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April 25, 2016

VIA HAND DELIVER

Hon. Thomas C. Miller, P.J. Ch.
Superior Court of New Jersey
20 N. Bridge Street
Somerville, NJ 08876-1262

Re: In re Hunterdon Somerset Warren Municipalities Seeking Declarations of Compliance with Mt. Laurel
-IMO Readington Township; Docket No. HNT-L-301-15
-IMO Raritan Township; Docket No. HNT-L-0312-15
-IMO Branchburg Township; Docket No. SOM-L-898-15

Your Honor:

Please accept this letter brief on behalf of the LHR/ RAH Group - Readington Township Defendants, **Docket No. HNT-L-301-15**; Raritan Junction, LLC -Raritan Township Defendants, **Docket No. HNT-L-0312-15** and Advance at Branchburg – Branchburg Township Defendants, **Docket No. SOM-L-898-15** in response to the Petitioners' Summary Judgment motions regarding Compliance Standards. As the issue of the appropriate compliance mechanisms is being determined on a vicinage wide basis to assure uniformity of application, Defendants are submitting one response brief on the three municipal matters to which Defendants are parties.

Specifically, the following Prior Round regulations govern the Petitioners' compliance standards: (1) N.J.A.C. 5:93-5.15 (Rental Bonus Credits); (2) N.J.A.C. 5:93-4.2 (Vacant Land Adjustments); (3) N.J.A.C. 5:93-5.6 (Criteria to Evaluate Inclusionary Developments); and (4)

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Hon. Thomas C. Miller, P.J. Ch.
April 25, 2016
Page 2

N.J.A.C. 5:93-5.3 (Funding for Municipal Sponsored Affordable Housing). The Petitioners raise the following arguments that should be disregarded by the Court because the Petitioners' sole motivation to assert the arguments is to reduce their fair share obligation, rather than to comply with the Supreme Court's edict in Mount Laurel IV.

1. Vacant Land Adjustment

There is no basis for the Petitioners to argue that a municipality should follow the First Round rules other than to reduce its obligation. The First Round rules forgive a municipality's unmet need where vacant land is a scarce resource. However, this argument runs counter to the Second Round and should be disregarded, as COAH amended the First Round rules to require municipalities to provide for their unmet need as redevelopment occurs until its fair share obligation is met.

The Second Round rules explain COAH's change in regulatory requirements associated with unmet need in municipalities where vacant land and sewer are scarce resources. N.J.A.C. 5:93-4.2(b) establishes that "[w]here the RDP is less than the pre-credited need minus the rehabilitation component the municipality shall provide a response towards the obligation not addressed by the RDP." The Council stated the basis for creating opportunities for unmet need:

With the concept of RDP, the Council is recognizing that some sites are more realistic and/or appropriate than others for the location of inclusionary development. For example, some sites may lack infrastructure or be surrounded by incompatible land uses. However, **these sites and others had the potential to develop or redevelop over time and, as such development takes place, the Council has determined that such sites shall contribute towards the affordable housing obligation.** N.J.A.C. 5:93-4.1(c)(emphasis added)



Fox Rothschild LLP
ATTORNEYS AT LAW

Hon. Thomas C. Miller, P.J. Ch.
April 25, 2016
Page 3

This obligation of a municipality to address unmet need through redevelopment opportunities that emerge over time has been confirmed by the Supreme Court in Fair Share Housing Center v. Cherry Hill, 173 N.J. 393 (2002). In the Cherry Hill decision, the Court required Cherry Hill to accommodate affordable housing obligations as to the redevelopment of the Garden State racetrack, finding that the mere payment of affordable housing fees was insufficient to meet the Township's unmet need. Id., at 411-416.

Therefore, it is entirely inappropriate to "forgive" municipal obligations, as this position is contrary to both COAH's most recent regulations and clear precedent.

2. Compliance Bonus

Petitioners advocate for the Court to adopt compliance bonuses pursuant to N.J.A.C. 5:93-3.6 for a percentage reduction of their Third Round obligation based on the percentage of the Second Round 1993-1999 obligation that was completed. The Third Round rules and the Second Round rules provide for different bonus structures. The petitioners also request that the Court adopt a "Smart Growth" bonus as was included in the second iteration of the Third Round rules pursuant to N.J.A.C. 5:97-3.18. This bonus allows for 1.33 units of credit for each affordable unit developed in a Transit Oriented Development in Planning Area 1, 2 or a designated center.

Defendants advocate that this Court should adopt Judge Jacobson's rulings that relate to rental bonus credits. In her ruling and opinion, Judge Jacobson recognized that bonus credits have been approved by courts as a proper incentive to foster the creation of affordable housing units. Calton Homes v. Council on Affordable Housing, 244 N.J. Super. 438, 456-58 (App. Div. 1990), certif. denied 127 N.J. 326 (1991) (permitting the use of rental bonus credits to ensure that such units are constructed). Rental bonus credits were explicitly endorsed by the Appellate Division in its review of the Third Round



Fox Rothschild LLP
ATTORNEYS AT LAW

Hon. Thomas C. Miller, P.J. Ch.
April 25, 2016
Page 4

Rules. In re Adoption of N.J.A.C. 5:94 & 5:95, 390 N.J. Super. 1, 81-84 (App. Div. 2007); In re Adoption of N.J.A.C. 5:96 & 5:97, 416 N.J. Super. at 495-97.

Judge Jacobson properly balanced the incentives permitted by COAH for construction of certain types of units through the bonus credit process with the limitation on the overall number of credits that a municipality may choose to seek. Based upon her thorough and well thought-out analysis of available bonus credits allowed under COAH rules, Judge Jacobson authorized municipalities to choose either the bonus credit structure of the Second Round Rules or that of the Third Round Rules (except for those provisions that were expressly rejected by the Appellate Division). As such, a municipality must choose which bonus structure it will follow, wither the Third Round or the Second Round, but not pick and choose from both.

3. Extension of Controls

Petitioners seek to continue use of extension of controls on affordable units with expiring controls. However, they do not propose any time line for how long controls should be extended. Consequently, until a municipality can demonstrate that this mechanism provides realistic opportunity for the development of affordable housing, then the Court should deny this to extend expiring controls.

4. Regional Contribution Agreements

Petitioners propose that municipalities should be able to use Regional Contribution Agreements as an acceptable compliance mechanism. This argument only demonstrates the unreasonable positions that Petitioners are advocating. Regional Contribution Agreements were expressly eliminated by the Legislature as an acceptable affordable housing compliance technique. PL2008, c.46 para. 4.



Fox Rothschild LLP
ATTORNEYS AT LAW

Hon. Thomas C. Miller, P.J. Ch.
April 25, 2016
Page 5

In eliminating the Regional Contribution Agreement (“RCA”) as a compliance technique, the Legislature found “that the use of regional contribution agreements, which permits municipalities to transfer a certain portion of their fair share obligation outside of the municipal borders, should no longer be utilized as a mechanism for the creation of affordable housing by the Council”. N.J.S.A. 52:27D–302j. The immediate effective date as to the elimination of RCA’s as a compliance technique was upheld by the Appellate Division in In re Galloway Township and City of Bridgeton, 418 N. J. Super. 94 (App. Div. 2011). In the Galloway case, the Appellate Division held that an RCA agreement without adequate fact-finding could not be remanded for further proceedings before COAH as to additional fact-finding and implementation of the RCA, as the Council lost all jurisdiction to approve RCAs with the adoption of PL2008, c.46. Id.

In light of the direct legislative action eliminating the use of RCAs as a compliance technique, this Court should reject the municipalities arguments in support of RCAs out of hand. In conclusion, Defendants’ compliance mechanisms should be adopted in their entirety. This Court’s consideration in this regard is greatly appreciated.

Respectfully,

Irina B. Elgart

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Encl.
cc: Service Lists (via Email)