

**TOWNSHIP OF FRANKFORD  
COUNTY OF SUSSEX, STATE OF NEW JERSEY**

**RESOLUTION NO: 2024-018**

**RESOLUTION OPPOSING ASSEMBLY BILL NO. 4/SENATE BILL NO. 50, WHICH PROPOSES TO OVERHALL THE FAIR HOUSING ACT (“FHA”) IN A WAY THAT IMPOSES UNREALISTIC OBLIGATIONS WITH UNREALISTIC DEADLINES BASED UPON ONEROUS STANDARDS.**

**WHEREAS**, in 1983, the Supreme Court decided a landmark case, commonly referred to as Mount Laurel II, wherein it created an easy standard for developers to satisfy to secure a “builder’s remedy” and also established standards to provide general guidance to the newly appointed Mount Laurel judges as to an appropriate fair share formula; and

**WHEREAS**, the State exploded with builder’s remedy lawsuits in the wake of Mount Laurel II seriously depriving many municipalities of their home rule power to zone and control their destiny; and

**WHEREAS**, in 1984, Judge Serpentelli decided the AMG case in which he established a fair share formula that generated high fair share responsibilities that were widely regarded as grossly excessive; and

**WHEREAS**, the combination of the avalanche of builder’s remedy lawsuits precipitated by Mount Laurel II and the grossly excessive fair share responsibilities generated by the AMG formula fueled a movement for a legislative response to the Mount Laurel doctrine; and

**The Fair Housing Act of 1985**

**WHEREAS**, a week after Judge Serpentelli issued the AMG decision, committees of the Legislature started to meet to develop affordable housing legislation; and

**WHEREAS**, the legislators on both sides of the aisle recognized that any legislation had to be bi-partisan to work; and

**WHEREAS**, those efforts culminated in the adoption of the Fair Housing Act (“FHA”) by both houses early in 1985; and

**WHEREAS**, on July 2, 1985 -- less than a year after Judge Serpentelli decided the AMG case -- former Governor Kean signed the New Jersey Fair Housing Act (“FHA”) into law to curb the excesses caused by Mount Laurel II and to restore balance to legitimate public purposes; and

**WHEREAS**, more specifically, the Legislature enacted the FHA to restore home rule, to bring the fair share numbers back to reality and to reduce the burdens of Mount Laurel compliance; and

**WHEREAS**, more specifically, the FHA sought *to restore home rule* by imposing a moratorium on the builder's remedy and by providing an administrative process that municipalities could voluntarily pursue wherein they would be insulated from developers seeking builder's remedies to try to compel them to capitulate their zoning demands; and

**WHEREAS**, the FHA sought *to bring the fair share numbers back to reality* by among other things defining the prospective need as the need "based on development and growth which is reasonably likely to occur" and by calling for the fair share to be adjusted to a number lower than the fair share formula generated if the municipality lacked sufficient land to satisfy the obligation generated by the fair share formula; and

**WHEREAS**, the FHA sought *to reduce the burdens on municipalities* by prohibiting any requirement for municipalities to expend their own resources to comply; and

### **The New Jersey Council on Affordable Housing**

**WHEREAS**, the FHA created COAH and conferred "primary jurisdiction" on COAH to administer the FHA and to implement the affordable housing policies of our State; and

**WHEREAS**, FSHC argued "that COAH's enabling legislation established such a delicate balance of control, as evidenced not only by its use of the phrase "in but not of," but also by its detailed attention to the composition of its Council. Accordingly, the Legislature could not have intended to allow the Governor to unilaterally disrupt that balance" *In re Plan for Abolition of Council on Affordable Hous.*, 424 N.J. Super. 410, 419-420(App.Div.2012) 419-420; and

**WHEREAS**, COAH adopted regulations for Round 1 in 1986 and for Round 2 in 1994 to implement the FHA and processed applications by municipalities for approval of their affordable housing plans in accordance with the regulations it adopted; and

**WHEREAS**, all acknowledged -- even Fair Share Housing Center ("FSHC") -- that COAH functioned just fine in Rounds 1 and 2; and

**WHEREAS**, the regulations COAH adopted in Round 2 made the obligations for Rounds 1 and 2 cumulative and adjusted the cumulative number downwards because the State did not grow as much as was anticipated in Round 1; and

**WHEREAS**, COAH's new construction obligation for Rounds 1 and 2 **averaged 5,034.5 units per year**, or 50,345 units for every 10 years as noted in 36 N.J.R. 5748(a) (November 22, 2004), COAH's comment regarding 5:94: Appendix A; and

**WHEREAS**, COAH’s Round 1 and/or 2 regulations permitted a 1-for-1 rental bonus credit for up to 25% of the obligations and provided flexible standards for adjustments predicated upon lack of adequate vacant developable land; and

**WHEREAS**, the same expert who calculated the Round 2 obligations provided a technical appendix in 2014 when COAH proposed regulations for Round 3; and

**WHEREAS**, COAH’s expert in 2014 calculated a prospective need obligation (then 2014-2024) of less than 40,000 units for the 10-year cycle, plus roughly an additional 23,000 units for the “gap” which were to be phased in between 2014-2034 due to concerns over what could be reasonably anticipated as a result of market absorption; and

**WHEREAS**, housing advocates attacked the regulations COAH adopted for Round 3 the first time it adopted them in 2004, the second time it adopted them in 2008 and the third time it proposed them in 2014, thereby crippling COAH’s ability to certify the plans that municipalities petitioned COAH to approve because the FHA required that COAH only certify municipalities consistent with its regulations; and

**WHEREAS**, COAH’s inability to certify Round 3 plans severely limited the production of affordable housing in Round 3 because COAH found itself fending off attacks instead of certifying affordable housing plans that municipalities could implement; and

#### **Mount Laurel IV**

**WHEREAS**, in 2015, the Supreme Court issued a decision, commonly referred to as Mount Laurel IV, in response to a motion to transfer the responsibilities of COAH back to the courts; and

**WHEREAS**, in Mount Laurel IV, the Supreme Court returned the task of implementing the doctrine back to the Courts because COAH had failed to do its job; and

**WHEREAS**, notwithstanding the foregoing, the Court emphasized that it preferred the administrative remedy created by the FHA to a judicial one and hoped that one day COAH would be effective so that towns could comply once again through the administrative process created by the FHA; and

**WHEREAS**, transferring the implementation of the doctrine from COAH back to the courts deprived the citizens of our State of an evenly balanced administrative body with four representatives of municipalities and four representatives of low- and moderate-income (“LMI”) households adopting regulations consistent with the FHA and processing petitions for substantive certification; and

**WHEREAS**, the Court process proved to be far more expensive than the COAH process and was ill-suited for resolving comprehensive planning disputes over affordable housing; and

**WHEREAS**, even municipalities that complied voluntarily in the newly minted court process were subject to intervention from developers, who were then able to leverage the process, litigate the municipalities into the ground, and often obtain site-specific rezoning contrary to one of the overriding public purposes of the FHA; and

**WHEREAS**, the judicial process the Supreme Court fashioned in Mount Laurel IV required municipalities to spend municipal resources not only on their own attorneys and planners, but also on Court appointed masters in a litigation process that was much more expensive than the administrative process the legislature established in the FHA; and

**WHEREAS**, as if that was not bad enough, FSHC routinely demanded that municipalities make a payment to them; and

**WHEREAS**, the Round 3 process was a disaster with judges pressing municipalities to comply before even establishing the obligations with which they must comply; and

**WHEREAS**, ultimately, on March 8, 2018, after a 41-day trial in Mercer County, Judge Jacobson issued an opinion in which she set forth a fair share methodology; and

**WHEREAS**, in that trial and in various other instances throughout the state, FSHC took the position that the Statewide obligation should exceed 300,000 affordable units to be produced between 2015 and 2025; and

**WHEREAS**, municipalities, through Dr. Robert Powell, presented evidence that the State could only absorb less than 40,000 affordable units, in a best-case scenario, and thus argued that FSHC's calculations was not grounded in reality whatsoever; and

**WHEREAS**, the Court, having been constrained by the Supreme Court to prescriptively utilize a formula from 1993, ultimately concluded that the Statewide obligation to be constructed between 2015-2025 was roughly 153,000 units; and

### **The 354 Settlements with FSHC**

**WHEREAS**, FSHC reports that it entered 354 settlements in Round 3; and

**WHEREAS**, many municipalities are reeling under the burden of satisfying their obligations under those settlements entered between 2015 and 2023; and

**WHEREAS**, Round 4 is set to begin in 2025 and there is no comprehensive analysis on the impacts of the 354 Round 3 settlements and over-zoning described above; and

**WHEREAS**, indeed, the A4/S50 Bill fails to consider the impact from affordable housing projects that were approved during the Third Round, but are still not yet under construction, as

said projects, as well as additional future projects, will impact legitimate public concerns like infrastructure, the environment, schools, traffic, parking and open space; and

**WHEREAS**, the Round 3 process destroyed the balance achieved by the Fair Housing Act in 1985; and

#### **A-4/S-50**

**WHEREAS**, against the above backdrop, on December 19, 2023, the Housing Committee of the Assembly unveiled the Legislation (A-4) that it stated it had been working on for a long time and scheduled the bill for a vote at a hearing scheduled less than 24 hours later; and

**WHEREAS**, on December 19, 2023, the Administrative Office of the Courts wrote to the Legislature and made clear that it could not structure the bill in the manner set forth in the proposed legislation; and

**WHEREAS**, notwithstanding the foregoing, the Housing Committee of the Assembly voted the bill out of Committee and announced that the bill needed to be ready for signing by the Governor before the end of the lame duck session on January 8, 2024; and

**WHEREAS**, the bill was not rammed through in the lame duck session and on January 16, 2024, the Legislature released a new version of the bill, Assembly Bill No. 4/Senate Bill No. 50 (hereinafter the "A4/S50" or "the Bill"); and

**WHEREAS**, A4/S50 Bill seeks to abolish the Council on Affordable Housing ("COAH") and purports to reform municipal responsibilities concerning the provision of affordable housing and

**WHEREAS**, the Bill would purportedly reduce litigation and municipal expenses; and

**WHEREAS**, A4/S50 details the methodology to be used for determining the fair share numbers of municipalities in Round 4 and in subsequent rounds; and

**WHEREAS**, the Bill is premised on the proposition that 40 percent of all households qualify as low or moderate; and

**WHEREAS**, A4/S50 calls for the determination of the prospective need by subtracting the number of households reported in the 2010 Decennial Census from the number of households reported in the 2020 Decennial Census and multiplying that figure by 40 percent; and'

**WHEREAS**, we calculate that number to be 84,690;

**WHEREAS**, A4/S50 calls for that number to be adjusted by the number of conversions and demolitions; and

**WHEREAS**, the statewide fair share would be increased from 84,690 to 96,780, if we assume the same number of demolitions and conversions used by Judge Jacobson in her formula for Round 3; and

**WHEREAS**, the 96,780 fair share compares to the roughly 211,000 COs issued between 2010 and 2020; and

**WHEREAS**, the 96,780 fair number divided by 211,000 COs equals roughly 46 percent (45.867 percent to be more precise); and

**WHEREAS**, all municipalities should be able to cure any violations of the prohibition against exclusionary zoning with inclusionary zoning; and

**WHEREAS**, traditional inclusionary zoning ordinances generally require no more than 20 percent of the units to be affordable; and

**WHEREAS**, it is mathematically impossible to satisfy a 46 percent problem with a 20 percent solution and, therefore, the number generated by the statutory formula is patently excessive; and

**WHEREAS**, while this mathematical error conceptually may have existed at COAH, COAH utilized its discretion to reduce the statewide number to roughly 5,000 units per year in Rounds 1-2 (or lower for prospective need in its attempted regulations in 2014); and

**WHEREAS**, in addition, COAH's Round 2 regulations had flexible standards, Regional Contribution Agreements (RCAs), an achievable bonus structure, waivers and other flexible standards to further mitigate the problem; and

**WHEREAS**, had COAH not mitigated the problem, it is likely that the regulations would have been challenged by municipalities; and

**WHEREAS**, A4/S50 also, systemically, calcifies the Court process and indeed makes critical changes which severely prejudice municipal interests and undercut the incentive to comply voluntarily; and

**WHEREAS**, in stark contrast to current laws that preserve a municipality's immunity in the absence of proof that the municipality is "determined to be constitutionally noncompliant", A4/S50 creates multiple opportunities to strip municipalities of immunity and expose them to litigation; and

**WHEREAS** A4/S50 subjects municipalities to litigation not only as they seek approval of their Housing Element and Fair Share Plans, but also even after they secure approval of those plans; and

**WHEREAS**, more specifically, while A4/S50 provides municipalities a “compliance certification” if the municipality secures approval of its affordable housing plan, that certification only protects municipalities from builder’s remedy lawsuits-not from exclusionary zoning lawsuits by FSHC or anyone else who is not seeking a builder’s remedy; and

**WHEREAS**, in stark contrast to the goal of A4/S50 to reduce litigation, A4/S50 dramatically proliferates litigation by providing many opportunities to sue the subject municipality and through other means; and

**WHEREAS**, even if a municipality, via the adoption of a resolution, accepts the Fourth Round affordable housing obligation numbers that will be promulgated by the Department of Community Affairs (the “DCA”) under the A4/S50 Bill, there is still a risk that the affordable housing obligation numbers will increase during the subsequent process required by the bill, as both housing advocates like FSHC and developers can subsequently challenge the fair share number the municipality accepts; and

**WHEREAS**, the A4/S50 Bill creates a judicial entity made up of 3-7 retired Mount Laurel judges called “The Program”, which, unlike COAH, is not comprised of an equal number of municipal and housing representatives, and is not made up of an equal number of Republicans and Democrats, thereby depriving the citizens of our State of the carefully crafted COAH Board that included a diversity of interests and that was the centerpiece of the FHA adopted in 1985; and

**WHEREAS**, the A4/S50 Bill does not require the promulgation of affordable housing obligations, or the adoption of substantive regulations, in a way that utilizes an open and transparent process that COAH used and that gave all interested parties an opportunity to comment and receive COAH’s response to their comments; and

**WHEREAS**, the A4/S50 Bill reduces, and in some cases completely eliminates affordable housing bonus credits, and creates an overcomplicated and difficult process to obtain the bonus credits that are still available under the bill; and

**WHEREAS**, the initial version of the A4/S50 Bill allowed for municipalities to utilize age - restricted affordable units to satisfy up to thirty-three percent (33%) of its Fourth Round obligation in recognition that roughly 33 percent of the demand for affordable housing came from this age group; however, the current version of A4/S50 unfairly and unceremoniously reduced the cap on age-restricted housing down to twenty-five (25%); and

**WHEREAS**, the Legislature previously capped the fair share of any municipality down to 1,000 in recognition that any obligation above 1,000 would be “onerous”; A4/S50 applies the 1,000-unit cap only to a component of the municipality’s fair share -- the prospective need – and authorizes the imposition of an obligation that is onerous; and

**WHEREAS**, the A4/S50 Bill creates unfair requirements and ambiguity when it comes to the Vacant Land Adjustment process, which could lead to municipalities that lack sufficient vacant land being required to produce more affordable housing units than is practical; and

**WHEREAS**, the A4/S50 Bill includes many other provisions and changes to the FHA that are impractical and devoid of any consideration of the burdens created by the statute; and

**WHEREAS**, the Office of Legislative Services (OLS) has not evaluated the formula required by the A4/S50 Bill for calculating a municipality's Fourth Round or Prospective Need Obligation for its magnitude or reasonableness; and

**NOW, THEREFORE, BE IT RESOLVED**, that for all of the above reasons, the Township Committee of Frankford Township, objects to and opposes Assembly Bill No. 4/Senate Bill No. 50, and requests that the bill be tabled, re-written and re-introduced in way that imposes achievable obligations and facilitates the ability of the municipality to satisfy its obligations.

#### **CERTIFICATION**

**I CERTIFY** the foregoing to be a true and accurate copy of a Resolution adopted by the Mayor and Committee of the Township of Frankford at their Regular Meeting held on February 13, 2024.

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Lori Nienstedt, RMC  
Municipal Clerk