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Reply to Atlantic County Address

July 7, 2015

Honorable Nelson C. Johnson, J.S.C.
Superior Court of New Jersey
1201 Bacharach Boulevard
Atlantic City, NJ 08401

Re: In Re Application of the Township of Mullica
Docket No: ATL-L-_____
Our File No.: 10343-11

Dear Judge Johnson:

This firm represents the Petitioner, Township of Mullica (the “Township”) and the Township of Mullica Planning Board (the “Board” and together with the Township, “Mullica”) in the above-captioned litigation. In accordance with In Re: Adoption of N.J.A.C. 5:96 & 5:97, 221 N.J. 1 (2015), please accept this letter brief in lieu of a more formal brief submitted in support of Mullica’s motion seeking a declaration that, pursuant to N.J.S.A. 52:27D-313(a), Mullica is under the Court’s voluntary compliance declaratory judgment jurisdiction and that the Township is immunized and protected against builder’s remedy litigation and exclusionary zoning challenges while it remains under the Court’s jurisdiction and complies with the Court’s directives.

PROCEDURAL BACKGROUND AND STATEMENT OF RELEVANT FACTS

On December 29, 2008, Mullica adopted a Third Round Housing Element and Fair Share Plan (collectively “Compliance Plan”) based upon the New Jersey Council on Affordable Housing’s (“COAH”) revised “growth share” rules and, as authorized by the Fair Housing Act, N.J.S.A. 52:27D-301, et seq. (“FHA”), petitioned COAH for substantive certification prior to COAH’s December 31, 2008 deadline. Certification of Tracy Siebold, Esquire (“Siebold Cert.”) at Exhibit A. The revised “growth share” rules were being challenged in the Appellate Division at the time of the Township’s submission and COAH did not complete its review of the Compliance Plan and grant substantive certification.

On October 8, 2010, the Appellate Division invalidated COAH’s revised “growth share” rules in In re Adoption of N.J.A.C. 5:96 & 5:97 by COAH, 416 N.J. Super. 462 (App. Div. 2010). Thereafter, the Supreme Court granted COAH’s petition for certification. In re Adoption of N.J.A.C. 5:96 & 5:97 by COAH, 205 N.J. 317 (2011). On September 26, 2013 the Supreme Court affirmed the Appellate Division’s 2010 decision and remanded to COAH to undertake new rulemaking based upon COAH’s prior round rules and methodologies. In re Adoption of N.J.A.C. 5:96 & 5:97 by COAH, 215 N.J. 586 (2013). The Supreme Court directed that the new rules and affordable housing allocations be adopted by February 26, 2014.

On February 26, 2014, COAH filed a motion with the Court petitioning to extend the rulemaking deadline until May 1, 2014. On March 14, 2014, after additional Appellate Division and Supreme Court proceedings, the Supreme Court granted COAH’s motion for an extension subject to COAH meeting firm deadlines for the adoption of the rules and for each interim rule-making step required by the Administrative Procedures Act (“APA”). In re Adoption of N.J.A.C. 5:96 & 5:97 by

COAH, 220 N.J. 355 (2014). The Supreme Court further ordered that if COAH did not adopt the Third Round rules and housing allocations by November 17, 2014, the Court would entertain applications for relief, including “a request to lift the protection provided to municipalities through N.J.S.A. 52:27D-313” and stated that “if such a request is granted, actions may be commenced on a case-by-case basis before the Law Division or in the form of builder’s remedy challenges.” Ibid.

COAH failed to comply with the Supreme Court’s rulemaking directives and deadlines which resulted in the filing of a motion to enforce litigant’s rights pursuant to New Jersey Court Rule 1:10-3. On March 10, 2015, the Supreme Court granted the motion to enforce litigant’s rights and ordered, inter alia, that:

A. The FHA’s exhaustion-of-administrative remedies requirement is dissolved and the Courts may resume their role as the forum of first resort for evaluating municipal compliance with Mount Laurel obligations.

B. The effective date of the Order is delayed until June 8, 2015 to effectuate an orderly transition by municipalities to the judicial review system that are currently under COAH’s jurisdiction.

C. Municipalities that were under COAH’s administrative review jurisdiction that wish to have the Court complete the review of their affordable housing compliance initiatives shall be permitted to file declaratory judgment actions with the Court pursuant to N.J.S.A. 52:27D-313(a) by July 8, 2015.

In re Adoption of N.J.A.C. 5:96 & 5:97 by COAH, 221 N.J. 1 (2015).

Mullica desires that the Court complete the review and evaluation of its Mount Laurel municipal compliance initiatives by filing this declaratory judgment action pursuant to N.J.S.A. 52:27D-313(a) as authorized by the Supreme Court in its March 10, 2015 Order. In this regard, despite significant impediments to residential or non-residential development within the Township of Mullica, Mullica has taken steps in meeting its Prior and Third Round affordable housing obligations as set

forth in the Affordable Housing Report, dated July 6, 2015, by Mullica's Special Affordable Housing Planner, Tiffany CuvIELlo. See Certification of Tiffany CuvIELlo ("CuvIELlo Cert.") at Exhibit A. Mullica incorporates the Affordable Housing Report in its entirety as if set forth herein.

LEGAL ARGUMENT

Mullica is entitled to immunity established by the Legislature and as contemplated under the Supreme Court's March 10, 2015 decision. Under the FHA, a municipality can obtain immunity by adopting a "resolution of participation" and/or filing a housing element and fair share plan with COAH prior to the institution of an exclusionary zoning litigation in court. N.J.S.A. 52:27D-309 and 316. Mullica has satisfied this criterion. Mullica submitted its Compliance Plan to COAH prior to COAH's deadline of December 31, 2008. In addition, Mullica has moved to adopt a "resolution of participation" on June 23, 2015. Siebold Cert. at ¶4. Further, Mullica has filed this declaratory judgment action as a declaration of its intent to comply with its affordable housing obligation, however it may ultimately be defined. Thus, Mullica has been committed, and has reaffirmed its commitment, to satisfy its affordable housing obligations, voluntarily and in the absence of any Mount Laurel lawsuits. Accordingly, this Court should immunize Mullica from exclusionary zoning litigation as contemplated by the FHA.

Moreover, in In re Adoption of N.J.A.C. 5:96 & 5:97 by COAH, 221 N.J. 1 (2015), the Court sought to implement the FHA, stating that "the judicial process authorized herein reflect as closely as possible the FHA's processes and provide the means for a town transitioned from COAH's jurisdiction to judicial actions to demonstrate that its housing plan satisfies Mount Laurel obligations." Id. at 6 (emphasis added). Thus, the expressed intention of the Supreme Court was not to penalize municipalities, such as Mullica, who participated in the COAH process by petitioning for substantive

certification under the then-existing COAH Third Round regulations. Instead, the Court held that such municipalities should be provided ample opportunity to demonstrate constitutional compliance to the Court's satisfaction without the threat of exclusionary zoning litigation. Id. at 27.

The Affordable Housing Report by Tiffany CuvIELLO, P.P, Mullica's Special Affordable Housing Planner, summarizes and demonstrates the history of Petitioner's due diligence in its efforts to meet its affordable housing obligations, as well as the significant barriers to development within this Pinelands community. CuvIELLO Cert. at Exhibit A. Mullica's affordable housing planning actions include:

August 7, 1991 - Mullica Township received substantive certification from COAH for its first round (1987-1993) housing element and fair share plan.

March 4, 1998 - Mullica Township received substantive certification from COAH for its second round housing element and fair share plan.

March 9, 2005 – COAH granted Mullica Township extended substantive certification of its Round 2 Fair Share Plan.

November 21, 2005 – Mullica Township adopted a Round 3 Housing Element and Fair Share Plan.

June 2, 2008 - COAH adopted new Round 3 rules and regulations.

December 29, 2008 – Mullica Township adopted an amended Round 3 Housing Element and Fair Share Plan

March 10, 2009 – COAH determined Mullica Township's petition Complete.

Id. at 1.

In addition, Mullica has actively participated in the following affordable housing production activities:

The Township of Mullica works with the Atlantic County Improvement Authority and utilizes a local program to rehabilitate properties. From April of 2000 through December 2008 the Township and County rehabilitated 46 units, exceeding their rehabilitation obligation.

The Township of Mullica has two existing group homes that satisfy a portion of their affordable housing obligation. The two homes consist of a total of 8 bedrooms (4 bedrooms each).

- June, 2000 - Career Opportunity Development opened a 4 bedroom facility on 3803 Reading Avenue (Block 3923, Lot 3).
- November, 2010 - ARC of Atlantic County with Collaborative Support Programs of NJ reconstructed a 4 bedroom group home on the White Horse Pike (Block 10024, Lot 6).

Id. at 2.

Development within Mullica does not come without significant obstacles. Mullica is completely located within the Pinelands Protection Area and is without public sewer service. This is why COAH approved a Vacant Land Adjustment (“VLA”) for the Township’s Prior Round obligation. The approved Vacant Land Adjustment resulted in zero units of Realistic Development Potential (“RDP”) and an unmet need of 39 units. The Prior Round Certification from COAH included a waiver from addressing this unmet need. It is the intent of the Township to seek to update its VLA while under this Court’s jurisdiction. Id.

In addition, existing income levels and the age of the housing stock warrant the Township to complete a Credits Without Control survey in accordance with N.J.A.C. 5:93-3.2, where over 360 housing units, or 15.6% of the total housing stock in Mullica, were constructed between 1980-1989. It is important to note that this survey was not warranted in 2008 under the invalidated “growth share” COAH regulations. Id.

Finally, the conditions that existed at the time of the Prior Round certification remain consistent for the Township. It is therefore anticipated that the Township will address any affordable housing obligation by updating and certifying that the conditions which existed in 1998 when the Prior Round plan was certified with a VLA and the waiver from satisfying the unmet need continue to exist today. To the extent that the Township is required to address any portion of their unmet need, a revised plan will provide for existing affordable housing credits and affordable housing programs to satisfy the unmet need component. Id.

As can be discerned from Ms. CuvIELLO's Affordable Housing Report, the Township took all necessary steps required under by the FHA to prepare and obtain Substantive Certification for its Compliance Plan. Through no fault of the Township and despite the Township's diligent efforts to seek approval of its Compliance Plan, it has been unable to move forward due to the lack of applicable COAH regulations and methodology. As made clear in the Court's decision in In Re Adoption of N.J.A.C. 5:96 & 5:97, municipalities should be provided the opportunity to demonstrate constitutional compliance to the Court's satisfaction before being subjected to exclusionary zoning litigation. Id. at 27.

CONCLUSION

Therefore, for the reasons set forth in the moving papers, it is respectfully submitted to the Court that temporary immunity from Mount Laurel exclusionary zoning litigation and the imposition of the builder's remedy be granted.

Respectfully submitted,

NEHMAD PERILLO & DAVIS, P.C.

By: 

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