

**RESOLUTION**  
of the  
**BOROUGH OF NEW PROVIDENCE**  
Resolution No 2015-236

Council Meeting Date: 06-22-2015

Date Adopted: 06-22-2105

TITLE: RESOLUTION AUTHORIZING THE PARTICIPATION OF THE BOROUGH OF NEW PROVIDENCE IN THE PREPARATION OF THE BURCHELL FAIR SHARE ANALYSIS

Councilperson Galluccio submitted the following resolution, which was duly seconded by Councilperson Muñoz.

WHEREAS, the Borough of New Providence has filed or anticipates filing a Declaratory Judgment Action in the Superior Court of New Jersey, Union County, in furtherance of the Supreme Court's March 10, 2015 decision captioned, In re: Adoption of N.J.A.C. 5:96 & 5:97 by N.J. Council on Affordable Housing, 221 N.J. 1 (2015) (the "Supreme Court Decision"); and

WHEREAS, the Fair Share Housing Center ("FSHC"), through the services of David Kinsey, has prepared what it considers to be the statewide fair share numbers (the "FSHC Number) for use by the 15 vicinage Mt. Laurel Judges to calculate a municipality's affordable housing obligation pursuant to the Supreme Court Decision; and

WHEREAS, the Borough of New Providence desires to participate in the preparation of a statewide fair share analysis to be undertaken by Rutgers, the State University of New Jersey ("Rutgers"), through Dr. Robert W. Burchell, Principal Investigator, and various other experts employed by Rutgers in order to establish a rational and reasonable methodology (the "Burchell Fair Share Analysis") for determination of a municipality's obligation to provide a realistic opportunity through its land use ordinances for its fair share of the region's affordable housing needs in accordance with the Mount Laurel Doctrine as set forth in In the Matter of the Adoption of N.J.A.C. 5:96 and 5:97 by the New Jersey Council on Affordable Housing, 221 N.J. 1 (2015) ("Decision"), and prior decisions of the Courts of New Jersey and the Fair Housing Act, N.J.S.A. 52:27D-301, et seq.; and

WHEREAS, Rutgers, utilizing Dr. Burchell as the principal investigator and author has agreed to prepare the Burchell Fair Share Analysis within 90 days of being retained to establish his view of the proper way to determine each municipality's fair share obligation; and

WHEREAS, Dr. Burchell estimates the cost to prepare the initial Burchell Fair Share Analysis will be \$70,000; and

WHEREAS, it is anticipated that there will be a need for Dr. Burchell to analyze any challenges to his conclusions and prepare a rebuttal report to said challenges which is not included in the \$70,000; and

WHEREAS, it is anticipated that if each municipality contributes \$2,000, there will be sufficient monies to pay the cost to prepare the initial Burchell Fair Share Analysis, to analyze any challenges to the Initial Fair Share Analysis and to prepare a Rebuttal Report, given the number of municipalities that have expressed an interest in retaining Burchell; and

WHEREAS, a Municipal Shared Services Defense Agreement (hereinafter "MSSDA") has been prepared a) so that monies can be collected to enter into an agreement with Rutgers (hereinafter "the Rutgers Agreement"), and so that Burchell, along with various other experts from Rutgers can perform the tasks described above, and b) so that the rights and responsibilities of each municipal wishing to sign the Agreement to retain Rutgers are defined; and

WHEREAS, the MSSDA provides that the Law Offices of Jeffrey R. Surenian & Associates, LLC ("Surenian") will serve as the administrative entity to sign the Rutgers Agreement on behalf of the municipalities that signed the MSSDA and paid the \$2,000 fee; and

WHEREAS, it is imperative, given the time constraints, for municipalities wishing to retain Dr. Burchell to sign the MSSDA and pay the \$2,000 fee so that Burchell can conduct the necessary analysis; and

WHEREAS, notwithstanding the foregoing, it is possible that the MSSDA may need to be changed as a result of ongoing negotiations with the Rutgers Agreement following execution of the MSSDA, and the payment of the \$2,000 fee; and

WHEREAS, in such an event, any member that objects to the changes Rutgers may require shall have the opportunity to relinquish membership in the Municipal Group and to receive back the \$2,000 payment as more specifically set forth in the MSSDA;

NOW, THEREFORE, BE IT RESOLVED, by the Council of the Borough of New Providence as follows:

1. The terms and conditions of the MSSDA attached hereto are hereby approved, ratified and confirmed;
2. The amount of \$2,000 is hereby authorized to be expended by the Borough of New Providence for Rutgers, through Dr. Robert Burchell, Principal Investigator, to prepare the Burchell Fair Share Analysis;
3. The Mayor of the Borough of New Providence be and is hereby authorized to execute the aforesaid MSSDA to memorialize the participation of the Borough of New Providence in the preparation of the Burchell Fair Share Analysis, and to take any and all actions reasonably required to effectuate said Agreement;
4. The Mayor of the Borough of New Providence hereby authorizes Jeffrey R. Surenian, Esq. to execute on behalf of the Borough of New Providence the Research Agreement with Rutgers to initiate and complete the Burchell Fair Share Analysis, and to do such other actions to effectuate the purposes of said Research Agreement;
5. If further changes to the MSSDA are needed as a result of finalizing the Rutgers Agreement, within ten (10) days of notification by Surenian of the changes, the Mayor of the Borough of New Providence will inform Surenian if it objects to the changes, and wishes to withdraw from the Municipal Group and obtain a refund of the \$2,000 paid.
6. This Resolution shall take effect immediately.

APPROVED, this 22<sup>nd</sup> day of June, 2015.

RECORD OF VOTE

	AYE	NAY	ABSENT	NOT VOTING
GALLUCCIO	X			
GENNARO	X			
KAPNER	X			
MADDEN	X			
MUÑOZ	X			
ROBINSON	X			
MORGAN			TO BREAK COUNCIL TIE VOTE	

I hereby certify that the above resolution was adopted at a meeting of the Borough Council held on the 22<sup>nd</sup> day of June, 2015.

Wendi B. Barry, Borough Clerk

## MUNICIPAL SHARED SERVICES DEFENSE AGREEMENT

This Agreement is made as of this \_\_ day of \_\_\_\_\_, 2015, between and among the Members (the "Members") of the Municipal Group (collectively, the "MG"), whose representatives have executed this Shared Services Defense Agreement ("Agreement"). A list of the Members is attached hereto as Appendix A. In consultation with their legal advisors, the Members of the MG are considering, have or will file a Declaratory Judgment Action in accordance with In the Matter of the Adoption of N.J.A.C. 5:96 and 5:97 by the New Jersey Council on Affordable Housing, 221 N.J. 1 (2015) ("Decision") or may otherwise be engaged in litigation (hereinafter referred to as "Litigation") for a Judgment of Compliance and Repose and, among other forms of relief, a determination of the municipality's obligation to provide a realistic opportunity for its fair share of the region's affordable housing needs in accordance with the Mount Laurel Doctrine as set forth in the Decision and prior decisions of the Courts of New Jersey, and the Fair Housing Act, N.J.S.A. 52:27D-301 et. seq. (Collectively referred to as "Housing Obligations")

WHEREAS, the Members wish to cooperate collectively to obtain information regarding the development of Housing Obligations that may be used in planning and in the Litigation and to enter into an agreement with Rutgers University for that purpose

NOW, THEREFORE, in consideration of the agreements and obligations listed below, the Members hereby agree as follows:

1. Purpose.

The purpose of this Agreement is to control the manner and the means by which the Members:

(a) participate in this Agreement;

(b) collectively retain the State University of New Jersey ("Rutgers"), which employs Dr. Robert Burchell and various other Rutgers experts with whom he will work (hereinafter collectively "Burchell");

(c) collectively work with Burchell to conduct an analysis and report (hereinafter "Burchell Report") of the housing need for each region and the allocation of that need to the individual municipalities in the region;

(d) may elect, at the exclusive expense of any Member or group of Members, to rely upon and present Burchell as a witness in the Litigation, including for any mediation, Alternative Dispute Resolution or other proceeding involving a determination of a Member's Affordable Housing Obligation;

(e) raise funds to pay for activities authorized by the MG ("Shared Costs") as described herein at Section 5 hereof; and

(f) engage in such other activities related to and in accordance with the purposes of this Agreement.

Nothing in this Agreement limits the right of any Member to take such action as deemed necessary to protect its own interests, or to present its own analysis of its Housing Obligation and rely upon credits, vacant land analysis adjustments, and such other factors and/or crediting mechanisms that may be necessary and appropriate to properly adjust its Housing Obligation.

## 2. Meetings.

Upon remitting the initial \$2,000 payment set forth in paragraph 5 and execution of this Agreement, each member of the MG shall provide Surenian with the email address of counsel to whom all notices under this Agreement shall be provided if it has not done so heretofore (hereinafter “designated counsel”). In the event the municipality fails to supply the name of the designated counsel, the municipal attorney shall serve as the designated counsel unless the municipality informs Surenian at [JRS@Surenian.com](mailto:JRS@Surenian.com) that it wishes another attorney to serve as designated counsel and Surenian confirms receipt of that request. Upon 5 calendar days notice by email to designated counsel, meetings of the MG shall be conducted with Counsel for Members to determine actions to be taken by and on behalf of the MG in furtherance of their common interests in the Litigation. All meetings shall be scheduled, to the extent reasonably possible at Rutgers University so that the greatest number of available counsel for Members may participate. In the event of such a meeting, each municipality shall have one vote and a majority of those present may take action on behalf of the MG

### 3. Retention of Burchell.

a. The administrative retention of Burchell through a Research Agreement with Rutgers to conduct an analysis of Housing Obligations shall be made by Jeffrey R. Surenian and Associates, LLC (“Surenian”) on behalf of the MG. Surenian shall monitor and track the progress of Dr. Burchell and shall confer with the MG as to the development of his analysis and report and other issues; provided, however, that nothing herein contained shall mean that Surenian is acting as legal counsel to the Members unless a Member has specifically authorized same by separate action

b. In the absence or unavailability of Surenian, Jonathan E. Drill, Esq. (“Drill”) shall serve in this capacity and in such other of Surenian’s capacities as provided by this Agreement; provided, however, that nothing herein contained shall mean that Drill is acting as legal counsel to the Members unless a Member has specifically authorized same by separate action.

c. To fulfill the responsibilities set forth in this paragraph, Surenian or Drill, as the case may be, except as is otherwise precluded under Paragraph 15 of this Agreement (i) shall pass on to Burchell any written communications forwarded to them by designated counsel as Burchell prepares his draft report (ii) shall furnish the MG a draft of the report prepared by Burchell for their input; (iii) shall furnish Burchell the comments on the draft report of the MG for his consideration; and (iv) shall furnish each Member the final Burchell Report. Members shall hold Surenian and Drill harmless for performing the tasks set forth in this agreement.

d. To facilitate the administration of this agreement, all materials shall be submitted to Surenian or Drill, as the case may be, electronically, and Surenian or Drill, as the case may be, shall be free to furnish all submissions referenced herein electronically.

#### 4. Authorization to Sign.

Surenian for Jeffrey R. Surenian and Associates is hereby authorized and directed to sign the Agreement with Rutgers University on behalf of the Members.

#### 5. Shared Costs.

a. All assessments for Shared Costs shall be solely to pay Rutgers for Burchell. Each Member shall be responsible for its per capita share and shall pay a \$2,000 no later than June 30, 2015.

b. It is anticipated that said fee shall suffice (i) to pay \$70,000 to prepare the Burchell Report, (ii) to pay for Burchell to analyze challenges to his report and (iii) to pay for the preparation of a rebuttal report to said challenges.

c. If the collection of this \$2,000 fee is insufficient to cover these costs, each Member shall pay an additional fee to cover said costs on a per capita basis.

d. If the aggregate fees collected exceed the costs for the aforementioned activities, each member of the MG shall be entitled to a per capita rebate of the remaining monies.

e. This \$2,000 fee is nonrefundable unless the sum of the \$2,000 fees collected exceed the cost of the tasks listed in this paragraph in which case each Member who contributed shall receive a per capita rebate.

f. A prerequisite to becoming a member is (a) the execution of this agreement, and (b) the payment of this \$2,000 fee.

#### 6. Expenses Not Covered By This Agreement.

This agreement is just for the cost to perform the services set forth in paragraph 5. Each member of the MG shall be responsible for any other expenses they may incur and the responsibility to pay those expenses shall not be the responsibility of the MG. Each Member shall be free to retain Burchell individually to serve as an expert in its case and shall be responsible individually for the expenses associated with Burchell serving as the municipality's expert witness at a rate of \$231 per hour to be paid to Rutgers University pursuant to a separately negotiated agreement

#### 7. Liaison Counsel or Committee.

The MG may select one or more counsel to coordinate with Surenian and Burchell to consult on the preparation and dissemination of the Burchell analysis and/or report, manage the collection and maintaining of funds, payment of invoices, and such other actions as may be necessary to effectuate the purposes of this agreement. The Members shall not be responsible for payment of the fees for Surenian or any counsel; each counsel will be paid by their respective client or clients.

#### 8. Holding of Funds.

The MG hereby authorizes Surenian to hold all Shared Cost monies collected in connection with this Agreement in escrow in the Attorney Trust Account of Jeffrey R. Surenian and Associates, LLC. Surenian is authorized to disburse such funds as they are received from the Members of the MG in accordance with the terms of this Agreement and the engagement contract between Surenian, on behalf of the MG, and Rutgers.

#### 9. Confidentiality and Use of Information.

(a) From time to time, Members or their counsel, and/or Burchell and/or other consultants or experts, including those independently retained by any Member may elect to disclose or transmit to each other such information as the Members may deem appropriate for the purpose of developing any common issues, claims, defenses, legal positions or other matters relating to the Litigation and for coordinating such other activities as may be necessary to carry out the purposes of this Agreement ("Shared Information"). Shared Information may include documents and information that are protected by attorney-client privilege, attorney work product doctrine, or other privilege or protection (hereinafter "Protected Materials"). The Members agree that any

sharing of Protected Materials among the Members and their counsel pursuant to this Agreement is not intended to and shall not constitute a waiver of any privilege or protection that otherwise would apply to the Protected Materials.

(b) Each Member agrees that all Shared Information, other than that described in Section (e) below, shall be held in strict confidence by the receiving Member, and by all persons to whom such confidential documents and information are revealed by the receiving Member, and that such documents and information shall be used by the receiving Member and any other receiving party only in connection with issues, claims, defenses, legal positions or other matters relating to the Litigation and for conducting such other activities as may be necessary to carry out the purposes of this Agreement. The Members intend by this Section to protect from disclosure all information and documents shared by any Members with each other and Burchell and other consultants or experts of individual members of the MG to the greatest extent permitted by law, regardless of whether the sharing occurred before execution of this Agreement and regardless of whether any writing or document is marked "Confidential."

(c) Sharing of Protected Materials between a Member and its governing body, zoning and/or planning boards, housing agency or other municipal board, agency or entity charged with zoning, planning or housing, pursuant to attorney-client privileged communications, shall not constitute a violation of the terms of this Agreement and by the acceptance of such Protected Material those recipients shall be bound by the terms of this Paragraph 9 to the extent applicable. Nothing in this Agreement shall preclude any Member from providing Shared Information with any independent expert or consultant that it has retained, who shall be bound by these same confidentiality terms.

(d) No Member shall provide any Shared Information, including but not limited to any communications with Burchell or any draft reports from Burchell with any counsel, planner, engineer or other professional consultant (collectively “Professional Consultants”) to that Member if said Professional Consultant also represents any builder or developer who is currently engaged in exclusionary zoning litigation or is contemplating initiating exclusionary zoning litigation or the New Jersey Builder’s Association or similar or related entities. To facilitate the implementation of this provision term, the expert or consultant with whom the designated attorney may consult shall be required to sign a statement or acknowledgment to that effect in the form attached hereto as Appendix B.

(e) The confidentiality obligations of the Members shall continue in full force and effect without regard to whether: (i) this Agreement is terminated, or (ii) any action arising out of the MG is terminated by final judgment or settlement; provided however, that the provisions of this Section shall not apply to information that is now, or hereafter becomes, public knowledge without violation of this Agreement, or which is sought and obtained from a Member pursuant to applicable discovery procedures and not otherwise protected from disclosure.

(f) The terms of this Section 9 shall survive the termination of this Agreement or the withdrawal of any Member.

#### 10. Communications.

All communications shall be through designated counsel and no member may contact Burchell directly, but must communicate through their designated counsel to Surenian or Drill as the case may be pursuant to paragraph 3. Any communication to Surenian or Drill from anyone other than designated counsel shall not be considered.

11. Common Interest.

As the Members have a common interest in the development of a uniform approach to certain aspects of the Litigation by engaging Burchell, each Member agrees that if any Member withdraws from MG and this Agreement, or elects not to rely upon any report or testimony of Burchell, that Member agrees that it shall raise no objection at trial or in any other proceeding to the continued presentation by any other Member of any report or testimony of Burchell, on the basis of the relationship that has been created between such Member and Burchell or under the terms of this Agreement. The terms of this Section shall survive the termination of this Agreement or the withdrawal of any Member.

12. No Adoptive Admission:

No Member shall be bound by any findings or conclusions of any report by Burchell until such time as the Burchell or such other common expert's report has been approved by such Member and is formally adopted by the Member within the Litigation. The terms of this Section shall survive the termination of this Agreement or the withdrawal of any Member.

13. New Members.

Any municipality that wishes to become a Member subsequent to the effective date of this Agreement may do so only by (a) signing this agreement, (b) paying the initial \$2,000 fee referenced in paragraph 2. a. and (c) paying *ab initio* any additional assessments which such Member would have been obligated to pay.

14. Denial of Admissions.

This Agreement shall not constitute, nor be interpreted, construed or used as evidence of, (a) any admission of responsibility, obligation, law or fact, or the failure of any Member to have met its Housing Obligation (b) a waiver of any right, defense, theory or position, or (c) an estoppel against any Member by Members as among themselves or by any other person not a Member; provided, however, that this Agreement can be used to enforce its terms..

15. Conflict of Interest.

If the firm of the attorney representing the municipality also represents (i) the New Jersey Builder's Association; (ii) a developer seeking a builder's remedy or is presently contemplating bringing a builder's remedy action, the municipality may become part of this consortium subject to the following limitations. Said attorney shall not (i) be made privy to any of the information presented to Dr. Burchell; (ii) have the right to make submissions to Dr. Burchell; and (iii) be entitled to attend any meetings with Dr. Burchell or the MG. Nothing in this paragraph is intended nor shall be interpreted to waive the Rules of Professional Conduct and/or the Local Government Ethics Law (N.J.S.A. 40A:9-22.1 et seq.)

16. Effective Date.

This Agreement shall not be effective for any individual Member until that municipality (a) executes this agreement and furnishes the executed agreement to Surenian and (b) pays Surenian of the \$2,000 payment referenced in paragraph 5 for deposit in the Attorney Trust Account of Surenian so that the bills of Rutgers may be paid.

17. Subsequent Agreement.

a. The Members may hereafter agree to engage in activities in addition to those set forth in Sections l(b) through l(f) hereof. Any such agreement, and any communications with respect thereto or in connection therewith, shall be protected under and pursuant to Section 9 hereof. Any such agreement shall be binding only upon the signatories thereto.

b. Since the Agreement between Rutgers and the MG has not yet been consummated, there is a possibility that changes to this agreement may be necessary. In such an event, Surenian shall notify designated counsel of how this agreement will change in which case, designated counsel will have ten business days to rescind membership of his or her client in which case the Member shall be entitled to a rebate.

18. Termination.

This Agreement shall terminate upon the execution of a writing signed by all Members which have not withdrawn from, been removed from, or otherwise ceased to participate in this Agreement.

19. Applicable Law.

This Agreement shall be interpreted under the laws of the State of New Jersey.

20. Severability.

If any provision of this Agreement is deemed invalid or unenforceable, the balance of this Agreement shall remain in full force and effect.

21. Counterparts.

This Agreement may be executed in several counterparts, each of which shall be deemed an original but collectively shall constitute but one and the same document provided that each Member receives a copy of signature page(s) signed by all other Members. Signatures sent electronically shall be deemed to be originals.

IN WITNESS WHEREOF, the Members hereto, which may be by and through their appointed counsel, enter into this Agreement. Each person signing this Agreement represents and warrants that he or she has been duly authorized to enter into this Agreement by the company or entity on whose behalf it is indicated that the person is signing.

**Appendix A**  
Signatory Parties

## Appendix B

### Agreement to Maintain Confidentiality: Attorney-Client/Attorney Work Product

The undersigned has been retained by [MUNICIPALITY] as a consultant and/or expert with regard to litigation pending in the Superior Court of \_\_\_\_\_ County, entitled \_\_\_\_\_ . I acknowledge that certain information and documentation will be provided to me by counsel for [MUNICIPALITY] which shall be subject to the Attorney-Client privilege and/or the Attorney Work Product Doctrine, (“Protected Materials”) and such other available privileges. I understand and agree that such Protected Materials shall be held in strict confidence by me and by all persons to who work with me in developing my opinions, reports and providing testimony in this matter and shall not be disclosed to any other person or party.

Signed \_\_\_\_\_

Date \_\_\_\_\_

**Signature Page to  
Municipal Shared Services Defense Agreement**  
[MUNICIPALITY], \_\_\_\_\_ County, New Jersey

ATTEST:

[MUNICIPALITY]

\_\_\_\_\_  
, Township Clerk

By: \_\_\_\_\_

Date: \_\_\_\_\_