IN THE MATTER OF WEST WINDSOR TOWNSHIP,

APPELLANT.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

DOCKET NO. A-003109-22 T4
DATE SUBMITTED: AUGUST 25, 2023

CIVIL ACTION

ON APPEAL FROM

SUPERIOR COURT, LAW DIVISION
MERCER COUNTY

Sat below: Hon. Robert T. Lougy, A.J.S.C.
Docket No. MER-L-1561-15

BRIEF AND APPENDIX OF APPELLANT WEST WINDSOR TOWNSHIP

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TABLE OF CONTENTS

TABLE OF ORDERS APPEALED FROM

TABLE OF CONTENTS OF APPENDIX
VOL. I OF I

TABLE OF AUTHORITIES

Other Authorities — Brief page number

PRELIMINARY STATEMENT

This is a straightforward case. Respondent AvalonBay Communities, Inc. ("Respondent") submitted a development application to the West Windsor Planning Board that showed that 85.9 percent of the family rental affordable units in its very large inclusionary development would have at least one bedroom without a window, while only 3.57 percent of family rental market units would. The Board, absent guidance from the courts, felt compelled to approve the development in spite of this shocking disparity, but brought the matter before the court for a determination that this manifest unfairness to affordable housing rental tenants could not be squared with Mt. Laurel principles and must be struck down. The basic question is a simple one: do Mt. Laurel principles apply to developers, or do they just apply to municipalities who are powerless to address this mistreatment of affordable housing tenants once construction of affordable housing is in the hands of developers? If Mt. Laurel is to be given the reach and robust application that it, and the residents of the State of New Jersey, deserve, then the answer must be that such mistreatment of affordable housing tenants cannot be condoned

and, as to windows in bedrooms, parity is required for affordable and market units.

In addition, can this gross mistreatment of affordable households be permitted in light of the requirements in the U.S. HUD Section 8 program, the main program for very low-income households, requiring that all sleeping rooms for Section 8 tenants have windows when those affordable tenants are effectively barred from Respondent's development due to most of the affordable units not having a window in at least one bedroom? The answer is an emphatic "No."

STATEMENT OF FACTS AND PROCEDURAL HISTORY[1]

In October 2021, Respondent secured approval from the West Windsor Planning Board for an 868-residential unit inclusionary development in West Windsor ("AVB Project"), a site identified in the Township's Housing Element and Fair Share Plan as one to address the Township's affordable housing

[1] The procedural and factual history are combined as the relevant facts are contained in the procedural history and no facts are in dispute in this matter.

obligation. Pa34-35. That obligation was established in a settlement agreement ("Settlement Agreement") between the Township and Fair Share Housing Center ("FSHC"), approved by the trial court in January 2019 as part of the Declaratory Judgment Action ("DJ Action") initiated by Appellant in 2015 (docket No. MER-L-1561-15) to establish its Third Round Mt. Laurel obligation and demonstrate compliance therewith, as subsequently confirmed by the trial court in a final judgment of compliance and repose entered on July 2, 2019 ("Final Judgment"). Pa52-56.

At the Planning Board hearing, Respondent's proposed design, in which at least one bedroom in the vast majority of the family rental affordable units (85.9%) has no window compared to very few (3.57%) market rate units having similar treatment, see Certification of David Novak, paragraphs 3-6, Pa87, and Certification of Joseph H. Burgis, paragraph 3, Pa84, drew scrutiny and concern among Board members and others. The disparity of treatment of the affordable tenants was noted in the memorialization of the Board's approval. Pa65. Respondent defended its windowless affordable unit bedrooms on the basis of the Uniform Construction Code ("UCC"), which permits artificial light in bedrooms. Notwithstanding the widespread concern over the windowless bedroom design, Respondent has been proceeding with the

construction permit process for the AVB Project, having completed the resolution compliance process.

In separate, related litigation brought as a Motion to Enforce Litigant's Rights under the DJ Action docket, and subsequently also a new complaint filed on March 27, 2023 essentially replicating that motion (Docket No. MER-L-000583-23), Respondent is suing West Windsor Township and its construction official over alleged delays in the permitting process for the AVB Project. In the Motion to Enforce Litigant's Rights, it sought appointment of a special master to replace the West Windsor Construction Code officials for all permitting and inspections relating to the AVB Project. In its response, Appellant raised the issue of the windowless bedrooms and argued that, if a special master were appointed, he or she should assess the fairness of windowless bedrooms for most of the family rental affordable units, or, if the court agreed with Appellant that a special master was not the appropriate relief, then the court should still address the discriminatory treatment by Respondent of the windowless bedrooms in the affordable units.

In a December 2, 2022 case management conference with the trial court on Respondent's Motion to Enforce Litigant's Rights in the DJ Action, it was agreed that the construction permit litigation was not the appropriate forum to raise the windowless bedroom issue and that a separate application, which could be in the form of a motion, would need to be filed for that, and such filing could be made under the DJ Action. 1T49-1-6.[2] Accordingly, Appellant on February 24, 2023 filed a Motion for Declaratory Judgement with respect to Respondent's treatment of windowless bedrooms in the affordable units. Pa1-3. It revised and re-filed its brief in support of the motion on March 23, 2023 to add the Federal law requirement that bedrooms have windows for Section 8 housing eligibility. Respondent filed opposition to the motion on April 18, 2023, to which Appellant responded on April 24, 2023. FSHC on April 20, 2023 filed a brief in support of Appellant's motion with respect to the windowless affordable bedrooms. Oral argument was heard on April 28, 2023. On May 1, 2023, the trial court dismissed Appellant's application, effectively denying its motion. Appellant on June 14, 2023 timely filed its Notice of Appeal and associated documents. Pa29-32. FSHC timely filed its Notice of Appeal in the matter on June 15, 2023.

[2] "1T" refers to the transcript of the hearing on December 2, 2022; "2T" refers to the transcript of the hearing on April 28, 2023.

LEGAL ARGUMENT

I. A MOTION FOR DECLARATORY JUDGMENT IS A PROPER MECHANISM FOR BRINGING THE WINDOWLESS BEDROOM ISSUE BEFORE THE APPELLATE DIVISION, AS IT WAS APPROVED BY THE TRIAL COURT AND SEEKS TO ENFORCE MT. LAUREL AND SECTION 8 OBLIGATIONS (Pa15-18).

This action comes firmly within the scope of the Declaratory Judgments Act, N.J.S.A. 2A:16-51 *et seq*. As the trial court explicitly recognized, at Pa15, "[b]y vesting New Jersey courts with the 'power to declare rights, status and other legal relations, whether or not further relief is or could be claimed,' the DJA provides all individuals and organizations, public or private, with a forum to present *bona fide* legal issues to the court for resolution." (Citing Carter v. Doe (In re N.J. Firemen's Ass'n Obligation), 230 N.J. 258, 275 (2017), citing N.J.S.A. 2A:16-52). The Act's self-described "remedial" purpose is to "settle and afford relief from uncertainty and insecurity with respect to rights, status and other legal relationships." N.J.S.A. 2A:16-51.

Appellant plainly meets the threshold findings of justiciability and standing for relief under the DJA, there being an "actual controversy" in which the facts present "concrete contested issues" affecting the "parties' adverse interests." Carter, 230 N.J. 258, 275, citing N.J. Turnpike Auth. v. Parsons, 3 N.J. 235, 240 (1949) (citation omitted). Appellant's interest is to provide its share of affordable housing in accordance with the terms of the Settlement Agreement (Pa36-45), approved by the trial court in the Final Judgment (Pa46-51), and enforcement of which is necessary in the face of Respondent's discrimination against affordable housing tenants. Basic fairness in the treatment of affordable tenants is a fundamental requirement of the laws and jurisprudence underlying Appellant's legal obligations under the Settlement Agreement and Final Judgment. That fairness is seriously compromised by Respondent's windowless bedroom design and demands redress.

No facts are in dispute, and the issue is justiciable, the trial court found (Pa16, 19). No discovery was requested, nor indeed necessary for the trial court to fairly consider the straightforward issue presented. Thus, Respondent cannot argue that it or any other party is procedurally prejudiced. The purely legal question presented is appropriate for review by this court, which, if it deemed it advisable, could choose to exercise original jurisdiction "when

necessary to complete determination of any cause on review," especially when no fact finding is necessary. Rosenstein v. State, Dep. of Treasury, Div. of Pensions and Benefits, 438 N.J. Super. 491, 499 (App. Div. 2014), citing N.J. Const. art VI, §5, ¶3; R. 2:10-5 and N.J.S.A. 2A:16-52. Original jurisdiction can be invoked "when there is 'public interest in an expeditious disposition of the significant issues raised.'" Price v. Himeji, LLC, 214 N.J. 263, 294 (2013), quoting Karins v. City of Atlantic City, 152 N.J. 532, 540-41 (1998). Mt. Laurel establishes the public's overriding interest in the expeditious disposition of the rights of affordable housing tenants.

Moreover, the trial court itself guided Appellant on the appropriateness of the present form of motion, when, during the December 2, 2022 case management conference on the related construction permit litigation brought under the same docket, it indicated that the issue of windowless bedrooms in the affordable units should be brought as a separate motion under the DJ Action that initiated West Windsor's affordable housing settlement. 1T49-1-6. Appellant followed this guidance in the filing of its motion seeking a Declaratory Judgment, which seeks to settle a question of constitutional import with respect to the rights and status of affordable housing tenants in an

inclusionary development and developers' obligations with respect to them and is brought in the appropriate form under the DJA.

II. RESPONDENT'S DISCRIMINATORY TREATMENT OF TENANTS WHO WOULD OCCUPY AFFORDABLE HOUSING RENTAL UNITS VIOLATES MT. LAUREL PRINCIPLES (Pa27).

While a trial court's findings of fact are entitled to deference, Balducci v. Cige, 240 N.J. 574, 595 (2020), as no facts are in dispute in the case at bar, the relevant standard here is this court's review of the trial court's rulings of law, which must be *de novo*. "A trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference." Row v. Bell & Grossett Co., 239 N.J. 531, 552 (2019), quoting Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995). The legal consequence of the trial court's interpretation is that discriminating against affordable tenants in the provision of windows in bedrooms in not a violation of Mt. Laurel. It would further follow that while the government must be "as fair to the poor as it is to the rich in the provision of housing opportunities," cited and discussed *infra,* developers remain free to violate that fundamental justification for Mt. Laurel. But a municipality's constitutional obligations do not end where the construction of outer walls

begins, and neither should a developer's. The trial court ignored Mt. Laurel's remedial mandate and must be reversed.

The trial court gave short shrift to the arguments by Appellant and FSHC that the discriminatory treatment of those who will occupy affordable family rental units violates Mt. Laurel principles warranting and, indeed, requiring rectification by the court. In the one page of its Opinion addressing the Mt. Laurel issue, at Pa27, it ruled that Appellant "has not pointed to one case, statute, or regulation that requires every affordable unit has bedrooms with windows [sic]" and ruled that it was not "explicitly discriminatory or in conflict with Mount Laurel for the number of windowless bedrooms to be different in the affordable versus market rate units." The trial court stated that, while it was "not unsympathetic to the arguments advanced by the Township and FSHC," the arguments lacked "authority in support of their adoption."

Despite noting, at Pa27, Chief Justice Wilentz's "powerful language in Mount Laurel II" that the "basic justification for Mount Laurel" is that "government be as fair to the poor as it is to the rich in the provision of housing opportunities," the trial court ruled that the language recognizes only

the government's obligation to be fair, not developers'. It went on to rule that, "despite the extensive and intensive regulatory scheme in place during COAH's rule making and enforcement and litigation across the State in every trial, appellate, and administrative venue conceivable, developers are under no obligation to design affordable units the same as the market rate units."

The trial court's view of both its own power and of the reach of Mt. Laurel cannot be squared with fundamental Mt. Laurel principles, which must be interpreted and applied so as to advance rather than diminish Mt. Laurel. Respondent's shocking discriminatory treatment of affordable housing rental units diminishes Mt. Laurel and cannot be countenanced under the constitutional framework the Court has so assiduously established to ensure that those principles are not ignored and rendered meaningless.

It is necessary to review the principles that come out of the Mt. Laurel cases before applying them to the case at bar. One point should, however, be made at the outset. There are no cases dealing with the disparate treatment of affordable family rental and market rental units. Further, Appellant and FSHC are unaware that there has ever been litigation involving windowless bedrooms

proposed for affordable family rental units. Certainly, no affordable unit in Appellant's extensive affordable housing inventory has a bedroom without a window (Certification of Samuel J. Surtees, paragraph 3, at Pa90).

A review of the salient principles set forth in the Mt. Laurel cases emphasizing the protection those cases provide affordable households – and not developers – explains why. S. Burlington County NAACP v. Mt. Laurel, 67 N.J. 151 (1975), writ of certiorari denied and appeal dismissed, Mt. Laurel v. Southern Burlington County NAACP, 423 U.S. 808 (1975) (Mt. Laurel I), emphasized that the ruling the Court was handing down was of constitutional dimension and addressed a major question of fundamental import. Mt. Laurel I at 175. See also id. at 210 (Justice Pashman, concurring). S. Burlington County NAACP v. Mt. Laurel, 92 N.J. 158 (1983) (Mt. Laurel II), also emphasized that the New Jersey Constitution was the underpinning of Mt. Laurel. See, e.g., id. at 204, 205, 209, 213, and 252. The Court noted that the doctrine was remedial in nature and that, unless an appropriate remedy is formulated to redress a constitutional violation, the New Jersey Constitution "embodies rights in a vacuum, existing only on paper," quoting Robinson v. Cahill, 69 N.J. 133, 147 (1975), in turn quoting Cooper v. Nutley Sun Printing Co., Inc., 36 N.J. 189, 197 (1961). That recognition is critical here.

The Mt. Laurel II Court emphasized that the basic doctrine was one in which fairness and decency underpin the idea that the State cannot favor the rich over the poor (Mt. Laurel II, 92 N.J. 158, 209), that permitting builder's remedies was also based upon principles of fairness (id. at 279), and that equal treatment under the New Jersey Constitution "requires at the very least that government be as fair to the poor as it is to the rich in the provision of housing opportunities." That is the basic justification for Mt. Laurel. Id. at 306. In this regard, the Court emphasized the need for decent living accommodations. See, e.g., Mt. Laurel I, 67 N.J. 151, 158; Mt. Laurel II, 92 N.J. 158, 214; and In re NJAC 5:96 & 5:97, 221 N.J. 1, 31 (2015) (Mt. Laurel IV).

The Mt. Laurel doctrine as enunciated in these cases is, to be sure, one that refers to the obligations of municipalities rather than to developers. However, the Court from the very beginning emphasized that there would inevitably be changes in the judicial approach, essentially because the Mt. Laurel doctrine is remedial in nature. See Mt. Laurel I, 67 N.J., 151, 176, recognizing "the inevitability of change in judicial approach and view as mandated by change in the world around us," citing numerous cases. As to the

Mt. Laurel doctrine being remedial in nature, see Mt. Laurel II, 67 N.J. 151, 287, noting that "the history of Chancery is as much a history of remedy as it is of obligation. The process of remedial development has not yet been frozen," and id. at 288, at which the Court states that institutional and public law litigation "require much more active judicial involvement in the remedial stage of litigation."

This moment, and this case, represent the next stage of development of Mt. Laurel jurisprudence. Respondent's extraordinarily shabby treatment of its prospective residents of the family rental affordable units demands correction. Unless Respondent is called to account and required to treat the market and affordable family rental units in parity, the Court's fear in Mt. Laurel II, 92 N.J. 158, 270, that the New Jersey Constitution will embody "rights in a vacuum, existing only on paper," will play out in disparate treatment of housing between affordable and market units in the provision of basic amenities, in this case, the most basic and reasonable, natural light.

Appellant and FSHC must take steps to ensure that that does not happen. A ruling by the Mt. Laurel II Court is dispositive not only of Appellant's right

but of its duty to act. When discussing the likely need for federal subsidies to satisfy the constitutional obligation, the Court ruled that a municipality's duty to help secure them would make the constitutional obligation a "charade" if it can be undermined by municipal "non-action." Id. at 264.

There is ample precedent for the Court's intervention in the process of Mt. Laurel implementation. See, e.g., Mt. Laurel II, 92 N.J. 158, 224, 254, with respect to definition of region and regional need, and, at 256, with respect to the determination of a municipality's fair share obligation. There is also ample precedent, in both the litigation and administrative arenas, of obligations imposed not merely upon municipalities but upon developers themselves. Integrating the Mt. Laurel units into the overall development and requiring that they be provided in tandem with market units is required by Mt. Laurel II, 92 N.J. 158, 268, and 281 respectively. These requirements have been followed by rule-making by the Council on Affordable Housing. See N.J.A.C. 5:97-6.4(d) and 5:93-5.6(d) with respect to building units in tandem and integration of the low- and moderate-income units with the market units "to the extent feasible" (N.J.A.C. 5:97-6.4(f)). The integration requirements ensure that affordable units in inclusionary developments are less likely to be

ghettoized and stigmatized because they are more visible and thus aid in ensuring fair treatment.

Other administrative rules require that the same heating source be used for market rate units and affordable units and that affordable units have access to community amenities available to market rate units and subsidized in whole by association fees. See N.J.A.C. 5:93-7.4(f) and N.J.A.C. 5:97-6.4(g), N.J.A.C. 5:80-26.3(f).

Mt. Laurel jurisprudence therefore represents much more than a numbers game. It gives affordable tenants protections to ensure that the decent accommodations the Supreme Court envisaged are produced. Developers are not at liberty to do whatever they wish. The Mt. Laurel obligation to provide affordable housing is a substantial constraint grounded in constitutional principles that limit what developers may wish to do. They may not discriminate against affordable households. And yet, that is exactly what Respondent proposes, and the trial court's bewildering statement that Respondent's windowless bedroom design is not "explicitly discriminatory" is deeply troubling and clearly wrong. Respondent's discriminatory treatment

guts the intent of Mt. Laurel through a back door approach that pays lip service to the court-approved set aside while signaling to prospective affordable housing tenants that they are to be second class citizens in a so-called inclusionary project. These affordable housing tenants are to be excluded from a most basic amenity necessary for decent accommodations, the provision of natural light, essential to the health, enjoyment and well-being of people in their homes. Direct access to sunlight from bedrooms becomes an amenity only for those people who can afford it. [3]

Lastly, it must be noted that COAH, by way of guidance, has recommended that affordable and market units be designed identically. The Third Round rules require that affordable units comply with the Uniform Housing Affordability Controls ("UHAC"), N.J.A.C. 5:80-26.1 *et seq.* and

[3] Fire safety considerations represent a potentially far more consequential aspect of this unequal treatment. While Appellant acknowledges that the UCC and Fire Code do not require windows in bedrooms where a door and sprinkler are provided, it is not hard to imagine a scenario where the egress of a window becomes the life saving feature in an emergency such as a fire or gas leak, as was tragically illustrated by the story of a fire in a single family dwelling in which a mother and child were fatally trapped and died in a bedroom on the second floor because of flames outside the door and the window was blocked by an air conditioner. But a 14-year-old boy survived the fire by jumping to safety from a second-story window. Meko, Hurubie, "Four Killer in an Early Morning House Fire Outside Albany." *New York Times*, July 8, 2023, Section A, Page 23.

N.J.A.C. 5:97-6.4(i). COAH's official 2010 guidance document interpretating UHAC explicitly noted that "COAH does recommend . . . that the affordable housing units be identical to the market-rate units within the same development." See Council on Affordable Housing, Understanding UHAC – A Guide to the Uniform Housing Affordability Controls for Administrators of Affordable Housing, 34 (2010), at https://www.nj.gov/ dca/services/lps/hss/ admin_files/uhac/2006uhacmanual.pdf.

Remedial action by this Court and Appellant's affirmative obligation to fulfill Mt. Laurel principles will ensure that, with respect to windowless bedrooms and the need for parity in the treatment between affordable family and market family units, the Mt. Laurel II requirement that "equal treatment requires at the very least that government be as fair to the poor as it as to the rich in the provision of housing opportunities" is honored and made real.

III. RESPONDENT'S DISCRIMINATORY TREATMENT OF TENANTS WHO WOULD OCCUPY AFFORDABLE HOUSING RENTAL UNITS VIOLATES THE FEDERAL SECTION 8 PROGRAM (Pa14).

Mt. Laurel II, 92 N.J. 158, 217, 260, and 263, recognizes that federal subsidies would be needed for very low-income households. As the Court noted, id. at 264, the Section 8 voucher program is the most important federal housing program, as it provides federal housing subsidies for very low-income households.

The Housing Choice Voucher Program Section 8 (where Section 8 refers to the U.S. Housing Act of 1937 (42 U.S.C. 1437f)), administered by the U.S. Department of Housing and Urban Development ("HUD") through local public housing agencies, is the "major program for assisting very low-income families, the elderly, and the disabled to afford decent, safe, and sanitary housing in the private market." U.S. Department of Housing and Urban Development, Housing Choice Voucher Program Section 8, Housing Choice Vouchers Fact Sheet, https://www.hud.gov/topics/housing_choice_voucher_program_section_8 (last visited August 25, 2023). Participants are free to choose "any housing that meets the requirements of the program." Id.

A key requirement is that "[t]here must be at least one window in the living room and in each sleeping room." 24 CFR 982.401(f)(2)(i). Although

HUD may approve some variations from these requirements, "HUD will not approve any acceptability criteria variation if HUD believes that such variation is likely to adversely affect the health or safety of participant families." 24 CFR 982.401(a)(4)(iv). The only variations it will approve must either "meet or exceed the performance requirements or significantly expand affordable housing opportunities for families assisted under the program." 24 CFR 982.401(a)(4)(iii).[4]

[4] See also the HUD Inspection Form (HUD-52580-A(07/19))("Inspection Form"), which, in its instructions, provides:

> **Window Condition**. Any room used for sleeping must have at least one window. If the windows in sleeping rooms are designed to be opened, at least one window must be operable. The minimum standards do not require a window in "other rooms." Therefore, if there is no window in another room not used for sleeping, check "Pass," and note "no window" in the area for comments. Inspection Form/Housing Choice Voucher Program (HUD-52580-A(07/19), s. 4.5, p.9.

Section 4.5 of the Inspection Form on page 10, to which this instruction refers, has next to it two columns with boxes in them, either of which may be checked off as applicable. The heading of the first column is "Yes, Pass," the other is "No, Fail." Whereas other questions in the form provide a third column and box that may be checked "Inconclusive," that box is not provided for the window condition, Question 4.5 – i.e., it is strictly pass or fail. The instructions to the form indicate that, "[I]f there are any checks under the column headed "Fail" the unit fails the minimum housing quality standards."

It is clear that the affordable family rental units with windowless bedrooms in Respondent's development would not meet HUD's housing quality standards without HUD approving a variation from those standards. Such an approval would be unlikely. Even if the affordable units with windowless bedrooms meet local building code standards, HUD has made the availability of natural light in each sleeping room an explicit priority for health and safety. Windowless bedrooms do not exceed the performance standards because the requirement to have a window in each sleeping room is one of those standards.

Very low-income households are effectively barred from Respondent's development since almost all the affordable rental units have windowless bedrooms. Although there is no rule that Section 8 voucher holders cannot rent market units, it is extremely unlikely that such very low-income households could afford the market rate units due to rent caps. The reality is, therefore, that only affordable units are likely to be accessible to voucher holders. This represents a direct conflict with federal housing law that requires windows in bedrooms for Section 8 use and is patently discriminatory, as the New Jersey

Law Against Discrimination includes in its protected classes those based on source of income. See N.J.S.A.10:5-4. Of course, the Mt. Laurel doctrine already effectively makes low- and moderate-income households a protected class for land use and housing purposes. Thus, Respondent's discrimination against affordable households, with 85.9 percent of the affordable family rental units having at least one bedroom without a window while only 3.57 percent of the market family rental units would have the same condition, violates federal as well as state housing law protections. This is precisely what the State's remedial housing laws, embodied by the Mt. Laurel cases and their administrative progeny, was intended to guard against, and what this court must address.

Notably, while these Section 8 issues were briefed thoroughly by Appellant and FSHC below, the trial court did not address the Section 8 issues.

CONCLUSION

For the foregoing reasons it is respectfully requested that the decision of the trial court be reversed and that the matter be remanded to it with a mandate

to enter an order requiring that there be parity in the treatment of the affordable housing family rental units and market family rental units so that the proportion of such units with windowless bedrooms is the same.

Respectfully submitted,
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Date: August 25, 2023

IN THE MATTER OF WEST WINDSOR TOWNSHIP, **RESPONDENT.**	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Docket No.: A-003109-22 T4 Civil Action Sat below: Hon. Robert T. Lougy, A.J.S.C. Docket No. MER-L-1561-15

BRIEF AND APPENDIX OF RESPONDENT FAIR SHARE HOUSING CENTER

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TABLE OF CONTENTS

APPENDIX TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

PRELIMINARY STATEMENT

This case involves a fundamental principle of implementing Mount Laurel's constitutional mandate —fairness to the low and moderate income residents of New Jersey. Proposals for new housing under municipal fair share plans must not only be truly realistic, they also must be implemented so that new affordable units are integrated into the surrounding community. This integration requirement is particularly critical in inclusionary developments, where for nearly 30 years, COAH's substantive rules have demanded that affordable units have the same design standards and access to essential amenities as market rate units.

Yet, AvalonBay Communities Inc. ("Respondent") has sought to reject this rule. Their proposed housing development would require the occupants of affordable units to live in bedrooms without windows. Meanwhile, almost no occupant of the project's market rate units would have this burden. In essence, the Respondents seek to make direct access to air and sunlight from bedrooms an amenity for only those people who can afford it. By doing so, it also limits the ability of tenants with Housing Choice Vouchers, which is a predominant way that tens of thousands of very-low- income tenants in New Jersey access affordable housing, to live in the development. This is clearly inconsistent with the aims of Mount Laurel, and this court should reject it.

FACTUAL AND LEGAL BACKGROUND[1]

The Supreme Court has designated Fair Share Housing Center ("FSHC") as an interested party in all declaratory judgment actions resulting from its decision in In re N.J.A.C. 5:96 and 5:97, 221 N.J. 1 (2015) ("Mount Laurel IV"), which resulted from a motion to enforce litigant's rights brought by FSHC. FSHC has participated in over 300 such actions statewide.

FSHC actively participated in the trial court declaratory judgment action filed by West Windsor Township as a result of Mt. Laurel IV. Following a methodology trial, the court issued an order on March 8, 2018, which established the Township's affordable housing obligations for the Third and Prior Rounds. FSHC Ra2[2]. On October 9, 2018, FSHC reached a settlement with the Township, which adopted the fair share obligations set forth by the trial court's decision. Pa36. On October 30, 2018, FSHC and West Windsor stipulated to correcting two minor errors contained in the original executed settlement. FSHC Ra5. On January 10, 2019, after conducting a fairness hearing on November 27 and 28, 2018, the court ruled that the corrected settlement agreement represented a realistic opportunity for the development

[1] The procedural and factual history are combined as the relevant facts are contained in the procedural history and no facts are in dispute in this matter.
[2] Because FSHC and AvalonBay Communities, Inc. are both Respondents in this appeal, citations in this brief to FSHC's appendix are preceded by the clarifying term, "FSHC."

of affordable housing in the Township. Pa46. On July 2, 2019, the court issued a Final Judgment of Compliance and Repose. Pa52.

As a part of the settlement, FSHC and West Windsor agreed to a 1,500-unit Third Round (1999-2025) obligation, including the "gap present need" that accrued during the 16 years between 1999 and 2015, as well as a Prior Round Obligation of 899 units. Pa36. The Avalon Bay Redevelopment Area, in which the Respondent's project is located, is a key compliance mechanism included in West Windsor's Housing Element and Fair Share Plan to help the Township satisfy its Third Round obligations. Pa34. The Respondent participated in the above declaratory judgment action as an Intervenor/Defendant and entered into a redeveloper's agreement with the Township. The implementation of that agreement became an explicit provision of the FSHC settlement agreement. Pa38. Initially, it was anticipated that the Respondent's project would yield 132 affordable units in an inclusionary development. Pa35. Later, it amended its plans to include an additional 68 housing units with a 25 percent set-aside, resulting in an anticipated total of 149 affordable housing units.[3] Pa57-58. Ninety-nine of the units are expected

[3] This project is also eligible for 99 rental bonus credits, which will result in a total of 248 affordable housing credits.

to be family rental units, which are the subject of this matter and incorporate the disputed windowless design. Pa58; Pa84.

The present issue arose from a Motion to Enforce Litigant's rights filed by the Respondents on October 14, 2022, through which it sought the appointment of a special master to help expedite and approve their application for the Avalon Bay Redevelopment Area affordable housing development. FSHC Ra7. At that time, FSHC became aware that the Respondent's application with West Windsor included plans to construct family rental units containing windowless bedrooms. This design choice would almost exclusively affect the affordable units in the development. Only a small fraction of the proposed market rate units would contain bedrooms without windows. FSHC Ra3; Pa84.

On December 2, 2022, the trial court held an oral argument on the above motion. During the argument, the parties suggested that they might be willing to stipulate to the appointment of some neutral third party to oversee the Respondent's application. 1T42-22-24.[4] As a result, on January 5, 2023, the trial court held a case management conference. At the conference, it became clear that the parties were no longer in agreement and the windowless

[4] "1T" refers to the transcript of the hearing on December 2, 2022; "2T" refers to the transcript of the hearing on April 28, 2023.

apartment issue remained unresolved. The same day, the trial court issued a scheduling order requesting that the parties submit supplemental briefing on the issue of the appointment of a special master as well as on whether the Respondent was legally permitted to construct units with windowless bedrooms. FSHC Ra12. FSHC indicated to the trial court at this conference that it was concerned that the windowless bedrooms disproportionately affected the affordable units, and in the court's same January 5, 2023 order, it invited FSHC to submit papers on this issue.

As outlined by the Appellant in their most recently filed brief, on February 24, 2023, West Windsor filed a Motion for Declaratory Judgement with respect to the Respondent's treatment of windowless bedrooms in the affordable units. Pa1-3. It then revised and re-filed their brief in support of the motion on March 23, 2023 to add key arguments regarding housing quality standards for Section 8 housing choice voucher eligibility. Respondent filed opposition to the motion on April 18, 2023, to which Appellant responded on April 24, 2023. FSHC filed a brief in support of Appellant's motion with respect to the windowless affordable bedrooms on April 20, 2023. Oral argument was heard on April 28, 2023. On May 1, 2023, the trial court dismissed the Appellant's application, effectively denying its motion. Pa4. The

Appellant timely filed its Notice of Appeal on June 14, 2023. Pa29-32. FSHC timely filed its Notice of Appeal in the matter on June 15, 2023.

LEGAL ARGUMENT

Fair Share Housing Center joins in the arguments advanced by the Appellant, West Windsor Township, in support of their request that this court reverse the decision of the trial court and remand with an order that there be parity in the treatment of affordable and market rate units with respect to windows in bedrooms. In addition, FSHC wishes to reiterate and highlight the following points.

I. THE DECISION TO CONSTRUCT WINDOWLESS BEDROOMS ALMOST EXCLUSIVELY IN AFFORDABLE HOUSING UNITS IS INCONSISTENT WITH MOUNT LAUREL

The Appellant is rightly opposed to an inclusionary development that treats affordable units less favorably than market rate units. For decades, the New Jersey Supreme Court has recognized a constitutional guarantee that municipalities across the state must provide lower- income people a realistic opportunity of access to affordable housing. See, e.g., Mount Laurel IV, 221 N.J. at 4; S. Burlington Cty. NAACP v. Mount Laurel, 92 N.J. 158, 222 (1983) (Mount Laurel II); S. Burlington Cty. NAACP v. Mount Laurel, 67 N.J. 151, 174 (1975) ("Mount Laurel I"). In Mount Laurel II, the Supreme Court made

clear that the "basic justification for *Mount Laurel*" is that "government be as fair to the poor as it is to the rich in the provision of housing opportunities." Mount Laurel II 92 N.J. at 191-192. Although this fairness mandate speaks to a governmental obligation, it is predicated on the assumption that developers will ultimately provide "decent housing" that will not lock the poor in "urban slums." Id. at 171-172.

This principle of fairness in the treatment of affordable housing has been a consistent feature of Mount Laurel compliance. In Mount Laurel IV, the Supreme Court transferred jurisdiction for Mount Laurel matters from the Council on Affordable Housing ("COAH") to the trial courts, but made clear that judges may, "utilize…discretion when assessing a town's [fair share] plan," and draw from the portions of the Prior and Third Round COAH rules that had not been invalidated by the NJ Appellate Division. Mount Laurel IV 221 N.J. at 30. For more than twenty years, these COAH rules required that affordable housing units be fully integrated with market rate housing and contain substantially the same features and amenities. COAH's Prior Round rules required that:

- Inclusionary developments must build affordable housing units in time with the construction of market rate units and, "integrat[e] the low and

moderate income units with the market units." N.J.A.C. 5:93-5.6(d) and (f).

- Low- and moderate-income units in inclusionary developments must "utilize the same heating source as market units within the inclusionary development." N.J.A.C. 5:93-7.4(f).

COAH's Third Round rules contained the same requirements. N.J.A.C. 5:97-6.4(d), (f), (g). In addition, the rules required that:

- Affordable units must comply with the Uniform Housing Affordability Controls ("UHAC"). N.J.A.C. 5:97-6.4(i); N.J.A.C. 5:80-26.1 et seq.
- Affordable units must have, "access to all community amenities available to market-rate units and subsidized in whole by association fees." N.J.A.C. 5:97-6.4(g). The Respondent's seek to make access to fresh air and sunlight an amenity that would be almost exclusively available to market rate unit residents, which would clearly violate COAH's substantive rules.
- COAH's official 2010 guidance document interpreting UHAC explicitly noted that, "COAH does recommend…that the affordable housing units be identical to the market-rate units within the same development."[5]

[5] NJ Council On Affordable Housing (COAH), Understanding UHAC- A Guide to the Uniform Housing Affordability Controls for Administrators of

Although the Respondent has compliant construction phasing with respect to its affordable housing units, it clearly fails to meet the overall integration requirements and recommendation that affordable units have identical design features to market rate units. Even though, to our knowledge, the issue of windowless bedrooms is not one that COAH ever faced, COAH clearly expressed a preference for the equal treatment of affordable units. Consistent with the discretion to given to judges in Mount Laurel IV to implement the Mount Laurel doctrine and evaluate compliance with COAH's rules, the court should find that the Respondent's treatment of affordable units is inconsistent with the intent of the rules.

Moreover, the design feature that differs here is a fundamental and substantial one. Occupants of the affordable units would be afforded less access to fresh air and sunlight than occupants of market rate units. If the rental housing market viewed bedrooms without windows as a neutral design choice, one would expect the Respondent's project to offer such bedrooms in its market rate units. Yet, with only minor exceptions, the Respondent does not. The effect is discriminatory towards low- and moderate-income residents of the development, and the court should not permit it.

Affordable Housing, 34 (2010), https://www.nj.gov/dca/services/lps/hss/admin_files/uhac/2006uhacmanual.pdf

II. THE RESPONDENT'S PLAN TO ASSIGN WINDOWLESS BEDROOMS ALMOST EXCLUSIVELY TO AFFORDABLE UNITS WOULD UNDERMINE THE FAIRNESS OF THE SETTLEMENT AGREEMENT.

West Windsor's settlement agreement with FSHC as well as its Housing Element and Fair Share plan make specifically and unmistakably clear that it entered into a binding agreement to zone for and expedite the development of family affordable units via the Respondent's project. The Respondent must implement this plan in a way that is fair and reasonable to low and moderate income households.

It is well established that "[c]ourts have the power to approve a settlement in an exclusionary case, provided certain procedures are followed to ensure that the interests of low and moderate income households are adequately protected." Toll Bros., Inc. v. Twp. of W. Windsor, 334 N.J. Super. 77, 94 (App. Div. 2000). "Such settlements have been recognized and tacitly approved by both the Legislature and the Court." Ibid. (citing N.J.S.A. 52:27d-322; Hills Dev. Co. v. Bernards, 103 N.J. 1, 64 (1986)); see also East/West Venture v. Borough of Fort Lee, 286 N.J. Super. 311, 328 (App. Div. 1996) ("We conclude that a trial judge may approve a settlement of Mount Laurel litigation after a 'fairness' hearing to the extent the judge is satisfied that the settlement adequately protects the interests of lower-income persons on whose behalf the affordable units proposed by the settlement are to be built.").

One of the primary rationales behind permitting municipalities to settle their Mount Laurel litigation is the expectation that "the proposed settlement will result in the expeditious construction of a signification number of lower income housing units." East/West Venture, 286 N.J. Super. at 335 (quoting Morris Cnty. Fair Hous. Council v. Boonton Twp., 197 N.J. Super. 359, 372 (Law Div. 1984)). The fairness of the proposed housing is reviewed in consideration of sound land use practices as well as Mount Laurel II and COAH's regulations. Id.

In this matter, the trial court approved West Windsor's settlement agreement after finding that it meets the required fairness standards for lower-income households. If a developer such as the Respondent can later build affordable housing that is inadequate and denies its residents, but not the residents of market rate units, access to fresh and air sunlight, it undermines, if not destroys, the basis for approving the agreement in the first place.

Furthermore, although the trial court found that the fairness obligation resides with the Township, not the Respondent, the court should reject this. Pa27. It is of course well recognized that Mount Laurel leaves some of the implementation of municipal fair share plans up to the "legislative" process. East/West Venture 286 N.J. Super at 330. It also does not concern itself with, "how [the municipality] meets its affordable housing obligation…, [or] how

the municipality zones or rezones property within its boundaries." Livingston Builders, Inc. v. Twp. of Livingston, 309 N.J. Super. 370, 381 (App. Div. 1998). However, the Respondent's decision to burden affordable units with windowless bedrooms is not an issue that West Windsor could remedy with zoning or related inducements. Rather, the decision represents an unnecessary design and affordability control choice, which would unfairly allocate access to fresh air and sunlight (which the Respondent would make amenities) and place the project in direct conflict with COAH's regulations. This is clearly distinguishable from the matters of municipal master plan amendments and zoning density that were at issue in Livingston Builders, and it could not be easily safe guarded by the local legislative process. Accordingly, this represents an issue which the courts must remedy.

Moreover, since the Respondent has a Redeveloper's Agreement with West Windsor that was explicitly referenced in the FSHC settlement presented at the fairness hearing, the Respondent's agreement to build well-designed, decent affordable housing that conforms to COAH's regulation was a vital component of the court's fairness review and determination, one which the Respondent should be required to fulfill.

III. WINDOWLESS BEDROOMS CONFLICT WITH THE HOUSING QUALITY STANDARDS FOR SECTION 8 AS WELL AS FEDERAL LAW.

FSHC supports and joins in West Windsor's arguments concerning the conflict between windowless bedrooms and the housing quality standards required by the Section 8 Housing Choice Voucher Program. Housing Choice Vouchers are a common method of making rental housing more affordable. With Mount Laurel units, Housing Choice Vouchers ("HCV") open up options for families who are generally very-low-income to access housing. Our Legislature has recognized the ability of families to use Housing Choice Vouchers as an important public policy by including the source of income used for housing as a protected class pursuant to the Law Against Discrimination ("LAD"). N.J.S.A. §10:5-9.1.

In order for individuals with Section 8 vouchers to occupy a rental housing unit, the unit must undergo an initial inspection, as well as a reinspection at least every other year. 24 CFR 982.405(c). The rental housing unit must meet various housing quality requirements, most notably, "[t]here must be at least one window in the living room and in each sleeping room." 24 CFR 982.401(f)(2)(i). Although The U.S. Department of Housing and Urban Development ("HUD") may approve some variations from these requirements that apply standards in local housing codes, "HUD will not approve any acceptability criteria variation if HUD believes that such variation is likely to adversely affect the health or safety of participant families." 24 CFR

982.401(a)(4)(iv). The only variations it will approve must either, "meet or exceed the performance requirements; or significantly expand affordable housing opportunities for families assisted under the program." 24 CFR 982.401(a)(4)(iii).

It is clear that the rental units with windowless bedrooms in the Respondent's development would not meet HUD's housing quality standards without HUD approving a variation from those standards. Such an approval would be unlikely. Even if the affordable units with windowless bedrooms meet local building code standards, HUD has made the availability of natural light in each sleeping room an explicit priority for health and safety. And windowless bedrooms likely do not exceed the performance standards because the requirement to have a window in each sleeping room is one of those standards.

Moreover, vouchers have rent caps, and especially in affluent areas such as West Windsor, it is extremely unlikely that a tenant with a voucher could afford rents in the Respondent's market rate units that contain bedrooms with windows. For example, in neighboring Princeton, Avalon Bay's development website advertises two-bedroom apartments starting at $4,353 a month.[6] The

[6] Avalon Communities, Avalon Princeton, (Apr. 20, 2023, 5:01 PM), https://www.avaloncommunities.com/new-jersey/princeton-apartments/avalon-princeton/#community- apartments.

"fair market rent" that a voucher holder is permitted to use in Mercer County is $1,998 per month.[7] Thus, unless the new apartments in West Windsor cost less than half what those in Princeton cost, which seems highly unlikely, voucher holders could not simply live in market-rate apartments.

Because AvalonBay's proposal would disproportionately prohibit voucher holders from living in its development, who are themselves a protected class under state law, and because voucher holders are more likely to be members of other state and federal protected classes covered by both the LAD and the federal Fair Housing Act, see 42 U.S.C. 3604(b), the proposal raises serious antidiscrimination concerns. In Mount Laurel I, the NJ Supreme Court recognized that "exclusionary zoning practices are…often motivated by fear of and prejudices against other social, economic, and racial groups." Mount Laurel I, 67 N.J. at 196. Accordingly, a major effect of the remedial structure of Mount Laurel compliance is that it widely serves individuals who are within various state and federally protected classes. These are the same individuals who will be adversely affected by the Respondent's decision to

[7] FY 2024 Fair Market Rent Documentation System, The FY 2024 Trenton, NJ MSA FMRs for All Bedroom Sizes, (Oct. 2, 2023, 10:53 PM), https://www.huduser.gov/portal/datasets/fmr/fmrs/FY2024_code/2024summary.odn.

create largely different standards for their affordable housing than for their market rate housing. The court should declare this practice unlawful.

CONCLUSION

For the foregoing reasons, the court should find that it is incompatible with Mount Laurel's constitutional mandate and other similar antidiscrimination laws for the burden of living in windowless bedrooms to fall almost exclusively on the state's poorest residents. FSHC respectfully requests that the court reverse the decision of the lower court and remand with an order that there must be parity in the treatment of market rate units and affordable units such that the Respondent's windowless bedroom design has an equal proportionate effect on both.

Respectfully Resubmitted,

FAIR SHARE HOUSING CENTER
Attorneys for Respondent

William S. Fairhurst, Esq.

Resubmitted dated: October 19, 2023

IN THE MATTER OF WEST WINDSOR TOWNSHIP	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO: A-003109-22 T4 CIVIL ACTION On Appeal From: Superior Court of New Jersey, Law Division, Mercer County Docket No. MER-L-1561-15 Sat Below: Hon. Robert T. Lougy, A.J.S.C.

BRIEF OF RESPONDENTS, AVALON WATCH, LLC & AVALONBAY COMMUNITIES, INC.

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES

UNPUBLISHED DECISIONS

STATUTES

REGULATIONS

COURT RULES

OTHER AUTHORITIES

PRELIMINARY STATEMENT

With this appeal, Plaintiff/Appellant West Windsor Township ("West Windsor") again seeks authority to prevent Intervenors/Respondents Avalon Watch, LLC and AvalonBay Communities, Inc. (collectively "AVB") from including a single windowless bedroom in certain affordable housing units AVB seeks to build as part of a 535-unit inclusionary development . However, AVB's design for the affordable units, including the windowless bedrooms, complies with every applicable law, building code, regulation, local ordinance, and judicial decision. Appellants cite no legal authority for their arguments because there is none. West Windsor's arguments, which have already been rejected by the New Jersey Department of Community Affairs and the Trial Court, provide no basis for disturbing the Trial Court's decision permitting AVB to construct the affordable units with a windowless bedroom (the "Order"). In this appeal, West Windsor is joined by Fair Share Housing Center ("FSHC"). West Windsor and FSHC are collectively referred to herein as "Appellants."

In addition to the lack of legal authority, there is no factual basis for Appellants' arguments. Appellants allege the occupants of the AVB affordable units will be deprived of fresh air and natural light "essential to health enjoyment and well-being." These are gross exaggerations with no evidentiary support. As Appellants well know, the affordable units at issue are not completely windowless,

they simply have *a single* windowless bedroom. The affordable units comply with all building codes. These codes are designed to protect occupants against substandard living conditions and ensure health, safety and welfare. The affordable units will have operable windows (i.e., windows that can be opened and closed) and state-of-the-art mechanical ventilation that supplies fresh, outside air. No fact-based allegation has been or could be made that occupants of AVB's affordable units will be deprived of either natural light or fresh air to their detriment.

Appellants argue AVB is discriminating against families who seek to utilize Section 8 (hereinafter defined) housing assistance to rent an affordable unit, because Section 8 assistance may not be used to rent units with windowless bedrooms. Appellants are either unaware, are ignoring, or have neglected to mention that the federal regulations on which their Section 8 argument is based have been superseded and replaced. Newly adopted standards for Section 8 housing have now become aligned with modern building codes, and no longer limit use of Section 8 assistance to rental of units with a window in every bedroom. The old standards relied on by Appellants have been repealed and are irrelevant to the future construction and utilization of the AVB affordable units. In sum, Appellants' allegations of discrimination against Section 8 voucher holders, which were already incorrect for other reasons, now have no legal basis whatsoever.

Recipients of Section 8 assistance can use their vouchers to rent any one of AVB's apartment homes, including the one hundred (100) planned affordable units.

The procedural impropriety of West Windsor's application to the Trial Court should also be found to preclude any possible reversal. West Windsor asserted this claim in the Trial Court by filing a dispositive motion without first initiating a claim by filing a complaint. This litigation, i.e., In the Matter of West Windsor, Docket No. MER-L-1561-15, was concluded by Final Judgment on July 2, 2019. No claims *against* AVB were ever asserted in the litigation, and no claim pertaining to windowless bedrooms in affordable housing units was ever asserted by any party. The matters at issue in this appeal came before the Trial Court when West Windsor, three and a half years after the entry of Final Judgment, filed a dispositive motion seeking declaratory judgment that windowless bedrooms are prohibited in AVB's proposed inclusionary project. West Windsor's request for judgment on claims and/or matters that had not been made the subject of a complaint and were never addressed in the long-ago-concluded litigation was contrary to the requirements of the Court Rules and could have been rejected on that basis alone.

For all the aforementioned reasons. The Trial Court's Order should be affirmed. There is no factual or legal support for Appellants' arguments and the dispositive motion below was procedurally defective.

COUNTERSTATEMENT OF FACTS

The Order being appealed resolved West Windsor's application styled as "Motion for Declaratory Judgment and Injunctive Relief With Respect to Windows in Bedrooms" (the "Motion"). Pa1. The Motion was filed as being part of In the Matter of West Windsor, Docket No. MER-L-1561-15 (the "DJ Action"), a 2015 action in which West Windsor sought declaratory judgment of compliance and repose based on its satisfaction of its Third Round (1999-2025) obligations under the Mount Laurel doctrine[1] pursuant to the Supreme Court's directive in In re Adoption of N.J.A.C. 5:96 & N.J.A.C. 5:97, 221 N.J. 1 (2015)("Mount Laurel IV"). Da1-7. Final Judgment was entered in the DJ Action on July 2, 2019, and all claims raised in the case's pleadings were resolved by that Final Judgment. Pa52. West Windsor did not assert any affirmative claims against AVB in the DJ Action. Da1-7. Prior to filing the Motion on February 4, 2023, West Windsor did not move to amend the pleadings or reopen the DJ Action.

AVB appeared in the DJ Action in August 2015 as an Intervenor. Da8-13. Upon the resolution of the DJ Action four years later, AVB's site was included in West Windsor's Housing Element and Fair Share Plan and the rezoning of the AVB property was revised through the adoption of an amended redevelopment plan to

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[1] Southern Burlington Cty. N.A.A.C.P. v. Township of Mount Laurel, 67 N.J. 151 (1975) ("Mount Laurel I"); Southern Burlington Cty. N.A.A.C.P. v. Township of Mount Laurel, 92 N.J. 158 (1983) ("Mount Laurel II").

provide for the construction of an inclusionary development. Pa34. Neither that redevelopment plan nor any other applicable zoning provisions within West Windsor's zoning code address the need for or configuration of windows in bedrooms. AVB's land development application seeking preliminary and final major subdivision and site plan approval for that inclusionary development was filed and requested no variance relief, conformed to all substantive provisions of West Windsor's applicable zoning ordinances and site-specific redevelopment plan, and was approved by West Windsor's Planning Board on October 13, 2021. Pa57-82.

AVB is seeking to develop a mixed-use inclusionary development adjacent to the Princeton Junction train station in West Windsor (the "AVB Project"). If West Windsor ever issues building permits, AVB is ready to begin constructing two four-story buildings containing 535 luxury rental apartment units. The AVB Project will also feature a fitness center and pool for use by residents, two parking garages, courtyard areas, a work lounge area, 21,300 square feet of commercial and restaurant space, and a 72,745 square foot walkable promenade located between the two buildings containing various pedestrian amenities including benches, tables, lounge chairs, ottomans, an interactive fountain play area, and a pavilion. Pa57-59.

One hundred (100) of the apartments AVB will construct as part of the AVB Project will be restricted as affordable to low- and moderate-income households. In this appeal, Appellants challenge the Trial Court's ruling that AVB's plan to utilize a windowless bedroom in most of the affordable units is permissible under all applicable laws and regulations. Pa4-28. To be clear, the AVB Project does not include *windowless apartments*. Da36, ¶3. All the affordable units will have operable exterior windows and their occupants will have ample access to natural light and fresh air. Da36, ¶ 3. *At most,* one bedroom per affordable unit will be windowless. Da36, ¶4. In other words, in the case of a 3-bedroom apartment, there will be an operable window in the living room, operable windows in two of the bedrooms, and one windowless bedroom.

The genesis of this dispute was West Windsor's assertion that the State Housing Code, N.J.A.C. 5:28, et seq. ("Housing Code"), which West Windsor has adopted and which requires all habitable rooms to have at least one exterior window, precludes AVB from constructing affordable housing units that have a windowless bedroom. West Windsor further asserted that the Housing Code prevails in this respect over the Uniform Construction Code, N.J.A.C. 5:23-1, et seq. ("UCC"), which *does not require exterior windows and permits an artificial source of light in all spaces intended for human occupancy, including bedrooms*.

In response to West Windsor's assertion and before any litigation regarding this issue was commenced, AvalonBay's undersigned counsel wrote to the New Jersey Department of Community Affairs ("DCA") in February 2022 seeking confirmation that: 1) the UCC's allowance for artificial light in a bedroom with no exterior window means the windowless bedrooms proposed in the design for the AVB Project are permissible under the building codes; and 2) the Housing Code's prohibition against windowless bedrooms does not compel a different conclusion, because the UCC controls all questions of what may be constructed. Da16-17. DCA's Code Assistance Unit responded to the inquiry on February 17, 2022, confirming the Housing Code is a property maintenance code that "does not apply to new construction." Da16-17. DCA further stated that AVB's multiple dwelling development must be constructed in accordance with the UCC's building subcode, the 2021 International Building Code ("IBC"), which permits (in Section 1204.1) the use of artificial light in a bedroom with no window.[2] Da16.

Less than two weeks after DCA's email exchange with undersigned counsel, DCA issued a Statewide advisory bulletin regarding the exact matters relating to windowless rooms. DCA publishes the Construction Code Communicator

[2] The UCC is comprised of the following trade and specialty subcodes adopted by the DCA: a) building; b) plumbing; c) electrical; d) fire protection; e) energy; f) mechanical; g) one- and two-family dwelling; h) fuel gas; i) rehabilitation; j) barrier-free; k) elevator; and l) lead hazard abatement.

("CCC"), a newsletter produced periodically by DCA that contains articles on topics of current interest to local code officials, architects, engineers, builders, electricians, plumbers, and others undertaking projects regulated by the UCC. In the Spring 2022 edition of the CCC, DCA explicitly clarified that: 1) the UCC governs building; 2) the Housing Code governs property maintenance; 3) the Housing Code does not apply to new construction; and 4) the Housing Code has no relevance to the review of a building permit application. Da28.

As discussed below, all applicable building codes now permit windowless habitable rooms, including bedrooms. Each of the windowless bedrooms in the AVB Project will be provided with artificial light that meets the requirements of the IBC, Section 1204.3, *and* a transom window above or beside the bedroom door that allows additional light to enter the bedroom from an adjacent naturally lit room. Da36, ¶4. Among the units currently proposed to be designated as "affordable" in the AVB Project, fifteen (15) of the 2-bedroom units have operable windows in both bedrooms, *i.e.*, a total of three operable windows. Da36, ¶5.

The AVB Project will be a LEED certified and Energy Star certified green community. Da36, ¶6. AVB is hopeful the AVB Project will achieve Gold level LEED certification, but it should achieve no lower than Silver level LEED certification. Da36, ¶6. The affordable units will all be "Zero Energy Ready Homes" ("ZERH"), meaning the affordable units are designed to consume as little energy as

possible by meeting very strict standards of energy savings, comfort, health and durability promulgated by the United States Department of Energy's Office of Energy Efficiency & Renewable Energy. Da36, ¶6.

In its Brief, West Windsor states several times that no facts are in dispute. That is not true. There is no evidence in the record establishing the amount of natural light or fresh air that will enter any one of the proposed windowless bedrooms or that supports Appellants' repeated assertions that residents will be "deprived" of natural light and fresh air. To the extent Appellants refer to the alleged deficiency of light as if it is a matter of fact, AVB disputes such assertions. Moreover, FSHC's focus on "fresh air" is almost nonsensical under the facts of this case, considering the units all have operable windows, are fully air conditioned, will be supplied fresh air mechanically, and will have state-of-the-art climate control features. Da36. The record is utterly bereft of evidence supporting West Windsor's repeated characterizations of the affordable units as being "ghettoized," squalid tenement apartments. Rather, the affordable units will be state-of-the-art modern apartments built in accordance with current building codes and dispersed throughout an amenity-rich, luxury development in an affluent municipality. Pa57-59; Pa34.

LEGAL ARGUMENT

A. Standard of Review

Appellants' briefs do not discuss the applicable standard of appellate review. The cause of action below was declaratory judgment. The granting of declaratory judgment is discretionary. Like other forms of equitable relief, declaratory judgment should be granted only as a matter of judicial discretion, exercised in the public interest. Matter of State Comm'n of Investigation, 108 N.J. 35, 46 (1987). Because the relief sought below was discretionary, the Trial Court's ruling should be reviewed for an abuse of discretion. See Gonzalez v. World Mission Soc., No. A-3389-19 (App. Div. February 24, 2022). Da42.

A court abuses its discretion when its decision is made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis. State v. Chavies, 247 N.J. 245, 257 (2021). When examining a trial court's exercise of discretionary authority, an appellate court reverses only when the exercise of discretion was manifestly unjust under the circumstances. Newark Morning Ledger Co. v. N.J. Sports & Exposition Auth., 423 N.J. Super. 140, 174 (App. Div. 2011). Here, there is no basis for this Court to alter any aspect of the Trial Court Opinion.

B. The Design Details of The AVB Project Are Permitted Under All Applicable Laws and Regulations.

1. The legal issues decided in the portion of the Trial Court's ruling that has not been appealed provide context important to understanding the scope of the parties' dispute.

As described above, DCA's Code Assistance Unit expressly rejected West Windsor's arguments that the UCC and Housing Code conflict and must be harmonized in favor of the Housing Code's more restrictive requirement that bedrooms must have windows. Da16. DCA's advice and conclusion should have settled the issue, but West Windsor nevertheless filed the Motion seeking a declaratory final judgment that windowless bedrooms are impermissible (in West Windsor) and that the Housing Code prevails over the UCC. In response to the Motion, AVB argued 1) the UCC and Housing Code neither overlap nor conflict; 2) the Housing Code does not apply to new construction; 3) windowless bedrooms are permitted under all applicable building codes; and 4) any housing unit built in accordance with the UCC is deemed to comply with the Housing Code. These were the primary issues raised and decided below. The Trial Court ruled in AVB's favor on these issues.

West Windsor has not appealed the Trial Court's ruling on those particular issues, but the foundational importance of the Trial Court's ruling and the applicable provisions of the UCC cannot be overstated, especially in light of West Windsor's continued hysterical exaggerations about windowless bedrooms being "shockingly discriminatory" (Pb11) and depriving occupants "of natural light

essential to health, enjoyment and well-being." Pb17. Windowless rooms and windowless bedrooms are perfectly permissible under the modern building standards codified in the IBC. Moreover, West Windsor produced not a shred of evidence supporting its claims that having a single windowless bedroom in a newly constructed, modern, LEED Certified apartment unit, see Da36, will negatively impact the "occupant's health, enjoyment and well-being." Pb17. West Windsor's arguments are simply the unsupported opinions of West Windsor's counsel modified by an assortment of adjectives. Certainly, the authorities who have compiled and promulgated the IBC and the entirety of the UCC disagree with West Windsor's counsel, as the UCC is considered a complete set of technical standards for construction designed to protect the public's health, safety, and welfare. N.J.A.C. 5:23-1.3(a). In other words, because the UCC incorporates all necessary health and safety standards, there is no legitimate basis for Appellants to claim a windowless bedroom is improper or detrimental to one's health when it is not prohibited by the UCC.

Appellants argue AVB is "discriminating against" affordable units, and that such discrimination is inconsistent with key objectives of Mount Laurel, to integrate affordable units within inclusionary developments and ensure fair treatment. However, there is no statute, regulation, local ordinance, contractual provision, or judicial decision that requires every affordable housing unit within a

multi-family development to be equal to every market-rate unit in terms of all features and appointments of the respective units. Appellants have not cited any legal authority that requires absolute equality among dwelling units relative to natural light (or relative to square footage, the number of windows, the type of appliances, the bathroom fixtures, the countertops and other finishes, whether the unit has a balcony, or any other feature). Neither the regulations of the New Jersey Council on Affordable Housing ("COAH"), see N.J.A.C. 5:93-7.1 through 7.4, nor the Uniform Housing Affordability Controls ("UHAC"), see N.J.A.C. 5:80-26.3 & 26.4, mandate any type of interior design standards or anything approaching such absolute equality. In the fifty-plus years since Mount Laurel I was decided, no judge, legislature or agency has ever mandated such requirements.

Indeed, it would be virtually impossible to design a multi-story, 500-plus unit apartment building such that all dwelling units are identical and/or equal in all respects. There will be literally dozens of different configurations among the dwelling units within the AVB Project, all of which are permitted under the UCC and every applicable law and regulation. All necessary safeguards against substandard living conditions are already incorporated into the UCC and such other laws and regulations. If construction of the AVB Project is permitted under the UCC and every other applicable statute and regulation, it follows that AVB's design and actions are based on legitimate, non-discriminatory business and

market considerations. West Windsor has no legal basis to argue it can prevent AVB from building the project because of alleged unlawful "discrimination."

2. The modern building codes applicable to construction of the AVB Project do not require windows in bedrooms; Appellants' arguments that occupants of apartments with a windowless bedroom will be deprived of fresh air and sunlight and/or subjected to substandard living conditions are gross exaggerations unsupported by evidence.

The IBC permits habitable rooms to be windowless. Under the IBC, ventilation of habitable rooms can be either mechanical or natural. IBC §1203.1. In terms of illumination, windowless habitable rooms, including bedrooms, are permissible under Section 1204.1 of the IBC, which provides:

> Every space intended for human occupancy shall be provided with natural light by means of exterior glazed openings in accordance with Section 1204.2 or shall be provided with artificial light in accordance with Section 1204.3. Exterior glazed openings shall open directly onto a public way or onto a yard or court in accordance with Section 1205.

Appellants are familiar with the plans for the AVB Project and, thus, are fully aware there is no truth whatsoever to their repeated claims that occupants of the AVB affordable units will be deprived of access to "sunlight and fresh air." *All* the affordable units will have operable exterior windows. Da36. The occupants of the affordable units will have ample access to natural light and fresh air. Da36. Each of the windowless bedrooms will be provided with permanent artificial light fixtures that meet the illumination requirements set forth in IBC Section 1204.3

and mechanical ventilation that meets the requirements of IBC Section 1203.1.[3] Da36. Nothing more is required under the building codes.

However, in addition to artificial light and mechanical ventilation, each windowless bedroom will be immediately adjacent to a naturally lit living room with operable windows. Thus, natural light will enter the windowless bedroom through both the open bedroom door and a transom window located above or beside the bedroom door or, when the bedroom door is closed, through the transom window. Da36. Thus, the bedrooms about which Appellants complain more than meet the lighting and ventilation requirements of the IBC. There is no factual basis in the record for Appellants to state that occupants of any AVB affordable unit will be deprived of natural light or fresh air, yet Appellants persist in advancing this unfounded and spurious claim.

3. COAH regulations cited by Appellants provide no support for Appellants' arguments.

In an effort to support their contention that absolute natural light equality among housing units is required, Appellants point to four (4) regulations adopted by COAH. Appellants argue these four (4) regulations supposedly demonstrate

[3] Regarding mechanical ventilation, the IBC incorporates by reference the International Mechanical Code ("IMC"). Section 403.3 of the IMC requires a significant amount of fresh outdoor air to be supplied mechanically to habitable rooms. Thus, "fresh air" will be supplied to the AVB affordable units through operable windows *and* the mechanical ventilation system.

requirements that affordable and market-rate housing units must have substantially the same features and amenities (Rb7), and that developers, and not just municipalities, are responsible for meeting the objectives of the Mount Laurel decisions. Pb15. The four cited regulations set forth the following requirements:

- The affordable units should be completed in tandem with the market-rate units. N.J.A.C. 5:93-5.6(d); N.J.A.C. 5:97-6.4(d).
- The affordable units should be integrated with the market-rate units. N.J.A.C. 5:97-6.4(f); N.J.A.C. 5:93-5.6(f).
- The affordable units and market-rate units should utilize the same heating source. N.J.A.C. 5:80-26.3(f); N.J.A.C. 5:93-7.4(f).
- The inclusionary development should meet the policy goal of locating affordable units in close proximity to places of employment and civic infrastructure. N.J.A.C. 5:97-6.4(g).

No other law or regulations are cited by Appellants. For several reasons, beyond the obvious plain language, these cited regulations support none of Appellants' arguments and provide no justification for reversing the Trial Court.

First, as Appellants are well aware, the AVB Project will satisfy the requirements of all four (4) regulations. Appellants' argument that these regulations somehow stand for the proposition that COAH, through these regulations, intended to regulate not only the matters covered in the regulations but also every interior design detail of every affordable housing unit makes no sense, and is unsupported by these regulations or any other legal authority.

Second, the cited COAH regulations apply to the *municipality*, not the developer or the particular inclusionary project. The entirety of COAH's regulatory scheme is intended to establish criteria for defining what a municipality must do to comply with its constitutional obligation to provide "*through its land use regulations* a realistic opportunity for a fair share of its region's present and prospective need for housing for low and moderate income families." N.J.S.A. 52:27D-302a (emphasis added). See also N.J.A.C. 5:93-1.1(b) and (c) (COAH regulations apply to municipalities); N.J.A.C. 5:97-1.2(b) and (c) (COAH Third Round Rules apply to municipalities). The four (4) COAH regulations cited by Appellants do nothing more than compel the *municipality* to adopt inclusionary zoning ordinances featuring the matters addressed in such regulations. See N.J.A.C. 5:97-6.4 (titled "Zoning for inclusionary development"); N.J.A.C. 5:93-5.6 (titled "Zoning for inclusionary development"). The regulations address front-end zoning requirements to be enacted by the *municipality*, not requirements against which the developer's performance is to be measured after the fact by a court.

West Windsor's project-specific zoning measures, including a redevelopment plan for AVB's property, were adopted and then approved by the Trial Court in the Final Judgment in the DJ Action (dated July 2, 2019). AVB's land development application seeking preliminary and final major subdivision and

site plan approval requested no variance relief, conformed to all substantive provisions of West Windsor's inclusionary zoning ordinances and redevelopment plan, and was approved by West Windsor's Planning Board on October 13, 2021. Pa57-82. Thus, the issues of what COAH had required to be included in West Windsor's zoning ordinances and whether AVB's land use application conformed to the project-specific zoning requirements were resolved long ago. There is no reason or legitimate legal basis to reexamine the meaning of the cited COAH regulations or for Appellants to argue for broader application of such regulations than was intended by COAH. The cited regulations simply mandate that certain content be included in municipal zoning ordinances. Ordinances were adopted, and AVB was found by West Windsor's Planning Board to be in compliance with all such ordinances.

A municipality's authority to regulate land use is solely a legislative power, and a municipality must exercise such power in conformity with the Municipal Land Use Law, N.J.S.A. 40:55D-1 et seq. ("MLUL"). See Livingston Builders, Inc. v. Township of Livingston, 309 N.J. Super. 370, 381 (App. Div. 1998). As FSHC correctly notes in its Brief (Rb11-12), Mount Laurel leaves the implementation of municipal fair share plans to the municipal legislative process. East/West Venture v. Borough of Fort Lee, 286 N.J. Super. 311, 330 (App. Div. 1996). Under the MLUL's "time of application rule," see N.J.S.A. 40:55D-10.3,

only those development regulations that were in effect on the date AVB submitted its application for development apply to municipal review of and decision making regarding the application. As West Windsor's Planning Board found, AVB's application complied with all extant development regulations, including the integration and other requirements of West Windsor's project-specific legislative enactments. Pa57-82. Appellants make no argument to the contrary. Accordingly, AVB submits the UCC now governs what can be built by AVB and neither West Windsor nor the Trial Court could now impose additional or different requirements regarding interior design details of affordable housing units. Livingston Builders, 309 N.J. Super. at 381.

4. The COAH guidance document, "Understanding UHAC," does not support Appellants' arguments.

Appellants argue COAH's 2010 guidance document, "Understanding UHAC: A guide to the Uniform Housing Affordability Controls for Administrators of Affordable Housing" (Da49-61), "recommends" that all design details of affordable units and market-rate units be identical. Based on COAH's "recommendation," which is decidedly *not* an adopted law or regulation of general application, Appellants argue the AVB Project fails to meet COAH's requirement that affordable and market-rate units be integrated in the inclusionary development. For several reasons, Appellants' arguments regarding "Understanding UHAC" have no bearing on the issues before this Court.

First, Appellants omit critical details about the context in which the cited "recommendation" appears. The language is contained in "FAQs" at the conclusion of a chapter titled "Determining Affordable Sales Prices and Rent." Da49-61. Nothing in the chapter or, for that matter, in COAH's adopted regulations discusses or addresses the design of the interior of affordable housing units. The cited passage reads as follows:

> **Question:** *Does COAH require design standards for affordable housing units?*
>
> **Answer:** COAH does not require any additional design standards above what is required by municipal zoning. COAH does recommend, however, that the affordable housing units be identical to the market-rate units within the same development and that affordable units be integrated with market-rate units within a development.

Da60 (emphasis added).

Appellants fail to discuss or mention the only relevant part of COAH's answer: COAH *does not* require design standards above what is required by municipal zoning. As stated previously, AVB has already been found by West Windsor's Planning Board to comply with West Windsor's zoning requirements, including whatever "integration" requirements West Windsor has adopted for inclusionary development. Pa57-82. Such finding of compliance ends the inquiry on the issue of "integration." West Windsor has not enacted any other "design standards" that apply to the AVB Project. COAH's regulations, as noted

previously, prescribe what a municipality must do to comply with its Mount Laurel obligations and how a municipality must implement its "fair share plan" through legislation. If West Windsor wanted to impose additional "design standards," it was obligated to enact such standards prior to the submission of AVB's development application.[4] "Understanding UHAC" is a guidance document written for the benefit of municipal *"Administrators of Affordable Housing."* Da49. It is not a separate suite of laws or regulations that applies to developers or specific projects or properties. Even if Appellants were not guilty of misrepresenting COAH's "recommendation," the cited passage in "Understanding UHAC" does not constitute an adopted standard or requirement that can be enforced by West Windsor in the absence of a municipal legislative enactment.[5]

Second, Appellants' interpretation that COAH's "recommendation" means affordable and market-rate units must be designed to have identical interior "features and amenities" is so broad it contravenes COAH's regulations. Never

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[4] West Windsor's Planning Board expressly found it had no jurisdiction over the issue of whether bedrooms in affordable units could be windowless. Pa65, ¶ 32. There is no local legislative enactment conferring such jurisdiction on the Planning Board. The Planning Board attorney advised the matter was governed by the State Housing Code, N.J.A.C. 5:28, a position rejected by the Trial Court. Pa65, ¶ 32.

[5] AVB submits West Windsor could not have adopted a "design standard" requiring a window in every bedroom, because West Windsor has no authority to adopt legislation that contravenes the UCC, a conclusion acknowledged by the Trial Court.

once in the almost fifty years since Mount Laurel I has any court, COAH, or COAH's successor agency, the New Jersey Housing and Mortgage Finance Agency, required any specific standard pertaining to the interior design "features and amenities" of affordable housing units. COAH's regulations say nothing about the design features and appointments of individual affordable units. Yet, Appellants argue that by saying nothing about design standards over the past fifty (50) years, COAH actually meant to impose an absolute design standard of equality among *all* "features and amenities." There is no legal, contextual or logical support for the interpretation urged by Appellants.

Indeed, if COAH's "recommendation" actually purported to be a "design standard," it would be void for vagueness. It contains nothing resembling a "standard." Appellants cite the "recommendation" for the opportunity it provides them to claim the "recommendation" means whatever Appellants say it means. Importantly, West Windsor does not and could not claim all the affordable units in West Windsor's inventory share identical designs, features, and amenities with all the market-rate units in their respective inclusionary developments. West Windsor is simply selectively deploying COAH's "recommendation" in service of its otherwise unsupported legal argument, knowing full well it has never actually demanded identical designs, features, and amenities for its affordable units.

Third, COAH's recommendation in "Understanding UHAC" that affordable and market-rate units be identical is seemingly intended to refer to the exterior appearance of the units. COAH "recommends" that affordable and market-rate units appear identical for the same reason COAH requires municipalities to adopt inclusionary zoning ordinances that compel integration of affordable and market-rate units within a development. The purpose is to prevent the inhabitants of the affordable units from being stigmatized due to the affordable units having an inferior (exterior) appearance. AVB submits its interpretation of COAH's "recommendation" is supported by COAH's answer in "Understanding UHAC" to the question of whether COAH requires design standards for affordable units. COAH responds to the question by stating it "does not require any additional design standards above what is required by municipal zoning." Da60. COAH would not mention municipal zoning in its answer if the question pertained to design standards for the *interior* of the affordable units, as zoning does not regulate the interior of structures. The UCC governs *interior* details. Zoning, on the other hand, affords a municipality some ability to exercise its legislative power to regulate the *exterior* aspects of a structure, such as height, lot coverage, setbacks from property lines, etc.

There is no allegation in this case or evidence in the record that any person viewing the AVB Project from the outside, or even a person standing in an interior

hallway, could tell the difference between the affordable and market-rate units. There will be no discernable outward difference. The affordable and market-rate units will be indistinguishable from one another and fully integrated within the development. Their exterior appearance will be "identical," and no occupant will be stigmatized. Nothing in COAH's regulations or "Understanding UHAC" can be interpreted to suggest anything more is required.

C. Appellant's Argument That Windowless Bedrooms in Affordable Units Violate The Federal Section 8 "Housing Choice Voucher Program" Is Factually and Legally Incorrect.

1. Appellants' arguments are based on regulations that are no longer in effect.

Appellants argue the affordable units with a windowless bedroom are "discriminatory" because they do not meet housing quality standards applicable to the Housing Choice Voucher ("HCV") program implemented by the Department of Housing and Urban Development ("HUD") pursuant to Section 8 of the United States Housing Act of 1937, 42 U.S.C. §1437f ("Housing Act"). The HCV program allows qualifying very low income families and individuals to utilize Section 8 assistance to pay rent. Appellants argue that the AVB units with a windowless bedroom cannot be rented by Section 8 voucher holders because the units do not satisfy HUD's standards for "illumination" requiring a window in each sleeping room. Thus, Appellants argue AVB is discriminating against voucher holders (meaning, discrimination on the basis of "source of income" under New

Jersey state law) by creating affordable units that cannot be rented by Section 8 voucher holders.

Appellants' arguments regarding the HCV program are incorrect for a number of reasons, most decisively because the HUD regulation on which Appellants rely has been superseded and replaced in the months since the parties appeared before the Trial Court. Specifically, the former 24 C.F.R. § 982.401(f)(2)(i) cited by Appellants, which stated sleeping rooms in housing assisted under the HCV program should have a window, no longer exists and has been replaced by a regulation that does not require a window in every sleeping room. The new regulation was adopted on May 11, 2023, shortly after the Trial Court issued its opinion, and went into effect on October 1, 2023. 88 Fed. Reg. 30503 (May 11, 2023). The new regulation eliminated the housing quality standards formerly codified at 24 C.F.R. § 982.401. That particular regulation, *i.e.*, 24 C.F.R. § 982.401, now simply incorporates HUD's newly adopted "National standards for the condition of HUD housing." 24 C.F.R. § 5.703 ("HUD National Standards").[6] The HUD National Standards do not require a sleeping room to have a window. See generally 24 C.F.R. § 5.703.

[6] Neither Appellant has cited or acknowledged the existence of the HUD National Standards.

Given this change in HUD's position, Appellants' argument that AVB will be discriminating against Section 8 voucher holders, already incorrect for other reasons, no longer has *any* basis in law and should be rejected by the Court.[7] When the AVB Project is finally constructed, a windowless bedroom will not impede any voucher holder from utilizing Section 8 assistance to pay rent, and thus not implicate non-discrimination protections for "source of income" at all.

The HUD National Standards do not supersede State housing codes. 24 C.F.R. § 5.703(f)(1). However, as was established in the portion of the Trial Court's ruling that has not been appealed, the AVB Project complies with all such codes. The UCC permits habitable rooms, including bedrooms, to be windowless. *See* IBC Section 1204.1. The state housing code applicable to the AVB Project will be the Maintenance of Hotels and Multiple Dwellings Law regulations, N.J.A.C. 5:10 (the "HMDL"). The HMDL specifically states that a certificate of occupancy issued by the local construction official under the UCC for a newly-constructed building is equivalent to a certificate of inspection pursuant to HMDL issued by the

[7] The HUD inspection form discussed and quoted in Footnote 4 on Page 20 of West Windsor's brief has also been superseded and replaced by a form reflecting current requirements.

DCA's Bureau of Housing Inspection.[8] N.J.A.C. 5:10-1.12(f). In other words, if new construction complies with the UCC, it is automatically deemed compliant with the applicable housing/property maintenance code, *i.e.*, the HMDL.[9] Da16.

West Windsor asserts AVB's affordable units are "patently discriminatory" solely because of the lack of a window in some bedrooms, such that AVB should be found to be in violation of the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1, et seq. ("NJLAD"), which prohibits discrimination in housing based on the "source of lawful income" the tenant seeks to use for rental payments. Pb21-22. As noted above, in light of the adoption of the HUD National Standards, the already weak support for this argument is mooted, and the argument should be disregarded. Voucher holders have the same ability to rent any affordable unit in

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[8] The Bureau of Housing Inspection, a division of DCA, administers the HMDL by conducting inspections of multiple dwelling properties once every five years.

[9] With its response to undersigned counsel's question about windowless bedrooms in the AVB Project, DCA provided a copy of its Bulletin 79-6. Da19. Bulletin 79-6 discusses N.J.A.C. 5:10-1.12(f), which states issuance of a Certificate of Occupancy by the local construction official is deemed equivalent to receiving a passing grade on an inspection that would otherwise have been conducted by the Bureau of Housing Inspection under the HMDL. Thus, newly-constructed, UCC-compliant multiple dwellings are not even inspected for compliance with the HMDL.

the AVB Project as any other low to moderate income household, and, depending on the market rents, even qualify for the market rate units[10].

2. The Appellants' arguments regarding the HCV program would have been rejected even if HUD had not amended the housing quality standards.

Even if the HUD National Standards had not been adopted, Appellants' arguments that the AVB Project supposedly violated the HCV program would have been incorrect. Appellants' claim that, someday, AVB will have insufficient Section-8-eligible affordable units to meet the demands of voucher holders. This is not a legal argument that can be redressed under the DJ Act, which requires there be a justiciable controversy between adverse parties. Appellants' arguments are a request for an advisory opinion that would have been rejected because: a) AVB *will* have a sufficient number of affordable units with a window in each bedroom to satisfy the demand for Section-8-eligible units Da36, ¶¶ 7-9.; b) the affordable units with a windowless bedroom arguably met all performance requirements necessary to be approved by HUD under an exception to the former and now superseded standards of the HCV program; c) the DJ Act cannot be used to decide or declare rights of parties upon a state of facts that are future, contingent and uncertain, Chamber of Commerce v. State, 89 N.J. 131, 140 (1982); and d) the DJ

[10] West Windsor did not raise any argument under the NJLAD in the Trial Court, and should not be permitted to raise this argument for the first time on appeal.

Act does not authorize actions to determine whether federal statutes have or will be violated when no private right to enforce such statute has been created by Congress. In re N.J. Fireman's Assoc. Obligation to Provide Relief Applications Under OPRA, 443 N.J. Super. 238, 253-55 (App Div. 2015), certif. granted, 224 N.J. 528 (2016).

Because the entirety of Appellants' argument is based on a speculative, and an at least arguably unlikely, state of future facts, it would have been legal error for the Trial Court to base an award of declaratory relief on Appellants' argument about the HCV program. Such argument provides no reason to disturb the Trial Court's ruling, especially now that HUD's revision of the housing quality standards mooted Appellants' claim altogether.

D. The Appeals of Both West Windsor and FSHC Should Be Dismissed Because Both the Application Made in the Trial Court and This Appeal Are Procedurally Deficient

1. The Trial Court Would Have Been Correct To Deny Declaratory Relief Based on the Procedural Impropriety Of West Windsor's Dispositive Motion

As noted by the Trial Court, West Windsor improperly asserted this claim by filing what purported to be a dispositive motion without first initiating a claim by filing a complaint. Pa18. The DJ Action was concluded by Final Judgment entered on July 2, 2019. Pa52. No claims *against* AVB were ever asserted in the DJ Action by West Windsor or any other party. Da1-7. More specifically, no claim

was asserted in the DJ Action that touched upon or concerned windowless bedrooms in affordable housing units.

Thus, with the Motion, West Windsor sought a dispositive judgment-type ruling on claims that had never been asserted in a pleading filed with the Trial Court and were not in any way "pending claims" in the DJ Action. West Windsor's request for judgment on claims or matters that had not been made the subject of a complaint was contrary to the Court Rules' pleading requirements, see, e.g., Rule 4:2-2 ("A civil action is commenced by filing a complaint with the court."); Rule 4:5-2 (plaintiff must file a pleading that sets forth a claim for relief and contains a statement of facts on which the claim is based and a demand for judgment). No case or claim was initiated on which judgment could be rendered.

Even if the matters at issue in the Motion had been made the subject of a separate complaint, the Motion should still have been denied by the Trial Court because it did not conform to the requirements of a dispositive motion. In the Rules of Court, there is no such thing as a "Motion for Declaratory Judgment." A plaintiff's motion for judgment on an affirmative claim is a motion under Rule 4:46. If a motion for summary judgment does not meet the requirements set forth in Rule 4:46-2, the motion should be denied. Kopec v. Moers, 470 N.J. Super. 133, 156-57 (App. Div. 2022). Nowhere in the Motion did West Windsor mention Rule 4:46 or any other Rule of Court that supposedly permitted the making of a

dispositive motion under the circumstances. Moreover, there is no Rule of Court that permits the making of a dispositive motion on issues never raised in a pleading. Similarly, the Motion stated that "injunctive relief" was sought, but the Motion did not comply with the requirements of Rule 4:52-1 and/or Rule 4:52-2. The right to any form of temporary restraint is governed by the standards set out in Crowe v. DeGioia, 90 N.J. 126 (1982). West Windsor failed altogether to address or mention the Crowe standards.

Because West Windsor sought judgment on a claim it never brought, and in a litigation where final judgment had been entered more than three and a half years earlier, the Trial Court would have been justified in denying the Motion on that basis alone. The Trial Court agreed that the Motion was procedurally improper,[11]

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[11] The Trial Court also noted the obvious problem of West Windsor's failure to join "all persons having or claiming any interest which would be affected by" the declaration sought by West Windsor, as required by the Declaratory Judgments Act. N.J.S.A. 2A:16-56. ("DJ Act"). Pa18. Numerous developers are currently constructing inclusionary developments in West Windsor in accordance with the Final Judgment in the DJ Action. None of the other developers were joined by West Windsor in the Motion, which seemingly renders the claim defective under the DJ Act. Based on the record before the Trial Court on the Motion, it is clear AVB is not the only developer planning to construct affordable units with windowless bedrooms in West Windsor. In fact, West Windsor's own certifications identify another developer who proposes to have a windowless bedroom in *every* affordable unit. Pa87, ¶ 5. AVB has no control whatsoever over such other developer's designs for its inclusionary condominium project. West Windsor's failure to join such other developer constitutes another procedural impropriety, but also begs the question why AVB's design plans have been singled out for attack.

but did not base its ruling on the procedural impropriety because the Trial Court found in AVB's favor on the substantive merits. Pa18.

In its Brief, West Windsor's effort to discount the Motion's procedural deficiencies amounts to a meandering series of conclusory statements (most of which are disputed by AVB) about the remedial purpose of declaratory relief, the alleged justiciability of the claim, the need for "basic fairness" in matters relating to the Mount Laurel doctrine, the lack of any request for discovery by AVB,[12] and the supposed absence of disputed facts. Pb6-9. None of West Windsor's "arguments" address the actual issue of West Windsor's failure to assert the claim in a pleading or cite legal authority justifying asserting the claim solely by motion. No provision in the Court Rules allows a party to ask for judgment on a claim that was never asserted, and declaratory judgment does not constitute an exception to the rules of pleading and/or the requirements of Due Process. Declaratory judgment is a cause of action like any other and must be commenced by filing a complaint and resolved, if by motion, by filing a dispositive motion of a type permitted under the Court Rules.

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[12] The discovery period in the DJ Action ended years before the Motion was filed. Nor would discovery have been possible, considering the limited time between the filing and return dates of the Motion.

On appeal, West Windsor seems to be blaming the Trial Court, claiming the Trial Court essentially directed West Windsor to bring the claim by way of a motion. In support of this argument, West Windsor cites the transcript from a separate hearing in the DJ Action at which the Trial Court considered a motion to enforce litigants rights filed by AVB in late 2022 on account of West Windsor's ongoing refusal to issue building permits for the AVB Project. The subject of windowless bedrooms was raised in discussions occurring late in the hearing, and West Windsor now contends the Trial Court "approved" the concept of raising the issue by way of a motion for declaratory relief.

The hearing transcript tells a different story. As evidenced by the quotes below, the Trial Court did not "approve" any particular course of action, but rather left it to West Windsor to determine how to raise the issue:

> THE COURT: So I -- so what -- and then again, the Municipality can make whatever application they wish, either joined by Fair Share or -- or whether Fair Share remains respectfully on the sidelines. So I -- I take no position on that, make no predetermination on any of those issues. But I -- I -- you know, if -- if you can figure out a way to get it before me, I'm -- I'll do my job too; okay?
>
> MR. MULLER: Yes, thank you, Your Honor.

1T48-16 -24

> THE COURT: So -- so -- so whether you want to open up a new cause of action or -- or -- or not, I leave it to -- to you all.

> MR. MULLER: I -- yeah, I -- I -- I would file a motion here to reopen the litigation for this limited purpose.

1T50-15-20.

As evidenced by this colloquy, the Trial Court did not "approve" West Windsor's strategy or any other particular strategy, and the entire argument that the Trial Court somehow gave West Windsor a dispensation from obeying both the Court Rules and foundational Due Process principles that underlie civil pleading is unfounded. West Winsor also fails to explain why, if the Trial Court approved raising the issue by way of a motion, the Trial Court later agreed with AVB that the issue should not have been raised by motion. Pa15-16.

2. All the procedural grounds for dismissing West Windsor's appeal apply equally to FSHC's cross-appeal.

For several reasons, the procedural improprieties that plague West Windsor's appeal plague the cross-appeal of FSHC equally. First, FSHC did not make any separate or independent application to the Trial Court. FSHC simply joined in the Motion. If the deficiencies inherent in the Motion preclude any possible reversal of the Trial Court, such deficiencies apply equally to FSHC's cross-appeal. FSHC also sought declaratory judgment on an issue that had not been raised in any party's pleadings.

Second, FSHC did not file a Notice of Appeal. As an appellant or cross-appellant, FSHC was obligated to file a Notice of Appeal. See R. 2:5-1 and/or R.

2:4-2(a). The substance of FSHC's Brief clearly indicates FSHC is an appellant, not a respondent. In its Brief, FSHC states on Page 5 that it filed a Notice of Appeal on June 15, 2023. It did not. FSHC filed only a Case Information Statement on June 15, 2023 in which it identified itself as a "Respondent/Interested Party." Due to its failure to file a Notice of Appeal, FSHC should be deemed to have waived its right to challenge the Trial Court's ruling.

CONCLUSION

For the foregoing reasons, the Trial Court's ruling should be affirmed. Certainly, no argument can be made that the Trial Court abused its discretion in refusing to grant declaratory relief. The Trial Court's decision did not lack rational explanation or rest on an impermissible basis. State v. Chavies, supra, 247 N.J. at 257. The decision was not manifestly unjust. Newark Morning Ledger, supra, 423 N.J. Super. at 174. Rather, the decision was completely consistent with applicable law.

On the substantive merits of the case, Appellants failed in the Trial Court and on appeal to identify a single statute, regulation, local ordinance, contractual provision, or judicial decision that the AVB Project violates or that requires every affordable housing unit within a multi-family development to be equal to every market-rate unit in terms of all design features and appointments. Appellants'

arguments are based on their: a) subjective sense of "fundamental Mount Laurel principles"; b) inaccurate and unsupported characterizations of the housing units at issue; c) unsupported opinions about "natural light" and "fresh air"; and d) refusal to acknowledge that modern lighting and ventilation technologies and the UCC's requirements eliminate any possibility an apartment with one windowless room could constitute a substandard housing unit solely because of that windowless room. Appellants' arguments are decidedly *not* based on the applicable law. Moreover, the Motion was procedurally defective. On that basis alone, it would be improper to conclude the Trial Court should have awarded the declaratory relief sought below by Appellants.

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Dated: November 20, 2023

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Re: In the Matter of West Windsor Township, Appellant
Superior Court of New Jersey, Appellate Division,
Docket No. A-003109-22 T4 – Appellant's Reply Brief

Date Submitted: December 1, 2023

On Appeal from: Superior Court, Law Division, Mercer County
Sat Below: Hon. Robert T. Lougy, A.J.S.C.
Docket No.: MER-L-1561-15

Respondent: Avalon Watch, LLC and AvalonBay Communities, Inc. [1]

Additional Respondent: Fair Share Housing Center, Denominated a Respondent, But Supporting Appellant

[1] Avalon is referred to as Respondent, and the Brief of Respondents, Avalon Watch, LLC and AvalonBay Communities, Inc. is referred to as Db. The Brief and Appendix of Respondent Fair Share Housing Center is referred to as FSHCDb. The Brief and Appendix of Appellant is referred to as Pb and Pa.

Dear Honorable Judges:

TABLE OF CONTENTS

PRELIMINARY STATEMENT

Respondent's brief is largely an exercise in obfuscation and avoidance of the main issue before the court. Respondent repeatedly and a great length argues that the International Building Code is the sole set of regulations that apply and that it complies with this, with windowless bedrooms being permitted under all laws. See e.g. Db6, 7, and 26 and especially Points B1 and 2 (Db10-15). See also Db1, stating that "West Windsor's arguments' have already been rejected by the New Jersey Department of Community Affairs…" This is all irrelevant and should be disregarded, as the question of whether the building codes permit, or bar, windowless bedrooms is not a subject of this appeal and is not before the court.

Respondent also repeatedly argues about points that Appellant never made. It argues that there is no requirement of equality of treatment of "all features and appointments," including finishes, bathroom fixtures, and countertops. See Db12-13 and 19-22. Appellant has never made these arguments, and the contentions Respondent makes are irrelevant and should be disregarded.

The same is true of the constant misstatements of Appellant's argument. Respondent repeatedly argues that no affordable rental unit is windowless. See, e.g. Db1, 6, 14, and 35. Appellant never argued the contrary. It is affordable unit bedrooms that do not have windows, not the entire unit. Respondent similarly argues that Appellant claims that COAH regulations require that all affordable units have the same features and amenities as the market units (Db16), but, again, Appellant never made such an argument.

Appellant's only contention before this court, other than the Section 8 argument set forth in Appellant's Point III (Pb18-22), is that the disparity in Respondent's treatment of windowless bedrooms in the affordable family rental units vis a vis the market family rental units, with 89% of the family rental affordable units having at least one bedroom without a window while only 3.57% of the family rental market units do, is discriminatory and in violation of Mt. Laurel principles (Pb Point II at 9-18). Astonishingly, however, Respondent does not respond to this argument or offer a legal argument point heading addressing it. It merely makes a one-sentence passing reference to it at Db12, followed by a response to an argument Appellant did not make.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Since the submission of Pb, Fair Share Housing Center ("FSHC") resubmitted its brief and appendix on October 19, 2023, and Respondent filed its brief and appendix on November 20, 2023. Appellant stated at Pb5 that FSHC filed a Notice of Appeal. As a respondent, so designated by the Appellate Division, it did not and could not.

LEGAL ARGUMENT

I. The Declaratory Judgment Procedure to Bring the Windowless Bedroom Issue Before the Trial Court Was Proper.

The crux of Respondent's argument that Appellant's Declaratory Judgment action was procedurally improper is that no complaint or pleading was filed. Db29-34. But the trial court's ruling on the merits of Appellant's petition renders this argument moot, as the trial court itself indicated.[2]

[2] The trial court found: "Given the Court's disposition of the Township's claims on the merits, however, the Court will not require the Township to initiate a new action by way of a complaint." Pa18.

Even if, arguendo, that were not the case, Appellant of course did file a complaint to initiate the declaratory judgment action (Docket No. MER-L-1561-15) as a result of In re N.J.A.C. 5:96 & 5:97, 221 N.J. 1 (2015)("Mount Laurel IV"), an action in which Respondent intervened shortly thereafter and actively participated as a result of seeking to have its site, the Project, selected for inclusion in Appellant's Housing Element and Fair Share Plan ("HEFSP"), which it was and leads to the present action. The trial court on July 2, 2019 entered a Final Judgment of Compliance and Repose ("JOR") approving Appellant's HEFSP and the Settlement Agreement reached between Appellant and FSHC that addressed Appellant's affordable housing obligation, including Respondent's Project. Pa52-56. While Respondent repeatedly argues that this judgment was final as to all matters (Db3, 4, 17, 29, 31), Respondent filed its own motion, styled as an enforcement of litigant's rights, under the action in late 2022, which precipitated the present action (Pb5).

The trial court in the JOR expressly retained jurisdiction for purposes of enforcing the Judgment and the provisions of the Settlement Agreement. Pa56. At the heart of this appeal is the enforcement of those provisions and the integrity of the approvals they cover, because Respondent's disparate and discriminatory treatment of affordable housing tenants in the Project cannot be

reconciled with them. As is discussed in Point IIB herein and as FSHC put it at FSHCDb11, if a developer such as Respondent can build affordable housing inconsistent with and in violation of Appellant's court-approved Settlement Agreement, this destroys the basis for the court's approval in the first place. In short, Respondent and any developer charged with executing affordable housing developments under a fair share plan have an obligation to aid in the municipality's constitutional compliance. Declaratory judgment relief is the appropriate mechanism for the reasons set forth in Pb Point I at 6-9.

II. Respondent's Discriminatory Treatment of Tenants Occupying Affordable Housing Rental Units Violates Mt. Laurel Principles and is Inconsistent with Fair Share Housing Center's Settlement Agreement with Appellant.

A. Respondent's Disparity in Treatment of Family Affordable Rentals and Market Rentals Violates Mt. Laurel.

Appellant reaffirms all of the arguments in Point II of Pb (Pb9-18). As Respondent has not contested any arguments made in that point nor, indeed, even acknowledged the existence of this central point of the case, only a limited response is in order.

In Point B3 (Db15) Respondent argues that certain COAH rules cited by Appellant do not apply because they were not incorporated into the West Windsor zoning ordinance and only by doing so would they have applicability. This bizarre argument is unsupported by the text of the rules, discussed at Pb15-16, nor is there any case law or other authority supporting it. The rules were offered, and continue to be offered, for the limited purpose of demonstrating that the New Jersey Supreme Court has intervened in the Mt. Laurel implementation process, as Appellant and FSHC urge the court to do herein.

Respondent also argues, at Db31, n. 11, citing Pa87, that another developer in West Windsor proposes to have windowless bedrooms in all of its affordable units, complaining that Respondent's "design plans have been singled out for attack." To the contrary, the very page of the certification cited, Pa87, paragraphs 3-5, makes clear that this is a component of the Avalon Project, not some other developer. This component was granted approval as part of the overall Project by the Planning Board. See Pa57-60.

B. Respondent's Windowless Bedroom Scheme is Inconsistent with the Settlement Agreement between Fair Share Housing Center and Appellant (Not Presented Below).

The court should honor and make tangible the powerful statement by Chief Justice Wilentz that the New Jersey Constitution "requires at the very least that government be as fair to the poor as it is to the rich in the provision of housing opportunities," S. Burlington County NAACP v. Mount Laurel, 92 N.J. 158, 209 (1983), discussed at Pb13 with other Supreme Court references to the underlying principle of fairness.

FSHC discusses the centrality of fairness when discussing the approval of its settlement agreement in this case with Appellant (FSHCDb10-12), as well as elsewhere in its brief. Mt. Laurel settlements require court approval after a fairness hearing, the procedure for which was established by the courts, as set forth in FSHCDb10. The reviewing court must be satisfied that the settlement agreement "adequately protects the interests of lower-income persons on whose behalf the affordable units proposed by the settlement are to be built," FSHCDb10 quoting East/West Venture v. Borough of Fort Lee, 286 N.J. Super 311, 328 (App. Div. 1996). A fairness hearing in this case was conducted by the Hon. Mary C. Jacobson. She ruled in her Order Approving Settlement Agreement, set forth in full at Pa46-51, that the settlement, which included Respondent's site as well as the other sites in the West Windsor Fair Share Program, was "fair and reasonable to the region's low- and moderate-

income population" (Pa47) and approved it. As FSHC argues at FSHCDb11, if a developer after the fact can build affordable units that denies the residents, but not the residents of market units, the fresh air and sunshine that Respondent would make amenities, "it undermines, if not destroys, the basis for approving the [settlement] agreement in the first place." Respondent's windowless bedroom scheme cannot be squared with the settlement agreement and is in violation of it.

III. The Section 8 Program is Violated by Respondent's Discriminatory Treatment of the Affordable Housing Rental Units Tenants.

In its Point C1 (Db24-28), Respondent notes, correctly, that the U.S. Department of Housing and Urban Development regulation requiring that units for which Section 8 recipients receive funding must have a window in each sleeping room has been repealed. H.U.D replaced the previous Housing Quality Standards with new standards under the acronym NSPIRE, which went into effect on October 1, 2023. See Db25. It is unclear whether the original standard has simply been replaced by a new egress standard that each sleeping room on the third floor or below has an unobstructed rescue opening. See https://www.hud.gov/sites/dfiles/PIH/documents/NSPIRE-Standard-Egress_20230811.pdf.

In any event, the compliance deadline for the new standards is not until October 1, 2024 for the Housing Choice Voucher Program. See https://www.govinfo.gov/content/pkg/FR-2023-09-28/pdf/2023-21141.pdf. The Housing Quality Standards and Checklist reviewed at Pb18-22 and FSHCDb12-16 are still operative.

CONCLUSION

For the foregoing reasons it is respectfully requested that the decision of the trial court be reversed and that a mandate requiring windowless bedroom parity between the affordable housing family rental units and market family rental units be issued.

Respectfully submitted,
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