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IN THE MATTER OF THE APPLICATION OF THE BOROUGH OF ENGLEWOOD CLIFFS, COUNTY OF BERGEN

SUPERIOR COURT OF NEW JERSEY
BERGEN COUNTY: LAW DIVISION

Docket No.: BER-L-6119-15

Civil Action
Mount Laurel

ORDER

THIS MATTER having been brought before the Court on application of the Borough of Englewood Cliffs ("the Borough"), through its counsel, Jeffrey R. Surenian, Esq. of Jeffrey R. Surenian and Associates, LLC, Thomas J. Trautner, Esq., of Chiesa, Shahinian and Giantommasi, PC and Albert Wunsch, III, Esq, of the Law Offices of Albert H. Wunsch, III, and the Defendant-Intervenor, 800 Sylvan Avenue, LLC ("Sylvan") being represented by Thomas F. Carroll, III, Esq., of Hill Wallack, LLP, and Antimo A. Del Vecchio, Esq., of Beattie Padovano, LLC, and Fair Share Housing Center ("FSHC"), being represented by Kevin D. Walsh, Esq.; and for good cause shown:

IT IS on this 27th day of August, 2019 **ORDERED** as follows:

1. The Court finds that there has been no proof that the Borough "is determined to be constitutionally noncompliant." Denied

2. The Court hereby declines to rescind or withdraw the Borough's immunity from exclusionary zoning lawsuits.

3. The immunity from all exclusionary zoning actions previously granted to the Borough of Englewood Cliffs, the Governing Body of the Borough of Englewood Cliffs, and the Planning Board of the Borough of Englewood Cliffs shall remain in full force until such time as the Court completes a trial in this matter and until further order by this Court.

4. Counsel for the Borough shall provide all parties and the Court Master with a copy of this Order within seven (7) days of the date hereof.

Christine Farrington

Hon. Christine A. Farrington, J.S.C., ret'd, t/a recall

[/] Opposed
[ ] Unopposed

* For reasons set forth in the attached rider

SUPERIOR COURT OF NEW JERSEY

BERGEN VICINAGE

CHAMBERS OF

CHRISTINE FARRINGTON

SUPERIOR COURT JUDGE, RET'D, t/a

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August 27, 2019

RIDER TO ORDERS DATED AUGUST 27, 2019

RE: In the Matter of the Application of the Borough of Englewood Cliffs
BER-L-6119-15

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Re: In the Matter of the Application of the Borough of Englewood Cliffs
BER-L-6119-15

This matter comes before the court upon the motion of the Borough to extend immunity pending a trial to determine the Borough's Fair Share Housing obligation. Both Fair Share Housing Center and Intervenor 800 Sylvan Avenue, LLC (800 Sylvan) oppose. 800 Sylvan cross moves for revocation of immunity. For the reasons which follow the court has determined that the Borough has acted in bad faith and determined to be constitutionally non-compliant and immunity from builders remedy actions is revoked.

The Borough of Englewood Cliffs took no action to comply with either of our Supreme Court's decisions of 1975 and 1983 in So. Burlington Cty. N.A.A.C.P. v. Twp of Mount Laurel (67 N.J. 151 and 92 N.J. 158). The Borough did not participate in the Council on Affordable Housing's (COAH) First Round.

As set forth in Special Master Lonergan's report, the Borough petitioned COAH for substantive certification based upon its Second Round Plan. In the Second Round plan, the Borough requested a Vacant Land Adjustment (VLA) which would reduce its then 219 unit pre-credited need to a 4-unit RDP with a 215-unit unmet need. COAH conditioned its 1997 denial of substantive certification upon the Borough's

adoption of an overlay zone to permit inclusionary development of a former Prentice-Hall headquarters, now the site of LG headquarters under construction. The Borough failed to adopt the overlay zoning and COAH denied certification in 1997, making the Borough vulnerable to possible builders remedy complaints. It is noteworthy that when the LG redevelopment was approved, it included no provision for affordable housing.

The Borough prepared an initial Third Round Housing Element and Fair Share Plan in January 2006. On account of Judge Skillman's 2010 decision overturning COAH's Third Round rules, the Borough's petition for substantive certification was not addressed by COAH. The Borough never implemented the mechanisms identified in its HEFSP adopted by the Englewood Cliffs Planning Board January 7, 2009.

In 2013, our Supreme Court upheld Judge Skillman and directed COAH to prepare and adopt necessary rule revisions. When COAH failed to do so, FSHC filed a motion in aid of litigant's rights to compel the production of constitutional affordable housing regulations. In March 2015, the Supreme Court transferred responsibility of review and approving to designated

Mount Laurel trial judges by way of declaratory judgments with temporary immunity from third party lawsuits during the municipality's development of compliant HEFSPs.

The Borough filed this declaratory judgment action on June 26, 2015. Special Master Lonergan issued a report in January 2016. The Borough pressed its claim for a vacant land adjustment which was disputed by FSHC. The Special Master proposed reviewing the VLA analysis and proposed zoning changes. The report also recommended mediation.

In January 2017 our Supreme Court issued its decision In Re Declaratory Judgment Actions Filed by Various Municipalities, County of Ocean, Pursuant to the Supreme Court's Decision in In Re Adoption of N.J.A.C. 5:96, 221 N.J. 1 (2015), the so-called "Gap" decision which found that the period between the end of the Second Round in 1999 and 2015 generates an affordable housing obligation.

The Borough was ordered to prepare an updated housing plan and updated VLA by December 2017.

On November 17, 2017, 800 Sylvan advised the Borough of their interest in offering a 20+ acre portion of their 28 acre property for inclusionary development. The offer consisted of

600 homes of which 15% (rental set-aside) or 20% (sale set-aside) would be affordable. The Honorable Menelaos Toskos (retired) entered an order granting 800 Sylvan's motion to intervene January 10, 2018. Judge Toskos subsequently entered an April 13, 2018 order dismissing 800 Sylvan's builder's remedy law suit. 800 Sylvan appealed and the Appellate Division issued an order on September 17, 2018 permitting 800 Sylvan's builder's remedy lawsuit to proceed as of right. On June 7, 2019 the Appellate Court stayed the proceedings before it until August 1, 2019 pending settlement discussions.

In March 2018, the court established a schedule for the parties to set forth their positions on a confidential basis and attempt settlement. The Borough was unable to reach agreement with FSHC. On October 1, 2018, the court entered an order ending mediation and scheduling trial for January 22, 2019.

On October 22, 2018, this court entered an order approving expenditure of the Borough's trust funds for the purchase of 476 Hudson Terrace for the purpose of construction of a 100% affordable housing project.

The Borough sought a bifurcated trial and to limit the first phase to quantification of the RDP and the second to the

sufficiency of the Borough's plan. This court denied those motions. Thereafter, this court denied the Borough's request to bifurcate trial for a determination of its RDP, followed by a compliance hearing. This court also advised the parties that the trial would utilize the same methodology as determined by the Honorable Mary C. Jacobsen, A.J.S.C., In the Matter of the Application of the Municipality of Princeton, decided March 29th, 2018. In its decision, the court stated:

> The failure of the Borough to provide a single unit of Affordable Housing between 1985 and 2018 resonates with this court. The Borough's dilemma is one of its own making and the result of a willful refusal to comply with its Constitutional obligations. . . This court continues to believe under circumstances where a municipality is desirous of meeting its Constitutional obligation, there might be a benefit to the municipal officials who are tasked with the obligation of implementing the Ordinances and housing plan, often unpopular with constituents, to ascertain the realistic development potential first, making it easier for those officials to explain to those constituents what the realities are. In the court's mind this might motivate the municipality to reach a settlement with Fair Share Housing to enable them to plan and build units in locations they deem best. The court believed the proximity of the trial following Judge Jacobson's decision might motivate the Borough of Englewood Cliffs to move forward in a constructive manner to meet its Constitutional obligation to provide affordable housing. The court has not seen anything which indicates this to be the case. Notwithstanding the extraordinary efforts of the Special Master in a mediation attempt spanning months and essentially accommodating the Borough in terms of a confidentiality agreement no progress has been made. That lack of progress cannot be blamed on the Intervener and/or

Fair Share Housing alone. The court is persuaded by the arguments of the Intervener and Fair Share Housing that the ultimate decision can no longer be delayed.

The court ordered the Borough to submit its Housing Element and Fair Share Plan and all expert reports by December 7, 2018. The court also denied FSHC's motion to strip the Borough of immunity at that time. This court also issued two orders on December 5,

2018, requiring the Borough to address its unmet need and denying FSHC's motion to require specific inclusionary overlay zoning as premature, noting the court found no bad faith as to that issue and the proximity of the then trial date of January 22, 2019.

On January 9, 2019 this court denied the Borough's motion for reconsideration of the issues of bifurcation, discovery and the trial date and denied 800 Sylvan's motion to terminate immunity. The trial date was adjourned to March 5, 2019 to permit the Special Master additional time to complete her report. The Borough's governing body adopted its Housing Element and Fair Share Plan on January 24, 2019. That plan acknowledges the Borough's obligation to be 584 units, but calculates its realistic development potential as 77 units. The calculation is

based in part on exclusion of certain properties based on steep slope, despite the fact the Borough has no steep slope ordinance. It is further based upon a density of 6 units per acre which the Special Master concluded was based solely on the character of the surrounding area as its threshold for determining density, and did not provided any context in its decision-making for the need for housing. The Master concluded that the densities assigned to some sites should be increased. The Plan further addresses only 95 of the 507 units of unmet need based upon the Borough's calculation of its RDP. The Plan excludes 800 Sylvan's property, despite the fact that the 800 Sylvan appears to be the only remaining location in the Borough available for significant affordable housing development. 800 Sylvan has committed to provide 120 units of affordable housing. This court has fact based concerns that the 800 Sylvan site will go the way of the Prentice Hall/LG site if a builder's remedy suit does not go forward.

According to the Borough's attorney, the Borough, recognizing a potential exposure to an estimated 12.7 million dollar cost[i], re-entered negotiations with 800 Sylvan and on April 25, 2019 the Borough's Mount Laurel subcommittee consisting

of three members of the Borough Council, FSHC, and 800 Sylvan entered into a non-binding Memorandum of Understanding.

On July 10, 2019, an informational town hall meeting was held. The governing body did not approve the non-binding Memorandum of Understanding nor did it adopt the ordinance regarding same. Instead, the Borough passed Resolution 19-57 on July 29, 2019 which states in part:

> . . .WHEREAS as a result of finding itself *forced* to prepare a plan before it knew with a measure of reliability the RDP it needed to plan for. . .
> WHEREAS the Borough remains committed to complying and has emphasized that commitment at every turn even though, like so many public officials in other municipalities, the Borough's public officials have questioned the wisdom of the Mount Laurel doctrine. . .
> WHEREAS as a result of the foregoing, the Governing Body wishes to express its commitment to providing affordable housing in a manner of its choosing and that the best way for the Borough to satisfy its obligations would not be to rezone the Sylvan site for residential housing. (emphasis provided)

Trial is currently scheduled for October 11, 2019. The court permitted the filing of the instant motion to terminate immunity and ordered release of the Special Master's report.

In addition to the procedural aspects of the case set forth herein, the court has been made aware that two council members

have reportedly had recall petitions commenced against them allegedly related to their support of the Memorandum of Understanding; and that the Mayor has been consistently opposed to resolution of the litigation.

It is clear from the rulings of our Supreme Court, the legislative enactments and the case law that voluntary compliance is preferred, and should be encouraged and that a builder's remedy action should be considered a remedy of last resort. This voluntary compliance, however, was not meant to refer to compliance with a judgment following trial, rather it derived from a desire to promote voluntary compliance *and early settlement*. It has to do with the desire to simplify litigation in this area and encourage voluntary compliance with the constitutional obligation. Here, despite the evidence to the contrary, the Borough as evidenced in its July Resolution, continues to insist it does not know what the range of its constitutional obligation is, and further provides no concrete plan for funding or building affordable units within that range.

The Borough argues that until the court adjudicates the Borough's realistic development potential, it is not clear to whether and to what extent the Borough must adjust its affordable

housing plan to satisfy the RDP the court finds satisfactory. The Borough advanced this same argument in November 2018. At that time, making arguments relative to the applicability of the 20-percent cap, Kevin Walsh, Esq., on behalf of FSHC noted that in that this court had indicated it would follow the methodology determined by Judge Jacobsen. Based upon that methodology, FSHC noted that the two components of the Borough's Third Round obligation total 599 units (Prior round obligation 219 units, Gap Period 234 units and prospective obligation of 418 units, capped at 365 (234+365)). The court rejects the Borough's argument here for the same reasons set forth in its opinion in the earlier motion.

As set forth in Judge Wolfson's opinion In the Matter of the Application of the Twp. Of South Brunswick, 448 N.J. Super 441 (Law Div. 2016):

> In enacting the FHA, the Legislature "clearly signaled," and the Supreme Court recognized, that an administrative remedy that resulted in "voluntary municipal compliance" with its affordable housing obligation, was "preferred" to litigation culminating in a "compelled rezoning." Mount Laurel IV, supra. Because of COAH's inability to function, the Supreme Court dissolved the FHA's "exhaustion-of-administrative-remedies requirement" leaving the courts to "resume" their role as "the forum of first instance," in adjudicating a municipality's constitutional compliance. The Supreme Court

> undoubtedly envisioned that "certified" and "participating" towns would likely subject themselves, as South Brunswick did in this case, to judicial review via the filing of a declaratory judgment action, taking advantage of the temporary immunity from the threat of multiple builder remedy lawsuits. The Court also recognized, however, that some municipalities might not embrace, in full, their affordable housing obligation, but instead might pursue a path of resistance, resulting in a loss of immunity. Judge Serpentelli's admonition in J.W. Field Co., Inc., bears repeating here: "[i]f a municipality chooses not to voluntarily comply, it brings upon itself the potential that multiple builders will force it to comply. The choice is the municipality's." (internal citations omitted)

It is clear to this court that the Borough of Englewood Cliffs has chosen to pursue a path of resistance.

In In re N.A.C.C., 221 N.J. 1 (2015) our Supreme Court held:

> We emphasize that the courts should employ flexibility in assessing a town's compliance and should exercise caution to avoid sanctioning any expressly disapproved practices from COAH's invalidated Third Round Rules. Beyond those general admonitions, the courts should endeavor to secure, whenever possible, prompt voluntary compliance from municipalities in view of the lengthy delay in achieving satisfaction of towns' Third Round obligations. If that goal cannot be accomplished, with good faith effort and reasonable speed, and the town is determined to be constitutionally noncompliant, then the court may authorize exclusionary zoning actions seeking a builder's remedy to proceed against the towns either that had substantive certification granted from COAH under earlier iterations of Third Round Rules or that had held "participating" status

before COAH until this action by our Court lifted the FHA's exhaustion of administrative remedies requirement.

This court has been diligent and flexible in its effort to secure voluntary compliance. The court's earlier reliance on the commitment of municipal elected officials to carry out their constitutional duties to provide opportunity for the construction of affordable housing was apparently misplaced. The result has been a long delay and the denial of equal treatment to the poor contrary to the holding in Mount Laurel II, 92 N.J. 158, 306 (1983), "Equal treatment requires at the very least that government be as fair to the poor as it is to the rich in the provision of housing opportunities. That is the basic justification for Mount Laurel."

Further in Mount Laurel II, the Supreme Court held, "Experience since Madison, however, has demonstrated to us that builder's remedies must be made more readily available to achieve compliance with Mount Laurel." A builder's remedy may result in site specific relief when the builder meets a three prong test: (1) the builder succeeds in Mount Laurel litigation, (2) the builder proposes a project with substantial amount of affordable

housing and (3) the builder's site is suitable. The court finds that the first prong would be satisfied if 800 Sylvan was permitted to file a builder's remedy suit as demonstrated by the Special Master's report and recommendations which includes the recommendation that this court to give the Borough an additional ninety (90) days to amend its deficient HEFSP. The amendments would include items which the Borough has failed to provide or provided incorrectly or incompletely. These include but are not limited to:

(1) Affordable Housing Ordinance and Affirmative Marketing Plan

(2) A Housing Element which includes a complete compilation of the Borough's housing inventory, assessment of housing size and occupancy, data on the number of bedrooms, accurate discussion of housing stock, and correlation of data regarding rental units and average rents to affordability.

(3) A projection of the Borough's housing stock including probably construction of low and moderate income housing for the next ten years.

(4) An analysis of existing and probably future employment characteristics[ii].

These deficiencies, together with the Borough's failure to produce a single unit of affordable housing in the forty- plus years since the original Mount Laurel decision convinces this court that further delay will be justice denied.

The second prong is met by 800 Sylvan's proposal to build 120 units of affordable housing.

The third, site suitability, is not contested by the Borough's experts from a reading of its HEFSP.

Regarding the Special Master's recommendation that the court receive her report as a pre-mediation report pursuant to N.J.A.C. 5:91-6.2 and recommending a 90-day process (which would exceed the trial date) during which the Master would work with the Borough to ascertain immediately if the Borough's proposed means to address what is likely an increased Court-approved RDP, a meeting to review the VLA analysis and the proposed zoning changes for unmet need and to explore additional development opportunities for unmet need, the court finds the time for such a process is long past. Such a process should have been pursued by the Borough following the Special Master's first report in 2016

or at any time prior to now. In its Resolution 19-157, the governing body states,

> WHEREAS, the plan was for the professionals to negotiate agreements consistent with a non-binding negotiation with Sylvan and FSHC; to introduce an ordinance to rezone the Sylvan site and thereafter, to take into account the public's input before voting on whether to adopt the Sylvan ordinance at second reading and to sign a settlement agreement with Sylvan; and . . .
>
> WHEREAS, the public made its sentiments clear at the July 10, 2019 town hall meeting: (1) It was committed to comply voluntarily – even if the plan was even more expensive than its January 2019 affordable housing plan; and (2) it did not want to comply by rezoning the Sylvan site for high density residential zoning. . .
>
> WHEREAS as a result of the foregoing, the Governing Body wishes to express its commitment to providing affordable housing in a manner of its choosing and the best way for the Borough to satisfy its obligations would not be to rezone the Sylvan site for residential housing. . .

In essence, the Governing Body wants this court to believe that it negotiated in good faith for months with FSHC and 800 Sylvan, but the time, money and effort of the parties, the intervener and the Special Master in reaching the terms of the Memorandum of Understanding were all for naught in the face of public opposition. The court finds this to be an abuse of the process. The Governing Body says it "wishes to express its commitment to providing affordable housing in a manner of its

choosing," but the manner of its choosing has been to stall, procrastinate and evade its obligations. The result of allowing the Borough to provide affordable housing "in a manner of its choosing" has produced not a single unit of affordable housing. As a result, the Borough has lost the ability to determine the elements of its affordable housing plan which will be designed by third parties, the Special Master and the court.

The motion for an extension of the Borough of Englewood Cliffs' immunity from builders remedy suits is denied. The motion of 800 Sylvan Avenue, LLC through its counsel for the revocation of the Borough of Englewood Cliffs' immunity and FSHC opposition to the Borough's application is granted for the reasons set forth herein.

CHRISTINE FARRINGTON, J.S.C., ret'd, t/a

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[i] This statement is also reflected in Resolution 19-157, July 30, 2019, p. 4
[ii] Special Master's report, August 14, 2019, pp. 52-53