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January 23, 2018

VIA FACSIMILE

Hon. Gregg A. Padovano , J.S.C.
Bergen County Justice Center
10 Main St., 4th Floor
Hackensack, NJ 07601

**Re: In the Matter of the Application of the Borough of Emerson for a
Declaratory Judgment
Docket No.: BER-L- 6300-15**

Dear Judge Padovano:

We represent the Borough of Emerson (“Emerson”) in the above referenced pending Declaratory Judgment action.

I am in receipt of correspondence from , Richard P. DeAngelis, Esq., from the law firm of McKirdy, Riskin Olson, DellaPelle. Mr. De Angelis represents two property owners, 214 Kinderkamack, LLC and Dolores Della Volpe (the “Owners”). His clients own the following Properties:

Block 419	Lot 2
Block 419	Lot 3
Block 419	Lot 4
Block 419	Lot 6.01 (hereinafter, the “Properties”)

On January 9, 2018, Richard P. DeAngelis, Esq., from the law firm of McKirdy, Riskin Olson, DellaPelle, filed a “formal brief in support of the Owners’ objection to the inclusion of the Block 419 Project in the proposed Settlement Agreement as it may not be considered a “realistic opportunity” toward the Borough’s affordable housing obligations (hereinafter “De Angelis Brief). A copy of Mr. De Angelis’ January 8, 2018 letter is attached hereto as Exhibit A.

Based on this formally filed objection to the settlement between the Borough and the Fair Share Housing Center (“FSHC”), both the Borough and FSHC requested that the merits of Mr. De Angelis’ arguments be fully addressed and resolved by the Court. Indeed, both the undersigned in my January 11, 2018, letter to Judge Toskos (Exhibit B) and Adam Gordon, Esq., of FSHC in his letter dated January 12, 2018, to Judge Toskos (Exhibit C) requested that the



Court rule on the Borough's ability to acquire certain properties under the Fair Housing Act ("FHA").

Specifically, FSHC confirmed that:

"As Emerson's brief filed yesterday notes, "Because the Intervenor challenges the Borough's authority to acquire the properties. . . the Borough's ability to comply with its obligations under the proposed Settlement Agreement, the Redevelopment Agreement with ERUR and its constitutional duty to provide the agreed upon 22 low and moderate income family units may be at risk." Borough January 11, 2018 Letter at 1-2. If, as Objectors assert, as a matter of law the FHA does not permit the condemnation action sought by the Borough under any circumstances, then the implementation of the agreement indeed itself, as opposed to other land use laws, it would have been within the provenance of COAH as the agency implementing the FHA, and thus this Court as a judicial entity tasked by the Supreme Court with providing the judicial equivalent of substantive certification, to address this issue."

Further, FSHC specifically requested the Court to "..... (2) set a briefing schedule on issues raised by Objectors; (3) hold a combined hearing on these objections and overall fairness in early-mid February 2018."

Mr. De Angelis in his January 12, 2018 letter to Judge Toskos (Exhibit D) sought to avoid being "joined" in the matter in order to resolve these critical issues to the Court's determination as to whether the proposed settlement is fair and reasonable and whether the proposed "Settlement Agreement creates a 'realistic opportunity' toward achieving the Borough's affordable housing obligations." (De Angelis brief, p. 1.)

Remarkably, Mr. De Angelis was invited – but specifically did not participate in the Court ordered telephone conference with Judge Toskos last week - (I personally advised Mr. De Angelis after receiving instruction from the court that I must "advise Mr. De Angelis that any 'interested party' was permitted to participate") and now appears to once again refuse to participate in the court ordered telephone conference with Your Honor for today, unless and until "Your Honor [will advise him] as to the purpose of the scheduled conference call..." Mr. Stone of my office, relayed to me that Mr. De Angelis then inquired of Your Honor, "how this matter was transferred to Your Honor?"

While refusing to participate "formally" in any proceedings before the Court in this matter until he is convinced by Your Honor as to why he needs to formally participate he continues to argue about the process, the merits for the "fairness hearing," and the viability of the settlement agreement reached with FSHC after many, many months of efforts and negotiations.

As to the "process," and as we explained in our January 16, 2018, letter to Judge Toskos (Exhibit E), Emerson cannot proceed with the fairness hearing unless this Court first determines

Emerson's authority to acquire property under the FHA. Importantly, Adam Gordon from FSHC joined in this position in his letter to Judge Toskos of January 12 (Exhibit C).

As to the merits of Mr. De Angelis' objections he continues to argue:

1. The "viability of the project is subject to the outcome of the Redevelopment Litigation;
2. The "reality is that more than 95% of the proposed development is for-profit;
3. The "Owners requested only that, if approved, the proposed Settlement Agreement be modified to remove the provisions related to the use of eminent domain under the FHA";
4. The authority to take under the FHA should be addressed if ever, in a condemnation action filed pursuant to the Eminent Domain Act ... to ensure the Owners are afforded all rights, protections and remedies intended by the Legislature in an action by a government entity to take private property.

But respectfully, Owners cannot have it all ways. They cannot be "formal objectors" and not simultaneously participate in the proceedings and importantly be bound by this Court's determination and continue to raise legal arguments to challenge the proceedings.

First, the viability of the project is not "subject to the outcome of the Redevelopment Litigation." The Settlement Agreement doesn't reference the Borough's continued ability to build the project as a Redevelopment as a condition to settling with FSHC.

Second, as we believe FSHC and the Special Master will likely argue, whether a project is "for profit" or "not for profit" has no bearing on the appropriateness of the settlement with FSHC or the Borough's ability to acquire the Properties under the FHA.

Third, Mr. De Angelis and the Owners are requesting specific relief in the form of court ordered "excision" of critical parts of the Settlement Agreement (i.e., the redevelopment project involving the Properties and the Borough's authority to acquire the Properties under the FHA) and simultaneously refusing to participate in or be bound by these very determinations by the Court.

Fourth, without this Court specifically ruling on the Borough's reasonable determination that the Properties (and the remaining properties that comprise the redevelopment project) are "necessary or useful for the construction or rehabilitation of low and moderate income housing (Cramer Hill Residents Association, Inc. v. Primas, 395 N.J. Super. 1, 95 (2007) , a subsequent Court must necessarily consider the very issues this Court will be considering as part of the Fairness Hearing process.

Finally Mr. De Angelis in all of his letters continues to argue that "[t]he Borough's effort to force the Owners to participate as parties in this proceeding is consistent with the series of delay tactics it has employed to thwart the prosecution of a challenge to the redevelopment designation in hopes of avoiding a decision on the merits of those matters."

Judge Toskos and Judge Friscia can confirm that in the Spring of 2017 at a settlement conference before Judge Friscia, Emerson specifically asked that these matters be transferred to Judge Toskos for judicial economy and expeditious determination by the Court on all matters, including the Emerson's right to acquire the properties under the FHA and shared a copy of the Cramer Hill decision with Judge Friscia and Mr. De Angelis. At that time, Judge Toskos did not agree that the matters should be consolidated.

Nevertheless, we have tried diligently to proceed to conclude the "blight challenge" by Owners – which frankly should have been briefed and submitted months ago - but for Mr. De Angelis' demand for unnecessary, and rarely permitted depositions and discovery from the Borough and Land Use Board.

Mr. De Angelis has made his intentions, quite clear, to wit, after he exhausts his attempts to derail the redevelopment project, he will then challenge the Borough's authority to acquire the Properties under the FHA at the time of a filing of a declaration of taking. This will further delay the completion of the project– creating yet further interference with the Borough's efforts to satisfy its constitutional obligation to provide 27 low and moderate (and very low) income, family rental units.

In closing, we also note that Mr. De Angelis' calculation of the Borough's "unmet need " is not consistent with the accepted methodology of FSHC and the Court's interpretation of municipal constitutional obligation to provide low and moderate housing.

We thank Your Honor for the Court's kind courtesies in this matter.

Respectfully submitted,
**DECOTIIS, FITZPATRICK,
COLE & GIBLIN, LLP**

By: 
Douglas F. Doyle, Esq.

DFD:sh

cc: Richard P. DeAngelis, Esq. (via electronic mailing)
Adam M. Gordon, Esq., FSHC (via electronic mailing)
Mary Beth Lonergan, PP, AICP (via electronic mailing)
Robert Hoffmann, Borough Administrator (via electronic mailing)

EXHIBIT A



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January 8, 2018

The Honorable Menelaos W. Toskos, J.S.C.
Superior Court of New Jersey – Bergen County
10 Main Street
Hackensack, New Jersey 07601

RE: I/M/O the Application of the Borough of Emerson
Docket No. BER-L-6300-15
Fairness Hearing

Dear Judge Toskos:

We write in behalf of 214 Kinderkamack, LLC (“214 Kinderkamack”) and Dolores Della Volpe, Trustee (“Della Volpe”) owners of certain properties located in Block 419 as shown on the Official Tax Map of the Borough of Emerson. 214 Kinderkamack and Della Volpe (referred to collectively as the “Owners”) appreciate that the Petitioner in the above matter, the Borough of Emerson (the “Borough”), must meet its affordable housing obligations. The Property Owners appreciate also that this matter has been pending since July 2015 and that the Borough and the Fair Share Housing Center have presented to the Court a proposed Settlement Agreement to address the Borough’s affordable housing obligations. However, the Borough’s proposed compliance efforts as set forth in that agreement include what has been identified as the “Block 419 Project” that is dependent upon the acquisition of the Owners’ properties and as such, the Owners are interested parties in this proceeding.

Please accept this this letter in lieu of a formal brief in support of the Owners’ objection to the inclusion of the Block 419 Project in the proposed Settlement Agreement as it may not be considered a “realistic opportunity” toward achieving the Borough’s affordable housing obligations.



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PRELIMINARY STATEMENT

The Block 419 Project is not an “affordable housing” project, but rather it is a proposal for a private, for-profit development. Neither the Borough nor its selected developer own or control the Owners’ properties and 214 Kinderkamack and Della Volpe are not interested in selling. The proposed Settlement Agreement provides that the Borough will assist the developer in acquiring the Owners’ properties by eminent domain. In this regard, the Borough cites to purported authority under the Local Redevelopment and Housing Law, *N.J.S.A. 40A:12A-1 et seq.* (“LRHL”) and the Fair Housing Act, *N.J.S.A. 52:27D-301 et seq.* (“FHA”). In March 2017 the Owners filed separate lawsuits to challenge the Borough’s claimed authority under the LRHL, which remain pending and therefore, it is premature for the Borough to claim any authority under the LRHL to take the Owners’ properties for the Block 419 Project. Nor does the Borough have the authority under the FHA to acquire the Owners’ properties by eminent domain to flip them to a developer for a for-profit project. As such, the Block 419 Project should not be considered as part of the proposed Settlement Agreement.

STATEMENT OF FACTS

1. The “Block 419 Project” is a for-profit venture to benefit private individuals.

As set forth in the accompanying Certifications of Alexander J. Lapatka (“Lapatka Cert.”), Deborah Agnello (“Agnello Cert.”), and Richard P. De Angelis, Esq. (“De Angelis Cert.”) and the exhibits attached thereto, the Block 419 Project is not an “affordable housing” project. The proposed development in the Block 419 Project area is a private, for-profit project. Referenced in and annexed as Exhibit B to the proposed Settlement Agreement is the Redevelopment Agreement



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by and between the Borough and Emerson Redevelopment Urban Renewal, LLC (“ERUR”). Not referenced in the proposed Settlement Agreement is the Financial Agreement by and between the Borough and ERUR that provides a long term tax exemption for ERUR’s proposed project on Block 419. (De Angelis Cert., ¶3, Exhibit A)¹

Pursuant to the Redevelopment Agreement and the Financial Agreement, the Block 419 Project will include a total of 147 residential units, inclusive of the affordable housing set-aside referenced in the proposed Settlement Agreement. (See Exhibit B to the Redevelopment Agreement and De Angelis Cert., ¶3, Exhibit A)² While the proposed Settlement Agreement states that the project will include 22 units, the Financial Agreement provides for only 15 units. (De Angelis Cert., ¶3, Exhibit A) Regardless, the overwhelming majority of residential units in the proposed project are to be rented at market rates. In addition, the project calls for 20,360 square feet of retail space that “will include restaurants, luxury goods, fitness studios and banks.” (See De Angelis Cert., ¶3, Exhibit A)

The claimed statutory authority for the long-term tax exemption provided under the Financial Agreement is the LRHL. (See De Angelis Cert., ¶3, Exhibit A)³ If the Block 419 Project were truly an affordable housing project, the Borough could have provided a tax break under the FHA that provides for “[t]ax abatements for purposes of providing low and moderate income housing.” *N.J.S.A. 52:27D-311a(6)*. Of course, given the true nature of the project, an abatement

¹ The Financial Agreement is comprised of Ordinance No. 1529-16 adopted by the Borough on August 16, 2016 that approves the Application for Long-Term Tax Exemption by Emerson Redevelopers, LLC, an affiliate of ERUR.

² See page 5 of the Application for Long-Term Tax Exemption that describes the proposed project.

³ See first Whereas Clause of Ordinance 1529-16.



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would never be approved under the FHA regardless of the nominal affordable housing set-aside. While the Borough will certainly tout the perceived benefit of the affordable housing set-aside, a review of the Financial Agreement shows that more than 95% of the project is for-profit. (De Angelis Cert., ¶3, Exhibit A (The Financial Agreement includes an income and expense *pro forma* that projects annual rental income of \$3,646,000, inclusive of the \$162,000 in rent from the 15 affordable units and, after expenses, a net rental operating income of \$2,365,374))

Also important to note is that ERUR is owned by two individuals who share an equal 50% stake in the entity, Joseph Forgione and Steven Kalafer. (De Angelis Cert., ¶4, Exhibit B)⁴ Mr. Forgione is the founder and principal of JMF Properties (“JMF”) a prominent developer of projects throughout New Jersey and New York. (De Angelis Cert., ¶5, Exhibit C) JMF “develops, builds and manages residential and real estate assets” and is particularly successful in “identifying undervalued assets, gaining complex approvals, and creating lasting value for residents, retailers, homeowners and municipalities.” (De Angelis Cert., ¶5, Exhibit C) While some JMF projects may include affordable units, JMF does not advertise itself as an entity that builds projects comprised entirely of units for low and moderate income households. Simply put, the proposed “Block 419 Project” is a for-profit venture for Messrs. Forgione and Kalafer.

2. The Borough is a defendant in pending litigation that challenges the designation of the Block 419 Project area as an area in need of redevelopment.

The Borough designated a large section of its downtown commercial district, that included the Block 419 Project area, as an area in need of redevelopment in 2004 (“2004 Designation”).

⁴ While the proposed Settlement Agreement includes as an exhibit thereto a copy the Redevelopment Agreement, that copy is missing “Exhibit D” that lists the members of the redeveloper.



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(De Angelis Cert., ¶6, Exhibit D) The Owners' properties, described in their accompanying certifications, (Lapatka Cert., ¶¶1, 3-11; Agnello Cert., ¶¶1, 4-7), are included in the 2004 Designation. (De Angelis Cert., ¶6, Exhibit D)

The Redevelopment Agreement was entered in an effort to achieve the goals of a 2006 Redevelopment Plan ("Redevelopment Plan") that was prepared to address the alleged blighted condition upon which the 2004 Designation is based. While a designation as an area in need of redevelopment authorizes the use of eminent domain, the Borough and JMF/ERUR recognized that any attempt to acquire property under the 2004 Designation could be successfully challenged due to changes in the law that resulted from intervening judicial decisions. The Redevelopment Agreement cites one of these cases, *Harrison Redevelopment Agency v. DeRose*, 398 N.J. Super. 361 (App.Div.2008), and provides that a new study redevelopment area investigation could be undertaken at the expense of JMF/ERUR. (See Redevelopment Agreement at p. 13) After it became clear that JMF/ERUR could not acquire the 214 Kinderkamack Property (Lapatka Cert., ¶29), and might need assistance in acquiring the Della Volpe property, (Agnello Cert., ¶¶19-24) the Borough adopted Resolution No. 221-16 on August 16, 2016 to authorize the Land Use Board to conduct a study of whether the area previously subject to the 2004 Designation qualified as a Condemnation Redevelopment Area under the LRHL.⁵ (De Angelis Cert., ¶7, Exhibit E)

⁵ On that same day, the Borough also approved the Financial Agreement with JMF/ERUR to provide a long term tax exemption for the project and authorized the Board to recommend amendments to the Redevelopment Plan to allow the addition of a fourth story, which was requested by JMF/ERUR. (De Angelis Cert., ¶8, Exhibit F)



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The Borough designated the Block 419 Project area as a Condemnation Redevelopment Area in January 2017.⁶ (“2017 Designation”) (De Angelis Cert., ¶9, Exhibit G) Both Owners have filed legal challenges to 2004 Designation and 2017 Designation (“Redevelopment Litigation”). (De Angelis Cert., ¶¶10-11, Exhibits H & I) The Redevelopment Litigation remains pending in the Superior Court of Bergen County, before the Honorable Gregg A. Padovano, J.S.C. (De Angelis Cert., ¶12)

The Owners allege in the Redevelopment Litigation that the Borough acted in bad faith in the proceedings that resulted in the 2017 Designation and did so to achieve a politically desired downtown redevelopment that would also benefit JMF/ERUR. A review of the specific allegations in that matter are not pertinent to the Court’s review of the proposed Settlement Agreement. However, what is important to note is not only that the Redevelopment Litigation remains pending, but that it was avoidable. The Borough knew before it adopted the resolution to approve the 2017 Designation that 214 Kinderkamack would challenge it.

Citing to various procedural irregularities as well as substance issues related to whether the Owners’ properties meet the criteria set forth under the LRHL to be designated, 214 Kinderkamack requested that the Borough rescind the authority for the redevelopment study investigation or, in the alternative, to reopen the hearing to afford 214 Kinderkamack, and possibly other residents, the opportunity to present additional evidence as the one hearing conducted had been cut short

⁶ The LRHL was amended in 2013 to provide, *inter alia*, a distinction between a Condemnation Redevelopment Area and a Non-Condemnation Redevelopment Area, with the former carrying more stringent notice requirements to comport with the decision in *DeRose, supra*, 398 N.J.Super. 26. *See 2013, c. 159*, eff. Sept. 6, 2013



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and, as was later determined, not conducted pursuant to the LRHL.⁷ (De Angelis Cert., ¶13, Exhibit J) The Borough denied this requested and adopted the 2017 Designation. Also important to note is that the Owners are the plaintiffs in those matters in name only because they were forced to initiate the litigation to defend their property rights. They had no choice but to file the lawsuits or be forever barred from challenging the designations in a subsequent condemnation action by the Borough. *See N.J.S.A. 40:12A-6.*

LEGAL ARGUMENT

1. The Borough may not acquire the Owners' properties by eminent domain under the LRHL.

The LRHL authorizes the acquisition by eminent domain of any property designated as an area in need of redevelopment. However, the Borough may not initiate a condemnation action under the LRHL while the Redevelopment Litigation is pending. *See N.J.S.A.40A:12A-6(b)6* (Barring municipality from taking any action to acquire property by condemnation in a redevelopment area during 45 day appeal period); *see also DeRose, supra*, 398 N.J.Super. at 413 (Preserving the right of a property owner to challenge a blight designation as a defense in an eminent domain action). It would be a waste of taxpayer dollars as well a judicial resources to allow a condemnation action to proceed where the very same issues that will be raised in defense of that action are already before the Court in the Redevelopment Litigation.

⁷ As part of its investigation, the Emerson Land Use Board conducted only a single hearing on December 8, 2016, which was cut short depriving all those in attendance an opportunity to appear. Moreover, before memorializing its resolution, 214 Kinderkamack requested that the Board reopen the hearing, but that request was denied. This, notwithstanding the fact that such hearings routinely take more than a single evening. Indeed, the investigation that resulted in the 2004 Designation included two hearing dates and another investigation by the Borough in 2008 included five hearings (that study did not result in a designation by the Borough).



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Perhaps recognizing the futility of proceeding under the LRHL, the Borough has repeatedly threatened the Owners with a condemnation action for “affordable housing.” In a letter to The Honorable Lisa Perez Friscia, then presiding over the Redevelopment Litigation, the Borough argued that “if the redevelopment designation was successfully challenged, the Borough would have no choice to pursue eminent domain under the Fair Housing Act . . . in order that the Borough can settle [the affordable housing matter]” before Your Honor. (De Angelis Cert., ¶14, Exhibit K) This, of course, begs the question as to why the Borough proceeded with the 2017 Designation. The Owners contend that the answer rests in the Financial Agreement. If the Owners’ prevail in the Redevelopment Litigation, all subsequent actions by the Borough based on those designations will be nullified, including the Redevelopment Plan and the Redevelopment Agreement. In such case, it may not matter if the Borough has authority under the FHA to take the properties because without the tax breaks the project will most certainly be abandoned.

It is clear that the Borough seeks to use this proceeding and a court approved Settlement Agreement as a “shield” to avoid a decision on the merits in the Redevelopment Litigation which should not be countenanced by the Court. Indeed, the Borough previously inquired as to whether Your Honor would consider taking over the Redevelopment Litigation in hopes of staying discovery in those matters while this affordable housing matter proceeded. (De Angelis Cert., ¶14, Exhibit K) The Borough hoped to achieve a Court approved Settlement Agreement in this matter that it suggested would “moot” the claims raised in the Redevelopment Litigation. (*Ibid.*) This was one of many efforts by the Borough to stall a trial on the merits of the issues before the court



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in the Redevelopment Litigation. Regardless, we understand that Your Honor indicated that you would not approve such a request. (*Ibid.*)

The Owners note that paragraph 25 of the proposed Settlement Agreement provides that it “may be enforced through a motion to enforce litigant’s rights or a separate action filed in Superior Court, Bergen County.” Thus the owners are concerned that if the proposed Settlement Agreement is approved and includes the Block 419 Project but does not contain an appropriate limitation, the Borough will attempt to use same to avoid a decision on the merits in the Redevelopment Litigation. Importantly, the Redevelopment Litigation was initiated pursuant to rights granted under the LRHL in order to avoid being barred from asserting a challenge to the designations in defense of a later condemnation action. In their respective challenges, the Owners have asserted also various constitutional rights, specifically: N.J. Const. art. I, ¶1 that grants citizens “certain natural and unalienable rights, among those of enjoying and defending life, liberty, of acquiring and possessing, and *protecting property*....” (emphasis added); and N.J. Const. art. VI, §V, ¶4 that grants the right to citizens bring an action in lieu of prerogative writ to challenge municipal action. The Borough must not be permitted to use an approved Settlement Agreement to make an “end run” around those rights asserted by the Owners in the Redevelopment Litigation.

In the event the proposed Settlement Agreement is approved it should not include the Block 419 Project to the extent it relies on the Redevelopment Agreement, the viability of which is subject to the outcome of the Redevelopment Litigation. In the alternative, the Court could reserve on its ruling of the proposed Settlement Agreement until the Redevelopment Litigation is resolved.



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2. The FHA does not provide authority to the Borough to acquire by eminent domain the Owners' properties for JMF/ERUR's for-profit development.

While the FHA authorizes a municipality to acquire property by eminent domain, it does not authorize such acquisitions where the property is flipped to a developer for purposes of a private, for-profit development project, even if that proposed project contains an affordable housing set-aside. The FHA provides that land may be “condemned by the municipality for purposes of providing low and moderate income housing.” *N.J.S.A. 52:27D-311a(5)*. The act specifically authorizes the acquisition by eminent domain any property determined “necessary or useful for the construction or rehabilitation of low and moderate income housing...” *N.J.S.A. 52:27D-325*. While the “necessary or useful” language may be perceived as broad grant of authority, the power to acquire property by eminent domain is circumscribed and the statutory grant of such power is strictly construed as discussed more fully in point 3 *infra*.

More importantly, the FHA imposes strict limitations on the sale or lease of property acquired thereunder and does not permit the acquisition of property by condemnation to turn it over to a private developer to construct a for-profit development, notwithstanding any affordable housing set-aside. Under the FHA, a municipality may only sell housing units and not vacant land. Moreover, such sales are limited to low and moderate income individuals or nonprofit entities.

[T]he municipal governing body may, by resolution, *authorize the private sale and conveyance or lease of a housing unit or units acquired or constructed pursuant to this section*, where the sale, conveyance or lease is *to a low or moderate income household or nonprofit entity* and contains contractual guarantee that the housing unit will remain available to low and moderate income households for a period of at least 30 years.”

[*N.J.S.A. 52:27D-325* (emphasis added)]



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Thus, the FHA does not permit the Borough to take the Owners' properties by eminent domain and turn them over to JMF/ERUR for its proposed for-profit development.

As discussed in point 3 *infra*, the grant of authority to a municipality to acquire property is grounded in our constitution and derived from specific legislative enactments. And while the obligation of municipalities to provide affordable housing is also of constitutional dimension, in reviewing such matters, the court must "ensure that the constitutional mandate of the *Mount Laurel* doctrine is not undermined by municipal action that, although taken in its name, may fall wide of the mark of actually fulfilling its purpose." *Cramer Hill Residents Ass'n v. Primas*, 395 N.J. Super. 1, 17 (2007).

The Block 419 Project is not an affordable housing project, nor is it vital to fulfilling the Borough's affordable housing obligations. However, it is being presented as such to advance a politically desired project as well as private financial interests. A practical consideration for the Court to consider is that if the proposed Settlement Agreement is approved with the Block 419 Project along with an endorsement of the use of eminent domain to acquire the Owners' properties, it will open the flood gates for developers to target properties for development with the promise of a nominal affordable housing set-aside to justify the use of eminent domain to assemble properties. Of course, such a result cannot be tolerated. The Borough's "*mere, unsupported assertion . . . that its governing body has determined that the exercise of eminent domain here is "necessary or useful" is insufficient.*" *Id.* (emphasis added).

Moreover, it is clear that the Legislature considered the role of private developers in the provision of affordable housing and granted municipalities specific powers to incentivize



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developers, none of which include the power to take property to turn over to a developer. The FHA provides for incentives to private developers for inclusionary developments. The authorized incentives include “increased densities and reduced costs.” *N.J.S.A.* 52:27D-311h. In addition there may be “reduced affordable housing set-asides or increased densities to ensure economic feasibility....” *N.J.S.A.* 52:27D-311i. Simply put, the FHA does not authorize the taking of private property for inclusionary developments.

Based on the foregoing, the proposed Settlement Agreement, if approved, should not include the Block 419 Project or, in the alternative, the Court should modify the agreement to remove the provisions related to the use of eminent domain under the FHA.

- 3. A Court approved Settlement Agreement may not confer upon the Borough any authority to acquire property by eminent domain not provided under State statute.**

It is apparent also that the Borough seeks to use a Court approved Settlement Agreement as a “spear” to assert authority to acquire the Owners’ properties by eminent domain. The Borough has already sent a written notice dated December 29, 2017 to advise that it intends to begin the condemnation process to take the Owners properties. In that letter, the Borough asserts that by virtue of the proposed Settlement Agreement it is required “to exercise all of its lawful authority to purchase and/or acquire the Properties.” (De Angelis Cert., ¶15, Exhibit L)

Only the State of New Jersey is vested with the power of eminent domain as an attribute of its sovereignty. To the extent municipalities may exercise such power, it is pursuant to a provision in the State Constitution that allows the delegation of that power, which is within the exclusive province of the Legislature. *N.J. Const. art. IV, § VI, ¶3; see also State by McLean v.*



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Lanza, 27 N.J. 516, 530 (1958), appeal dismissed, 358 U.S. 333, 79 S.Ct. 351, 3 L.Ed.2d 350 (1959), *reh'g denied*, 359 U.S. 932, 79 S.Ct. 606, 3 L.Ed.2d 634 (1959) In other words, a municipality may only condemn property subject to rights provided by the enabling statute. See *New Jersey Highway Auth. v. Currie*, 35 N.J.Super.525, 540 (App.Div.1955) (“The power of condemnation being in derogation of property rights, it is required to be strictly construed and all statutory prerequisites must be established to sustain its exercise.”) As the FHA does not provide the authority for the Borough to take the Owners’ property by eminent domain for JMF/ERUR, the Borough may not claim such authority by virtue of an approved Settlement Agreement.

In the event the proposed Settlement Agreement is approved it should not include the Block 419 Project or, in the alternative, be clear that it does not confer upon the Borough any authority to acquire property by eminent domain that is not specifically authorized under a State statute.

4. JMF has not pursued good faith negotiations with the Owners.

The proposed Settlement Agreement states that JMF/ERUR “has been pursuing good faith negotiations with [the Owners],” which as set forth in the Owners’ certifications, is not accurate. (*Lapatka Cert.*, ¶¶22-27; *Agnello Cert.*, ¶¶15-25, 30) The attempts of JMF/ERUR to acquire the Owners’ properties lends further support for the finding that the proposed project is all about the desire to complete a downtown redevelopment to be cited as a political achievement and the for-profit interests of two individuals. While there is nothing wrong with either of these considerations, it is the attempt to acquire private property by eminent domain to achieve these goals that is of concern to the Owners.



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ATTORNEYS AT LAW

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Here, JMF was seeking to acquire the properties even before the issuance by the Borough of the January 2016 Request for Proposals (“RFP”) for developers to redevelop the Block 419 Project area. (De Angelis Cert., ¶16, Exhibit M; Lapatka Cet., ¶¶18-22; Agnello Cert., ¶¶16-19) As to 214 Kinderkamack, after being appointed by the Borough as the developer JMF/ERUR reduced its offer by more than 50% and presented it as a “take it or else” proposition. (Lapatka Cet., ¶¶25-27) Not long after the offer was rejected, JMF/ERUR followed up on the “or else” threat by getting the Borough to initiate the process that resulted in the 2017 Designation.⁸ (De Angelis Cert., ¶¶7-8, Exhibits E & F) As to Della Volpe, despite promises of addressing concerns regarding her tenants, JMF/ERUR refused to offer any meaningful assistance. (Agnello Cert., ¶29) While such negotiating tactics may be tolerated in the private market, a developer may not employ them when claiming to stand in the shoes of a municipality. JMF/ERUR had an obligation to deal fairly with the Owners and was not permitted, as a matter of law, to try and gain any bargaining advantage. *F.M.C. Stores Co. v. Borough of Morris Plains*, 100 N.J. 418, 426-427 (1985); *Jersey City Redevelopment Agency v. Costello*, 252 N.J.Super. 247, 257 (App.Div.1991). Moreover, JMF/ERUR was obligated make offers based on estimates of fair market value, but instead was more concerned with its bottom line.

As such, in the event the proposed Settlement Agreement is approved it should not include the Block 419 Project or if approved, in addition to the other modifications requested by the

⁸ The 2017 Designation was a predetermined outcome directed by the Borough without regard to the procedural or substantive requirements of the LRHL. This was done in an attempt to assist JMF/ERUR in acquiring properties under the threat of eminent domain. Indeed, the December 2016 study report upon which the 2017 Designation is based was prepared by the Borough’s planner who nearly one year earlier had prepared the RFP seeking developers for Block 419. (De Angelis Cert., ¶9 & 16, Exhibits G & M)



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The Honorable Menelaos W. Toskos, J.S.C.
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Owners, the agreement should not make any finding that JMF/ERUR acted in good faith.

CONCLUSION

Based on the foregoing, the Owners respectfully request that the Block 419 Project be removed from consideration in the proposed Settlement Agreement or, in the alternative, that the Court adopt the modifications as suggested *supra*.

Respectfully,

McKIRDY, RISKIN, OLSON
& DELLA PELLE, P.C.

RICHARD P. DE ANGELIS

EXHIBIT B

—LAW OFFICES—
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January 11, 2018

VIA FACSIMILE AND REGULAR MAIL

Hon. Menelaos W. Toskos, J.S.C.
Bergen County Courthouse
10 Main St., 4th Floor
Hackensack, NJ 07601

Re: **In the Matter of the Application of the Borough of Emerson for a
Declaratory Judgment
Docket No.: BER-L- 6300-15**

Dear Judge Toskos:

As Your Honor may recall, this office represents the Petitioner Borough of Emerson (the "Borough") in the above referenced and pending Declaratory Judgment matter scheduled for a fairness hearing before the Court on January 24, 2018.

I write to Your Honor regarding the recently filed objection by Richard P. De Angelis, Esq., dated January 11, 2018, on behalf of two property owners, 214 Kinderkamack, LLC and Dolores Della Volpe (hereinafter, collectively the "Intervener"). The Intervener owns the following Properties:

Block 419	Lot 2
Block 419	Lot 3
Block 419	Lot 4
Block 419	Lot 6.01 (hereinafter, the "Properties")

These Properties are necessary to complete a Redevelopment Project which is critical to construct 22 constitutionally mandated low and moderate family units in downtown Emerson and to satisfy the Borough's obligations under the proposed Settlement Agreement with the Fair Share Housing Corporation ("FSHC"). This Redevelopment Project is the subject of a formal Redeveloper's Agreement with Emerson Redevelopment Urban Renewal ("ERUR").

Because the Intervener challenges the Borough's authority to acquire the properties under both the Local Redevelopment and Housing Law N.J.S.A. 40A:12A-1 et seq. ("LRHL") and the Fair Housing Act N.J.S.A. 52:27D-301 et seq. ("FHA"), the Borough's ability to comply with its obligations under the proposed Settlement Agreement, the Redevelopment Agreement with



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ERUR and its constitutional duty to provide the agreed upon 22 low and moderate family units may be at risk.

Therefore, respectfully, unless the issues raised by the Intervener are resolved by the Court (subject of course to the exhaustion of all of the Intervener's appeal rights), the Borough would not be in a position to proceed with the proposed Settlement Agreement and fairness hearing.

For the foregoing reasons, the Borough feels compelled to file a motion seeking the following relief and Order from the Court:

1. Deeming Mr. De Angelis's clients an "Intervener" and providing the Intervener all of the rights of an intervener, including the right, to call witnesses and experts, cross examine witnesses and introduce expert reports;
2. Determining that the Intervener is bound by the Court's determination as to the substantive authority of the Borough to acquire the properties under the LRHL and/or the FHA and subject only to
 - a. the Intervener's right to exhaust its appeal rights from this Court's determination; and
 - b. the Intervener's right to challenge future municipal action concerning the acquisition of the Properties on non-substantive, procedural grounds;
3. Setting a briefing schedule for the Borough and FSHC to file opposition to the Intervener's objection together with a date for the Intervener's to file a reply to such opposition;
4. Setting a hearing and making a determination on the Intervener's objection prior the conduct of a Fairness Hearing.

However, in lieu of a formal motion, perhaps the Court can convene a conference call with the all of the parties and the Intervener to secure an agreement that can be memorialized in the form of a Consent Order.

In order to protect the Borough's rights, if the Court is not inclined to engage in such a conference call in the next day or so, we will file our motion and ask that it be returnable, January 24, 2018, the previously scheduled (and noticed) date for the Fairness Hearing.

We thank the Court for its attention to this matter and await Your Honor's instruction.

Respectfully submitted,

DeCotiis, FitzPatrick, Cole & Giblin, LLP

By:


Douglas F. Boyle, Esq.

cc: Mary Beth Lonergan, PP, AICP
Joshua Bauers, Esq.
Adam Gordon, Esq.
Brigette Bogart, PP, AICP, CGW
Richard P. De Angelis, Esq.

EXHIBIT C



Peter J. O'Connor, Esq.
Kevin D. Walsh, Esq.
Adam M. Gordon, Esq.
Laura Smith-Denker, Esq.
David Rammier, Esq.
Joshua D. Bauers, Esq.

January 12, 2018

Hon. Menelaos W. Toskos, J.S.C.
Bergen County Courthouse
10 Main Street, 4th Floor
Hackensack, NJ 07601

**Re: In the Matter of Application of the Borough of
Emerson for a Declaratory Judgment,
Docket No: BER-L-6300-15**

Dear Judge Toskos:

Fair Share Housing Center ("FSHC") submits this response to the letter by the Borough of Emerson ("Borough") filed yesterday as to the procedure to be followed in the fairness hearing in this matter. FSHC respectfully suggests that the Court: (1) limit the scope of 214 Kinderkamack, LLC and Dolores Della Volpe ("Objectors") legal arguments to be addressed in this matter to legal argument #2, on the Borough's authority to take under the FHA, while making it clear that Objectors are not prejudiced from pursuing their currently pending litigation or any claims they may have on the issue of good faith; (2) set a response date by the Borough and FSHC to Objectors' brief, perhaps January 29, 2018, with a reply shortly thereafter if the Court is so inclined, though a further reply is not necessarily common practice in fairness hearings; (3) hold a combined hearing on these objections and overall fairness in early-mid February 2018.

Preliminarily, FSHC wishes to note that in its opinion only one of the four legal issues raised by Objectors is germane to the fairness hearing being held in this matter, while the other challenges are more appropriately reserved for other proceedings. Challenges to redevelopment plans and zoning ordinances adopted by the Borough and challenges in this proceeding to determination of a municipality's substantive certification or equivalent are separate challenges. In Alexander's Dept. Stores of New Jersey, Inc. v. Borough of Paramus, 243 N.J.Super. 157 (App.Div. 1990) aff'd, 125 N.J. 100 (1990), the court found that COAH's powers and duties surrounding the determination of substantive certification did not extend to legal determinations on the validity of a proposed ordinance or developer's agreement and that a challenger could raise these issues in a prerogative writ matter after the determination of substantive certification. Id. at 167. The Appellate Division, in reaffirming Alexander's, found in Saratoga v. West Paterson, 346 N.J.Super. 569 (App.Div. 2002) that substantive certification does not preclude a challenge to

the validity of zoning ordinances. If the COAH process, and now this court's process, were not final until any possible challenges to all implementing ordinances and related actions were adjudicated, it would be impossible to reach a final decision. In many cases the implementation of plans in practice stretch out for years after the grant of a judicial equivalent of substantive certification, which is not surprising given that this process results in a final judgment that lasts through 2025.

Under Mount Laurel IV, the court's role in the declaratory judgment matters, like COAH, is to determine whether a municipality should be granted substantive certification or the legal equivalent. The court is being asked to determine if the Borough has planned and provided for a realistic opportunity for its fair share of the region's need of affordable housing. It is not being asked to determine whether the Borough has followed or will follow the correct procedures in implementation of the ordinances and plans that implement the Housing Element and Fair Share Plan reviewed by the court.

Most of the Objectors' legal arguments go to whether the Borough has carried out its redevelopment process correctly based on the specific facts as to its site. These implementation issues are not properly brought in this proceeding, as detailed below:

- Objectors' Legal Argument #1 has to do with a pending challenge in a separate case by Objectors to the Borough's prior actions. It is FSHC's opinion that the issues raised in that case neither should be adjudicated in this case prior to the fairness hearing, nor should this court's decision on the fairness hearing preclude the other case from proceeding. That said, FSHC certainly hopes that case will proceed expeditiously so as not to provide an obstacle to the Borough implementing its plan.
- Objectors' Legal Argument #3 is a proposition that is both not a part of this case and to our knowledge has not been advanced by either FSHC or the Borough. The header for Legal Argument #3 states "A court approved settlement agreement may not confer upon the Borough any authority to acquire property under eminent domain not provided under State statute." Objectors' Brief at 12. The Settlement Agreement makes no such claim and as such this issue is a red herring.
- Objectors' Legal Argument #4 asks that "the agreement should not make any finding that JMF/ERUR acted in good faith." Objectors' Brief at 15. While the agreement does in passing use the words "good faith," this Court should not make any finding on the issue of good faith - not because FSHC concedes in any way that the Borough has not acted in good faith, but rather because such a finding one way or another is not properly part of a fairness hearing. To the degree that Objectors wish to raise any

claims that the Borough did not negotiate in good faith pursuant to condemnation law, FSHC, again without agreeing with Objectors that there may be any merit to such claims, takes the position that the right to pursue such claims would not be foreclosed by any action within the fairness hearing process.

The sole issue raised by Objectors that FSHC agrees may be a germane issue to the fairness hearing is the Borough's authority pursuant to the Fair Housing Act to pursue condemnation, i.e. Legal Argument #3 in Objectors' brief. FSHC believes Objectors' view of the law on this point is patently wrong. But if Objectors somehow were correct, then it may impinge on the settlement's ability to provide a realistic opportunity for the Borough's fair share of low- and moderate-income housing in a way that should be addressed now. As Emerson's brief filed yesterday notes, "Because the Intervenor challenges the Borough's authority to acquire the properties. . . the Borough's ability to comply with its obligations under the proposed Settlement Agreement, the Redevelopment Agreement with ERUR and its constitutional duty to provide the agreed upon 22 low and moderate income family units may be at risk." Borough January 11, 2018 Letter at 1-2. If, as Objectors assert, as a matter of law the FHA does not permit the condemnation action sought by the Borough under any circumstances, then the implementation of the agreement indeed may be at risk. Furthermore, because this issue concerns the FHA itself, as opposed to other land use laws, it would have been within the provenance of COAH as the agency implementing the FHA, and thus this Court as a judicial entity tasked by the Supreme Court with providing the judicial equivalent of substantive certification, to address this issue.

FSHC thus agrees that this issue, and only this issue of the issues raised by Objectors, should be resolved by the Court prior to making a fairness determination on the settlement agreement. FSHC offers the following comments on the procedure proposed by the Borough:

1. FSHC does not object to Objectors intervening for the limited purpose of participation in the fairness hearing; however, FSHC also notes that at this stage of the proceeding that even non-Intervenors are bound by the outcome of the fairness hearing (which is the purpose of the notice process). FSHC does not dispute that, whether as an Intervenor or simply as an objector, Objectors have the right at a fairness hearing to cross-examine experts and call witnesses. FSHC also notes that Objectors obviously have already received notice of the hearing, and filed an objection, and that is the proper procedure for a fairness hearing; even if intervention is granted,

that does not create the need for an additional procedure, additional reports, etc.

2. FSHC agrees that a decision by this court on the issue of the Borough's authority to take under the FHA would be binding on Objectors - whether or not they intervene as fairness hearings are, as class action settlement proceedings, binding on everyone. FSHC also agrees that whether Objectors intervene or not, they have a right to appeal under appropriate procedures, and have a right, pursuant to the case law cited above, to separately challenge actions taken by the Borough on procedural grounds not covered by this process.
3. FSHC agrees that a briefing schedule should be set by the Court.
4. FSHC suggests the following procedure for a fairness hearing. The legal issue of authority to take can be argued. The Special Master simultaneously should review the agreement and issue a report opining as to whether it is sufficient as drafted, and also opining as to what the impact on the agreement and plan would be if Objectors' comments are sustained, recognizing that legal determinations ultimately are to be made by the Judge. The Court should have one hearing at which legal arguments can be made and the normal fairness hearing process occurs, and then the Court can rule on all issues. Obviously, if Objectors prevail on their legal argument, there would need to be further proceedings thereafter. FSHC is concerned about this matter being overly delayed which would impact the production of low- and moderate-income housing, and thus, while allowing Objectors to make their arguments, does not want to create a drawn out process for addressing an issue which, again, in FSHC's opinion is simply an incorrect reading of the applicable law.

In sum, FSHC again respectfully requests that the Court: (1) limit the scope of Objectors' legal arguments to the authority to take under the FHA while not prejudicing Objectors from pursuing other challenges; (2) set a briefing schedule on issues raised by Objections; (3) hold a combined hearing on these objections and overall fairness in early-mid February 2018.

Thank you for your attention to this matter.

Respectfully,



Adam M. Gordon
Counsel for Fair Share Housing Center

C (via e-mail):

Mary Beth Lonergan, AICP, PP
Wendy Rubenstein, Esq.
Doug Doyle, Esq.
Richard P. DeAngelis, Esq.

EXHIBIT D



McKIRDY
RISKIN
OLSON
DELLAPELLE
ATTORNEYS AT LAW

January 12, 2018

Via Facsimile

The Honorable Menelaos W. Toskos, J.S.C.
Superior Court of New Jersey – Bergen County
10 Main Street
Hackensack, New Jersey 07601

**RE: I/M/O the Application of the Borough of Emerson
Docket No. BER-L-6300-15
Fairness Hearing**

Dear Judge Toskos:

We write in behalf of 214 Kinderkamack, LLC and Dolores Della Volpe, Trustee (referred to collectively as the “Owners”) who earlier this week filed objections and comments with the Court as interested parties in the above matter. Please accept this in response to the request by the Petitioner, Borough of Emerson (the “Borough”), that the Court convene a case management call to discuss joining the Owners in this action in lieu of the Borough filing a motion “[d]eeming [the Owners] an ‘Intervenor.’” The Owners do not consent to the Borough’s request. Should the Borough wish to file a motion, the Owners do not consent to same being filed on short notice.

That the Borough decided to rely on the proposed Block 419 Project in the proposed Settlement Agreement is not sufficient grounds to compel the Owners to participate in this matter as a party. The Borough included the Block 419 Project notwithstanding the pending litigation in which the Owners have challenged the designation of Block 419 as a Condemnation Redevelopment Area. Thus, the question of the Borough’s claimed authority to acquire the subject properties under the Local Redevelopment and Housing Law, *N.J.S.A. 40A:12A-1 et seq.* (“LRHL”) is already before the Court in the matter before Judge Padovano and need not be addressed in this proceeding. The Borough’s effort to force the Owners to participate as parties in this proceeding is consistent with the series of delay tactics it has employed to thwart the prosecution of the challenge to the redevelopment designation in hopes of avoiding a decision on the merits in those matters. Indeed, the Borough’s most recent request is no different than that requested of Your Honor on June 7, 2017, as addressed in the Borough’s letter to Judge Friscia dated June 21, 2017.¹ As we understand Your Honor rejected the Borough’s request then and the Owners respectfully request that it be denied now.

The Owners are not indispensable parties to the Borough’s affordable housing matter. The Borough may not make them such by including their properties in the Block 419 Project, especially while the redevelopment litigation is pending. The Borough is under no obligation to resolve its affordable housing obligations through the inclusion of the proposed Block 419 Project. Contrary

¹ A true copy of this letter is annexed as Exhibit L to my January 8, 2018 Certification submitted in behalf of the Owners but I have attached a copy here for Your Honor’s convenience.



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The Honorable Menelaos W. Toskos, J.S.C.
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to the Borough's assertions, the Block 419 Project is not "constitutionally mandated" and there is no "constitutional duty" for the affordable housing set-aside included in that proposal. The Block 419 Project is a 95% for-profit venture that the Borough is trying to hide behind its fair share obligations in hopes of being able to take the Owners' properties by eminent domain. By its most recent request, the Borough seeks also to drive up the litigation costs for the Owners in hopes of forcing them to succumb to the Borough's demands that they sell their properties to the for-profit developer. This is not only unfair to our clients, but to Borough taxpayers.

To the extent the Owners have an interest in this proceeding, they have provided their objections for the Court's consideration. There are no facts in dispute that require the Owners' participation as a party. And while there is a legal issue regarding the Borough's right to take under the Fair Housing Act, *N.J.S.A. 52:27D-301 et seq.* ("FHA") the Owners have not requested a final determination on that issue. Rather they have requested only that the Block 419 Project be removed from consideration of the proposed Settlement Agreement or, in the alternative, that the language regarding the use of eminent domain as it pertains to this proposed project be removed.

The Owners should not be forced to defend in this proceeding a threatened condemnation action which would deprive them of the rights afforded under the Eminent Domain Act, *N.J.S.A. 20:3-1, et seq.* While the FHA grants the power of eminent domain it does not limit or alter the rights of property owners facing a condemnation action. As to the use of eminent domain, the terms and objectives of the FHA must be harmonized with those of the Eminent Domain Act and our Court Rules. *See Harrison Redevelopment Agency v. DeRose*, 398 N.J.Super. 361, 368 (App.Div.2008) (Holding that a harmonized reading of the LRHL, Eminent Domain Act and Court Rules ensures that the redevelopment laws pass muster under the Due Process Clause of the Federal Constitution and separation of powers principles under the State Constitution). This harmonized reading is intended also to relieve property owners of the burdens of engaging in premature litigation, so that owners are not forced to go to court unless they are facing a real and imminent threat of losing their property by eminent domain. *See id.* at 369.

We received this morning a letter from Fair Share Housing Center ("FSHC") and appreciate its comments that consideration of the challenge to the redevelopment destination is not appropriate in this proceeding. However, we respectfully disagree that this Court should resolve the issue of the right to take under the FHA. We would like to address also FSHC's assertion that the Owners' are "patently wrong" in their claim that the Borough does not have the authority to condemn their property. While the Owners appreciate FSHC's advocacy for its clients we note that neither the Borough nor FSHC has presented the Court with a citation to a single case that suggests the FHA may be used to condemn property for an inclusionary project that is 95% for-profit. This is not surprising as we are unaware of any such cases.

Nor are we aware of any cases that even suggest such an expansion of municipal authority under the FHA to permit the acquisition of property by eminent domain to turn over to a for-profit developer for an inclusionary development. On the contrary, our courts have rejected the use of



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inclusionary developments for purposes of expanding rights under the guise of providing affordable housing. The Appellate Division has held that the inclusion of affordable housing as a relatively small component of a much larger residential development does not transform an entire project into an “inherently beneficial use” for purposes of obtaining a use variance. *Advance at Branchburg II, LLC v. Branchburg Tp. Bd. Of Adjustment*, 433 N.J.Super. 247 (App.Div. 2013) (There the applicant proposed a 292 unit project with a 59 unit (20%) affordable housing set-aside); *see also AB JC Invs., LLC v. Borough of Franklin Lakes Zoning Bd. of Adjustment*, 2016 N.J. Super. Unpub. LEXIS 1780² (Rejecting plaintiff’s claim for an inherently beneficial use determination in support of a request for a use variance for a project with a 20% set-aside where the municipality had an unmet need under the FHA).

If a 20% set-aside is not sufficient to support a finding of an inherently beneficial use to support the grant of a use variance even in a municipality with an unmet need, it certainly may not be used to expand the grant of authority under the FHA to permit a municipality to acquire property by eminent domain. Regardless, this question is not ripe for adjudication as there is no condemnation action pending. Should the Borough decide to file such an action then the Court may address this issue in a challenge to the right to take as provided under the Eminent Domain Act and Court Rules.

Based on the foregoing, the Owners respectfully request that they not be compelled to participate in this proceeding as anything more than interested parties.

Respectfully,

McKIRDY, RISKIN, OLSON
& DELLA PELLE, P.C.

RICHARD P. DE ANGELIS

C: Douglas Doyle, Esq.
Wendy Rubenstein, Esq.
Adam Gordon, Esq.
Anthony F. Della Pelle, Esq.
Mary Beth Lonergan, AICP, FP
214 Kinderkamack, LLC
Dolores Della Volpe, Trustee
(All via Email w/ Enc.)

² Pursuant to R 1:36-1, a copy is annexed hereto. Counsel is unaware of any contrary unreported decisions.

DECOTIIS

DeCotiis, FitzPatrick, Cole & Giblin, LLP

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RECEIVED
JULY 10 2017
SUPERIOR COURT OF NEW JERSEY
CLERK OF COURT
201707101001

June 21, 2017

VIA FACSIMILE & REGULAR MAIL

Honorable Lisa Percz Friscia, J.S.C.
Superior Court of New Jersey
Bergen County Justice Center
10 Main Street
Hackensack, NJ 07601-7699

Re: **214 Kinderkamack, LLC v. Borough of Emerson, et al**
Docket No. L-1660-17

Dolores Della Volpe, Trustee v. Borough of Emerson, et al
Docket No. L-1855-17

Dear Judge Friscia:

As Your Honor may recall, the undersigned is Redevelopment Counsel to the Borough of Emerson.

Kindly accept this letter in response to Plaintiffs' June 16 letter to Your Honor and in furtherance of settlement discussions which took place on June 7¹.

On that date the Court endeavored to engage in settlement negotiations with counsel. Mr. DeAngelis represents two different parties who we referred to as the Restaurant Property and the Liquor Store Property.

During those preliminary negotiations, my client offered to:

1. Completely remove the Restaurant Property from the redevelopment area and adopt the necessary municipal resolutions to confirm that the property was not "blighted";
2. Have the designated redeveloper pay the owner of the Restaurant Property \$500,000 for two vacant unimproved lots that have been unlawfully used for parking to service the restaurant;

¹ In attendance with me was Wendy Rubinstein who is the Borough Attorney for this client.

3. Grant the Restaurant Property owner a perpetual license for new parking spaces within the same distance from the Restaurant Property as the spaces which that client is improperly using adjacent to the Restaurant Property for the same number of spaces the vacant lots provide;
4. Provide the necessary temporary parking during construction to reduce if not completely eliminate any "interruption" in the Restaurant Property owner's Tenant's restaurant business.

In exchange for the foregoing the Borough was seeking only the following:

- A. A transfer of the two vacant lots to the redeveloper;
- B. Dismissal of the Challenge to the redesignation of the balance of the redevelopment area².

Mr. DeAngelis indicated that his "clients were not interested in settling." However, contrary to Plaintiffs' overheated contention and as we explained, this recent redesignation under N.J.S.A. 40A:12A-1 et seq. is not "pretextual." Indeed, such a claim or argument flies in the face of 16 years of irrefutable history:

1. Emerson has been a Court municipality since 2001;
2. Emerson's first designation of the downtown as meeting the criteria for an area in need of redevelopment was in 2004;
3. 4 years later the Emerson Planning Board, yet again, determined that the downtown (including block 419) met the applicable statutory criteria but the Mayor and Council did not move to adopt the Planning Board's findings. Nevertheless the Planning Board hearings were conducted with the benefit of all property owners receiving the Harris-DeRose (that Mr. DeAngelis correctly pointed out were the result of his firm's legal work).
4. Emerson is currently engaged in a declaratory judgment action docket number BER-L-6300-15 ("DJ Action") with the Fair Share Housing Corporation over the Borough's constitutionally mandated duty to provide affordable housing;

Moreover, and as discussed during the settlement conference, we respectfully explained to Mr. DeAngelis (and Your Honor) that if the redevelopment designation was successfully challenged, the Borough would have no choice but to pursue eminent domain under the Fair Housing Act ("FHA"), N.J.S.A. 52:27D-325, in order that the Borough can settle the DJ Action and thereafter comply with its constitutionally mandated obligation to provide affordable housing. Indeed, we discussed the Appellate Division case, Craner Hill Residents Ass'n, Inc. v. Primas, 395 N.J. Super. 1 (2007), and suggested to the Court that it would make more appropriate use of judicial resources to request that the Honorable Maneolas Toskos consider taking this matter and staying the discovery as we believed proceeding under the FHA would potentially "moot" the claims herein.

² Your Honor immediately discerned the apparent conflict in Mr. DeAngelis' firm representing two property owners with potentially conflicting interests. In this author's humble opinion, that potential conflict immediately materialized when this offer was made to the Restaurant Property owner, and may become (if it has not already become) grounds for the disqualification of Mr. DeAngelis and his firm from representing either client.

At the conclusion of the conference, we met with Judge Toskos to discuss our request that His Honor consider consolidating these matters and staying discovery. Judge Toskos advised that he would not likely grant such an application.

We then advised Your Honor later that day that Judge Toskos would not agree to "consolidate" these matters for case management or discovery purposes. We also understand that Your Honor will not stay discovery in this matter pending the determination in the DJ Action.

Since that date we met with the Borough and have obtained the authority to proceed. Since that meeting I have received several emails from Mr. DeAngelis -- one inquiring as to my "next move?"; the other demanding a potentially privileged and completely irrelevant document; and the third addressed to the Borough Clerk seeking yet more discovery under the Open Public Records Act.

The Borough does not view its endeavor to redevelop the downtown and simultaneously provide 29 units of affordable housing as some sort of "chess game." Further, the plaintiffs have now made the following separate requests under OPRA:

December 16, 2016
January 16, 2017
January 18, 2017 (two requests)
January 27, 2017
February 14, 2017
February 15, 2017
March 1, 2017
March 22, 2017
June 19, 2017

This has required the Borough (and at times this office) to expend substantial resources to provide documents which are wholly irrelevant to the challenge to the most recent redevelopment designation and the subject matter of the within complaint.

Nevertheless, it now appears that the Borough is left with no choice but to (potentially) proceed on two litigation fronts at the unfortunate and substantial expense to the Emerson tax payers. However, in order to mitigate unnecessary expense to the tax payers, we believe we must send Rule 1:4-3 notices to plaintiffs on certain aspects of plaintiffs' demand for discovery and particularly plaintiffs' highly unusual demand for depositions of elected officials and redeveloper's representatives. Moreover, if Emerson is forced to file motions to prevent such depositions, we will seek reasonable attorneys' fees and costs for any motions which are successful or successful in part.

Your Honor made it clear to counsel that you have only permitted one deposition of an elected official and that testimony was substantially limited. In anticipation of plaintiffs' strenuous objection to the award of fees in the event the Court quashes subpoena's and/or notices of deposition pursuant to Emerson's motions, the Borough would like to be on record stating that this case -- unlike other litigation battles between warring companies -- is not at the expense

of entrepreneurs' profits or shareholders' distributions, but rather is at the direct expense of Emerson taxpayers – who frankly should not have to shoulder the expense of such frivolous and over reaching discovery demands in what should be a simple prerogative writ matter.

In conclusion, Emerson is ready to proceed with the discovery in this matter if the Court remains disinclined to stay discovery pending the outcome of the DJ Action. However, perhaps, one last settlement conference with "clients present" may be appropriate at this juncture and before the parties engage in costly litigation expense. While I am quite confident that Mr. DeAngelis has clearly explained the costs (and risks) of litigation to his clients, sometimes hearing it from a Judge may have a different impact.

We can meet with Your Honor at the Court's convenience, and as the Court may direct for case management or further settlement discussions.

Respectfully yours,
DeCotiis, Fitzpatrick, Cole & Giblin, LLP

By:


Douglas F. Doyle Esq.

cc: Richard P. DeAngelis, Jr., Esq. (via email & regular mail)
Christopher E. Martin, Esq. (via email & regular mail)

AB JC Invs., LLC v. Borough of Franklin Lakes Zoning Bd. of Adjustment

Superior Court of New Jersey, Appellate Division

April 5, 2016, Argued; July 29, 2016, Decided

DOCKET NO. A-2022-14T2

Reporter

2016 N.J. Super. Unpub. LEXIS 1780 *

AB JC INVESTMENTS, LLC,¹ Plaintiff-
Appellant, v. BOROUGH OF FRANKLIN
LAKES ZONING BOARD OF ADJUSTMENT,
Defendant-Respondent.

Whipple.

Opinion

Notice: NOT FOR PUBLICATION WITHOUT
THE APPROVAL OF THE APPELLATE
DIVISION.

PLEASE CONSULT NEW JERSEY RULE
1:36-3 FOR CITATION OF UNPUBLISHED
OPINIONS.

Prior History: [*1] On appeal from the
Superior Court of New Jersey, Law Division,
Bergen County, Docket No. L-9745-13.

Core Terms

zoning, variance, inherently, use variance,
affordable housing, municipal, housing,
proposed use, beneficial use, beneficial,
residential, site, proposed site, single-family,
general welfare, suitable

Counsel: Robert A. Kasuba argued the cause
for appellant (Bisgaier Hoff, LLC, attorneys;
Mr. Kasuba and Yolanda N. Melville, on the
briefs).

Robert F. Davies argued the cause for
respondent.

Judges: Before Judges Hoffman, Leone and

¹ Plaintiff's counsel has indicated that Plaintiff's name has
been changed to 724 Franklin Avenue, LLC.

PER CURIAM

Plaintiff AB JC Investments, LLC, appeals the
November 19, 2014 order dismissing with
prejudice its action in lieu of prerogative writs
against defendant, the Zoning Board of
Adjustment (Board) of the Borough of Franklin
Lakes (Borough). We affirm.

I.

Plaintiff entered into a contract to purchase a
3.21-acre parcel of land located in the Borough
in a district zoned for single-family homes.
Multi-family housing is neither a permitted nor
conditional use in the district. The property
currently is occupied by a single-family home,
garage, and shed.

In April 2013, plaintiff applied for approval of a
proposed site plan for a twenty-four unit, two-
building residential development, with forty-six
parking spaces. The site plan proposed that
five of the twenty-four units be deed restricted
for occupancy by low- to moderate-income
households.

To carry out its proposal, plaintiff [*2] applied
for a use variance to build the multi-family
structures in the single-family residential zone,
N.J.S.A. 40:55D-70(1)(c), and a bulk variance
because the total proposed land coverage
exceeded the permissible 20%, N.J.S.A.

40:55D-70(c).² Plaintiff bifurcated its use variance and site plan applications, as permitted under N.J.S.A. 40:55D-70(b), requesting that the Board consider the site plan if the use variance was granted.

The Board conducted three hearings on the use variance application. On November 7, 2013, the Board denied the application.

Plaintiff filed a complaint in lieu of prerogative writs in the Law Division, challenging the Board's denial of its application. Plaintiff primarily argued that, because 20% of the proposed units would be set aside as affordable housing, the proposed use is inherently beneficial, and thus the Board should have granted the use variance.

In his October 23, 2014 written opinion, Judge William C. Meehan found: "The real issue in this matter is whether a 20% unit set aside for low and moderate income is of such an inherent beneficial use that that alone is grounds for a variance being approved by the Planning Board." Judge Meehan held that: [*3] (1) plaintiff was not entitled to a use variance simply because it planned to set aside 20% of the proposed units for low or moderate income housing; (2) under Advance at Branchburg II, LLC v. Branchburg Twp. Bd. of Adjustment, 433 N.J. Super. 247, 78 A.3d 589 (App. Div. 2013) [hereinafter "Branchburg"], a development setting aside 20% of its units for affordable housing is not "inherently beneficial"; and (3) use variance determinations are not the appropriate mechanism for enforcing a municipality's compliance under the Fair Housing Act (FHA), N.J.S.A. 52:27D-301 to -309.19. Plaintiff appeals.

II.

"Our standard of review for the grant or denial of a variance is the same as that applied by the Law Division." Branchburg, supra, 433 N.J. Super. at 252 (citing Bressman v. Gash, 131 N.J. 517, 529, 621 A.2d 476 (1993)). "We defer to a municipal board's factual findings as long as they have an adequate basis in the record." Ibid. "[W]hen a party challenges a zoning board's decision through an action in lieu of prerogative writs, the zoning board's decision is entitled to deference." Kano Props., LLC v. City of Hoboken, 214 N.J. 199, 220, 83 A.3d 1274 (2013). Indeed, "zoning boards, 'because of their peculiar knowledge of local conditions[,] must be allowed wide latitude in the exercise of delegated discretion.'" Price v. Hineff, LLC, 214 N.J. 263, 284, 69 A.3d 575 (2013) (citation omitted). However, a zoning board's "legal determinations are not entitled to a presumption of validity and are subject to de novo review." Jacoby v. Zoning Bd. of Adjustment, 442 N.J. Super. 450, 462, 124 A.3d 691 (App. Div. 2015) (citation omitted).

"[C]ourts ordinarily should [*4] not disturb the discretionary decisions of local boards that are supported by substantial evidence in the record and reflect a correct application of the relevant principles of land use law." Lang v. Zoning Bd. of Adjustment, 160 N.J. 41, 58-59, 733 A.2d 404 (1999). "[T]he burden is on the challenging party to show that the zoning board's decision was 'arbitrary, capricious, or unreasonable.'" Price, supra, 214 N.J. at 284 (quoting Kramer v. Bd. of Adjustment, 45 N.J. 268, 296, 212 A.2d 153). Additionally, "[c]ourts give greater deference to variance denials than to grants of variances, since variances tend to impair sound zoning." Med. Ctr. at Princeton v. Twp. of Princeton Zoning Bd. of Adjustment, 343 N.J. Super. 177, 199, 778 A.2d 482 (App. Div. 2001). We must hew to our standard of review.

A.

²This bulk variance request was subsumed within the use variance request.

Plaintiff argues that the Board's decision should be reversed because the site plan satisfied the positive criteria required for obtaining a land use variance under N.J.S.A. 40:55D-70(d)(1).

"[M]unicipalities are authorized to impose conditions on the use of property through zoning by a 'delegation of the police power' that must 'be exercised in strict conformity with the delegating enactment'" of the Municipal Land Use Law (MLUL), N.J.S.A. 40:55D-1 to -163. Price, supra, 214 N.J. at 284 (citation omitted). "Because of the legislative preference for municipal land use planning by ordinance rather than variance, use variances may be granted only in exceptional circumstances." Kinderkamack Rd. Assocs. LLC v. Mayor & Council of the Borough of Oradell, 421 N.J. Super. 8, 12, 22 A.2d 129 (App. Div. 2011). "Therefore, a municipal board of adjustment may permit 'a use or principal structure in a district [*5] restricted against such use or principal structure' only where the applicant can demonstrate 'special reasons' for the variance." Ibid. (quoting N.J.S.A. 40:55D-70(d)(1)). "This requirement is known as the 'positive criteria.'" Ibid. (quoting New Brunswick Cellular Tel. Co. v. Borough of S. Plainfield Bd. of Adj., 150 N.J. 1, 6, 137 A.2d 442 (1999)).

Our case law recognizes three categories of circumstances in which the "special reasons" required for a use variance may be found: (1) where the proposed use inherently serves the public good, such as a school, hospital or public housing facility; (2) where the property owner would suffer "undue hardship" if compelled to use the property in conformity with the permitted uses in the zone; and (3) where the use would serve the general welfare because "the proposed site is particularly suitable for the proposed use."

[Saddle Brook Realty, LLC v. Twp. of

Saddle Brook Zoning Bd. of Adjustment, 388 N.J. Super. 67, 76, 906 A.2d 454 (App. Div. 2006) (citations omitted).]

First, plaintiff argues that the proposed use is inherently beneficial, because 20% of the proposed units would be set aside for affordable housing. "The Legislature has defined an 'inherently beneficial use' as one 'which is universally considered of value to the community because it fundamentally serves the public good and promotes the general welfare. Such a use includes, but is not limited to, a hospital, school, child care center, [*6] group home, or a wind, solar or photovoltaic energy facility or structure.'" Branchburg, supra, 433 N.J. Super. at 254 (quoting N.J.S.A. 40:55D-4). As the Board here recognized, a project comprised solely of "[a]ffordable housing is an inherently beneficial use." Homes of Hope, Inc. v. Eastampton Twp. Land Use Planning Bd., 409 N.J. Super. 330, 336, 976 A.2d 1128 (App. Div. 2009) (citing Sica v. Bd. of Adjustment, 127 N.J. 152, 165, 603 A.2d 30 (1992) (citing De Simone v. Greater Englewood Housing Corp., 56 N.J. 428, 442, 267 A.2d 31 (1970))).

However, here "the predominant use is not the inherently beneficial one." Branchburg, supra, 433 N.J. Super. at 257. In Branchburg, as here, the developer of a proposed multi-unit residential development argued that making approximately 20% of the units "affordable" rendered the entire development an inherently beneficial use. Id. at 251. We held that "although a project including only affordable housing units may be inherently beneficial, the addition of affordable units to a proposed development in which most of the proposed units are market-rate housing does not make the entire project inherently beneficial." Id. at 256. We recognized, as plaintiff argues here, that "[a] developer's ability to build market-rate units undoubtedly facilitates its building of affordable housing financially, and the mixture

of affordable and market-rate housing may well provide benefits to the residents of both." *Id.* at 253. However, we saw "no basis under our current statutory or decisional law to hold that the inclusion of affordable housing as a relatively [*7] small component of a much larger residential development transforms the entire project into an inherently beneficial use for purposes of obtaining a (d)(1) variance[.]" *Ibid.*

Plaintiff tries to distinguish *Branchburg*, claiming the Borough has an unmet affordable-housing obligation under the FHA. However, the FHA has its own compliance mechanisms, through the regulations promulgated by the Council on Affordable Housing (COAH), and currently in suits by developers seeking a "builder's remedy." See *In re N.J.A.C. 5:96 & 5:97*, 221 N.J. 1, 7, 26-27, 29, 33-34, 110 A.3d 31 (2015).³ In *Branchburg, supra*, the trial court "concluded that granting the (d)(1) variance requested by Advance would amount to awarding a builder's remedy through the variance process rather than through the mechanism established by the Fair Housing Act." 433 N.J. Super. at 252. We agreed that "the merits of this case do not turn on the status of the Township's compliance with the Fair Housing Act." *Id.* at 251 n. 1.

Thus, we reject plaintiff's attempt to distinguish *Branchburg*. What constitutes an inherently beneficial use is decided based on the criteria of the MLUL, not based on a municipality's compliance or lack thereof with the FHA. In *Homes of Hope, supra*, we rejected the zoning board's contention "that after a municipality attains its fair share of affordable housing

pursuant to the FHA and its concomitant regulations, affordable housing in that municipality is no longer entitled to inherently beneficial use status," under the MLUL. 409 N.J. Super. at 336. We noted that "[a] municipal land use board serves a different function in considering an application for a use variance" than do the FHA's compliance mechanisms. *Id.* at 339. "A municipality's compliance with COAH regulations does not change the necessary site-specific analysis necessary for a [use] variance." *Ibid.*

As in *Branchburg*, "[n]othing in our decision would prevent the [Borough] from deciding to change the zoning in the future to comply with its Fair Housing Act obligations or prevent [plaintiff] from seeking to build on its land in the event it is ultimately found to be entitled to a builder's remedy." *Branchburg, supra*, 433 N.J. Super. at 251 n.1.⁴ Like *Branchburg*, we rule only that a project, 80% of which is not an [*9] inherently beneficial use, is not an inherently beneficial use under the MLUL.⁵

Second, plaintiff argues that even if its proposed use is not inherently beneficial, the proposed site is particularly well-suited for the proposed use. *Saddle River Realty LLC, supra*, 388 N.J. Super. at 76. In *Price, supra*, our Supreme Court "explain[ed] the meaning and intent of the particularly suitable standard in an effort to provide clarity to this important area of zoning law." 214 N.J. at 287. "[P]articularly suitable means that 'the general welfare is served because the use is peculiarly fitted to the particular location for which the variance is sought.'" *Ibid.* (citation omitted).

³Under the FHA, a "builder's remedy" is "a court imposed remedy for a litigant . . . in which the court requires a municipality to utilize zoning techniques such as mandatory set-asides or density bonuses which provide for the economic viability of a residential development by including housing which is not for low and moderate [*8] income households." N.J.S.A. 52:27D-328.

⁴As the trial court noted, at the time of its ruling, the Borough was insulated from builder's remedies because it "had placed itself under COAH jurisdiction." We note that this is no longer the case, due to the subsequent decision in *In re N.J.A.C. 5:96 & 5:97, supra*.

⁵We reject plaintiff's estoppel claim substantially for the reasons given by Judge Meehan in his October 23, 2014 written opinion.

"[I]n the context of the specific parcel, it means that strict adherence to the established zoning requirements would be less beneficial to the general welfare." *Ibid.* However, "almost all lawful uses of property can be said to promote the general welfare [*10] to some degree, with the result that if general societal benefit alone constituted 'an adequate special reason, a special reason almost always would exist for a use variance.'" *Id.* at 299 (citation omitted). "As a result, any application for a use variance based on the particularly suitable standard has always called for an analysis that is inherently site-specific." *Ibid.*

Here, the site is not particularly suited for the proposed use. Plaintiff notes that the site is a larger-sized lot, located between a nursery and single-family homes, and is situated near the downtown and a sewer line. However, the Board found that approximately 40% of the property is a wetland area; one of the proposed buildings would be partially located in "the wetlands transition zone"; and the proposed site plan "would intrude into the wetland buffer." Moreover, the Board found that the remaining lot had "far too little developable land to make it well suited" for twenty-four housing units with forty-six parking spaces. The Board found the project would have "significant" negative impacts on the surrounding single-family homes, where properties are as close as twenty-six feet.

We cannot say that the Board's denial of the [*11] application on the basis that the site was not particularly suitable to a multi-family development was arbitrary, capricious or unreasonable. Plaintiff again cites the Borough's need for affordable housing, but that is not a characteristic of the proposed site, and general societal benefit is itself insufficient to constitute an adequate special reason. *Ibid.*

Third, Plaintiff does not claim on appeal that it would suffer undue hardship if compelled to

use the property in conformity with the zone's permitted use, namely single-family homes. *Saddle Brook Realty, LLC supra* 388 N.J. Super. at 76. Thus, the Board properly found plaintiff did not satisfy the positive criteria.

B.

The Board also found that plaintiff's proposed site plan did not satisfy the negative criteria. Where, as here, the proposed use is not inherently beneficial, the applicant must "satisfy the 'enhanced quality of proof' set forth by the Court in *Medici*." *Branchburg, supra*, 433 N.J. Super. at 255 (citing *Medici v. DPR Co.*, 107 N.J. 1, 21, 526 A.2d 100 (1987)).

"Under *Medici*, the first inquiry under the negative criteria focuses on the potential effects of the variance on the surrounding properties." *Id.* at 255. "The board of adjustment must evaluate the impact of the proposed use variance upon the adjacent properties and determine whether or not it will cause such damage to [*12] the character of the neighborhood as to constitute 'substantial detriment to the public good.'" *Ibid.* (quoting *Medici, supra*, 107 N.J. at 22 n. 12). "Satisfaction of the second prong of the negative criteria analysis normally requires the applicant also 'demonstrate through "an enhanced quality of proof . . . that the variance sought is not inconsistent with the intent and purpose of the master plan and zoning ordinance.'" *Ibid.* (quoting *Smart SMR v. Borough of Fair Lawn Bd. of Adjustment*, 152 N.J. 309, 323, 704 A.2d 1271 (1998)).

The Board permissibly found the proposed twenty-four housing units and forty-six-space parking lots would generate an unacceptable amount of noise, traffic, and light, impacting the adjacent residential neighborhood. Additionally, the Board found that the proposed use would substantially impair the master plan's goals to maintain stability, existing density, and the residential character

of the community, and to respect the Borough's environmental features. Plaintiff did not demonstrate that the variance it sought was not inconsistent with the Borough's master plan and zoning ordinances. *Ibid.* Thus, the Board properly found that plaintiff failed to satisfy the negative criteria.

C.

Finally, plaintiff asserts that the Board's decision was arbitrary, capricious, and unreasonable, because [*13] it was based on prejudices against persons qualifying for affordable housing. However, plaintiff cites no prejudicial statements by the Board. Instead, plaintiff cites comments by members of the public, taken out of context. One Borough resident noted: "who knows what these people, what kind of pills or whatever they're going to throw down into the septic system." Another resident speculated that the residents of the proposed development might not properly dispose of their trash in the proposed dumpster. Whether these two resident's concerns were warranted or reflected prejudices, the record provides no indication that they were the opinions of the Board. "[T]he law presumes that boards of adjustment . . . will act fairly and with proper motives and for valid reasons." *Stop & Shop Supermarket Co. v. Bd. of Adjustment*, 162 N.J. 418, 441-744 A.2d 1169 (2000) (citation omitted). Thus, we have no reason to believe that the Board's decision was motivated by prejudice, or that it was otherwise arbitrary, capricious, or unreasonable.

Affirmed.

End of Document

EXHIBIT E

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January 16, 2018

VIA FACSIMILE & REGULAR MAIL

Hon. Menelaos W. Toskos, J.S.C.
Bergen County Courthouse
10 Main St., 4th Floor
Hackensack, NJ 07601

Re: **In the Matter of the Application of the Borough of Emerson for a
Declaratory Judgment**
Docket No.: BER-L- 6300-15

Dear Judge Toskos:

We represent the Borough of Emerson in the above referenced pending Declaratory Judgment action.

On January 9, 2018, Richard P. DeAngelis, Esq., from the law firm of McKirdy, Riskin Olson, DellaPelle, filed a “formal brief in support of the Owners’ objection to the inclusion of the Block 419 Project in the proposed Settlement Agreement as it may not be considered a “realistic opportunity” toward the Borough’s affordable housing obligations (hereinafter “De Angelis Brief).

Based on this formally filed objection to the settlement between the Borough and the Fair Share Housing Center (“FSHC”), both the Borough and FSHC requested that the merits of Mr. De Angelis’ arguments be fully addressed and resolved by the Court. Indeed, both the undersigned in my January 11, 2018, letter to Your Honor and Adam Gordon, Esq., of FSHC in his letter dated January 12, 2018, to Your Honor requested that the Court rule on the Borough’s ability to acquire certain properties under the Fair Housing Act (“FHA”).

Specifically, FSHC confirms that:

“As Emerson’s brief filed yesterday notes, “Because the Intervenor challenges the Borough’s authority to acquire the properties. . . the Borough’s ability to comply with its obligations under the proposed Settlement Agreement, the Redevelopment Agreement with ERUR and its constitutional duty to provide the agreed upon 22 low and moderate income family unites may be at risk.” Borough January 11, 2018 Letter at 1-2. If, as Objectors assert, as a matter of law the FHA



does not permit the condemnation action sought by the Borough under any circumstances, then the implementation of the agreement indeed itself, as opposed to other land use laws, it would have been within the provenance of COAH as the agency implementing the FHA, and thus this Court as a judicial entity tasked by the Supreme Court with providing the judicial equivalent of substantive certification, to address this issue.”

Further, FSHC specifically requested the Court to “..... (2) set a briefing schedule on issues raised by Objectors; (3) hold a combined hearing on these objections and overall fairness in early-mid February 2018.”

Mr. De Angelis now in his most recently filed January 12, 2018 letter seeks to avoid being “joined” in the matter in order to resolve these critical issues to the Court’s determination as to whether the proposed settlement is fair and reasonable and whether the proposed “Settlement Agreement creates a ‘realistic opportunity’ toward achieving the Borough’s affordable housing obligations.” (De Angelis brief, p. 1.)

Remarkably, after hurling the proverbial “grenade” into the scheduled proceedings, and immediately trying to retreat from participating in and being bound by the Court’s determination concerning the Borough’s right to acquire properties in Block 419 under the FHA, Mr. De Angelis nevertheless continues to advance additional legal arguments in support of his client’s position that they are not “aware of any cases that ever suggested such an expansion of municipal authority under the FHA to permit the acquisition of property by eminent domain to turn over to a for-profit developer for an inclusionary development.” (De Angelis January 12, 2018 Letter, p. 2.)

The seminal case on this issue is Cramer Hill Residents Association, Inc. v. Prinas, 395 N.J. Super. 1 (2007)¹. Cramer Hill made it clear that the only limitation on a municipality’s ability to exercise eminent domain under the FHA is whether “the municipal governing body determines the property to “necessary or useful for the construction or rehabilitation of low and moderate income housing (Cramer Hill at 69). Similar to the project in Cramer Hill, the project the Borough is pursuing and to which Mr. De Angelis objects, was a mixed use inclusionary development by a private developer that would produce both market rate and affordable units.

Mr. De Angelis also argues that “inclusionary developments are not inherently beneficial uses.”¹ As this legal analysis relates solely to the consideration of “use variances” in the Municipal Land Use Law setting, we suggest and believe FSHC will concur that the analysis is not relevant or instructive to this Court’s determination as to the Borough’s authority to acquire property under the FHA.

Nevertheless, Mr. De Angelis’ clients cannot have it both ways. They cannot be “formal objectors” and not simultaneously participate in the proceedings and importantly be bound by this Court’s determination.

¹ The Cramer Hill case was specifically discussed with Mr. De Angelis when the Honorable Lisa Perez-Friscia, J.S.C.

We would note in closing that Mr. De Angelis continues to claim that “[t]he Borough’s effort to force the Owners to participate as parties in this proceeding is consistent with the series of delay tactics it has employed to thwart the prosecution of a challenge to the redevelopment designation in hopes of avoiding a decision on the merits of those matters.”

Quite to the contrary, the issue concerning the Borough’s right to acquire property under the FHA is appropriately before this Court, and not before Judge Padovano, where Mr. De Angelis is challenging the “blight designation” and currently seeking depositions of the Mayor and the Land Use Board Chairman to determine their “motives” in re-confirming that the properties in Block 419 continue to be in need of redevelopment. It is his efforts to seek this impermissible discovery (which is the subject of pending motions for a Protective Order) which has delayed a decision on the “merits” in that matter.

Importantly, by ruling on the Borough’s rights under the FHA now, it will avoid further delays when Mr. De Angelis challenges the Borough’s authority after the Borough adopts an ordinance authorizing the taking under the FHA or after the Borough files a declaration of taking with the Court.

We respectfully submit that for the foregoing reasons, the Borough cannot reasonably proceed to have the Court conduct a fairness hearing and decide whether the Borough’s determination that properties within Block 419 are necessary or useful for the construction or rehabilitation of low and moderate income housing, unless the Court rules on the Borough’s authority under the FHA and the Court orders either:

- A. Mr. De Angelis’ clients are directed to participate in the hearing based on his formally filed objections; or in the alternative
- B. Mr. De Angelis’ clients are advised that they will be bound by the Court’s determination on the Borough’s ability to acquire properties in Block 419 under the FHA (subject to his clients’ right to file an appeal from this Court’s final Order of Compliance), as opposed to Mr. De Angelis’ clients retaining the right to challenge the Borough’s authority to take property under the FHA after the adoption of an authorizing ordinance or the filing of an eminent domain action in Superior Court.²

In closing, we believe this proposed process will be supported by FSHC, the Special Master and prevent further delays for Mr. De Angelis’ clients.

² The Borough recognizes that the owners will continue to retain the right to challenge the Borough’s actions on procedural grounds, but not substantive grounds.

We thank the Your Honor for the Court's kind courtesies in this matter.

Respectfully submitted,
DECOTIIS, FITZPATRICK,
COLE & GIBLIN, LLP

By: 
Douglas F. DeAngelo, Esq.

DFD:sh

cc: Richard P. DeAngelis, Esq. (via electronic mailing)
Robert Hoffmann, Borough Administrator (via electronic mailing)