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Honorable Maryann L. Nergaard, J.S.C.
Morris/Sussex Vicinage
P.O. Box 910
Morristown, NJ 07963-0910

April 18, 2018

Re: In the Matter of the Application of the Township of Denville
Docket No. MRS-L-1641-15

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Dear Judge Nergaard:

Enclosed please find my report on the Fairness and Preliminary Compliance of the Settlement Agreements between the Township of Denville and RAM Associates, LLC and between the Township of Denville and Glenmont Commons Developers, LLC. These agreements will be the subject of a hearing before Your Honor on Friday, April 20, 2018 at 1:30 PM.

I look forward to presenting my report and testimony on Friday. In the meantime, please let me know if Your Honor has any questions concerning my report.

Sincerely,

Philip B. Caton, PP, FAICP

cc: Edward J. Buzak, Esq.
Keli Gallo, Esq.
Henry Kent Smith, Esq.
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MASTER'S REPORT
FOR A *MOUNT LAUREL* FAIRNESS AND PRELIMINARY COMPLIANCE HEARING
TOWNSHIP OF DENVILLE
MORRIS COUNTY, NEW JERSEY

IMO Application of the Township of Denville
Docket No. MRS-L-1641-15

April 18, 2018

Prepared for:

The Honorable Maryann L. Nergaard, J.S.C.
Superior Court of New Jersey
Morris County Courthouse
Washington & Court Streets
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1.0 INTRODUCTION

This report has been prepared in light of the upcoming Fairness and Preliminary Compliance Hearing before the Honorable Maryann L. Nergaard, J.S.C. on April 20, 2018 In the Matter of the Application of the Township of Denville, County of Morris, Docket No. MRS-L-1641-15. The purpose for the hearing is for the Court to determine whether the terms of the Settlement Agreements between the Township of Denville (hereinafter "Township" or "Denville"), and Glenmont Commons Developers, LLC. (hereinafter "Glenmont") and between the Township and RAM Associates, LLC. (hereinafter "RAM") (collectively, "the Developers") are fair to the interests of low- and moderate-income households. I am submitting this report in my capacity as Special Master appointed by the Honorable Stephan C. Hansbury, P.J., Ch. by Order of August 10, 2015 to assist the Court in the above-captioned litigation.

Public notice of the upcoming hearing was published in accordance with established *Mount Laurel* case law. The notice directed any interested member of the public to the Clerk's office in the Township municipal building where they could review the Agreement, described the purpose of the Court hearing on April 20, 2018, and invited comments on the Agreements to be filed by April 6, 2018. I am not aware of any comments having been received in response to the public notice.

2.0 THE CONTEXT FOR REVIEW

Before addressing the documents that have been submitted for the Court's consideration, I would like to acknowledge the parties' efforts in achieving settlement. Settlement of *Mount Laurel* litigation – so long as it meets the appropriate standards for judicial approval – is clearly preferable to the adjudication of a dispute.

Among the most prominent advantages to settlement is that it creates a more civil atmosphere for the further interactions between the parties, such as the Township's future progress in addressing its fair share obligations. Cooperative working relationships increase the likelihood that Glenmont, RAM, and the Township will be able to resolve differences during the coming years without resorting to Court action. In this way, settlements typically expedite the delivery or rehabilitation of affordable housing.

The Settlement Agreements will be evaluated according to guidelines established by the Court in two principal cases: Morris County Fair Housing Council v. Boonton Twp. 197 N.J. Super. 359, 369-71 (Law Div. 1984) and East/West Venture v. Borough of Fort Lee 286 N.J. Super. 311 (App. Div. 1996). These cases require agreements in *Mount Laurel* litigation to be subject to a "Fairness Hearing." The scope of the Fairness Hearing was determined by the Appellate Division in a decision that upheld the hearing process conducted by then–Assignment Judge Peter Ciolino in East/West Venture v. Borough of Fort Lee, a case in which I was privileged to serve as Special Master. In its 1996 decision, the Appellate Court ruled that a settlement between a builder Plaintiff and municipal Defendant in a *Mount Laurel* case may be approved by the Trial Court after a hearing which establishes that the settlement "adequately protects the interest of lower-income persons on whose behalf the affordable units proposed by the settlement are to be built" 286 N.J. Super.311, 329 (App. Div. 1996). The Appellate Court provided specific factors for Trial Courts to consider in making fairness determinations. These factors will be detailed in a subsequent section of this report.

Notwithstanding the uncertainty which continues to prevail in the statewide affordable housing realm, I have utilized the "Second Round" regulations of the NJ Council on Affordable Housing (hereinafter "COAH") (*N.J.A.C.* 5:93) to the greatest extent practicable in the course of this review for the Court. This approach encourages uniformity in the interpretation of the *Mount Laurel* doctrine and is consistent with both legislative and judicial directives. The Fair Housing Act (P.L. 1985. 222) states,

> *"The interest of all citizens, including low and moderate income families in need of affordable housing, would be best served by a comprehensive planning and implementation response to this constitutional obligation." (N.J.S.A. 52:27D-302(c))*

Furthermore, the NJ Supreme Court, in its decision in *The Hills Development Co. v. Town of Bernards,* 103 *NJ* 1 (1986) (commonly known as *Mount Laurel III*) upheld the constitutionality of the Fair Housing Act, and stated,

> *"Instead of varying and potentially inconsistent definitions of total need, regions, regional need, and fair share that can result from the case-by-case determinations of courts involved in isolated litigation, an overall plan for the entire state is envisioned, with definitions and standards that will have the kind of consistency that can result only when full responsibility and power are given to a single entity [COAH]." (103 N.J. at 25)*

Lastly, in the decision, the Supreme Court also stated that to the extent that *Mount Laurel* cases remained before the courts,

> *"...any such proceedings before a court should conform wherever possible to the decisions, criteria and guidelines of the Council." (103 N.J. at 63)*

On March 10, 2015, the NJ Supreme Court delivered a unanimous decision In re Adoption of *N.J.A.C.* 5:96 & 5:97 by N.J. Council on Affordable Housing 221 N.J. 1 (2015) (also known as "*Mount Laurel IV*"). This decision acknowledged COAH's inability or unwillingness to adopt constitutional rules for the so-called "Third Round" of municipal affordable housing compliance. In the absence of regulatory guidance from COAH or Legislative action, the decision instructs the Trial Courts to, once again, evaluate the constitutionality of municipal Fair Share Plans.

While the Court has invalidated COAH's last two attempts to promulgate Third Round rules, the Second Round rules (*N.J.A.C.* 5:93) are still largely intact. In fact, these rules have been relied upon by the Trial Courts in numerous compliance and fairness hearings during the "gaps" in COAH's rule-making since the Second Round ended in 1999. Furthermore, in the *Mount Laurel IV* decision, the NJ Supreme Court directed the Trial Courts to continue to rely on the Second Round rules with certain specific exceptions. The parties to the Settlement Agreements have been guided by these instructions and I will rely on COAH's Second Round rules and established Court precedent to evaluate the Settlement Agreements before the Court. This will promote the uniformity of approach that is clearly indicated in the NJ Supreme Court's decisions.

This matter comes before the Court by way of Denville's 2015 Declaratory Judgment motion which sought – among other relief – a judicial determination that the Town's Housing Element and Fair Share Plan, as it may be amended and supplemented, satisfies its fair share of the regional need for low- and moderate-income housing pursuant to the *Mount Laurel* doctrine. Denville sought and was

granted immunity by the Court from exclusionary zoning lawsuits while it was preparing its compliance plan and negotiating the terms of the Settlement Agreements. The immunity remains in effect.

3.0 BACKGROUND

The Township of Denville is a "Highlands municipality," with seven acres in the Highlands Preservation Area and the remainder of the Township in the Highlands Planning Area. The Township opted not to conform its Master Plan and land use ordinance to the Highlands Regional Master Plan with regard to the lands in the Planning Area. The Township contends that it has limited developable land and is therefore eligible for a vacant land adjustment ("VLA"). The extent of the Township's Realistic Development Potential ("RDP") has been the subject of reports by planning consultants for the parties and by myself. The RDP remains unresolved at this time. However, that lack of resolution does not obstruct the Court's ability to conduct a fairness hearing since the RDP proposed by the Township exceeds – by a substantial margin – the 34 affordable housing units proposed by the two Developers.

RAM is the owner of a 41-acre tract of land including Block 40203, Lot 1, and Block 40001, Lot 4, located at 360 Franklin Avenue. Your Honor granted intervention for RAM on August 10, 2015. The tract is located in an area appropriate for multi-family development, as it is between a commercial area along US 46 to the north, and near Morris Knolls High School to the south. Per its Settlement Agreement with the Township, RAM may construct up to 116 "for sale" units, of which 24 shall be affordable to very-low, low, and moderate-income households. The RAM Agreement incorporates a Concept Plan for 116 units.

Only the frontage of the RAM site along Franklin Road is within the Rockaway Valley Regional Sewerage Authority ("RVRSA") service area. However, the Township, the RVRSA, the NJ Department of Environmental Protection and the US Environmental Protection Agency ("US EPA") are all aware of the need to extend sewer service to the balance of the RAM development site in order for the planned affordable housing to be realized. At this stage the prospects for achieving the necessary utility expansion are promising.

Glenmont Commons is the owner of a 13.52-acre property at Block 10002, Lot 3. The Glenmont site has been included in the Township's draft housing plans and is a contributing site to each RDP calculation that the Township has put forward. The basis of the Glenmont Settlement Agreement is a November 27, 2017 Concept Plan showing 65 non-age restricted rental townhouse units that include 10 affordable units.

It should be noted that there are two other intervenors with whom the Township has not yet settled – 382 Franklin, LLC and U.S. Home Corporation, doing business as Lennar. The Township has included 382 Franklin, LLC in its RDP calculations, but disputes the suitability of the Lennar site.

4.0 THE SETTLEMENT AGREEMENT

I have reviewed the executed Settlement Agreements between the Township of Denville, RAM and Glenmont in the context of the required "Fairness" analysis. The Agreement with RAM was executed by Denville Township Mayor Thomas Andes on December 18, 2017 and by Alexander Opper, Manager of RAM on December 19, 2017. The Agreement with Glenmont was executed by Mayor Andes on December 14, 2017 and by Edward Mosberg, Manager of Glenmont, on December 6, 2017. The Agreements establish the obligations of the Township and the Developers to take steps necessary to ensure that development occurs in a timely manner and in accordance with the relevant affordable housing statutes and regulations.

The RAM and Glenmont Agreements are identical with the exception of terms specific to each site and to the affordable units the developers have agreed to provide. The affordable housing requirements set forth in the agreements and in the attached T-5 District zoning ordinance include the following:

- The affordable housing set-aside will be 15% for rental development (Glenmont) and 20% for for-sale development (RAM)
- Half of the affordable units at each site will be affordable to very-low or low-income households, with 13% of each site's affordable units restricted to very-low income households.
- The bedroom distribution will be in accordance with the Uniform Housing Affordability Controls (UHAC), such that no more than 20% of the affordable units may be one-bedroom units (2 units at Glenmont, 4 units at RAM), and at least 20% of affordable units must be three-bedroom units (3 units at Glenmont, 5 units at RAM).
- The affordable units shall have affordability controls for at least 30 years and until the Township elects to release the controls thereafter.
- The affordable units shall be constructed according to the schedule established at N.J.A.C 5:93-5.6(d)
- The Developers shall use an approved and experienced affordable housing administrative agent and the costs of the administrative agent services are at the expense of the Developers.

The Agreements also establish the responsibilities and obligations of the Developers and the Township for rezoning the properties and for obtaining all necessary approvals and permits through the regular application process. These include the following:

- Within 60 days of a Court Order approving the Settlement Agreements, the Township shall introduce and adopt the T-5 Zone District ordinance.
- Within 60 days of the Township adopting the T-5 ordinance the Developers must apply to the Planning Board.
  - The application must be consistent with the concept plans on which the settlement agreements are based, and variances or waivers from the T-5 ordinance shall not be permitted except as required for final engineering design.
  - The Township shall cooperate with the Developer's efforts to obtain all required governmental approvals and permits.
- The Planning Board shall adopt a Housing Element and Fair Share Plan that includes the RAM and Glenmont Commons projects.

As stated above, the Settlement Agreements require the Township to rezone each of the Developers' properties under the T-5 District zoning ordinance. The District includes only the parcels that comprise the RAM and Glenmont developments. It permits detached single-family dwellings, townhouses, "vertical flats" (defined in the ordinance as "at least two single-story residential dwellings with direct and individualized access to the ground floor"), and "interlocking dwellings" (defined in the ordinance as "a multiple story residential dwelling unit that shares vertical space within another residential dwelling unit"). The ordinance establishes a maximum density of five (5) dwelling units per acre on each site, and limits townhouse blocks to eight (8) units per building and vertical flats / interlocking dwellings to 12 units per building.

The affordable housing standards provided in the T-5 District zoning echo the conditions in the Settlement Agreements, including requiring dispersal of affordable units among market-rate units, architectural compatibility of market rate and affordable units, income distribution, bedroom distribution, and construction phasing all in accordance with *N.J.A.C.* 5:93-5.6(d).

5.0 FAIRNESS ANALYSIS

The Settlement Agreements must be subjected to the fairness analysis embodied in the *East/West Venture* case referenced above. Under that case, the Court established criteria for evaluating the fairness of settlements between municipalities and builder plaintiffs in exclusionary zoning cases.

The first step is to evaluate the number and rationale for the affordable housing units to be provided by the Developer(s).

The two Settlement Agreements provide a realistic opportunity for the Township to create a combined 34 affordable units – 10 units at the Glenmont site and 24 units at the RAM site. In addition, the 10 rental units at Glenmont Commons may be eligible for as many as 10 rental bonuses, bringing the total number of credits to 44. These 44 units and credits were included in the RDP compliance plan section of the Township's December 28, 2017 report, *Response to Special Master's Review of Vacant Land Adjustment 2017*.

The rationale for the affordable housing component at RAM and Glenmont is well founded in the *Mount Laurel* doctrine and is set forth in the T-5 District zoning amendment: a 15% set-aside is required for rental affordable housing (such as Glenmont) and a 20% set-aside is required for "sales" housing (such as RAM).

In addition, the T-5 District ordinance requires the integration of affordable units with market rate units, architectural design such that the exterior of market rate units is indistinguishable from affordable units, bedroom distribution in conformance with *N.J.A.C.* 5:93-7.3, and phasing in accordance with *N.J.A.C.* 5:93-5.6 (d), all of which are consistent with sound planning and COAH's second round rules.

In the second step under the East/West Venture fairness analysis, any other contributions being made by the Developers or the Township must be considered along with any other components that contribute to the municipality's satisfaction of its Mount Laurel obligation.

As previously stated, the Settlement Agreements list the rights and obligations of the Developers and the Township to facilitate the Township's satisfaction of its fair share housing responsibilities through construction of the RAM and Glenmont developments. The Agreements require the Township to adopt the T-5 District zoning ordinance within 60 days of Court approval of the Agreements, and to ensure that the sites are included in an adopted Housing Element and Fair Share Plan addressing its Third Round obligation. The Developers are required to apply for approvals from the Planning Board within 60 days of the Township adopting the T-5 District zoning ordinance and to not seek planning waivers or variances from the requirements of the ordinance and the attached concept plans except as may be necessary due to final engineering design changes. The Township agrees to support the Developers' efforts in the approval and development process.

The requirements cited above contribute to Denville's satisfaction of its *Mount Laurel* obligation. Moreover, as mentioned above, the very act of settling this litigation advances *Mount Laurel* compliance.

6.0 CONCLUSION

As directed by the Court, I have evaluated the Settlement Agreements between the Township and Glenmont, and between the Township and RAM, based on the authority, procedures, and standards set forth in Morris County Fair Housing Council v. Boonton Twp. 197 N.J. Super. 359, 369-71 (Law Div. 1984) and East/West Venture v. Bor. of Fort Lee, 286 N.J. Super. 311 (App. Div. 1996). For the reasons set forth in the body of this report, I find the subject Settlement Agreements fair and reasonable to the interests of the protected class and recommend them to the Court for approval.

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