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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-4773-15

Civil Action
(Mount Laurel)

**NOTICE OF MOTION
TO REVOKE TOWNSHIP OF
VERONA'S TEMPORARY
IMMUNITY AGAINST
EXCLUSIONARY ZONING ACTIONS**

TO: Brian T Giblin, Sr., Esq.
Giblin & Gannaio
2 Forest Avenue
Oradell, NJ 07649
Attorney for Plaintiff Township of Verona
AND: All Counsel/Parties on attached service list

PLEASE TAKE NOTICE that on Friday, November 30, 2018 at 9:00 a.m. or as soon thereafter as counsel may be heard, the undersigned attorney for Defendants/Intervenors Bobcar Corporation, Neil Joy Associates, and Forsons Partners, LLC will move before this court, at the Essex County Historic Courthouse, 470 Dr. Martin Luther King, Jr. Boulevard, Newark, New Jersey for an Order revoking the temporary immunity against exclusionary zoning actions

previously granted to the Township of Verona, thereby permitting the Defendants/Intervenors to seek a builder's remedy and scarce resources restraints, and further awarding attorneys' fees and costs of suit to the Defendants/Intervenors.

PLEASE TAKE FURTHER NOTICE that the Defendants/Intervenors shall rely upon the attached Certifications of Art Bernard, P.P. and Allyson M. Kasetta, Esq., the exhibits attached thereto and the accompanying Brief in Support of Motion to Revoke Temporary Immunity. A proposed form of Order is submitted herewith.

PLEASE TAKE FURTHER NOTICE that oral argument is hereby requested.

Dated: October 26, 2018

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Neil Joy Associates and Forsons Partners, LLC.

By: _____


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SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: ESSEX COUNTY
DOCKET NO.: ESX-L-4773-15

Civil Action
(Mount Laurel)

**ORDER REVOKING THE TOWNSHIP
OF VERONA'S TEMPORARY
IMMUNITY AGAINST
EXCLUSIONARY ZONING ACTIONS
AND AWARDING ATTORNEYS'
FEES AND COSTS OF SUIT TO
DEFENDANTS/INTERVENORS**

This matter having been brought before the Court on a Motion by Price, Meese, Shulman & D'Arminio, P.C. (Gregory D. Meese, Esq.), attorneys for Defendants/Intervenors Bobcar Corporation, Neil Joy Associates and Forsons Partners, LLC, on notice to Giblin & Gannaio (Brian T. Giblin, Sr., Esq.) attorneys for Plaintiff Township of Verona, and notice having been provided to all parties on the Service List; and

This Court having reviewed the Motion and supporting documents, and good cause having been shown:

IT IS ON THIS ____ day of _____, 2018,

ORDERED that the temporary immunity against exclusionary zoning actions previously granted to the Township of Verona in connection with this matter is hereby revoked; and it is further

ORDERED that such exclusionary zoning actions may therefore be brought against the Township of Verona, in connection with which the Defendants/Intervenors may seek a builder's remedy and scarce resource restraints; and it is further

ORDERED that the Defendants/Intervenors are hereby awarded attorneys' fees and costs in connection with the Motion.

A copy of this Order shall be served by Counsel for Defendants/Intervenors on all parties to the Verona Service List within five (5) days of receipt hereof.

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

PRICE, MEESE, SHULMAN & D'ARMINIO, P.C.
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SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: ESSEX COUNTY
DOCKET NO.: L-4773-15

Civil Action
(Consolidated)

**CERTIFICATION OF
ART BERNARD, P.P.**

I, Art Bernard, of full age, hereby certify as follows:

1. I am a professional planner licensed by the State of New Jersey and the Managing Member of Art Bernard and Associates, L.L.C., a professional planning firm with an office at 77 North Union Street, Lambertville, New Jersey. I have been retained by Defendants/Intervenors Bobcar Corporation, Neil Joy Associates and Forsons Partners, LLC (collectively "Bobcar") as an expert witness in this exclusionary zoning litigation regarding the Township of Verona.

2. I am very familiar with the municipal obligation to provide low and moderate-income housing. I have served the New Jersey Council on Affordable Housing ("COAH"). I was COAH's Deputy Director from March 1986 until January 1993, when I became COAH's Acting Executive Director. In mid-1993, COAH appointed me its Executive Director. I served COAH in this capacity until September 1994.

3. In my various capacities with COAH, I have developed and/or supervised every facet of COAH's work program.

4. I performed research and worked with the staff and the public to develop proposed policies for the COAH Board to adopt as rules. This work included policy decisions that were incorporated in COAH's fair share methodology.

5. I was the staff person responsible for working with COAH in developing its procedural and substantive rules (N.J.A.C. 5:91-1 et seq., N.J.A.C. 5:92-1 et seq. and 5:93-1 et seq.), including those rules adopted in 1986 and those adopted in 1994. I wrote the first and second round rules for the COAH Board. I was also the staff person responsible for working with COAH in developing the interpretations to those rules

6. When it was functioning, COAH sat as a quasi-judicial body. Any interested party could seek relief, rule interpretations, priority status for sewer and water, and other decisions by making a motion to COAH. During my tenure with COAH, I was the staff person responsible for reviewing motion requests, summarizing their content for COAH and recommending a course of action for its consideration. I supervised and helped write The New Jersey Council on Affordable Housing Digest of Motion Decisions, a summary of all COAH motion decisions indexed by subject matter and municipality.

7. As a private consultant, I have been retained by municipal and private sector clients in matters related to implementing the low- and moderate-income housing obligation. I have been retained to prepare housing elements and fair share plans for Harrison Township, High Bridge Borough, Marlboro Township, Avon Borough, North Plainfield Borough, South River Borough, South Plainfield Borough, Delanco Township, Matawan Borough, Carteret Borough, Milltown Borough, Wanaque Township, Ramsey Borough, Tinton Falls Borough, Closter

Borough, West Caldwell Township, Piscataway Township, Cherry Hill Township, Mount Laurel Township, Riverside Township and Medford Township. I have been retained as a consulting planner regarding low and moderate-income housing issues in Allendale Borough, Mount Holly Township, Delanco Township, Bernardsville Borough and Princeton Township.

8. I have served, or currently serve, the Superior Court as a Special Master with regard to exclusionary zoning litigation in cases involving: Cinnaminson Township, Edgewater Park Township, Burlington City, Franklin Lakes Township, Little Falls Township and Old Bridge Township.

9. I wrote the expert reports for the New Jersey Builders Association (NJBA) in its successful appeals of COAH's adoption of N.J.A.C. 5:94-1 et seq. in 2004 and N.J.A.C. 5:97-1 et seq. in 2008. I am very familiar with the Appellate Division's decisions overturning both sets of regulations. I am also familiar with the Supreme Court decisions that have affirmed those Appellate Division decisions and recognized that COAH is no longer a functioning agency.

10. I am very familiar with fair share related issues and I have testified as an expert witness in the Middlesex County and Mercer County fair share trials.

DOCUMENTS REVIEWED

11. In preparing this certification, I have reviewed the Township's 2009 Master Plan and its Zoning Ordinance. I have also reviewed: the Township's Notice of Filing of Declaratory Judgment Action and Motion Seeking Temporary Immunity, its Verified Complaint for Declaratory Judgment and supporting papers dated July 2, 2015; a May 17, 2018 letter from Special Master Elizabeth McKenzie to Brian T. Giblin Esquire; the *New Jersey Guide to Affordable Housing*; N.J.A.C. 5:93-1 et seq.; an October 24, 2016 COAH monitoring report related to Verona; a July 3, 1995 COAH Compliance Report for Verona Township, engineering

and architectural plans for the two Bobcar properties (the 11.61 acre Commerce Court site, Block 1201, Lot 3.01, and the 14.29 acre Mt. Prospect Avenue site, Block 501, Lot 83), Resolution No. 2018-135 adopted by the Township of Verona Authorizing the Settlement and Execution of a Memorandum of Understanding with Poekel Properties, LLC with Regard to Docket No. ESX-L-4773-15 (the “Poekel Resolution”), and Resolution No. 2018-136 adopted by the Township of Verona Authorizing the Settlement and Execution of a Memorandum of Understanding with Spectrum 360 with Regard to Docket No. ESX-L-4773-15 (the “Spectrum Resolution”).

BACKGROUND

12. In its March 10, 2015 decision, In re Adoption of N.J.A.C. 5:96, 221 N.J. 1, (2015)(the “Decision”), the Supreme Court determined that COAH was no longer a functioning agency and created a process for municipalities to seek *temporary* immunity as they developed plans to address the affordable housing obligation.

13. The Court built off the COAH process established by New Jersey’s Fair Housing Act, N.J.S.A 52:27D-301 to 329 (the Act). The Act provided protection from builder’s remedy litigation for municipalities that had petitioned COAH for substantive certification and a more limited protection for municipalities that had filed plans with COAH.

14. The Supreme Court’s Decision established protections from “builder’s remedy” litigation for municipalities that had received COAH’s third round substantive certification and somewhat lesser protections for municipalities that had merely participated in COAH’s third round process.

15. I have reviewed the status report on COAH’s website. I find that Verona petitioned for third-round substantive certification on December 29, 2008 but never received

substantive certification. Thus, Verona is a participating municipality pursuant to the Supreme Court classification system.

16. The Decision established a process in which municipalities that seek to demonstrate constitutional compliance could seek a declaratory judgment from the court and submit a plan by the end of 2015.

17. The Supreme Court said that participating municipalities pose a difficult challenge for the court in determining a “temporary period” of immunity. The Court said that such towns should have no more than five (5) months to submit their housing elements and fair share plans. The Court was clear that such municipalities should have immunity during that initial five (5) month period (that expired at the end of 2015). In re Adoption of N.J.A.C. 5:96, 221 N.J. at 27. However, after the five (5) month period to file a plan, the Court outlined the criteria for continued immunity:

In determining whether to grant such a town a period of immunity while responding to a constitutional compliance action, the court’s *individualized* (emphasis provided) assessment should evaluate the extent of the obligation and the steps, if any, taken toward compliance with that obligation. 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 affecting need, and progress in satisfying past obligations. Id. at 28.

18. As to the length of immunity, the Supreme Court allowed the trial courts to offer temporary periods of immunity. “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.

19. Comparing the Supreme Court's direction to the Township's actions, Verona filed a Verified Complaint for Declaratory Judgment on July 2, 2015, seeking, among other relief, five (5) months in which to prepare a constitutionally compliant Housing Element and Fair Share Plan but has taken no substantive measures since that time. Verona did not submit a housing element and fair share plan by the end of 2015. Unlike most municipalities, it did not even submit a summary or matrix plan for the court and intervenors to review. It has taken the position that it does not have sufficient vacant and underutilized land to address its housing obligation (going back to the 2009 Housing Element and Fair Share Plan that was submitted to COAH). But it has not provided any of the information required of municipalities to establish land as a scarce resource (N.J.A.C. 5:93-4.2)

20. In the over three (3) years since the Supreme Court's March 2015 decision and its filing of the Declaratory Judgment Action, the Township has only taken preliminary steps to offer two (2) sites that may produce affordable housing; the Poekel Properties site (9 units) and the Spectrum site (60 units). The Township has not prepared an updated Housing Element or Fair Share Plan.

21. I am aware that the *New Jersey Guide to Affordable Housing* reveals that the only affordable housing built in Verona has included a three (3) bedroom group home for people with special needs and a 159-unit age restricted community, known as Verona Senior Apartments that, according to COAH's 1995 Compliance Report, was built in 1981.¹ Thus, in the 35 years since Mount Laurel II (1983), the Township has not created any affordable housing for low and moderate income families with children.

¹ The Housing Element and Fair Share Plan within the 2009 Master Plan indicates that the Verona Senior Apartments include 159 affordable housing units.

22. I have reviewed the Township's Zoning Ordinance. I find no requirement for any developer to build affordable housing, although I have been told that the Township has recently taken steps to amend its Ordinance to require future residential developments to include some affordable housing.

23. In 2016, after the filing of its Declaratory Judgment action and supposedly seeking to demonstrate its constitutional compliance with its affordable housing obligation, Verona granted approval to a 112-unit multi-family community, known as the Annin Flag redevelopment site, *and did not require it to include any affordable housing*.

24. The Township had asserted that land was a scarce resource when it petitioned COAH for substantive certification in 2009.² So, Verona knew that land was a scarce resource when it sought its declaratory judgment in 2015. Yet, the Annin 2017 approval for 112 multi-family units, with no affordable housing, was based on an ordinance that was adopted in July and August of 2016.³ So, with land a scarce resource and an obligation to provide an affordable housing plan, the Township decided to squander an opportunity to create significant affordable housing on the Annin property.

25. I have reviewed the 2009 Master Plan on the Township's website. It includes a recreational and open space needs assessment. The assessment compares the recreational and open space facilities to the need in each of the Township's three (3) Census tracts. (Section 5, pages 3-5 of 2009 Master Plan) The assessment concludes that each census tract has sufficient recreational facilities based on a land based standard, similar to the standard employed by COAH's rules. I have found no Master Plan language recommending the purchase of additional

² Page 32 of 2008 Housing Element refers to Verona as almost entirely built up.

³ Source: Planning Board resolution of approval, page 2.

open space and certainly no language related to the Bobcar properties on Commerce Court (Block 1201, Lot 3.01 or Mt Prospect Avenue (Block 501, Lot 83).

26. Thus, there is no language, let alone a recommendation, in the Master Plan designating either of the Bobcar sites for active recreation or open space. This fact is relevant to COAH's regulations because N.J.A.C. 5:93-4.2(d)4 allows a municipality to reserve a "limited" amount of land for recreational purposes *only if it is so designated in the municipal master plan*.

27. As to the Township's 11th hour effort to reserve Bobcar's two (2) sites through condemnation, COAH, in interpreting its rules, was clear that the concern for recreational land and opens space should not begin with a response (or avoiding a response) to the affordable housing obligation:

COMMENT: The Council should be realistic about what can be achieved in one year regarding the purchase of recreational land. The Green Acres process is a long one.

RESPONSE: *The planning for the recreational needs of a community should not begin with the response to the housing obligation.* (emphasis provided) Recreational planning is an on-going concern. Although the Council understands the need to be flexible for unique circumstances, it believes its rule is appropriate. (Comment 103, 25 N.J.R 5771)

THE AFFORDABLE HOUSING OBLIGATION

28. In its March 10, 2015 Decision, the Supreme Court established that each municipality is responsible for its prior round housing obligation (1987 – 1999) as calculated by COAH. The Court also gave direction to the Superior Court in determining the post 1999, or third round housing obligation. The Court determined that the Superior Court should follow the prior round methodologies, that had been upheld by the courts, in determining the third-round housing obligation.

29. Subsequent to the March 10, 2015 Decision, there was litigation raising the question of whether municipalities were responsible for a housing need that accrued between 1999 and 2015. The Supreme Court settled that question in the affirmative in In Re Declaratory Judgment Actions Filed by Various Municipalities, 227 N.J. 508 (2017). In that decision, the Court provided the Superior Court with more flexibility in calculating what is now often referred to as the “gap obligation” (referring to the gap between the last set of COAH’s regulations that had been affirmed by the court ((expiring in 1999) and 2015). The Court did not require the Superior Court to follow the prior round methodologies in calculating the gap obligation.

30. As a result, Dr. David Kinsey and Fair Share Housing Center (FSHC) developed a methodology for computing a 1999 – 2015 gap obligation and a 2015 - 2025 prospective need. Dr. Peter Angelides and the Municipal Consortium developed a competing methodology for the gap obligation and prospective need. Many of the Superior Court judges hired Mr. Richard Reading to help the court understand the two (2) methodologies and their differences.

31. The Honorable Mary Jacobson was one of the judges to hire Mr. Reading. Judge Jacobson conducted over 40 days of trial, listening to witnesses articulate and critique various methods for computing fair share. I was fortunate enough to testify on behalf of the New Jersey Builder’s Association (NJBA) and two (2) private sector developers. Mr. Reading provided his testimony as the last witness in the trial.

32. On March 8, 2018, Judge Jacobson issued her decision in In Re Application of the Municipality of Princeton and In Re West Windsor Township, Docket Nos.: MER-L-1550-15 and MER-L-1561-15 (consolidated)(Judge Jacobson’s Decision), that describes the methodology she used to determine the gap period and prospective need housing obligations for Princeton and

West Windsor. Judge Jacobson directed Mr. Reading to compute the fair share for these two (2) municipalities.

33. I have received Mr. Reading's spreadsheets that were used to determine the Princeton and West Windsor housing obligations. I have reviewed Judge Jacobson's Decision. I find that the Decision, Mr. Reading's spread sheet, Dr. Kinsey's spreadsheets and Dr. Angelides spreadsheets allow me to calculate any municipal fair share based on Judge Jacobson's Decision.

THE PRIOR ROUND OBLIGATION

34. In its March 10, 2015 Decision, the Supreme Court determined that each municipality was responsible for addressing its 1987 – 1999 housing obligation as calculated by COAH. The Township's prior round obligation is 24.

THE 2015 – 2025 PROSPECTIVE NEED

35. New Jersey's low and moderate income housing obligation is a regional housing obligation that is allocated to municipalities. Consistent with all of COAH's rules, Verona is in a housing region that includes Essex, Union, Morris and Warren Counties.

36. Prospective need is a projection of housing need based on population projections developed by New Jersey's Department of Labor and Workforce Development (DOLWD). DOLWD issues different methodologies for the State, including one (1) preferred methodology that is available by County and age group. Judge Jacobson's Decision directs: the use of specific DOLWD projections; the manner in which they are to be used; a methodology to convert the population projections into household projections; and a methodology to convert the household projections to yield the increase in low and moderate income households from 2015 –

2025. Based on her direction, Mr. Reading determined that the 2015 - 2025 prospective need for the Verona housing region is 13,317 low and moderate income housing units.

37. COAH, in its prior round rules, allocated the regional need to municipalities based on the municipal share of three (3) factors: increase in non-residential valuations; undeveloped land weighted by the presence of infrastructure; and income. COAH averaged the three (3) factors to yield an average allocation factor for each municipality. Dr. Angelides offered a different way to allocate the regional need to municipalities. However, Judge Jacobson decided to allocate the need based on the three (3) factors that had been used by COAH and reproduced by David Kinsey. The Verona prospective need average allocation factor, as calculated by Dr. Kinsey, is .00754.

38. When one multiplies the regional prospective need of 13,317 by Verona's share of the regional need (.00754), one finds that the Verona share of the regional prospective need is 100.

39. COAH determined that private market forces add to and help address the prospective need obligation. It determined that demolitions, at the local level, remove housing opportunities and add to the housing need. It determined that existing structures are subdivided into additional housing units and that these additional housing units help address (or lower) the housing obligation. COAH called the additional housing created within the existing housing stock, "conversions." Finally, COAH determined that some housing becomes more affordable over time and helps create affordable housing through filtering.

40. The Appellate Division struck down COAH's filtering calculation as unreliable and found that the calculation was not supported by Census data that measures affordability of housing in New Jersey over time. In Re Adoption of N.J.A.C. 5:94 & 5:95 by N.J. Council on

Affordable Housing, 390 N.J. Super. 1, 42-46 (App. Div. 2007). Judge Jacobson found that neither Dr. Kinsey nor Dr. Angelides had produced a reliable methodology for calculating filtering and chose not to include filtering in her methodology.

41. However, Judge Jacobson did provide very clear direction about demolitions and conversions. Based on the court's direction, Mr. Reading has determined that demolitions add 15 units to the Verona prospective need. Judge Jacobson's Decision endorsed Dr. Angelides calculation of conversions for Verona. Conversions, based on Judge Jacobson's Decision, lowers the Township's housing obligation by 12 units.

42. Based on Judge Jacobson's Decision, the Township's 2015 – 2025 prospective need housing obligation equals 100 (share of regional need) + 15 demolitions – 12 conversions = 103 low and moderate income units.

THE GAP OBLIGATION

43. The 1999 – 2015 gap obligation is based on growth that actually occurred from 1999 – 2015. Before the end of the trial, the Census had actually measured the actual growth in households during the gap period. Judge Jacobson used the Census count of households and determined that 41.45 percent of the 1999 – 2015 increase in households qualify as low and moderate income households. Judge Jacobson's Decision provides direction in calculating the regional need for the gap period. Mr. Reading has followed the court's direction and calculated a regional gap obligation of 13,412.

44. In providing direction to calculating the regional need, Judge Jacobson studied the Municipal Consortium's argument that the regional need should be lowered because a certain percentage of low and moderate income households found affordable housing during the gap period. As a result of her study, the court determined that the Municipal Consortium's

calculation was flawed and found that, on balance, more low and moderate income households lost than found affordable housing.

45. As with prospective need, Judge Jacobson used the COAH allocation factors to distribute the regional gap obligation to each municipality. Dr. Kinsey had calculated each allocation factor and averaged them to compute an average allocation factor of .00832 for Verona.

46. When one multiplies the regional gap obligation of 13,412 by the average allocation factor of .00831, one calculates a 1999 – 2015 Verona gap obligation of 111 affordable units.⁴

47. Judge Jacobson agreed with the Municipal Consortium argument that demolitions and conversions should not apply to the gap obligation because the gap calculation does not require one to forecast the impact of demolitions or conversions. The households that formed during the gap period have, for the most part, found housing.

SUMMARY OBLIGATION

48. If one follows the Supreme Court's direction and applies Judge Jacobson's Decision to Verona, one finds that Verona has a prior round obligation (1987 – 1999) of 24. It has a gap obligation (1999 – 2015) of 111 and a 2015 – 2025 prospective need obligation of 103. The Township's total 1987 – 2025 housing obligation is 238 (24 + 111 + 103).⁵

49. I recognize that Judge Jacobson's Decision is not binding on this court. But in my expert opinion, as a planner, intimately involved with fair share issues for over 30 years, the fair

⁴ The gap obligation, in this case, is almost identical to the prospective need calculation because the projected growth of households is very similar to the actual growth that occurred during the gap period.

⁵ Special Master McKenzie's May 17, 2018 letter to Brian Giblin indicates that the Township's housing obligation is 239. I attribute the difference to rounding error.

share resulting from Judge Jacobson's methodology results in a fair share that falls within a reasonable range of a fair share that this Court might calculate if it conducted its own trial.

COMPLIANCE

50. In researching the Township's compliance, I have reviewed an October 24, 2016 COAH monitoring report for Verona and a 1995 COAH Compliance Report. I have reviewed a publication that lists affordable housing by municipality, *New Jersey's Guide to Affordable Housing*. I have reviewed: the Township's Zoning Ordinance and its 2009 Master Plan, including its 2009 Housing Element; the Poekel Resolution; and the Spectrum Resolution.

51. I find that the Zoning Ordinance does not include any zones that impose an affordable housing obligation on any development.

52. *The New Jersey Guide to Affordable Housing*, the Township's 2009 Housing Element and COAH's monitoring report indicate that 159 affordable age-restricted units exist within Verona. The COAH 1995 Compliance Report indicates that the housing was financed by HMFA and was constructed in 1981.

53. *The New Jersey Guide to Affordable Housing* indicates that a three (3) bedroom group home is located in Verona.

54. FSHC has modified COAH's rules to establish some core principles regarding settlements. One of the core principles is that no more than 25 percent of the fair share can be addressed with age-restricted units.⁶ Based on this principle and a 1987-2025 housing obligation of 238 units, Verona may be able to receive up to 59 units of credit for the Verona Senior Apartments. (In order to receive 59 credits, the Township would have to establish that the housing is governed by controls on affordability that extend through 2025).

⁶ This principle is very similar to COAH's 25 percent cap on age-restricted credits, at N.J.A.C. 5:93-5.14.

55. The Township may also receive credit for the three (3) bedroom group home that has located in Verona *if it meets COAH's criteria for credit*.

56. The Township has taken the position that the Township can receive a 60-unit rental bonus (or extra credit) for rental housing that may be the subject of an agreement with Intervenor Spectrum. It is presumed that their rental bonus opinion is based on a cumulative obligation of 238 units, pursuant to the methodology outlined by Judge Jacobson. However, in order to receive a 60-unit rental bonus credit, the court would have to deviate from COAH's rules, which permit a rental bonus of one unit for each affordable non-age restricted unit *that satisfies the rental obligation*.

57. Assuming Verona is addressing its entire housing obligation, the rental obligation, as applied to Verona, would equal 25 percent of the calculated need.⁷ (see N.J.A.C. 5:93-5.15(a)) Calculated need is determined by subtracting prior cycle credits from the municipal housing obligation. A prior cycle credit is granted for housing constructed between 1980 and 1986. The Verona Seniors Apartments received their certificates of occupancy in 1981. They are prior-cycle credits. Therefore, if the Township receives 59 prior cycle credits for the age restricted housing in the Verona Seniors Apartments, Verona's rental obligation would be 25 percent of (238 – 59), or 45 units. Under this scenario, the maximum rental bonus the Township could receive is 45 units.

58. So, if the Township does negotiate agreements to build rental housing with Intervenor Spectrum for 60 units and Intervenor Poeckel for nine (9) units, it could receive a rental bonus of up to 45 units. This extra credit, the possibility of up to 59 units of credit for the Verona Senior Apartments, and perhaps three (3) credits for a group home would result in a maximum of 176 credits, or 62 credits short of the Township's 238-unit housing obligation.

⁷ If Verona is not addressing its entire housing obligation, the rental obligation and an rental bonus will be less.

59. It is my understanding that the Township is seeking a rental bonus for any affordable housing that results from the Spectrum site. However, in order to receive a rental bonus, the affordable rentals must be already constructed. In the alternative, a rental bonus may be granted if the municipality provides or is provided *a firm commitment* (emphasis provided) for the construction of the rental units (N.J.A.C. 5:93-5.15(d)).

60. COAH's response document provides some clarity regarding the firm commitment required for the rental bonus:

COMMENT: It is not clear whether municipalities that zoned for low and moderate income units will receive the extra rental bonus proposed by the Council.

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.

61. The Spectrum Resolution makes clear that there is no concrete agreement for the construction of affordable housing on the Spectrum property as it states that the current owner is seeking a buyer for the property. The Spectrum resolution does not indicate how many affordable housing units will be constructed on site. Furthermore, since there is no developer, there is no entity associated with the Spectrum site that can provide a firm commitment to construct affordable rental housing. Without an agreement in place to actually build affordable rental units, the Township is not, under COAH Rules, entitled to receive the rental bonus it is seeking.

62. Without the rental bonus on the Spectrum site, Verona may be in position to receive the following credits: 59 units for Hillside, three (3) units for a group home, nine (9) units for the Poekel site and 60 units for Spectrum. This is a total of 131 credits; or

approximately units 107 short of addressing its 1987 – 2025 housing obligation that may be reasonably estimated to be 238 affordable housing units.

CONCLUSION

63. Verona was a participating municipality in COAH's process when COAH ceased to function. The Supreme Court, in its March 10, 2015 Decision said that the courts should consider the extent of the housing obligation and the steps, if any, taken toward compliance with that obligation in determining whether to grant immunity.

64. In March of this year, Judge Jacobson released a long-awaited decision in computing the third-round housing obligation. Judge Jacobson's methodology, applied to Verona, yields a 1987 – 2025 housing obligation of 238 housing units.

65. My research into the Township's compliance reveals that the Township may be eligible to receive credit for three (3) bedrooms in one group home and for some portion of the 159 age restricted housing units that were produced within the Verona Senior Apartments prior to the Mount Laurel II Decision.

66. In the three (3) plus years since the Supreme Court established a process for municipalities to establish constitutional compliance, the Township has not submitted a housing element or summary plan of any sort. It has not provided any information, required by N.J.A.C. 5:93-4.2, to document: that land is a scarce resource; or the capacity of its vacant land to accommodate affordable housing.

67. The Township has met with Bobcar on three (3) occasions to discuss its plans for the two (2) sites offered by Bobcar. The specifics of those discussions are under the umbrella of confidentiality. But I think it is fair to say that the municipal representatives encouraged Bobcar

to prepare costly surveys, engineering and architectural plans and planning reports; and that Bobcar has diligently, and in good faith, attempted to work with the Township to help Verona address its housing obligation. On April 6, 2018, counsel for the Township advised the Court that settlement discussions between the Township and Bobcar were progressing well and that he was confident that a settlement was near. Since then, the Township has canceled two (2) scheduled sessions designed to finalize an agreement on the development of the Bobcar properties, decided to explore condemnation of the Bobcar sites until Bobcar notified the Court of the Township's actions in its initial motion to strip the Township of immunity, and has met again with Bobcar with no progress being made.

68. So, to apply the Supreme Court's criteria for immunity to Verona, I conclude that the Township was participating in COAH's third round process but did not receive substantive certification.

69. I have applied the methodology in Judge Jacobson's Decision to Verona and have determined that the Township has a 1987 – 2025 housing obligation of 238 affordable housing units.

70. There were 159 affordable age restricted housing units built in Verona in 1981. Of this total, the Township may (if controls on affordability have been extended) receive credit for a total of 59 affordable units.

71. The Township may also receive credit for a three (3) bedroom group home if it meets the criteria for such credit.

72. In terms of progress towards addressing the affordable housing obligation since the Supreme Court's March 10, 2015 Decision, the Township has offered no plan of any sort that offers additional affordable housing. Its 2009 Housing Element claims that land is a scarce

resource that precludes the Township from addressing its entire fair share. I find no record that the Township has done anything to follow COAH's second round rules that are applicable for a municipality that claims land is a scarce resource.

73. Those rules require a municipality to use land efficiently to provide affordable housing. Rather than use land efficiently for affordable housing, Verona has squandered affordable housing opportunities by granting approval to a 112 unit non-inclusionary development on the Annin Flagg redevelopment site, initiated a process to investigate the condemnation of the Bobcar sites, and passed two resolutions: one that appears to have a realistic ability to result in the construction of 9 affordable units (the Poekel site) and the second (Spectrum) for which the Township claims credit for 60 affordable units. But there is no developer associated with the Spectrum property. Certainly, no developer has committed to build rental housing and so no rental bonus is warranted. Even if a rental bonus was warranted, the rental bonus, pursuant to N.J.A.C. 5:93-15 should be 45, not the 60 which we believe that Verona is seeking.

74. Verona has made meager progress toward addressing its housing obligation despite having over three years to become constitutionally compliant. In my opinion, the Court should revoke the Township's immunity from "builder's remedy" litigation and I urge the Court to do so.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Dated: October 26, 2018



Art Bernard, PP

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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-4773-15

Civil Action
(Mount Laurel)

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

Of Counsel and on the Brief:

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On the Brief:

Allyson M. Kasetta, Esq.

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
PRELIMINARY STATEMENT	1
PROCEDURAL HISTORY	2
STATEMENT OF FACTS	5
LEGAL ARGUMENT	13
 <u>POINT I</u>	
VERONA SHOULD BE STRIPPED OF THE TEMPORARY RELIEF FROM A BUILDER’S REMEDY SUIT PROVIDED BY MT. LAUREL IV DUE TO ITS FAILURE TO DEVELOP A COMPLIANT HOUSING PLAN	13
CONCLUSION.....	29

TABLE OF AUTHORITIES

Cases

<u>Cranford Development Associates, LLC v. Township of Cranford,</u> 445 <u>N.J. Super.</u> 220, 224-225 (App. Div. 2016), <u>certif. denied</u> , 2016 N.J. LEXIS 923 (Sept. 7, 2016).....	17, 18, 22
<u>Hills Dev. Co. v. Bernards</u> , 103 <u>N.J.</u> 1, 61 (1986).....	29
<u>Holmdel Builders Ass'n v. Holmdel</u> , 121 <u>N.J.</u> 550, 577 (1990)	29
<u>In re adoption of N.J.A.C. 5:96 and 5:97 by N.J. Council on Affordable Housing</u> , 221 <u>N.J.</u> 1 (2015)(“ <u>Mt. Laurel IV</u> ”).....	14, 15, 16, 17, 18, 28
<u>In Re Marlboro Twp.</u> , 2015 <u>N.J.Super. Unpub.</u> LEXIS 1898.....	18
<u>In re the Municipality of Princeton and In re West Windsor Township</u> , Nos. MER-L-1550-15 and MER-L-1561-15 (consolidated), Law Div., Mercer Cty., (Mar. 8, 2018).....	3, 10, 19, 26
<u>In re Township of South Brunswick</u> , 448 <u>N.J. Super.</u> 441, 450-451 (Law Div. 2016).....	17, 18
<u>J.W. Field v. Tp. Of Franklin</u> , 204 <u>N.J. Super.</u> 445, 456 (Law Div. 1985)	14
<u>Tocco v. Council on Affordable Housing</u> , 242 <u>N.J. Super.</u> 218, 221 (App. Div. 1990)	29
<u>Toll Bros. v. Twp. of W. Windsor</u> , 173 <u>N.J.</u> 502, 560 (2002)	18, 22, 28

State Statutes

<u>N.J.A.C. 5:93-4.2</u>	16
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PRELIMINARY STATEMENT

Bobcar Corporation, Neil Joy Associates and Forsons Partners, LLC, Defendants/Intervenors in the Declaratory Judgment Action filed by the Township of Verona (together, the “Intervenors” or “Bobcar Intervenors”), bring this Motion to revoke the temporary immunity against exclusionary zoning actions previously granted by this Court.

It has been over three years since the Township of Verona (the “Township” or “Verona”) filed its Declaratory Judgment Action. Despite repeated assurances, it has not prepared an updated Housing Element and Fair Share Plan, or submitted to the Court a matrix or any other evidence of concrete plans to implement a constitutionally-compliant Plan. During that time, the Township has approved a large residential development without any affordable units and has failed to negotiate in good faith with the Bobcar Intervenors toward a settlement that would permit them to construct multifamily residential housing, including a substantial number of affordable housing units, on their two (2) properties. The Bobcar Intervenors’ properties are critical for the Township to satisfy its constitutional fair share obligation, yet after an extended period of documented good faith efforts by the Intervenors to demonstrate the feasibility of their proposed developments, the Township suddenly and arbitrarily commenced an investigation into the condemnation of their properties without any legitimate public need.

Having been alerted to the Township’s willful noncompliance with its constitutional obligations by the Bobcar Intervenors when they filed their first motion to strike the Township’s immunity, the Court instructed the Township to present a plan for compliance by September 28, 2018. The Township failed to comply with that Order. Following the Township’s assurances that it was close to having a plan prepared, the Court extended the Township’s time for

compliance until November 16, 2018. It will not meet that deadline as it does not have a plan nor sufficient time to serve notice of a fairness hearing.

The Township has continued to ignore the Court's directives and does not have a constitutionally-complaint plan. It has acted in bad faith and has abused the temporary immunity granted by the Court. As a result, the Bobcar Intervenorers again request the Court to revoke its immunity against exclusionary zoning actions in order to permit the Intervenorers to seek a builder's remedy and the imposition of a scarce resources order.

PROCEDURAL HISTORY

1. The Township submitted its Notice of Filing for Declaratory Judgment Action and Motion Seeking Temporary Immunity on July 2, 2015 (together, the "DJ Action"). Certification of Allyson M. Kasetta ("Kasetta Cert."), Ex 1.

2. On August 14, 2015, Bobcar Corporation, Neil Joy Associates and Forsons Partners, LLC filed a Motion to Intervene in the DJ Action as Interested Parties. Kasetta Cert., Ex. 2.

3. On September 15, 2015, the Court entered an Order granting the Bobcar Intervenorers' Motion to Intervene. Kasetta Cert., Ex. 3.

4. Also on September 15, 2015, the Court entered an Order granting Verona (1) a period of five (5) months to prepare a constitutional compliant Housing Element and Fair Share Plan ("HEFSP"); and (2) temporary immunity from third party lawsuits pending the Court's issuance of a Final Judgment of Compliance and Repose based upon the updated HEFSP to be prepared and submitted by Verona. Kasetta Cert., Ex. 4.

5. Two additional interested parties have been permitted to intervene in the DJ Action: (a) Poekel Properties LLC, which is the owner of property designated as Block 2301, Lots 17 and 18 on the Verona Tax Map and consisting of approximately 2.7 acres; and (b) Spectrum 360, LLC, which is the owner of property designated as Block 13, Lot 4, on Verona Tax Map and consisting of approximately 5.5 acres within Verona and an additional 2.5 acres in the adjacent Township of Montclair. Kasetta Cert., Ex. 11-12.

6. On February 5, 2016, the Court entered an Order consolidating all declaratory judgment actions filed by municipalities in Essex County; appointing a Special Master and Regional Special Master; providing instructions to the various parties; and setting timelines for submission of expert reports and depositions. The February 5, 2016 Order provided the municipalities with temporary immunity until such time that their affordable housing plans are determined to be constitutionally compliant. Kasetta Cert., Ex. 5.

7. Thereafter, the Court held several case management conferences on the consolidated actions, and entered additional Case Management Orders on December 12, 2016, March 24, 2017 and November 9, 2017, each time extending the temporary immunity granted to the municipalities. Kasetta Cert., Ex. 7; Ex. 10; Ex. 13.

8. On March 9, 2018, the Court entered an Order rescheduling the case management conference previously set for that date to April 6, 2018, so as to provide the Court, the parties and the Special Masters the opportunity to review the Opinion and Order of the Honorable Mary C. Jacobson, A.J.S.C. in In re the Municipality of Princeton and In re West Windsor Township, Nos. MER-L-1550-15 and MER-L-1561-15 (consolidated), (Law Div. Mercer Cty., Mar. 8, 2018) (“Judge Jacobson’s Decision”) and extending the temporary immunity granted to the municipalities through that date. Kasetta Cert., Ex. 17.

9. On March 28, 2018, the Court entered an Order scheduling trial dates for various municipalities other than Verona. Kasetta Cert., Ex. 19.

10. On April 6, 2018, the Court held a case management conference with all parties. During the case management conference, Township of Verona Attorney Brian Giblin represented to the Court that settlement discussions are ongoing and that Verona is nearing a settlement with all Intervenors. Kasetta Cert., Ex. 21.

11. Based upon that representation, the Court scheduled a further case management conference with respect to Verona for July 3, 2018.

12. On June 14, 2018, the Bobcar Intervenors filed a previous Motion to revoke the Township's temporary immunity against exclusionary zoning actions. Oral argument was heard by the Court, and the Motion was denied by Order entered July 20, 2018. Kasetta Cert., Ex. 29. However, the Court directed the Township to submit a plan for compliance before the case management conference scheduled for September 28, 2018.

13. On July 21, 2018, the Court issued a notice advising that the discovery period would end on September 28, 2018, and that the DJ Action would be scheduled for arbitration or trial with no adjournments granted absent exceptional circumstances. Kasetta Cert., Ex. 30.

14. The Township did not have a plan to present to the Court within the extended timeframe, so the case management conference was converted to a telephonic conference on September 28, 2018. During that conference, the Court set a new date of November 16, 2018, for the fairness hearing.

15. On October 22, 2018, the Court entered a written Order memorializing its decision on September 28, 2018, which scheduled a fairness hearing for November 16, 2018. Kasetta Cert., Ex. 32.

STATEMENT OF FACTS

1. In the Certification of the Township Manager submitted by Verona over three years ago in support of the DJ Action, it was represented to the Court that Verona was in the process of preparing a revised Housing Element and Fair Share Plan (“HEFSP”) that will verify full compliance with its constitutional affordable housing obligations. Kasetta Cert., Ex. 1(f) at ¶22¹.

2. On that basis, Verona submitted that it has fully discharged its affordable housing obligations and requested protection and repose against exclusionary zoning litigation for a period of ten (10) years. Id. at 5-6. Verona further requested temporary immunity from third party lawsuits pending the Court’s issuance of a final Judgment of Compliance and Repose based upon its HEFSP. Id.

3. The Bobcar Intervenors are the owners of two large, undeveloped properties in Verona: one is located at 25 Commerce Court, Block 12.01, Lot 3.01, and consists of 11.61 acres; the second is located at 111 Mt. Prospect Avenue, Block 501, Lot 83, and consists of 14.29 acres.

4. The Bobcar Intervenors filed their Motion to Intervene in the DJ Action as Interested Parties on the basis of their ownership of 25 Commerce Court and ability to construct an inclusionary development thereon. Kasetta Cert., Ex. 2.

5. Subsequent to the Court’s entry of the Order granting their Motion to Intervene, the Bobcar Intervenors advised Special Master Elizabeth McKenzie and the Township Attorney

¹ The Brief submitted by the Borough states that “the [Planning] Board has adopted and the Township has endorsed an amended Third Round HPE&FSP, the 2015 HPE&FSP, which has been submitted to the court for review and approval as part of the Verified Complaint for Declaratory Judgment.” Kasetta Cert., Ex. 1(e) at 9. However, no such document was included with the Complaint or provided to the Intervenors at any time thereafter.

of their ownership of 111 Mt. Prospect Avenue and ability to construct an additional inclusionary development on that property. Kasetta Cert., Ex. 6. As a result, the Bobcar Intervenor has continuously negotiated with Verona for the development of both properties.

6. Verona has not yet submitted an updated HEFSP in accordance with Mt. Laurel IV, and its Master Plan has not been reexamined since 2009.

7. A previous HEFSP is included within the Township's 2009 Master Plan Reexamination Report at Section 13. The 2009 HEFSP indicates that Verona will be unable to fully satisfy its fair share obligation due to a shortage of land, stating "[a]s a community that is almost entirely built up, most of the future development will either occur as additions to, rehabilitation of, or complete demolition and reconstruction of existing structures." Kasetta Cert., Ex. 27 at 32.

8. The 2009 HEFSP includes a worksheet entitled "Summary of Adjusted Growth Share Projection Based on Land Capacity," which states "[m]unicipalities seeking to request a downward adjustment to the COAH-generated growth projections may do so by providing a detailed analysis of municipal land capacity." Id. at 35. Based upon the calculations that appear to have been inserted by the Township, the worksheet concludes: "[t]he Municipal land capacity analysis results in a reduction to the COAH-generated growth projection." Id.

9. The 2009 HEFSP includes both of the Bobcar Intervenor's properties in the "Township of Verona Growth Projection Adjustment – Residential Parcel Inventory," demonstrating that Verona considered both properties as possible sites for inclusionary development prior to filing the DJ Action. Id. at 37, 53, 61.

10. On November 2, 2016, the Bobcar Intervenor attended an initial mediation session with Township officials, Special Master Elizabeth McKenzie, and counsel for Fair Share Housing Center (“FSHC”).

11. At the request of the Court, counsel for the Bobcar Intervenor submitted a letter to the Court on January 11, 2017, advising of the initial mediation session. The letter advised that Verona’s unmet need for affordable housing units was stated by FSHC to be 327 units and that the Bobcar Intervenor’s professionals had prepared concept plans for the development of the two properties, attaching copies for the Court’s review. As set forth in the letter, it was anticipated that the two properties together could produce 72 affordable units while respecting the environmental constraints and providing significant setbacks to surrounding residential properties, although Verona’s zoning ordinance would need to be amended. Finally, the letter advised the Court that settlement negotiations were expected to become more specific based upon the concept plans and invited input from Verona, FSHC and Special Master McKenzie. Kasetta Cert., Ex. 8.

12. On May 18, 2017, the Bobcar Intervenor held an additional mediation session with the Township officials, at which time the parties reviewed more detailed concept plans and discussed specific areas of concern. Verona encouraged the Bobcar Intervenor to provide more detailed plans so that the proposed settlement could be presented to the Township Council and FSHC and the appropriate amendments to the zoning ordinance could be prepared. The Township advised the Intervenor that it will likely be unable to satisfy its fair share obligation without an adjustment based on insufficient vacant, developable land.

13. The Bobcar Intervenor then prepared new property surveys and developed site plans and preliminary architectural plans for both properties. On January 25, 2018, the Bobcar

Intervenors submitted to the Township and Special Master McKenzie (1) updated concept plans for the development of both properties; (2) preliminary elevations for both properties; and (3) draft amendments to the Township Zoning Ordinance which would effectuate the necessary changes to make the proposed projects feasible and conforming. The letter requested that the Township contact the Intervenors' counsel to schedule a continued mediation session. Copies of the letter, with enclosures, were provided to the Township Planner and FSHC counsel. Kasetta Cert., Ex. 15.

14. After several attempts to follow up with the Township and schedule a mediation session to discuss the recently submitted documents, counsel for the Bobcar Intervenors sent an additional letter to the Township Attorney on February 15, 2018, requesting that such a session be scheduled prior to the upcoming March 9, 2017 case management conference (which was subsequently adjourned by the Court). Kasetta Cert., Ex. 16.

15. On March 27, 2018, a mediation session was held among the Bobcar Intervenors and their professionals and the Township Manager, Attorney, and Planner. At that time, the Township officials recommended certain modifications to the Bobcar Intervenors' concept plans and requested additional information, including perspective renderings and steep slope analyses. The Bobcar Intervenors and the Township professionals tentatively scheduled a continued mediation session for April 27, 2018.

16. At the case management conference held by the Court on April 6, 2018, Township Attorney Brian Giblin advised on the record 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." Counsel for the Bobcar Intervenors agreed (as did counsel for the

two additional developers who have intervened in the DJ Action), based upon the discussions that took place at the mediation sessions. Kasetta Cert., Ex. 21 at 4-5.

17. On April 18, 2018, Mr. Giblin advised that the Township officials would not be available for mediation on April 27, 2018 and requested that it be rescheduled to May 18, 2018. Counsel for the Bobcar Intervenor's consented to the delay and agreed to provide additional perspective views of the two proposed developments as had been requested at the previous session. Kasetta Cert., Ex. 22. The mediation session was confirmed for May 18, 2018 shortly thereafter.

18. On the afternoon of Friday, May 4, 2018, Township Attorney Brian Aloia (who had not previously been involved in the DJ Action or the Township's negotiations with the Bobcar Intervenor's) advised the Bobcar Intervenor's Counsel by telephone of the Township Council's intention to introduce ordinances authorizing the acquisition of both of the Bobcar Intervenor's properties for open space and/or public purpose at its Monday, May 7, 2018 meeting.

19. On May 7, 2018, counsel for the Bobcar Intervenor's sent a letter to the Township advising that the Intervenor's objected to its contemplated acquisition of the properties and reminding the Township that as previously discussed, Verona would not be able to meet its constitutional fair share obligations without a vacant land adjustment and without the affordable housing units contemplated as part of the Bobcar Intervenor's proposed projects. Kasetta Cert., Ex. 23.

20. On May 8, 2018, revised concept plans incorporating the changes suggested by the Township professionals and including steep slope analyses for both properties were forwarded to Township Attorney Giblin in anticipation of the May 18, 2018, mediation session.

Counsel for the Bobcar Intervenors requested confirmation that the May 18, 2018, mediation would still occur as planned. Kasetta Cert., Ex. 24.

21. To date, the Bobcar Intervenors have provided the Township with engineering and architectural plans, perspective renderings, and draft zoning ordinance amendments, all to demonstrate the feasibility of the two proposed inclusionary developments.

22. The Bobcar Intervenors have also obtained Letters of Interpretation from the New Jersey Department of Environmental Protection (“NJDEP”) with respect to both properties. Kasetta Cert., Ex. 14, 20².

23. On May 17, 2018, Township Attorney Giblin advised that he was canceling the mediation session scheduled for May 18, 2018, in light of Verona’s decision to proceed with the acquisition of the Bobcar Intervenors’ properties.

24. Also on May 17, 2018, Special Master McKenzie sent a letter to Township Attorney Giblin providing her estimations of (1) the calculation of Verona’s fair share obligation by FSHC’s expert; (2) the settlement number offered to Verona by FSHC; and (3) the calculation of Verona’s fair share utilizing the methodology set forth in Judge Jacobson’s decision in In Re Application of the Municipality of Princeton and In Re West Windsor Twp., Docket Nos. MER-L-1550-15 and MER-L-1561-15 (consolidated). Kasetta Cert., Ex. 25.

25. In the letter, Special Master McKenzie cautioned that any effort by Verona to condemn land while its DJ Action is pending is “apt to be viewed as an attempt to circumvent

² It was brought to the attention of the Bobcar Intervenors that a concerned resident “objected” to the issuance of the Letter of Interpretation for 111 Mt. Prospect Avenue, in response to which NJDEP issued a letter explaining that a letter of interpretation does not authorize development but only verifies the locations of wetlands. Kasetta Cert., Ex. 18.

compliance with its affordable housing obligations” if the Township is seeking an adjustment due to insufficient vacant developable land and cannot justify the reservation of properties on the grounds that it would fall below permissible thresholds. Id. at 2. She further warned that “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-aside³” and that “[t]he fact that the two sites ... have been offered as sites for inclusionary residential development in Verona’s pending Declaratory Judgment action could be used as evidence of bad faith and exclusionary intentions, *no matter how good Verona’s reasons may be for wanting these sites for other public purposes.*” Id. at 3-4 (emphasis in original).

26. Despite the strongly worded letter from Special Master McKenzie and the objections raised by counsel for the Bobcar Intervenors, the Township introduced and scheduled for final adoption ordinances authorizing the acquisition of the Intervenors’ properties and appropriating capital funds for the preliminary planning expenses. The Township ultimately voted to table the ordinances authorizing the acquisitions, and the Township Attorney has since advised that the Township will not pursue the condemnations. Kasetta Cert., Ex. 26.

27. As a result of the Township’s actions, the Bobcar Intervenors previously filed a Motion seeking the revocation of its temporary immunity against inclusionary zoning actions. The primary basis for that Motion was the Township’s unexcused failure to develop a compliant housing plan. However, the Motion also pointed out the impropriety of the Township’s attempt to condemn the Bobcar Intervenors’ properties under the pretext of a public need for open space

³ The Annin Flag site is located at 141-163 Bloomfield Avenue and received site plan approval from the Verona Planning Board for the construction of a 112 unit residential development without any requirement for an affordable housing set-aside on January 5, 2017, while the DJ Action was pending. See Kasetta Cert., Ex. 9.

where the real purpose was to thwart the development of affordable housing and circumvent compliance with its constitutional obligations.

28. The previous Motion was denied by Order entered July 20, 2018. Kasetta Cert., Ex. 29. However, in denying the Motion, the Court specifically required that the Township present a plan for compliance by September 28, 2018. The Court thereafter issued a notice advising that the discovery period would end on September 28, 2018, and that arbitration or trial would be scheduled with no adjournments granted absent exceptional circumstances.

29. On August 28, 2018, the Bobcar Intervenors again met with the Township representatives to discuss the development of their properties and how their properties may be included in the Township's plan. The Township also stated that it was seeking to acquire another property that it may seek to include in the plan, but it refused to provide the Bobcar Intervenors with any information with respect to this property.

30. Despite having had two (2) additional months to negotiate settlement agreements with the various parties and develop a plan for compliance, on September 26, 2018, the Township's COAH Attorney sent a letter to the Court conceding that it still had not complied with the Court's instruction and requesting that the Township's temporary immunity be again extended through November 30, 2018 so that it could provide the requisite 30-day notices for a fairness hearing to be held by the Court. Kasetta Cert., Ex. 31.

31. On September 28, 2018, the Court held a case management conference by telephone with all of the parties.

32. During the case management conference, the Court advised the parties that a fairness hearing would be scheduled for November 16, 2018, at which time the Court would

consider whether the Township's HEFSP and proposed settlement with FSHC and the various Intervenor are fair and reasonable to low and moderate income households.

33. The Township still has not presented a plan for compliance or any proposed settlement agreement for consideration by the Court or Special Master McKenzie.

34. Further, the Bobcar Intervenor have not received the required 30 day notice of the fairness hearing on November 16, 2018. As of the date of this Motion, the Township cannot satisfy the notice requirement for a fairness hearing on November 16, 2018.

35. It has come to the attention of the Bobcar Intervenor that on October 1, 2018, the Verona Township Council adopted Resolutions authorizing settlements with Poekel Properties, LLC and Spectrum 360, LLC, the other Intervenor in the DJ Action. Kasetta Cert., Ex. 37; Ex. 38. The Bobcar Intervenor have no knowledge of the terms of the contemplated settlements other than the information contained in the Resolutions.

36. The within Motion does not rely upon the attempted condemnations of the Intervenor's properties as a separate basis for revocation of the Township's immunity because the Township Attorney has represented to the Court that such condemnations will not be pursued; however, those actions are referenced as evidence of the Township's bad faith and willful refusal to comply with its constitutional affordable housing obligations.

LEGAL ARGUMENT

POINT I

I. Verona Should Be Stripped of the Temporary Relief from a Builder's Remedy Suit Provided by Mt. Laurel IV Due to its Failure to Develop a Compliant Housing Plan

In the landmark "Mt. Laurel IV" decision, the Supreme Court of New Jersey set forth a transitional process for (1) "participating" municipalities, i.e., those who adopted resolutions of

participation to submit their fair share housing plans to the former Council on Affordable Housing (“COAH”); and (2) municipalities who had previously received substantive certification under COAH’s Third Round Rules to seek judicial confirmation that their affordable housing plans are presumptively valid. 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”).

Municipalities were given the option to file a declaratory judgment action within 30 days of the order implementing the Mt. Laurel IV decision, unless they chose to wait for a challenge by an interested party. Id. at 26-27. Participating municipalities could also seek from the court temporary immunity against exclusionary zoning actions where developers might seek a builder’s remedy. Id. at 27-28. The 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.” Mt. Laurel IV, supra, 221 N.J. at 27. (Emphasis added).

Continuing immunity throughout the declaratory judgment process is not automatic for a participating municipality. Rather, the municipality must demonstrate good faith efforts to comply with its fair share obligation, and the court must undertake a fact-specific analysis in order to determine whether immunity is likely to lead to compliance. See also, J.W. Field v. Tp. Of Franklin, 204 N.J. Super. 445, 456 (Law Div. 1985). In considering whether to grant continuing immunity after the initial five month period, the courts were directed 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. The courts look more favorably at a request for immunity by a municipality that has taken good faith actions toward implementing a plan of compliance than one “that merely submitted a resolution of participation and took a few or perhaps no further steps toward preparation of a formal plan demonstrating its constitutional compliance.” Id. at 27.

For this reason, the Court declared that immunity “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. at 28. The trial court must “assiduously assess whether immunity, once granted, should be withdrawn if a particular town abuses the process for obtaining a judicial declaration of constitutional compliance.” Id. at 26. As detailed below, Verona’s immunity should be withdrawn because it has failed to take any substantive action toward constitutional compliance in over three years since Mt. Laurel IV.

A. Verona is no longer entitled to immunity because in more than three years since Verona filed its DJ Action, it has failed to submit a compliant plan or make any progress toward compliance.

The Township of Verona chose to file the Declaratory Judgment Action in order to have the Court confirm its compliance with the constitutional obligation to provide for affordable housing. As a result, the Township has enjoyed immunity from exclusionary zoning actions for

more than three (3) years.⁴ However, in that time, the Township has not made any meaningful effort to comply with its fair share obligation.

A Certification by the former Township Manager filed with its initial declaratory judgment papers stated that the Township of Verona was in the process of preparing a revised HEFSP. Kasetta Cert., Ex. 1(f) at ¶22. Now, more than three (3) years later, the Township still has not submitted to the court a new HEFSP or even a summary or matrix plan for review. See Certification of Art Bernard, P.P. (“Bernard Cert.”), ¶19. It has not provided the required information under N.J.A.C. 5:93-4.2 to establish land as a scarce resource, despite representations that it cannot fully satisfy its obligations due to a shortage of vacant developable land. Id. at ¶¶19, 63. On January 5, 2017, during the pendency of the DJ Action, the Township’s Planning Board inexplicably granted site plan approval for the construction of a 112-unit residential development without **any** requirement for an affordable housing set-aside. See Bernard Cert., ¶23; Kasetta Cert., Ex. 9.

A fact-specific analysis of Verona’s efforts as required by Mt. Laurel IV can only lead to one conclusion: that it has, for a protracted period of over three (3) years, abused the process for obtaining a judicial declaration of constitutional compliance by failing to take any meaningful action toward compliance, and that its temporary immunity against exclusionary zoning actions should therefore be revoked.

The courts have not hesitated to revoke immunity where municipalities have failed to act in good faith toward reaching compliance under the process dictated by Mt. Laurel IV. For

⁴ Verona submitted its Notice of Filing for Declaratory Judgment Action and Motion Seeking Temporary Immunity for filing on July 2, 2015. See Kasetta Cert., Ex. 1. As set forth therein, the Township submitted itself to this Court’s jurisdiction as a participating municipality. Id. at 1(b), 1(d), 1(e), 1(f).

example, the temporary immunity granted to the Township of South Brunswick was revoked due to its “refusal to remedy and/or remove” deficiencies in its HEFSP, leading the court to conclude that 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) (quoting Mount Laurel IV, *supra*, 221 N.J. at 73-73). As the court noted in that case, “[d]espite a span of seven months and several extensions of its immunity, South Brunswick’s progress had been ‘miniscule’ at best. Its insistence in relying upon mechanisms that were legally improper was entirely unacceptable⁵.” Id.

In determining that South Brunswick was not in compliance with its affordable housing obligations, the court noted that “because of [its] systematic ‘abuses’ of the declaratory judgment process, and the revocation of its immunity, the Township stands in a far less favorable position than it would have had it proceeded with ‘good faith’ and with ‘reasonable speed.’” Id. at 466. The court noted that builder’s remedy actions such as those brought against South Brunswick are permitted “where the declaratory judgment review process was ‘abused,’ became ‘unreasonably protracted,’ or where the Township’s proposed manner of compliance was ‘constitutionally wanting.’” Id.⁶ (quoting Mount Laurel IV, *supra*, 221 N.J. at 29).

In another example, the Township of Cranford was found to have failed to comply with its fair share housing obligations and was subjected to a builder’s remedy action by a developer willing to construct affordable housing units. Cranford Development Associates, LLC v.

⁵ The legally improper mechanisms included multiple 100% affordable housing projects, excessive age-restricted units, a higher than acceptable set-aside for low and moderate income homes and an inclusionary development with an inappropriate gross density.

⁶ It should be noted that the court also awarded costs to the Defendant-Intervenors in the South Brunswick matter.

Township of Cranford, 445 N.J. Super. 220, 224-225 (App. Div. 2016), certif. denied, 2016 N.J. LEXIS 923 (Sept 7, 2016). In that case, the court found Cranford's HEFSP "seriously deficient" in terms of its fair share obligation of 410 units. Id. The Appellate Division acknowledged that in order to qualify for a builder's remedy under Mt. Laurel IV, a developer must demonstrate that it engaged in good faith negotiations. Id. at 226. However, it concurred with the trial judge's finding that "before filing suit, [the developer] had appeared at three meetings of the municipal governing body (the Committee) and had requested that the Committee include [its] proposed development plan in the Township's fair housing plan," and thus rejected a claim by the township that the developer had failed to engage in such good faith negotiations before filing suit. Id. at 227.

The court affirmed the decision to allow a builder's remedy, concluding "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." Id. at 231, citing Toll Bros. v. Twp. of W. Windsor, 173 N.J. 502, 560 (2002). See also, In Re Marlboro Twp., 2015 N.J. Super. Unpub. LEXIS 1898 (allowing for builder's remedy litigation as a result of the township's bad faith in the completion of its second-round obligations). Kasetta Cert., Ex. 28.

Here, Verona has had more than three (3) years (as compared to seven (7) months in the South Brunswick case) to take affirmative actions toward compliance, and has willfully chosen not to do so. Where the plans submitted by South Brunswick and Cranford were deficient, Verona has failed to even submit an updated HEFSP for review by the Court, Special Master

McKenzie, or the Intervenors. See Bernard Cert., ¶19. Moreover, despite an estimated obligation of 238 affordable housing units⁷, the Township's zoning ordinance remains devoid of any requirement for an affordable housing set-aside within new residential developments. Id. at ¶¶47, 50. Inexplicably, it decided during the pendency of this action to grant site plan approval for the construction of a 112-unit residential development without **any** requirement for an affordable housing set-aside. See Bernard Cert., ¶23; Kasetta Cert., Ex. 9.

On October 1, 2018, the Verona Township Council adopted Resolutions authorizing settlements with Intervenors Poekel Properties, LLC ("Poekel") and Spectrum 360, LLC ("Spectrum"). Kasetta Cert., Ex. 37; Ex. 38. The Resolution with respect to Poekel states that the affordable housing plan to be adopted by the Township "will include the [Poekel] Property as the site of an inclusionary development at a density of approximately 46 rental units, including a 20% set-aside for units to be affordable to very low, low and moderate income households, together with approximately 6,395 square feet of commercial space and other site improvements." Kasetta Cert., Ex. 37.

The Resolution with respect to Spectrum states that Spectrum "desires to sell the Property for a developer who will construct a multifamily inclusionary development on the Property" and that "Spectrum prepared concept plans that are representative of the type of proposed project, depicting a maximum six (6) stories including parking, which accommodates approximately 300 residential units." Kasetta Cert., Ex. 38. The Resolution states that the contemplated development will have an inclusionary affordable housing component, but does not specify any

⁷ Utilizing the methodology articulated by Judge Jacobson in In Re Application of the Municipality of Princeton and In Re West Windsor Twp., Docket Nos. MER-L-1550-15 and MER-L-1561-15 (consolidated).

particular set-aside percentage or number of affordable housing units. Id. It is clear from the Resolution that Verona has not in fact secured an agreement by which affordable housing units will be constructed on the Spectrum site, but only a concept plan for the same.

Notwithstanding the information contained in the Resolutions and the agreements that Verona is presumably negotiating with Poekel and Spectrum, Verona has failed to provide any substantive compliance information to the Court which would be required for it to proceed with the fairness hearing scheduled for November 16, 2018. Verona cannot justify its failure to submit a draft HEFSP with the timing of Judge Jacobson's Decision. Unlike Verona, many other municipalities throughout the State have developed compliant housing plans and reached settlements both before and after Judge Jacobson's Decision, including, by way of example, the Township of Long Hill (September 2017), the Borough of Hillsdale (September 2017), the City of Lambertville (May 2018) and the Borough of Raritan (May 2018). Kasetta Cert., Ex. 33-36.

Verona has recently represented that it is considering the acquisition of another parcel of land for the construction of affordable housing. Since Verona suddenly chose to explore the condemnation of the Bobcar Intervenor's properties and ceased negotiating a settlement with the Bobcar Intervenor's, it is presumed that Verona intends to develop some number of affordable housing on this parcel in lieu of taking credits for affordable units on the Bobcar Intervenor's properties. However, Verona has failed to provide any specific information as to the status of the acquisition, the size of the parcel, or how many affordable housing units it might feasibly accommodate. Further, the Bobcar Intervenor's are unaware of any Resolution adopted by the Township Council with regard to the acquisition or development of another parcel that could be used for the construction of affordable housing.

Both Special Master McKenzie and the Bobcar Intervenor have calculated Verona's obligation at 238 units, and Verona has yet to explain how it can satisfy that obligation without the units proposed on the Bobcar Intervenor's two properties⁸. Kasetta Cert., Ex. 25; Bernard Cert., ¶48. The Bobcar Intervenor estimates that the maximum number of credits that the Township may receive from the existing senior housing development, the existing group home, the Poekel property and the Spectrum concept is 176. Bernard Cert., ¶58⁹. Giving Verona the benefit of every doubt, that number is still 62 of its obligation. Id.

Moreover, since the Bobcar Intervenor's initial Motion was decided in July 2018, the Court has granted Verona not one, but two additional extensions in order to prepare a HEFSP. First, the Court instructed Verona to have a HEFSP submitted for review in advance of the case management conference on September 28, 2018. Having failed to meet that deadline, Verona requested a further extension, advising "the parties will need until mid- to late October to conclude negotiations and provide the requisite 30 day Notice of a fairness hearing to be held in late November." Kasetta Cert., Ex. 31. Verona neglected to acknowledge the notice issued by the Court on July 21, 2018, which confirmed the discovery end date of September 28, 2018 and

⁸ Verona also indicated to the Court that it anticipates having a surplus of affordable housing units resulting from an existing development containing low and moderate income 159 units. However, Verona has not provided any documentation confirming the income restriction (including its duration), the nature of the units, or any other information necessary for the Court to evaluate whether those units are eligible for credits toward Verona's fair share obligation. Moreover, the claim of a surplus is contrary to Verona's previous filings with COAH claiming that the existing 159-unit development is age-restricted, for which credit is capped by State regulation, as well as its assertions that it would need to seek a vacant land adjustment due to a shortage of developable land. See Bernard Cert., ¶¶19, 59; Kasetta Cert., Ex. 23, 25, 27.

⁹ This calculation assumes for the sake of argument that Verona will receive a rental bonus of 45 units, which has not been established at this time due to Verona's failure to provide the appropriate documentation.

advised that the DJ Action would be scheduled for arbitration or trial and that no adjournments would be granted absent exceptional circumstances. Kasetta Cert., Ex. 30.

Based upon Verona's representation that it was nearing the conclusion of settlement negotiations, the Court scheduled a fairness hearing for November 16, 2018. Verona has not notified the Court of any exceptional circumstances that has prevented it from complying with the Court order, and yet, as of the date of filing of this Motion, Verona has neither presented a proposed settlement or HEFSP nor complied with the notice requirements for a fairness hearing on that date. As has been the case for more than three (3) years, Verona still has not made any measurable progress toward compliance. 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).

B. The Bobcar Intervenors have negotiated in good faith.

The Bobcar Intervenors have continuously engaged in good faith negotiations with the Township. The Intervenors held an initial mediation session with the Township on November 2, 2016, with Special Master McKenzie and counsel for FSHC present. At that time, it was estimated that the two developments could produce 72 affordable units while both respecting existing environmental constraints and providing significant setbacks to surrounding residential properties. See Kasetta Cert., Ex. 8.

A second mediation was held on May 18, 2017, at which time, the Bobcar Intervenor presented more detailed plans and the parties discussed specific areas of concern. With the encouragement of the Township, the Bobcar Intervenor agreed to further refine the plans so that the proposed settlement could be presented to the Township Council and FSHC and the appropriate amendments to the zoning ordinance could be prepared. The Township also stated that it will likely be unable to satisfy its fair share obligation without an adjustment based on insufficient vacant, developable land.

On January 25, 2018, following the completion of new property surveys, engineering site plans and preliminary architectural plans, counsel for the Bobcar Intervenor provided the Township, FSHC and Special Master McKenzie with detailed plans for the development of both of the Bobcar Intervenor's properties, and draft zoning ordinance amendments for both properties with a request that the Township contact the Intervenor's counsel to schedule a further mediation session. Kasetta Cert., Ex. 15. Because no response was received from the Township, a second letter was sent on February 15, 2018, requesting that a mediation session be scheduled prior to the case management conference on March 9, 2018. Kasetta Cert., Ex. 16.

The third mediation session ultimately occurred on March 27, 2018. The Township professionals provided recommendations to address their final concerns before the proposed settlement would be presented to the Council, and the Intervenor agreed to modify the plans accordingly. A further mediation session was tentatively scheduled for April 27, 2018.

At the case management conference held by the Court on April 6, 2018, the Township's Attorney advised on the record 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.” Counsel for the Bobcar Intervenor agreed, based upon the discussions that took place at the March 27, 2018, mediation session. Kasetta Cert., Ex. 21 at 4-5.

On April 18, 2018, the Township Attorney requested rescheduling of the April 27, 2018 mediation, and it was agreed that the mediation session would occur on May 18, 2018. Kasetta Cert., Ex. 22. As requested by the Township, counsel for the Bobcar Intervenor provided additional architectural renderings the following week. Id.

Following the July 2018 hearing before the Court, the Bobcar Intervenor met once more with the Township officials on August 28, 2018. And yet again, the Township has not accepted their offer to provide for the construction of a significant number of affordable housing units.

As reflected by the record, the Bobcar Intervenor have expended substantial time and costs in working toward a settlement with the Township, not only in diligently attending mediation sessions, but also in engaging professionals to prepare costly surveys, engineering plans, architectural plans, elevations, perspective renderings, and draft zoning ordinance amendments. The Bobcar Intervenor have also obtained from NJDEP Letters of Interpretation that verify the locations of freshwater wetlands on the properties and confirm that the properties can be developed as proposed. See Kasetta Cert., Ex. 14; Ex. 20. It is submitted that the Bobcar Intervenor’s good faith cannot be questioned.

C. The Township has acted in bad faith and has abused the immunity conferred by the Court.

In contrast to the good faith efforts undertaken by the Intervenor, the Township has abused the immunity granted by the court and has acted in bad faith. At this late date, Verona has still failed to submit a compliance plan to the court, has alleged that there is insufficient land in the Township for the construction of affordable housing, yet has approved a large residential development without any affordable housing obligation and, on May 21, 2018, the Verona Township Council adopted two ordinances to explore the condemnation of the Intervenor's two properties which would further deplete the Township's inventory of available land.

Late in the afternoon of Friday, May 4, 2018, counsel for the Bobcar Intervenor received a rather unexpected telephone call from Township Attorney Brian Aloia¹⁰ advising that the Township Council would introduce ordinances on Monday, May 7, 2018, to commence the process of acquiring the Bobcar Intervenor's two properties by eminent domain.

On May 7, 2018, counsel for the Bobcar Intervenor sent a letter to Mr. Aloia objecting to such a course of action and warning that if the ordinances were introduced the Intervenor would take all necessary legal action to protect their rights, including a request that the Township's immunity against builder's remedy actions be revoked by this Court. The letter reminded Mr. Aloia that, as previously discussed, the Township will not be able to meet its constitutional fair share obligation without both a vacant land adjustment and the substantial number of affordable housing units contemplated as part of the Intervenor's proposed projects. Kasetta Cert., Ex. 23. As a result of the letter to Mr. Aloia, a telephone conference was held on

¹⁰ Until then, the Intervenor had been negotiating with Brian Giblin, Esq., the Township's COAH Counsel.

May 7, 2018, among counsel for the Intervenor, Township Attorney Aloia, Township Condemnation Attorney Demetrice Miles, and Special Master McKenzie. During the call, counsel for the Bobcar Intervenor again objected to the introduction of the ordinances.

Despite the objections raised by the Bobcar Intervenor, ordinances authorizing the acquisitions of the Intervenor's properties and appropriating capital funds for preliminary planning expenses in connection therewith were introduced by the Township Council and scheduled for final adoption.

On May 8, 2018, counsel for the Bobcar Intervenor provided to Mr. Giblin revised plans for both properties, which incorporated detailed steep slope analyses, as requested at the previous mediation session. Counsel requested confirmation from Mr. Giblin that the May 18, 2018 mediation would still occur as planned. Kasetta Cert., Ex. 24. Unfortunately, on May 17, 2018, Mr. Giblin canceled the mediation session scheduled for the next day.

Also on May 17, 2018, Special Master McKenzie sent a letter to Township COAH Attorney Brian Giblin advising that FSHC's expert had calculated Verona's Third Round Obligation at 327 units in 2016; that FSHC had offered as a settlement a Third Round Obligation of 229 units; and that Verona's Third Round Obligation based on Judge Jacobson's decision in In Re Application of the Municipality of Princeton and In Re West Windsor Twp., Docket Nos.: MER-L-1550-15 and MER-L-1561-15 (consolidated)(Law Div. Mercer Cty., Mar. 8, 2018)(Judge Jacobson's Decision), would be 239 units (including the prior round obligation)¹¹. Kasetta Cert., Ex. 25.

¹¹ Special Master McKenzie noted that Judge Jacobson's methodology has not been endorsed by FSHC at this point and that some adjustment may be necessary in the event of a trial.

The letter from Special Master McKenzie also commented on the Township's effort to begin the process of condemning the Intervenor's properties, the implications of which are discussed in further detail below. Special Master McKenzie advised that "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 an adjustment due to insufficient vacant developable land.*" Id. at 4 (emphasis in original).

Despite the unequivocal letter from Special Master McKenzie and the objections raised by the Intervenor, final adoption of the ordinances was included on the agenda for the Township Council's meeting on May 21, 2018. At the recommendation of Township Attorney Aloia, the final votes on the ordinances authorizing the acquisitions of the Bobcar Intervenor's properties were tabled to June 11, 2018. Kasetta Cert., Ex. 26 at 10, 14-15. However, the Council voted to adopt ordinances to authorize the expenditures of capital funds in connection with the two acquisitions. Id. at 16-23.

In response to the filing of the Bobcar Intervenor's first motion to strip the Township of immunity, its attorney represented to the Court that it will not pursue the condemnations. However, the eleventh hour effort to condemn the Intervenor's properties, which are necessary for Verona to meet its obligations and are feasible for inclusionary development, is especially egregious given Verona's expressed intent to seek an adjustment in its fair share obligation due to a shortage of vacant developable land. The Township cannot satisfy its fair share obligation without the proposed developments and could not point to a legitimate need to acquire the

properties for any public purpose, so it was forced to abandon those efforts only after the Bobcar Intervenor brought this to the attention of the Court. This is bad faith.

Since filing this DJ Action in 2015, the Township has failed to submit a HEFSP or any information to substantiate its claim that land is a scarce resource in Verona; failed to amend its Zoning Ordinance to require any affordable housing set aside for new residential developments; approved a large residential development without any affordable housing; and attempted to condemn the two largest and most viable properties where affordable housing can be developed. These actions clearly demonstrate an abuse of the declaratory judgment process as set forth in Mt. Laurel IV.

Because the Bobcar Intervenor has acted in good faith and the Township has willfully chosen a path of non-compliance, the Township is no longer entitled to immunity against exclusionary zoning actions. This Court should immediately revoke the Township's temporary immunity, thereby permitting the Bobcar Intervenor to seek a builder's remedy and scarce resources order, and award costs to the Bobcar Intervenor in connection with this Motion.

The Bobcar Intervenor will then make the required showing that the Township's land use regulations fail to provide "a realistic opportunity for the construction of its fair share of ... low and moderate income housing" as the first prong for entitlement to a builder's remedy. Toll Bros v. Twp. of W. Windsor, 173 N.J. 502, 542 (2002), citing S. Burlington County NAACP v. Mt. Laurel, 92 N.J. 158, 204-205 (1983) ("Mt. Laurel II"). The Bobcar Intervenor will also show that they "proposed a project with a substantial amount of affordable housing" and that their sites are "suitable, i.e. the municipality failed to meet its burden of providing that the [sites

are] environmentally constrained or that construction of the project[s] would represent bad planning.” *Id.* at 559¹².

Given the Township’s representations that it does not have adequate vacant land to meet its fair share obligation, the Bobcar Intervenor will also seek an order preserving land within Verona as a scarce resource and restraining the Township from acquiring the Intervenor’s properties. See Holmdel Builders Ass’n v. Holmdel, 121 N.J. 550, 577 (1990), citing N.J.A.C. 5:91-11.1; Hills Dev. Co. v. Bernards, 103 N.J. 1, 61 (1986) (authority to order a municipality to “take appropriate measures to preserve ... those resources that will probably be essential to the satisfaction of its *Mount Laurel* obligation”); Tocco v. Council on Affordable Housing, 242 N.J. Super. 218, 221 (App. Div. 1990).

CONCLUSION

For all of the foregoing reasons, 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/Intervenor attorney’s fees and costs of suit.

¹² As noted by the Court, “where a developer succeeds in *Mount Laurel* litigation and proposes a project providing a substantial amount of lower income housing, a builder’s remedy should be granted unless the municipality establishes that because of environmental or other substantial planning concerns, the plaintiff’s proposed project is clearly contrary to sound land use planning.” *Id.* at 562-563.

Respectfully submitted,

PRICE, MEESE, SHULMAN & D'ARMINIO, P.C.
ATTORNEYS FOR DEFENDANTS/INTERVENORS
BOBCAR CORPORATION, NEIL JOY ASSOCIATES
AND FORSONS PARTNERS, LLC

By:



Gregory D. Meese

Date: October 26, 2018

CERTIFICATION OF SERVICE

I hereby certify that the within Notice of Motion, Brief in support thereof, Certifications of Art Bernard, P.P. and Allyson M. Kasetta, Esq., and proposed form of Order were served upon all counsel on this day by way of electronic notification to the following:

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I further certify that copies of the Notice of Motion, Brief in support thereof, Certifications of Art Bernard, P.P. and Allyson M. Kasetta, Esq., and proposed form of Order were also sent to the following addressees via UPS overnight delivery on this day:

Hon. Robert H. Gardner, J.S.C.
Superior Court, Essex County, Law Division
Historic Courthouse
470 Martin Luther King Jr. Drive, 4th Floor
Newark, NJ 07102

I certify that the foregoing statements made by me are true. I am aware that if the foregoing statements made by me are willfully false, I am subject to punishment by the court.

Dated: October 26, 2018

PRICE, MEESE, SHULMAN & D'ARMINIO, P.C.
Attorneys for Defendants/Intervenors

By: /s/Gregory D. Meese
Gregory D. Meese

PRICE, MEESE, SHULMAN & D'ARMINIO, P.C.
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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-4773-15

Civil Action
(Mount Laurel)

**CERTIFICATION OF
ALLYSON M. KASETTA, ESQ.**

Allyson M. Kasetta, Esq., of full age, certifies as follows:

1. I am an Attorney At Law of the State of New Jersey employed by the firm of Price, Meese, Shulman & D'Arminio, P.C., counsel for proposed Intervenors/Defendants Bobcar Corporation, Neil Joy Associates and Forsons Partners, LLC, (hereinafter collectively referred to as the "Bobcar Intervenors").
2. I make this Certification in support of the Bobcar Intervenors' Motion to Revoke the Temporary Immunity Granted to the Plaintiff Township of Verona ("Verona").
3. Attached as Exhibit 1 are true copies of the documents filed by the Township of Verona on July 2, 2015, commencing its Declaratory Judgment Action under 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) (the “DJ Action”),

consisting of the following:

- a. Notice of Filing of Declaratory Judgment;
 - b. Notice of Motion for Temporary Immunity;
 - c. Civil Case Information Statement;
 - d. Complaint for Declaratory Judgment;
 - e. Brief in support of Township;
 - f. Certification of Township Manager;
 - g. Affidavit of Publication; and
 - h. Check in the amount of \$50.00 for filing fees (intentionally omitted).
4. Attached as Exhibit 2 is a true copy of the Notice of Motion to Intervene in the DJ Action filed by the Bobcar Intervenors on August 17, 2015.
 5. Attached as Exhibit 3 is a true copy of the Order entered on September 15, 2015 granting the Bobcar Intervenors’ Motion to Intervene in the DJ Action.
 6. Attached as Exhibit 4 is a true copy of the Order entered on September 15, 2015 granting the Township a five month period to prepare a constitutionally compliant Housing Element and Fair Share Plan and further granting temporary immunity against third party lawsuits pending the issuance of a Final Judgment of Compliance and Repose.
 7. Attached as Exhibit 5 is a true copy of the First Case Management Order entered by the Court on February 5, 2016.
 8. Attached as Exhibit 6 is a true copy of a letter to Special Master Elizabeth McKenzie from counsel to the Bobcar Intervenors dated May 5, 2016.

9. Attached as Exhibit 7 is a true copy of the Case Management Order entered by the Court on December 12, 2016.
10. Attached as Exhibit 8 is a true copy of a letter to the Court from counsel to the Bobcar Intervenor dated January 11, 2017 enclosing copies of the concept plans for 25 Commerce Court and 111 Prospect Avenue as discussed with the Township of Verona at a mediation session on November 2, 2016.
11. Attached as Exhibit 9 is a true copy of a resolution adopted by the Verona Planning Board on January 26, 2017, memorializing its January 5, 2017 approval of a residential development at 163 Bloomfield Avenue.
12. Attached as Exhibit 10 is a true copy of the Case Management Order entered by the Court on March 24, 2017.
13. Attached as Exhibit 11 is a true copy of the Order entered by the Court on May 12, 2017 granting the Motion of Spectrum 360, LLC to intervene in the DJ Action as an interested party.
14. Attached as Exhibit 12 is a true copy of the Order entered by the Court on May 26, 2017 granting the Motion of Poekel Properties LLC to intervene in the DJ Action as an interested party.
15. Attached as Exhibit 13 is a true copy of the Case Management Order entered by the Court on November 9, 2017.
16. Attached as Exhibit 14 is a true copy of the Letter of Interpretation issued by the New Jersey Department of Environmental Protection on December 28, 2017 with respect to 25 Commerce Court.

17. Attached as Exhibit 15 is a true copy of a letter to Township COAH Attorney Brian Giblin and Special Master Elizabeth McKenzie from counsel to the Bobcar Intervenor dated January 25, 2018 enclosing concept plans, preliminary elevations and draft zoning ordinances with respect to 25 Commerce Court and 111 Mount Prospect Avenue.
18. Attached as Exhibit 16 is a true copy of a letter to Township COAH Attorney Brian Giblin from counsel to the Bobcar Intervenor dated February 15, 2018.
19. Attached as Exhibit 17 is a true copy of the Order entered by the Court on March 9, 2018, rescheduling the case management previously scheduled for that date to April 6, 2018 and extending the temporary immunity granted to the municipalities through the date of the rescheduled case management conference.
20. Attached as Exhibit 18 is a true copy of a letter from the New Jersey Department of Environmental Protection to a concerned resident dated March 19, 2018 in connection with the Letter of Interpretation issued for 111 Mount Prospect Avenue.
21. Attached as Exhibit 19 is a true copy of the Order entered by the Court on March 28, 2018 scheduling trial dates for various municipalities other than the Township of Verona.
22. Attached as Exhibit 20 is a true copy of the Letter of Interpretation issued by the New Jersey Department of Environmental Protection on March 28, 2018 with respect to 111 Mount Prospect Avenue.
23. Attached as Exhibit 21 is a true copy of an excerpt of the transcript of the case management conference held on April 6, 2018 in connection with the DJ Action.
24. Attached as Exhibit 22 is a true copy of an email to Township COAH Attorney Brian Giblin from counsel to the Bobcar Intervenor dated April 23, 2018 enclosing additional

perspective renderings of the proposed developments at 25 Commerce Court and 111 Mount Prospect Avenue.

25. Attached as Exhibit 23 is a true copy of a letter to Township Attorney Brian Aloia from counsel to the Bobcar Intervenor dated May 7, 2018.
26. Attached as Exhibit 24 is a true copy of an email to Township COAH Attorney Brian Giblin from counsel to the Bobcar Intervenor dated May 8, 2018 and enclosing revised concept plans for 25 Commerce Court and 111 Mount Prospect Avenue.
27. Attached as Exhibit 25 is a true copy of a letter to Township COAH Attorney Brian Giblin from Special Master Elizabeth McKenzie dated May 17, 2018.
28. Attached as Exhibit 26 is a true copy of an excerpt of the transcript of the May 21, 2018 meeting of the Verona Township Council.
29. Attached as Exhibit 27 is a true copy of Section 13 (Housing Element and Fair Share Plan) of the Township of Verona's 2009 Master Plan Reexamination Report.
30. Attached as Exhibit 28 is the unpublished opinion in In re Marlboro Twp., NO. A-0243-10T4 (App. Div. August 7, 2015).
31. Attached as Exhibit 29 is a true copy of an Order entered by the Court on July 20, 2018 denying the Bobcar Intervenor's previous Motion to revoke the Township's immunity.
32. Attached as Exhibit 30 is a true copy of a notice received from the Court advising that the discovery period in this matter would end on September 28, 2018 (the same date as the most recent case management conference) and that the DJ Action would be scheduled for arbitration or trial on that date with no adjournments thereafter granted absent exceptional circumstances.

33. Attached as Exhibit 31 is a true copy of a letter to the Court from Township COAH Attorney Brian Giblin dated September 26, 2018.
34. Attached as Exhibit 32 is a true copy of an Order entered by the Court on October 22, 2018 which scheduled a fairness hearing for November 16, 2018 and extended the Township's temporary immunity through November 17, 2018.
35. Attached as Exhibit 33 is a true copy of a settlement agreement between the Borough of Hillsdale and Fair Share Housing Center dated September 27, 2017, as retrieved by this office via internet search.
36. Attached as Exhibit 34 is a true copy of a settlement agreement between the Township of Long Hill and Fair Share Housing Center dated September 27, 2017, as retrieved by this office via internet search.
37. Attached as Exhibit 35 is a true copy of a settlement agreement between the Borough of Raritan and Fair Share Housing Center dated May 18, 2018, as retrieved by this office via internet search.
38. Attached as Exhibit 36 is a true copy of a settlement agreement between the City of Lambertville and Fair Share Housing Center dated May 22, 2018, as retrieved by this office via internet search.
39. Attached as Exhibit 37 is a true copy of Resolution No. 2018-135 adopted by the Township of Verona Council on October 1, 2018, authorizing the settlement and execution of a memorandum of understanding with Poekel Properties, LLC.

40. Attached as Exhibit 38 is a true copy of Resolution No. 2018-136 adopted by the Township of Verona Council on October 1, 2018, authorizing the settlement and execution of a memorandum of understanding with Spectrum 360, LLC.

I hereby certify that the foregoing statements made by me are true, and that I am aware that if any of those statements are willfully false, I am subject to punishment.

Dated: October 26 2018


Allyson M. Kasetta