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IN THE MATTER OF THE APPLICATION OF THE BOROUGH OF MADISON, a municipal corporation of the State of New Jersey, *Plaintiff/petitioner.*	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: MORRIS COUNTY DOCKET NO.: MRS-L-1694-15 (MOUNT LAUREL) CIVIL ACTION

BRIEF OF PROPOSED DEFENDANT-INTERVENOR, DREW UNIVERSITY, IN SUPPORT OF ITS MOTION TO VACATE THE BOROUGH'S CONDITIONAL JUDGMENT OF COMPLIANCE AND REPOSE, IN THE ALTERNATIVE CONDUCT A MIDPOINT REVIEW HEARING, AND PERMIT INTERVENTION

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PRELIMINARY STATEMENT

By filing this motion, proposed Defendant-Intervenor, Drew University ("Drew" or the "University"), seeks to vacate the Conditional Judgment of Compliance and Repose (the "Judgment") obtained by the Borough of Madison (the "Borough" or "Madison") in its affordable housing declaratory judgment action because the Borough knowingly and purposefully refused to disclose the development potential of Drew's undeveloped surplus land. The Borough's misconduct artificially reduced its realistic development potential ("RDP") and enabled it to avoid instituting zoning mechanisms which create a realistic opportunity for the construction of inclusionary housing meeting its true Third Round RDP. These actions are consistent with Madison's long-term efforts to avoid its affordable housing obligation.

The Borough's deliberate omission and concealment must be addressed through the vacation of the Judgment and the reinstitution of proceedings in the Borough's declaratory judgment action. As an alternative to the vacation of the Judgment, the Court is entitled to, at a minimum, conduct a midpoint review hearing to evaluate the adequacy of the Borough's existing inclusionary zoning mechanisms and consider how Drew's surplus land can and should be rezoned to provide for additional affordable housing in a municipality where the need is so great. Finally, Drew respectfully requests that the Court permit intervention in the Borough's declaratory judgment action, as it is the owner of certain property proposed for inclusionary development which will satisfy the Borough's affordable housing shortfall.

PROCEDURAL HISTORY AND STATEMENT OF FACTS

For over four years, Madison engaged in a sophisticated scheme to skirt its constitutional affordable housing obligation and prevent inclusionary housing from being constructed on the vacant and developable lands of one of its largest – if not the largest – landholders. Madison

realized, as early as March 2018 that, to accomplish this shameful feat while under the supervision of the Court, it would need to engage the University in a drawn-out negotiation process which was always designed to fail. Madison did so by dangling a succession of escalating incentives, including: first, the acquisition a portion of University property for a 100% affordable housing development; second, the purchase of a conservation easement on University lands which would eliminate the potential for inclusionary housing to be constructed on said lands; and third, the rezoning the University's peripheral lands for a significant inclusionary housing community. Madison executed the scheme to perfection. In so doing, it prevented at least 100 low- and moderate-income families from calling Madison their home. This Motion is brought to remedy this lawless and unconstitutional behavior.

The University's lands encompass 168 acres with a street address of 36 Madison Avenue, Madison, New Jersey 07940, more formally identified as Block 3001, Lot 1 on the Borough's official Tax Map (the "Property").[1] Portions of the Property are currently developed as a university with various buildings, infrastructure, and student grounds. Approximately 64 acres of Drew's unoccupied land, all located on the periphery of the University, are proposed for multifamily inclusionary development (but excluding the Zuck Arboretum and the aquifer recharge bowl), and are suitable, available, developable, and approvable for an inclusionary community consisting of hundreds of units.

As set forth in greater detail herein, while the Borough was engaged in a long-running attempt to settle its declaratory judgment action with Fair Share Housing Center ("FSHC"), it was simultaneously engaged in drawn-out discussions with the University to either purchase a portion of Drew's land or to rezone said property for multifamily inclusionary development. Although

[1] The University also owns several parcels on Loantaka Terrace, comprising approximately 1.6 total acres, and designated as Block 3101, Lots 9 through 12.

these discussions between the University and the Borough commenced well in advance of the August 2020 settlement agreement between the Borough and FSHC, the Borough concealed the fact that a significant portion of Drew's lands were available, developable, approvable, and suitable, and failed to account for them in the vacant land analysis which it presented to the Court for endorsement. Indeed, at the Borough's behest, the University expended hundreds of thousands of dollars on appraisals, development concepts, environmental assessments, and a master plan amendment, only for the Borough to suddenly pull the proverbial rug out from under the University. The Borough's conduct should not be countenanced by the Court, particularly given that Madison obtained a significantly reduced RDP as a result thereof.

On or about March 10, 2015, the New Jersey Supreme Court issued a decision in the matter entitled In re Adoption of N.J.A.C. 5:96 and 5:97 ex rel. New Jersey Council on Affordable Housing, 221 N.J. 1 (2015) ("Mt. Laurel IV"). Therein, the Supreme Court terminated the Council on Affordable Housing's ("COAH") jurisdiction to administer and approve municipalities' affordable housing plans, determined that the Court would reassert primary jurisdiction over the same, and directed interested municipalities to petition the Court for immunity while constitutionally compliant housing plans were prepared.

On or about July 8, 2015, in response to the Supreme Court's decision in Mt. Laurel IV, the Borough filed a declaratory judgment action in the case entitled In the Matter of the Application of the Borough of Madison, bearing Docket No. MRS-L-1694-15 (the "Borough's DJ Action") seeking a declaration of its compliance with the Mt. Laurel doctrine and the Fair Housing Act of 1985, N.J.S.A. 52:27D-301, et seq.

In the first three years following the filing of the Borough's DJ Action, Madison failed to accomplish much, if indeed anything, by way of settlement negotiations with FSHC or concrete

rezonings which produced affordable housing. On March 21, 2018, facing mounting judicial pressure and the looming possibility of builder's remedy lawsuits, Robert H. Conley, Borough Mayor, emailed MaryAnn Baenninger, the then-President of the University, to inquire about the possibility of utilizing one of the University's properties located along Loantaka Way for affordable housing. See Certification of Thomas J. Schwarz ("Schwarz Cert."), at ¶ 2. In the fall of 2018, after years of municipal foot dragging and a total failure to proceed with reasonable speed, the Honorable Maryann L. Nergaard, J.S.C. (the then-Mt. Laurel judge for the Morris/Sussex vicinage), made it clear that she would no longer tolerate a lack of progress towards a timely resolution. In this regard, a series of Orders entered by Judge Nergaard emphasized that Madison could no longer enjoy immunity from builder's remedy lawsuits while it only half-heartedly attempted to address its constitutional obligation. For example, on October 19, 2018, Judge Nergaard denied Madison's request to adjourn two case management conferences, scheduled an all-day, in-person settlement conference, and granted FSHC intervenor status in this matter. Certification of Counsel ("Counsel Cert."), at ¶ 2, Ex. A.

It is interesting, and not coincidental, that in November 2018 Madison began efforts to acquire a conservation easement restricting development on at least 35 acres of Drew lands, which easement would significantly reduce any RDP obligation attributable to the University's property. To wit, on November 30, 2018, Ray Codey, the Borough's Business Administrator, emailed Barb Bresnahan, the University's Chief of Staff & Dean of Administration, requesting a meeting with the University to discuss the purchase of a conservation easement on a portion of Drew's lands. Schwarz Cert., at ¶ 3. On December 11, 2018, Mr. Codey contacted Ms. Bresnahan, requesting a meeting with the University to purportedly "discuss ways to work together to increase affordable housing opportunities in Madison." Id. at ¶ 4. The email clearly indicates that the highest

decisionmaker at the Borough desired to utilize Drew's lands for affordable housing. This meeting was conducted on or about December 14, 2018.

On the same day, Judge Nergaard scheduled another in-person conference, firmly directed that Madison's immunity would extend only until January 11, 2019, and again noted that FSHC had been granted intervenor status in this matter. Counsel Cert., at ¶ 3, Ex. B. Next, on January 11, 2019, Judge Nergaard required all parties to appear at a conference during which time Madison promised to "present more specific concepts and proposal[s] for reaching a final and comprehensive settlement with FSHC." Counsel Cert., at ¶ 4, Ex. C. Judge Nergaard noted that "the Borough's current immunity from builders' remedy lawsuits [is extended] only until midnight on February 28, 2019," and that this was done "[b]ased on the representations made on the record" that the Borough would "enter into a fully executed and approved settlement agreement" with FSHC by that time. Ibid.

Facing a potential revocation of immunity from builder's remedy lawsuits, the Borough re-engaged in discussions with the University regarding the potential conservation easement and affordable housing opportunities on University lands in early 2019. Schwarz Cert., at ¶ 5. On February 28, 2019, Judge Nergaard extended the Borough's immunity one more time until "midnight on May 3, 2019," writing by hand that "[t]he court is not willing to extend immunity without a definite fairness hearing date." Counsel Cert., at ¶ 5, Ex. D.

Having obtained a brief reprieve from the Court, and undoubtedly desiring to reduce its development exposure if the University's lands were discovered to be available for inclusionary development, the Borough reached out to the University to follow up on the potential conservation easement. Schwarz Cert., at ¶ 6. In reply, Ms. Bresnahan responded that the University was eager to continue exploring the conservation easement proposal, but noted that the proposal would first

have to be discussed at the University's Buildings and Grounds Committee meeting in April 2019 and then presented to the University's Board of Trustees for consideration at the May 2019 meeting. Ibid. Via response email dated March 13, 2019, Mr. Codey stated that the Borough could work with the University's schedule and that it appreciated the opportunity to continue discussions in the spring. Id. at ¶ 7.

On April 30, 2019, Mr. Codey followed up with Ms. Bresnahan regarding the status of the conservation easement proposal and inquired whether the process was still on track. Id. at ¶ 8. In response, Ms. Bresnahan noted that the Buildings and Grounds Committee had asked for additional information. Ibid. In response to Ms. Bresnahan's inquiry as to whether there was a deadline for a decision, Mr. Codey noted that there was no firm deadline but that it would be good to conclude the transaction in 2019, if possible. Ibid.

Following Judge Nergaard's retirement, Your Honor issued a series of further orders directing a resolution. On May 6, 2019, the Court entered an order recognizing "that the parties have reached certain contingent agreements in principle that need to be reduced to a written Memorandum of Understanding, including but not limited to the need for a critical collateral approval from another governmental unit; and thereafter the parties anticipate reaching a Settlement Agreement that will provide a reasonable opportunity for the Borough to satisfy its constitutional affordable housing obligation." Counsel Cert., at ¶ 6, Ex. E.

On or about June 11, 2019, the Borough and FSHC entered into a Memorandum of Understanding ("MOU"). In the six months that followed entry of the MOU, the Borough failed to enter into a final settlement agreement with FSHC. Counsel Cert., at ¶ 7, Ex. F.

On the same date, June 11, 2019, John Vitali, the University's Vice President for Finance and Administration/CFO, issued a letter to Mr. Codey with questions regarding the proposed

conservation easement. Schwarz Cert., at ¶ 9. Mr. Vitali specifically inquired, among other things, as to which parts of the University's campus that the Borough intended to place a conversation easement, whether the transaction would be in fee simple, the proposed terms of the easement, and whether the Borough had adequate funds on hand for the transaction. Ibid.

Via correspondence dated July 31, 2019, Mr. Codey responded to Mr. Vitali's June 11, 2019 letter. Id. at ¶ 10. Therein, Mr. Codey provided a rough sketch of the areas on Drew's campus that the Borough desired to record a conservation easement against, noted that the Borough would entertain a fee simple acquisition and/or options to purchase the property, and stated that the Borough's governing body was aware of the proposed transaction but would need to formally authorize the same and appropriate the necessary funds, among other things. Ibid.

On September 2, 2019, Mr. Vitali emailed Mr. Codey inquiring whether the three areas delineated on rough sketch attached to Mr. Codey's July 31, 2019 letter were three different options for an easement or, alternatively, whether the Borough was proposing one easement across the collective 35 acres of the three areas. Id. at ¶ 11. On September 5, 2019, Robert Vogel, Borough Engineer, responded to Mr. Vitali's inquiry, noting that it was important to "know what areas have development potential" and stating that he "believe[d] the Borough would like to see Drew get the highest value for the most property that it reasonably can without compromising university interests." Id. at ¶ 12.

On or about November 25, 2019, Drew and the Borough representatives met to discuss, among other matters, the Borough's conservation easement proposal. Id. at ¶ 13. During this meeting, Drew invited the Borough to consider jointly formulating a comprehensive development scheme which included zoning for inclusionary housing, student housing, along with some area for a conservation easement. Ibid. Thus, in addition to the Borough's previously-stated desire to

utilize the University's lands for affordable housing, the Borough was expressly told that Drew's lands were available for the same.

By Order dated December 10, 2019, Your Honor adjourned the fairness hearing that had been scheduled for January 10, 2020, directed the parties to continue settlement discussions, and noted the Court's expectation that, by January 10, 2020, the Borough would have refiled a Green Acres diversion application with regard to a proposed, municipally-sponsored 100% affordable housing development. Counsel Cert., at ¶ 8, Ex. G.

In the interim, on or about January 21, 2020, University representatives met with Mayor Conley at Borough Hall to continue the discussions regarding the potential conservation easement on a portion of Drew's lands along with a rezoning for inclusionary development. Schwarz Cert., at ¶ 14. By correspondence dated February 25, 2020, Borough counsel advised the Court that the State had asserted Green Acres jurisdiction over the parcel proposed by the Borough for diversion, noted that the diversion application would have to be repeated (with an estimated timeline of 9 to 12 months), and stated that, in order for the diversion to be successful, the Borough would have to replace the diverted land by purchasing a conservation easement for approximately 3.5 to 4 acres elsewhere in the Borough. Counsel Cert., at ¶ 9, Ex. H.

By letter to the Court dated March 17, 2020, FSHC noted that "there are legitimate concerns about the Borough's pattern of conduct to date", that the Borough had "squandered" a substantial opportunity for affordable housing at a site located at 33 Green Village Road, noted that it was "particularly frustrating" that the Borough was seeking a vacant land adjustment, and critically, asserted that the "Borough appears to have been aware - - and certainly should have been - - that it had limited available land and that it was vital that it maximize every opportunity for affordable housing." Counsel Cert., at ¶ 10, Ex. I.

On or about March 25, 2020, Mayor Conley sent a letter to then-University President Baenninger, explicitly expressing the Borough's interest in acquiring a 9.6 acre parcel of land owned by Drew, wherein he wrote:

> Thank you for making yourself available for our recent discussion during these difficult times. Pursuant to our conversation, **I wanted to confirm the interest of the Borough of Madison to purchase a 9.6 acre parcel on the perimeter of the Drew University Campus fronting onto Loantaka Way** (see attached sketch), **to develop affordable housing**, for a purchase price of $3,000,000.00 to be confirmed through our appraisal process as required by State law.
>
> The Borough would coordinate and pay for the subdivision process and proceed to closing within thirty (30) business days after the completion of the subdivision. We would also pay the cost of an appraiser to be selected by Drew to verify the property valuation. Our appraiser is Mr. Matthew S. Krauser from Newmark Knight Frank. In addition, the Borough would "hold" Drew harmless from the reduction of this acreage from your impervious coverage ratio.
>
> This purchase offer is subject to formal governing body approval of a Contract of Sale between the Borough and Drew, clear title and no significant environmental issues. The funds to consummate this transaction are in place.
>
> [Schwarz Cert., at ¶ 15 (emphasis added).]

In response, the University retained an appraiser who began preparing his own appraisal of the 9.6 acre parcel. On April 1, 2020, Mr. Codey sent a follow up email to Mr. Vitali inquiring of the University's interest in the Borough's proposed acquisition of the 9.6 acre parcel owned by Drew University. Id. at ¶ 16. By email dated April 2, 2020, Mr. Vitali affirmed the University's interest in the transaction and noted that it was working as quickly as possible to evaluate it. Ibid.

On May 21, 2020, Mayor Conley emailed then-President Baenninger with an update on the Borough's affordable housing litigation. Id. at ¶ 17. Attached to this email was a memorandum prepared by the Borough's legal counsel, wherein counsel noted that the funds for the potential acquisition of 9.6-acre portion of the University's property were held in the Borough's Affordable

Housing Trust Fund, further noting that the rationale for the potential acquisition of the subject property was to effectuate a settlement of the Borough's pending affordable housing litigation. Ibid. On or about May 28, 2020, the University provided the Borough with its own appraisal of the 9.6 acre parcel, which appraisal placed a significantly higher value on the subject land. Id. at ¶ 18.

For the next several months, negotiations between Madison and the University fell dormant as the Borough sought to finalize its settlement with FSHC through a municipally-sponsored 100% affordable housing site consisting of 40 units. The underlying purpose of the Borough's tactics are now clear – keep the University at bay with a proposed acquisition while simultaneously concealing the availability and suitability of the University's surplus property from FSHC and the Court.

By Order dated June 1, 2020, the Court appointed Joseph Burgis, PP, AICP, as Special Master, replacing Michael Bolan, PP. Counsel Cert., at ¶ 11, Ex. J.

On August 1, 2020, Mr. Schwarz joined the University as its President, and was quickly brought up to speed on the discussions and negotiations between the University and the Borough. Schwarz Cert., at ¶ 19.

On or about August 10, 2020, the Borough and the FSHC entered into a Settlement Agreement (the "Agreement") which, in salient part, established the Borough's Third-Round affordable housing obligation and provided proposed zoning mechanisms by which the Borough would satisfy its Third-Round obligations. Counsel Cert." at ¶ 12, Ex. K. Notably, the Agreement established the Borough's Prior Round obligation as 86 units, its present need (or rehabilitation) obligation as 21 units, and its prospective need obligation as 500 units. Ibid. Due to the fact that the Borough allegedly lacked adequate vacant land to meet the entirety of its prospective need

obligation, the parties to the Agreement stipulated that the Borough's realistic development potential ("RDP") was 147 units, leaving a considerable unmet need of 353 units.

Incredibly, the lions-share of Drew's land – **or 168 acres** - was conspicuously excluded from Madison's vacant land analysis without even a purported justification for exclusion as required by COAH's regulations. And, of the 191 parcels identified in the Borough's vacant land analysis, only 4 University parcels were identified as contributing to Madison's RDP, including Block 3101, Lot 9 (0.3 acres), Lot 10 (0.42 acres), Lot 11 (0.41 acres), and Lot 12 (0.34 acres), resulting in a total RDP of 2.34 units at an assumed density of 8 units per acre. As discussed in greater detail in subsequent sections of this Brief, the Borough's failure to identify the University's land as contributing to its RDP explicitly violated COAH's regulations regarding the preparation of a vacant land analysis and undermines the municipal affirmations which induced FSHC to enter into the settlement agreement with Madison.

Having executed a settlement agreement which, on its face, provided the Borough with a modicum of protection for exclusionary zoning lawsuits, the Borough then renewed its negotiations with the University. Like before, the underlying purpose of this tactic is also clear – keep the University at bay from pursuing inclusionary development on its surplus lands while maintaining a backup site for the 40-unit 100% affordable housing development.

On or about September 11, 2020, University President Schwarz had a conference call with Mayor Conley where President Schwarz advised that he had been hired to secure Drew's financial future and desired to arrange a meeting with him. Schwarz Cert., at ¶ 20.

In this connection, on or about October 7, 2020, University President Schwarz met with Borough Mayor Conley. Id. at ¶ 21. During this meeting, Mayor Conley referenced the fact that the Borough had a significant unmet need in connection with its affordable housing obligation.

Ibid. Mayor Conley also indicated an interest in potentially acquiring land for affordable housing from Drew, and University President Schwarz affirmatively indicated that Drew desired to sell its land and would be able to accommodate the Borough in this regard. Ibid. University President Schwarz advised Mayor Conley of Drew's interest in selling its peripheral lands to raise money for the University's endowment. Ibid.

On or about October 9, 2020, former counsel to Drew University engaged in a conference call with Borough Administrator Ray Codey, during which Mr. Codey emphasized that the Borough was still interested in acquiring the previously discussed 9.6-acre parcel from the University along Loantaka Way for the Borough's affordable housing needs. Id. at ¶ 22.

On or about October 16, 2020, the Court conducted a fairness hearing on the Settlement Agreement. During the hearing, the Borough avoided making any reference to the 9.6-acre parcel of University land that it had proposed to acquire, or indeed any other portion of Drew's undeveloped and suitable peripheral lands, notwithstanding the Borough's statutory obligation to include Drew's property in its RDP calculations. At the conclusion of expert testimony, the fairness hearing was carried to December 8, 2020, to provide the public with an opportunity to make statements regarding the settlement.

On November 12, 2020, Borough Administrator emailed Drew's former counsel and advised that, "[a]lthough we'll be announcing two sites we've secured for affordable housing on 11/16/20, our pending purchase offer still stands." Schwarz Cert., at ¶ 23. That same month, the University again requested that Madison consider revisions to the University zoning district which would permit multifamily inclusionary development on the periphery of the campus. Id. at ¶ 24. Obviously, Drew made it clear to the Borough that it wanted to monetize its peripheral lands. Ibid. In response, Mr. Codey directed that Drew's campus-wide Master Plan be updated prior to any

conversations or negotiations concerning multifamily development on the Drew peripheral lands. Id. at ¶ 25. This directive, which the University honored to as it believed Madison was working with it in good faith, was designed to and successfully stalled development conversations while Madison's affordable housing compliance remained in a precarious position.

The University promptly retained a team of consultants to prepare a Master Plan update for the campus that would remain after the surplus lands were rezoned and sold, as well as concept plans for the potential inclusionary development which was proposed for such surplus lands. Id. at ¶ 26. The University also formed an ad hoc Master Plan committee to undertake the laborious and time-consuming Master Plan amendment process. Id. at ¶ 27.

Over the course of the next 10 months, from March 2021 through January 2022, the University carefully updated its Master Plan, prepared various iterations of concept plans for Madison's consideration, and engaged in a holistic conceptual development process. Id. at ¶ 28. Notwithstanding the foregoing, at no point was FSHC made aware of the availability of Drew's land.

While the University was occupied with this internal process which, again, was at Madison's demand, the Borough continued forward on a separate track with its 40-unit 100% affordable development and ostensible progress in complying with the FSHC settlement. By Order dated February 23, 2021, the Court affirmed the fairness of the FSHC settlement agreement, scheduled a second fairness and final compliance hearing for April 22, 2021, and granted Madison continued immunity from builders' remedy lawsuits. Counsel Cert., at ¶ 13, Ex. L.

By letter dated April 7, 2021, FSHC informed the Court that the "most significant aspect of the Borough's Third Round Plan, a proposed 100% affordable development, appears to not yet be realistic, and the Borough has not provided all of the documentation to verify several of the

mechanisms for which it is seeking credit and to complete compliance. Counsel Cert., at ¶ 14, Ex. M. FSHC also noted that, as of the date of its letter, Madison had not yet designated a developer for the 100% affordable housing development, provided a construction schedule, or in fact undertaken the necessary steps to ensure that the project would be eligible for 9% LIHTC tax credits. Ibid. As such, FSHC requested that the hearing be adjourned to a future date.

On April 22, 2021, the Court conducted the second fairness and final compliance hearing and carried the hearing to May 27, 2021 to provide Madison with additional time to finalize its compliance documentation. Counsel Cert., at ¶ 15, Ex. N.

On May 27, 2021, the Court conducted a second fairness and final compliance hearing and took the testimony of Madison's planning experts and the arguments of counsel. Counsel Cert., at ¶ 16, Ex. O. At the recommendation of the Special Master, the Court, on or about August 16, 2021, entered a conditional judgment of compliance and repose, which required Madison to satisfy several outstanding conditions. Ibid. Notably, at the time this Judgment was entered, Madison's designated 100% affordable housing developer, RPM, had not yet applied for tax credits to finance the construction of the proposed 40-unit 100% affordable housing development and the development was still in question. Ibid.

With Madison's proposed 100% affordable housing development remaining uncertain, the Borough escalated its negotiations with the University. Specifically, in June and July 2021, the Borough re-engaged Drew in lengthy negotiations regarding the rezoning of the University's lands for either preservation and/or development of townhomes or multifamily housing. Schwarz Cert., at ¶ 29.

On September 23, 2021, the University's planner supplied Susan Blickstein, the Borough's planner, with a proposed campus Master Plan amendment. Id. at ¶ 30. The draft amendment

proposed three areas consisting of 63 developable acres for multifamily inclusionary development. Ibid. As described in the concept plans prepared by the University's professional team, this area can easily yield at least 500 units with a 20% affordable housing set-aside, and assuredly more units depending upon product type.

On October 6, 2021, University President Schwarz and the University's professional team met with the Borough to present the proposed rezoning of Drew's peripheral properties. Id. at ¶ 31. At the time, the University believed that the meeting was productive, and that the Borough was interested in reaching agreement with it on the proposed multifamily rezoning of the University's lands. Ibid.

On October 12, 2021, Ms. Blickstein emailed the University's planner requesting a scaled prototype of the proposed townhome and apartment units. Id. at ¶ 32. On October 13, 2021, the University's planner provided Ms. Blickstein with the requested prototypes. Ibid. On October 19, 2021, Ms. Blickstein emailed the University's planner to advise that the Borough's environmental staff would be conducting a preliminary wetlands assessment of a portion of the University's property which had been proposed for multifamily inclusionary development. Id. at ¶ 33.

On October 27, 2021, Ms. Blickstein requested that the University's planner provide her with shapefiles of the building layouts and site plans. Id. at ¶ 34. On November 10, 2021, former Drew counsel and University President Schwarz met with Mayor Conley and David Epstein, President of the Land Conservancy of New Jersey, to further discuss the rezoning and possible preservation of the wooded areas of Drew's property. Id. at ¶ 35.

On November 12, 2021, the University's planner provided Ms. Blickstein with a narrative report prepared by EcolSciences, the University's environmental consultant, which supported the wetlands mapping previously provided to the Borough. Id. at ¶ 36. On November 22, 2021, the

University's planner met with the Borough's professionals to discuss the University's development proposal. Id. at ¶ 37. On November 23, 2021, Ms. Blickstein emailed the University's planners, copying Mayor Conley and Mr. Epstein, with comments and questions on the University's development proposal. Id. at ¶ 38.

From November 2021 through January 2022, the University and its professionals continued exchanging emails and development proposals with the Borough and its professional team. In particular, on or about January 1, 2022, and then again on January 26, 2022, the University met with the Borough and presented a revised development plans, later sharing CAD files with the Borough's professional staff. Id. at ¶ 39.

On or about January 26, 2022, the Borough suddenly announced that it was no longer interested in rezoning one area of the Drew lands to permit the discussed townhome development proposal, stating that the Borough would only consider single family homes on that portion of the campus. Id. at ¶ 40. The Borough's new position constituted a complete about-face of the negotiations it had engaged in with the University for the past several months, all of which presumed multifamily development. Subsequently, in response to the Borough's change in position on that portion of the lands, Drew made a concrete counter proposal with respect to the number of single-family homes on that portion of Drew's property which Drew believed would have resulted in an agreement with regard to that portion. Id. at ¶ 41.

Shortly thereafter, Mr. Codey called Drew's former counsel and advised that the Borough would not rezone the Drew property and would only agree to hypothetical zoning for the purpose of an appraisal. Id. at ¶ 42. Ultimately, even this "hypothetical zoning" for appraisal purposes also turned out to be false, as the Borough failed to apply to the County of Morris for Open Space grant funds by the June 9, 2022 deadline. Id. at ¶ 43.

This motion now follows.

LEGAL ARGUMENT

I. THE BOROUGH HAD AN AFFIRMATIVE, STATUTORY OBLIGATION TO DISCLOSE AND TAKE DREW'S UNDEVELOPED LANDS INTO ACCOUNT WHEN CALCULATING ITS RDP.

The Borough's vacant land analysis and resulting RDP was plainly deficient under COAH's rules because it failed to even consider any portion of Drew's 168-acre Property. Significant portions of this land – which is generally located on the periphery of the campus and comprised of at least 63 acres - is "suitable", "available", "developable", and "approvable" for inclusionary housing, and should have contributed to the Borough's RDP. The Borough's purposeful omission of the Property from its RDP, particularly when juxtaposed against its long-running yet illusory negotiations with the University to: (i) acquire a portion of it for a 100% affordable housing project; (ii) record a conservation easement against 35 acres of it; (iii) and rezone it for inclusionary development, constitutes sophisticated exclusionary zoning practices which must be eradicated to provide low- and moderate-income households with decent housing in this wealthy suburb.

First, it is important to understand how COAH has historically defined "vacant land" in terms of calculating a municipality's RDP. Under the First Round Rules, at N.J.A.C. 5:92-1.3, "vacant land" was defined broadly, and included:

1. Undeveloped and unused land area;
2. Any non-residential areas with significant amounts of land not covered by impervious surfaces on site, as determined by the Council;
3. Land suitable for redevelopment or infill at higher densities; and
4. Residential areas with lot sizes in excess of two acres where environmental factors permit higher densities.

[Ibid.]

Under COAH's Second Round Rules, in response to critiques lodged by the League of Municipalities and others, COAH narrowed its definition of "vacant land" to reflect the first of the four sub-definitions of "vacant land" under the First Round Rules, and then added separate provisions to address the other categories of land with redevelopment potential. Thus, under the Second Round Rules, "vacant land" is defined as "undeveloped and unused land area." N.J.A.C. 5:93-1.3. Critically, COAH defined "vacant land" by specifically referencing "land area" instead of "tax lots." The reason for this is because COAH expressly required municipalities to evaluate lands "that may be subdivided and support additional development[,]" – such as the University's 168-acre mother campus lot – as areas which should be rezoned to permit inclusionary development. See N.J.A.C. 5:93-4.2(h).

With regard to process, COAH's regulations make clear that the obligation to identify sites that are realistic for inclusionary development, which thus contribute to the RDP, lies with the municipality. In this regard, N.J.A.C. 5:93-4.1(b) explicitly provides that:

> When a municipality attempts to demonstrate that it does not have the capacity to address the housing obligation calculated by the Council, the municipality shall identify sites that are realistic for inclusionary development in order to calculate the [RDP] of the community, in accordance with N.J.A.C. 5:93-4.2
>
> [N.J.A.C. 5:93-4.1(b).]

Pursuant to N.J.A.C. 5:93-4.2(b), municipalities requesting a vacant land adjustment, like the Borough, are required to submit "an inventory of vacant parcels by lot and block that includes the acreage and owner of each lot." Municipalities are only permitted to **exclude** land from the vacant land inventory which are either: (i) owned by a local government entity and the local government entity has adopted a resolution stating that the land shall be used for a public purpose

other than housing; or (ii) any vacant contiguous parcels in private ownership of a size that would accommodate less than 5 dwelling units. N.J.A.C. 5:93-4.2(c). Notably, "[a]ll vacant sites shall initially be presumed" as likely to develop for low- and moderate-income housing. N.J.A.C. 5:93-4.2(d). More importantly, however, is the fact that COAH would expressly consider "other sites" which are "devoted to a specific use which involves relatively low-density development" – such as a 168-acre university with buildings and uses clustered in the general center of the tract – as contributing to the RDP if "inclusionary zoning was in place." Ibid. Indeed, N.J.A.C. 5:93-4.2(d) provides a **non-exhaustive** list of such sites, including golf courses not owned by members, driving ranges, nurseries, and so on and so forth. Ibid.

For all other sites which the municipality seeks to eliminate from its vacant land analysis—as compared to exclude—COAH's regulations are clear: the municipality must "present documentation" justifying the elimination of the site from RDP calculation. See N.J.A.C. 5:93-4.2(e). In this regard, there are only 6 categories of sites which can be, through the presentation of supporting documentation, eliminated from RDP consideration. These 6 categories include: (i) agricultural lands when the development rights have been purchased or restricted by covenant; (ii) environmentally sensitive lands which are either within the jurisdiction of a Statewide agency or encumbered by delineated wetlands, steep slopes, or flood hazard areas; (iii) historically and architecturally important sites, if such sites are listed on the State Register of Historic Places[2]; (iv) active recreational lands which have been designated for recreational purposes in the municipal Master Plan (along with several other requirements); (v) conservation, parklands, and open space lands; and (vi) individual sites that COAH, or in this case the Court, determines are not suitable for inclusionary development. N.J.A.C. 5:93-4.2(e)(1) to (6). None of these 6 categories applies to

[2] Only two buildings on Drew's campus are listed on the State's register of historic places – Gibbons Mansion and Rose Memorial Library.

Drew's property which is proposed for development. More importantly, Madison failed to even attempt to undertake the RDP elimination analysis required by COAH's regulations in connection with the vacant land analysis that it presented to the Court.

In the case at bar, the correspondence between Madison and the University evinces years of previously undisclosed Borough acknowledgment regarding the suitability of the University's periphery lands for inclusionary development, including but not limited to the following:

- The March 21, 2018 email from Mayor Conley to then-President Baenninger inquiring about the possibility of utilizing the University's property for affordable housing;
- The December 11, 2018 email from Mr. Codey to Ms. Bresnahan requesting a meeting to "discuss ways to work together to increase affordable housing opportunities in Madison";
- The 2018 and 2019 emails between Borough staff and University representatives regarding the valuation of University lands for alleged conservation purposes – which valuation was premised on the suitability and developability of the lands for inclusionary housing;
- The many requests by the University, commencing in 2019, that the Borough consider rezoning the University's peripheral lands for inclusionary housing;
- The March 25, 2020 proposal by the Borough to acquire 9.6 acres of University land for affordable housing;
- The University's 2021 draft Master Plan amendment, which called for a 497-unit inclusionary housing development on the University's peripheral lands;

- The conceptual development plans prepared by the University's professional team and shared with the Borough throughout 2021 and early 2022, all of which called for an inclusionary housing community with hundreds of units; and
- The countless meetings between the Borough, the University, and their respective professional teams to discuss the University's development proposals for its peripheral lands.

This correspondence, which commenced years before the Borough entered into the Settlement Agreement with FSHC, establishes that the University's peripheral lands were vacant, suitable for inclusionary development, proposed for inclusionary development, required to be included in the Borough's RDP and, ultimately, should have been rezoned to provide a "realistic opportunity" for the construction of inclusionary housing.

Unfortunately, Madison betrayed the University's faith that it would act in good faith, while simultaneously deceiving the Court and FSHC into accepting an artificially reduced RDP. Indeed, the entirety of the Borough's understated RDP appears to be met through either existing credits or two new zoning mechanisms – the Madison Mall Apartments (8 family rental units) and the proposed 40-unit municipally-sponsored 100% affordable housing development. Meanwhile, the remaining 347-unit unmet need obligation is purportedly met through the adoption of overlay zoning on various locations throughout the municipality – which overlay zoning need not necessarily present a "realistic opportunity" for the construction of affordable housing. In other words, a municipality with a 500-unit Third Round obligation and a track record of opposing inclusionary housing has, at least for now, apparently resolved the entirety of its obligation by promising to produce 48 new affordable housing units.

The Borough's conduct necessitates a strong judicial hand to shape a remedy, which remedy can be achieved by the vacation of the Borough's Conditional Judgment, as discussed below.

II. THE BOROUGH'S CONDITIONAL JUDGMENT SHOULD BE VACATED PURSUANT TO R. 4:50-1 BECAUSE THE UNDERLYING SETTLEMENT AGREEMENT WAS PREMISED ON MADISON'S PURPOSEFULLY DEFICIENT RDP CALCULATION.

Drew respectfully submits that the Court should vacate the Borough's Judgment and reinstitute proceedings pursuant to R. 4:50-1(a), (b), (c), (e), and (f). This requested relief is warranted because the Judgment was premised on a plainly incorrect vacant land analysis which artificially reduced the Borough's RDP by purposefully omitting the University's lands. As a direct result thereof, the Borough was able to skirt its actual Third Round constitutional Mt. Laurel obligation. New proceedings are required to address this manifest injustice, and such others as may be discovered, and modify the Borough's Housing Plan to ensure that that the Borough satisfies its true Third Round RDP, namely by factoring in the developmental potential of Drew's undeveloped surplus land which Borough officials had repeatedly recognized as suitable and available since at least March 2018.

R. 4:50-1 provides, in relevant part, that the court may relieve a party from a final judgment or order for the following reasons:

> (a) mistake, inadvertence, surprise, or excusable neglect;
> (b) newly discovered evidence which would probably alter the judgment or order and which by due diligence could not have been discovered in time to move for a new trial under R. 4:49;
> (c) fraud (whether heretofore denominated intrinsic or extrinsic);
> . . .
> (e) the judgment or order has been satisfied, released or discharged, or a prior judgment or order upon which it is based has been reversed

> or otherwise vacated, or it is no longer equitable that the judgment or order should have prospective application; or
> (f) any other reason justifying relief from the operation of the judgment or order.
>
> [R. 4:50-1.]

Several subparagraphs of R. 4:50-1 apply to matter at hand, including: (a) mistake – if one takes an exceedingly charitable view of the Borough's conduct; (b) newly discovered evidence – in this case the availability and developability of Drew's surplus land, which information was not in the record upon which the Court entered the Judgment; (c) fraud – potentially applicable given the Borough's intentional failure to take Drew's land into account in preparing its vacant land analysis; (e) the judgment is no longer equitable – applicable given that the Borough was able to artificially reduce its RDP by improperly excluding Drew's lands; and (f) the catch all provision – applicable given that the creation of adequate affordable housing is a constitutional obligation in New Jersey.

While R. 4:50-1 motions are relatively commonplace in civil litigation, the Rule has also been specifically applied in the context of Mt. Laurel litigation to evaluate the circumstances under which a Mt. Laurel consent judgment can and/or should be vacated and/or modified. For example, in Toll Brothers, Inc. v. Township of West Windsor, 334 N.J. Super. 77 (App. Div. 2000), a municipality sought to delete sites from its affordable housing plan on the basis that they were no longer suitable for inclusionary housing. Id. at 89. In response to the landowners' challenge to the municipality's attempt to remove their sites from the affordable housing plan, the Supreme Court held that R. 4:50-1(e) provided the appropriate rubric by which the municipality's actions should be evaluated. Id. at 98. In particular, the Court held that, because the landowners' sites were previously included in the town's affordable housing plan, the town would have to demonstrate significant changes in facts or applicable law warranting revision of the consent judgment, and

also demonstrate that the removal of the sites was "suitably tailored to the change circumstance." Id. at 102. While the Toll Brothers Court's analysis was limited to subset (e) of R. 4:50-1 due to the unique factual scenario present in that matter, we respectfully submit that subsets (a), (b), (c), and (f) are also applicable and constitute appropriate grounds for this Court to vacate the Borough's Judgment and reopen proceedings.

In this connection, the gulf between the Borough's Third Round affordable housing obligation and its claimed RDP amounts to a staggering three hundred and fifty-three (353) units, reduced by fifty-seven to account for two projects. Counsel Cert., at ¶ 3, Ex. B. Exhibit C to the Borough's Settlement Agreement provides strategies for meeting the Borough's significant unmet need of the Borough's affordable housing obligation. Counsel Cert., at ¶ 10, Ex. I. The lions-share of Drew's land – **or 168 acres** - was conspicuously excluded from Madison's vacant land analysis without even a purported justification for exclusion as required by COAH's regulations. The Borough's failure to identify the University's land—which the Borough itself had sought to acquire, deed restrict, or rezone—as contributing to its RDP, explicitly violated COAH's regulations regarding the preparation of a vacant land analysis. Moreover, this willful failure also undermines the municipal affirmations which induced FSHC to enter into the settlement agreement with Madison.

The deliberate and purposeful omissions in the Borough's vacant land analysis resulted in a settlement agreement which is woefully deficient in the production of new affordable housing. As previously noted, the entirety of the Borough's understated RDP is met through either existing credits or two new zoning mechanisms – the Madison Mall Apartments (8 family rental units) and the proposed 40-unit municipally-sponsored 100% affordable housing development. Meanwhile, the remaining 347-unit unmet need obligation is purportedly met through the adoption of overlay

zoning on various locations throughout the municipality – which overlay zoning need not necessarily present a "realistic opportunity" for the construction of affordable housing. In other words, a municipality with a 500-unit Third Round obligation and a track record of opposing inclusionary housing has, at least for now, apparently resolved the entirety of its obligation by promising to produce 48 new affordable housing units.

Moreover, the Borough knew that Drew's land was available for development and engaged in negotiations with the University as early as March 2018. During such negotiations, the Borough had explicitly identified property owned by Drew as suitable for the development of affordable housing to assist the Borough in meeting its considerable Third Round affordable housing obligations. However, throughout its negotiations with the FSHC and these proceedings, the Borough has repeatedly failed, through malfeasance and/or purposeful omission, to either take Drew's property into account in calculating its RDP or to disclose its negotiations for the purchase of Drew's property for affordable housing purposes. For all of these reasons, whether the Court views this Motion through lens of R. 4:50-1(e) or any of its other subparts, the general conclusion is the same – the underlying Judgment was based on a defective RDP calculation and the Judgment must be vacated to establish an appropriate remedy and ensure that Madison adopts zoning mechanisms meeting its true fair share of the region's need for low- and moderate-income housing.

As such, Drew respectfully requests that the Court vacate the Borough's Conditional Judgment pursuant to R. 4:50-1 and reinstitute proceedings in the Borough's DJ Action.

III. IN THE ALTERNATIVE, THE COURT SHOULD CONDUCT A MID-POINT REVIEW HEARING PURSUANT TO N.J.S.A. 52:27D-313.

In the alternative to vacating the Borough's Judgment, Drew respectfully submits that the Court should conduct a midpoint review and evaluate: (i) whether the Borough's existing zoning

mechanisms provide a "realistic opportunity" for its satisfaction of its constitutional obligation; and (ii) the developmental potential of Drew's undeveloped lands which are suitable for inclusionary development; and (iii) the rezoning of Drew's peripheral lands to meet the affordable housing shortfall in Madison. As set forth in greater detail herein, a midpoint review is well-recognized mechanism which is statutorily required by COAH's regulations and also mandated by significant precedent in Mt. Laurel proceedings.

The Mt. Laurel doctrine requires municipalities to provide "a realistic opportunity for the construction" of affordable housing. S. Burlington Cty. NAACP v. Mt. Laurel Twp., 67 N.J. 151, 174 (1975) ("Mt. Laurel I"); S. Burlington Cty. NAACP v. Mt. Laurel Twp., 92 N.J. 158, 204-205 (1983) ("Mt. Laurel II"). In Mt. Laurel II, the Supreme Court defined "realistic opportunity" to mean that "there is in fact a likelihood – to the extent economic conditions allow – that the lower income housing will actually be constructed." 92 N.J. at 222. As described in greater detail herein, the Supreme Court's declarations regarding a municipality's ongoing obligation to provide a "realistic opportunity" for the construction of affordable housing was subsequently addressed by COAH in rule amendments and the institution of the midpoint review requirement.

In 2002, the Fair Housing Act was amended to extend the substantive certification period from 6 years to 10 years, but also require a midpoint review. N.J.S.A. 52:27D-38; see also In re Six Month Extension of N.J.A.C. 5:91-1 et seq., 372 N.J. Super. 61, 100-101 (App. Div. 2004). Specifically, this amendment required that COAH "establish procedures for a realistic opportunity review at the midpoint of [a town's] certification period and shall provide for notice to the public. N.J.S.A. 52:27D-313(b). As noted by the Appellate Division, "COAH is now expressly required to conduct 'a realistic opportunity' review in the interim, at the midpoint of the now longer period for substantive certification[.]" In re Six Month Extension, supra, 372 N.J. Super. at 101.

Shortly after the 2002 amendment to the Fair Housing Act, COAH adopted its original Third Round rules which introduced the concept of growth share (since struck down by the Supreme Court) and provided "monitoring" requirements throughout the substantive certification period. See N.J.A.C. 5:96-11.1 through 11.8. Following the Supreme Court's rejection of COAH's growth share regulations, COAH proposed revised Third Round procedural rules at the Supreme Court's instruction in June 2014 (N.J.A.C. 5:98-1 et seq.), which addressed the midpoint review. While COAH failed to adopt the revised Third Round rules due to a procedural deadlock, they are instructive of the midpoint review process.

These proposed rules stated that the purpose of the midpoint review is to verify if a town's affordable housing techniques "continue" to be realistic to produce affordable housing, "and in the case of a municipality that received a vacant land adjustment . . . to assess whether new opportunities are available." See 46 NJR 919; N.J.A.C. 5:98-10.1(a).[3]

Thus, pursuant to the Fair Housing Act, proposed COAH regulations, and judicial decisions, a midpoint review requires the Court to make a substantive evaluation of a municipality's compliance mechanisms to determine which have proven successful, not successful, or will likely not result in affordable housing. See N.J.S.A. 52:27D-313; In re Six Month Extension, supra, 372 N.J. Super. at 100-101. A midpoint review is the mechanism that COAH, and now the courts, can and should utilize to determine whether unbuilt sites or unfulfilled mechanisms, such as those present in the Borough, continue to present a "realistic opportunity" based upon information that is to be provided by the municipality.

In performing the midpoint review, both procedurally and substantively, the Court's role is to undertake a meaningful substantive review on notice and an opportunity to be heard. Ibid.

[3] An online link to N.J.A.C. 5:98 can be found here: https://www.nj.gov/dca/divisions/lps/hss/statsandregs/598_for_web.pdf

Prior COAH regulations and case law have made clear that the Court's role during the midpoint is to perform a "realistic opportunity review" which involves: (i) an investigation; (ii) notice and an opportunity for the public to lodge objections; (iii) mediation and reconciliation; (iv) evaluation of the compliance mechanisms to determine which have proven successful, not successful, or are unlikely to result in affordable housing; and (v) for the Court to arrive at a "considered judgment." Ibid.

Section 16(a) of the Borough's Settlement Agreement acknowledges the Borough's obligation under N.J.S.A. 52:27D-313, stating:

> For the midpoint realistic opportunity review required pursuant to N.J.S.A. 52:270-313, upon approval of this Agreement following a fairness hearing, the Borough will post on its municipal website, with a copy provided to Fair Share Housing Center, a status report as to its implementation of its Plan and an analysis of whether any unbuilt sites or unfulfilled mechanisms continue to present a realistic opportunity and whether the mechanisms to meet unmet needs should be revised or supplemented. Such posting shall invite any interested party to submit comments to the municipality, with a copy to the FSHC, regarding whether any sites no longer present a realistic opportunity and should be replaced and whether the mechanisms to meet unmet need should be revised or supplemented. **Any interested party may by motion request a hearing before the court regarding these issues**.
>
> [Counsel Cert., at ¶ 10, Ex. I (emphasis added).]

The proposed midpoint review is also specifically contemplated by the Agreement. Pursuant to Paragraph 16(a) of the Agreement, the Borough agreed to post a midpoint review and to provide a status report as to its implementation of its Housing Plan and an analysis of whether any unbuilt sites or unfulfilled mechanisms continue to present a realistic opportunity. The alternative relief sought by Drew is thus specifically contemplated and permitted under the Agreement.

Furthermore, the fact that a municipality has obtained a judgment of compliance, as here, does not preclude a reviewing Court from revisiting the basis for that judgment when an objection is filed post-entry of judgment. To the contrary, our Appellate Division held, in the COAH context, that objections filed subsequent to a grant of substantive certification must be investigated and reviewed. See In re Southampton, 338 N.J. Super. 103 (App. Div. 2001). In the Southampton matter, supra, COAH voted to grant a municipality final substantive certification. Two weeks following the vote, a contract purchaser of property located within the municipality filed a motion seeking reconsideration of COAH's grant of substantive certification, noting that two lots proposed by the municipality for inclusionary development had already been developed with substantial commercial structures, and asserting that COAH's grant of substantive certification was premised on incorrect grounds. Id. at 109-110. COAH denied the reconsideration motion, after which the contract purchaser filed a direct appeal with the Appellate Division. Id. at 111-112. On appeal, the Appellate Division held that:

> COAH should not disregard or give only perfunctory consideration to information supplied by a property owner or other interested party concerning the feasibility of a compliance plan simply because that party has not filed a timely objection to the plan. A municipality has an obvious incentive to present a favorable picture of its plan, and COAH's capacity to make an independent evaluation of the information a municipality submits in support of a plan may be limited by time and resources . . . . COAH should not turn a deaf ear to such information simply because the source is a party which failed to file a timely objection to the plan.
>
> [Id. at 114.]

In light of the compelling nature of the submissions by the contract purchaser, the Appellate Division ultimately reversed COAH's grant of substantive certification, specifically noting that COAH should have required the municipality to explain why it affirmatively failed to disclose the commercial development on the proposed inclusionary sites and to discuss the impact of the same

upon the potential for future affordable housing on the sites. Id. at 115. Like the contract purchaser in the Southampton case, the University has now presented the Court with information that was withheld from it when it considered and approved the Borough's affordable housing plan, and similarly requests that the Court re-open proceedings to evaluate this information and the continued fairness of Madison's affordable housing settlement agreement.

As such, in the event that the Court determines that the Judgment should, at least temporarily, remain in place, Drew respectfully submits that a midpoint review is required. As part of this process, the Court should also evaluate the inclusion of Drew's lands as a new mechanism to satisfy the considerable shortfall in the Borough's affordable housing plan.

IV. THE DECLARATORY JUDGMENT ACT REQUIRES THE JOINDER OF DREW AS A DEFENDANT AND "PARTY IN INTEREST" IN THIS ACTION.

Drew also seeks to be joined as a party-defendant in the Borough's DJ Action in order to effectively participate in these proceedings. Since Drew has proposed an inclusionary project which can contribute to satisfying the Borough's shortfall of affordable units, its participation as a party-defendant is vital in order to ensure the Borough's satisfaction of its ongoing constitutional obligation. Furthermore, since Drew's property was inappropriately excluded from Madison's vacant land analysis based upon Madison's demonstrated unwillingness to accurately apprise the Court of suitable lands within its municipal borders, Drew is the only party able to present the Court with the realistic development potential of its vast tracts of surplus land.

The Uniform Declaratory Judgments Act, N.J.S.A. 2A:16-51, et seq. (the "Act"), requires the joinder of Drew as a party to the Borough's DJ Action. The Act is required to be "liberally construed and administered and shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it, and to harmonize, as far as possible,

with federal laws, rules and regulations on the subject of declaratory judgments." N.J.S.A. 2A:16-51. As a general matter, the Act's purpose is to "settle and afford relief from uncertainty and insecurity." Ibid.

By way of this Motion, Drew seeks to vacate the Judgment and reinstitute additional proceedings in the Borough's DJ Action in order to address the Borough's failure to satisfy its Third-Round affordable housing obligation, specifically to address the Borough's failure to consider the availability and developmental potential of Drew's undeveloped surplus lands. Drew also proposes its Property as a mechanism to meet this shortfall and help ensure that the Borough can satisfy its constitutional obligations. Pursuant to the Act, the Agreement, and the Court's ongoing jurisdiction under the Judgment, Drew has a statutory right to be joined as a party because the Agreement established municipal obligations with regard to Drew's interests that must now be examined and implemented by this Court.

Separately, as the owner of real property located within the Borough, Drew also has an undeniable right to intervene in the Borough's DJ Action under both R. 4:33-1 and 4:33-2. R. 4:33-1 provides as follows:

> Upon timely application anyone shall be permitted to intervene in an action if the applicant claims an interest relating to the property or transaction which is the subject of the action and is so situated that the disposition of the action may as a practical matter impair or impede the ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.
>
> [R. 4:33-1.]

Intervention as of right requires the proposed intervenor to show: (i) an interest relating the property or transaction which is the subject of the transaction; (ii) that the applicant is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect

that interest; (iii) that its interest is not adequately represented by existing parties; and (iv) a timely application to intervene. See Meehan v. K.D. Partners, L.P., 319 N.J. Super. 563, 568 (App. Div. 1998). Because a motion to intervene is liberally viewed, a decision whether to grant intervention under R. 4:33-1 is not discretionary. See Employers v. Tots & Toddlers, 239 N.J. Super. 276 (App. Div.), cert. denied, 122 N.J. 147 (1990); see also Chesterbrooke Limited Partnership v. Planning Bd. of the Twp. of Chester, 237 N.J. Super. 118, 124 (App. Div. 1989). Instead, if all the Rule's criteria are met, intervention must be granted. Ibid. In the case at bar, Drew's unique interest in the Borough's DJ Action is not adequately represented by any other party because all other parties to this action have settled. Given that Drew seeks to implement the Court's ongoing jurisdiction over the Borough's shortfall with regard to its Third-Round obligation, which shortfall has only recently arisen in the Court's record of this case, Drew's application is timely. For these reasons, Drew is entitled to intervention as of right pursuant to R. 4:33-1.

Alternatively, under the permissive intervention standard set forth in R. 4:33-2, Drew's intervention should still be granted because its timely application concerns a "claim or defense" that has a "question of law or fact" in common with the main action, which is the Borough's DJ Action. In this case, the claim—or rather the fact—is that the Borough has willfully understated its RDP by failing to account for the University's land. While intervention under R. 4:33-2 is discretionary, in exercising said discretion "the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties."

Thus, under both R. 4:33-1 and R. 4:33-2, Drew's motion for intervention should be granted because it has a demonstrable and unique interest in the outcome of the litigation and its participation is, in essence, limited to a post-judgment reevaluation and supplemental addition to the Borough's settlement agreement to compel compliance with the Mt. Laurel doctrine. As such,

Drew respectfully requests that the Court grant this Motion and permit it to intervene in the litigation.

CONCLUSION

Drew respectfully submits that it has demonstrated the Borough's malfeasance both with regard to the calculation of its RDP and in its negotiations with the University. The Court is empowered to, and should, correct this bad faith conduct by revisiting the Borough's vacant land analysis and adjusting its RDP to include Drew's property, which is suitable, available, developable, and approvable for an inclusionary community with hundreds of units. Vacation of the Borough's Judgment, along with the reinstitution of proceedings, is an appropriate remedy to ensure that the Borough meets its constitutional Mt. Laurel obligations. Alternatively, the Court may conduct a midpoint review hearing to evaluate the Borough's compliance mechanisms and determine whether, as Drew respectfully submits is necessary, that the Borough's compliance mechanisms should be supplemented to include Drew's lands. Under these circumstances, Drew's intervention as a party-defendant is both necessary and appropriate in light of its unique interest in the proceedings and its proposal to contribute its lands to assist the Borough in meeting its significant affordable housing obligation. For all of the foregoing reasons, proposed Defendant-Intervenor, Drew University, respectfully requests that the Court grant this motion in its entirety.

Respectfully submitted,

INGLESINO, WEBSTER
WYCISKALA & TAYLOR, LLC

By: /s/ John P. Inglesino
JOHN P. INGLESINO

Dated: June 22, 2022