4 Usually you decide a motion on a legal basis. And if I  
 5 were going to decide this purely on a legal basis, I'd  
 6 say, you know, I think Hartz has a right to be involved  
 7 in this.  
 8 You're still under oath from this morning.  
 9 MS. McKENZIE: It's a different case, though.  
 10 THE COURT: It's a different case, but -- all  
 11 right. I'll swear you in. Mr. Surenian wasn't here.  
 12 MR. SURENIAN: No, no, no, it's not necessary  
 13 Your Honor.  
 14 THE COURT: Do you think she'll lie if we  
 15 don't put her under oath? (Chuckle)  
 16 MS. McKENZIE: They could accuse me of that,  
 17 though. (Chuckle)  
 18 THE COURT: Okay. Let me put you under oath,  
 19 Ms. McKenzie.  
 20 MR. EISDORFER: Cranford has actually accused  
 21 her of lying earlier in this case.  
 22 THE COURT: Okay. So I'll put her under oath.  
 23 E L I Z A B E T H M C K E N Z I E, SPECIAL MASTER,  
 24 SWORN  
 25 THE COURT: State your name again for the

1 record.  
 2 MS. McKENZIE: Elizabeth, middle initial C,  
 3 McKenzie, M-C-K-E-N-Z-I-E. My office is at 9 Main  
 4 Street in Flemington, New Jersey.  
 5 THE COURT: Okay. Now you're under oath in  
 6 this case.  
 7 MS. McKENZIE: Thank you.  
 8 THE COURT: So this motion, the Township wants  
 9 me to grant it leave to amend its round three Judgment  
 10 of Repose and to direct you, first of all, to review  
 11 the RDP analysis and its claim to credits and advise me  
 12 as to your recommendations as to the magnitude of the  
 13 RDP and the number of credits to which the Township is  
 14 entitled. Those are the first things that it wants you  
 15 to do. And then have them give you a preliminary plan  
 16 as to how to address on that need and then further on.  
 17 You've had the opportunity to look at this?  
 18 MS. McKENZIE: I have. I've looked at all the  
 19 papers on both sides for both motions.  
 20 THE COURT: Okay.  
 21 MS. McKENZIE: So --  
 22 THE COURT: Specifically with -- I don't want  
 23 to put you on the spot --  
 24 MS. McKENZIE: No, no, you're not putting me  
 25 on the spot.

1 THE COURT: -- but with regard to granting it  
2 leave to amend the round three Judgment of Repose, what  
3 would --

4 MS. MCKENZIE: Well, here's the thing. The  
5 Judgment of Repose that Judge Chrystal gave in 2013,  
6 the Final Judgment, was basically final with respect to  
7 the prior round and it was conditional with respect to  
8 the third round. It was an acknowledgment that they  
9 were entitled to a vacant land adjustment with a  
10 determination that at that time it looked like they had  
11 a five unit RDP. But because there was no third round  
12 number assigned -- and I think part of the motivation  
13 for this was Fair Share Housing Center had actually  
14 sent a letter in on that and said, "We would like --  
15 you know, there isn't a determination as to the third  
16 round numbers. They're going to have a substantial  
17 unmet need, and we would actually, you know, like it if  
18 that, you know, they were required to address that  
19 unmet need at some time," which was a reasonable  
20 position and appropriate, and I agreed with it. And so  
21 my recommendation was that -- and this was reflected in  
22 the Judge's Order -- that the third round would have an  
23 RDP of five as calculated at that time but that when  
24 third round numbers came out the Town would have one  
25 year from the time those numbers came out -- at that

1 time we still thought they were going to come from COAH  
2 because what was happening during that time was COAH  
3 had adopted third round numbers in 2008 but then in  
4 2011 or 2010 the numbers were thrown out by the  
5 Appellate Division and then it wended its way through  
6 the process and ultimately there were no numbers. So  
7 Cranford has essentially been waiting around -- I mean,  
8 they haven't been waiting around. They did have their  
9 appeals in the Appellate Court and the Supreme Court.

10 THE COURT: Yes. And that's another thing  
11 which I won't --

12 MS. MCKENZIE: It's a separate issue.

13 THE COURT: -- you won't get involved in  
14 because it's a legal thing, but the calculation of how  
15 we're one year from the final number, to me, was --

16 MS. MCKENZIE: Well, the thing is --

17 THE COURT: -- I couldn't take that  
18 seriously.

19 MS. MCKENZIE: -- the Judgment was through  
20 2018 because at that time that was what the Judgments  
21 were for that COAH was giving out. So it was through  
22 2018. But it was always conditional as to that third  
23 round --

24 THE COURT: Hmm-hmm.

25 MS. MCKENZIE: -- because they still had an

1 unmet need to address.

2 So, you know, in terms of amending the prior  
3 round Judgment or the Judgment as to the prior round, I  
4 -- you know, when I first got the calls on this and  
5 started looking at it, my reaction was, well, you know,  
6 you certainly are entitled to some rental bonuses that  
7 you weren't allowed to pick up before. You may be able  
8 to cover that. There are things you needed to do with  
9 your Final Judgment that, you know, still have to be  
10 cleaned up. You know, you can clean up all that stuff  
11 and you can come in to patch up your, you know, prior  
12 round Judgment with respect to all of that.

13 I think with the third round, first of all,  
14 there are changed circumstances. But as far as the  
15 third round is concerned, I felt that that's something  
16 -- my feeling is the third round, we're really starting  
17 a little bit from scratch. If they did have additional  
18 sites, obviously they're going to have to be able to  
19 deal with those in coming up with the calculation of  
20 the RDP.

21 So it wouldn't be inappropriate, in my  
22 opinion, to divide this between what might need to be  
23 done to plug the holes in the prior round obligation  
24 with, you know, things they have done to make up the  
25 difference, but the third round I think is -- I had

1 always wondered why they weren't coming in for a  
2 Declaratory Judgment on the third round because that  
3 almost -- without third round numbers, to do that now  
4 would almost require, you know, someone with Fair Share  
5 Housing Center, which I've encouraged them to do and  
6 they've been talking to Fair Share. I will say that.  
7 They've been talking to them about what might be  
8 required and what the obligations might be.

9 So it's not that they're not moving in the  
10 right direction, but, you know, it may be that with  
11 respect to the third round that, you know, that a DJ  
12 action might be an appropriate way to do it.

13 THE COURT: See, now, that makes sense to me.  
14 That makes -- that, I understand procedurally, I  
15 understand that with regard to the Rules of Court and  
16 how to amend the Judgment and why an Order would say,  
17 you know, why Mr. Surenian would be saying, "We have  
18 the right to come in to fix these things." Well,  
19 certainly to the prior round, but going forward to just  
20 work off an old Order and work off third round numbers  
21 that never came to be, I don't know how to do that. I  
22 don't think we can do that, I don't think we should do  
23 that, I don't think it's fair to do that.

24 MR. SURENIAN: Your Honor, if I just might. I  
25 certainly operated under the understanding that when we

1 were doing cleanup -- first of all, we've done all the  
2 cleanup.

3 MS. MCKENZIE: Right.

4 MR. SURENIAN: So there's nothing left to  
5 clean up.

6 MS. MCKENZIE: Oh, yes, you've done good.  
7 You've done a good job.

8 MR. SURENIAN: I mean, we're perfect. We have  
9 -- all the conditions are satisfied and we've addressed  
10 everything in that Judgment.

11 THE COURT: Except the whole litigation that  
12 Judge Chrystal spent a lot of time on and that you  
13 appealed up to the Supreme Court. That project has  
14 never been built.

15 MR. SURENIAN: Well, that project is going to  
16 be built --

17 THE COURT: But --

18 MR. SURENIAN: -- and it's going to have a  
19 set aside, and the gap is going to be accounted for --

20 THE COURT: And it's going to be smaller.

21 MR. SURENIAN: -- if it's not already  
22 accounted for. Okay. So that was just -- it's important  
23 not to let the tail wag the dog. That's one aspect of a  
24 lot of different moving parts here.

25 And just so that the record is --

1 THE COURT: But that's where you got your  
2 Judgment in that case. Okay. So that's why -- you call  
3 it the tail wagging the dog, but that's where you got  
4 your Judgment. It was in that case that you --

5 MR. SURENIAN: Okay.

6 THE COURT: -- so, you know -- anyway, go on.  
7 What else?

8 MR. SURENIAN: So I just want the record to be  
9 clear. It was my understanding -- and, as you know, I  
10 didn't speak to you directly, but Mike kept me apprised  
11 of his discussions with you. It was my understanding  
12 that your thought was that when we addressed this gap  
13 that this twenty -- make sure that we've covered this  
14 twenty unit gap from the changing of the CDA site, that  
15 we address all the changed circumstances in round  
16 three. I thought we were proceeding in a way that was  
17 consistent with what you thought made sense and what  
18 certainly made sense.

19 MS. MCKENZIE: No, no, no, and, you know, it  
20 was an evolving -- it was an evolving discussion  
21 because I'm not sure when we started the conversations  
22 that either Mike or I knew where it was going to end  
23 up. And when I had the initial conversations with your  
24 predecessors I didn't -- I don't know all of us really  
25 thought about where it was going to end up or how this

1 was going to play out.

2 What I will say is that as it has evolved the  
3 other changed circumstances which would increase the  
4 third round RDP and where you also would like to get a  
5 Judgment of Repose that extends through the middle of  
6 2025, I think that that is beginning to get into the  
7 area of really dealing with what should be covered with  
8 a Declaratory Judgment for the third round, not the  
9 second round. The prior round, I think if you wanted to  
10 amend that with respect to the prior round plugging the  
11 holes, I think that's fine and I think you can do that  
12 fairly easily. But in terms of the RPD, I mean, that  
13 was still fluid, too, because we hadn't completely  
14 resolved all of that issue. So I think with calculating  
15 the third round RDP, you would be best served going  
16 through a Declaratory Judgment process on that only  
17 because we don't -- the thing that is missing, the  
18 missing ingredient that, you know, Judge Chrystal had  
19 anticipated was that there would be eventually third  
20 round COAH rules and that you might even engage in  
21 administrative process with respect to the COAH rules  
22 or you'd come back to Court, whatever your preference  
23 would be. But in any case, that's not the situation. So  
24 the only way to get to resolving the issue of the third  
25 round number is to have the participation of Fair Share

1 Housing Center in settling that with you because  
2 they're an interested party automatically in those  
3 things. So it seems to me that you could go -- you  
4 could resolve that prior. We could finish that and then  
5 come back and deal with the third round. Or if it's  
6 your preference not to get too cumbersome with it, you  
7 can as part of the third round resolve the prior round,  
8 as well. You could, in other words, resolve that by  
9 saying how you're going to plug the holes as part of  
10 the third round.

11 But I never minded the idea that you wanted  
12 to come in and substitute some credits for the ones  
13 that were missing because I think that is allowed and,  
14 you know, that is a process that you could come in with  
15 the Court and simply say, "You know, we lost these  
16 units, but we have these others and we have rental  
17 bonuses we can now claim credit for." I didn't have a  
18 problem with that.

19 I think that we've gotten more and more into  
20 what you want out of this as we've gone along,  
21 understandably so, but as part of that I think that the  
22 idea of maybe filing a DJ action or doing something  
23 comparable to that so that, you know, it goes through  
24 the same process everybody else goes. In establishing  
25 third round obligations, it might be a good idea.

1 THE COURT: Because you don't have -- and  
2 that's where I really became baffled with looking at  
3 requiring the Township to conform with COAH's  
4 procedural regulations with the NJAC to guide the  
5 Township, the Special Master, and any interested  
6 parties to the Affordable Housing plan amended process,  
7 the objection process, and the review and approval  
8 process. We're not in an Administrative procedure. I  
9 don't have a staff, an Administrative --

10 MR. SURENIAN: I think I've confused you --

11 THE COURT: Okay.

12 MR. SURENIAN: -- with the way we framed the  
13 prayer for relief, but --

14 THE COURT: Maybe, yes. But I'm certainly not  
15 going to do a round, you know, a third round in a  
16 motion like this. I can't, I can't do that. It's not  
17 COAH. I don't have a staff that's going to sit and work  
18 with you. I have a Master, I have a Law Clerk, but it's  
19 not -- we do a lot of other things. So this is not, you  
20 know, what I can work full time on or even part time  
21 on. And I think when you're dealing with the fact that,  
22 as Ms. McKenzie said, we anticipated that COAH would  
23 get, you know, its act together so that you could go to  
24 them and do this, which I'm sorry that you can't. But  
25 that's how it is.

1 MS. MCKENZIE: Very sorry. (Chuckle)

2 THE COURT: I'm very sorry. No, there's no one  
3 sorrier than I, but --

4 MS. MCKENZIE: All the Judges are sorry.  
5 (Chuckle)

6 THE COURT: -- but you can't. Okay. So now  
7 it's a different procedure and it needs to work within  
8 the Court Rules. You're in Court and this is how it has  
9 to be. Yes, it makes sense to me to plug up holes, to  
10 go back to the round that Judge Chrystal dealt with and  
11 deal with the twenty unit gap in whatever way you think  
12 you have a right to deal with it or at whatever  
13 proposal you want to make in that regard. I don't have  
14 a problem with that, but I could not conceptualize as I  
15 read your papers, notwithstanding that Mr. Eisdorfer  
16 wanted to intervene and maybe he'd be obviously a  
17 worthy adversary and point out a lot of things, but he  
18 represents a developer. I mean, he wants to develop for  
19 the enrichment of his company not so much because maybe  
20 Hartz loves low income people. I don't think it's --  
21 you know, so that's what we need Fair Share for and I  
22 can't see doing this --

23 MS. MCKENZIE: Kevin is laughing. (Chuckle)

24 THE COURT: Yes. I can't see doing this in a  
25 motion context from a 2008 case that really doesn't

1 have that much relevance anymore except what are you  
2 doing with your twenty unit gap.

3 MR. SURENIAN: The motion was simply a vehicle  
4 to establish a procedure that would have all the due  
5 process you would have -- if instead of putting in  
6 accordance with COAH regulations, I had said in  
7 accordance with law. It would be no different than what  
8 we're proposing.

9 THE COURT: Well, in accordance with law it's  
10 procedural regulations that you use to guide the  
11 Township through the Affordable Housing plan amendment  
12 process. I don't have those procedural regulations.

13 MR. SURENIAN: I mean, look --

14 THE COURT: I don't have the people --

15 MR. SURENIAN: -- I just read an expert  
16 report on this paper in Summit where Phil Caton said,  
17 you know, COAH has procedural regs and recommended  
18 let's follow that process, if my memory is right, and,  
19 you know, other --

20 THE COURT: But Summit came in through a DJ  
21 with Fair Share with interested parties --

22 MR. SURENIAN: I need to disabuse you of the  
23 notion that we are doing this behind anyone's back.

24 THE COURT: I'm not -- you're not.

25 MR. SURENIAN: There's no one that provides

1 more notice than we do.

2 THE COURT: I'm not saying that you --

3 MR. SURENIAN: Okay.

4 THE COURT: -- I don't want you to feel that  
5 I'm looking askance at you. I'm just having a problem  
6 with this conceptually and procedurally. If you want to  
7 file a motion to address your twenty unit gap and  
8 you're coming, you know, you're coming forthrightly to  
9 me and saying, "Judge, we bought that property. We lost  
10 our appeal. We did something else and now we have a  
11 twenty unit gap, and here's how we propose to deal with  
12 it," I'm willing to hear that. But in terms of going  
13 forward on round three, on third round numbers, I can't  
14 do it in this motion. I want you to file a Declaratory  
15 Judgment action on that. And I appreciate that you've  
16 been trying to work with Hartz and, you know, you may  
17 well be ready to come in with a fait accompli when your  
18 immunity expires in December of 2018. You may be ready  
19 to just continue right along because you've done  
20 everything you're supposed to do.

21 MR. SURENIAN: It is our intention to do that  
22 well before that deadline.

23 THE COURT: Exactly, so that you don't have to  
24 keep coming in and asking for extensions of Orders,  
25 extension of Orders. You remember what happened two and



1 a half years ago. Immunities ended in July and  
2 everybody was scurrying into Court to get extensions of  
3 immunity and then --

4 MR. SURENIAN: I remember.

5 THE COURT: You remember it well because you  
6 were all over the State, you know, dealing with that  
7 including with me for your two towns that are here. But  
8 you don't have to do that maybe. You know, you're  
9 already fourteen months, you have fifteen months to  
10 work with Hartz, to work with the Master on what your  
11 RDP, what's your gap, you know, that whole issue.

12 MR. SURENIAN: That was the idea. It wasn't  
13 the idea -- the idea was never to foreclose anyone from  
14 fully participating, you know, on the notion that we  
15 would get --

16 THE COURT: Well, we can do that. We can do  
17 it. I don't mind you addressing the prior round through  
18 motion, through amendments, and particularly telling us  
19 exactly what you plan to do with regard to the twenty  
20 unit gap. And just notice Fair Share on that. They'd be  
21 the main interested parties on that.

22 MR. SURENIAN: Absolutely.

23 THE COURT: And then if you file a DJ for  
24 round three, Mr. Eisdorfer can participate. But maybe  
25 even before that happens you'll be negotiating with him

1 and his client and getting something reasonable for  
2 that particular parcel of land. I'm familiar with that.  
3 I pass by that land. It seems like a lot of units they  
4 want there. So you're going to have a lot of  
5 negotiating to do with that.

6 MR. EISDORFER: Your Honor, my client is happy  
7 to negotiate with the Town. What we don't want -- what  
8 we didn't want to have is -- in case you couldn't tell  
9 that what the Town did not want to have is my client  
10 participate in this process until after the deal was  
11 reached. That's what all the three hundred pages or  
12 five hundred pages of the paper they filed.

13 THE COURT: I don't know. He always files five  
14 hundred pages of paper.

15 MR. EISDORFER: That's right.

16 THE COURT: In whatever town it is, I get five  
17 hundred pages of paper --

18 MR. EISDORFER: And the Berkeley --

19 THE COURT: -- and so I don't ascribe  
20 anything --

21 MR. EISDORFER: -- Township case is always  
22 included at least once.

23 But my client is happy to negotiate with the  
24 Town. We're eager to negotiate. We've been trying to  
25 negotiate with the Town. What we don't want to have is

1 a Court proceeding that forecloses that, and that's  
2 what we perceive what was going on here.

3 THE COURT: Yes. And that's why you shouldn't  
4 have worried about why it was adjourned. It wasn't  
5 adjourned -- I mean, Mr. Surenian asked, but I wasn't  
6 ready on September 1st. We do our switch over with Law  
7 Clerks and --

8 MR. EISDORFER: But we're already --

9 THE COURT: We're past that.

10 MR. EISDORFER: -- but what is clear is the  
11 Town is lobbying the Master about what should happen to  
12 my client's site, and my client isn't being apprised of  
13 that and isn't having input into that, and that's a  
14 matter of concern to us.

15 MR. SURENIAN: I mean --

16 THE COURT: I don't know whether that's clear  
17 that they're lobbying the Master. I saw what you want  
18 to do and I happen to be familiar with that. I live  
19 near there. I drive past it. It seems like a huge  
20 number, a huge number of units that you want to put  
21 there, but I don't know. I don't know. I need to have  
22 this fully fleshed out. I'm sure the Town is going to  
23 say that's way too many, you know.

24 MR. EISDORFER: I've read Mr. Mistretta's  
25 certification and I'm confident that that's -- I'm now

1 confident that that's their position.

2 THE COURT: Yes.

3 MR. EISDORFER: But Mr. Mistretta says, "We've  
4 been meeting with the Special Master to refine our RDP  
5 calculation." And so I --

6 THE COURT: Well, they have to do that now;  
7 right? Don't they?

8 MR. SURENIAN: Absolutely. If we --

9 MS. MCKENZIE: Could I just for the record?

10 MR. SURENIAN: Yes.

11 MS. MCKENZIE: I have not endorsed an RDP  
12 calculation yet for them or give them the go ahead on  
13 anything. If anything, I've raised issues and  
14 questions. So, you know, I don't know what you consider  
15 lobbying. If it's just their effort to see if I like  
16 something, possibly. But it hasn't gotten to the point  
17 of anything transpiring. There's been -- I have not  
18 endorsed anything yet.

19 MR. SURENIAN: Yes.

20 MS. MCKENZIE: I don't think they're ready.

21 MR. SURENIAN: It would really be unreasonable  
22 for us not to speak to the Master before preparing a  
23 plan amendment. It would be a waste of your resources,  
24 it would be a waste of my client's resources. So, of  
25 course, you go to the Master and you try to get the

1 basic parameters preliminarily understood subject to  
2 what we've had -- I can give you example, after  
3 example, after example that once you proceed formally,  
4 that's -- just like the Court, the Master has to hear  
5 all the evidence and has to make a judgment based on  
6 all the evidence.

7 The Court will recall -- or Ms. McKenzie will  
8 recall in the Willingboro case. You wrote a letter, you  
9 said, "Looks good." Kevin Walsh said, "I have a problem  
10 with that." I said, "I think we're right." You said, "I  
11 agree with Kevin." We adjusted course. That's the  
12 process.

13 THE COURT: Well, that's the process, and  
14 that's what you've been doing in all your cases. You've  
15 been mediating. Ms. McKenzie has been very successful,  
16 you know, with working with you on a number of the  
17 towns and working with other people, and I think that  
18 could happen, too. And certainly Mr. Eisdorfer will  
19 have the opportunity to -- if it gets to the point  
20 where you are at an impasse where she can help mediate.  
21 But I need to have this -- I can't -- you know, Mr.  
22 Surenian and everybody here just about has had, you  
23 know, a forty year experience with Mount Laurel and I  
24 have a two year experience with Mount Laurel. So  
25 there's a lot of catching up that I have to do and it's

1 very complicated. And if I hand the torch off to  
2 somebody else -- every year I get -- this is the third  
3 Law Clerk that is, you know, being baffled by Mount  
4 Laurel. Okay.

5 MS. MCKENZIE: He's already pretty good with  
6 it. (Chuckle)

7 THE COURT: All right. Yes, Ms. McKenzie is  
8 saying great things about you, Andrew. So I'm going to  
9 rely on you so heavily. (Chuckle)

10 But, you know, so I have to be able to grasp  
11 what's going on. But I've been a Judge long enough,  
12 twenty years, to know when something is not coming to  
13 me in the right way. And I had procedural difficulties  
14 with this, I had difficulties with how if you have a  
15 Judgment of Repose, how do I allow somebody to  
16 intervene. But if he doesn't intervene, how do we do  
17 this case --

18 MR. SURENIAN: The way you've done it in  
19 scores of cases. How many interested parties have you  
20 had appear in front of you that haven't moved to  
21 intervene?

22 MR. EISDORFER: Why is the Town so urgent to  
23 keep us out?

24 THE COURT: Well, you know, rather than him  
25 being -- he should be allowed to be an intervener as we

1 had with the developers --

2 MR. SURENIAN: Well, can we discuss --

3 THE COURT: -- we had with the developers in  
4 Berkeley Heights and that all worked out very well.

5 MR. SURENIAN: The developer that you had this  
6 morning that made the process go on, and on, and on,  
7 that developer wasn't a party.

8 THE COURT: I understand that.

9 MR. SURENIAN: Did their non-party status  
10 prevent --

11 THE COURT: And, you know, it seemed like  
12 everybody wanted that. I was the one that was demanding  
13 that they finish up and that we get that done because I  
14 myself did not care for the fact that we had a couple  
15 of interveners who worked hard to get things done and  
16 then all of a sudden as we were about to approve it,  
17 two other people show up. And I let them know that.  
18 Okay. And I don't think that hurt in terms of getting  
19 things done for Berkeley Heights and getting some good  
20 things happening for Berkeley Heights.

21 But in any event --

22 MR. SURENIAN: Can I address intervention, or  
23 no?

24 THE COURT: I don't want an intervention now.

25 MR. SURENIAN: Okay. All right.

1 THE COURT: I'm not going to let you go  
2 forward with a motion on your third round obligation.  
3 I'm going to tell you that you should do this the way  
4 we've done the others. That's the way I know now. Okay.  
5 And this is how I want you to do it because I think  
6 procedurally it works. It works. You keep you immunity.  
7 He can't intervene. You fix whatever you need. Your  
8 twenty unit gap, you do need to address that. I  
9 appreciate that you brought it forward and, you know,  
10 told us about it. You need to address that. And then as  
11 you go forward, you're already on the way for what you  
12 should think -- what you think is your third round  
13 obligation, what Fair Share thinks is your third round  
14 obligation, what Hartz wants to build and how you can  
15 fit that in, and what's fair, what's reasonable for  
16 Cranford. Okay. And that's how I want you to do it. You  
17 don't have to file a DJ now. You can negotiate and  
18 wait. And obviously Mr. Eisdorfer is going to be on the  
19 list of people who are going to be interested. So he  
20 can participate. Mr. Walsh is going to be on the list  
21 and all the other people that you're required to  
22 notify, any community groups that are involved. And you  
23 don't have to do anything else now.

24 I mean, in terms of your motion, I grant it  
25 only as to round two and allow you to propose something

1 to me with regard to round two. But as for round three,  
2 no, I don't even know how to go about understanding  
3 what your RDP is, what your gap period is in this  
4 process. I don't want to do it that way. Okay. I don't  
5 think it's the right way to do and procedurally it  
6 makes no sense for you to be moving to amend a Judgment  
7 based on changed circumstances. Towns change all the  
8 time. That doesn't mean you can do a motion to amend  
9 the Judgment with regard to Mount Laurel. If you have a  
10 period of repose, then that means he can't intervene.  
11 But he can move to intervene when you file your DJ.

12 MR. SURENIAN: Okay.

13 THE COURT: Okay.

14 MR. EISDORFER: Thank you, Your Honor.

15 MR. SURENIAN: Thank you.

16 MR. JEDZINIAK: Your Honor, if you don't mind,  
17 there are two things that I thought needed to come out.

18 THE COURT: Okay.

19 MR. JEDZINIAK: One is I thought that you are  
20 drawing a negative inference for the Township buying  
21 the property and dropping the yield on the CDA site. If  
22 that's the case, I think that you might want to ask  
23 your Special Master because I didn't think that you had  
24 a problem with it as long as we addressed the gap.

25 THE COURT: Well, you know what, regardless of

1 what the Special Master thinks -- and you know I have  
2 great regard for her -- I'm reading your papers and I'm  
3 seeing this happening and I'm saying this is something  
4 that's striking me, this is odd. Now we have a problem  
5 and the problem is created by an end run around the  
6 judicial Order. That's what it looks like. Okay?

7 MR. JEDZINIAK: Your Honor, respectfully, I  
8 don't think it was an end around at all.

9 THE COURT: But from your papers that's what I  
10 see it is, you couch it as, "Look, Cranford is doing  
11 this. Cranford is proactive." You know, of course, you  
12 couch it in the most laudatory terms for your own  
13 client, but it is what happened. It is what happened.

14 MR. JEDZINIAK: Right --

15 THE COURT: You took it to the Supreme Court,  
16 which is your right. You petitioned for cert. You were  
17 denied --

18 MR. JEDZINIAK: Hmm-hmm.

19 THE COURT: -- and then you bought the  
20 property. Okay. You made them an offer they couldn't  
21 refuse. Why? Because you didn't want that density.

22 MR. JEDZINIAK: That's right.

23 THE COURT: And maybe you didn't want that  
24 much --

25 MR. JEDZINIAK: There's no shame in that, Your

1 Honor.

2 THE COURT: And I don't know. Maybe you didn't  
3 want that much Affordable Housing. I don't know what  
4 the -- I mean, I know that the density, whatever it was  
5 initially, was lowered by Judge Chrystal in that  
6 litigation. It did go down, but it wasn't sufficient  
7 for you.

8 MR. JEDZINIAK: No, because Ms. McKenzie said  
9 it wasn't suitable for 419 units.

10 THE COURT: Okay. And it wasn't listed for 419  
11 units. It was lowered to, I don't know what, three  
12 hundred.

13 MR. JEDZINIAK: Three, sixty.

14 MS. MCKENZIE: Three, sixty.

15 THE COURT: Three, sixty, which is  
16 significant.

17 MR. JEDZINIAK: My point, Your Honor, was just  
18 that -- and you may want -- because I think Betsy  
19 wanted to say something -- but all I'm saying is there  
20 should not be negative inference drawn from that.  
21 That's the first thing I wanted to talk about.

22 The second thing is you also seemed skeptical  
23 that anything was going to be built on that CDA site. I  
24 thought I heard that you were a little skeptical.

25 THE COURT: Oh, I don't know whether something

1 is going to be built or not. I have no idea.

2 MR. JEDZINIAK: We had said that and I thought  
3 you had been a little skeptical.

4 THE COURT: I just said nothing has been  
5 built.

6 MR. JEDZINIAK: Yes.

7 THE COURT: This is going back to 2008 and  
8 nothing has been built. It's 2017.

9 MR. JEDZINIAK: Right. I just wanted --

10 THE COURT: Is there any Affordable Housing on  
11 that site? No.

12 MR. JEDZINIAK: But they just designated a  
13 developer, a redeveloper, and they're in the process of  
14 negotiating a redeveloper's agreement right now.

15 THE COURT: Which is great. But if Mr.  
16 Eisdorfer's client had been allowed to do what Judge  
17 Chrystal said they could do, there might be some  
18 Affordable Housing on that site now because this case  
19 goes back to 2013.

20 MR. JEDZINIAK: CDA may have changed their  
21 mind, though, too. We don't know the facts.

22 THE COURT: Maybe they might have. I don't  
23 know.

24 MR. JEDZINIAK: They may have been willing to  
25 just back out. We don't know. All I'm saying is you

1 shouldn't be drawing a negative inference. Ms. McKenzie  
2 can --

3 MS. MCKENZIE: And what I would say is that  
4 this is not the first time I've ever heard of a town  
5 buying a piece of property that is slated for  
6 Affordable Housing. And as long as the town is able to  
7 cover the affordable units that would have been  
8 generated by --

9 THE COURT: Sure.

10 MS. MCKENZIE: -- that site, I don't have a  
11 problem and as long as they're fulfilling their  
12 obligation. So I think that to come in and show how you  
13 were going to cover that gap was your responsibility.

14 THE COURT: That's what we need.

15 MS. MCKENZIE: It went hand in hand.

16 THE COURT: That's exactly it.

17 MS. MCKENZIE: Yes, that went hand in hand.  
18 So I think that's the right step and I'm totally  
19 supportive of that and I think you may have the credits  
20 because I know there were rental bonus credits you left  
21 on the table because the units weren't built. And the  
22 way I was reading the Appellate Division decision, I  
23 didn't think that you could get the rental bonuses  
24 unless units were built. I then sort of changed my  
25 approach, but unfortunately even benefit from that. But

1 now those units are built anyway. So you have them.

2 THE COURT: But the way to come in -- if you  
3 had wanted, you know, a pat on the back -- the way to  
4 come in is, "Well, you know, Judge, we just bought that  
5 site. We're going to do something else. We know we have  
6 a twenty unit gap, and here's how we're going to fill  
7 it." And then I'd be praising you. Okay. So it's a  
8 little bit different.

9 MR. JEDZINIAK: Okay.

10 THE COURT: It's a little bit different.

11 MR. JEDZINIAK: We have our marching orders,  
12 Your Honor.

13 THE COURT: Okay.

14 MR. EISDORFER: Thank you, Your Honor.

15 MS. MCKENZIE: Thank you, Judge.

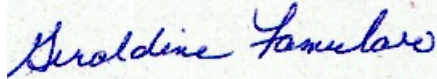
16 THE COURT: Thank you. I'm not exactly sure  
17 how I want to write up this Order.

18 (The matter concluded at 3:26 p.m.)

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CERTIFICATION

I, Geraldine Famularo, the assigned transcriber, do hereby certify the foregoing transcript of proceedings on Courtsmart 9/19/17, index 2:19:10 to 3:25:58 is prepared in full compliance with the current Transcript Format for Judicial Proceedings and is a true and accurate compressed transcript of the proceedings as recorded.



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GERALDINE FAMULARO

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#154  
AOC NUMBER

Dated: September 25, 2017

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