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November 13, 2014

HAND DELIVERY
Mark Neary, Clerk
Supreme Court of New Jersey
Richard J. Hughes Justice Complex
25 West Market Street, P.O. Box 970
Trenton, New Jersey 08625-970

Re: I/M/O Adoption of N.J.A.C. 5:96 and 5:97
Docket #67,126

LETTER BRIEF IN OPPOSITION TO FAIR SHARE HOUSING CENTER'S MOTION TO ENFORCE LITIGANT'S RIGHTS

Dear Mr. Neary:

Please accept this letter brief in lieu of a formal brief on behalf of Appellants Bernards Township (Somerset County), Clinton Township (Hunterdon County), Union Township (Hunterdon County), and Greenwich Township (Warren County) (referred together as the "Four Towns") in opposition to the pending motion filed by Fair Share Housing Center ("FSHC") for enforcement of litigant's rights.

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PRELIMINARY STATEMENT

The Four Towns file the within letter brief to oppose the pending motion filed by FSHC for enforcement of litigant's rights. The FSHC motion seeks from the Court an order that would "lift the protection provided to municipalities through N.J.S.A. 52:27D-313" and would declare that "actions may be commenced on a case-by-case basis before the Law Division or in the form of 'builders remedy' challenges."

The Four Towns join in and incorporate by reference the legal argument set forth in the brief filed by the New Jersey State League of Municipalities (the "League") and set forth in the brief filed by Atlantic Highlands ("AH") that the Council on Affordable Housing

("COAH") should be ordered to complete the adoption of the proposed 2014 Third Round Rules as required by this Court's March 14, 2014 Order. The Four Towns also join in and incorporate by reference the legal argument set forth in the brief filed by AH that, in the event this Court eliminates the substantive certification process created by the FHA and orders the return of exclusionary zoning litigation to the Law Division, that municipalities be granted temporary immunity so that they enjoy no lesser protection from Mount Laurel lawsuits in court proceedings than they enjoyed in COAH proceedings. The Four Towns do not join in any other arguments set forth in the League's brief.

The within brief supplements and adds to the arguments made by the League and AH that this Court should not order the return of affordable housing disputes to the Law Division but that, if the Court does do that, that municipalities should maintain and be granted immunity and a sufficient time to allow voluntary compliance.

PROCEDURAL HISTORY

The Four Towns adopt as if fully set forth herein the procedural history as set forth in the League's brief.

STATEMENT OF FACTS

The Four Towns adopt as if fully set forth herein the statement of facts as set forth in the League's letter brief. The Four Towns add the following.

Bernards Township filed a petition for Third Round substantive certification with COAH on December 30, 2008 and obtained Third Round

substantive certification from COAH on May 13, 2010. The other three municipalities all have housing plan elements and fair share plans pending before COAH for Third Round substantive certification and have modified their plans as the Third Round regulations evolved. Clinton Township obtained Second Round substantive certification from COAH on March 7, 2001 and obtained amended Second Round substantive certification from COAH on April 2, 2004. On January 24, 2005, Clinton Township re-petitioned for amended Second Round substantive certification at the direction of COAH and then, on October 10, 2006, submitted a petition for Third Round substantive certification at the direction of COAH. Greenwich Township obtained an extension of its Second Round substantive certification from COAH on April 13, 2005 and submitted a petition for Third Round substantive certification in November, 2005. Union Township obtained an extension of its Second Round substantive certification from COAH on June 8, 2005 and submitted a petition for Third Round substantive certification on December 7, 2005.

If the Court were to return exclusionary zoning lawsuits to the Law Division without an immunity mechanism, Clinton Township, Greenwich Township and Union Township would be immediately exposed to builder's remedy lawsuits due to COAH's failure, not their own, and Bernards Township would be exposed to builder's remedy lawsuits upon the expiration of its substantive certification. Then much of the municipal resources that would have been spent on complying with whatever standards are deemed appropriate are likely to be spent on

fending off the builder's remedy lawsuits. The likelihood of such suits in the absence of the protection of COAH's jurisdiction cannot be overstated. Nor can the burden and distraction of such suits be overstated. Returning the Four Towns to the Law Division for affordable housing compliance without immunity would be inequitable and punish them for nothing that they have done.

LEGAL ARGUMENT

I. WHILE FSHC SEEKS TO CREATE THE IMPRESSION THAT TRIAL JUDGES CAN EASILY SUBSTITUTE FOR COAH AND RESOLVE THE PROSPECTIVE NEED ISSUE, GRANTING FSHC'S MOTION WOULD FORCE TRIAL JUDGES TO FACE A CRUSHING TASK OF MAKING A WIDE ARRAY OF CONTROVERSIAL AND COMPLEX POLICY JUDGMENTS

FSHC paints an inaccurate picture of the consequence of having trial judges determine the standard with which municipalities must comply in lieu of COAH. FSHC suggests that trial judges can easily substitute for COAH merely by following the instruction manual its expert prepared and submitted to the Court setting forth its view as to how to trial judges should calculate a municipality's prospective need. However, an examination of a small sampling of the issues that a trial judge would need to resolve to review and approve a municipality's affordable housing plan demonstrates the fallacy of FSHC's suggestion.

A. Fair Share Issues

At the outset, trial judges will need to determine whether they will take a "cumulative" approach to fair share allocation as COAH has done in the past. Through this cumulative approach, COAH reaches back to obligations COAH assigned almost three decades ago in 1986.

In this way, COAH's proposed regulations assign a 1987 through 2024 obligation for each municipality. Alternatively, a trial judge could take the approach established by Mount Laurel II [1] in which the trial judge would decide the obligation only for one compliance period and would not reach back as COAH does. Since this Court ruled that the FHA incorporated the remedy set forth in Mount Laurel II, [2] it bears emphasis that nothing in Mount Laurel II, the Fair Housing Act of 1985, N.J.S.A. 52:27D-301 to 329.9, ("FHA") or in more than 17 amendments to the FHA required COAH to reach back and make the fair share obligations it assigned cumulative. Therefore, it would be perfectly reasonable for a trial judge to take an approach consistent with Mount Laurel II and not insist on forcing municipalities to look back at obligations previously imposed.

As to the issue of each municipality's fair share of the regional need, each trial judge would need to decide if it should (i) impose a "reallocated present need" obligation on the municipality as COAH did in the first and second housing cycles; or (ii) eliminate reallocated present need as COAH did in all three sets of round three regulations. Compare N.J.A.C. 5:92-5.4 and N.J.A.C. 5:93-2.4 with N.J.A.C. 5:97-1.4 et seq. In this regard, the Appellate Division upheld COAH's decision not to impose reallocated present need. See, In re Adoption Of N.J.A.C. 5:94 and 5:95 By New Jersey Council On Affordable Housing, 390 N.J.Super. 1, 56-60 (App. Div.), certif.

[1] So. Burlington Cty. N.A.A.C.P. v. Mount Laurel Tp., 92 N.J. 158 (1983) (Mount Laurel II).
[2] In re Adoption of N.J.A.C. 5:96 & 97, 215 N.J. 578, 586, 620 (2013).

denied 192 N.J. 72 (2007). However, if trial judges must now decide the issue, that will not stop FSHC from its challenge. Nor will it stop developers from pursuing this claim in order to achieve maximum profit.

Once the trial judge determines a municipality's prospective regional need, it will need to determine what factors to use to allocate the regional need to the subject municipality. The trial judge could select: (i) the allocation factors COAH used in the first, second or third housing cycles - all of which differed from one another; or (ii) the factors that FSHC advocates? Compare, N.J.A.C. 5:92-5.6 (referring to Technical Appendix A for allocation factors found at 18 N.J.R. 1134-1141) and N.J.A.C. 5:93-2.6 (referring to Appendix A for allocation factors found at 29 N.J.R. 2342-2373) with pages 68 and 69 of FSHC's Appendix.

Once the trial judge determines the initial prospective need obligation for a municipality, it will need to decide what adjustments to make to that municipal figure. In this regard, COAH adjusted the prospective need for each municipality based upon the following factors :(i)group quarters; (ii) households with assets; (iii) vacancies;(iv) filtering; (v) conversions; (vi) demolitions; (vii)reallocation of portion of obligation from urban aid municipalities; and (viii) buildable limit cap. See, 46 N.J.R. 998 through 1010. Trial judges will need to examine each of these adjustments and decide what adjustments he or she believes are appropriate.

For the municipalities that seek a "vacant land adjustment," the court would need to decide whether to follow the same protocols that COAH established in Round 1 and 2 to determine the so-called "realistic development potential" ("RDP"); or whether to take a different approach. Since COAH regulations require municipalities to create a *realistic* opportunity to satisfy the realistic development potential, this RDP analysis has always played an important role in the regulatory process. See, N.J.A.C. 5:93-4.2 (f) (for how COAH calculates the RDP).

Another critical component of the regulatory fabric has been that a municipality is entitled (a) to satisfy its RDP through the full range of compliance techniques established by COAH regulations; and (b) to zone the sites that contributed to the RDP free from any Mount Laurel considerations as long as the municipality creates a realistic opportunity for satisfaction of its realistic development potential. See, N.J.A.C. 5:93-4.2 (g). The trial judge will need to decide whether to follow these protocols or take a different approach than that utilized by COAH.

As to the "unmet need," which is the portion of the new construction component of the fair share that the municipality lacks sufficient land to address, the trial judge will need to decide whether to follow COAH's position in the first housing cycle; or in subsequent cycles. In the first housing cycle, once a municipality satisfied its realistic development potential, COAH required no more from that municipality. In essence, COAH excused the municipality

from having an obligation to address its unmet need. In subsequent housing cycles, COAH required the municipality that secured a vacant land adjustment to make some effort to address its unmet need. See, N.J.A.C. 5:93-4.2 (h).

If the trial judge requires the municipality to address the unmet need, the next issue is how much of an effort is sufficient. In accordance with this Court's directive in Hills Dev. Co. v. Bernards Twp., 103 N.J. 1, 63 (1986)(Mount Laurel III), should the trial courts continue to follow COAH decisions "wherever possible" and use COAH's decisions regarding municipalities with insufficient land as a guidepost? Or, should trial judges ignore COAH's decisions on the adequacy of municipal efforts to address the unmet need and render its own decisions based on the zealous, myopic positions of non-profit organizations who are unconcerned with anything other than creation of more affordable housing regardless of other legitimate public interests?

As to "rental bonuses," how many of the affordable housing units must a municipality provide to be eligible for a rental bonus? Should the first 20 or 25 percent of the municipality's new construction obligation be eligible for rental bonuses as was the case in Rounds 1 and 2? N.J.A.C. 5:92-14.4 (a); N.J.A.C. 5:93-5.15. Or, should the municipality only be entitled to rental bonuses if it provides affordable rental units in excess of the 25 percent limit as set forth in the round 3 regulations this Court invalidated last year? See, N.J.A.C. 5:97-3.6(a). Should age-restricted units be eligible

for rental bonuses at the same rate as "family" units, or should age-restricted units generate a lesser bonus, or none at all? For group homes, should the court issue credits for each bedroom as in past regulations or should a different standard apply?

As to the "substantial compliance bonuses," should the trial judge use the approach set forth in the proposed regulations, See, Proposed Regulation N.J.A.C. 5:99-3.5; or should the trial judge take a different tact?

The above list is the tip of the iceberg. If this Court grants FSHC's motion, trial judges will need to decide not only the issues identified above, but also many others just to establish each town's obligation. FSHC seeks to create the impression that determining a municipality's fair share obligations involves little more than simple math. Indeed, FSHC asserts that "[t]he trial courts can and should establish a briefing schedule to finalize the methodology within 90 days to ensure there are no further harmful delays." FSHC Brief at 17. However , an examination of AMG Realty Co. v. Warren Tp., 207 N.J. Super 388 (Law Div. 1984) will give this Court an appreciation of what a monumental task it is to determine a municipality's fair share and the patent unreasonableness of FSHC's position.

B. Compliance Issues

After the trial judge completes the enormous task of determining the municipality's fair share obligation, it must then turn its

attention to the "compliance issues," namely, the methods by which municipalities will address that obligation.

As to the rehabilitation component of its fair share, if a municipality chooses to address its indigenous need through a rehabilitation program, how much must the municipality spend on the unit before it is entitled to credit for the rehab? Must a municipality address rental units in its rehabilitation program as required by past COAH regulations; or can a municipality exclude rentals from its rehabilitation program as in the proposed regulations? Compare N.J.A.C. 5:93-5.2(f) and Proposed Regulation N.J.A.C. 5:99-6 (which does not include a requirement for a municipality to include rental units in a rehabilitation program). See also, N.J.A.C. 5:97-6.2(b)6 (which provides that a municipal rehabilitation program "shall" provide for the rehabilitation of rental units).

As to the new construction component of its fair share, what is the menu of compliance techniques available to municipalities to satisfy their fair share? Should municipalities have the power to use the full range of techniques specified in COAH's round two regulations; or should the Court limit the availability of compliance techniques to just four techniques as set forth in COAH's proposed regulations with respect to addressing the prospective need? Compare N.J.A.C. 5:95-5.6 through 5.12 with Proposed Regulation N.J.A.C. 5:99-7.2 through 7.5.

As to inclusionary zoning, what standards apply? Should the trial judge follow the standards this Court set forth in Mount Laurel II, which COAH has incorporated into its proposed regulations; or should the trial court use standards set forth in prior regulations, which did not follow Mount Laurel II? Since this Court ruled that the Legislature incorporated the remedy set forth in Mount Laurel II into the FHA, it would be entirely appropriate for a trial judge to use the proposed regulations to establish standards for inclusionary zoning because those proposed regulations are soundly rooted in Mount Laurel II. In this regard, in Mount Laurel II this Court appreciated the value conferred when a municipality increased density and empowered a municipality to harness that value to maximize the production of affordable housing from each site. Mount Laurel II, supra. at 267 n.29. Proposed Regulations N.J.A.C. 5:99-7.2(a)1 and 7.2(b)4 are soundly rooted in this principle because they empower municipalities to relate the zoning benefits they confer to the percentage of affordable housing they require from developers.

Developers will undoubtedly press trial judges to defer to COAH regulations from rounds one and two in which COAH limited the set-aside to a *maximum* of 20 percent. N.J.A.C. 5:92-8. 4.c. and N.J.A.C. 5:93-5.6 However, in Mount Laurel II this Court set forth a *minimum* set-aside of 20 percent for when a developer secured a builder's remedy and suggested that municipalities could impose set-asides as high as 34 percent for when a municipality designed inclusionary ordinances. See Mount Laurel II, supra. at 279 n.37 (establishing a

"minimum" set-aside of 20 percent when a trial judge awards a builder's remedy) and at 267 n.29 (wherein this Court provides the guidance of the Princeton study to establish set-asides, which study calls for set-asides as high as 34 percent).

Another major issue concerns how trial judges deal with development fees, which have generated hundreds of millions of dollars. Those funds have provided funding essential (i) to creating countless affordable housing opportunities and (ii) to addressing the needs of households with very low income. In Holmdel Builder's Ass'n v. Township of Holmdel, 121 N.J. 550, 586 (1990), the Court said that municipalities could only impose those fees if COAH adopted regulations to empower them. So, how are trial judges supposed to establish the standards? If so, how great a fee should a trial judge permit on residential developers -.5 percent of equalized assessed value ("EAV") as COAH authorized in its Second Round regulations, N.J.A.C. 5:93-8.1, or 1.5 percent of EAV as COAH authorized in its 2008 Third Round regulations, N.J.A.C. 5:97-8.3(c)?

The trial judge's determination of the standards that will apply to enable a municipality to determine its obligations and to identify the means by which it can satisfy its obligations does not end the process. To the contrary, it only begins the compliance process. If trial judges are to function as COAH, then the trial judges, like COAH, must determine the standards before they can reasonably expect municipalities to fashion affordable housing plans that meet them.

The proposed regulations, if adopted, would give municipalities six months to put together a plan. See, N.J.A.C. 5:98-16.1.

In conclusion, requiring trial judges to decide Mount Laurel cases in lieu of COAH will: (1) impose enormous burdens on those judges as they would have to make numerous policy judgments best handled by the agency with primary jurisdiction; and (2) result in a waste of expenditures of resources by municipalities.

II. IN THE EVENT THAT THE COURT DETERMINES TO RETURN EXCLUSIONARY ZONING LITIGATION TO THE LAW DIVISION, THE COURT SHOULD AUTHORIZE AND DIRECT THE USE OF THE IMMUNITY MECHANISM WHICH HAS BEEN ROUTINELY USED BY MOUNT LAUREL TRIAL JUDGES TO FACILITATE VOLUNTARY MUNICIPAL COMPLIANCE

Prior to the adoption of the FHA in 1985, Judge Serpentelli, one of the original three Mount Laurel judges, established an immunity procedure to be utilized in Mount Laurel litigation. The immunity procedure is described in J.W. Field v. Twp. of Franklin, 204 N.J. Super. 445, 456-458 (Law Div. 1985). This Court favorably referenced the immunity procedure in Hills Dev. Co. v. Bernards Twp., 103 N.J. 1, 29-30 (1986) when it noted that this innovative procedure had been used in the case involving Bernards Township, and praised the trial judges for developing "innovative refinement of techniques for the process of litigation [which] has given credibility to the implementation of the Mount Laurel doctrine". Id. at 64.

To summarize, after balancing all seven "overarching policy objectives" established by the Court in Mount Laurel II, Judge Serpentelli in J.W. Field conferred immunity from Mount Laurel lawsuits upon any municipality that committed to comply voluntarily.

More specifically, if a municipality had been sued, the immunity would insulate the municipality from subsequent suits. If the municipality had not been sued, the immunity would empower the municipality to comply free from any Mount Laurel lawsuits. J.W. Field, 204 N.J. Super. at 456.

The Legislature, too, favored voluntary compliance and thus structured the FHA to require the exhaustion of administrative remedies through the administrative procedure created by the FHA and "not litigation" before filing a builder's remedy lawsuit in court. See, N.J.S.A. 52:27D-303, 309 and 316. As such, in the event the Court determines to excise N.J.S.A. 40:55D-313, thereby eliminating the substantive certification process and returning exclusionary zoning litigation to the Law Division, the Court should authorize and direct the use of the immunity mechanism which has routinely been used by Mount Laurel trial judges to facilitate voluntary municipal compliance for almost 30 years.

The purpose of the builder's remedy provides strong support for providing municipalities with immunity from builder's remedy lawsuits as they achieve compliance through the trial courts. In this regard, it must be noted that this Court created the builder's remedy solely to provide an incentive for developers to sue municipalities unwilling or unable to comply. See Toll Bros. v. Twp. of West Windsor, 173 N.J. 502, 562 (2002) ("The purpose of the remedy, then, was to accomplish what a municipality might otherwise have been unable or unwilling to do itself. . . ."). Because each of the 314

municipalities under COAH's jurisdiction have already demonstrated their *willingness* to comply; and indeed would have been *able* to do so but for COAH's inability to process their petitions; there is no good reason to expose 314 municipalities to developers pursuing builder's remedy lawsuits.

In addition to the above, there are other aspects of excising N.J.S.A. 40:55D-313, thereby eliminating the substantive certification process and returning exclusionary zoning litigation to the Law Division, that must be considered in determining how much time to provide for municipal compliance.

First, as touched on in Point I above, municipalities will have to devote time and resources to litigating the full panoply of issues that COAH has had to make judgments on including but not limited to (i) determining the precise obligation of each municipality; (ii) identifying the menu of compliance techniques available to each municipality; (iii) deciding the circumstances where rental bonuses, adjustments age restricted caps apply. The trial judge would then have to review the municipal affordable housing plan, mediate and ultimately adjudicate the case. As set forth above, the trial judges will have to establish these complicated parameters without the benefit of the institutional expertise of COAH. Simply put, unless this Court allows sufficient time for municipalities to complete this endeavor, the return of affordable housing disputes to the Law Division will be a formula for chaos, delay and the enormous divergence of public resources into litigation.

Once trial judges determine the standards with which municipalities must comply, they will need to give municipalities a reasonable period to comply after the court formally established the municipal fair share. To put this in perspective, COAH gave municipalities five months to comply with the substantive regulations it adopted in round one. See N.J.A.C. 5:91-3.1(a) (requiring a petition within five months of the effective date of the first round regulations). COAH gave municipalities twelve months to comply with the first iteration of Round 3 regulations. N.J.A.C. 5:95-3.8 (wherein the regulations became effective on December 20, 2004, and the deadline for filing third Round 3 was December 20, 2005). COAH gave municipalities six months to comply with its proposed regulations. N.J.A.C. 5:98-16.1. It makes no sense for trial judges to provide municipalities with inadequate time to prepare plans to address the judicially-assigned obligations.

Further, affordable housing plans often evolve during the course of a petition. COAH understood this reality in the past and, as noted above, provided municipalities at least three opportunities to amend their plans before considering requiring the municipality to provide the developer site-specific relief. N.J.A.C. 5:96-3.4(c). The proposed regulations give municipalities even greater freedom to refine their plans until such time as COAH is ready to certify them. See N.J.A.C. 5:98-3.4 and 8.5 (revealing that COAH no longer imposes *any* limit to the number of amended plans, which provides municipalities maximum flexibility to revise their plans due to

changed circumstances). Trial judges should give municipalities no lesser protections and flexibility complying in Court than they would have at COAH.

Finally, it is important to understand that the immunity procedure Judge Serpentelli devised in the wake of Mount Laurel II protected the right of would be builder's remedy plaintiffs to object to any affordable housing plan the municipality formulates. Thus, just as the COAH process preserves the ability of developers to object while preventing them from litigating municipalities into submission, immunity can and should be used to place developers in the same posture in a court proceeding. Said another way, municipalities should not lose the protections conferred by the FHA because of actions or inactions of COAH.

The method of obtaining immunity would be through a municipality filing a declaratory judgment action. And, such an action would not be limited to being brought pursuant to N.J.S.A. 52:27D-313a but could also be brought pursuant to N.J.S.A. 2A:16-50 to 62. In fact, the Four Towns note that at the time Judge Serpentelli developed the immunity procedure, N.J.S.A. 52:27D-313a had not been adopted.

To enable COAH municipalities to pursue declaratory relief with the same protections afforded by the FHA, we propose that the following procedure be authorized and directed:

1. The Court should order that any of the 314 municipalities presently under COAH's jurisdiction shall have a 60-day opportunity to seek immunity in accordance with the longstanding procedures described in J.W. Field.

2. The Court should order that municipalities and their planning boards are entitled to immunity from any Mount Laurel lawsuits during the 60-day period.

3. The Court should order that, if a municipality files its declaratory action within this 60-day period, the immunity shall remain in full force and effect while the trial judge establishes the affordable housing obligation and standards with which the municipality must comply and while the municipality complies with those standards.

4. The Court should order that, if a municipality files its declaratory action after the 60-day period, it should be entitled to regain immunity from any entity that did not file a Mount Laurel lawsuit in the interim.

The Four Towns acknowledge that developers express universal disdain for immunity orders because such orders prevent them from securing the profits waiting at the end of a successful builder's remedy lawsuit. Rather than giving credence to any claim of abuse, this Court should allow trial judges to evaluate any such claim based on the facts and circumstances of each case. A trial judge should rescind an immunity order only under the most egregious circumstances. Moreover, divesting a municipality of immunity would force it to divert its finite resources from compliance to fending off one or more developers vigorously pursuing a builder's remedy in their efforts to achieve maximum profit. Clearly, it is in the public interest to avoid that situation wherever possible.

CONCLUSION

In conclusion, the Four Towns respectfully request that the Court deny FSHC's motion and order that COAH complete the rule making

process which it started in accordance with this Court's March 14, 2014 Order.

In the event, however, that the Court determines to return exclusionary zoning litigation to the Law Division, the Four Towns respectfully request that the Court authorize and direct the use of the immunity mechanism which was routinely used by Mount Laurel trial judges to facilitate voluntary municipal compliance.

Specifically, the Four Towns respectfully request that the Court authorize and direct the following procedure:

1. The Court should order that any of the 314 municipalities presently under COAH's jurisdiction shall have a 60-day opportunity to seek immunity in accordance with the longstanding procedures described in J.W. Field.

2. The Court should order that municipalities and their planning boards are entitled to immunity from any Mount Laurel lawsuits during the 60-day period.

3. The Court should order that, if a municipality files its declaratory action within this 60-day period, the immunity shall remain in full force and effect while the trial judge establishes the affordable housing obligation and standards with which the municipality must comply and while the municipality complies with those standards.

4. The Court should order that, if a municipality files its declaratory action after the 60-day period, it should be entitled to regain immunity from any entity that did not file a Mount Laurel lawsuit in the interim.

Respectfully submitted,

STICKEL, KOENIG, SULLIVAN & DRILL, LLC

By: Jonathan E. Drill
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