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April 14, 2020

Via E-Courts

Hon. Thomas J. Walsh, J.S.C.
Superior Court of New Jersey, Law Division
Union County Courthouse
2 Broad Street
Elizabeth, New Jersey 07207

**Re: In the Matter of the Application of the Township of Cranford
Docket No. UNN-L-3976 -18**

Dear Judge Walsh:

This firm represents Defendants Hartz Mountain Industries, Inc., H-Cranford Conduit L.P., and H-Cranford Credit L.P. (“Hartz”) in connection with the fairness hearing for the settlement between Fair Share Housing Center (“FHSC”) and the Township of Cranford (“Township”). Hartz is in receipt of the Court’s Notice scheduling a telephonic Fairness Hearing and the Township’s letter of April 13, 2020. Please be advised that Hartz objects to conducting the hearing remotely, but for the reasons that follow, agrees in part with the Township’s request to conduct a joint Fairness and Compliance Hearing in or about October 2020, provided the hearing is conducted in the courtroom with live testimony.

A. Background

In 2012, the Law Division entered final judgment in connection with Mt Laurel Builder’s Remedy complaints¹ filed by other parties due to the Township’s failure to comply with its affordable housing obligation for the Second Round (1987-1999 affordable housing cycle). As

¹ See Cranford Development Associates v. Township of Cranford, 445 N.J. Super. 220, 230 (App. Div. 2016).



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immunity from future Builders Remedy lawsuits was set to expire, the Township filed the present declaratory judgment action (the “DJ Action”) in 2018 to adjudicate Cranford’s regional affordable housing obligation for the Third Round (1999 to 2025 affordable housing cycle).

Hartz was granted intervention as a party defendant in this DJ Action because it is the owner of approximately 30.5 acres at 750 Walnut Avenue (Block 541, Lot 2) who has offered to develop its property with a substantial amount of affordable housing. The Township unfortunately has rejected Hartz’s economically feasible proposals that would produce up to 149 affordable units in Cranford. As part of its 2018 rezoning application, Hartz proposed to construct an inclusionary development of up to 136 affordable units on its property. While the denial of Hartz’s application is before Your Honor as a separate action, Hartz remains committed to creating a substantial amount of affordable housing, provided the Township zoning and redevelopment plan allows for an economically feasible redevelopment opportunity.

B. Settlement Agreement

Cranford and FSHC agreed to a settlement of the Township’s DJ Action without Hartz’s consent, which is subject to this court’s review as to “fairness” in accord with East/West Venture v. Borough of Fort Lee, 286 N.J. Super. 311 (App. Div. 1996), and Morris County Fair Housing Council v. Boonton Tp., 197 N.J. Super. 359 (Law Div. 1984). Pursuant to the November 2019 Settlement Agreement, the Township and FSHC agreed that Cranford’s regional affordable housing obligation is 440 low and moderate income (LMI) units for the Third Round. The Township claims that it lacks sufficient vacant land to satisfy its entire Third Round obligation. Because of this settlement, the Township will be left with an unconscionably large unmet need of between 289 and 309 affordable housing units – without any clear means to satisfy this unmet need. N.J.A.C. 4:93-4.

Notwithstanding Hartz’s offer of its property as an affordable housing location to create a substantial amount of affordable housing, the Settlement contemplates an economically deficient redevelopment plan for the Hartz Property at a relatively low density. In the settlement, Cranford proposes to either: (1) rezone Hartz’s site at a density of 9 units per acre, yielding 45 affordable units; or (2) designate this property as a redevelopment area with the power of condemnation, which would then permit a density of 10 units per acre, yielding 49 affordable units. In accordance with the Realistic Development Potential (RDP) analysis undertaken pursuant to N.J.A.C. 5:93-4.2, the Township and FSHC agree that a suitable density for the Hartz’s site is 18 units per acre and accommodate 88 affordable housing units, and even then, only considers 24.5 out of 30.5 acres “available” without a rational basis. As a reference point, the average density of the other affordable housing compliance mechanisms is about 33 units per acre. The Settlement, therefore,



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represents a gross reduction in the amount of not only the affordable housing proposed by Hartz (136) but also less affordable housing than the RDP the Township assigns to the site (88).

Hartz presented objections to many of the elements of the Settlement Agreement, particularly as to the rezoning/ redevelopment of its property. These objections were submitted in writing, and include a report and will include testimony from Hartz' planning expert, Art Bernard, P.P.

C. Joint Fairness and Compliance Hearing

Hartz agrees that the Fairness and the Compliance Hearing should be conducted jointly due to the nature of the Township's burden of proof in this matter, and that it should be conducted in person. In submissions and argument before Judge Robert Mega in February, Hartz had objected to bifurcating the fairness and compliance portion of the settlement review, particularly because the Township has a statutory obligation to justify the economic feasibility of rezoning any non-residential property to provide for affordable housing under N.J.S.A. 52:27D-307(e). See also Toll Bros., Inc. v. Township of West Windsor, 173 N.J. 502, 553-54 (2002) (relying on the FHA, N.J.A.C. 5:93-3.5(a) and N.J.A.C. 5:93-5.6(b)). By consolidating the hearings, the Township and the parties will be able to exchange the requisite economic analyses and address any legal issues that need to be flushed out, the schedule for which can be discussed at a future case management conference with the court.

Placing it into context, because this is public interest litigation, absent a settlement with all parties, a municipality must present substantive evidence that the projects in its fair share plan present a "real" opportunity; whereas, in the case of a settlement of the entire litigation with all parties, a municipality need only demonstrate that the compliance mechanisms in the settlement are "reasonable." The Township and FSHC have argued that they need to show nothing further than the "reasonableness" of the settlement, rather than that each project presents a "realistic opportunity," which is the benchmark of the Mount Laurel Doctrine. The purpose of a fairness and compliance hearing is to foreclose any future challenges by non-parties. Hence, the hearing is not a mere formality where an objecting party produces evidence that the settlement will not adequately protect the welfare of low and moderate income households.

D. Due Process

The fairness hearing was scheduled on March 19, but was adjourned by Judge Mega to May 19, 2020 and May 20, 2020. Due to the ongoing COVID-19 emergency, the Court has now indicated that the May 19 and 20 fairness hearing will be conducted remotely. By holding the fairness hearing remotely, Hartz's and the public's due process interests will be greatly prejudiced,



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while a delay of the fairness hearing until courts are open to the public raises no harm to either the Township or FSHC, particularly because Hartz will agree to extend the Township's immunity from builder's remedy actions.

There no prejudice in delaying the hearing until courts reopen because, effective April 10, 2020, Governor Murphy's Executive Order No. 122 (EO 122) ceases all physical operations of non-essential construction projects, which according to the EO are not inclusionary projects. EO 122 is specific that only "residential projects that are *exclusively* designated as affordable housing" are considered essential. See EO 122, ¶ 2d (emphasis added). As such, construction of any inclusionary project in the Settlement could not move forward until Governor Murphy removes the restrictions placed on non-essential construction projects. Moreover, Hartz would not object to any 100% affordable housing project proceeding or continuing construction, should the Township proceed in that direction. Moreover, pursuant to Chief Justice Rabner's Order dated March 27, 2020 (the "Suspension Order"), "to the extent *practicable*, all court matters including hearings, conferences, and arguments, will be conducted by video or phone conferencing, and in-person appearances will be permitted only in emergency situations." See Suspension Order ¶ 7b. (emphasis added). Therefore, no party is legitimately delayed or prejudiced by adjourning the fairness hearing until it is safe to do so in person.

Most troubling to Hartz are the due process obstacles that arise because this action is an adversarial proceeding. The Court and counsel will be unable to study the witness's demeanor and body language to determine the credibility, weight and probative value of an expert's opinion. As to Hartz, this concern is of vital importance through cross-examination and the presentation of countervailing evidence to test the expert's opinion and the facts the expert's opinion is based on. One of the key reasons why courts allow for *de bene esse* depositions where a witness is unavailable is to allow a jury to witness first-hand the demeanor and body language of that witness. N.J. Ct. R. 4:36-3. To make matters more complicated, the examination of each witness involves extensive reference to exhibits and document control is not possible when all parties are conducting the hearing from separate locations.

The terms of this settlement are unlike any other that have been reached by FSHC. Hartz has proposed a project that will address a substantial portion of the unmet need. Conversely, as part of the settlement with FSHC, the Township's plan is to condemn Hartz's property and develop it with less than half of the affordable housing proposed by Hartz. This aspect of the Township and FSHC settlement is unprecedented, and Hartz submits that using eminent domain **to reduce** affordable housing is an abuse of the eminent domain power. In addition, this unprecedented aspect of the FSHC settlement demands an analysis of whether the Township's proposal is economically feasible. This issue will be the subject of expert testimony, require a determination



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of credibility, and will be the subject of rigorous cross-examination with the use of exhibits that a remote hearing will not be able to accommodate.

Finally, this matter will be appealed whether or not the court approves the settlement. In the interests of affording the parties the benefit of a full and complete appellate record, Hartz submits this proceeding must be conducted live and in person, once it is deemed safe to do so. Hartz can only assume based on that position that the hearing serves to foreclose its challenge to the terms of the settlement, and will require appellate review to challenge whether the proposed compliance mechanisms are adequate. In this regard, the Court Rules require that all proceedings be recorded verbatim and that the verbatim record include references to all exhibits. N.J. Ct. R. 1:2-2 and 1:2-3.

A telephonic hearing makes it nearly impossible for a court reporter to accurately record at all times which statements are being made by a specific party on the line without the benefit of seeing who is speaking. On the other hand, a video conference is perhaps more difficult for a court reporter to record since it relies heavily on all parties having a perfect internet connection where no video “jumps” or “cuts out” while the court reporter attempts to create a verbatim record. Important words, statements, or questions can easily be left out of the record create serious concerns regarding potential flaws in the accuracy of the record. For this same reason, it is not feasible for all counsel to adequately cross examine witnesses that they cannot see or hear sufficiently as would occur in a normal court proceeding.

While the prejudice to Hartz and the public will be material and substantial if the Court moves forward with the hearing remotely, there is no prejudice that will result to postponing the hearing until the courts are able to accommodate the public. Consequently, Hartz requests that Your Honor schedule a case management conference call to address supplemental submissions, adjourn the Fairness Hearing and consolidate the Fairness and Compliance Hearings to be scheduled in October.

Respectfully submitted,

A handwritten signature in black ink that reads 'Irina B. Elgart'.

Irina B. Elgart

IBE:ibe
cc: Counsel of Record (via E-Filing and E-mail)