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May 17, 2018

Brian T. Giblin, Sr., Esquire
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2 Forest Avenue
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Re: Pending Declaratory Judgment Action in Superior Court: Third Round Fair Share
Obligation, Settlement Offer and Vacant Land Adjustment Issues

Dear Mr. Giblin:

When we spoke this morning, you asked me to provide you with what I believe to be: 1) the calculation of Verona's fair share obligation by the expert for Fair Share Housing Center (FSHC), David Kinsey, PhD, FAICP, PP; 2) the settlement number that FSHC has offered to Verona; and 3) the calculation of Verona's fair share number arising from the application of the Mercer County methodology (based on Judge Jacobson's recent decision).

It should be understood that FSHC has not endorsed Judge Jacobson's methodology just yet and has further indicated that, even if the Jacobson methodology were to be applied elsewhere, it would have to be adjusted in those housing regions, including yours (Region 2) that include towns in the Highlands, to reallocate affordable units out of the Highlands towns and into non-Highlands towns in the same region. As a result, there would likely be some variation in the numbers assigned, should there be a numbers trial, even if Judge Gardner were to accept Judge Jacobson's basic methodology. The Highlands issue was not a factor for Mercer County or for the other counties in its housing region (Region 4).

Here are the numbers:

1. Kinsey's numbers from 2016: 23 Rehabilitation Share; 24 Prior Round Obligation; and **327 Third Round Obligation** (this covers all of 1999-2025, so it includes the gap period 1999-2015 need as well as the prospective 2015-2025 need). Dr. Kinsey did re-calculate his numbers in 2017 to separate out the calculations for the gap period need from the prospective need and ended up with higher total obligations in most cases. But FSHC's offer to Verona in previous mediations (and not yet withdrawn) is based on the 2016 numbers.

ELIZABETH C. MCKENZIE, P.P., P.A.

Brian T. Giblin, Sr., Esquire
Giblin & Gannaio, LLC
May 17, 2018
Page Two of Four

2. FSHC's previous settlement offer to Verona based on Kinsey's 2016 number: 23 Rehabilitation Share, 24 Prior Round Obligation, and **229 Third Round Obligation** (reflecting a 30 percent settlement discount).
3. Verona's Third Round Obligation, calculated based on Judge Jacobson's decision alone, with no adjustment for a Highlands reallocation, would be a **215 Third Round Obligation**. That number would be just for the Third Round, and would be in addition to the Rehabilitation Share and Prior Round Obligation, on which Judge Jacobson did not rule.

With the possibility of a Highlands reallocation in Housing Region 2 and the discount that is being offered by FSHC, I think the offer from FSHC is close enough to be taken seriously.

I also want to comment on the issue of acquiring land for public purposes (other than for affordable housing) when a municipality has filed a request for a Declaratory Judgment in Superior Court, which request is still pending, and where it is likely that the municipality intends to seek an adjustment in the requirement to satisfy all of its fair share obligation within the repose period due to insufficient vacant, developable land.

If Verona: 1) is seeking an adjustment due to insufficient vacant developable land to satisfy the entirety of its current fair share obligation within the repose period, and 2) cannot justify the reservation of certain properties from its inventory of vacant developable land on the grounds that, without such reservation (and a corresponding commitment to contract to purchase such properties within one year), Verona would fall below the permissible thresholds of 3% active recreation and 3% conservation lands allowed under COAH's Prior Round Rules (N.J.A.C. 5:93-4.2), then any effort right now to condemn land that is vacant and developable (or potentially vacant and re-developable) is apt to be viewed as an attempt to circumvent compliance with its affordable housing obligations.

Verona already has some vulnerability in this regard due to its approval of the redevelopment of the Annin Flag site without an affordable housing set-aside. The fact that the two sites that are being contemplated for taking have been offered as sites for inclusionary residential development by an intervenor in Verona's pending Declaratory Judgment action could be used as evidence of

Brian T. Giblin, Sr., Esquire
Giblin & Gannaio, LLC
May 17, 2018
Page Three of Four

bad faith and exclusionary intentions, *no matter how good Verona's reasons may be for wanting these sites for other public purposes.*

As a consequence, Verona stands to lose the temporary immunity from builder's remedy lawsuits that the Court had provided to the Township in order to give Verona time to submit a compliant third round Plan.

Verona chose to file its request for a Declaratory Judgment in Superior Court in an effort to remain protected from builder's remedy lawsuits while preparing and obtaining the Court's approval of its third round Plan. The withdrawal of immunity would unbar the door to such lawsuits. Once such a lawsuit has been filed, especially in a town that is anticipating seeking an adjustment due to insufficient vacant developable land, there is a strong possibility that the builder-plaintiff would immediately move for entry of an order for scarce resource restraints (as has happened in similar instances). An order for scarce resource restraints would essentially put a stop to any governmental action that would affect the use or development of land unless and until the validity of the Township's housing element and fair share plan have been decided. Along with this, the builder would be entitled to relief in the form of a "builder's remedy" on the parcels for which he is proposing inclusionary multi-family residential development, unless the Township can demonstrate to the Court's satisfaction that there are overwhelming reasons why one or both of the sites cannot sustain such development.

As it stands now, when Verona has not yet taken any action toward condemnation but is still hoping to do so, its best and most protective strategy would be to postpone any action toward condemnation, forego seeking a vacant land adjustment, settle with Fair Share Housing Center right away, and develop and submit to the Court a plan to meet the entirety of the agreed-upon fair share obligation. Once the Court has approved the Township's Plan, Verona would be free to acquire by eminent domain or other lawful means any property(ies) it wishes for valid public purposes unrelated to affordable housing.

With no need for a vacant land adjustment, there would be no issue as to the Township's having approved the Annin Flag site redevelopment without an affordable housing set-aside.

ELIZABETH C. MCKENZIE, P.P., P.A.

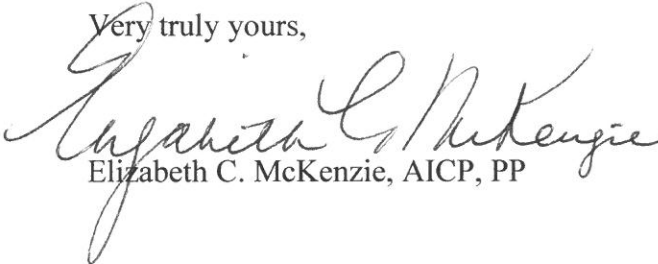
Brian T. Giblin, Sr., Esquire
Giblin & Gannaio, LLC
May 17, 2018
Page Four of Four

During the Declaratory Judgment process, while Verona is under the Court's protection (due to its temporary immunity from builder's remedy lawsuits), intervenors and interested parties may propose sites for inclusionary residential development, but the Township is not required to use such sites to meet its fair share obligation, ***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 an adjustment due to insufficient vacant developable land.***

The choice of how to proceed is, of course, entirely up to the Township, but I view it as my responsibility to make certain that the governing body fully understands the ramifications and consequences of any action it chooses to take that might affect the outcome of the Declaratory Judgment action.

I hope that these comments are helpful to the Township in its deliberations. I would look forward to an opportunity to meet with representatives of the Township to discuss this in person and to answer any questions.

Very truly yours,



Elizabeth C. McKenzie, AICP, PP

cc: Brian J. Aloia, Esquire
Gregory D. Meese, Esquire
Kevin D. Walsh, Esquire
Joshua D. Bauers, Esquire
John P. Inglesino, Esquire