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July 2, 2015

The Honorable Francine A. Schott, J.S.C.
Superior Court of New Jersey
Essex County Historic Courthouse
470 Dr. Martin Luther King, Jr. Boulevard
Newark, New Jersey 07102

Re: In re Township of Verona Compliance with Third Round
Mount Laurel Affordable Housing Obligation
Docket No. (T/B/D)

Dear Judge Schott:

Please accept this letter brief in lieu of a formal brief on behalf of the Township of Verona, Essex County (the "Township") in support of its motion for entry of an Order granting the Township and the Verona Township Planning Board (the "Board") temporary immunity in accordance with In re Adoption of N.J.A.C. 5:96 and 5:97, 221 N.J. 1 (2015). Specifically, the Township seeks an order of temporary immunity from any and all exclusionary zoning lawsuits, commencing retroactively on June 8, 2015 and remaining in effect until the court reviews and either approves or disapproves the Township's Third Round Housing Plan Element and Fair Share Plan.

PRELIMINARY STATEMENT OF JURISDICTION AND AUTHORITY TO ENTER ORDER

The Law Division of the Superior Court, Essex County, has jurisdiction over the within matter which seeks a Declaratory Judgment of Third Round Mount Laurel Compliance and Repose pursuant to R. 4:42-3, R. 4:3-1(a)(4), N.J.S.A. 2A:16-53, J.W. Field v. Twp. of Franklin, 204 N.J. Super. 445, 456-458 (Law Div. 1985), favorably referenced in Hills Dev. Co. v. Bernards Twp., 103 N.J. 1, 29-30 (1986), N.J.S.A.

52:27D-313(a), and In re Adoption of N.J.A.C. 5:96 & 5:97, 221 215 N.J. 1 (2015), and venue of the action is before the designated Mount Laurel Judge for Vicinage 13 accordance with paragraph 10 of the implementing order accompanying the 2015 Decision. Id. at 36.

As the Court held in In re Adoption of N.J.A.C. 5:96 & 5:97, 221 215 N.J. 1 (2015) (the “2015 Decision”), part of the process of judicial review of a municipal Third Round Housing Plan Element and Fair Share Plan (“HPE&FSP”) includes the Mount Laurel trial courts providing municipalities with temporary immunity from exclusionary zoning litigation during the period when the court is reviewing the HPE&FSP. As the Court explained, “towns that were in ‘participating’ status before COAH [those that had submitted their HPE&FSP and had petitioned for substantive certification but had not obtained substantive certification] and that now affirmatively seek to obtain a court declaration that their affordable housing plans are presumptively valid should have no more than five months in which to submit their supplemental housing element and affordable housing plan and during that period, the court may provide initial immunity preventing any exclusionary zoning actions from proceeding.” Id. at 27-28. As the Court held, “as part of the court’s review [of a municipality’s Third Round HPE&FSP], . . . we authorize . . . a court to provide a town whose plan is under review immunity from subsequently filed challenges during the court’s review proceedings, even if supplementation of the plan is required during the proceedings.” Id. at 24. “[T]he trial court may enter temporary periods of immunity prohibiting exclusionary zoning actions from proceeding pending the court’s determination of the municipality’s presumptive compliance with its affordable housing obligation.” Id. at 28.

PROCEDURAL HISTORY AND STATEMENT OF FACTS

The following Procedural History and Statement of Facts is drawn from the Verified Complaint for Declaratory Judgment which has been filed in this matter as well as from the Certification of the Township Manager, Joseph A. Martin which has been submitted with the within Motion.

1. In 1975 the Supreme Court of New Jersey in South Burlington County N.A.A.C.P. v. Township of Mount Laurel, 67 N.J. 151 (1975), ruled that the developing municipalities in the State of New Jersey exercising their zoning power, in general, had a constitutional obligation to provide a realistic opportunity for the construction of their fair share of the region's low and moderate income housing needs.

2. In 1983, the Supreme Court refined that constitutional obligation in South Burlington County N.A.A.C.P. v. Township of Mount Laurel, 92 N.J. 158 (1983), to apply to those municipalities having any portion of their boundaries within the growth area as shown on the State Development Guide Plan.

3. In 1985, the New Jersey Legislature adopted, and the Governor signed, the Fair Housing Act ("FHA") N.J.S.A. 52:2D-301 et seq. which transformed the judicial doctrine which became known as the "Mount Laurel doctrine" into a statutory one and provided an alternative administrative process in which municipalities could elect to participate in order to establish a Housing Element and Fair Share Plan ("HEFSP") that would satisfy its constitutional obligation by creating an administrative agency known as the Council on Affordable Housing ("COAH") to develop regulations to define the obligation and implement it.

4. COAH proceeded to adopt regulations for first round obligations applicable from 1987 to 1993 and second round obligations that created a cumulative obligation from 1987 to 1999.

5. In 1992 the Township of Verona prepared and adopted, in accordance with the

requirements of the Fair Housing Act as well as the standards and regulations of the Council on Affordable Housing (COAH), its Affordable Housing and Fair Share Plan. The intent of this plan was to identify any obligations for the provision of low and moderate income housing and, where such obligations exist, to outline a program for addressing the need. Foresight on the part of the township has allowed for the construction of a 159 unit Section 8 project completed in 1981 and financed through the New Jersey Housing and Mortgage Finance Agency. Verona submitted this housing plan and received full credit for that project, the full fair share obligation of Verona is satisfied, including its indigenous need.

8. The February 1995 Housing Element and Fair Share Plan incorporated updated demographic information and reflected changes in COAH's fair share allocation for Verona. The Township's fair share had, in 1987, been determined to be 127 units. However, when new cumulative fair share numbers (1987-1999) were issued by COAH in 1993, Verona's fair share allocation was reduced to 27 units. The 1995 Housing Element and Fair Share Plan continued to claim credits for 159 prior cycle low income senior citizens housing in fulfillment of its fair share obligation.

9. This plan was submitted to COAH on April 4, 1995. On August 2, 1995 COAH granted Verona's petition for Substantive Certification awarding credits of the 159 unit senior citizens low income section 8 rental housing development. This project was deemed to have satisfactorily addressed the entire 1987 to 1999 fair share obligation. (Cumulative Rounds One and Two)"

10. COAH first proposed third round substantive and procedural rules in October, 2003. 35 N.J.R. 4636(a); 35 N.J.R. 4700(a).

11. Those rules remained un-adopted and COAH re-proposed both the substantive and procedural third round rules (N.J.A.C. 5:94 and 5:95) in August of 2004 and adopted the same effective on December 20, 2004. (the "2004 Regulations")

12. In 2005, the Township of Verona Adopted a Fair Share Plan and Housing Element to address its third round obligation."

13. The 2004 Regulations were challenged and on January 25, 2007, the Appellate Division invalidated various aspects of those regulations and remanded considerable portions of the rules to COAH with direction to adopt revised rules. In the Matter of the Adoption of N.J.A.C. 5:94 and 5:95 by the New Jersey Council on Affordable Housing, 390 N.J. Super. 1 (App. Div.), certif. denied, 192 N.J. 72 (2007) (the "2007 Case").

14. On January 22, 2008, COAH proposed and published revised third round regulations in the New Jersey Register. 40 N.J.R. 237.

15. On May 6, 2008, COAH adopted the revised third round regulations and advised that the new regulations would be published in the June 2, 2008 New Jersey Register, thereby becoming effective.

16. On May 6, 2008, COAH simultaneously proposed amendments to the revised third round rules it had just adopted. Those amendments were published in the June 16, 2008 New Jersey Register, 40 N.J.R. 3373 (Procedural N.J.A.C. 5:96); 40 N.J.R. 3374 (Substantive N.J.A.C. 5:97). The amendments were adopted on September 22, 2008 and made effective on October 20, 2008.

17. On Thursday, December 18, 2008 the Township of Verona Planning Board held a public hearing pursuant to ~~N.J.S.A. 40:55D-10~~ of the Municipal Land Use Law to hear public

comment and to consider the amendment to the Housing Element and Fair Share Plan of the Township's Master Plan. After public comment, the Planning Board adopted amendments to the Housing Element and Fair Share Plan. This housing element, COAH completed application, resolution adopting the housing element, the most recent zoning ordinance, and developers fee ordinance were all send to COAH on December 24, 2008 in compliance with COAHs regulations."

18. In June of 2012 Verona submitted to COAH modifications to its spending plan." and Verona continues to monitor its affordable housing trust funds in accordance with COAH regulations.

19. The Supreme Court established a transitional process for municipalities, like the Township of Verona, that participated in the administrative process before COAH to file a declaratory judgment action with the trial courts seeking to declare their HEFSPs as being constitutionally compliant and seeking similar protections to those that the participating municipalities would have received if they had continued to proceed before COAH.

20. In explaining the transitional process contemplated, the Supreme Court equated these "Participating "Municipalities" to those municipalities in 1985 that had sought to transfer jurisdiction from the Court to the newly created COAH and switch the forum from a judicial one to an administrative one under N.J.S.A. 52:27D-316.

21. While the Supreme Court in the 2015 Case declined to adopt a specific methodology or formula to calculate the third round affordable housing obligations of the municipalities and instead left that determination to the 15 Mount Laurel Judges (one in each vicinage), it did provide some guidance by reiterating its endorsement of the previous

methodologies employed in the First and Second Round Rules as the template to establish third round affordable housing obligations, and as abovementioned, by treating Participating Municipalities filing Declaratory Judgment actions in the same way that the 1985 FHA when originally enacted on July 2, 1985 treated municipalities transitioning from the judicial to the administrative process.

22. In light of the decisions in the 2013 Case and the 2015 Case, the Township of Verona and its Planner are currently in the process of preparing a revised HEFSP that will verify full compliance of the Township of Verona with its constitutional affordable housing obligations.

23. For all of the forgoing reasons it is respectfully submitted that the Township of Verona has fully discharged its constitutional affordable housing obligations and seeks protection and repose against exclusionary zoning litigation for a period of ten (10) years from its date of entry.

LEGAL ARGUMENT

I. THE COURT SHOULD GRANT THE TOWNSHIP AND THE BOARD TEMPORARY IMMUNITY FROM ANY AND ALL EXCLUSIONARY ZONING LAWSUITS TO ALLOW THE COURT TO REVIEW THE TOWNSHIP'S AFFORDABLE HOUSING PLAN UNDAUNTED BY THE FILING OF EXCLUSIONARY ZONING LAWSUITS

After the Mount Laurel II decision, 92 N.J. 158 (1983), and prior to the 1985 adoption of the Fair Housing Act, N.J.S.A. 52:27D301 et seq. (the "FHA"), Judge Serpentelli, one of the original three Mount Laurel judges, established an immunity procedure to be utilized in Mount Laurel litigation,⁵ which he explained in J.W. Field v. Twp. of Franklin, 204 N.J. Super. 445, 456-458 (Law Div. 1985). After balancing all of the "overriding policy objectives" established by the New Jersey Supreme Court in Mount Laurel II, Judge Serpentelli determined that "immunity" from Mount Laurel lawsuits, including but not limited

to builder's remedy lawsuits, should be conferred upon any municipality that committed to comply voluntarily with its affordable housing obligations through either stipulating to noncompliance and agreeing to comply in an on-going lawsuit or filing a Declaratory Judgment action seeking a judgment of compliance and repose. Id.

The immunity mechanism was created to encourage municipal voluntary compliance and to refocus efforts away from unnecessary and expensive litigation and towards voluntary compliance. Although the Supreme Court never expressly reviewed this type of order, the Court favorably referenced this immunity procedure in Hills Dev. Co. v. Bernards Twp., 103 N.J. 1, 29-30, 62-64 (1986) as a creative and effective management tool in a Mount Laurel case, noting that this innovative procedure had been used and praising the trial judges for developing innovative techniques to implement the Mount Laurel doctrine. To repeat from above, after balancing all seven "overarching policy objectives" established by the Court in Mount Laurel II, Judge Serpentelli in J.W. Field conferred immunity from Mount Laurel lawsuits upon any municipality that committed to comply voluntarily. More specifically, if a municipality had been sued, the immunity would insulate the municipality from subsequent suits. If the municipality had not been sued, the immunity would attach upon the filing of a Declaratory Judgment action to empower the municipality to comply free from any Mount Laurel lawsuits. J.W. Field, 204 N.J. Super. at 456.

The 2015 Decision formally approves a temporary immunity procedure as part of the process of judicial review of a municipal Third Round HPE&FSP. As set forth above in the Preliminary Statement, the Court held in the 2015 Decision that part of the process of judicial review of a Third Round HPE&FSP includes the Mount Laurel trial court providing the municipality with temporary immunity from exclusionary zoning litigation during the period when the court is reviewing the HPE&FSP, even if supplementation of the HPE&FSP is required during the proceedings. 221 N.J. at 24.

As the Court explained, “towns that were in ‘participating’ status before COAH [those that had submitted their HPE&FSP and had petitioned for substantive certification but had not obtained substantive certification] and that now affirmatively seek to obtain a court declaration that their affordable housing plans are presumptively valid should have no more than five months in which to submit their supplemental housing element and affordable housing plan (and] (during that period, the court may provide initial immunity preventing any exclusionary zoning actions from proceeding.” *Id.* at 27-28. As the Court held, “as part of the court’s review (of a municipality’s Third Round HPE&FSP], . . . we authorize . . . a court to provide a town whose plan is under review immunity from subsequently filed challenges during the court’s review proceedings, even if supplementation of the plan is required during the proceedings.” *Id.* at 24. “[T]he trial court may enter temporary periods of immunity prohibiting exclusionary zoning actions from proceeding pending the court’s determination of the municipality’s presumptive compliance with its affordable housing obligation.” *Id.* at 28.

The Township has not only filed a Declaratory Judgment action seeking to voluntarily comply with the Township’s Third Round Mount Laurel affordable housing obligation, but the 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. For this reason alone, the court should grant the Township’s motion and enter an order granting the Township and Board temporary immunity from all exclusionary zoning lawsuits while the court reviews the Township’s 2015 HPE&FSP.

In the event an interested party argues to the court that temporary immunity for the Township should not be automatic upon filing the Declaratory Judgment action and that, instead, the court must engage in an individualized assessment of the Township’s compliance efforts, the Township notes that the Supreme Court was clear that only in cases where a town elects not to file a Declaratory Judgment

action and, instead, elects to wait until its affordable housing plan is challenged for constitutional compliance, are immunity requests to be assessed on an individualized basis. Id. at 28. Only in a case where the town elects not to file a Declaratory Judgment action and finds itself a defendant in an exclusionary zoning lawsuit, must the court evaluate the extent of the town's obligation and the steps, if any, taken toward compliance with that obligation in determining whether to grant temporary immunity. Id. In those cases, and in only those cases, the factors that the court may review as relevant, in addition to assessing current conditions within the community, are whether the housing element has been adopted, any activity that has occurred in the town affecting the need for affordable housing, and progress the town has made in satisfying past obligations. Id.

While no such individualized assessment should be made in this case because the Township here has filed a Declaratory Judgment action and has not waited for a lawsuit to be filed against it, an individualized assessment of the Township's obligations and the steps the Township has taken toward compliance with its obligations as set forth above in the Procedural History and Statement of Facts and in the Martin Certification, would in any event result in the court granting the Township's motion and entering an order granting the Township and Board temporary immunity from all exclusionary zoning lawsuits while the court reviews the Township's 2015 HPE&FSP.

CONCLUSION

For all of the foregoing reasons, the Township respectfully requests that the court grant its motion and confer on the Township and on the Board temporary immunity from any and all exclusionary zoning lawsuits, commencing retroactively on June 8, 2015 and remaining in effect until the court reviews and either approves or disapproves the Township's 2015 HPE&FSP.

Respectfully submitted,

GIBLIN & GANNAIO

By: 
Michael A. Gannaio, Esq.
Township Attorney