



**New Jersey Judiciary
Superior Court - Appellate Division
NOTICE OF MOTION**

GREGORY D MEESE, Esq.
PRICE MEESE SHULMAN & D'ARMINIO PC
50 TICE BLVD, STE 380
WOODCLIFF LAKE, NJ 07677
201-391-3737
GMEESE@PRICEMEESE.COM
JZELLER@PRICEMEESE.COM

**IN THE MATTER OF THE TOWNSHIP OF VERONA, A
MUNICIPAL CORPORATION OF THE STATE OF NEW
JERSEY**

Notice of Motion:

MOTION FOR LEAVE TO APPEAL
TO SEEK INTERLOCUTORY RELIEF

PLEASE TAKE NOTICE that the undersigned hereby moves before the Superior Court of New Jersey, Appellate Division, for an Order granting the above relief:

In support of this motion, I shall rely on the accompanying brief or certification.

I hereby certify that I am submitting the original of this notice of motion and accompanying brief or certification to the Clerk of the Appellate Division, and submitting same upon my adversary by email notification. If delivery by non-electronic means, two copies of same will be served upon the following:

TO:

DEBRA DADIC

ROBERT HEYS GARDNER

BRIAN T GIBLIN, Esq.
GIBLIN & GANNAIO
2 FOREST AVE
ORADELL, NJ 07649

**JOHN PHILIP INGLESINO,
Esq.**
INGLESINO WEBSTER
WYCISKALA & TAYLOR LLC
600 PARSIPPANY RD STE
204
PARSIPPANY, NJ 07054

**PETER MICHAEL
FLANNERY, Esq.**
BISGAIER HOFF LLC
25 CHESTNUT STREET
SUITE 3

HADDONFIELD, NJ 08033

Trial court #: ESX-L-4773-15

Trial court disposition date: 06/07/2019

Category: LAW-CIVIL PART

Type: CIVIL

County: ESSEX

Trial Court Judge name: ROBERT HEYS GARDNER, JSC

For: APPELLANT,
BOBCAR CORPORATION, NEIL JOY
ASSOCIATES AND FORSONS PARTNERS, LLC
s/ GREGORY D MEESE, Esq.
PRICE MEESE SHULMAN & D'ARMINIO PC
BAR ID#: 037831983 Date: 06/27/2019
EMAIL:
GMEESE@PRICEMEESE.COM,JZELLER@PRICE
MEESE.COM

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
APPELLATE DIVISION

DOCKET NO.:

Civil Action

ON APPEAL FROM:

ESSEX COUNTY SUPERIOR COURT,
LAW DIVISION, ESSEX COUNTY

Docket No.: L-4773-15

HON. ROBERT H. GARDNER,
J.S.C., Sat Below

**DEFENDANTS/INTERVENORS' BRIEF IN SUPPORT OF MOTION FOR
LEAVE TO APPEAL**

PRICE, MEESE, SHULMAN & D'ARMINIO, P.C.
50 Tice Boulevard
Woodcliff Lake, NJ 07677
(201) 391-3737
gmeese@pricemeese.com
Attorneys for Defendants/Intervenors
Bobcar Corporation, Neil Joy Associates
and Forsons Partners, LLC

Of Counsel and on the Brief:

Gregory D. Meese, Esq. (NJ Bar No. 037831983)

On the Brief:

Allyson M. Kasetta, Esq. (NJ Bar No. 012892009)

TABLE OF CONTENTS

TABLE OF JUDGMENTS, ORDERS AND RULINGS ii

TABLE OF APPENDIX iii

TABLE OF AUTHORITIES ix

PRELIMINARY STATEMENT 1

FACTS AND PROCEDURAL HISTORY 3

LEGAL ARGUMENT 11

POINT I

 IT IS IN THE INTEREST OF JUSTICE TO GRANT THE BOBCAR
 INTERVENORS LEAVE TO APPEAL 11

POINT II

 THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING THE
 BOBCAR INTERVENORS' MOTION 15

CONCLUSION 25

TABLE OF JUDGMENTS, ORDERS AND RULINGS

Order denying Bobcar Intervenors' third Motion to BDa506
revoke the Township's immunity entered June 7, 2019

Oral decision denying Bobcar Intervenors' third
Motion to revoke the Township's immunity (June 7, 2019)
TRANSCRIPT REQUESTED; TO BE PROVIDED UPON RECEIPT

TABLE OF APPENDIX

<u>Appendix Document</u>	<u>Page Number</u>
July 2, 2015 - Documents filed by the Township of Verona commencing its Declaratory Judgment	
Notice of Filing	BDa001
Notice of Motion for Temporary Immunity	BDa004
Case Information Statement	BDa007
Verified Complaint	BDa009
Certification of Township Manager	BDa025
Affidavit of Public Notice	BDa032
<u>Exhibit A: Legal Notice</u>	BDa036
<u>Exhibit B: Transmission Letter</u>	BDa039
<u>Exhibit C: Service List</u>	BDa041
August 17, 2015 - Documents filed by Bobcar seeking permission to Intervene	
Notice of Motion	BDa046
Certification of Gregory D. Meese	BDa052
<u>Exhibit A: Unpublished opinion in In re Adoption of the Monroe Township Housing Element and Fair Share Plan and Implementing Ordinances, No. MID-L-3365-15 (Law Div. July 9, 2015)</u>	BDa056
<u>Exhibit B: Fair Share Housing Center's Estimate of Verona's Third Round Obligation</u>	BDa074
<u>Exhibit C: Proposed Answer</u>	BDa076
Certification of Roger Kruvant	BDa086
Proposed Order	BDa088
September 15, 2015 - Order granting the Township a five month period to Prepare a constitutionally compliant Housing Element and Fair Share Plan and further granting temporary immunity pending the issuance of a Final Judgment of Compliance and Repose	BDa090
September 15, 2015 - Order granting Bobcar's Motion to Intervene	BDa092
February 5, 2016 - Case Management Order	BDa094
May 5, 2016 - Letter to Special Master Elizabeth McKenzie from counsel to Bobcar	BDa097
December 12, 2016 - Case Management Order	BDa099

January 11, 2017 - Letter to Trial Court from counsel to Bobcar	BDa102
<u>Exhibits:</u>	
(i) Concept Plan for 25 Commerce Court	BDa104
(ii) Concept Plan for 111 Mt. Prospect Avenue	BDa105
January 26, 2017 - Resolution adopted by the Verona Planning Board memorializing its approval of a residential development at 163 Bloomfield Avenue	BDa106
March 24, 2017 - Case Management Order	BDa117
May 12, 2017 - Order granting the Motion of Spectrum 360, LLC to intervene in the DJ Action as an interested party	BDa119
May 26, 2017 - Order granting the Motion of Poekel Properties LLC to intervene in the DJ Action as an interested party	BDa121
November 9, 2017 - Case Management Order	BDa122
December 28, 2017 - Letter of Interpretation issued by the New Jersey Department of Environmental Protection with respect to 25 Commerce Court	BDa124
January 25, 2018 - Letter to Township COAH Attorney Brian Giblin and Special Master Elizabeth McKenzie from counsel to Bobcar	BDa127
<u>Exhibit 1:</u> Draft amendment to Zoning Ordinance for 25 Commerce Court	BDa130
<u>Exhibit 2:</u> Concept Plan for 25 Commerce Court	BDa135
<u>Exhibit 3:</u> Preliminary Elevations for 25 Commerce Court	BDa138
<u>Exhibit 4:</u> Draft amendment to Zoning Ordinance for 111 Mt. Prospect Avenue	BDa140
<u>Exhibit 5:</u> Concept Plan for 111 Mt. Prospect Avenue	BDa145
<u>Exhibit 6:</u> Preliminary Elevations for 111 Mt. Prospect Avenue	BDa148
February 15, 2018 - Letter to Township COAH Attorney Brian Giblin from counsel to Bobcar	BDa149

March 9, 2018 - Order entered by Trial Court rescheduling the case management previously scheduled for that date to April 6, 2018 and extending temporary immunity	BDa150
March 19, 2018 - Letter from the New Jersey Department of Environmental Protection to a concerned resident in connection with the Letter of Interpretation issued for 111 Mount Prospect Avenue	BDa151
March 28, 2018 - Order entered by Trial Court scheduling trial dates for various municipalities other than the Township of Verona	BDa152
March 28, 2018 - Letter of Interpretation issued by the New Jersey Department of Environmental Protection with respect to 111 Mount Prospect Avenue	BDa154
April 6, 2018 - Excerpt of transcript of case management conference	BDa158; 1T
April 23, 2018 - Email to Township COAH Attorney Brian Giblin from counsel to Bobcar	BDa164
May 7, 2018 - Letter to Township Attorney Brian Aloia from counsel to Bobcar	BDa166
May 8, 2018 - Email to Township COAH Attorney Brian Giblin from counsel to Bobcar	BDa168
May 17, 2018 - Letter to Township COAH Attorney Brian Giblin from Special Master Elizabeth McKenzie	BDa169
May 21, 2018 - Excerpt of transcript of Verona Township Council meeting	BDa173
Section 13 (Housing Element and Fair Share Plan) of the Township of Verona's 2009 Master Plan Reexamination Report	BDa197
August 7, 2015 - Unpublished opinion in <u>In re Marlboro Twp., NO. A-0243-10T4</u> (App. Div. August 7, 2015)	BDa309
July 20, 2018 - Order entered by Trial Court denying Bobcar's first Motion to revoke the Township's immunity	BDa314

July 21, 2018 - Notice from Trial Court regarding Discovery end date	BDa316
September 26, 2018 - Letter to the trial court from Township COAH Attorney Brian Giblin	BDa317
October 22, 2018 - Order entered by Trial Court scheduling a fairness and extending the Township's temporary immunity through November 17, 2018	BDa319
September 27, 2017 - Settlement agreement between the Borough of Hillsdale and Fair Share Housing Center	BDa321
September 27, 2017 - Settlement agreement between the Township of Long Hill and Fair Share Housing Center	BDa331
May 18, 2018 - Settlement agreement between the Borough of Raritan and Fair Share Housing Center	BDa342
<u>Exhibit A</u> : 2017 Affordable Housing Regional Income Limits by Household Size	BDa354
<u>Exhibit B</u> : Vacant Land Adjustment	BDa356
<u>Exhibit C</u> : Unmet Need Sites	BDa360
May 22, 2018 - Settlement agreement between the City of Lambertville and Fair Share Housing Center	BDa361
<u>Exhibit A</u> : Vacant Land Analysis	BDa372
<u>Exhibit B</u> : 2017 Income Limits	BDa376
<u>Exhibit C</u> : Concept Plan	BDa378
October 1, 2018 - Resolution No. 2018-135 adopted by the Township of Verona Council authorizing the settlement and execution of a memorandum of understanding with Poekel Properties, LLC	BDa379
October 1, 2018 - Resolution No. 2018-136 adopted by the Township of Verona Council authorizing the settlement and execution of a memorandum of understanding with Spectrum 360, LLC	BDa381
November 30, 2018 - Order entered by Trial Court denying Bobcar's second Motion to revoke the Township's immunity and scheduling a trial date/fairness hearing on March 4, 2019	BDa383

November 30, 2018 - Amended Order entered by Trial Court denying Bobcar's second Motion to revoke the Township's immunity and scheduling a trial date/fairness hearing on March 1, 2019	BDa385
January 31, 2019 - Notice received from Trial Court as to the scheduling of a status conference on March 29, 2019	BDa387
December 3, 2018 - Ordinance 2018-34, adopted by the Verona Township Council authorizing the issuance of bonds in connection with the acquisition of Block 2301, Lots 11, 12, 14 and 15 on the Tax Map for municipal purposes	BDa388
January 7, 2019 - Resolution 2019-29, adopted by the Verona Township Council directing the Verona Planning Board to undertake a preliminary investigation as to whether Block 303, Lot 4 on the Verona Tax Map meets the statutory criteria for designation as an Area in Need of Redevelopment	BDa393
February 1, 2019 - Article published on myveronanj.com entitled "Planning Board: Sunset Property Does Not Meet Redevelopment Criteria."	BDa394
February 6, 2019 - Memorandum from Verona Planning Board concluding that Block 303, Lot 4 on the Verona Tax Map does not meet the statutory criteria for designation as an Area in Need of Redevelopment	BDa396
February 8, 2019 - Article published on myveronanj.com entitled "Planning Board Recommends Special District for Cameco Area, Bloomfield Lot."	BDa397
February 11, 2019 - Resolution 2019-55 adopted by the Verona Township Council designating Block 2301, Lots 1-19 on the Tax Map as an Area in Need of Redevelopment	BDa400
March 8, 2019 - Certification of Allyson M. Kasetta submitted with Bobcar's third Motion to revoke the Township's immunity (excluding exhibits)	BDa402
March 7, 2019 - Certification of Art Bernard, P.P. submitted with Bobcar's third Motion to revoke the Township's immunity	BDa410

March 22, 2019 - Certification of Matthew Cavallo, Township Manager submitted by the Township of Verona in opposition to Bobcar's third Motion to revoke the Township's immunity	BDa433
<u>Exhibit A</u> : Previous Certification of Matthew Cavallo dated November 26, 2018	BDa441
<u>Exhibit B</u> : Settlement Agreement between Verona and Poekel Properties LLC	BDa447
<u>Exhibit A</u> : Concept Plan	BDa461
<u>Exhibit B</u> : No document included	
<u>Exhibit C</u> :	
(i) Deed to Block 2301, Lots 11 & 14	BDa463
(ii) Deed to Block 2301, Lots 12 & 15	BDa469
March 25, 2019 - Letter to Trial Court from counsel to Spectrum 360, LLC	BDa474
May 20, 2019 - Letter to Trial Court from Anne Studholme, Esq., counsel to First Ridge Alliance, Inc.	BDa478
May 31, 2019 - Settlement Agreement between the Township of Verona and Spectrum 360, LLC	BDa480
<u>Exhibit A</u> : Concept Plan	BDa502
<u>Exhibit B</u> : Concept Plan for Alternative Project	BDa504
June 3, 2019 - Order extending the Township of Verona's immunity through July 31, 2019 and scheduling a case management conference on July 29, 2019	BDa505
June 7, 2019 - Order denying Bobcar's third Motion to revoke the Township's immunity	BDa506

TABLE OF AUTHORITIES

Cases

Bd. of Educ. v. Caffiero, 173 N.J. Super. 204, 206-08 (App. Div. 1980), aff'd, 86 N.J. 308 (1981) 13

Brundage v. Estate of Carambio, 195 N.J. 575, 599 (2008) ... 12,13

Cranford Development Associates, LLC v. Township of Cranford, 445 N.J. Super. 220, 224-225 (App. Div. 2016), certif. denied, 2016 N.J. LEXIS 923 (Sept 7, 2016) 22

Frantzen v. Howard, 132 N.J. Super. 226, 227-28 (App. Div. 1975) 12

Harris v. Peridot Chemical (New Jersey), Inc., 313 N.J. Super. 257 (App. Div. 1998) 15

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") 1,2,3,13,15,16,18,19,21,22

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) 6,7

In Re Marlboro Twp., 2015 N.J. Super. Unpub. LEXIS 1898 23

In re Township of South Brunswick, 448 N.J. Super. 441, 450-451 (Law Div. 2016) 21,23

J.W. Field v. Tp. Of Franklin, 204 N.J. Super. 445, 456 (Law Div. 1985) 19

Moon v. Warren Haven Nursing Home, 182 N.J. 507, 511 (2005) .. 12

Romano v. Maglio, 41 N.J. Super. 561, 567 (App. Div. 1956), certif. denied, 22 N.J. 574 (1956), certif. denied, 353 U.S. 923 (1957) 12

S.N. Golden Estates, Inc. v. Continental Cas. Co., 317 N.J. Super. 82, 87 (App. Div. 1998) 12

Southern Burlington County NAACP v. Twp. of Mount Laurel,
67 N.J. 151, appeal dismissed and cert. denied, 423 U.S.
808 (1975) ("Mt. Laurel I") 13

Southern Burlington County NAACP v. Twp. of Mount Laurel, 92
N.J. 158 (1983) ("Mt. Laurel II") 13

State v. Reldan, 100 N.J. 187, 205 (1985) 12

Toll Bros. v. Twp. of W. Windsor, 173 N.J. 502, 560 (2002) ... 23

State Statutes

N.J.A.C. 5:93-4.2 20

Rules

R.2:2-4 12

PRELIMINARY STATEMENT

Defendants/Intervenors Bobcar Corporation, Neil Joy Associates, and Forsons Partners, LLC (the "Bobcar Intervenors" or "Bobcar") move for leave to appeal the decision of Judge Gardner, Law Division, Essex County Superior Court (the "Trial Court"), denying their Motion to revoke the Township of Verona's (the "Township" or "Verona") temporary immunity against zoning exclusionary actions. For four (4) years, the Trial Court has improperly extended Verona's immunity despite Verona's failure to comply with its constitutional obligation to provide affordable housing and in contravention of the declaratory judgment process established by Mt. Laurel IV. Having denied three (3) such motions brought by Bobcar, the Trial Court continues to improperly condone a pattern of willful noncompliance by Verona.

The interests of justice warrant leave to appeal in this matter. Verona's refusal to provide a realistic opportunity for affordable housing perpetuates a grave injustice by depriving residents of the State of New Jersey of appropriate housing. Further, Verona seeks to exclude Bobcar's two large, undeveloped properties (the two largest in Verona) from its housing plan, notwithstanding Bobcar's expenditure of significant time and cost in demonstrating the feasibility of inclusionary developments that would provide the affordable housing that Verona needs. Instead, it has taken refuge behind the court's grant of immunity and has

struggled to attempt to cobble together a plan that could, with the Bobcar properties, be easily achievable.

The merits of Bobcar's claims are reflected in the record. At this late date, Verona still has not presented even a draft Housing Element and Fair Share Plan, and yet the Trial Court continues to extend its immunity on the basis of unsubstantiated promises to move toward compliance, overlooking Verona's numerous acts of bad faith and unjustified failure to present a plan where governing case law dictates otherwise. As the Trial Court has declined to enforce the requirements of Mt. Laurel IV, Bobcar respectfully requests that leave to appeal be granted in this matter.

FACTS AND PROCEDURAL HISTORY

1. On March 10, 2015, the New Jersey Supreme Court decided Mt. Laurel IV, which offered municipalities an opportunity to file a declaratory judgment action with the Court to demonstrate compliance with constitutional affordable housing obligations and for those that demonstrated compliance, or substantial steps toward compliance, the Court's protection by way of immunity from builder's remedy suits. The Court mandated that participating municipalities "should have no more than five months in which to submit their supplemental housing element and affordable housing plan." In re adoption of N.J.A.C. 5:96 and 5:97 by N.J. Council on Affordable Housing, 221 N.J. 1, 27 (2015) ("Mt. Laurel IV").

2. Verona filed its Declaratory Judgment Action on July 2, 2015¹. The Certification of the Township Manager in support of its request for immunity represented that Verona was preparing a revised Housing Element and Fair Share Plan² to verify compliance with its affordable housing obligations. BDa25-31.

3. The DJ Action has now been pending for four (4) years and Verona has not submitted an updated HEFSP, or even an initial draft of one.

4. Bobcar owns two large, undeveloped properties in Verona: one is 11.61 acres located at 25 Commerce Court, Block 12.01, Lot

¹ (the "DJ Action")

² ("HEFSP")

3.01; the second is 14.29 acres located at 111 Mt. Prospect Avenue, Block 501, Lot 83.

5. Bobcar filed its Motion to Intervene on the basis of its ability to construct an inclusionary development at 25 Commerce Court. BDa46-89.

6. Subsequent to the Motion to Intervene, Bobcar advised former Special Master Elizabeth McKenzie³ and the Township of its ability to construct another inclusionary development at 111 Mt. Prospect Avenue. BDa97-98. Bobcar has continuously negotiated with Verona for the development of both properties.

7. On November 2, 2016, Bobcar attended an initial mediation session with the Township⁴. Concept plans demonstrated that the two properties could produce 72 affordable units at modest densities, while respecting environmental constraints and providing significant setbacks to residential properties. Township officials encouraged Bobcar to prepare more detailed plans to further the negotiations. BDa102-105.

8. An additional mediation was held on May 18, 2017, at which plans based upon property surveys, wetlands investigations and preliminary engineering and architectural studies were presented. Verona encouraged Bobcar to further develop the plans

³ Elizabeth McKenzie served as Special Master in this matter until her retirement in November 2018, at which time she was replaced by Special Master Elizabeth McManus.

⁴ Also in attendance were former Special Master Elizabeth McKenzie and counsel for Fair Share Housing Center ("FSHC").

so that a proposed settlement could be presented to the Township Council. The Township advised Master McKenzie that it would be unable to satisfy its housing obligations due to insufficient vacant, developable land and would seek a vacant land adjustment.

9. Thereafter, Bobcar submitted revised plans and preliminary building elevations as well as draft amendments to the Township Zoning Ordinance to make the proposed projects feasible and conforming. BDA127-148.

10. On March 27, 2018, a third mediation session was held at which Verona requested minor modifications to the plans and perspective renderings and steep slope analyses. A continued mediation session was tentatively scheduled for April 27, 2018.

11. At a case management conference held on April 6, 2018, Township Attorney Brian Giblin advised "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 Bobcar agreed (as did counsel for the other Intervenors in the DJ Action), based upon the discussions that had previously taken place. BDA158-163; 1T4⁵.

12. On the afternoon of Friday, May 4, 2018, Township Attorney Brian Aloia (who had not previously participated in the DJ Action or mediations) advised Bobcar's counsel that the

⁵ 1T refers to the excerpt of the transcript of the April 6, 2018 case management conference. Transcripts of the proceedings on March 29, 2019 and June 7, 2019 have been requested and will be provided upon receipt.

Township Council intended to introduce ordinances authorizing the condemnation of both of its properties for open space and/or public purpose at its Monday, May 7, 2018 meeting.

13. On May 7, 2018, counsel for Bobcar sent a letter to Verona objecting to the proposed condemnations. BDA166-167.

14. On May 8, 2018, revised concept plans including steep slope analyses for both properties were forwarded to Township Attorney Giblin in anticipation of a mediation session which was ultimately canceled by the Township. BDA168.

15. Bobcar has provided Verona with architectural and engineering plans, renderings and draft zoning amendments, and has obtained Letters of Interpretation from the New Jersey Department of Environmental Protection⁶ all to demonstrate the feasibility of the proposed developments. BDA124-148; 154-157; 164-165; 168.

16. 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 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

⁶ ("NJDEP")

of Princeton and In Re West Windsor Twp., Docket Nos. MER-L-1550-15 and MER-L-1561-15 (consolidated). BDA169-172.

17. Special Master McKenzie cautioned that any effort to condemn land while the DJ Action is pending is "apt to be viewed as an attempt to circumvent compliance with its affordable housing obligations" if Verona seeks a vacant land adjustment and cannot justify the reservation of properties on the grounds that it would fall below permissible thresholds⁷. BDA170. She further warned "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-aside⁸" 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.*" BDA171-172 (emphasis in original).

18. Despite the letter from the Special Master and Bobcar's objections, the Township introduced ordinances authorizing the acquisitions and appropriating capital funds for preliminary planning expenses.

⁷ The HEFSP in the Township's 2009 Master Plan Reexamination Report indicated Verona would be unable to fully satisfy its obligation due to a shortage of land, and Verona has previously stated in connection with the DJ Action that it would seek a vacant land adjustment. BDA197-308.

⁸ The Annin Flag site is located at 141-163 Bloomfield Avenue and received site plan approval from the Verona Planning Board for a 112 unit residential development without any affordable housing set-aside on January 5, 2017, while the DJ Action was pending. BDA106-116.

19. Due to the Township's actions, Bobcar filed its first Motion seeking the revocation of Verona's immunity. At the hearing on July 20, 2018, the Township advised that it had decided not to pursue the condemnations, and the Trial Court denied Bobcar's motion but directed Verona to present a plan for compliance by September 28, 2018. The Trial Court then issued a notice advising that discovery would end on September 28, 2018, and that arbitration or trial would be scheduled with no adjournments absent exceptional circumstances. BDA316.

20. On August 28, 2018, Bobcar again met with the Township for the purpose of discussing how their two properties might be included in Verona's plan. The Township stated it was seeking to acquire another property that it may include in the plan, but refused to provide any other information with respect to the same.

21. Despite additional time to negotiate settlements and develop a plan for compliance, on September 26, 2018, the Township Attorney conceded that it had not complied with the Trial Court's instruction and requested that the Township's immunity be again extended through November 30, 2018. BDA317-318.

22. On September 28, 2018, the trial judge held a conference by telephone, during which he advised that a fairness hearing would be scheduled for November 16, 2018 despite the fact that Verona still had no plan for compliance or proposed settlement.

23. On October 1, 2018, the Township Council adopted Resolutions authorizing settlements with Poekel Properties, LLC and Spectrum 360, LLC ("Spectrum"), the other Intervenors in the DJ Action. BDa379-382. No Resolution was adopted to authorize a settlement with the Bobcar Intervenors.

24. On October 26, 2018, Bobcar filed its second Motion seeking to revoke Verona's immunity. The court again denied Bobcar's motion, but with a warning to the Township - produce a plan that can be confirmed at a fairness hearing on March 1, 2019, or be prepared to go to trial. BDa383-386.

25. On December 3, 2018, the Township Council adopted an Ordinance authorizing the issuance of bonds for the acquisition of property designated as Block 2301, Lots 11, 12, 14 and 15 on the Tax Map (the "Cameco Property"). BDa399-392. On February 11, 2019, the Township Council adopted a Resolution designating the Cameco Property as an Area in Need of Redevelopment pursuant to the Local Redevelopment and Housing Law⁹. BDa400-401.

26. Verona has stated that it is negotiating with a developer for a 100% affordable development on the Cameco Property but no details have been provided with respect to the same.

27. On January 7, 2019, the Township Council directed the Planning Board to undertake a preliminary investigation as to

⁹N.J.S.A. 40A:12A-1 et seq. ("LRHL")

whether the Spectrum property met the statutory criteria for designation as an Area in Need of Redevelopment. BDa393. The Planning Board concluded that the Spectrum property does not meet the criteria for the Area in Need Designation and denied the request by memorandum dated February 6, 2019. BDa394-396.

28. On January 31, 2019, the Trial Court scheduled a status conference for March 29, 2019. BDa387. Special Master McManus confirmed that the fairness hearing scheduled for March 1 was adjourned and that without a compliance plan to review, the Trial Court would instead hold a status conference.

29. On March 8, 2019, Bobcar filed its third Motion seeking revocation of the Township's immunity. In its opposition, Verona indicated it would seek to achieve compliance without the units previously contemplated by Bobcar or Spectrum, BDa433-473, but did not present any evidence to demonstrate its ability to do so.

30. Counsel for Spectrum submitted a letter to the Trial Court confirming that Verona had reneged on its agreement to include the Spectrum site in its plan and suggesting bad faith as to Spectrum as well. BDa474-477.

31. The Trial Court heard oral argument on the Motion on March 29, 2019, but reserved decision for more than two (2) months.

32. On May 31, 2019, the Township entered into a new settlement with Spectrum. The agreement provides for two alternative scenarios: (a) a 200-unit development with no set-

side, contingent upon designation of the property as an Area in Need of Redevelopment¹⁰ and requiring a contribution by Spectrum for construction of affordable units elsewhere in the Township; or (b) a 300-unit development with an affordable set-aside of 15 percent¹¹. BDa480-504.

33. On May 20, 2019, counsel for a group of Verona residents known as First Ridge Alliance, Inc. filed a Complaint in Lieu of Prerogative Writs challenging the Council Resolution authorizing the Spectrum settlement. BDa478-479.

34. After a brief conference with counsel on June 7, 2019, the Trial Court denied Bobcar's third Motion. BDa506-507. The June 7, 2019 decision is the subject of the within Motion.

35. Verona still has not presented a plan for compliance and the Trial Court's denial was based solely on the Township's unsubstantiated representation that it is working on a plan.

LEGAL ARGUMENT

I. IT IS IN THE INTEREST OF JUSTICE TO GRANT THE BOBCAR INTERVENORS LEAVE TO APPEAL

Generally, an appeal as of right may be taken to the Appellate Division only from a final judgment. R. 2:2-3. "This rule, commonly referred to as the final judgment rule, reflects the view that '[p]iecemeal [appellate] reviews, ordinarily, are [an]

¹⁰ This was subsequent to the planning board's determination that the property does not meet the statutory criteria.

¹¹ It is noted that a 20 percent set-aside had previously been agreed upon.

anathema to our practice.'" S.N. Golden Estates, Inc. v. Continental Cas. Co., 317 N.J. Super. 82, 87 (App. Div. 1998), quoting Frantzen v. Howard, 132 N.J. Super. 226, 227-28 (App. Div. 1975). However, there are circumstances where appeals from interlocutory orders are permitted, and in fact, necessary i.e. in the interest of justice. R.2:2-4; Moon v. Warren Haven Nursing Home, 182 N.J. 507, 511 (2005).

Whether to grant leave is within the Appellate Division's discretion and should not be utilized as a means to "correct minor injustices." Brundage v. Estate of Carambio, 195 N.J. 575, 599 (2008); State v. Reldan, 100 N.J. 187, 205 (1985). "Rather, when leave is granted, it is because there is the possibility of 'some grave damage or injustice' resulting from the trial court's order." Brundage, supra, 195 N.J. at 599, quoting 13. The moving party must establish that the appeal has merit and that "justice calls for [an appellate court's] interference in the cause." Romano v. Maglio, 41 N.J. Super. 561, 567 (App. Div. 1956), certif. denied, 22 N.J. 574 (1956), certif. denied, 353 U.S. 923 (1957).

Although the power to grant leave is "exercised only sparingly" (State v. Reldan, 100 N.J. 187, 205 (1985)), the Court enjoys considerable discretion in determining whether the "interest of justice" standard has been satisfied and, as a result, whether to grant leave to file an interlocutory appeal. Brundage, supra, 195 N.J. at 599. "[I]ssues of constitutional magnitude" are

frequently considered to warrant interlocutory review. Brundage at 600, citing Bd. of Educ. v. Caffiero, 173 N.J. Super. 204, 206-08 (App. Div. 1980), aff'd, 86 N.J. 308 (1981).

The interests of justice warrant leave to appeal. Verona's failure to comply with its affordable housing obligation is an issue of constitutional magnitude because it deprives residents of the State of New Jersey of their rights to due process and equal protection under the law. "The *Mount Laurel* series of cases recognized that the power to zone carries a constitutional obligation to do so in a manner that creates a realistic opportunity for producing a fair share of the regional present and prospective need for housing low- and moderate-income families." Mt. Laurel IV, 221 N.J. 1, 3-4 (2015), citing Southern Burlington County NAACP v. Twp. of Mount Laurel, 92 N.J. 158 (1983) ("Mt. Laurel II"); Southern Burlington County NAACP v. Twp. of Mount Laurel, 67 N.J. 151, appeal dismissed and cert. denied, 423 U.S. 808 (1975) ("Mt. Laurel I").

The injustice to low income residents as a result of Verona's inaction is precisely what the declaratory judgment process established under Mt. Laurel IV was intended to eliminate. The Supreme Court mandated that municipalities such as Verona be provided with "no more than five months" to demonstrate compliance. Despite numerous extensions throughout four (4) years, Verona has failed to present a plan and has no legitimate justification for

its continued failure to do so. All the while, low and moderate income residents continue to be deprived of appropriate housing.

The injustice to Bobcar is also well documented in the record. It invested several years and significant expense in meeting with the Township officials and, at their encouragement, preparing detailed engineering and architectural plans, obtaining documentation from the NJDEP, and drafting ordinances all to demonstrate the feasibility of its developments. BDa124-148; 154-157; 164-165; 168. Bobcar's proposed 72 affordable units could have been approved at any time but instead Verona attempts to cobble together enough credits to satisfy its 238-unit obligation¹², with a new strategy presented every few months, but without ever demonstrating that it can actually do so.

The grant of leave to appeal would not result in the piecemeal review that the final judgment rule seeks to avoid. The Trial Court has waited four (4) years to review Verona's plan of compliance, and the sole reason why it cannot hold a compliance hearing is Verona's inaction. Bobcar is ready, willing and able to proceed with the development of needed housing. This Court's review would bring this matter to a close and allow a sure plan for the creation of affordable housing to be put in place. Further, it would make clear to other intransigent municipalities who have not yet

¹² 238 units is the obligation previously estimated by Special Master McKenzie as set forth in her letter dated May 17, 2018. BDa169-170.

demonstrated compliance that the mandates of Mt. Laurel IV will be enforced.

The merits of Bobcar's claims are clearly demonstrated in the record. Verona had no plan when it filed the DJ Action, and did not even contemplate the purchase of the Cameco Property, which it now relies upon for most of its units, until three (3) years into the process. As of the date of this Motion, four (4) years after filing the DJ Action, Verona still has not submitted even a draft plan for compliance. Notwithstanding, and in direct contravention of the Supreme Court's dictates, the Trial Court has again excused Verona's failure to act and extended its immunity upon a bare promise that Verona is working on such a plan. Because this latest promise is no less illusory than Verona's other promises, the interests of justice require that this Court review the Trial Court's decision declining to revoke Verona's temporary immunity.

II. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING THE BOBCAR INTERVENORS' MOTION

A trial court's discretionary decisions are entitled to deference and will not be reversed absent a showing of an abuse of discretion involving a clear error in judgment. Harris v. Peridot Chemical (New Jersey), Inc., 313 N.J. Super. 257 (App. Div. 1998). Here, the trial judge made a clear error in judgment by permitting Verona to remain in willful noncompliance of the Supreme Court's

dictates set forth in Mt. Laurel IV and protecting it from builder's remedy actions where its bad faith dictates otherwise.

A. THE TRIAL COURT ERRED IN CONTINUING TO CONDONE VERONA'S WILLFUL FAILURE TO MOVE INTO COMPLIANCE

In denying Bobcar's Motion, the trial judge overlooked not only Verona's failure to present a plan of compliance within the time established by the Supreme Court, but also its repeated disregard of the numerous extensions granted by the court. When denying Bobcar's first Motion, the trial judge directed Verona to submit a plan before September 28, 2018. The trial judge issued a notice advising that discovery would end on September 28, 2018, and that arbitration or trial would be scheduled with no adjournments granted absent "exceptional circumstances." BDa316. A fairness hearing was scheduled for November 16, 2018, but could not occur because Verona had no plan to review. BDa319-320. When it became clear that no fairness hearing would occur on November 16, 2018, because the Township still had not submitted a plan, Bobcar filed its second Motion. This Motion was also denied despite the lack of evidence demonstrating exceptional circumstances warranting Verona's failure to act. Rather, the Trial Court allowed Verona to ignore the deadline and continued its immunity.

The trial judge warned that if Verona did not produce a plan by March 1, 2019, it would need to be prepared for trial. BDa383-386. Instead of holding Verona to this new deadline, when

noncompliance became clear the Trial Court scheduled a status conference for March 29, 2019. BDa387. Once again, as was the case in September 2018, there was no evidence of exceptional circumstances related to Verona's failure to submit a plan.

Bobcar filed its third Motion on March 8, 2019, which was heard on March 29, 2019 and denied on June 7, 2019. BDa506-507. In the interim, Verona entered into a new settlement with Spectrum. BDa480-504. The new Spectrum settlement curiously provides for two alternative developments. The first option is contingent upon the designation of the Spectrum property as an Area in Need of Redevelopment (despite the Planning Board's determination only weeks earlier that it did not meet the statutory criteria for the same) and a financial agreement for a long term tax exemption, and would permit 200 market rate units with no affordable housing. Instead, Spectrum would pay \$6,250,000.00 for the construction of affordable units elsewhere in the Township. BDa485-486.

Verona and Spectrum, apparently aware of the substantial uncertainty associated with this scenario, agreed to an alternative development scheme that does not depend on a redevelopment designation. The second alternative would contain 300 units, with an affordable set-aside of 15 percent or 45 units. BDa486. A group of nearby residents has filed a Complaint in Lieu of Prerogative Writs in objection to the settlement. BDa478-479. In denying Bobcar's Motion, the Trial Court failed to consider the

impact of protracted litigation with the residents on Verona's ability to implement the settlement and provide the affordable units to satisfy its obligation.

Verona's judicial lollygagging is far from the expedient declaratory judgment process envisioned by Mt. Laurel IV. Had Verona negotiated in good faith with Bobcar, it could have presented a plan of compliance and resolved the DJ Action as hundreds of other municipalities have done with their intervenors. Instead, Verona chose to cease negotiations with Bobcar (the owner of the two largest undeveloped properties in Verona), sought to condemn their properties without justification, and has been left scrambling for a solution that allows it to obtain 238 credits. For all of these reasons, the Trial Court erred in denying the Bobcar Intervenors' Motion.

B. THE TRIAL COURT DISREGARDED THE ESTABLISHED STANDARDS FOR CONTINUING IMMUNITY.

Mount Laurel IV dictated that "participating" municipalities¹³ who chose to commence the declaratory judgment process could seek temporary immunity against exclusionary zoning actions where developers might seek a builder's remedy. Mt. Laurel IV, supra, 221 N.J. at 27-28 (emphasis added). The Court mandated that such municipalities "should have no more than five months in which to

¹³ Municipalities who adopted resolutions of participation to submit their fair share housing plans to the former Council on Affordable Housing ("COAH").

submit their supplemental housing element and affordable housing plan." Id. at 27 (emphasis added).

Continuing immunity throughout the declaratory judgment process is not to be automatic. Rather, the Court instructed trial courts to undertake a fact-specific analysis in order to determine whether a municipality is acting in good faith and 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, 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." Mt. Laurel IV, supra, 221 N.J. at at 28.

The Supreme Court was very clear 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.

The record makes clear that the Trial Court failed to undertake such an assessment here and that Verona’s immunity should be withdrawn because it has failed to take any substantive action toward constitutional compliance for a protracted period of four (4) years. Despite Verona’s representation in its initial filing that it was in the process of preparing a revised HEFSP, this still has not been done. Nor has Verona provided the required information under N.J.A.C. 5:93-4.2 to establish land as a scarce resource, despite prior representations that it cannot satisfy its obligations due to a shortage of vacant developable land¹⁴. Rather than settling with its largest landowner and allowing Bobcar to construct the needed housing, it sought to condemn its properties in order to remove them from the vacant land inventory and Verona’s planning board granted approval for the construction of a 112-unit residential development without any requirement for affordable housing - all during the pendency of this action and without any rebuke by the Trial Court. BDa106-116; 173-196.

Bobcar has urged the Trial Court to undertake a fact-specific analysis of Verona’s efforts and to find that Verona has abused

¹⁴ Verona has changed course on this issue as well, recently representing that it will not seek a vacant land adjustment; however, the merits of this claim cannot be evaluated since no HEFSP has been provided.

the declaratory judgment process by failing to take meaningful action toward compliance. This was the process set forth by the Court in Mt. Laurel IV and there are several examples of municipalities whose immunity had been revoked for less egregious examples of inaction.

The Township of South Brunswick's immunity 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, 450-51 (Law Div. 2016) (quoting Mount Laurel IV, supra, 221 N.J. at 33). "Despite 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 unacceptable¹⁵." Id.

The South Brunswick court noted "because of [its] systematic 'abuses' of the declaratory judgment process ... the Township stands in a far less favorable position than it would have had it proceeded with 'good faith' and with 'reasonable speed.'" Id. at 466. The court stated that builder's remedy actions are permitted "where the declaratory judgment review process was 'abused,'

¹⁵ 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.

became 'unreasonably protracted,' or where the Township's proposed manner of compliance was 'constitutionally wanting.'" Id.¹⁶ (quoting Mount Laurel IV, supra, 221 N.J. at 29).

The Township of Cranford 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. Township of Cranford, 445 N.J. Super. 220, 224-25 (App. Div. 2016), certif. denied, 2016 N.J. LEXIS 923 (Sept 7, 2016). The court found Cranford's HEFSP "seriously deficient" as to its obligation of 410 units. Id. The court acknowledged that 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. 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 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,

¹⁶ The court also awarded costs to the Defendant-Intervenors in the South Brunswick matter.

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 as to its second-round obligations). BDa309-313.

Verona has had four (4) years (as compared to seven (7) months in South Brunswick) to take affirmative actions toward compliance. Where the plans in South Brunswick and Cranford were deficient, Verona has failed to even submit a draft HEFSP. With contemptuous disregard for its constitutional obligations, Verona granted site plan approval for the construction of a 112-unit residential development without **any** affordable units during the pendency of this DJ Action! BDa106-116. Because a fact-specific analysis dictates that Verona is not entitled to continuing immunity, Bobcar's Motion should have been granted.

C. THE TRIAL COURT ERRED IN CONTINUING TO COUNTENANCE VERONA'S BAD FAITH AT THE EXPENSE OF LOW INCOME FAMILIES.

Since intervening in the DJ Action, the Bobcar Intervenors have engaged in good faith negotiations with the Township. The

Township, on the other hand, changes course every few weeks and has not formulated a plan for the Trial Court's consideration.

Counsel for Verona represented to the Trial Court on April 6, 2018 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 Bobcar agreed, based upon the discussions that took place at the previous mediation. BDA158-163; 1T4-5. Less than a month later, Township Attorney Brian Aloia advised that the Township intended to condemn Bobcar's two properties. The Township introduced ordinances to authorize the acquisitions and only tabled them after Bobcar filed its first Motion and Special Master McKenzie's warning that such actions could be used as evidence of bad faith. BDA169-172.

Verona has also demonstrated bad faith in its interactions with Spectrum. After authorizing an initial settlement with Spectrum for the construction of a 300-unit development with 60 affordable units, Verona suddenly reneged and represented that it intended to proceed without the Spectrum property. BDA433-439. Spectrum acknowledged in a letter to the Trial Court that Verona's actions "are strongly suggestive of bad faith." BDA474-477.

As set forth above, Verona squandered an opportunity to provide affordable housing units by approving a large residential development without any set-aside in 2017. BDA106-116. It failed

until after Bobcar's first Motion to amend its Zoning Ordinance so as to require an affordable housing set-aside and waited three years after filing the DJ Action to acquire the Cameco property for a potential 100% affordable development, knowing that it would take a significant amount of time to obtain a firm commitment from a developer (at the time of the within Motion, no such commitment has been submitted to the Trial Court). BDA433-473.

The record is replete with acts of bad faith on Verona's part, and the Trial Court has ignored them for far too long. Because low and moderate income residents continue to be deprived of appropriate housing as a result, the Bobcar Intervenors' Motion should have been granted by the Trial Court.

CONCLUSION

In the interest of justice and for the reasons stated, Defendants/Intervenors Bobcar Corporation, Neil Joy Associates and Forsons Partners, LLC respectfully request that this Court grant its Motion for Leave to Appeal.

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

Dated: June 26, 2019

Revised as to citations: June 28, 2019