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Township of Verona

IN THE MATTER OF TOWNSHIP OF
VERONA, a municipal corporation of the
State of New Jersey

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO.: AM-573-18

CIVIL ACTION

ON APPEAL FROM:

SUPERIOR COURT OF NEW JERSEY
ESSEX COUNTY: LAW DIVISION

Chancery Division Docket No.:
BER-L-4773-15

SAT BELOW:
HON. ROBERT H. GARDNER, J.S.C.

**PETITIONER/RESPONDENT'S BRIEF IN OPPOSITION TO MOTION FOR LEAVE
TO APPEAL**

On the Brief: Brian T. Giblin, Sr., Esq.
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PRELIMINARY STATEMENT

Defendant/Intervenors Bobcar Corporation, Neil Joy Associates, and Forsons Partners, LLC's (together referred to as "Bobcar") has filed a Motion for Leave to Appeal the denial of the Trial Court's denial to revoke Verona's temporary immunity. In support of its Motion, Bobcar alleges that, i) It is in the interest of justice to grant the Bobcar Motion for leave to appeal and ii) The Trial Court abused its discretion by denying Bobcar's Motion to revoke the Township of Verona's ("Verona") temporary immunity.

Bobcar's argument is primarily based upon allegations that Verona, in bad faith, has not made any progress towards compliance with its COAH obligation, in that; i) Verona has failed to submit a compliance plan to the court and ii) Verona has made no progress towards compliance.

The interest of justice will not be served should Bobcar be granted leave to appeal. While it is true that Verona has not submitted a compliance plan yet, its failure to do so is based not upon a disregard of its obligation to provide a realistic opportunity for low and moderate income housing but rather because of its desire to achieve compliance in the way that is most beneficial for all of its residents. To that end, should Bobcar be allowed leave to appeal, it will frustrate the substantial actions taken for the Township to be in compliance, and potentially jeopardize the settlements already reached with the other intervenors.

Further, the Trial Court did not abuse its discretion by extending Verona's temporary immunity. Verona submits that it is obligated to craft the best and most advantageous settlement for its residents while still complying with its constitutional obligations and not merely try to achieve a settlement as quickly as possible. There are numerous other municipalities which have not yet settled with intervenors or the Fair Share Housing Center ("FSHC") regarding their Fair Share obligations, and have yet to submit compliance plans or change their Zoning Ordinances.

Verona's conduct is specifically permitted by the Supreme Court during negotiations to determine Fair Share Housing Obligations.

In the case at bar, Verona negotiated with all three defendant/intervenors, Spectrum, Poekel, and Bobcar, in good faith, and through the process of negotiating it was determined Verona could meet its obligation with the properties of Poekel and Spectrum together with the purchase and development of a site for one hundred percent (100%) affordable units. Settlement Agreements have already been entered into by the Township with both of the intervenors whose property is included in Verona's compliance plan. Verona has negotiated for, purchased, paid for and closed title on property which will be devoted to a one hundred percent (100%) affordable housing development and is currently negotiating with developers to build it. The area where the property is located has been designated as an area in need of redevelopment.

In sum, Verona has made great strides towards achieving compliance and has chosen to do so without including the property of the appealing intervenors. It is well within the authority and discretion of Verona's governing body to do so. Bobcar's dissatisfaction with Verona's decision on how to meet its low and moderate income housing obligation without the use of their site does not warrant revoking Verona's temporary immunity or granting leave to appeal the Court's denial of same.

PROCEDURAL HISTORY

In the interest of judicial economy, Verona hereby adopts the Procedural History only as outlined by Bobcar in its moving papers. A short supplementation of relevant facts to those set forth by Bobcar follows.

1. The Township and Poekel Properties, an Intervenor, agreed to the development of Poekel's property and the construction of ten (10) low and moderate income units. That Agreement is fully executed. [BDa434]
2. On or about January 2, 2019, the Township entered into that certain Purchase and Sale Agreement with Verona Warehousing Company (“VWC”) and R & J Realty Company (“R&J”; together with VWC, the “Sellers”) for the acquisition of the Cameco Property for a purchase price of Two Million Eight Hundred Fifty Thousand Dollars (\$2,850,000.00). [BDa435]
3. On February 11, 2019, by Resolution No. 2019-55, the Township Council, upon the Planning Board’s recommendation, designated the Proposed Area which includes the Poekel, Cameco and County property (discussed below) as a non-condemnation redevelopment area (the “Redevelopment Area”) in accordance with the Redevelopment Law. [BDa435]
4. On March 13, 2019, the Township finalized the acquisition with the Sellers and closed title on the Cameco Property. [BDa436]
5. On January 18, 2019, the Township and CHA met to discuss the Township’s requirements on the Cameco Property, which include a minimum of one hundred low and moderate rental apartments. [BDa436]
6. CHA has reviewed the site and has determined that it can develop one hundred units as the site is currently configured. [BDa436]

LEGAL ARGUMENT
LEGAL STANDARD

Generally, an appeal as of right may be taken to the Appellate Division only from a final judgment. R. 2:2-3. Under New Jersey Court Rules, parties do not have a right to appeal an interlocutory order. *In re Pa. R.R. Co.*, 34 *N.J.Super.* 103, 107–08, 111 *A.2d* 509 (App.Div.1955), *aff'd*, 20 *N.J.* 398, 120 *A.2d* 94 (1956); *see R. 2:2–3*. Rather, leave to file an interlocutory appeal of a trial court's order is permitted only “in the interest of justice.” R. 2:2–4. A similar standard applies to this Court's review of interlocutory orders. *See R. 2:2–2(b)* (providing that this Court may take appeals from interlocutory orders only to “prevent irreparable injury”).

Interlocutory appellate review runs counter to a judicial policy that favors an “uninterrupted proceeding at the trial level with a single and complete review.” *In re Pennsylvania R.R.*, 20 *N.J.* 398, 404, 120 *A.2d* 94 (1956); *accord* Clifford, “Civil Interlocutory Appellate Review in New Jersey,” 47 *Law & Contemp.Probs.* 87, 97 (1984) (The court may be thought to harbor an “inhospitable attitude toward most interlocutory appeals.”). Courts have held that “piecemeal [appellate] reviews, ordinarily, are [an] anathema to our practice.” *S.N. Golden Estates, Inc. v. Continental Cas. Co.*, 317 *N.J. Super.* 82, 87 (App. Div. 1998).

The rationale that supports this stringent standard may be found in our general policy against piecemeal review of trial-level proceedings. *See State v. Reldan*, 100 *N.J.* 187, 205, 495 *A.2d* 76 (1985). As our Appellate Division has recognized, an interlocutory appeal is not appropriate to “correct minor injustices....” *Romano v. Maglio*, 41 *N.J.Super.* 561, 567, 125 *A.2d* 523 (App.Div.), *certif. denied*, 22 *N.J.* 574, 126 *A.2d* 910 (1956), *cert. denied*, 353 *U.S.* 923, 77 *S.Ct.* 682, 1 *L.Ed.2d* 720 (1957). Rather, when leave is granted, it is because there is the

possibility of “some grave damage or injustice” resulting from the trial court's order. *Id.* at 568, 125 A.2d 523.

To ensure that interlocutory review would be limited to those exceptional cases warranting appellate intervention, the sole discretion to permit an interlocutory appeal has been lodged with the appellate courts. *Brundage v. Estate of Carambio*, 195 N.J. 575, 599–600, 951 A.2d 947 (2008). Indeed, the power to grant leave is "exercised only sparingly." *State v. Reldan*, 100 N.J. 187, 205 (1985).

POINT I
THE INTERESTS OF JUSTICE WOULD NOT BE SERVED SHOULD BOBCAR BE GRANTED LEAVE TO APPEAL

Allowing Bobcar to appeal the Trial Court's interlocutory Order extending Verona's temporary immunity serves only to frustrate the interests of justice.

The grant of leave to appeal an interlocutory order is itself discretionary, R. 2:2-4; it is customarily exercised only sparingly, and only when there is a possible of "some grave damage or injustice" so that an appeal should be granted in the "interest of justice."

First, the grant of leave to appeal this case is entirely unwarranted given the procedural requirements of this type of case. Even if Verona were to settle with all of the intervenors and the Fair Share Housing Center, it would not end the litigation. Instead, the court would still be required to conduct a fairness hearing and "A trial judge should approve a settlement of Mount Laurel litigation if a fairness hearing, conducted on appropriate notice, demonstrates "that the settlement adequately protects the interest of lower-income persons on whose behalf the affordable units proposed by the settlement are to be built." *East/West Venture v. Borough of Fore Lee*, 286 N.J.Super. 311, 328, 669 A.2d 260 (App. Div. 1996).

The Fairness Hearing acts a de facto "safeguard" to ensure that the Court is satisfied with the plan set forth. The proper time for Bobcar to object to any proposed plan would be at the Fairness Hearing.

Second, Bobcar's repeated reliance on the Supreme Court stating that municipalities be provided with "no more than five months" to demonstrate compliance is antiquated. While it is true the current matter has been pending for four (4) years, due to the recent and dramatic changes to COAH, Verona is not a one-off case wherein a plan for compliance has taken more than five months to formulate. Indeed, numerous other municipalities' Declaratory Judgment Actions in Essex County alone are still pending before the Court and awaiting a Fairness Hearing.

The interest of justice would be best served by permitting the settlement process, which is nearing completion, to continue so that the Township of Verona can present its plan for compliance to the Court and all other interested parties at a fairness hearing. At that time, Appellant, and anyone else affected by the plan, will be able to attend and argue in favor of or against the plan.

POINT II
**THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY EXTENDING
VERONA'S TEMPORARY IMMUNITY**

Although the "abuse of discretion" standard defies precise definition, it arises when a decision is "made without a rational explanation... or rested on an impermissible basis." *State v. Flagg*, 171 N.J. 561, 578–79, 796 A.2d 182 (2002).

In the instant matter, the Court undoubtedly relied upon the fact that the Township of Verona has been making steady and substantial progress towards reaching compliance its on low

and moderate income housing obligation. Each time the Appellant brought this identical motion before the Trial Court, Verona had taken demonstrable steps toward reaching its goal; including:

1. Adopting a set aside Ordinance requiring any development of five or more units to include a twenty percent (20%) set aside for low and moderate income units;
2. Negotiating, reaching agreement, and executing a memorandum of understanding with intervenor Poekel Properties, LLC., to provide for ten (10) low and moderate income units;
3. Becoming aware of the availability of property along Bloomfield Avenue that could be developed for low and moderate income housing. Negotiating a sale price, passing a bond ordinance and closing title on the property for development of a one hundred percent affordable housing complex.
4. Entering into a settlement agreement with intervenor Spectrum 360 that will result in either a payment by Spectrum of 6.25 million dollars towards the Township's one hundred percent (100%) affordable development, or, alternatively, the construction of three hundred rental units of which forty five (45) would be dedicated to low and moderate income families.

Based upon the foregoing, the Trial Court did not abuse its discretion or rest on an impermissible basis but rather an acknowledgement of the substantial progress made by the Township and its demonstrated ability to reach its obligation without the property of Bobear.

POINT III
THE TRIAL COURT DID NOT ERR IN EXTENDING VERONA'S IMMUNITY

A municipality is entitled to immunity throughout the declaratory judgment process so long as it demonstrates a good faith effort to comply with its fair share obligation.

Towns that were in “participating” status before COAH and that come before the courts seeking to obtain approval of an affordable housing plan should receive like treatment to that which was afforded by the FHA to towns that had their exclusionary zoning cases transferred to COAH when the Act was passed. See N.J.S.A. 52:27D–316. Such towns received insulating protection due to COAH's jurisdiction provided that they prepared and filed a housing element and fair share plan within five months. *Id.* Similarly, towns that were in “participating” status before COAH and that now affirmatively seek to obtain a court declaration that their affordable housing plans are presumptively valid should have no more than five months in which to submit their supplemental housing element and affordable housing plan. During that period, the court may provide initial immunity preventing any exclusionary zoning actions from proceeding. *In re adoption of N.J.A.C. 5:96 and 5:97 by N.J. Council on Affordable Housing*, 221 N.J. 1(2015)(“*Mt. Laurel IV*”)

As in the case of the towns that had been awarded substantive certification from COAH, the “participating” towns will have the choice to proceed with their own actions during the thirty-day period post the effective date of our order before which challenges to constitutional compliance may be brought by FSHC or other interested parties. *Id.* If a town elects to wait until its affordable housing plan is challenged for constitutional compliance, immunity requests covering any period of time during the court's review shall be assessed on an individualized basis. *Id.* The five-month protected period for submitting a housing element and plan, identified earlier, has no parallelism in this setting. *Id.*

In determining whether to grant such a town a period of immunity while responding to a constitutional compliance action, the court's individualized assessment should evaluate the extent of the obligation and the steps, if any, taken toward compliance with that obligation. *Id.* In

connection with that, the factors that may be relevant, in addition to assessing current conditions within the community, include whether a housing element has been adopted, any activity that has occurred in the town affecting need, and progress in satisfying past obligations. *Id.*

Thus, in all constitutional compliance cases to be brought before the courts, on notice and opportunity to be heard, the trial court may enter temporary periods of immunity prohibiting exclusionary zoning actions from proceeding pending the court's determination of the municipality's presumptive compliance with its affordable housing obligation. *Id.* Immunity, once granted, should not continue for an undefined period of time; rather, the trial court's orders in furtherance of establishing municipal affordable housing obligations and compliance should include a brief, finite period of continued immunity, **allowing a reasonable time as determined by the court for the municipality to achieve compliance.** *Id.*

In the end, a court reviewing the submission of a town that had participating status before COAH will have to render an individualized assessment of the town's housing element and affordable housing plan based on the court's determination of present and prospective regional need for affordable housing applicable to that municipality. *Id.* A preliminary judicial determination of the present and prospective need will assist in assessing the good faith and legitimacy of the town's plan, as proposed and as supplemented during the processes authorized under the FHA—conciliation, mediation, and use of special masters—and employed in the court's discretion. *Id.* **Only after a court has had the opportunity to fully address constitutional compliance and has found constitutional compliance wanting shall it permit exclusionary zoning actions and any builder's remedy to proceed.** *Id.*

Bobcar's Motion to revoke Verona's temporary immunity rests on three grounds;

i) Verona has failed to submit a compliance plan to the court, ii) Verona has failed to amend its Zoning Ordinance to require any affordable housing set aside for new residential developments, and iii) Verona has made no progress towards compliance.

A) Verona Is Not Required to Submit a Compliance Plan with the Court nor Amend its Zoning Ordinance during Active Negotiations to Determine and Settle its Fair Share Housing Obligation

Verona has not submitted a compliance plan or changed its Zoning Ordinance because it did not know what methodology would be used to calculate same and, until recently, was still negotiating with the defendants/intervenors in this matter as well as reviewing all reasonable methods of compliance.

In this regard, Verona is like numerous other municipalities which have also not yet settled with all defendants/intervenors or the Fair Share Housing Center regarding their Fair Share obligations, and have yet to submit compliance plans or change their Zoning Ordinances. Verona's conduct is specifically permitted by the Supreme Court during negotiations to determine Fair Share Housing Obligations.

It is also important to note that there is still no judicially sanctioned fair share obligation for Verona. Verona has based its obligation upon the methodology contained in the decision of the Honorable Mary C. Jacobson in the Mercer County decisions titled "In the Matter of the Application of the Municipality of Princeton" and "In the Matter of West Windsor Township," docket nos. MER-L-1550-15 and MER-L-1561-15. That decision was issued on March 8, 2018 and consisted of 217 pages. While not necessarily serving as precedent for the instant matter, the decision provides a methodology that has allowed Verona and the defendants/ intervenors to make informed decisions based upon the findings of Judge Jacobson. In addition, it appears likely that the methodology used in the West Windsor matter will be accepted by the Fair Share

Housing Center and has, in fact, been used as the basis of settlement in other municipalities.

Verona and its residents should not be punished for failing to take action that it is unable to take until negotiations and the Fairness Hearing has concluded. This is particularly true when Verona has carried a surplus of affordable units for decades and has been pursuing all reasonable means to achieve compliance.

B) Verona has made substantial progress towards meeting its fair share obligation.

The movant's allegations that Verona has "willfully" made no progress towards compliance is far from accurate. The Township has reached agreement with two of the intervenors, Spectrum 360, LLC and Poekel Properties, LLC. When added to the existing credits that the Township is entitled to, namely fifty nine (59) units of credit for Verona Senior Housing and eight (8) credits for homes, Verona will have provided for a large majority of its required two hundred thirty eight (238) units. Therefore, the movant's statement that "the Township has not made any meaningful effort to comply with its fair share obligation is simply untrue.

Further, Verona is confident that it can meet its fair share obligation, without seeking a vacant land adjustment using the following credits:

1. Affordable units from the Hillwood development, an existing development containing 159 units which are all low and moderate income. Verona and the owner of that development entered into an agreement in 2010 maintaining its low and moderate reduction for thirty years the Township should receive credit for at least 59 units from this development ;
2. Credit for forty-five (45) units plus a rental bonus of forty-five (45) units, or a payment of \$6,250,000.00 to partially fund the 100% affordable development to be constructed

property recently acquired by Verona, (discussed later as the "Cameco" property) under a settlement with intervenor Spectrum 360.

3. Credit for 10 units in a project to be developed by Poekel Properties, LLC, another Intervenor in this case together with a rental bonus of ten (10) credits.
4. Credit for a three group homes already located in Verona containing a total of eight (8) bedrooms; and
5. Credit for a one hundred percent (100%) affordable housing unit project on land acquired by the Township specifically for that purpose, on which Verona will have constructed approximately one hundred (100) units, all of which will be rentals and will result in an additional rental bonus of fifty (50) credits.

Based upon Verona's calculation of the credits it will be entitled to, it meets its fair share obligation set forth above. The status of each of the credits set forth above will be discussed in turn.

Verona Senior Apartments (Hillwood)

The Township has been the location of the Verona Senior Apartments since 1981. The entire one hundred fifty nine (159) unit complex is subject to affordability controls and is also age restricted. Because of the age restricted nature of the complex, the Township will be able to claim twenty five per cent of its total need, or fifty nine (59) units of credits for this existing development

Spectrum 360 LLC

The Township, through its professionals, conducted numerous negotiating sessions with Spectrum 360, an Intervenor in this matter and the current owner of a large tract of land located principally in the Township of Verona but extending into the adjacent municipality of Montclair.

The property, which has an address of 1 Sunset Avenue, Verona, New Jersey, is the site of an existing school for children with disabilities.

The agreement reached between the Township and Spectrum 360 LLC will provide for either two hundred (200) rental units to be constructed on the site, with a payment of 6.20 million dollars or a development of three hundred (300) rental units with a fifteen percent (15%) set aside, or forty five (45) low and moderate income units located on site.. Verona will also seek credit for an additional sixty units based upon the development being rental units rather than for sale units in the event the low and moderate units are built on site.

Poekel Properties, LLC

The Township has also negotiated and reached agreement with another property owner, also an Intervenor in this matter, Poekel Properties, LLC. The Poekel tract consists of 2.7 acres having an address of 860 Bloomfield Avenue, Verona, New Jersey. The Township and Poekel have fully negotiated a Settlement Agreement which requires Poekel to construct and deed restrict twenty (20%) percent of the individual units in the development as very low, low or moderate income affordable units. [BDa450] Due to the size of the overall development, this will equal ten (10) credits towards the Township's obligation. The Settlement Agreement implementing the terms has been negotiated and has been signed by the Township Manager.

Group Homes

The Township is the site of three existing group homes which contains a total of eight (8) bedrooms and are, therefore, eligible for eight (8) credits.

Cameco

The Township became aware during this last summer that a large tract of land along Bloomfield Avenue, which had been developed and used for decades as a commercial establishment, would be made available for sale to the Township.

The Cameco site is directly adjacent to a property which is already owned by the Township which, in turn, is adjacent to the property which is owned and will be developed by Poekel Properties, LLC. The Township acquired the Cameco site specifically in order to provide a one hundred (100%) percent affordable housing development. The Cameco site, together with the existing, adjacent, Township property is nearly as large as the Poekel site, and is large enough to accommodate the remaining affordable housing needs of the Township.

The Township has been negotiating with a developer to build the project and has been assured that at least one hundred units can be constructed there. [BDA 436]

C) The Township of Verona has adopted a mandatory set aside ordinance.

The Township adopted a mandatory set aside ordinance on October 15, 2018. [BDa450] Therefore, any further development of five (5) or more units within the Township of Verona will need to include a mandatory set aside for low and moderate income units. There is, in fact, now an affordable housing obligation on any development of five (5) units or more, regardless of the zone as Special Master McKenzie advised the Township, “ the Township is not required to use [sites proposed by intervenors for inclusionary development] **as long as it can satisfy the entirety of the fair share obligation in another way and as long as the Township is not seeking any adjustment due to insufficient vacant developable land**”. Verona is not seeking a vacant land adjustment and believes it can achieve its fair share obligation without relying on the property owned by intervenor Bobcar.

POINT IV

THE CASES CITED BY BOBCAR DEMONSTRATING BAD FAITH ARE FACTUALLY DISTINCT FROM THE PRESENT MATTER

Defendant cites to two cases that outline instances the Court has revoked municipalities immunity for "bad faith." All three cases show egregious behavior on part of the municipality in an attempt to permanently forego or skirt compliance with their housing obligations, whereas Verona has been diligently working towards settlement and compliance should be obtained in the very near future.

The Appellant's reliance on *In Re: Township of South Brunswick*, 448 N.J. Super. 441 is misplaced. In that case, in South Brunswick submitted a compliance plan to the Court that was "contrary to the Special Master's direction, still included too many 100% percent affordable housing projects, proposed virtually no new inclusionary developments, and included too many senior units" Id. at 449.

Despite the many problems identified, the Court still continued South Brunswick's immunity in order to permit it to address the deficiencies. At the next court appearance, the Judge held that "the Township's Plan showed little or no improvement. Many of the plan's component parts were unrealistic or impractical. Still others were contrary to valid COAH regulations and/or judicial precedent". Id. at 449. Still, despite the Township's seeming refusal to voluntarily comply with its low and moderate income housing obligation, the Judge continued the Township's immunity and set a new date for the Township to prove that it was not "determined to be non-compliant." Id. at 449.

When the parties next appeared in Court, the South Brunswick plan still contained a myriad of problems. According to the Court, it was:

“still inconsistent with COAH regulations and judicial precedents, and did not address even its own estimated fair share number. For example, it continued to include multiple 100% affordable housing projects, despite the limited availability of tax credits available through HUD’s Low-income Housing Tax Credit program. And, despite an oversupply of senior citizen housing in New Jersey generally see N.J.S.A.45:22A-46.3(e), (h) (age restricted housing market is oversupplied), the plan included excessive age-restricted units, contrary to the 25% limitation embodied in N.J.A.C. 5:93-5.14. Similarly, inappropriate was a proposed inclusionary development that was comprised not of traditional, multi-family units, but rather, only to age-restricted, single family, detached homes. Even more problematic was the Township’s insistence on a thirty-three (33%) percent set-aside for low-and moderate-income units, instead of the 15-20% set-asides traditionally sanctioned by COAH and the courts. Equally problematic was a proposed inclusionary development that was limited to a gross density of 2.8 units per acre. Given the internal subsidies needed to justify the economics of such development, and the minimum densities typically demanded and approved by COAH and the courts (six or more units/acre), this proposal too was ill-conceived. Id. at 450

In contrast, the method of compliance chosen by the Township of Verona suffers from none of the infirmities that led to the revocation of South Brunswick’s immunity. On the issue of one hundred (100%) percent affordable housing projects, Verona has proposed only one. In addition, as set forth above, Verona has already purchased, paid for and closed title on the land

for the project and declared the property as an area in need of redevelopment. Verona has also has negotiating with developers to build the housing.

Unlike South Brunswick, Verona is not seeking to include any age restricted units in its plan other than apartments which have already been built and have been occupied by low and moderate income families for decades. Even then, the Township is limiting its credit for age restricted units to only twenty five (25%) percent of its total obligation, consistent with COAH regulations, even though there are substantially more units in existence. Similarly, Verona has not proposed any inclusionary development of single family homes nor has it insisted on a thirty three (33%) percent set aside for low and moderate income units from developers. In fact, both of the settlements between Verona and the other intervenors in this case, as well as Verona's adopted set aside ordinances require either fifteen (15%) or twenty (20%) percent set aside, as has been sanctioned by both COAH and our courts.

Lastly, unlike South Brunswick, Verona has not limited inclusionary development to 2.8 units per acre. Both of the settlements entered into between Verona and the intervenors, as well as Verona's planned one hundred (100%) percent affordable project, are substantially in excess of the six (6) units per acre minimum density "typically demanded and approved by COAH and the Courts". *Id.* at 450.

The Appellant's reliance on *Cranford Development Associates, LLC v. Township of Cranford*, 445 N.J. Super. (App Div. 2016) is also misplaced. In *Cranford*, the trial court judge determined, during an earlier phase of the litigation, that Cranford has failed to comply with its fair share housing obligation under the Mount Laurel Doctrine (*Id.* at 224). The only issues on appeal were whether the developer was required to engage in good faith negotiations prior to filing a Mount Laurel lawsuit and the Court's denial of attorneys' fees to the developer.

Specifically, the Court observed that “the Township does not challenge the trial court’s 2009 determination that it failed to comply with its fair share obligation under Mount Laurel”. (Id. at 225).

In the instant matter there has been no claim that the developer failed to engage in good faith negotiations. The Township of Verona has simply chosen to satisfy its Mount Lauren obligation without using Appellant’s property to achieve compliance. The issue raised in this appeal manually whether the municipality is entitled to continued immunity, was not raised or decided in the Cranford case, and the case is therefore not relevant to the case at bar.

While it is understandable that Appellant would be dissatisfied with Verona’s failure to include Appellant’s two properties in its compliance plan, that fact alone does not warrant intervention by the court. At the Appellate Division held more than twenty (20) years in a similar case.

How Livingston meets its affordable housing obligation and, once that obligation is met, how the municipality zones or rezones property within its boundaries is not a Mount Laurel issue (citation omitted). What is appropriate zoning for the Township is a legislative determination to be decided by the council and planning board, subject to the Municipal Land Use Law. *Livingston Builders Inc. v. Township of Livingston*, 309 N.J. Super 370, 381 (App. Div. 1998).

In this case, Verona has chosen to meets its constitutional obligation by seeking credits from a variety of permitted compliance methods. The fact that the Appellant’s property was not included in that plan is not sufficient grounds to warrant the revocation of immunity or leave to appeal.

In sum, the Court revoked immunity for the Township of South Brunswick because the municipality "was not proceeding in good faith, and was 'determined to be non-compliant.'" *In re Township of South Brunswick*, 448 N.J. Super 441, 450-451 (Law Div. 2016). The Court also noted that "because of [its] **systematic 'abuses' of the declaratory judgment process...** the Township stands in a far less favorable position than it would have had it preceded with 'good faith'..." Id. at 466. Verona's has not "refused" to remedy any deficiencies in its HEFSP, and is confident it will be compliant with its obligation in the near future. This hardly rises to the level of being "determined to be non-compliant" or "abusing" the declaratory judgment process as outlined in *Township of South Brunswick*.

Verona, though its Manager and professionals, has met numerous times with all three intervenors and has actively participated in settlement negotiations. As proof of its good faith, Verona has reached settlement agreements with two intervenors, and Spectrum 360, LLC and Poekel Properties, LLC.

Verona believes it has not only the right, but an obligation, to provide for its fair share obligation in a manner which is most beneficial to its residents and taxpayers while still accommodating its need to provide low and moderate income housing.

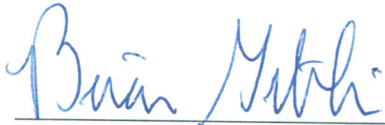
Most importantly, the Court only allowed a builders remedy suit ***"provided the lawsuit demonstrates that the municipality's current failure to comply with its affordable housing obligation."*** *Toll Bros v. Twp. of W. Windsor*, 173 N.J. 502, 560 (2002).

CONCLUSION

As the Trial Court did not abuse its discretion, and in the interests of justice, Verona respectfully requests that the Court deny Defendant/Intervenor Bobcar's Motion for Leave to Appeal the Trial Court's Order denying to revoke Verona's temporary immunity.

Respectfully submitted,

GIBLIN & GANNAIO, ESQS.

By: 

Brian T. Giblin, Sr