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IN THE MATTER OF THE TOWNSHIP	:	SUPERIOR COURT OF NEW JERSEY
OF BRANCHBURG'S HOUSING	:	LAW DIVISION
ELEMENT AND FAIR SHARE PLAN	:	SOMERSET COUNTY
	:	DOCKET NUMBER: SOM-L-898-15
	:	
	:	Civil Action
	:	
	:	ORDER
	:	

This matter having been opened to the Court by Woolson Sutphen Anderson, a Professional Corporation, attorneys for the Township of Branchburg, for an Order extending Branchburg's immunity through October 31, 2016, and good cause having been shown;

It is on this 24th day of June, 2016, ORDERED that the Township of Branchburg's immunity is hereby extended through October 31, 2016. *as outlined in the Court's opinion attached hereto and made a part hereof.*

Honorable Thomas C. Miller, P.J.Cv.

Opposed

Unopposed

See attached Statement of Reasons dated _____

16EL-47

May 16, 2016

IN THE MATTER OF THE
APPLICATION OF TOWNSHIP OF
BRANCHBURG, A Municipal
Corporation of the State of New Jersey,

Petitioner.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
SOMERSET COUNTY
DOCKET NO. SOM-L-898-15

CIVIL ACTION
(Mount Laurel)

I. PARTIES & RELIEF SOUGHT

This matter comes to the Court on Plaintiff, Branchburg Township's Motion to extend immunity in "Mt. Laurel" or "Exclusionary" Lawsuits through October 31, 2016. Branchburg Township is represented by Mark S. Anderson, Esq. of Woolson, Sutphen & Anderson, P.C.

Defendant-Intervenor, S/K Stoney Brook Associates, by and through its counsel, Derek W. Orth, Esq. of Ingesino, Webster, Wyciskala Taylor, LLC, opposes the Township's Motion to extend immunity and has filed a lengthy opposition to the Township's Motion.

II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

It is undisputed that by decision dated September 18, 2015, and order entered October 8, 2015, this Court held that Branchburg was entitled to an order of temporary immunity because of its status as a "participating" municipality in the substantive certification process before COAH. In the Matter of the Application of Branchburg, Docket No. SOM-L-898-15 (Miller, J., Law Div., September 18, 2015). On February 5, 2016, this Court entered an Order that confirmed that Branchburg's temporary immunity would expire on March 31, 2016.

On March 16, 2016, Branchburg moved to extend its immunity to July 31, 2016 which was the date on which the temporary immunity extended to the other Vicinage 13 municipalities.

On April 7, 2016, intervenors Advance/GLB Development Partners, LLC and Advance at Branchburg II, LLC ("Advance")¹ objected to Branchburg's Motion to extend its immunity on the ground that Branchburg had not met with intervenors and had not submitted its position with regards to compliance issues. (Branchburg had requested an extension to file its submission on the compliance issues which was granted by the Court) No other intervenors objected to the extension of immunity at that time.

By order dated April 15, 2016, this Court extended Branchburg's immunity to July 31, 2016. At that time this Court ordered Branchburg to meet with all intervenors by May 16, 2016, regardless of whether those intervenors had participated in the Request for Proposal ("RFP") process which was uniquely established by Branchburg.

On April 28th and April 29th, Branchburg claims to have met with all of the intervenors in this action. Certification of Mark Anderson, submitted herewith ("Anderson Cert."), para. 3. Court-Appointed Special Master Christine Cofone was present at those meetings. *Id.* Branchburg also filed its compliance brief by the April 18, 2016 extended deadline set by the Court. Thus, Branchburg submits that it has complied with all of this Court's Orders so that it now seeks to have its immunity extended to October 31, 2016, which is the date that this Court has extended immunity for other Municipalities within Vicinage 13.

III. REASONS FOR INTERVENOR'S OPPOSITION

S/K Stoney Brook Associates ("Intervenor") opposes the Township's Motion to extend its temporary immunity. The gist of the Intervenor's Motion is twofold: (1) the Township required all interested developers submit a detailed RFP, but then after the Intervenor submitted their proposal, in good faith, they were given "short shrift"; and (2) there is evidence to indicate that Branchburg has not made good faith efforts to select developers or enough developers to meet their affordable housing obligation.

As a basis for their arguments, Stoney Brook indicates that on March 12, 2016 it hand-delivered to the Township's municipal building a proposal for an affordable housing development. See Certification of Noah P. Chrismer ("Chrismer Cert."), at ¶ 2. In salient part, Stoney Brook's proposal included the following: (i) a seven-page Narrative Statement addressing each item requested in the RFP; (ii) a concept plan prepared by Maser Consulting, P.A.; (iii) a Planning

¹Branchburg advised the Court for the first time in its moving papers that Advance is one of the Intervenor's that has not complied with this Court's Order to pay escrow for the Special Master's Fees.

Memorandum dated March 11, 2016, prepared by C. Richard Roseberry, P.E., P.P., AICP; (iv) a Traffic Generation Comparison dated March 11, 2016, prepared by Gary W. Dean, P.E., P.P.; and (v) sample architectural renderings.² In short, Stoney Brook proposed to develop a total of 654 luxury apartments with a fifteen percent (15%) affordable set-aside, which would result in the provision of ninety-eight (98) affordable units. Id. at ¶¶ 3-4. Due to the onerous submission requirements unilaterally imposed upon Stoney Brook by the Township, the preparation of this in-depth proposal required Stoney Brook to incur significant expenses for planners, engineers, consultants, and attorneys, not including the substantive internal resources that Stoney Brook brought to bear in order to meet the short submission deadline arbitrarily imposed by the Township. Id. at ¶ 3.

On or about March 16, 2016, the Township filed its first motion to extend immunity. This motion was objected to by another intervenor, Advance at Branchburg II, LLC, on the grounds that the Township had failed to comply with Paragraphs 4 and 7 of the Branchburg Order; namely, that the Township had failed to (i) meet with Intervenors or (ii) submit its position statement regarding compliance issues by March 18, 2016. By Order dated April 15, 2016, the Court granted the Township a limited extension of immunity through July 31, 2016, but explicitly conditioned this extension on the fulfillment of the following terms: (a) to meet, *in good faith*, with all Intervenors, whether those Intervenors have provided an RFP or not, by May 16, 2016; and (b) to submit a position statement regarding compliance issues by March 18, 2016. Id. at ¶ 5.

Subsequent to the Court's issuance of the April 15, 2016 Order, the Township contacted Stoney Brook and scheduled a meeting on April 29, 2016. This meeting was attended by Stoney Brook's professionals, certain representatives from the Township, and Special Master Christine Cofone, P.P. Stoney Brook colors their version by stating that upon their arrival at the meeting, Gregory Bonin, the Township Administrator, flatly informed Stoney Brook's professionals that their presentation was strictly limited to twenty-five (25) minutes. To this effect, as soon as the presentation began, Stoney Brook states that Mr. Bonin initiated a timer, thereby making it clear (to Stoney Brook, in their subjective view) that the Township did not intend to fully consider or discuss Stoney Brook's proposal or the substantive benefits that it would yield towards the Township's satisfaction of its affordable housing obligation. Chrismer Cert., at ¶ 7. In fact, Stoney

² Stoney Brook did not submit its proposal from this submission but did indicate that the proposal is available online at http://www.branchburg.nj.us/documents/index.php#revizo_document_center_rz379.

Brook indicates that upon the conclusion of its presentation, none of the Township's representatives asked any questions of substance, nor did they express any concerns regarding the proposal *Id.* at ¶ 9. Thus, despite having created an onerous RFP process and receiving, in turn, an explicitly-detailed proposal for a luxury, inclusionary 654-unit development that included a traffic study, a site suitability analysis, a detailed concept plan, a narrative statement, and architectural renderings—all at significant cost—the Township was apparently determined to merely go through the motions of complying with the Court's directives instead of actually meeting and negotiating in good faith.

On or about May 9, 2016, Stoney Brook received a two-page letter from Gregory J. Bonin, Township Administrator, wherein Mr. Bonin noted that Stoney Brook's project was "one that the Township does not seek to pursue at this time." *Id.* at ¶ 6. Stoney Brook indicates that instead of providing any sort of in-depth explanation regarding the rejection of Stoney Brook's proposal that would corroborate any good faith consideration of their proposal, the letter noted the following in a "conclusory fashion":

The consensus indicated that your project was less desirable than others for reasons including location, community impact, traffic, consistency with existing development, residents' access, number of affordable units and other benefits to the Township, and other factors.

[*Ibid.*]

It is that process that apparently left Stoney Brook with the impression that its application was either not fairly considered or that it was pre-determined that its site would not be seriously considered, even before the merits of the application were reviewed.

Branchburg presents their version of the events quite differently by indicating that they listened to Stoney Brook's presentation, but for various reasons that are generally considered to be within their discretion, they rejected Stoney Brook's proposal.

Secondly, the Defendant-Intervenor contends that the Township is not addressing its affordable housing obligation in a realistic manner. As evidence of their offering, the Intervenor notes that shortly thereafter, the Township published on its web page a letter addressed to its residents wherein it noted the two (2) projects that it had selected for inclusion in its conceptual housing plan. *Id.* at ¶ 7. These two (2) sites include the Township-owned "Triangle Site" and certain property owned by Cronheim Management. According to its letter, the Township claims that the Triangle Site will yield 100 rental affordable housing units whereas the Cronheim

Management site will provide 140 affordable housing rental units. The Township also noted that, if it should need to add beyond the 240 units set forth above, it intends to "further discuss" the proposal submitted by Sycamore Developers, which would allegedly yield a total of eighty-six (86) affordable units. *Ibid.* Thus, the Intervenor postulates that despite having an obligation that Fair Share Housing Center has determined to be approximately 1300 units, the Township is only planning for, or more accurately appearing to plan for, less than one-third of that obligation.

The Intervenor also notes that the Township has "gratuitously claimed" Third Round credits from the Triangle Site in its 2008 Housing Element and Fair Share Plan ("HEFSP"), its 2010 HEFSP, its 2015 Declaratory Judgment Complaint and, as noted earlier, its conceptual 2016 HEFSP. Despite repeatedly proclaiming its commitment to the project as well as the "serious discussions" it has engaged in with developers regarding the project for the past eight (8) years,³ the Township has utterly failed to undertake any significant steps towards actual construction. Indeed, the Township apparently only acquired the third lot that comprises the Triangle Site on or about March 30, 2015.

For those reasons the Defendant-Intervenor questions the Township's self-professed good faith compliance with the Court's directives.

IV. COURT'S DECISION

At this stage of the proceeding the Court is not in a position to resolve the questions raised by the Defendant-Intervenor with regards to the fairness, sufficiency, or bona fide effort of the process that the Township has thus far employed to vet eligible projects. This Court imposed a condition upon all of the Municipalities in this Vicinage so that in order to continue to qualify for continued temporary immunity, the Municipalities were required to meet in good faith with all Intervenor.

The purpose of the Court's condition was to make sure that each Municipality was familiar with each particular proposal so that they could (1) initiate and foster communications with prospective developers; and (2) begin the process to evaluate the proposals and alternatives with the best interests of their community in mind.

³ The Township's 2008 HEFSP claimed that the site would be fully constructed and occupied by December 2011. After failing to meet this self-imposed deadline, the Township's 2010 HEFSP then claimed that the site would be fully occupied and constructed by December 2014. Of course, neither of these deadlines have been met. Due to the length of these documents, they have been omitted from Stoney Brook's moving papers. However, Stoney Brook will provide them to the Court upon request.

Notwithstanding the Intervenor's characterization of the Township's handling of their application, at this stage the Court will provide a measure of deference to the Township's process understanding that the elected officials who made these decisions are generally unpaid (or low paid) officials whose valuable time must be balanced and considered. Also, a measure of deference must be provided to the local elected officials' vision for their Municipality, subject of course to this Court's ultimate determination concerning whether they have complied with their constitutional obligations.

Thus, the Court is not inclined to withhold continued temporary immunity based upon the Intervenor's subjective feelings as to whether their application was fairly considered. The Court does note that if it is subsequently determined that the Township did not exercise good faith and instead simply went through the motions in order to mollify the Court while pursuing its own agenda, the Court will consider such a circumstance at that time. At this time, however, the Court must provide a measure of deference to the Municipality when it evaluates proposals for affordable housing. The Court is simply not in the position of being able to evaluate each proposal made in the matters pending in this Vicinage in order to determine whether the Municipality's decision is reasonable or in the best interest of the Town. This process is simply not appropriate for that kind of analysis and determination.

The issue concerning whether the Township is addressing its Affordable Housing obligation in a realistic manner is the more troubling problem at this time. Branchburg has responded to the Intervenor's criticism by providing:

"Branchburg believes that Dr. Kinsley's (sic) position that Branchburg will require the construction of 1000 units is substantially inflated. However, every unit planned at the Triangle Site, the Cronheim Project and the Sycamore Project is a family rental unit, and Branchburg expects that those projects will receive substantial bonus credits, the amount of which has not yet been determined by the Court."

The Township has not provided any specific information or calculation however concerning how they have arrived at their conclusion. Based upon the information provided, there is simply no way for the Court to be able to gauge whether the Township's assumptions are realistic.

The Court will task the Branchburg appointed Special Master, Christine Cofone, with providing the Court with an analysis of whether Branchburg's actions are realistic and reasonable. Certainly if Branchburg has not taken realistic steps to plan for its obligation, it faces the prospect of a Court imposed obligation that may exceed its plan which may result in circumstances that

may compel the Court to open the Municipality to "Builders Remedy" suits in order to fill the gap, that prospect alone would seem to be incentive plan appropriately.

In any event, for now the Court will extend temporary immunity until such time as the Court has had the opportunity to review and consider Ms. Cofone's report on that issue.

For those reasons, Branchburg's Motion to Extend Temporary Immunity is GRANTED IN PART and DENIED IN PART in accordance with this Court's opinion.