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March 26, 2019

Via Electronic Filing and UPS

Honorable Robert H. Gardner, J.S.C.

Superior Court of New Jersey

Essex County Historic Courthouse, 4th Floor

470 Dr. Martin Luther King, Jr. Boulevard

Newark, New Jersey 07102


**RE: In All Declaratory Judgment Actions Filed by Various
Municipalities, County of Essex, Pursuant to the
Supreme Court's Decision in In re Adoption of
N.J.A.C. 5:96, 221 N.J. 1 (2015)
Docket No. ESX-L-4773-15**

Dear Judge Gardner:

This office represents Defendants/Intervenors Bobcar Corporation, Neil Joy Associates, and Forsons Partners, LLC (collectively referred to as "Bobcar") in the above-captioned matter (originally captioned as "In the Matter of the Township of Verona, a municipal corporation of the State of New Jersey, Plaintiff/Petitioner" prior to the Court's consolidation of all Essex County Mt. Laurel cases).

Attached is Bobcar's Reply Brief in further support of its pending Motion to revoke the Township of Verona's temporary immunity against builder's remedy actions. Kindly confirm that oral argument will be held on Friday, March 29, 2019 at 1:30 P.M.

Respectfully submitted.


Gregory D. Meese

ak/

cc: Service List
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IN ALL DECLARATORY JUDGMENT
ACTIONS FILED BY VARIOUS
MUNICIPALITIES, COUNTY OF
ESSEX, PURSUANT TO THE SUPREME
COURT'S DECISION IN In re Adoption
of N.J.A.C. 5:96, 221 N.J. 1 (2015)

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: ESSEX COUNTY
DOCKET NO.: ESX-L-004773-15

Civil Action
(Mount Laurel)

**REPLY BRIEF ON BEHALF OF DEFENDANTS/INTERVENORS
IN SUPPORT OF MOTION TO REVOKE THE TEMPORARY IMMUNITY GRANTED
TO THE TOWNSHIP OF VERONA**

Of Counsel and on the Brief:
Gregory D. Meese, Esq.
On the Brief:
Allyson M. Kasetta, Esq.

As it has done repeatedly over the last four years, Verona again claims that it is making great progress towards completing its affordable housing compliance plan. A simple review of its claims, however, reveals that it is losing ground, rather than finalizing a well-conceived plan. A timeline of key events in this matter demonstrates repeated misstatements to the Court by Verona and bad faith in its negotiations with the intervenors, as follows:

- July 2, 2015: Verona files its Declaratory Judgment Action and Motion Seeking Temporary Immunity and represents to the Court that it has fully discharged its affordable housing obligations and is in the process of preparing a revised Housing Element and Fair Share Plan that will verify full compliance.
- April 6, 2018: Verona's Township Attorney represents to the Court that Verona is very close to a settlement with all of the intervenors, including the Bobcar and Spectrum 360 Intervenors' properties.
- May 7, 2018: Verona introduces Ordinances authorizing the condemnation of both of the Bobcar Intervenors' properties for other than affordable housing purposes.
- July 20, 2018: the Court denies the Bobcar Intervenors' first Motion seeking the revocation of Verona's temporary immunity, but directs Verona to present a plan for compliance by September 28, 2018.
- November 16, 2018: a fairness hearing is scheduled by the Court, but could not proceed because Verona failed to present a plan for compliance.
- November 2018: Verona claims that it can reach compliance without the Bobcar properties, but with the inclusion of the Spectrum 360 properties.
- November 30, 2018: the Court denies the Bobcar Intervenors' second Motion seeking the revocation of Verona's temporary immunity, but advises Verona that it must either present a plan for compliance to be reviewed at a fairness hearing or be prepared to go to trial on March 1, 2019.
- December 2018: Verona adopts ordinance to acquire the Cameco Property, which was not previously in its plan.
- January 31, 2019: the Verona Planning Board finds that the Spectrum 360 LLC ("Spectrum") property does not meet the criteria for designation as an Area in Need of Redevelopment under the Local Redevelopment and Housing Law, contrary to the agreement previously reached by Verona and Spectrum.

- February 11, 2019: the Verona Township Council includes on its agenda a resolution rescinding its prior authorization of a settlement with Spectrum in connection with this action, but ultimately tables the resolution due to opposition from Spectrum.
- March 22 2019: After having previously claimed that it could obtain a total of 120 credits for a development on the Spectrum property, Verona advises the Court that it now intends to exclude the Spectrum property as well as the Bobcar Intervenors' properties from its plan of compliance. Verona also represents that it can obtain credits for several existing group home facilities that were not previously disclosed. No information is provided to the Court to support this allegation.
- March 29, 2019: a fairness hearing is scheduled by the Court, but again cannot proceed because Verona does not have a plan that can be reviewed for compliance.

This is the third motion that the Bobcar Intervenors have filed seeking to revoke the Verona's temporary immunity. In denying each of the previous motions, the Court directed the Township to present a plan for compliance and on each occasion the Court has extended the Township's immunity. As of this date, the Township has no plan and has again failed to comply with the Court's order.

Verona admits that it does not have a plan. It is still not in compliance, and again it seeks more time based on entirely hypothetical *and new* credit calculations. Verona insists that it has a right to develop a compliance plan based on its own best interests. The Court found that argument persuasive in 2015 when it granted immunity, but it should reject that argument now for which Verona fails to cite any legal authority from which such a right would be derived. Suffice is to say, the constitutional rights of the poor must now trump the parochial whims of Verona.

In Mt. Laurel IV, the Supreme Court instructed that participating municipalities choosing to file declaratory judgment actions "should have **no more than five months** in which to submit their supplemental housing element and affordable housing plan." In re adoption of N.J.A.C. 5:96 and 5:97 by N.J. Council on Affordable Housing, 221 N.J. 1, 27 (2015) (Emphasis added).

It directed trial courts to undertake an “individualized assessment” of “the extent of the obligation and the steps, if any, taken toward compliance with that obligation,” including an assessment of such factors as “whether a housing element has been adopted, any activity that has occurred in the town affecting need, and progress in satisfying past obligations.” Id. at 28.

Forty-four months and counting, and Verona does not even have an outline of a plan. It has not submitted a proposed settlement or even a rudimentary housing element or affordable housing plan, even though the Court has granted it ample time to do so. After repeatedly asserting that it would be entitled to 60 credits plus a rental bonus of 60 additional credits for the Spectrum site (which the Bobcar Intervenors do not concede), Verona has suddenly excluded the Spectrum site from its hypothetical plan.

Instead, Verona now claims it can meet its obligation without the Spectrum site and the Bobcar Intervenors’ two properties. For the first time, Verona claims it can obtain credits for an existing 4-bedroom group home run by ARC of Essex County, 3 units at Project Live X located at 23 Mt. Prospect Avenue, and 2 units run by Jewish Services for the Developmentally Disabled of Metrowest on Wedgewood Drive, where it previously only mentioned three units in an unnamed existing group home. Once again, Verona has submitted no documentation to the Court in order to substantiate any of these claims or that it is entitled to any of those 9 credits.

Suddenly, the Township believes it can receive a rental bonus of 60 in addition to 100 credits for an entirely affordable development on the Cameco property, which it has apparently acquired in the time since the Bobcar Intervenors filed their second motion. The Township has allegedly been negotiating with a developer, but has not secured a commitment to construct the development, presented so much as a conceptual plan, or demonstrated to the Court the feasibility of a 100-unit development on that site.

The Township also has not provided any evidence to demonstrate entitlement to a rental bonus on the Cameco property. A rental bonus is available for affordable units that are constructed and, in accordance with N.J.A.C. 5:93-5.15(d), when “the municipality has provided a firm commitment for the construction of rental units.”

In its rule making, COAH provided some direction as to what is required of a firm commitment:

RESPONSE: The rental bonus is not granted when a municipality zones unless there is a commitment from the developer to build rental housing within a definite period of time within the period of substantive certification. If the developer does not build the units within the stated time frame, the Council will re-examine the bonus.

See Certification of Art Bernard, P.P. dated March 7, 2019 (“Bernard Cert.”) ¶62.

At this point, Verona clearly does not qualify for a rental bonus on the Cameco property. Verona may be “negotiating” with a developer, but has not secured a firm commitment to build rental housing at any time in the future. Verona openly admits that it does not intend to sign an agreement with the prospective developer until a redevelopment plan has been adopted, which it anticipates will occur in late April 2019. Further, Verona is now contemplating a subdivision involving the Cameco property, the Poekel property, and a third parcel owned by the County of Essex with which is no agreement. Even if it should reach agreement with the County, the reconfiguration of those properties will undoubtedly involve additional delays and obstacles to Verona’s compliance with its affordable housing obligation.

Verona has chosen a path of uncertainty instead of working in good faith with the existing Intervenor who are ready and willing to construct the developments that will bring it into compliance. Each time the Bobcar Intervenor have filed a motion to revoke Verona’s immunity, it has responded with empty promises, pure hypotheticals and excuses. In response to Bobcar’s latest motion, Verona requests the Court to wait another few months while it pursues

yet another possible avenue, rather than include the properties that will resolve its constitutional infirmity.

It is clear that Verona is no nearer to compliance than it was at the time of the Bobcar Intervenor's first motion filed nine months ago. In fact, Verona has only muddied the waters so that it is impossible for the Court to determine the number of credits to which Verona is entitled. What remains clear is that a hypothetical 100-unit development on the Cameco property, for which no actual commitment has been secured, is insufficient to compensate for the 72 units that could be built on the Bobcar Intervenor's properties, particularly now that the Spectrum site has also been excluded. Nonetheless, Verona again asks the Court to disregard its continued abuse of the declaratory judgment process.

The Township's representations to the Court should be reviewed in light of (1) the Certification of the Township Manager submitted by Verona forty-four months ago in which it was represented that Verona was in the process of preparing a revised HEFSP; (2) the Township Attorney's representation one year ago at the case management conference held on April 6, 2018, in which the Court was advised that "we're very close to resolution on all of the properties that are involved and hopefully within another couple of sessions we'll be able to get to an agreement;" Certification of Allyson M. Kasetta dated March 8, 2019 ("Kasetta 11/27/18 Cert.)," Ex. 1; Ex. 21; the Township's adoption of ordinances to acquire the Bobcar properties one month after making that representation to the Court; and the Township's latest exclusion of the Spectrum property. The Court should not accept any more empty promises from the Township in light of its demonstrated bad faith.

Because Verona has not complied with its constitutional obligations, the Court should no longer provide protection against exclusionary zoning actions. As the court stated in Cranford Development, "a developer may be entitled to a builder's remedy, even if a municipality has

begun moving toward compliance before or during the developer's lawsuit, provided the lawsuit demonstrates the municipality's current failure to comply with its affordable housing obligations." 445 N.J. Super. 220, at 231, citing Toll Bros. v. Twp. of W. Windsor, 173 N.J. 502, 560 (2002).

CONCLUSION

Verona was not in compliance when it filed its declaratory judgment action seeking immunity. Forty-four months on and Verona is still not in compliance. It has no commitments for the construction of affordable housing for which it intends to claim credit other than an agreement with Poekel Properties, LLC for 10 units, which is an insignificant fraction of its 238-unit obligation. Inexplicably, it has now chosen to exclude three (3) developments proposed by Intervenor in this action which could produce a large number of affordable housing units and to delay the action even further, all the while enjoying the immunity that was only intended for municipalities who work in good faith to move toward compliance.

As noted above, "a developer may be entitled to a builder's remedy, even if a municipality has begun moving toward compliance before or during the developer's lawsuit, provided the lawsuit demonstrates the municipality's current failure to comply with its affordable housing obligations." Cranford Development Associates, LLC v. Township of Cranford, 445 N.J. Super. 220, 231 (App. Div. 2016), citing Toll Bros. v. Twp. of W. Windsor, 173 N.J. 502, 560 (2002). The Bobcar Intervenor has established that Verona is not in compliance and that it has abused the immunity granted to it. For those reasons and those set forth in their initial Brief, Defendants/Intervenor Bobcar Corporation, Neil Joy Associates and Forsons Partners, LLC respectfully request that this Court revoke the Township of Verona's immunity against exclusionary zoning actions, thereby permitting the Defendants/Intervenor to seek a builder's

remedy and scarce resources order, and further request that the Court award the Defendants/Intervenors attorney's fees and costs of suit in connection with the Motion,

Respectfully submitted,

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ATTORNEYS FOR DEFENDANTS/INTERVENORS
BOBCAR CORPORATION, NEIL JOY ASSOCIATES
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By: _____


Gregory D. Meese

Date: March 26, 2019