HOUSING ELEMENT AND FAIR SHARE PLAN
FOR THE THIRD ROUND: 1999-2025

PREPARED FOR

THE BOROUGH OF EAST RUTHERFORD
IN THE COUNTY OF BERGEN
STATE OF NEW JERSEY

April , 2016

APPENDIX 2 OF 2

Appendices

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BOROUGH OF EAST RUTHERFORD
RESOLUTION NO. 82-2015

RESOLUTION DECLARING THE INTENT OF THE BOROUGH OF EAST RUTHERFORD TO FULLY COMPLY WITH ITS CURRENT AND FUTURE MOUNT LAUREL OBLIGATIONS AND TO SERVE AS THE "CATALYST FOR CHANGE" TO RENDER ANY EXCLUSIONARY ZONING LAWSUITS AS "UNNECESSARY LITIGATION"

WHEREAS, on or about June 1, 2006, the Superior Court entered a Final Judgment in the matter entitled *Tomu Development Co. v. Borough of East Rutherford* (the "Tomu Decision") which; among other things, determined that the Borough failed to meet its Affordable Housing obligations, appointed a Compliance Monitor (the Monitor") to supervise the Borough's land use regulatory system and required the Borough and the Monitor to draft and submit an Affordable Housing Plan to Council on Affordable Housing ("COAH") to obtain substantive Certification from COAH of the Borough's Affordable Housing Plan; and

WHEREAS, the *Tomu* decision awarded a Builder's Remedy to *Tomu* permitting it to construct 420 units of housing in East Rutherford at the site of which 60 units would be affordable; and

WHEREAS, the Court's Final Judgment in Tomu required the Borough to seek substantive Certification of its Housing Element and Fair Share Plan ("HEFSP") through COAH and therefore the Borough brought itself under COAH's jurisdiction to permit administrative process to resolve disputes over affordable housing matters rather than litigation (see N.J.S.A. 52:27D-303); and

WHEREAS, on or about December 31, 2008, the Borough submitted a HEFSP and a Petition for Substantive Certification to the Council on Affordable Housing ("COAH"); and

WHEREAS, the Borough's Petition was deemed complete by COAH on or about June 8, 2009; and

WHEREAS, the Borough has awaited the COAH process to move forward pursuant to its duly adopted regulations; and

WHEREAS, as a result of that filing with COAH, the Borough has been protected against exclusionary zoning and builder's remedy lawsuits by the provisions of the Fair Housing Act, *N.J.S.A. 52:27D-316* pending completion of COAH's process; and

WHEREAS, on September 26, 2013, the Supreme Court released ***In re Adoption of N.J.A.C. 5:96 & 5:97 by N.J. Council on Affordable Housing, 215 N.J. 578 (2013)*** which invalidated the Round 3 regulations adopted in 2008 by the New Jersey Council on Affordable Housing ("COAH"); and

WHEREAS, the HEFSP submitted by the Borough was based upon the regulatory requirements of the regulations invalidated in that case; and

WHEREAS, on March 14, 2014, the Supreme Court issued an order directing COAH to propose new Round 3 regulations on or before May 1, 2014 and to adopt them by October 22, 2014; and

WHEREAS, the March 14, 2014 Order further provided that, if COAH failed to meet these deadlines, the Court would entertain a Motion in Aid of Litigant's Rights which could include an application for the right, on a case-by-case basis, to file a builder's remedy suit against a municipality under COAH's jurisdiction, such as the Borough; and

WHEREAS, on April 30, 2014, in accordance with the March 14, 2014 Order, COAH proposed Round 3 regulations and published them in the New Jersey Register on June 2, 2014; and

WHEREAS, the proposed third round regulations again modified the regulatory basis for calculating the Borough's "fair share;" and

WHEREAS, COAH accepted public comments on the proposed Round 3 regulations until August 1, 2014, and indeed received roughly 3,000 comments; and

WHEREAS, on October 20, 2014, the COAH board met to consider adopting the proposed regulations, reached a 3-3 deadlock and therefore did not adopt the proposed regulations; and

WHEREAS, COAH therefore failed to meet the Supreme Court's October 22, 2014 deadline; and

WHEREAS, COAH's failure to adopt the proposed regulations has left the Borough in a continuing state of limbo, without knowledge of the applicable governing standards, despite its continuing commitment to satisfying its obligations voluntarily and without the need for litigation; and

WHEREAS, on October 31, 2014, Fair Share Housing Center ("FSHC") filed a Motion In Aid of Litigant's Rights urging the Supreme Court, among other things, to direct trial judges – instead of COAH – to establish standards with which municipalities must comply; and

WHEREAS, FSHC's motion included an alternative fair share calculation for each municipality, further highlighting the uncertainty of the regulatory framework with which municipalities must ultimately comply; and

WHEREAS, on March 10, 2015, the Supreme Court issued its decision which removed the immunity provided to municipalities like East Rutherford that complied with the Fair Housing Act and COAH's regulations but did so prospectively by affording those municipalities, including East Rutherford, a stay of 90 days plus a 30 day period following that stay wherein East Rutherford would have an exclusive right to seek Court approval of its HEFSP and an extension of the immunity from Mt. Laurel lawsuits; and

WHEREAS, the Supreme Court's March 10, 2015 decision did not adopt the FSHC's alternative calculations; however, as a result of future regulations, litigation, and/or legislation, it is entirely possible that the Borough's obligation may indeed differ from those proposed by COAH or advocated by FSHC; and

WHEREAS, in light of all this uncertainty, it is possible that the Borough's HEFSP may not be in compliance with the latest iteration under applicable State law of its affordable housing obligations; and

WHEREAS, regardless of whatever its obligation is ultimately assigned, the Borough remains committed to comply voluntarily with its obligations; and

WHEREAS, the Borough wishes to be in a position to complete its efforts to comply voluntarily once its obligations are defined; and

WHEREAS, in *So. Burlington County N.A.A.C.P. v. Tp. Of Mount Laurel, 92 N.J. 158, 279-80 (1983) ("Mount Laurel II")*, the New Jersey Supreme Court ruled, subject to several other limitations, that in order for a plaintiff to be entitled to a builder's remedy, it must "succeed in litigation;" and

WHEREAS, in *Toll Bros. Inc. v. Tp. Of W. Windsor, 173 N.J. 502, 507 (2002)*, the Supreme Court ruled that in order for a developer to succeed in litigation, it must not only prove that the municipality failed to create a realistic opportunity to satisfy its affordable housing obligation, but also must be the "catalyst for change;" and

WHEREAS, the Borough, in cooperation with the Monitor, has complied with its obligations under the Fair Housing Act and duly adopted COAH regulations; and

WHEREAS, accordingly, the Borough wishes to seek a continuation of its immunity from the courts now that the Supreme Court has ruled that trial judges should perform COAH's functions so that the Borough can complete its efforts to comply voluntarily with whatever standards the courts may determine are appropriate; and

WHEREAS, the Borough herein intends to make its intentions to continue that voluntary compliance process inescapably clear to the public and all concerned.

NOW THEREFORE, BE IT RESOLVED as follows:

1. The Borough acknowledges that, given its reliance upon COAH's original Round 3 regulations and subsequent uncertainty in the law, it is entirely possible that the Housing Element and Fair Share Plan ("HEFSP") submitted to COAH in December of 2008 may not be in compliance with the Borough's affordable housing obligations as may need to be revised to comply with standards other than the original Round 3 regulations.

2. The Borough hereby reaffirms its commitment to satisfy its affordable housing obligations, however they may ultimately be defined, voluntarily and in the absence of any Mount Laurel lawsuits.

3. The Borough directs the Borough Attorney and Borough Planner, subject to the supervision of the Monitor, to revise the Borough's HEFSP to reflect compliance with the latest requirements and to submit that revised HEFSP to the Planning Board for further action. Once its affordable housing obligations are defined, the Borough directs its legal and planning professionals to take all reasonable and necessary action to enable it and its Planning Board to satisfy those obligations expeditiously.

4. The Borough Attorney and Borough Planner, in cooperation with the Monitor, shall take such action as may be necessary or advisable, including the institution of an action in the Superior Court for a Judgment of Compliance and Repose granting the Borough immunity from exclusionary zoning and builder's remedy lawsuits and to rely upon this Resolution as appropriate to maintain the Borough's current immunity from exclusionary zoning suits.

5. The Borough Clerk shall forward a copy of this Resolution to the East Rutherford Planning Board and to Robert T. Regan, Esq., the Monitor and to place this Resolution on file in Borough Hall to put the public and all interested parties on notice of the formal commitments herein.

6. This Resolution shall take effect immediately.

I hereby certify that the foregoing is a true copy of the resolution passed by the Mayor and Council at the meeting held on the 19th day of May, 2015.

Danielle Lorenc, RMC

Councilmember	Moved	Second	Aye	Nay	Abstain	Absent
Britzi		X	X			
Homaychak			X			
Lahullier	X		X			
Perry			X			
Stallone			X			
Ravettine			X			

ROBERT T. REGAN, ESQ.
Special Master
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Westwood, New Jersey 07675
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FILED

NOV 2 8 2005

JONATHAN N. HARRIS
J.S.C.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: BERGEN COUNTY
DOCKET NO. BER-L-5894-03

TOMU DEVELOPMENT CO., INC.,

Plaintiff,

v.

BOROUGH OF CARLSTADT, PLANNING BOARD OF CARLSTADT and NEW JERSEY MEADOWLANDS COMMISSION,

Defendants.

Civil Action

ORDER

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: BERGEN COUNTY
DOCKET NO. BER-L-5895-03

TOMU DEVELOPMENT CO., INC.,

Plaintiff,

v.

BOROUGH OF EAST RUTHERFORD, PLANNING BOARD OF EAST RUTHERFORD and NEW JERSEY MEADOWLANDS COMMISSION,

Defendants.

Civil Action

ORDER

THIS MATTER coming on for trial before the Honorable Jonathan N. Harris on August 8th and 9th, 2005, September 26th, 27th,

28th and 29th, 2005 and November 2nd and 3rd, 2005, in the presence of Thomas Jay Hall, Esq. and Robert Kasuba, Esq. of the firm of Sills, Cummis, Epstein & Gross, P.C., attorneys for plaintiff Tomu Development Co., Inc. ("plaintiff" or "Tomu"); Richard J. Allen, Jr., Esq. of the firm of Kipp & Allen, LLP, attorney for defendants Borough of Carlstadt and Planning Board of Carlstadt; Beverly M. Wurth, Esq. of the firm of Calo Agostino, P.C., attorney for defendants Borough of East Rutherford and Planning Board of East Rutherford; and Robert L. Gambell, Esq., Deputy Attorney General (Peter C. Harvey, Attorney General), attorney for defendant New Jersey Meadowlands Commission ("NJMC"), upon plaintiff's Complaint for a builder's remedy pursuant to Southern Burlington County NAACP v. Mount Laurel Township, 92 N.J. 158 (1983) (hereinafter "Mount Laurel II"), and the Court having previously entered an Order granting plaintiff's motion for partial summary judgment and determining that the land use ordinances and regulations of Carlstadt and East Rutherford are unconstitutional under Mount Laurel II, and the Court having rendered a written decision on November 10, 2005, the provisions of which are incorporated herein by reference, and good cause appearing:

IT IS on this 28 day of NOVEMBER, 2005:

ORDERED as follows:

1. Plaintiff is determined to be entitled to a builder's remedy pursuant to the decision in Mount Laurel II, and its lands in East Rutherford and Carlstadt may be developed with a mixed use project as follows:

> The development in East Rutherford shall consist of no more than 420 residential units consisting of 360 market rate units and 60 affordable rental units, plus no more than 420 residential units consisting of 340 market rate units and 80 affordable rental units in Carlstadt. These units shall be located in two midrise buildings which height shall not exceed the lesser of Federal Aviation Administration elevation guidelines or 230 feet. All dimensional requirements of the NJMC shall be satisfied, as must all applicable requirements of the Residential Site Improvement Standards found in N.J.A.C. 5:21-1, *et seq.* In addition, there shall be no more than 38,000 square feet of "ancillary development" that shall include limited commercial facilities (such as a dry cleaner or convenience store), recreational facilities, public safety facilities, and meeting rooms. The development shall include a marina available to the public, to be overseen by the NJMC, but reserving five berths for the development or its residents. Tomu shall construct a riverwalk promenade, plus public parking, to allow access to the Hackensack River by members of the public, all as directed by the NJMC and in accordance with applicable law. The development shall comply with all other rules and regulations of the NJMC that are not inconsistent with this builder's remedy. Finally, the development shall comply with all Federal and local

statutes, regulations, development regulations or ordinances that may apply and shall also comply with all other State laws including, but not limited to, the Fair Housing Act, N.J.S.A. 52:27D-301 *et seq.*; Freshwater Wetlands Protection Act, N.J.S.A. 13:9B-1 *et seq.*; the Endangered and Nongame Species Conservation Act, N.J.S.A. 23:2A-1 *et seq.*; the Water Supply Management Act, N.J.S.A. 58:1A-1 *et seq.*; the Water Pollution Control Act, N.J.S.A. 58:10A-1 *et seq.*; the Realty Improvement Sewerage and Facilities Act (1954), N.J.S.A. 58:11-23 *et seq.*; the Water Quality Planning Act, N.J.S.A. 58:11A-1 *et seq.*; the Safe Drinking Water Act, P.L. 1977, c.224, N.J.S.A. 58:12A-1 *et seq.*; the Flood Hazard Area Control Act, N.J.S.A. 58:16A-50 *et seq.*, and all implementing rules.

2. The land use regulations of Carlstadt and East Rutherford remain invalid and unconstitutional insofar as such provisions continue past exclusionary practices.

3. The Carlstadt and East Rutherford Planning Boards and the respective governing bodies of these Borough (hereinafter collectively "the municipal defendants") shall immediately prepare comprehensive compliance plans (including appropriate strategies to address the indigenous and unmet needs) for each municipality, together with zoning and planning legislation to satisfy the fair share obligations of rounds one and two, and the unmet need, all in accordance with regulations adopted by the Council On Affordable Housing ("COAH").

4. The municipal defendants shall draft meaningful Housing Element and Fair Share Plans, together with fee ordinances (if appropriate) and spending plans that are consonant with COAH rules.

5. The municipal defendants shall exercise planning discretion in deciding whether to employ a program of rehabilitation grants, regional contribution agreements, accessory apartments, mobile homes, overlay zones, or any other incentive devices to meet the fair share and unmet need.

6. The plans of the municipal defendants shall be completed, adopted and presented to the Court no later than February 28, 2006. In default thereof, *all* development regulations in East Rutherford and Carlstadt, as the case may be, shall be permanently invalidated, and a scarce resource order enjoining *all* land use development applications in the defaulting Borough (whether before the Planning Board, Board of Adjustment or the NJMC) shall become automatically effective.

7. In the event the municipalities, or either of them, comply with the requirements hereinabove set forth, in such event the respective complying municipality will be entitled to a six (6) year judgment of repose commencing no earlier than February 28, 2006.

8. The Special Master shall regularly consult with designated representatives of both Boroughs and their Planning Boards and governing bodies during the preparation of the compliance plans and he shall provide appropriate input and constructive criticism throughout the process.

9. A copy of this Order shall be served by the Special Master upon all counsel of record within 5 days of the date hereof.

JONATHAN N. HARRIS, J.S.C.

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: BERGEN COUNTY
DOCKET NO. BER-L-5894-03

TOMU DEVELOPMENT CO., INC.,

Plaintiff,

v.

BOROUGH OF CARLSTADT,
PLANNING BOARD OF CARLSTADT,
and the NEW JERSEY
MEADOWLANDS COMMISSION

Defendants,

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: BERGEN COUNTY
DOCKET NO. BER-L-5895-03

TOMU DEVELOPMENT CO., INC.,

Plaintiff,

v.

BOROUGH OF EAST RUTHERFORD,
PLANNING BOARD OF EAST
RUTHERFORD, and the NEW JERSEY
MEADOWLANDS COMMISSION

Defendants,

Decided: November 10, 2005

Robert A. Kasuba and Thomas Jay Hall (Sills Cummis Epstein & Gross, P.C., attorneys) tried the cause for plaintiff.

Richard J. Allen, Jr. (Kipp & Allen, LLP, attorneys) tried the cause for defendant Borough of Carlstadt and Planning Board of Carlstadt.

Beverly M. Wurth (Calo Agostino, A Professional Corporation, attorneys) tried the cause for defendant Borough of East Rutherford and Planning Board of East Rutherford.

Robert L. Gambell (Peter C. Harvey, Attorney General, attorney) tried the cause for defendant New Jersey Meadowlands Commission.

JONATHAN N. HARRIS, J.S.C.

INTRODUCTION

On August 14, 2003, plaintiff filed two lawsuits alleging that two southern Bergen County municipalities -- Carlstadt and East Rutherford (see Figure 1)-- have engaged in patterns of exclusionary

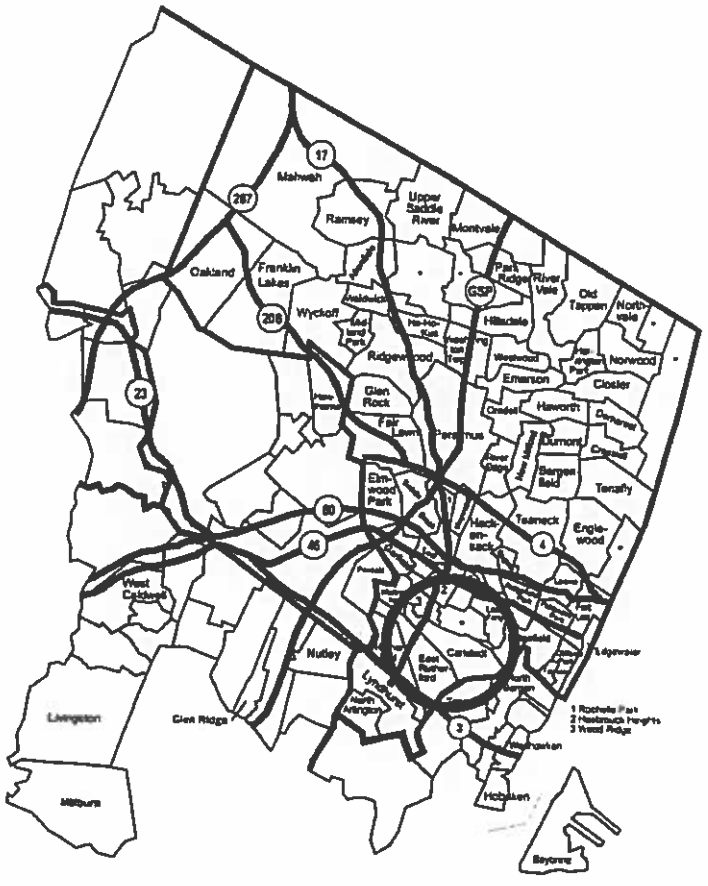

Figure 1

zoning that violate the New Jersey Constitution as interpreted

in the *Mount Laurel* cases,[1] their progeny,[2] and the Fair Housing Act of New Jersey (FHA).[3] A builder's remedy is sought to allow plaintiff's waterfront land at the foot of historic Paterson Plank Road on the Hackensack River to be developed with 840 units of non-age-restricted housing, including 140 units of affordable rental housing. The municipalities contend that they are not responsible for the alleged abdication of constitutional responsibility because they enjoy neither the power to zone plaintiff's land nor to affect the vast acreage[4] within their municipal boundaries that is within the preeminent zoning authority of codefendant New Jersey Meadowlands Commission (NJMC) pursuant to N.J.S.A. 13:17-11.

I conclude that the municipalities have failed to comply with their express obligations to provide realistic opportunities for affordable housing within their borders, and that the NJMC has implicitly fostered the long-standing municipal failures

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[1] Southern Burlington County NAACP v. Mount Laurel Township, 67 N.J. 151, cert. denied, 423 U.S. 808, 96 S. Ct. 18, 46 L. Ed. 2d 28 (1975)(Mount Laurel I); Southern Burlington County NAACP v. Mount Laurel Township, 92 N.J. 158 (1983)(Mount Laurel II).

[2] Oakwood at Madison v. Township of Madison, Inc., 72 N.J. 481 (1977); Holmdel Builders Ass'n v. Township of Holmdel, 121 N.J. 550 (1990); Toll Bros., Inc. v. Twp. of W. Windsor, 173 N.J. 502 (2002).

[3] N.J.S.A. 52:27D-301 to -329.

[4] The New Jersey Meadowlands region consists of 19,485 acres spread over 30.4 square miles in two counties and fourteen municipalities. http://www.meadowlands.state.nj.us/commission/index.cfm (last visited on November 4, 2005.)

through its benign neglect of the housing needs of the poor.[5] On this subject, but perhaps not with the NJMC directly in mind, Chief Justice Wilentz, in Mount Laurel II wrote:

> The basis for the constitutional obligation is simple: ***the State controls the use of land, all of the land.*** In exercising that control, it cannot favor rich over poor. It cannot legislatively set aside dilapidated housing in urban ghettos for the poor and decent housing elsewhere for everyone else. ***The government that controls this land represents everyone.*** While the State may not have the ability to eliminate poverty, it cannot use that condition as the basis for imposing further disadvantages.
>
> [92 N.J. at 209-210 (emphasis added).]

Additionally, plaintiff is entitled to a builder's remedy because none of the defendants has demonstrated that the site is environmentally constrained, that construction of a high-density mixed-use project would represent bad planning, or that plaintiff has prosecuted this action in bad faith.

II. FACTUAL BACKGROUND

Plaintiff Tomu Development Co., Inc. (Tomu) owns several adjoining parcels of land in Carlstadt and East Rutherford at the

[5] NJMC regulation N.J.A.C. 19:4-3.8 purports to reflect the NJMC's commitment to affordable housing. However, it gives little more than institutionalized lip service to affordable housing obligations by merely "encouraging" municipal compliance with guidelines of the Council on Affordable Housing (COAH). Unlike the proactive posture of the former Hackensack Meadowlands Development Commission in the 1980s, the NJMC's position until very recently simply reinforced municipal inertia and maintained the *status quo* of a dearth of affordable housing in East Rutherford and Carlstadt.

intersection of Paterson Plank Road's eastern[6] terminus (in Bergen County) and Outwater Lane, shoehorned between the New Jersey Turnpike's Western Spur and the Hackensack River. (See Figure 2.)

Figure 2

It appears from the record that the total land mass consists of approximately 26.9 acres, with 4.9 acres located in Carlstadt and 22 acres located in East Rutherford. Not all of this land is developable. Tomu acknowledges that in Carlstadt, only 3.584

[6] Paterson Plank Road is commonly considered an east/west thoroughfare, at one time having been a wooden planked road through the Hackensack Meadowlands that connected Hoboken and Paterson. See State ex rel. Zimmerman v. Township Committees of Bergen, 57 N.J.L. 68 (Sup. Ct. 1894). In reality, it is skewed to a northwest/southeast alignment and at the point where it adjoins Tomu's land, it is arguably at its *southern* terminus in Bergen County. (See Figure 2.)

acres are developable uplands (not wetlands) and in East Rutherford, 5.286 acres are developable uplands (not wetlands).

In 1989, as part of a planned unit development consisting of 1,328,430 square feet of improvements proffered by then-owner Riverview Associates, the land in East Rutherford received permission from the NJMC to be developed with 350 residential units, of which 70 were required to be devoted to affordable housing. Additionally, the adjoining parcels were approved for a 100-suite hotel, 1,200-seat banquet facility, restaurants, fitness center, multi-level parking facility, and a full service 135-berth marina. Although there was to be substantial development in Carlstadt, no residential housing units were proposed for that municipality. The NJMC zoning regulations at the time designated the land as being within the Waterfront Recreation and Marshland Preservation zones.[7] Residential uses were permitted at that time when they were included with a marina or other water-oriented recreation use at a density of 15 units per acre. Today, the NJMC's zoning regulations do not permit residential uses in the East Rutherford or Carlstadt parcels, reflecting its 21st century view of the land as most suitable primarily for recreational uses associated with access to the

[7] Today the lands are split between the Environmental Conservation zoning district and the Waterfront Recreation zoning district. Residential use was permitted on all of Tomu's uplands until the 2004 amendment to the NJMC Master Plan, after the commencement of the instant *Mount Laurel* action.

Hackensack River.[8] N.J.A.C. 19:4-5.18 ("The Waterfront Recreation zone is designated to accommodate marinas in combination with other water-oriented commercial and recreation facilities that provide and encourage public access to and visibility of the Hackensack River or its tributaries. The Waterfront Recreation zone is to be developed in such a way that views of the river are protected.").

The land was never developed according to the approvals granted in 1989. However, so-called "interim uses" were permitted by the NJMC to be established and operated on the land until the ultimate development became realistic. These interim uses include a marina, a golf driving range and putting facility, and a cafe. For ten years following the initial approval, the NJMC and its predecessor agency approved extensions keeping the approvals alive. Then, in 1999, the NJMC declined further to extend Tomu's approvals. Presently, Tomu and the NJMC are engaged in litigation in the Office of Administrative Law that revolves around whether the 1989 development approvals were unreasonably not extended by the NJMC. For reasons that are unclear, this dispute has lingered without resolution at the agency level for more than five years.

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[8] For a recent take on how another riverfront is undergoing redevelopment, see *New York Times* article of October 31, 2005, "Rooms With Views Replace Factories on Hudson's Banks," http://www.nytimes.com/2005/10/31/nyregion/31hudson.html?ex=1131685200&en=af379e948d52a128&ei=5070 (last visited on November 9, 2005). See also *The Record* article of November 4, 2005, "Visions of Hackensack River Renaissance," http://www.northjersey.com/page.php?qstr=eXJpcnk3ZjcxN2Y3dnFlZUVFeXkzJmZnYmVsN2Y3dnFlZUVFeXk2ODA3NzA3 (last visited on November 8, 2005).

As part of its efforts in this case to secure a builder's remedy, Tomu has proposed building a mixed-use facility on its combined lands. Originally, Tomu sought a builder's remedy for 988 residential units, divided equally between the two municipalities. By the end of the trial, however, Tomu refined its proposal so that the development would consist of 420 housing units (360 market rate units (85.7%) and 60 affordable rental units (14.3%)) in East Rutherford, plus an additional 420 housing units (340 market rate units (81%) and 80 affordable rental units (19%)) in Carlstadt. In the aggregate, the final proposal offers a total of 840 housing units, of which 140 would be available for rent to low and moderate income persons.[9] These units would be located in two midrise buildings that would not exceed Federal Aviation Administration elevation guidelines, approximately 230 feet in height. In addition, Tomu proposes approximately 38,000 square feet of "ancillary development" that would include limited commercial facilities such as a dry cleaner, recreational facilities, public safety facilities, and meeting rooms. Tomu would make a marina on the site available to the public, presumably to be overseen by the NJMC, reserving five berths for private purposes. Finally, Tomu proposes that it build a

[9] These affordable housing units would have to comply with COAH regulations regarding distribution of incomes, N.J.A.C. 5:93-7.2 and distribution of bedroom types, N.J.A.C. 5:93-7.3. The details of compliance with these regulations were not explored at the trial. As rental units, each municipality should be able to garner bonus credits provided by N.J.A.C. 5:93-5.15(d)(1).

riverwalk promenade, plus public parking, to allow access to the Hackensack River by members of the public.

In earlier proceedings in this action, I determined that Tomu had clearly demonstrated that both East Rutherford and Carlstadt had failed to comply with their constitutional obligations regarding affordable housing opportunities.[10] The municipal failures were systemic and long standing. Neither East Rutherford nor Carlstadt had done anything meaningful to fulfill their separate obligations for new affordable housing, and their response to indigenous need was a deafening silence. Although both municipalities claimed that they were utterly helpless to accommodate affordable housing by rezoning land under the jurisdiction of the NJMC -- an understandable, if crabbed, position -- they even neglected to address their obligation to rehabilitate substandard housing units. Neither municipality participated in COAH's voluntary process leading to substantive certification. Although the witnesses who testified on behalf of the municipalities vociferously trumpeted their openness to low and moderate income housing, their inaction over at least the last two decades bespeaks the opposite.

The municipalities argue that since they control the land use decisions over such little land within their borders, they

[10] In granting partial summary judgment in favor of Tomu on the issue of municipal noncompliance with the *Mount Laurel* doctrine and the FHA, I appointed Robert T. Regan, Esq. to serve as Special Master to assist the parties and the court in developing a compliance plan.

should be either relieved of their *Mount Laurel* obligations or otherwise excused from constitutional compliance. Although many sounds and messages are carried by the natural breezes that flow across the Hackensack Meadowlands, I will not allow the message of *Mount Laurel* to be drowned out. The NJMC must share some of the blame for the baleful circumstances that exist in these municipalities' responses to affordable housing obligations. The NJMC has been a convenient scapegoat upon which the municipalities heap their scorn when it comes to discussions about their loss of home rule over land use decisions. The irony is not lost on me that now the municipalities seek refuge under the inaction of their former nemesis, the NJMC. What is even more distressing is the past behavior of the NJMC -- arguably inconsistent with one of its purposes to foster the use of land for new homes and residential uses[11] -- that has enabled the defendant-municipalities to avoid providing affordable housing opportunities, thereby perpetuating the exclusionary character of these boroughs.

III. DETERMINATIONS OF LAW

The dominant question in every *Mount Laurel* action is whether the municipality has created a realistic opportunity for the construction of its fair share of the region's needs for affordable housing. In reviewing the municipality's response to

[11] N.J.S.A. 13:17-1.

its constitutional duty, the judiciary should harmonize its decisions wherever possible to COAH guidelines and policy. See Hills Dev. Co. v. Bernards Twp., 103 N.J. 1, 22 (1986). Courts hearing and deciding exclusionary zoning cases should follow COAH's fair-share methodology. Id. at 63 and see Bi-County Dev. Corp. v. Mayor of Borough of Oakland, 224 N.J. Super. 455, 458-59 (Law Div. 1988); Mount Olive Complex v. Township of Mount Olive, 340 N.J. Super. 511, 527-28 (App. Div. 2001). The good faith or bad faith of the municipality is not a relevant consideration in determining the municipal obligation. Such considerations, however, may be appropriate once a remedy must be imposed.

The instant case is dramatically more complicated[12] than the ordinary contested *Mount Laurel* case (which is already complicated enough) because the lands that are the subject of the builder's remedy, together with large tracts in both municipalities, are not subject to municipal land use controls. The role of the NJMC thus becomes a focus of the action. Upon a review of the extensive record generated in this case, I conclude that there is no significant evidence in this case that any of the governmental agencies -- meaning Carlstadt, East Rutherford, and the NJMC -- took any meaningful steps to provide reasonable

[12] The trial consumed eight trial days spread over four months. In addition, I viewed the property in the presence of the attorneys under the procedures of Morris County Land Improvement Co. v. Township of Parsippany-Troy Hills, 40 N.J. 539, 548-49, (1963). A lengthy recess was taken in August and September 2005, to give the parties a final chance to try to reach a mutual accommodation and resolve their differences. Although the Special Master valiantly pursued settlement efforts, the mediation process failed.

opportunities for low and moderate income housing in East Rutherford and Carlstadt. Indeed, shortly before the trial in this case, the NJMC approved a housing development in an isolated area of East Rutherford that conspicuously omitted any obligation on the part of the developer to devote a percentage of the units to the needs of low and moderate income persons. Also, in East Rutherford's downtown -- albeit before this exclusionary zoning case was filed -- the municipality approved multi-family developments on lands within its zoning control, but made no accommodations for a set aside of low or moderate income housing units. Although at trial the NJMC attempted to eschew its prior gentle disregard of affordable housing needs, I conclude that it is as responsible for the lack of affordable housing in East Rutherford and Carlstadt as are those municipalities' elected officials. Although I can not say that the NJMC violated *its* duty under the constitution to provide affordable housing opportunities, it aided and abetted the municipalities' turning blind eyes to the plight of the poor, in direct violation of the municipalities' affirmative obligations under the *Mount Laurel* doctrine.

The threshold step in determining municipal compliance with the *Mount Laurel* doctrine requires calculation of fair share.

Carlstadt's current[13] cumulative affordable housing obligation as determined by COAH is 198 units. Twelve of these units represent satisfaction of an indigenous need, or rehabilitation component. The balance of 186 units represents Carlstadt's pre-credited obligation of its region's present and prospective need, or the so-called inclusionary or new construction component. Carlstadt claims that it is land poor and therefore it is entitled to a reduction in the COAH-computed obligation for new construction because it has no sites available, including the Tomu site, which it considers unsuitable for housing. It also claims that it is entitled to credits for some of its indigenous obligation because of rehabilitation work done in the last few years. Under COAH rules, credits for rehabilitation are governed by N.J.A.C. 5:93-3.4:

> (a) A municipality may receive credit for rehabilitation of low and moderate income substandard units performed subsequent to April 1, 1990.
>
> (b) Units shall be eligible for crediting if:
>
> 1. They were rehabilitated up to the applicable code standard and that the average capital cost expended on rehabilitating the housing units was at least $8,000; and
>
> 2. The unit is currently occupied by the occupants who resided within the unit at the time of rehabilitation or by other eligible low or moderate income households.

[13] This does not include Carlstadt's third round obligations as implemented by COAH's "growth share" regulations. N.J.A.C. 5:94-1.1 *et seq.*

(c) Credits for rehabilitation shall not exceed the rehabilitation component and shall only be credited against the rehabilitation component.

Carlstadt proved at trial that several dwelling units in the municipality were the beneficiaries of block grants exceeding $8,000 each to be used for unspecified purposes, but presumably rehabilitative in nature. However, it did not satisfy the requirement of proving that any unit "is currently occupied by the occupants who resided within the unit at the time of rehabilitation or by other eligible low or moderate income households." Thus, Carlstadt is not entitled to any credits against its twelve unit obligation for indigenous need.

East Rutherford's current[14] cumulative affordable housing obligation as determined by COAH is 104 units. Thirty-four of these units represent satisfaction of an indigenous need and the balance of 70 units represents East Rutherford's new construction component. Unlike Carlstadt, East Rutherford neither challenges the new construction component of its fair share obligation nor seeks a vacant land adjustment. Like Carlstadt, however, it claims entitlement to credits for recent rehabilitation efforts. However, also like Carlstadt, and for the same reasons, it has failed to satisfy the proof requirements of N.J.A.C. 5:93-3.4(b)(2). Thus, East Rutherford is not entitled to any credits against its 34 unit obligation for indigenous need.

[14] This does not include East Rutherford's third round obligations as implemented by COAH's "growth share" regulations. N.J.A.C. 5:94-1.1 *et seq.*

Under N.J.A.C. 5:93-4.1 and -4.2, where developable land is supposedly scarce, a municipality may attempt to demonstrate that it does not have the physical capacity to address the fair share housing obligation calculated by COAH. This is known as the "lack of land" or "vacant land" adjustment. It is up to the municipality to prove its entitlement to this adjustment. N.J.A.C. 5:93-4.2. This process involves the identification of all appropriate vacant land in the municipality and the assignment thereto of dwelling unit densities, which produces what COAH calls the municipal realistic development potential (RDP). N.J.A.C. 5:93-4.2(f). Another way of expressing this adjustment process is to recognize that a land poor municipality is entitled to a vacant land adjustment or "adjustment due to available land capacity." However, in order to obtain this adjustment, the municipality must perform an exhaustive planning analysis and convince the court of its clear entitlement to an adjustment.

The actual calculation of RDP is not subject to arithmetic precision or mathematical perfection. It is based upon an assessment of the competent factual and expert evidence, informed by the gloss of COAH rules, and ultimately distilled into a concrete number. It is neither forensic alchemy nor judicial sleight-of-hand that results in the RDP. Rather, it emerges from the overarching notion that whatever the development potential is calculated to be, it must perforce be based upon a foundation of

realism. The question to be answered is, what is the realistic (not necessarily the maximal) development capacity of the land?

The process of computing the RDP is expressly outlined in N.J.A.C. 5:93-4.2 and is supposed to begin with the municipality creating a map showing all existing land uses. Next, the municipality should prepare an inventory of all vacant parcels by block and lot. Third, the municipality may exclude certain vacant lands from the inventory based upon certain objective conditions. Fourth, the municipality must presumptively include all other vacant lands and may include underutilized, but not vacant, lands including certain golf uses, nurseries and farms, and nonconforming uses. In connection with nonvacant land, COAH may request confirmation from the owner indicating the site's availability for inclusionary development. Fifth, land may be excluded from the inventory by the municipality if it falls within any of the following categories:

1. Constrained agricultural lands.
2. Environmentally sensitive lands.
3. Historic and architecturally important sites.
4. Certain active recreational lands.
5. Certain conservation, parklands, and open space lands.
6. Other sites determined to be not suitable for low and moderate-income housing.

The final step in the RDP recipe is to assign a site-specific density and percentage set-aside for each parcel that

has survived the culling process. The *minimum* presumptive density shall be six units per acre and the *maximum* presumptive set-aside shall be 20 percent. The regulations require a consideration of "the character of the area surrounding each site and the need to provide housing for low and moderate income households in establishing densities and set-asides for each site." N.J.A.C. 5:93-4.2(f).

Before completing the computation of RDP, I must point out that the criteria for inclusion in RDP is not the same criteria used to determine the inclusion or exclusion of a site as part of an ultimate compliance mechanism. N.J.A.C. 5:93-5.3 provides guidance as to which sites are appropriate to be designated for inclusionary development. It includes the requirement that the site be "available, suitable, developable, and approvable, as defined in N.J.A.C. 5:93-1." These criteria -- except arguably suitability -- do not apply when RDP is computed. Rather, they play a role when the municipality's compliance plan reveals those sites to which it intends to confer incentive inclusionary zoning or other site-specific affirmative measures to meet the RDP. Thus, the only two relevant criteria for RDP purposes are 1) planning concerns and 2) affordable housing needs.

Carlstadt argues that it has neither vacant nor underutilized land that could accommodate housing, much less affordable housing, and therefore its RDP should be fixed at zero. The Special Master concurs, to the extent that he agrees that Carlstadt has scarce

land resources, but disagrees that the Tomu site is inappropriate for housing. Indeed, as the Special Master noted, the Tomu property is "the only game in town."

To make its argument, Carlstadt contends that the Tomu site is unsuitable for housing because it is located on a cul de sac and isolated from the already-residentially developed areas of Carlstadt. A careful, nuanced analysis of actual adjacent uses, the surrounding road network, and local environmental conditions was eschewed in favor of the default position that simply because the Tomu land was approximately three miles from the core of municipal services (municipal building, public safety facilities, library, and schools) it was not appropriate for housing. This undefined concept of site isolation as a basis for unsuitability for housing is belied by the recent NJMC approval of a 614 unit residential development in East Rutherford on a distant and isolated area of Route 3. This project, approved by the NJMC in May 2005, shares many of the same attributes of the Tomu land, yet it was thought fully appropriate for residential development by the NJMC. In like vein, during the trial, the NJMC virtually conceded site suitability of the Tomu site and did not seriously dispute that the Tomu land in Carlstadt could be used for housing. However, it clearly preferred that it be utilized for recreation purposes in accordance with the NJMC Master Plan and not for high density housing.

Carlstadt's position regarding site suitability is untenable and unpersuasive, even though it was expressed by the experienced expert on behalf of the municipality. I conclude that her ultimate opinion constitutes nothing more than a net opinion, the product of the personal views of the expert, untethered to objective standards and principles in the discipline of professional planning. The net opinion rule provides that an expert's "bare conclusions, unsupported by factual evidence" are inadmissible. Buckelew v. Grossbard, 87 N.J. 512, 524 (1981). The rule often focuses upon "the failure of the expert to explain a causal connection between the act or incident complained of and the injury or damage allegedly resulting therefrom." Ibid. In this regard, the net opinion rule requires the expert witness "to give the why and wherefore of his expert opinion, not just a mere conclusion." Jimenez v. GNOC, Corp., 286 N.J. Super. 533, 540 (App. Div.), certif. denied, 145 N.J. 374 (1996). It is insufficient for an expert simply to follow slavishly an "accepted practice" formula; there must be some evidential support offered by the expert establishing the existence of the standard. A standard that is personal to the expert is equivalent to a net opinion. Taylor v. DeLosso, 319 N.J. Super. 174, 180 (App. Div. 1999). In Kaplan v. Skoloff, 339 N.J. Super. 97 (App. Div. 2001), an attorney's expert opinion was rejected in a legal malpractice case for the following reasons:

> Plaintiff's expert offered no evidential support establishing the existence of a standard of care, other than standards that were apparently personal to himself. In this regard, Ambrosio failed to reference any written document or unwritten custom accepted by the legal community recognizing what would constitute a reasonable settlement under the facts presented in this case. In this stark absence of supporting authority, Ambrosio provided only his personal view, which, as we have explained, "is equivalent to a net opinion."(quoting Taylor v. DeLosso, 319 N.J. Super. at 180).
>
> [339 N.J. Super at 103.].

In the instant case, Carlstadt's expert opinion regarding site suitability was similarly barren of evidential support, and I reject it. In fact, using COAH parameters for suitability found in N.J.A.C. 5:93-1.3 ("[s]uitable site means a site that is adjacent to compatible land uses, has access to appropriate streets and is consistent with the environmental policies delineated in N.J.A.C. 5:93-4") it appears that the Tomu land in Carlstadt is plainly suitable for housing. The land that surrounds the Tomu site is dedicated to nature preservation, river access, and benign utility uses. The Special Master described the area as positively "bucolic" in comparison to the Route 3 residential development recently approved in East Rutherford. Although it is at the end of a long cul de sac (Paterson Plank Road) that also serves as a major service road along the northern edge of facilities at the New Jersey Sports and Exposition Authority, the site has access to a significant thoroughfare that is plainly capable of handling the anticipated traffic. Carlstadt did not present any expert evidence that the capacity of the road network would be inappropriate for

the proposed housing; its best argument seemed to be that potential residents would encounter congestion when the New Jersey Sports and Exposition Authority's facilities were operating or that they might endure inconvenience if the road were closed because of an accident or other emergency. These arguments do not militate against the development of housing on the site. Even Carlstadt's argument about the land's remote location -- as compared to Carlstadt's developed "downtown" -- is unpersuasive because Paterson Plank Road provides excellent access to points north and east, including the already-residentially developed areas of Carlstadt and East Rutherford. Finally, Carlstadt did not demonstrate how the Tomu uplands, already being used for commercial purposes, would detract from, degrade, or defeat the environmental policies of the NJMC.

Table 1 summarizes my computation of RDP according to COAH methodology and results in Carlstadt's RDP of 72 units of low and moderate income housing:

Table 1:
Summary of RDP Calculation
for Carlstadt

Site	Unconstrained Area (In acres)	Units per Acre	Total Units	Set-Aside	RDP Units
Tomu Site	3.584	100	358	20%	72

I selected a density of 100 units per acre because it is consistent with the approximate average of the density approved on

the East Rutherford portion of the Tomu site by the NJMC in 1989 of 66[15] units per acre, and the recently approved density of 146[16] units per acre on the Route 3 site by the NJMC. I also took into account the Special Master's reminder that a density of 110[17] units per acre was the agreed-upon density in East/West Venture v. Fort Lee, 286 N.J. Super. 311, 322 (App. Div. 1996). Tomu's final proposal for a builder's remedy results in a density of 117[18] units per acre, which is not much more than the density I selected for purposes of computed Carlstadt's RDP.

A developer is entitled to a builder's remedy if: (1) it succeeds in Mount Laurel litigation; (2) it proposes a project with a substantial amount of affordable housing; and (3) the site is suitable, that is, the municipality fails to meet its burden of proving that the site is environmentally constrained or construction of the project would represent bad planning. Mount Laurel II, 92 N.J. at 279-280; Shire Inn, Inc. v. Borough of Avon-by-the-Sea, 321 N.J. Super. 462, 465 (App. Div.), certif. denied, 162 N.J. 132 (1999). "The builder's remedy is a device that rewards a plaintiff seeking to construct lower income housing for success in bringing about ordinance compliance through

[15] 350 units were approved on 5.286 acres of upland.

[16] 614 units were approved on 4.2 acres of upland.

[17] 585 units were approved on 4.88 acres.

[18] 420 units are proposed on 3.584 acres of upland.

litigation." Allan-Deane Corp. v. Bedminster Township, 205 N.J. Super. 87, 138 (Law Div. 1985).

Even if a developer satisfies these three prongs, it may still be disqualified from receiving a builder's remedy if it is found that the developer acted in bad faith or has used the *Mount Laurel* doctrine as a bargaining chip:

> Care must be taken to make certain that Mount Laurel is not used as an unintended bargaining chip in a builder's negotiations with the municipality, and that the courts not be used as the enforcer for the builder's threat to bring Mount Laurel litigation if municipal approvals for projects containing no lower income housing are not forthcoming. Proof of such threats shall be sufficient to defeat Mount Laurel litigation by that developer.
>
> [Mount Laurel II, 92 N.J. at 280.]

The loss of a builder's remedy to an otherwise-qualifying plaintiff-developer is neither novel, nor shocking. The interests of the absent class -- the unhoused poor -- for which the litigation is prosecuted, will not be prejudiced as long as the municipality's compliance mechanism is capable of satisfying the ultimate fair share obligation. Other land in the municipality that is identified as being realistically developable with affordable housing will absorb the disqualified plaintiff-developer's complement of low and moderate-income housing. In this case, however, no other land in either municipality has been proffered as being capable of providing affordable housing. Ironically, the NJMC, just a few months ago, squandered an

opportunity to inject affordable housing into East Rutherford as part of the 614-unit residential development approved for the Route 3 Service Road. Thus, even if some bad conduct exists on the part of plaintiff, it must be balanced by the needs of the absent class.

The record produced at trial does not support the conclusion that Tomu acted in bad faith or manifestly engaged in conduct prohibited by the *Mount Laurel* doctrine. Notwithstanding Tomu's conceded profit motivation, it cannot rightly be criticized as abusing *Mount Laurel* principles simply because of its incessant efforts to develop its land. The administrative proceedings that are pending in the Office of Administrative Law have little bearing on Tomu's present application. There is nothing contrary to the public interest for a land owner to attempt to keep as many of its development options open and available as possible. The doctrine of election of remedies is inapposite when the rights of the absent class of unsheltered poor are involved. Although there is some evidence in the record that suggests that Tomu representatives may have allowed the words "Mount Laurel Project" to slip from their lips during one or more discussions with, or in the presence of, municipal officials, I find those comments to be stray and harmless error, not worthy of a wholesale disenfranchisement that would redound to the detriment of the absent class.

No responsible local official is unaware of the obligations that the *Mount Laurel* doctrine has imposed. To argue seriously that the chief executive officers of the NJMC, East Rutherford, and Carlstadt were taken aback by mention of affordable housing in connection with the development of vacant land is almost laughable. The dreadful record of disaccomplishment of the NJMC, East Rutherford, and Carlstadt since Mount Laurel II and the adoption of the FHA speaks volumes more than an amateurish utterance by a Tomu representative of the new seven dirty words,[19] "Mount Laurel low and moderate income housing." *Mount Laurel* litigation must not devolve into a dreaded game of gotcha, where the mere expression of proscribed words results in a disqualification. Taken in context and under the totality of the circumstances I can not say that the Tomu representatives' references to potential *Mount Laurel* litigation had any negative effect upon the public interest, other than the transient righteous indignation suffered by the officials who heard the comments.

In this case, Tomu satisfies all three prongs of the three-prong test for entitlement to a builder's remedy. First, it successfully participated in obtaining summary judgment declaring East Rutherford's and Carlstadt's development regulations

[19] The original seven dirty words, of course, are attributed to comedian George Carlin. See http://en.wikipedia.org/wiki/George_Carlin (last visited on November 8, 2005). I will not repeat them here, but they may be found at FCC v. Pacifica Foundation, 438 U.S. 726, 751; 98 S. Ct. 3026, 3041; 57 L. Ed. 2d 1073, 1095 (1978).

invalid, thereby necessitating rezoning and the appointment of the Special Master. Second, it has offered to make substantial contributions to the municipalities' nonexistent stock of family-type low and moderate income housing units. Third, the municipalities have failed to demonstrate that because of substantial planning concerns, Tomu's proposed use of its land in both municipalities is clearly contrary to sound land use principles. Said another way, the competent evidence clearly establishes that the land is fully capable of being developed for Tomu's proposed development and there are neither legitimate planning concerns nor environmental constraints that would hinder a sound development. The site is qualified for affordable housing substantially in the manner proposed by Tomu.

One issue that received attention at the trial was the manner of conveying wastewater from the site. The Carlstadt inclusionary development will be serviced by the Carlstadt Sewerage Authority. The East Rutherford inclusionary development could be serviced by the East Rutherford Sewerage Authority, but Tomu wants all of the development's sewage to be serviced by the infrastructure of the Carlstadt Sewerage Authority under an inter-municipal agreement authorized by Dynasty Building Corp. v. Borough of Upper Saddle River, 267 N.J. Super. 611 (App. Div. 1993) and Samaritan Center, Inc. v. Borough of Englishtown, 294 N.J. Super. 437 (Law Div. 1996), as validated by Bi-County Dev. of Clinton, Inc. v. Borough of High Bridge, 174 N.J. 301, 327-328

(2001). Since East Rutherford enjoys its own sewer network, there is no sound reason, on the record presented in this trial, for me now to declare that Tomu is entitled to a Bi-County-like remedy. It is simply premature to engineer the wastewater management of the project, keeping in mind that Tomu has demonstrated the feasibility of dealing with its sewage discharge through either or both municipalities' infrastructure.

In light of the foregoing, I shall enter an order granting Tomu's application for a builder's remedy to allow its lands in East Rutherford and Carlstadt to be developed with a mixed use project as follows:

> The development In East Rutherford shall consist of no more than 420 residential units consisting of 360 market rate units and 60 affordable rental units, plus no more than 420 residential units consisting of 340 market rate units and 80 affordable rental units in Carlstadt. These units shall be located in two midrise buildings which height shall not exceed the lesser of Federal Aviation Administration elevation guidelines or 230 feet. All dimensional requirements of the NJMC shall be satisfied, as must all applicable requirements of the Residential Site Improvement Standards found in N.J.A.C. 5:21-1 *et. seq.*[20] In addition, there shall be no more than 38,000 square feet of "ancillary development" that shall include limited commercial facilities (such as a dry cleaner or convenience store), recreational facilities, public safety facilities, and meeting rooms. The development shall include a marina available to the public, to be overseen by the NJMC, but reserving five berths for the development or its residents. Tomu shall construct a riverwalk promenade, plus public parking, to allow access to the Hackensack River by members of the public, all as directed by the NJMC and in accordance

[20] This decision does not prohibit Tomu from applying to the appropriate agency for variances, exceptions, waivers or other relief from applicable regulations.

> with applicable law. The development shall comply with all other rules and regulations of the NJMC that are not inconsistent with this builder's remedy. Finally, the development shall comply with all Federal and local statutes, regulations, development regulations or ordinances that may apply and shall also comply with all other State laws including, but not limited to, the Fair Housing Act, N.J.S.A. 52:27D-301 *et seq.*; Freshwater Wetlands Protection Act, N.J.S.A. 13:9B-1 *et seq.*; the Endangered and Nongame Species Conservation Act, N.J.S.A. 23:2A-1 *et seq.*; the Water Supply Management Act, N.J.S.A. 58:1A-1 *et seq.*; the Water Pollution Control Act, N.J.S.A. 58:10A-1 *et seq.*; the Realty Improvement Sewerage and Facilities Act (1954), N.J.S.A. 58:11-23 *et seq.*; the Water Quality Planning Act, N.J.S.A. 58:11A-1 *et seq.*; the Safe Drinking Water Act, P.L. 1977, c.224, N.J.S.A. 58:12A-1 *et seq.*, the Flood Hazard Area Control Act, N.J.S.A. 58:16A-50 *et seq.*, and all implementing rules.

The order shall further declare that East Rutherford's and Carlstadt's land use regulations remain invalid and unconstitutional insofar as they continue past exclusionary practices. The East Rutherford and Carlstadt Planning Boards and the respective governing bodies shall immediately prepare comprehensive compliance plans (including appropriate strategies to address the indigenous and unmet needs) for each municipality, together with zoning and planning legislation to satisfy the fair share obligations of rounds one and two, and the unmet need, all in compliance with COAH regulations. They shall draft meaningful Housing Element and Fair Share Plans, together with fee ordinances (if appropriate) and spending plans that are consonant with COAH rules. They shall exercise planning discretion in deciding whether to employ a program of rehabilitation grants,

regional contribution agreements, accessory apartments, mobile homes, overlay zones, or any other incentive devices to meet the fair share and unmet need. This plan shall be completed, adopted, and presented to the court no later than February 28, 2006. In default thereof, *all* development regulations in East Rutherford and Carlstadt shall be permanently invalidated and a scarce resource order enjoining *all* land use development applications in East Rutherford and Carlstadt (whether before the Planning Board or Board of Adjustment or the NJMC) shall become automatically effective. On the other hand, if the municipalities, or either of them, comply, they will be entitled to a six-year judgment of repose commencing no earlier than February 28, 2006.

The Special Master shall regularly consult with designated representatives of East Rutherford and Carlstadt and their Planning Boards and governing bodies during the preparation of the compliance plans and he shall provide appropriate input and constructive criticism throughout the process.

IV. CONCLUSION

I understand that "no one wants his or her neighborhood determined by judges." Hills Dev. Co. v. Bernards, supra, 103 N.J. at 63-64. Nevertheless, this case demonstrates the risks that attend the failure of municipalities to advance proactively affordable housing opportunities. Hiding in plain sight of the

NJMC, each of the defendant-municipalities elected to turn a cold shoulder to the needs of those citizens most in need of decent and affordable shelter.[21] In like vein, the NJMC stood mute for years while prospects for affordable housing were lost in East Rutherford and Carlstadt, and available land grew scant. The NJMC is complicit in the municipalities' commission of constitutional torts and the silent acquiescence of conditions where not one unit of identifiable affordable housing has been built in twenty years. Where other governmental actors have failed to conform their conduct to the dictates of the constitution, it becomes the duty of the judiciary to order remediation. That, simply, is what has happened here. The stark reality of the situation is that in the absence of court intervention, low and moderate income housing would remain as illusory today as it has since the inception of the NJMC and its predecessor agency more than three decades ago.

I request that the Special Master prepare the appropriate order to memorialize this decision and submit it to all counsel and to the court as soon as practicable pursuant to R. 4:42-1(c).

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[21] As I write this opinion, I am aware that France is encountering its worst civil unrest in four decades, partly because of neglecting the shelter needs of its most economically vulnerable citizens, incongruously living in the *suburbs* of Paris. See "France Riots Spill Into 8th Day," http://www.cbsnews.com/stories/2005/11/03/world/main1006022.shtml (last visited on November 8, 2005) and *New York Times* article "Inside French Housing Project, Feelings of Being the Outsiders," http://www.nytimes.com/2005/11/09/international/europe/09projects.html (last visited on November 9, 2005). The United States, including New Jersey, has a history of *urban* violence that has been mitigated, however, -- in part -- by the creation of new housing opportunities (and some better jobs and schools) for members of economic underclasses. One of the goals of the *Mount Laurel* doctrine is to consign such unrest and violence to the dustbin of history.

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5512-05T1

TOMU DEVELOPMENT COMPANY, INC.,

Plaintiff-Respondent,

v.

BOROUGH OF CARLSTADT, and
PLANNING BOARD OF CARLSTADT,

Defendants-Appellants,

and

NEW JERSEY MEADOWLANDS
COMMISSION,

Defendant-Respondent.

DOCKET NO. A-5621-05T1

TOMU DEVELOPMENT COMPANY, INC.,

Plaintiff-Respondent,

v.

BOROUGH OF EAST RUTHERFORD, and
PLANNING BOARD OF EAST RUTHERFORD,

Defendants-Appellants,

and

NEW JERSEY MEADOWLANDS
COMMISSION,

Defendant-Respondent.

DOCKET NO. A-5741-05T1

TOMU DEVELOPMENT COMPANY, INC.,

Plaintiff-Respondent,

v.

BOROUGH OF CARLSTADT, PLANNING BOARD OF CARLSTADT, BOROUGH OF EAST RUTHERFORD, PLANNING BOARD OF EAST RUTHERFORD,

Defendants-Respondents,

and

NEW JERSEY MEADOWLANDS COMMISSION,

Defendant-Appellant.

Submitted: April 9, 2008 - Decided: August 29, 2008

Before Judges Axelrad, Payne, and Messano.

On appeal from the Superior Court of New Jersey, Law Division, Bergen County, Docket Nos. L-5894-03 and L-5895-03.

Kipp & Allen, attorneys for appellants Borough of Carlstadt and Planning Board of Carlstadt in A-5512-05T1 (Richard J. Allen, Jr., on the brief).

Calo Agostino, attorneys for appellants Borough of East Rutherford and Planning Board of East Rutherford in A-5621-05T1 (Beverly M. Wurth, on the brief).

Anne Milgram, Attorney General, attorney for appellant New Jersey Meadowlands Commission in A-5741-05T1 (Michael J. Haas, Assistant Attorney General, of counsel; Christine Piatek, Deputy Attorney General, on the brief).

Anne Milgram, Attorney General, attorney for respondent New Jersey Meadowlands Commission in A-5512-05T1 and A-5621-05T1 (Patrick DeAlmeida, Assistant Attorney General, of counsel; Christine Piatek, Deputy Attorney General, on the brief).

Sills Cummis & Gross, attorneys for respondent Tomu Development Company in A-5512-05T1, A-5621-05T1 and A-5741-05T1 (James M. Hirschhorn and Thomas Jay Hall, of counsel; Robert Kasuba, on the brief).

Respondents Borough of Carlstadt, Planning Board of Carlstadt, Borough of East Rutherford, and Planning Board of East Rutherford have not filed a brief in A-5741-05T1.

PER CURIAM

These three back-to-back appeals arise from two consolidated "builder's remedy" suits brought by plaintiff Tomu Development Company, Inc. (Tomu) alleging that two southern Bergen County municipalities, the Borough of Carlstadt (Carlstadt) and the Borough of East Rutherford (East Rutherford), and their respective planning boards,[1] engaged in patterns of exclusionary zoning that failed to address their Mount Laurel[2] affordable housing obligations. Because the land

[1] In this opinion, the planning boards are encompassed in the reference to the municipalities.

[2] Southern Burlington County NAACP v. Mount Laurel Township, 67 N.J. 151 (Mount Laurel I), cert. denied and appeal dismissed, 423 U.S. 808, 96 S. Ct. 18, 46 L. Ed. 2d 28 (1975); Southern (continued)

upon which Tomu proposed to build a development, including affordable housing, lay wholly within the statutorily created Meadowlands District, the New Jersey Meadowlands Commission (Meadowlands Commission) was joined as a party. See N.J.S.A. 13:17-11. The municipalities and Meadowlands Commission appeal from the orders declaring Tomu was entitled to a builder's remedy, allowing it to develop the site with an affordable housing component. The court's orders were based on its findings that the municipalities "failed to comply with their express obligations to provide realistic opportunities for affordable housing within their borders," the Meadowlands Commission "implicitly fostered the long-standing municipal failures through its benign neglect of the housing needs of the poor[,]" and that none of the defendants "demonstrated that the site is environmentally constrained, that construction of a high-density mixed-use project would represent bad planning," or that Tomu prosecuted the "action in bad faith." The municipalities also appeal from the order appointing a private person as a "Mount Laurel Implementation Monitor" to make all land use decisions for the two municipalities, including appearing before the Meadowlands Commission on their behalf. We

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(continued)
Burlington County NAACP v. Mount Laurel Township (Mt. Laurel II), 92 N.J. 158 (1983).

affirm substantially for the cogent and comprehensive reasons articulated by Judge Jonathan Harris in his December 3, 2004 oral decision, November 10, 2005 written opinion, and May 19, 2006 oral decision and written opinion.

The subject property is an irregularly shaped plot of approximately 26.9 acres, with 4.9 acres in Carlstadt (block 136, lots 14 and 15) and 22 acres in East Rutherford (block 107.03, lots 2, 5, and 7[3]). In Carlstadt only about 3.584 acres are developable uplands and in East Rutherford, 5.286 acres are developable uplands. The site is located at the terminus of Paterson Plank Road, on the banks of the Hackensack River and is separated from the Xanadu Development by the New Jersey Turnpike.

Tomu purchased the property from Riverview Associates in 1995. In 1989, contingent approvals were granted to permit construction of 350 residential units, of which 70 were required to be devoted to affordable housing, a 100-suite hotel, a 1,200-seat banquet facility, two restaurants, a fitness center, a multi-level parking facility, and a 240-slip marina. The conditionally approved plan included residential uses only in East Rutherford, with no housing in Carlstadt. The approvals

[3] Formerly designated as block 107A, lots 59A, B, C, D and L and 60B, and block 108A, lots 27C, 32C and 33C.

lapsed in 1999, and Tomu appealed administratively.[4] The land upon which Tomu proposed to build the development, straddling the boundary between Carlstadt and East Rutherford, was located within the Commercial District and Waterfront Recreational zone of the Meadowlands District. A certain measure of residential use was permitted on all of Tomu's uplands until the 2004 amendment to the Meadowlands District's Master Plan, after commencement of the present action. The Amendment changed the zoning of the site from Waterfront Development to Waterfront Recreation, which did not allow for housing.

In August 2003, Tomu filed exclusionary zoning complaints against the municipalities and thereafter the Meadowlands Commission, seeking a builder's remedy for permission to construct 988 residential units, divided equally between the two municipalities. The development proposal was thereafter redefined to consist of 420 housing units (360 market rate units and 60 affordable rental units) in East Rutherford, and an

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[4] See Riverview Associates v. New Jersey Meadowlands Commission, OAL HMD 1118-00, initial decision (May 1, 2006), http://lawlibrary.rutgers.edu/oal/search.html> (holding that Meadowlands Commission's sudden denial of the extension in December 1999 was fundamentally unfair and the extension should be granted); Riverview Associates v. New Jersey Meadowlands Commission, OAL HMD 1118-00, final decision (July 25, 2007), http://lawlibrary.rutgers.edu/oal/search.html> (rejecting the ALJ's decision and affirming the Commission's denial); Riverview Associates v. New Jersey Meadowlands Commission, A-151-07T3 (appeal pending).

additional 420 housing units (340 market rate units and 80 affordable rental units) in Carlstadt, located in two mid-rise buildings, plus approximately 38,000 square feet of "ancillary development" of limited commercial, recreation, and environmental facilities.

On October 14, 2004, the Meadowlands Commission filed a motion for summary judgment seeking to dismiss Tomu's builder's remedy. It contended that Tomu had ample opportunity to construct the seventy affordable housing units on the site but failed to do so and that the newly adopted Master Plan and regulations appropriately concluded the site was not deemed suitable for residential uses. The Meadowlands Commission also argued it should be dismissed from the action, primarily based on the claim that Tomu failed to exhaust administrative remedies against it. The municipalities filed cross-motions for partial summary judgment seeking to determine their Mount Laurel construction obligations as zero and to set their rehabilitation obligations, and to dismiss Tomu's builders remedy claim. Tomu also filed a motion for partial summary judgment, seeking a declaration that the municipalities' land use ordinances failed to comply with their Mount Laurel obligations to provide a reasonable opportunity for low and moderate income housing within their borders. Tomu additionally sought the appointment

of a Special Master to assist the court and parties in fashioning constitutional compliance.

Following argument on December 3, 2004, and memorialized in orders on that date, the court granted Tomu's motion, declaring Carlstadt's and East Rutherford's land use ordinances were unconstitutional for failing to provide a realistic opportunity for the provision of their fair shares of low and moderate income housing. It further ordered that an attorney, Robert T. Regan, be appointed as the Special Master to assist the municipalities in complying with their Mount Laurel obligations. The court also denied the Meadowlands Commission's and municipalities' cross-motions. The municipalities filed appeals from these orders, which pursuant to Tomu's motion, we dismissed as interlocutory on March 16, 2006 (A-2373-05T5).

On February 1, 2005, Tomu filed a motion with supporting certifications seeking entry of a "scarce resources" order, asserting the land and infrastructure needed for affordable housing was scarce in the municipalities. Carlstadt filed several certifications in opposition to the motion. Following oral argument, the court requested a Special Master's report on the issue, which was completed on April 13, 2005. Carlstadt and the Meadowlands Commission each moved for an order rejecting some of the Master's recommendations. On May 13, 2005 the court

entered an order declaring that land, public potable water supply, and sewerage capacity constituted scarce resources in Carlstadt and East Rutherford, including the parts of those municipalities that lay in the Meadowlands District under the jurisdiction of the Meadowlands Commission. The court restrained the municipalities from approving any new use of or access to those scarce resources without court approval, unless the uses fell within certain exceptions.

On June 13, 2005, the Special Master issued his report and recommendations to the court regarding the builder's remedy issue. The Meadowlands Commission moved for reconsideration of the court's denial of summary judgment, or, alternatively, for holding the litigation in inactive status until completion of pending administrative actions, which the court denied.

Judge Harris conducted a nine-day bench trial on the consolidated complaints from August 8 through November 3, 2005. In addition, he viewed the property in the presence of the attorneys under the procedures of Morris County Land Improvement Co. v. Township of Parsippany - Troy Hills, 40 N.J. 539, 548-49 (1963). On November 10, 2005, the court issued a thirty-page opinion, concluding that Tomu had proved its entitlement to a builder's remedy and that its lands in East Rutherford and Carlstadt may be developed with the proposed mixed-use project

because the municipalities failed to meet their obligations to provide realistic opportunities for affordable housing within their borders and the Meadowlands Commission "implicitly fostered" those municipal failures through its "benign neglect of the housing needs of the poor." The court further held the land use regulations of the municipalities remained invalid and unconstitutional insofar as they continued past exclusionary practices, and directed the municipalities to immediately prepare comprehensive compliance plans and appropriate zoning and planning legislation to meet their affordable housing obligations. An order was entered on November 28, 2005.

On February 28, 2006 and April 10, 2006, Carlstadt and East Rutherford, respectively, filed their affordable housing compliance plan documents and sought approval of the plans and judgments of repose that would protect them from builder's remedy litigation. The Special Master thereafter filed a report analyzing the Carlstadt and East Rutherford compliance plans. On April 26, 2006, the court heard argument on the motions.

The court rendered its decision on the record on May 19, 2006, followed by a written opinion later that day, concluding the municipalities continued to be recalcitrant in implementing their Mount Laurel obligations and consequently creating, as an independent judicial officer, a "Mount Laurel Implementation

Monitor" to oversee all land use authority in the two municipalities. The monitor's duties included preparing an affordable housing plan for each municipality and acting in place of the municipality in connection with development applications in the jurisdiction of the Meadowlands Commission. The court designated Regan, the Special Master, as the Implementation Monitor. The decision was memorialized in a final judgment of June 1, 2006. The trial court denied a stay. In late June 2006, Carlstadt, East Rutherford and the Meadowlands Commission filed appeals. On September 25, 2006, we granted Carlstadt's motion for a stay pending appeal (A-5512-05T1), which the parties agreed would also apply to East Rutherford.

On appeal, the three appellants argue the court erred in awarding Tomu a builder's remedy because: (a) the Meadowlands Commission did not zone the site for residential use; (b) the property was not suitable for affordable housing; and (c) Tomu improperly used the builder's remedy as a threat and failed to conduct good faith and pre-litigation negotiations. The municipalities additionally argue the court erred in: (1) ruling the municipalities failed to meet their Mount Laurel affordable housing obligations and develop appropriate affordable housing compliance plans; (2) imposing the punitive ruling of appointing

a private person as an "Mount Laurel Implementation Monitor" which removed authority from the municipalities' planning and zoning authority and did not benefit the municipalities; and (3) imposing an unconstitutional prior restraint on public officials' protected speech, and interfering with their duties owed to the public and with their constitutional rights to petition other branches of government for redress on public policy matters by appointing a "Mount Laurel Implementation Monitor." We are not persuaded by appellants' arguments and affirm.

In January 1969 the Legislature enacted the Hackensack Meadowlands Reclamation and Development Act, N.J.S.A. 13:17-60 to -76. Meadowlands Reg'l Dev. Agency v. State, 112 N.J. Super. 89, 124 (Ch. Div. 1970), aff'd, 63 N.J. 35, appeal dismissed, 414 U.S. 991, 94 S. Ct. 343, 38 L. Ed. 2d 230 (1973). The Act created the Hackensack Meadowlands Commission, now called the Meadowlands Commission, to oversee the orderly development of the Hackensack Meadowlands and to "provide a means to reclaim, plan, develop and redevelop 21,000 acres of public and private land in the Meadowlands District[], consisting of saltwater swamps, meadows and marshes, and related uplands." Town of Secaucus v. Hackensack Meadowlands Dev. Comm'n, 267 N.J. Super. 361, 367 (App. Div. 1993), certif.

denied, 139 N.J. 187 (1994). In establishing the Meadowlands District, the Legislature recognized that "this land acreage is a land resource of incalculable opportunity for new jobs, homes and recreational sites, which may be lost to the State through piecemeal reclamation and unplanned development" and that an "orderly, comprehensive development of these areas, due to their strategic location in the heart of a vast metropolitan area with urgent needs for more space for industrial, commercial, residential, and public recreational and other uses, can no longer be deferred[.]" N.J.S.A. 13:17-1. The District's boundaries, set out at N.J.S.A. 13:17-4, encompass parts of fourteen municipalities, including Carlstadt and East Rutherford.

In In Re Adoption of N.J.A.C. 19:3, 19:4, 19:5 & 19:6, 393 N.J. Super. 173 (App. Div. 2007), certif. denied, 194 N.J. 267-68 (2008), we held that under the New Jersey Constitution, as interpreted by the Mount Laurel cases, the Meadowlands Commission has an affirmative zoning and planning role to play in providing for affordable housing located in the Meadowlands in consultation with the Council on Affordable Housing (COAH). This decision, which post-dated Judge Harris' rulings, undercuts appellants' argument that Tomu could not obtain a builder's remedy because its property was in the Meadowlands District as

the trial court was without jurisdiction to make such award because the municipalities did not have zoning authority for that property and the trial court was without authority to require the Meadowlands Commission, a State agency, to change its zoning to allow affordable housing on the site.

The core inquiry in Mount Laurel cases is whether a municipality has met its constitutional obligation by "affirmatively affording a realistic opportunity for the construction of its fair share of the present and prospective regional need for low and moderate income housing." Mount Laurel II, supra, 92 N.J. at 205. The Supreme Court firmly established that in most instances where a developer succeeds in Mount Laurel litigation and proposes a project that would provide a substantial amount of lower income housing, the court should grant a builder's remedy. Id. at 278-81. "A developer is entitled to a builder's remedy if: (1) it succeeds in Mount Laurel litigation; (2) it proposes a project with a substantial amount of affordable housing; and (3) the site is suitable, that is, the municipality fails to meet its burden of proving that the site is environmentally constrained or construction of the project would represent bad planning." Mount Olive Complex v. Twp. of Mount Olive, 340 N.J. Super. 511, 525 (App. Div. 2001), remanded on other grounds, 174 N.J. 359 (2002).

Judge Harris reviewed voluminous reports and certifications in connection with the motions and trial. He also viewed the site and during the nine-day trial heard extensive testimony from Tomu's planner, Joseph Burgess; the municipalities' planner, Jill Hartmann; and Special Master Regan, regarding the second and third round Fair Share Housing obligations of the municipalities,[5] and all aspects of site suitability and feasibility of the municipalities' proposed plans. Judge Harris made express credibility determinations. For example, he discredited Hartmann's opinion that Carlstadt had a zero realistic development potential, and explained in detail the reasons why he disagreed with the Master's conclusion that East Rutherford made a good faith effort to submit a compliant housing element.[6] The court made extensive findings, holding

[5] COAH revised its third round substantive rules in response to the decision in In Re Adoption of N.J.A.C. 5:94 & 5:95, by New Jersey Council on Affordable Housing, 390 N.J. Super. 1 (App. Div.), certif. denied, 192 N.J. 72 (2007). N.J.A.C. 5:96, 5:97 (effective June 2, 2008), appeals pending, IMO The Revised Third Round Regulations Promulgated by the NJ Council on Affordable Housing, N.J.A.C. 5:96 and 5:97, A-5382-07T3, A-5404-07T3, A-5423-07T3, A-5424-07T3, A-5429-07T3, A-5436-07T3, A-5451-07T3, A-5455-07T3, A-5458-07T3, A-5460-07T3, A-5461-07T3, A-5590-07T3, A-5752-07T3, A-5756-07T3, A-5757-07T3, A-5758-07T3, A-5759-07T3, A-5760-07T3, A-5761-07T3, A-5763-07T3, A-5765-07T3, A-5767-07T3, A-5871-07T3, and A-5920-07T3.

[6] Regan reported that Carlstadt did not make a good faith effort to comply, particularly noting its continued opposition to residential use in the Meadowlands District.

development within the municipal borders. Another is to suspend all legislative barriers that prohibit multi-family uses while at the same time ensuring that any such development includes affordable housing. It is no answer that the court should give East Rutherford and Carlstadt one more chance to comply; that they misunderstood the court's direction; and now they will get it right. The reason for the absence of this last bite of the apple remedy is two-fold. First the Supreme Court in Mount Laurel II would not countenance such a transparent delay tactic. Second, any further lag would only increase the detriment to plaintiff and the third party beneficiaries of plaintiff's builder's remedy by delaying the entry of a final, appealable judgment, again putting off into the future the ultimate disposition of this litigation. I must act *now* to end this litigation in a way that protects and preserves the interests of all concerned. One remedy that I have considered and rejected is the use of contempt proceedings against individual governmental actors or the municipal corporations themselves. Although monetary sanctions might well incite the defendant municipalities into action, and I truly understand the power of the wallet, I intend to avoid the replication of local government errors that were committed in the past. Another reason I have eschewed the traditional contempt mode of ensuring compliance is to avoid the martyrdom syndrome that some public officials exploit. Rather than involve those governmental actors who have failed the public in the past, I have elected to simply remove them from the process and substitute a court-appointed monitor to oversee land development activities in East Rutherford and Carlstadt for the foreseeable future.

. . . .

> The missing link in all the municipalities' compliance efforts has been the land in the jurisdiction of the New Jersey Meadowlands Commission. Contrary to plaintiff's view that East Rutherford and Carlstadt are required to lobby *affirmatively* for housing within their borders but beyond their control, I think that the municipalities should not be required to advocate purposefully positions that their elected officials deem contrary to the local public interest. This is especially so if it turns out that the New Jersey Meadowlands Commission is itself someday authoritatively obligated to ensure compliance with the Mount Laurel doctrine. However, recalcitrant municipalities, such as the defendants here, should not be allowed to inflict damage to affordable housing opportunities by either their active discouragement of such housing opportunities or by silence . . . a Mount Laurel Implementation Monitor shall be appointed to speak on behalf of each municipality on matters affecting affordable housing in the New Jersey Meadowlands District in order to ensure that the inertia engendered by each municipality will no longer impede appropriate affordable housing opportunities on lands in these municipalities under the control of the New Jersey Meadowlands Commission.

The appointment of the Implementation Monitor, with defined powers, is an inspired and appropriate exercise of the court's judicial powers, consistent with the Mount Laurel decisions, to assume oversight responsibility for the constitutional right to have zoning throughout New Jersey appropriately accommodate affordable housing where, as here, the municipalities neglected

such constitutional obligations. Judge Harris' ruling was creative and insightful. It was definitely not punitive. Rather than hold the municipal officials in contempt, which would have been a knee-jerk reaction, the judge wisely looked for a remedy that would move the case forward. The ruling was intended to avoid collaboration between the municipalities and Meadowlands Commission that would continue the pattern of non-compliance. It was also intended to allow the Special Master to continue to implement the Mount Laurel doctrine continuously ignored by the municipalities by seeking rezoning of the Tomu site and promoting other changes necessary to permit realistic opportunities for affordable housing in the municipalities. Noting there were limits on available land in the municipalities and the municipalities' recalcitrance in fulfilling their obligations, as well as the prior lost opportunities for affordable housing on District lands which should not be repeated, Judge Harris appropriately concluded it was imperative for a neutral person to seek to advance Mount Laurel goals on behalf of the municipalities before the Meadowlands Commission.

We perceive of no constitutional infirmity in this appointment. The issue involves who may speak to the Meadowlands Commission regarding land use matters of State constitutional significance, not the denial of governmental

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March 22, 2016

Via Overnight Mail and E-Mail
Richard J. Allen, Jr., Esquire
Kipp & Allen, LLP
52 Chestnut Street
P.O. Box 133
Rutherford, NJ 07070-1704

Dennis C. Ritchie, Esquire
15 Union Avenue
Rutherford, NJ 07070

Re: ***In the Matter of the Application of the Borough of East Rutherford for a Judgment of Compliance and Repose***
Docket No. BER-L-5925-15
In the Matter of the Application of the Borough of Carlstadt for a Judgment of Compliance and Repose
Docket No. BER-L-6392-15

Dear Mr. Allen and Mr. Ritchie:

As you are aware, our office represents Defendant-Intervenor, Tomu Development Co., Inc., ("Tomu") in the above referenced matters. Tomu is the owner of several adjoining parcels of land, which are known and designated as Block 136, Lots 14 and 15 on the tax maps of the Borough of Carlstadt, and Block 107.03, Lots 2, 5 and 7 on the tax maps of East Rutherford (collectively, the "Property"). The Property is approximately 26.9 acres, of which 4.9 acres is located in Carlstadt and 22 acres is located in East Rutherford.

I know Mr. Allen is familiar with the background history of the Property, but I include a brief summary of the background. On August 14, 2003, Tomu filed two lawsuits against East Rutherford and Carlstadt seeking builder's remedies for the municipalities' exclusionary zoning practices. The matters were consolidated, and by Opinion dated November 10, 2005 and Order dated November 28, 2005, Judge Harris awarded Tomu a builder's remedy to construct a 420-unit inclusionary residential development within East Rutherford, consisting of 360 market rate units and 60 affordable units, and a 420-unit inclusionary residential development within Carlstadt, consisting of 340 market rate units and 80 affordable units. The trial court entered final judgment on June 1, 2006 and Carlstadt and East Rutherford appealed to the Appellate Division, and then to the Supreme Court. Their petition to the Supreme Court was denied on October 5, 2009.

Given the delays in the appeal process, the real estate market encountered a severe economic depressing lasting from 2007 until 2015. See N.J.S.A. 40:55D-136 et. seq. Now that

these conditions have improved, Tomu is moving forward with the development of the Property and is actively seeking to market the Property. The only reason development has not progressed beyond marketing is market conditions, which have been depressed since 2009, when Carlstadt and East Rutherford exhausted its appeals.

Please let me know if there is any additional information you require. Thank you for your cooperation in this matter.

Very truly yours,

BISGAIER HOFF, LLC

Robert A. Kasuba

cc: Tomu Development Co., Inc. (via e-mail)

[T007-0003/325782/1]

New Jersey Meadowlands Commission

1 DeKorte Park Plaza Lyndhurst, NJ 07071 Phone: 201.460.1700 Fax: 201.372.0161
www.njmeadowlands.gov

CONDITIONAL ZONING CERTIFICATE

June 08, 2012

File # 11-249, Group @ Route 3/Equinox 360 - Residential Development
Block 108.04, Lot 5
ROUTE 3 E (SERVICE ROAD)
Borough of East Rutherford

OWNER	APPLICANT / CONTACT
Larry Pantirer Group at Route 3, LLC 16 Micro Lab Rd. Livingston, NJ 07039	R. James Puleo Group at Route 3, LLC 16 Micro Lab Rd. Livingston, NJ 07039

☒ New Building	☐ Tanks	☐ Monopole	☐ Recycling Areas	☐ Interior Alteration related to Use Change
☐ Addition	☐ Fences	☐ Antenna	☐ Site Improvements	☐ Equipment

This Office has recently completed its review of your zoning certificate application and related plans for a new 316-unit residential development, consisting of 284 market-rate units and 32 affordable units.

Based on our review, we have determined that the application conditionally complies with the Commission's Route 3 East Redevelopment Area Zoning Regulations, and we are therefore approving your Conditional Zoning Certificate with the condition(s) listed in Attachment A.

This letter shall serve as your Conditional Zoning Certificate, designated CZC-11-249, and shall be valid for a period of one year.

THIS IS NOT AN APPROVAL TO START CONSTRUCTION. Applications must be made to the Borough of East Rutherford for a building permit.

Please find enclosed a copy of the approved plan(s). A description of the approved plan(s) are listed in Attachment B.

The applicant is hereby advised of his responsibility to investigate and obtain all federal, state and local permits which may pertain to his proposal or project. The New Jersey Meadowlands Commission will not be held liable for any damage which may result from the applicant's failure to obtain the approvals from all respective agencies having jurisdiction. This Office must receive copies of all federal, state, and local permits which may pertain to the proposal before it will issue a Certificate of Completion. If this file is related to the construction of new buildings and additions, please find enclosed a partially completed Elevation Certificate which must be completed by a Professional Land Surveyor and returned to this Office together with a signed and sealed as-built plan before a Certificate of Completion is issued.

Any person who claims to be aggrieved by this decision may request an appeal pursuant to N.J.A.C. 19:4-4.19. A written request for such an appeal must be filed, by certified mail, with the Executive Director within fifteen (15) days of the date of this decision. The request for an appeal shall specify the grounds therefore. Upon grant of the request for an appeal, the Executive Director or his designee shall transmit the matter to the Office of Administrative Law for a hearing.

If there are any questions regarding this approval, please contact Mia Petrou of this Office at (201) 460-4672.

If you should have any questions regarding the building permit process, please contact Ralph Venturini of this Office at (201) 460-4639.

RECOMMENDED BY: Mia A. Petrou
Mia A. Petrou, P.P., AICP
Senior Planner

APPROVED BY:
Sara J. Sundell, P.E., P.P.
Chief Engineer

cc: Frank Recanati, East Rutherford Construction HMMC Official
Frank Regan, Esq.
Matthew Greco, P.E.

New Jersey Meadowlands Commission

1 DeKorte Park Plaza Lyndhurst, NJ 07071 Phone: 201.460.1700 Fax: 201.372.0161

www.njmeadowlands.gov

ATTACHMENT A

June 08, 2012

File # 11-249, Group @ Route 3/Equinox 360 - Residential Development
Block 108.04, Lot 5
ROUTE 3 E (SERVICE ROAD)
Borough of East Rutherford

a. All conditions of the NJMC variance approval dated March 15, 2012 shall apply, as follows:

1. The residential development shall include a minimum of 152 one-bedroom market rate units and a maximum of 132 two-bedroom market rate units. The development shall not exceed 316 residential units.

2. The number of parking spaces required for the development shall be modified and determined as follows: a minimum of one parking space shall be provided per affordable unit, a minimum of 1.5 parking spaces shall be provided per market rate unit, and the remaining 102 parking spaces of the 560 spaces proposed shall be reserved for visitors and may not be assigned to any particular unit. In the event that the number of residential units in the development decreases, the minimum number of visitors spaces required shall equal 35 percent of the total number of market rate units in the development.

3. The applicant shall submit a parking management plan for the residential development that addresses the methodology for the assignment and control of parking spaces to individual units, as well as the allocation of visitor parking spaces. The plan shall also address how on-site parking will be monitored to ensure adequate parking is available for visitors and residents. The plan shall be submitted to the NJMC for review and approval prior to the issuance of a zoning certificate for the development.

4. Upon build-out and 85 percent occupancy of the development, the applicant may prepare a parking study analyzing data collected over a period of one full year. The parameters of the parking study shall be approved by the NJMC prior to the start of the study. If supported by the results of the parking study, the visitor parking allocation may be reduced by the NJMC Chief Engineer, but may not be reduced to less than 25 percent of total number of market rate units. The remaining spaces may then be available for assignment to residents.

5. To justify their requested variance for a reduction in the NJMC's residential parking requirements, the applicant contends that they will provide for residents private shuttle service to mass transit opportunities in the area. In order to accommodate residents of a facility with limited parking space availability, the applicant shall provide an ongoing direct connection to such mass transit opportunities, including local commuter rail stations and NJ Transit bus stops. The applicant shall either institute their own independent shuttle service or contract with an outside shuttle service, such as Meadowlink. The applicant shall provide the NJMC with a plan, prior to the issuance of any occupancy approvals, indicating how they intend to provide a continual shuttle service.

b. The approved parking management plan shall be reviewed and, if deemed necessary by the Chief Engineer, revised, when the subject development achieves 85 percent occupancy and at one year of full occupancy. The NJMC reserves the right to require review of the parking plan and/or preparation of parking monitoring surveys on an as-needed basis.

c. The project shall comply with any applicable affordable housing requirements of the State of New Jersey and NJMC.

d. Prior to the issuance of a certificate of occupancy and/or certificate of completion, the applicant shall provide photographs showing the condition of the tide gate and riprap apron. The applicant's engineer shall inspect the outlet and provide a signed and sealed statement indicating that the tide gate is functional and the existing riprap apron is in satisfactory condition.

e. The lighting plan is not approved at this time, and shall be revised to indicate an average to minimum uniformity ratio not exceeding 4:1.

New Jersey Meadowlands Commission

1 DeKorte Park Plaza Lyndhurst, NJ 07071 Phone: 201.460.1700 Fax: 201.372.0161
www.njmeadowlands.gov

ATTACHMENT B

June 08, 2012

File # 11-249, Group @ Route 3/Equinox 360 - Residential Development
Block 108.04, Lot 5
ROUTE 3 E (SERVICE ROAD)
Borough of East Rutherford

Please find enclosed a copy of the approved plans as follows:

A. The following plans prepared by Matthew A. Greco, P.E., McNally Engineering, LLC, dated 08/10/2011, and revised through 04/18/2012, unless otherwise noted, entitled:
Sheet CS-1, "Cover Sheet";
Sheet SP-1, "Site Plan";
Sheet GD-1, "Grading and Drainage Plan";
Sheet UP-1, "Utility Plan";
Sheet LA-1, "Landscape and Pedestrian Circulation Plan";
Sheet CD-1, "Construction Details;
Sheet TT-1, "Truck Turning Analysis;"
Dwg. UNI-1, "Unit Calculations" (05/22/2012)

B. The following plans and reports prepared by Christopher J. Lessard, R.A., Lessard Design, Inc., entitled and dated as noted:
C0.1 Cover Sheet (9/21/11)
A1.1 Lobby Level Plan (9/19/11)
A1.2 Upper Garage Level Plan (9/19/11)
A1.3 Plaza Level Plan (9/21/11)
A1.4 2nd & 3rd Level Plan (9/21/11)
A1.5 4th Level Plan (9/19/11)
A1.6 Roof Plan (9/19/11)
A2.1 North Elevation(8/12/11)
A2.2 West Elevation (8/12/11)
A2.3 South Elevation (8/12/11)
A2.4 East Elevation (8/12/11)
A3.1 Section (9/21/12)
E101 Lobby Level Lighting Plan (5/11/12)
E103 Upper Garage Level Lighting Plan (5/11/12)

C. "Parking Management Plan," by Robert Jorgenson, R.A., Minno and Wasko Architects, dated 03/22/2012, with attached Parking Management Program summary dated 05/11/2012.

BOROUGH OF EAST RUTHERFORD
ZONING BOARD OF ADJUSTMENT

RESOLUTION NO. 06-06

APPLICATION OF 132 UNION AVENUE, L.L.C.
AMENDED SITE PLAN APPROVAL WITH DESIGN WAIVERS AND BULK VARIANCES
APPROVED JANUARY 4, 2007
MEMORIALIZING RESOLUTION ADOPTED FEBRUARY 1, 2007
PRIOR APPROVAL

WHEREAS, on June 1, 2006 the Board adopted a resolution granting 132 Union Avenue, L.L.C. (the "Applicant") approval of a variance pursuant to N.J.S.A. 40:55D-70(D) 5 and 6 so as to permit construction and use of a 32 unit multi-family residential project consisting of three buildings with ancillary parking (the "Project") together with site plan approval and related bulk variances; and

WHEREAS, financial factors have required Applicant to revise the Project; and

WHEREAS, Applicant has applied to the Zoning Board of Adjustment for Amended Site Plan Approval to modify the Project to reduce the number of buildings on site from three buildings to 2 buildings and to, among other things, change the bedroom mix of the Project from three - 3 bedroom units and 2 1-bedroom units to thirty - 2 bedroom units and two 1 bedroom units with various other changes as more particularly described on the Amended Site Plan (the "Amended Project"); and

WHEREAS, the applicant is contract purchaser of the subject property known as Block 97, Lots 1, 2, 3 and 4 (the "Site"); and

WHEREAS, the property is located in the NC, "Neighborhood Commercial" Zone; and

WHEREAS, Applicant has submitted the following documents in support of this Application for Amended Site Plan Approval, all prepared by CPA Architecture, Albert Arencibia, R.A. dated September 1, 2006 entitled "Proposed Multi-Family Complex: (32 Units) 30 - 2 bed rm units 2 - 1 bed rm units at: 132 Union Avenue, East Rutherford, N.J. Lots 1, 2, 3 and 4, Block 97." Which include the following:

T1 Survey, 200 Radius Map and Property Owner List, Zoning Map, Key Map and Zoning Information

T2 Site Plan, Site Details, Soil Erosion and Sediment Control Notes & Details

T3 Utility Map and Details

A1 Site Plan, Affordable Unit Floor Plan

A2 Typical Floor Plans and Elevations

WHEREAS, the Board held a public hearing on the application on January 4, 2007, pursuant to public notice at the Municipal Building, East Rutherford, New Jersey; and

WHEREAS, the Board considered the arguments of J. Alvaro Alonso, Esq., attorney for the applicant, the testimony of the applicant's expert witnesses, Katherine Gregory, P.P., and Albert Arencibia, A.I.A., Joseph Staigar, P.E. (as to traffic) and Carl Jenne, P.E. (as to drainage), and the report of the Borough Planner, Jill Hartmann, P.P.; and

WHEREAS, at its January 4, 2007 meeting the Board considered the evidence produced and it granted the requested relief subject to a number of conditions including a memorialization resolution; and

WHEREAS, the Board does hereby intend to memorialize the approvals made on January 4, 2007, subject to the conditions set forth herein.

NOW, THEREFORE, BE IT RESOLVED that:

A. **Finding of Fact**.

The Board makes the following findings of fact on this application:

1. **The Prior Resolution.**

On June 1, 2006 the Board adopted a Resolution granting various approvals for the Project to the Applicant. A copy of that Resolution is attached hereto as Exhibit "A". The Board incorporates the terms and conditions of that Resolution as if set forth in this Resolution at length. All of the terms and conditions of the June 1, 2006 Resolution shall remain in full

force and effect except as specifically modified by this Resolution.

2. **Applicant's Amended Site Plan.**

2.1 Applicant proposes to modify the Project as described in the Amended Site Plan. This Amended Project represents the same per unit density approved in the June 1, 2006 resolution; however, it represents a net decrease in 30 bedrooms thereby reducing the effective density.

2.2 Applicant proposes in the Amended Project a building height of 44' 6" and 4 stories while the zoning ordinance only permits 35 feet and 3 stories.

2.3 All parking for the Amended Project will be provided on-site. The parking will have ingress and egress from both Winter's Place and Union Avenue. A total of 68 parking spaces are proposed. Of those, 36 spaces are located within the buildings to be constructed the remainder are outside.

2.4 The building setbacks will be modified from those provided for the June 1, 2006 resolution.

2.5 The impervious coverage of the Site is reduced from 100% in its current configuration to 32.77%. Accordingly, there is an increase in the amount of open space in the Amended Project.

2.6 A landscaped area and pool recreation play area will be created along Winters Place (in the general area of the now-deleted third building) for use of the residents of the Amended Project.

3. **The Impact of the Project.**

The Amended Project will have a no traffic impact different from the proposal approved in the June 1, 2006 Resolution on surrounding streets.

4. **The East Rutherford Master Plan and State Plan**

The findings of the Board with regards to the East Rutherford Master Plan and the New Jersey State Plan as set forth in the June 1, 2006 Resolution are incorporated herein by reference.

BE IT FURTHER RESOLVED, that the Board, after considering the testimony and questions raised above, makes the following conclusions of law:

1. **The Zoning Ordinance**.

1.1 The Board incorporates the conclusions of law found in Section 1 of the June, 2006 Resolution.

1.2 In addition to, or in lieu of, the non-comformities described in the June 1, 2006 resolution, the Amended Project does not comply with the following zoning requirements within the NC Zone:

	Required	Proposed
Minimum Setback - all yards	30 Feet front 30 Feet Side	4' 3" Front 3' 9" Side
Maximum Height	35 Feet 4 Stories	44 ~~Inches~~ ~~44 feet~~ inches 10 Feet - 6 Inches 4 stories
Maximum Distance Between Buildings	30 Feet	58.3 Feet

1.3 The Project satisfies the off-street parking requirements set forth in the East Rutherford Site Plan Review Ordinance and the New Jersey Residential Site Improvement Standards.

2. **As to the D5 and D6 Variance Applications**. The Board finds that the Amended Site Plan has no impact on the D5 and D6 variance granted in the June 1, 2006 Resolution.

3. **As to the C (Bulk) Variance Applications**.

3.1 Except as modified herein, the bulk variances approved in the June 1, 2006 resolution are reaffirmed. The bulk variances described in Conclusion 1.2 above are granted for the reasons set forth in this resolution.

3.2 The Board finds that the grant of the variances will allow the construction of the proposed development thereby bring the benefits described above to the community.

3.3 In light of the factual findings described above, the bulk variances will cause no substantial detriment to the public good nor any substantial impairment of the zone plan or Zoning Ordinance.

the grant of the bulk variances described in this resolution are not inconsistent with the intent and purpose of the Master Plan and Zoning Ordinance nor will it negatively impact the purpose of the Master Plan and Zoning Ordinance and will not present a substantial detriment to the public good.

4. **As to the Amended Site Plan Application**.

4.1 The Applicant's Amended Site Plan submitted with the Application is in conformity with the Land Subdivision and Site Plan Review Ordinance of the Borough of East Rutherford and the Municipal Land Use Law.

4.2 The development contemplated by the Application would not impair the intent and purpose of the Site Plan Ordinance of the Borough of East Rutherford and it would not be detrimental to the public good.

4.3 The Board has determined that certain conditions are necessary to protect the public interest in this Application and the Applicant has agreed to comply with those conditions as a requirement for site plan approval.

4.4 In addition to the waivers approved in the June 1, 2006 resolution, the Board hereby grants the following waiver from the terms of the Site Plan ordinance and the Residential Site Improvement Standards:

Site plan ordinance and N.J.A.C. 5:21-4.16(c) (Table 4.5)	requires parking aisle width of 24 feet, 22 feet width proposed

BE IT FURTHER RESOLVED, by the Zoning Board of Adjustment of the Borough of East Rutherford, that the application for Amended preliminary and final site plan approval with waivers and for the bulk variances all as described above submitted by 132 Union Avenue, L.L.C. is hereby approved, subject to the following conditions, each of which is deemed necessary to permit the application for development to meet the requirements for use variance and site plan approval:

1. No construction permit shall be issued until all conditions set forth herein, and in the June, 2006 Resolution, except conditions 7, 8, 11, 13, and 17 of that Resolution, have been satisfied.

2. Construction of the improvements on the site shall be in strict accord with the plans submitted to the Zoning Board and in the record made by Applicant before the Board except as provided in this resolution or any other subsequent resolution of the Zoning Board.

3. The exterior façade and finishes of the buildings to be constructed shall be as described in the plans and in the testimony before the Zoning Board. The certification of the Borough Planner shall evidence compliance with this condition. Any dispute may be referred by the Applicant to the Board for resolution.

4. Approvals of all other government agencies and utilities having jurisdiction over any aspect of the Project.

5. Satisfaction by Applicant of the representations and commitments made in the submissions testimony and in the Application approved by the June 1, 2006 Resolution and in this Amended Site Plan Application in the record made by Applicant before the Zoning Board.

6. All parking under the buildings must be assigned by the property owner or condominium association.

7. Parking space No. 32 as shown on the Amended Site Plan shall be deleted. Parking space No. 27 shall be re-designed to be a handicapped accessible parking space and the remainder of that bank of parking adjusted accordingly. Any left over space shall, be curbed and landscaped in accord with plans to be approved by the Borough Engineer and Borough Planner.

8. Applicant shall modify the Amended Site Plan to eliminate the "Garbage" area on the Winters Place side of the site and to install a trash storage area in the northwesterly corner of the site in the area of parking space 23 at the end of the driveway opposite Summer Street.

9. Applicant shall provide a plan detail showing the screening for each trash storage area. This detail shall be subject to the approval of the Borough Engineer and Borough Planner.

10. All plans for the storm water and waste water drainage shall be subject to the approval of the Borough Engineer.

BOROUGH OF EAST RUTHERFORD
ZONING BOARD OF ADJUSTMENT

RESOLUTION NO. 06-05A

APPLICATION OF 132 UNION AVENUE, L.L.C.
AMENDMENT TO SITE PLAN APPROVED APRIL 5, 2007
MEMORIALIZED MAY 3, 2007

WHEREAS, on June 1, 2006 the Board adopted a Resolution granting the Applicant approval of a variance pursuant to N.J.S.A. 40:55D-70D 5 and 6 to permit construction and use of a 32 unit multi-family residential project consisting of three buildings with ancillary parking (the "Project") together with Site Plan Approval and related bulk variances; and

WHEREAS, on February 1, 2007 the Board adopted resolution 06-06 memoralizing the grant to 132 Union Avenue, L.L.C. (the "Applicant") of an Amended Site Plan Approval with design waivers and bulk variances (the "Amended Site Plan"); and

WHEREAS, the Applicant thereafter applied for approvals from the Bergen County Planning Board; and

WHEREAS, the Bergen County Planning Board requested that the Applicant make a slight change in the location of the building closest to the corner of Hackensack Street and Union Avenue; and

WHEREAS, the Applicant's Architect Albert Arencibia, R.A. revised the Amended Site Plan to relocate the buildings as requested by the Bergen County Planning Board under revision dated February 20, 2007 (the "Revised Site Plan"); and

WHEREAS, the Revised Site Plan shows that the building located closest to the corner of Union Avenue and Hackensack Street was moved ten feet southwesterly from the property line on Union Avenue and the corner of the building was given a curve in replacement of the previously approved square corner; all as requested by the Bergen County Planning Board; and

WHEREAS, as a result of the movement of the building there were other slight differences between the Amended Site Plan and the Revised Site Plan; and

WHEREAS, the Board reviewed the Revised Site Plan at its April 3, 2007 meeting.

NOW, THEREFORE, BE IT RESOLVED by the Zoning Board of Adjustment of the Borough of East Rutherford as follows:

1. The Board finds and determines that the changes contained in the Revised Site Plan from those in the Amended Site Plan are minor and insubstantial. Those changes do not require any further public hearings.

2. The Board hereby approves the Revised Site Plan.

3. This approval of the Revised Site Plan is conditioned upon Applicant's compliance with the terms and conditions of Resolution 06-06 and the June 1, 2006 Resolution prior thereto.

Dated: 5/3/07

Christine Mantano

Christine Mantano, Board Secretary

132 Union-Res-5-3-07

BOROUGH OF EAST RUTHERFORD

RESOLUTION NO. 78

A RESOLUTION TO COMMIT FUNDS FROM THE BOROUGH'S AFFORDABLE HOUSING TRUST FUND TO AN AFFORDABLE HOUSING PROJECT OF THE HOUSING AUTHORITY OF BERGEN COUNTY.

WHEREAS, the Borough of East Rutherford has a balance of approximately $140,000 in its Affordable Housing Trust Fund; and

WHEREAS, the Housing Authority of Bergen County ("HABC") a public agency established pursuant to NJSA 40A:12A-17, has requested financial assistance from the Borough in order to acquire a two family home within the Borough and convert and restrict such 2 family home to affordable housing meeting the requirements of the Council on Affordable Housing or such other agency that may succeed it ("COAH"); and

WHEREAS, the Housing Authority intends to provide rental housing in the property to be acquired thereby providing the Borough with a bonus credit against the Borough's affordable housing obligation.

NOW THEREFORE, be it established by the Mayor and Council of the Borough of East Rutherford as follows:

1. Subject to the conditions set forth in this Resolution, the Borough hereby commits to loan from the Affordable Housing Trust Fund to the HABC such sums not to exceed $140,000 that are available in the Trust Fund, after satisfying any debts and obligation of the Trust Fund, to assist in the purchase and conversion of a two-family home located in East Rutherford to at least 2 units of affordable housing.

2. The financing described in Section 1 above shall be subject to the following conditions:

(a) The proceeds shall be used solely for the creation of affordable housing meeting the guidelines COAH and which qualify for a rental unit bonus from COAH;

(b) The Borough shall receive credit from COAH against its affordable housing obligations of at least two units;

(c) The HABC shall not sell, but instead shall retain title to the property acquired with the Borough's assistance;

(d) The HABC shall rent the units created by the Borough's assistance only to tenants qualified to rent affordable housing under COAH's guidelines;

(e) To the extent permitted by law the HABC shall grant a preference to East Rutherford residents in selecting tenants for the units, the Borough acknowledging that Tenant selection shall be conducted by the HABC consistent with COAH regulations;

(f) The Borough shall have no obligation or responsibility to manage or maintain the property, or to provide any additional funding for the project, all of which shall be performed or provided by the HABC.

(g) The amount advanced by the Borough shall remain an obligation of the HABC to the Borough but shall not bear interest nor shall it be subject to repayment of the Borough except as provided in this resolution;

(h) The amount advanced by the Borough shall be repaid by the HABC to the Borough if:

(i) The property is sold or title is transferred to a third party, including but not limited to a tenant or other person eligible to occupy affordable housing under COAH's regulations, it being the intent of the Borough that the property shall remain affordable rental housing (according to COAH guidelines of the HABC);

(ii) The property ceases to be used as affordable rental housing qualifying as such for a rental bonus under COAH regulations;

(iii) HABC shall breach any of the conditions herein or in any document referenced herein.

(i) The HABC shall comply with all local zoning, site plan and other land use regulations of the Borough (subject to such waivers and variances as may be granted) and with the requirements of other laws applicable to the project including but not limited to the New Jersey Uniform Construction Code.

(j) The HABC shall execute and deliver to the Borough, and record in the land records of the Bergen County Clerk, a mortgage in form and substance acceptable to the Borough Attorney and to the Mount Laurel Compliance Monitor placing on record the restrictions and conditions of the Borough's financing and the

other terms of this transaction and the HABC shall execute and deliver to the Borough such other agreements, affidavits, certification and other documents deemed necessary by the Borough Attorney or Mount Laurel Compliance Monitor.

3. If any amendment or other filing applicable to any Spending Plan or to this transaction which the Borough may be required to submit to COAH or to the Superior Court is necessary to carry this resolution into effect, such amendment or filing shall be prepared and filed by the Mayor, with the assistance of the Borough Planner and Borough Attorney, in accordance with applicable law.

4. This resolution is conditioned upon the approval of Robert T. Regan, Esq., the court-appointed Mount Laurel Compliance Monitor.

5. This resolution is conditioned upon the transaction described herein:

(a) Being deemed a landful investment by the Borough for affordable housing purposes; and

(b) Resulting in at least 2 units credit to the Borough against its affordable housing obligation.

6. All costs of the Borough incurred in the planning and implementation of the transaction described in this resolution shall be paid from the Affordable Housing Trust Fund but only to the extent permitted by law.

7. The Borough reserves the right to amend and supplement this resolution at anytime hereafter.

8. If the HABC does not acquire the property and create affordable housing as provided herein by December 31, 2012, the Borough may, in its sole discretion:

(i) extend the time for HABC performance;

(ii) otherwise amend this resolution; and/or

(iii) terminate this transaction in which event the loan described herein shall not be made.

9. This resolution shall take effect immediately but shall remain inoperative until approved by the Mount Laurel Compliance Monitor pursuant to Section 4 above.

10. Notwithstanding anything in this resolution including this commitment of funds, no amounts shall be paid to or for the HABC with regards to this project until all conditions precedent set forth herein and otherwise established by law for the expenditure of funds described herein have been satisfied.

CERTIFICATION

I, Danielle Lorenc, Municipal Clerk, do hereby certify that the foregoing is a true copy of the resolution passed by the Mayor and Council at the meeting held on the 19th day of June, 2012.

Danielle Lorenc, RMC

Councilmember	Moved	Second	Ayes	Nays	Absent	Abstain
Brizzi	X		X			
Ravettine					X	
Lahullier		X	X			
Perry			X			
Stallone					X	
Banca			X			

HOUSING DEVELOPMENT CORPORATION OF BERGEN COUNTY
ONE BERGEN COUNTY PLAZA, 2ND FLOOR
HACKENSACK, N.J. 07601
PHONE: 201-336-7600
FAX: 201-336-7660

Mayor James Cassella and Councilmembers
Borough of East Rutherford
1 Everett Place
East Rutherford, NJ 07073

August 15, 2013

Re: Affordable Housing in East Rutherford

Dear Members of the Governing Body,

Let me begin by thanking you for the passage of East Rutherford's resolution on June 19, 2012, which formalized your intent to support affordable housing for your community, and for your support to use Affordable Housing Trust Funds for their intended purpose.

The Housing Development Corporation of Bergen County is the non-profit arm of the Housing Authority of Bergen County, and as such, we were pleased to apply for a grant to provide a two-family home within your borders for people with low/moderate income. We made formal application to HUD for this grant in December 2012, and were recently notified of its approval and award.

It is important to understand that these grants require matching contributions in order to receive the award. Therefore, East Rutherford's contribution of $140,000 of Affordable Housing Trust Funds is critical to achieve successful completion of this housing project.

There are requirements imposed by the grant to complete the project within a certain timeline. We are awaiting specifics on that, but are aware that HUD expects performance in order to award future grants to our agency for affordable housing. That, of course, is reasonable and protective of the public.

May we hear from you as to when the funds may be utilized, so that we may pursue going forward with this housing project. Again, it is commendable that you are participating with us to provide housing that is truly needed in this area.

Very truly yours,

Charlotte Vandervalk
Director of Development

BOROUGH OF EAST RUTHERFORD
ZONING BOARD OF ADJUSTMENT

RESOLUTION NO. 14-

IN RE THE APPLICATION OF
CAPODAGLI PROPERTY COMPANY, LLC
FOR USE VARIANCES
PQ: 228 PARK AVENUE
BLOCK 73, LOT 7
USE VARIANCES – Bifurcated Application
Hearing Dates: March 6, 2014, August 7, 2014 and September 23, 2014

****

WHEREAS, CAPODAGLI PROPERTY COMPANY, LCC, has applied to the Board of Adjustment of the Borough of East Rutherford, Bergen County, New Jersey, for permission to remove the existing industrial building and construct a multi-family development with residential amenities, upon the premises located within the NC Neighborhood Commercial Zone district upon the premises commonly known as 228 Park Avenue; and

WHEREAS, the Applicant made it's application pursuant to N.J.S.A. 40:55D-70 (d)(5) and (6) for the required variances relating to density and height; and

WHEREAS, the Board held public hearings at its February 6, 2014, March 6, 2014 and September 23, 2014 meetings, pursuant to public notice, at the Municipal Building, East Rutherford, New Jersey, at which time it heard testimony and considered the subject application; and

WHEREAS, the Applicant was represented by Robert Kasuba, Esq.; and

WHEREAS, Brigette Bogart, a Professional Planner, testified in support of the application; and

WHEREAS, Craig Peregoy, a Professional Engineer, testified in support of the application; and

WHEREAS, Patrick McClellan, a Professional Engineer, testified in support of the application; and

WHEREAS, Yogesh Mistry, an Architect, testified in support of the application; and

WHEREAS, Mr. George Capodagli, a principal of the Applicant, and a Mr. Henry Szwed, further testified in support of the application; and

WHEREAS, the Board had granted the original application for development without proper notice being provided to Robert Regan, Esq., Mount Laurel Implementation Monitor (hereafter "Monitor"). The Monitor negotiated the number of units and other particulars of the application of development directly with the Applicant subsequent to the original approval; and

WHEREAS, the Monitor attended the Special Hearing conducted on September 23, 2014, and after reviewing the plans, testimony and supporting evidence issued a directive dated October 16, 2014 directing the Zoning Board to grant the (c) and (d) variances and site plan applied for, subject to the Board imposing reasonable conditions on said approval; and

WHEREAS, the Zoning Board of Adjustment, after hearing the testimony and evidence presented by the Applicant and by adjoining property owners and by the general public, and after due consideration and deliberation has made the following findings of fact and conclusions:

NOW, THEREFORE, BE IT RESOLVED that:

A. **Findings of Fact.** The Board makes the following findings of fact on this application:

1. **Jurisdiction.**

1.1 That the application for the use variances were duly made to Zoning Board of Adjustment and that all owners of property situated within 200 feet of the premises to be affected were duly notified in accordance with law.

1.2 The Applicant has presented satisfactory proof to the Zoning Board of Adjustment that a notice of said hearing was duly published.

2. **The Site & Application.**

2.1 The Applicant originally filed an application for development with the Zoning Board which proposed the construction of 23 one-bedroom apartment and 32 two-bedroom apartments. After listening to the testimony and considering the evidence presented, the Zoning Board granted the use variances requested by the Applicant for 55 units. The application was a bifurcated application and no Site Plan details were provided.

2.2 The Monitor had not been provided with notice of the application despite a representation to the contrary being made to the Zoning Board. Therefore, the prior approval issued by the Zoning Board was deemed null and void and of no effect. After the Applicant met with the Monitor numerous times, the Applicant filed an Amended Application proposing 45 dwelling units. Thirty -six of the units would be market rate units. Nine of those units would be one-bedroom units. Twenty-seven of those units would be two-bedroom units. Nine units would be made available to persons of low and moderate income. Of the nine affordable units, two would be three-bedroom, six would be two-bedroom and one would be a one-bedroom unit.

2.3 The subject site is located within the NC-Neighborhood Commercial Zone District.

2.4 The subject site has an existing industrial building which is dilapidated and which is not in current use.

2.5 Mr. Henry Szwed, Project V.P./Manager, testified on behalf of the application as follows. The existing building is in disrepair. The Applicant desires to knock down the existing building. Mr. Szwed also testified at length with respect to the easement in response to questions posed by the Zoning Board. Mr. Szwed testified that the title search performed on behalf of the Applicant discloses that the easement belongs to the Borough of East Rutherford.

2.6 The Applicant retained the services of Mr. Yogesh Mistry, an Architect, to prepare architectural plans. The Board accepted Mr. Mistry's credentials and finds him to be an expert in the field of architecture.

2.7 The Architect testified as to the existing use and the surrounding uses. The units are typically smaller as compared to the neighboring Avalon development.

2.8 He provided a summary of the changes of the project. The Applicant now meets the minimum bedroom square footage requirement of 750 square feet. For the lower garage, the handicapped stall adjacent to the trash was shifted to insure better access and convenience. The parking stall numbers were increased to 100 stalls. This represents 88 residential stalls plus 12 retail stalls.

2.9 Mr. Mistry testified that in his opinion the new building blends with the community. In his opinion, the current property is dilapidated. The rear of the property has graffiti. The new building is aesthetically pleasing and benefits the surrounding properties and the citizens of the borough.

2.10 The Applicant retained the services of Patrick McClellan, Professional Engineer. The Board accepted Mr. McClellan's credentials and finds him to be an expert in the field of civil engineering.

2.11 He addressed the concerns raised by the review letter of the Board Engineer as follows:

Natural Features Items 1: The existing contours had dashed lines, the applicant proposes solid lines.
Man-Made Features Item 10: An alert system for pedestrians will be provided.
Man-Made Features Item 12: The distances measures along the right of way lines of existing streets abutting the property to the nearest intersection with other public streets has been provided.
Miscellaneous Item 1: Traffic impact study was performed.
Performance Standards A1: The project has a two level parking garage. The upper level will have an entrance/exit on Park Ave. and the lower level will exit on an alley that runs behind the building.
Performance Standard Item A2: Warning lights will be provided.
Performance Standard Item A3: It appears that the Park Ave. garage entrance will conflict with an existing street tree. The tree will be relocated.
Performance Standard Item A4: The project proposes twelve (12) one-bedroom units and thirty-three (33) two-bedroom units. There are 88 parking stalls for residential use.
Performance Standard Item 7: Delivery by UPS and FedEx is acceptable; deliveries by tractor trailers are not likely.
Utilities item C (1 &2): The water connection and sanitary sewer connection must follow the appropriate approval process.
Planting Design Item D: The existing tree within the existing streetscape will be relocated. The applicant agrees to comply with all requirements.
Lighting Item E: As previously testified, the applicant state they are willing to comply with all the necessary terms for illuminating the garage with reflective lights, and other lighting requirements.
Trash Enclosure Item G: Annual reports of recycled materials will be provided.

Miscellaneous Item I (1&2): Nine (9) affordable units are set aside.
Fences Item J (2): Applicant will provide a second gate at each end of the dog area to reduce the chances of pets escaping its owners.

2.12 The Applicant retained the services of Craig Peregoy, a Professional Engineer to prepare a Traffic Impact Analysis. The Board accepted Mr. Peregoy's credentials and finds him to be an expert in the field of civil engineering.

2.13 Parking spaces are assigned. There is a low turnover when tenants take their vehicles to work and return in the evening.

2.14 The property's close proximity to a train station also minimizes the need for parking. Parking space standards are 1.8 for one-bedroom units and 2.1 for three-bedroom units. In his opinion, wider parking spaces are not necessary. The spaces can be reduced in width when there is a low turnover.

2.15 Several board members engaged in colloquy with the witness and other witnesses with respect to the easement and the line of site. After a recess, the Applicant offered to amend its application to shift the exterior wall. The Applicant stated that he will cantilever the exterior wall to alleviate the line of site issue. The nine stalls and roll down gate will be shifted back. The effect of increasing the stall width to 8.5 feet is to reduce the parking spaces to 8.

2.16 The Applicant retained the services of Brigette Bogart, a Professional Planner. The Board accepts her credentials and finds her to be an expert in the field of professional planning.

2.17 She prepared a report dated December 17, 2013 which was revised on February 25, 2014.

2.18 The property is 150 feet by 150 feet in size. The topography of the site varies greatly. The ground elevation is at 52.5 feet in the north corner of the site along Park Avenue and it drops to 37.5 feet towards the rear of the site. This grade change is 15 feet. This equates to a two-story building which allows an efficient use of the land with parking below the building. It also greatly diminishes the visual impact.

2.19 A Transit Oriented Development study was prepared by Rutgers University. This revealed that the population, school and auto ownership impacts are substantially different in a transit-oriented development versus a typical development.

2.20 Ms. Bogart testified that the following variances are being requested by the Applicant:

ITEM	ZONING REQUIREMENT	APPLICANT'S PROPOSAL
Minimum Front Yard	20 feet	0 feet (Note 1)
Minimum Side Yard	10 feet	0 feet/5 (Note 2)
Minimum Rear Yard	20 feet	10 feet
Minimum Open Space	30%	4.4%
Maximum Building Coverage	40%	88.8%
Maximum Coverage (Impervious)	70%	95.6%
Maximum Building Height	35 ft./3 stories	66 ft./4 stories
(Minimum Parking Setback) From Side Property Line	10 feet	6.5± ft./5 ft.
From Rear Property Line	5 feet	10 feet

Notes:

1. Upper story overhangs and encroach 1.5 feet over public right-of-way.
2. Said dimensions are respectively setback from the easterly and westerly property lines.

2.21 At the public portion of the meeting, Mr. Robert Regan, the Monitor, testified as follows:

A. He supports the proposed 45 units, including 9 affordable units.

B. He does have a concern that the Applicant might charge a fee to the tenants for multiple parking spaces. He would like to see a condition imposed that the owner not be permitted to charge rent or a fee to the tenants for one or more parking spaces.

2.22 At the public portion of the meeting, Mr. Michael Goras testified in support of the application. In summary, he testified that he operates a local insurance business. He believes that the proposed building will attract young professionals like a friend of his which would improve the local economy and the town.

A motion was made to approve the subject application. However, the vote was

four board members in favor of the application for development and site plan application and three votes against it. The use variances applied for by the Applicant required five affirmative votes. Therefore, the application for development was denied by the East Rutherford Zoning Board due to receiving only four affirmative votes.

2.23 The Mount Laurel Implementation Monitor issued written directions on October 16, 2014 to the East Rutherford Zoning Board pursuant to his authority set forth in the Final Judgment in Tomu Development Co., Inc. v. Borough of East Rutherford, et al. A copy of Mr. Regan's October 16, 2014 letter is attached hereto and incorporated herein by reference. Mr. Regan directed the East Rutherford Zoning Board of Adjustment to grant the requested (d) variances as well as the ancillary "c" variances and site plan approval applied for by the Applicant.

BE IT FURTHER RESOLVED by the Zoning Board of Adjustment of the Borough of East Rutherford that the application for a d(5) and d(6) variance to permit the construction of a multi-family development as set forth in the exhibits and testimony, as amended, as well as all of the ancillary "c" variances and site plan approval are hereby approved upon the following conditions:

1. Approvals of all other government agencies and utilities having jurisdiction over any aspect of the Project.

2. Satisfaction by Applicant of the representations and commitments made in the submissions testimony and in the record made available by Applicant before the Board.

3. Deposit of the appropriate amounts into escrow and payment of requisite application fees pursuant to ordinance and reasonable requirements of applicable Borough Professionals.

4. The Applicant shall comply with the requirements of structural, fire and sanitary safety as provided for in the current edition of the New Jersey Uniform Construction Code.

5. Payment of all development fees which may apply to the property pursuant to the Code of the Borough of East Rutherford.

6. The Applicant shall not be permitted to charge a fee or to lease any parking spaces located on the subject property to either a tenant or to any other person or entity.

7. The Applicant shall cantilever the building to move the rear wall in to improve the sight line for vehicles as testified to. The Applicant shall provide revised plans to be reviewed by Robert Perry, Board Engineer, and the revised footprint of the building shall be subject to his approval.

8. The Applicant shall comply with all the requirements of the Bergen County Soil Conservation district.

9. The Applicant shall file an application with the Bergen County Planning Board.

10. The total number of parking spaces shall be eighty-nine, all of which shall have a minimum width of eight and one-half (8½) feet. The width of the ADA spaces shall be 8 feet wide which complies with the law.

MOTION TO APPROVE

Introduced by:

Seconded by:

In favor of granting:

Oppositions:

Abstentions:

MOTION APPROVED

The foregoing is a true copy of a Resolution adopted by the Zoning Board of Adjustment of the Borough of East Rutherford at the meeting of November 6, 2014 and authorized to be released for publication.

Cheryl Wloch-Rapetti, Secretary

RESOLUTION NO. 2005-05
BOROUGH OF EAST RUTHERFORD
PLANNING BOARD
DECIDED: SEPTEMBER 12, 2005

WHEREAS, application has been made by M&M Investments, LP for Preliminary and Final Major site plan approval, variance relief and waiver from the Borough of East Rutherford's zoning code for the property known as Block 92, Lot 16 located on Van Winkle Street;

WHEREAS, the applicant proposed to construct a 33 multi-family residential unit project in the R-3 Multi-Family District;

WHEREAS, the East Rutherford Planning Board held a public meeting on August 8, 2005 and September 12, 2005 pursuant to public notice at the Municipal Building, One Everett Place, East Rutherford, New Jersey; and

WHEREAS, the Planning Board considered the application presented by the applicant through its attorney; and further considered the testimony of the applicant's experts;

WHEREAS, the Planning Board also considered the reports and testimony of its professional planner, Jill Hartmann;

WHEREAS, the Planning Board considered all of the testimony presented by the witnesses as well as all plans and exhibits presented by the applicant;

WHEREAS, the meeting was opened to the public and the Planning Board further considered the questions and comments of members of the public;

WHEREAS, numerous residents appeared at both meetings and testified that they were in favor of the application and strongly urged the Planning Board to grant the application;

WHEREAS, after hearing all testimony and reviewing all plans the Planning Board voted to approve the application subject to certain conditions and the approval of a memorializing resolution;

WHEREAS, the Planning Board hereby memorializes the grant of the aforementioned approvals made on September 12, 2005;

NOW THEREFORE BE IT RESOLVED, that the Planning Board of the Borough of East Rutherford makes the following findings of fact and

conclusions of law:

1. The applicant as owner of the property has standing to make this application.

2. The applicant seeks Preliminary and Final Site Plan approval, variance relief and waiver relief for the proposed complex to be constructed on property known as Block 92, Lot 16 located on Van Winkle Street for the construction of a 33 multi-family residential unit project in the R-3 Multi-Family District.

3. The site is a 1.12 acre parcel that is presently developed with an old industrial building that is non-conforming in both its use and structure. The site has access to Orchard Street with its main expanse fronting on Van Winle Street.

4. The application proposes to demolish the existing non-conforming building and construct a three story residential condominium complex. The entrance to the complex is via a one-way driveway from Orchard Street. An underground parking garage will provide space for 39 vehicles. At grade parking spaces along the eastern and northern perimeter is also proposed. Exiting the site is via the Van Winkle Avenue driveway. Two handicap spaces will also be located under the building.

5. The main entrance to the building will be from Van Winkle Street. A small lobby and elevator will be located there. The remainder of the ground/first floor will consist of 11 two bedroom units ranging in size from 1,210 square feet to 1,500 square feet located around a central hallway. The second and third floor designs are identical with 11 two bedroom units per floor ranging in size from 1,200 square feet to 1,400 square feet. A total of 33 two bedroom units will be constructed.

6. In addition to parking, the underground garage provides individual storage areas for each unit and the garbage and recycling areas.

7. The complex will have a finished look on all sides of ht building.

8. The applicant has presented extensive expert and factual testimony that the construction of the project is in conformity with the Zone Plan as provided by the Borough of East Rutherford Zoning Ordinance.

9. The applicant must comply with all conditions set forth herein.

10. The following waivers are granted from the Borough of East Rutherford's site plan ordinance in order to permit parking spaces with dimensions of 9' x 18' where 9' x 20' are required by the ordinance. The requested waiver is hereby granted.

11. The following variances are granted from the Borough of East Rutherford's Zoning Ordinance:

Required	Requested
25% Maximum % Lot Coverage for the main building	34.8%
60% maximum impervious surface coverage	67%

All of the requested variances are granted.

12. The following conditions are agreed to by the applicant:

A. The applicant will abide by and conform with all conditions set forth on the record at the Planning Board's August 8, 2005 and September 12, 2005 meetings. The applicant will ensure that demolition of the existing building and construction in accordance with the application will minimize any impact on neighboring property owners. The applicant will address all concerns as agreed to on the record at the August 8 and September 12, 2005 meetings.

B. The applicant will make all necessary applications to the all applicable state, county and municipal agencies as well with the construction office with the Borough of East Rutherford and will obtain all necessary permits for the project.

C. The applicant will at all time remain current with escrow requirements imposed by the Borough of East Rutherford.

D. The applicant will landscape the site in accordance with the plans presented to the Board.

E. The applicant will agree to provide on-site construction of one affordable housing unit for every eight units constructed or in the alternative will satisfy its affordable housing obligation in accordance with all applicable law and regulations subject to the approval of the Planning Board and subject to approval as set forth in the fair share resource order currently governing all development in the Borough

13. The Planning Board shall have continuing jurisdiction over all issues arising from construction of the project including

all conditions set forth herein as well as all other conditions set forth on the record during the course of the Planning Board hearings and the applicant agrees to submit to the Board's continuing jurisdiction.

14. The application does not negatively impact upon the neighborhood.

15. The applicant's plans are in conformity with the land subdivision and the site plan review ordinance of the Borough of East Rutherford as well as the zoning ordinance for the Borough of East Rutherford.

16. The development contemplated by the application will not impair the intent and purpose of the zoning ordinance of the Borough of East Rutherford and is not detrimental to the public.

17. This approval is also contingent upon applicant's full compliance with all ordinances governing escrow accounts and payments to all professionals from said accounts.

Dated:

ATTEST:

, Secretary

APPROVED:

Richard Evans, Chairman

BOROUGH OF EAST RUTHERFORD
PLANNING BOARD

RESOLUTION NO. 16-001

IN RE THE APPLICATION OF:

THE STERLING DEVELOPMENT GROUP, LLC

APPLICATION: PB 15-01

FOR: PRELIMINARY AND FINAL SITE PLAN APPROVAL, VARIANCE RELIEF, AND WAIVERS FROM SITE PLAN REQUIREMENTS

SITE: BLOCK 26, LOTS 1 & 2
OAK STREET, CENTRAL AVENUE AND PATERSON AVENUE

Hearing Dates: April 13, 2015, May 11, 2015, June 22, 2015, November 9, 2015, December 14, 2015, and December 29, 2015

WHEREAS, THE STERLING DEVELOPMENT GROUP, LLC ("Sterling"), with the written consent of Oak Street, LLC, the owner of the above property, applied to the Planning Board of the Borough of East Rutherford, Bergen County, New Jersey, for approval to construct a 208 unit inclusionary multi-family residential development, including 391 surface and garage parking spaces upon Lots 1 and 2 in Block 26, as shown on the Tax Map of the Borough of East Rutherford within the Affordable Housing Overlay Zone B ("AHO-B") Zone located at the intersections of Oak Street, Central Avenue and Paterson Avenue; and

WHEREAS, the Applicant filed an application for that development, pursuant to N.J.S.A. 40:55D-70 (c)(1) and (2) for bulk variances from East Rutherford's Code Zoning Ordinance, on January 23, 2015, which application was deemed complete on February 9, 2015; and

WHEREAS, pursuant to N.J.S.A. 40:55D-61, the Applicant consented to such extensions of time so as to allow the Board to render its decision in a timely and lawful way; and

WHEREAS, the Applicant was represented by Thomas H. Bruinooge, Esq. LLC d/b/a Bruinooge & Associates; and

WHEREAS, the Board held public hearings, pursuant to sufficient public notice, at the Municipal Building, East Rutherford, New Jersey, during which the Board heard testimony and was presented with evidence and heard comments from the public and considered the subject application; and

WHEREAS, Robert T. Regan, Esq., the Court appointed Mount Laurel Implementation Monitor ("Monitor") was duly notified of all hearings and was in attendance at the hearings convened by the Planning Board on April 13, 2015; May 11, 2015; June 22, 2015, December 14, 2015, and December 29, 2015;

WHEREAS, during the public portion of the hearing on June 22, 2015, the Monitor stated that he would consider an affordable housing set aside less than 20%, the maximum required by Ordinance §389-56E(3), based upon the testimony and evidence presented by the Applicant; and

WHEREAS, the New Jersey Supreme Court, in its recent decision in In re Adoption of N.J.A.C. 5:96 and 5:97 by N.J. Council on Affordable Housing, 22 N.J. 1 (2015), has indicated that methodologies previously employed in COAH's First and Second Round rulings should be used, along with those portions of earlier versions of the Third Round Regulations found to be valid, in determining an appropriate set aside for the Applicant's project;

WHEREAS, the Monitor has determined that an affordable housing set aside of thirty (30) units is both appropriate and justified, based upon the testimony presented to the Board; and

WHEREAS, on October 26, 2015, the Applicant filed an amended application requesting preliminary and final site plan approval, variance relief and waivers; and

WHEREAS, a subsequent variance application was filed on November 30, 2015, seeking relief from the limitations on the size and number of permitted signs; and

WHEREAS, the initial application proposed an inclusionary multi-family residential project consisting of 208 dwelling units, including 21 affordable units, located in two 3-story at grade structures, and a wrap deck parking structure with 270 parking spaces and 120 surface spaces (total 391 parking spaces); and

WHEREAS, the amended application and accompanying plans filed on October 26, 2015, seek approval for a 208 unit inclusionary development [fifteen (15) studios, eighty-two (82) one-bedroom units, one hundred and five (105) two-bedroom units, and six (6) three-bedroom units. The total of 208 units includes 30 affordable units [six (6) one-bedroom units, eighteen (18) two-bedroom units, and six (6) three-bedroom units], located in two 4-story buildings, each with residential units above ground-level parking, with the height of each structure being less than 55 feet, with 398 total parking spaces (176 garage spaces, 206 at-grade spaces, and 16 banked spaces); and

WHEREAS, on December 14, 2015, at its regularly scheduled meeting, the Planning Board, upon proper notice, heard testimony and evidence presented by the Applicant in support of the requested sign variance and the construction of 16 formerly banked parking spaces on "grass pavers", statements made by interested parties and a statement by the Monitor, and by the general public, and after due consideration and deliberation; and

WHEREAS, the Monitor has informed the Board that he will not reverse any decision of the Board with respect to the Applicant's waiver/variance request for relief under §327-49C of the East Rutherford Land Use Ordinances, provided that the project will afford, without additional charge, one (1) parking space for each market rate unit, and up to two (2) parking spaces for each low/moderate income (affordable) unit.

NOW, THEREFORE, the Planning Board of the Borough of East Rutherford makes the following findings of fact and conclusions of law:

1. **Jurisdiction.**

1.1 The application for preliminary and final site plan approval, variance relief, and waivers from site plan requirements of East Rutherford's Zoning and Site Plan Ordinances, were duly made to the Planning Board, and on written notice by all owners of property situated within 200 feet of the property in question.

1.2 The Applicant has presented satisfactory proof to the Planning Board that the notices of said hearings were duly published in the Record on April 2, 2015, in the Record and Herald News on June 12, 2015, in the Record on December 4, 2015, and in the Record and Herald News on December 19, 2015.

1.3 The Board had and has jurisdiction to hear and decide the application.

1.4 The application was filed with the express written consent of Oak Street, LLC, the owner of the property. The Applicant, as developer and contract purchaser, has proper standing to make this application.

1.5 The application filed on October 26, 2015 is not substantially different from the initial application; the October application constitutes an amended application rather than a new application.

2. The Site & Application.

2.1 The subject site is located within the Affordable Housing Overlay Zone B; multi-family residential use is a permitted use in the zone.

2.2 The Applicant requested the following variances:

Ordinance	Required	Proposed
389-37F(5)	Identification or directory signs are not to exceed 12 square feet of surface display area and are limited to one sign per frontage	Applicant proposes to erect 3 double-sided freestanding signs, each with a sign area of 24 square feet (4 feet by 6 feet) per side, rather than 12 square feet per side. October 23, 2015. Applicant also seeks a variance to the extent there is more than 1 sign per frontage.
§389-54F(2)	Parking is prohibited in the front yard	Applicant proposes to locate drive aisles in the front yard, resulting in a 5-foot encroachment
§389-56E(3)	Such number of affordable housing units required by law, not to exceed 20% of the market rate units	30 unit affordable housing set aside (14%)

2.3 Applicant requested the following waivers:

(1) Driveway grade, §327-46: Driveway intersections within 35 feet from the curbline with any roadway shall not exceed a grade of 1.5%. The grade at the proposed driveway that intersects with Central Avenue is 3%.

(2) Landscape screening of the parking lot, §327-55B (duplicated in §327-39B): Off-street parking and loading areas for more than six vehicles must provide screen planting or a dense evergreen material not less than four feet in height. The Applicant proposes a combination of berms and landscape material.

(3) Parking stall size, §327-41: Stall size of 9x20 feet is required, whereas the Applicant proposes a parking stall size of 9x18 feet, consistent with New Jersey's Residential Site Improvement Standards ("RSIS").

(4) Loading docks, §327-51A: Two (2) loading docks are required if the floor area of each building exceeds the maximum requirement of any land use of 10,000 s.f. The Applicant proposes two loading spaces in lieu of two loading docks.

(5) Sidewalk between parking areas and structures, §327-62D: Sidewalks, when constructed along a building, shall be located not less than three feet from that building. With the exception of the front entrance of Building 1, the Applicant proposes to locate the sidewalk more than three feet from the buildings.

(6) Charge for Parking, §327-49C: The ordinance provides that no charge shall be assessed for "open off-street parking facilities." The Amended Application proposed to provide one off-street parking space, without charge, for each residential unit, with the Applicant having the right to impose a fee or charge for each additional parking space utilized by a tenant.

(7) Parking Spaces: Banking of Parking Spaces, §327-48: A total of 398 parking spaces are required. The Amended Application proposed 176 garage spaces and 206 at grade/surface parking spaces, including 16 banked parking spaces; thereafter, in lieu of land-banking 16 spaces, the Applicant proposed to provide 16 parking spaces on grass pavers.

2.4 The following individuals testified in support of the application:

Steven Katz, a partner in Sterling;
Wayne Zuckerman, a partner in Sterling;
Jeffrey Garfinkel, Director of Acquisitions and Development for Sterling (extraordinary costs associated with environmental conditions and issues, construction costs, and signage issues);
Kevin Haney, PE (Maser Consulting, P.A.), civil engineer;
Thomas Brennan, AIA (Thomas J. Brennan Architects);
Donald W. Barree, AIA (Rotwein & Blake);
Jarrett Kest, PLA (J. Kest & Company, LLC), landscape architect;
Timothy Tracy, PE (Desman Design Management, formerly Desman Associates), parking consultant (regarding the wrap deck parking structure);
Jeffrey M. Fiore, PE (Maser Consulting, P.A.), traffic engineer; and
Steven Lydon, PP (Burgis Associates), professional planner.

2.5 The Applicant identified and/or introduced certain exhibits, including plans and reports that were subsequently revised. The documents that the

Applicant introduced into evidence and upon which it seeks preliminary and final site plan approval are set forth below:

Hearing Date	Number	Description
4/13/15	A-1	Affidavit of Service
4/13/15	A-3	Survey prepared by Maser Consulting PA (1 of 1), dated 1/23/15
4/13/15	A-3A	Photo Exhibit, Sheet 1 of 1 "Photo Exhibit Existing Conditions" prepared by Maser Consulting PA dated 3/24/15
6/22/15	A-21	Traffic Impact Study, prepared by Maser Consulting P.A., dated 1/23/15
11/9/15	AA-1.0	Preliminary Major Site Plan, prepared by Maser Consulting, P.A., dated 4/10/15
11/9/15	AA-2.0	Site Rendering- Amended Preliminary Major Site Plan and Final Major Site Plan prepared by Maser Consulting P.A., dated 10/23/15, filed 10/26/15
11/9/15	AA-3.1	Fire Overlay Plan A, prepared by Maser Consulting P.A., dated 1/23/15, last revised 10/23/15
11/9/15	AA-3.2	Fire Overlay Plan B, prepared by Maser Consulting P.A., dated 1/23/15, last revised 10/23/15
11/9/15	AA-3.3	Fire Overlay Plan C, prepared by Maser Consulting P.A., dated 1/23/15, last revised 10/23/15
11/9/15	AA-4.0	Limits of NFPA13 and NFPA13R, prepared by Rotwein & Blake Associated Architects, PA
11/9/15	AA-5.1	Building 1 Conceptual Rendering D-15, prepared by Thomas Brennan Architects, dated 10/21/15
11/9/15	AA-5.2	Building 2 Conceptual Rendering D-16, prepared by Thomas Brennan Architects, dated 10/21/15
11/9/15	AA-5.3	Oak Street Entrance Conceptual Rendering D-17, prepared by Thomas Brennan Architects, dated 10/21/15
11/9/15	AA-5.4	Railroad Elevations Conceptual Rendering D-18, prepared by Thomas Brennan Architects, dated 10/21/15
11/9/15	AA-6.1	Master Landscape Plan, prepared by J.Kest & Co., dated 1/23/15, last revised 10/23/15
11/9/15	AA-6.2	North Courtyard Plan, prepared by J.Kest & Co., dated 1/23/15, last revised 10/23/15
11/9/15	AA-6.3	South Courtyard Plan, prepared by J.Kest & Co., dated 1/23/15, last revised 10/23/15
11/9/15	AA-7.1	Overall Aerial Perspective prepared by J.Kest & Co., dated 4/13/15, last revised 10/23/15
11/9/15	AA-7.2	North Courtyard Aerial Perspective prepared by J.Kest & Co., dated 4/13/15, last revised 10/23/15
11/9/15	AA-7.3	South Courtyard Aerial Perspective prepared by J.Kest & Co., dated 4/13/15, last revised 10/23/15
11/9/15	AA-8.0	Amended Stormwater Management Report prepared by Maser Consulting P.A., dated 1/23/15, revised 10/23/15
12/14/15	AA-9.0	Sign Plans (monument and directional) prepared by Prolific Design

		Group, dated 11/22/15
12/14/15	AA-10.0	Building 1 Elevations rendering D1 prepared by Thomas J. Brennan Architects, dated 12/10/15
12/14/15	AA-11.0	Limits of NFPA 13 and NFPA 13R fire suppression systems, prepared by Rotwein & Blake Associated Architects, PA
12/14/15	AA-12.0	Fire Overlay Plan prepared by Master Consulting P.A., dated 1/23/15, last revised 11/25/15 (3 sheets) (replaces AA-4)
12/14/15	AA-13.0	Oak Street Entrance Conceptual Rendering D-17, prepared by Thomas J. Brennan Architects, dated 12/02/15

2.6 Steven Katz, a principal in Sterling, provided an overview of the project. The witness testified that the Applicant retained the services of professional engineers, architects and planner, whose plans were prepared at the request of, and in consultation with, Sterling.

Wayne Zuckerman, a principal in Sterling, provided a brief overview of the revised design, which locates the proposed parking beneath the residential buildings and also introduced the revised architectural drawings prepared by Thomas Brennan Architects.

2.7 Kevin Haney, PE, a partner in the firm of Maser Consulting, P.A. ("Maser"), testified in support of the application. The Board accepted his credentials and qualified him to be an expert in the field of civil professional engineering.

The witness, who has 15 years experience with this project site, described the location and physical features of the site, an irregularly shaped 7.339-acre parcel with frontage on three streets, as depicted on the survey (Exhibit A-3). The property is vacant and has been so for several years following the demolition of buildings that had been used in the manufacture of building and roofing materials. Remnants of those buildings' foundations and concrete slabs, which extend several feet below the surface, remain on site. In addition, stockpiles of demolished materials including concrete and brick are scattered throughout the site, as shown in the photo display (Exhibit A-3A). The property is subject to New Jersey Department of Environmental Protection ("NJDEP") imposed deed restrictions and a remedial action work plan for the site, is being overseen by a Licensed Site Remediation Professional. The environmental contamination that resulted from the property's history as a former industrial site is being addressed. The environmental remediation of the site will ultimately include a cap consisting of the proposed paved areas and proposed buildings. A vapor barrier will be installed under the proposed buildings, allowing for residential use consistent with NJDEP's technical requirements.

Mr. Haney testified that, in his opinion and from a professional engineering perspective, the unique characteristics and unusual conditions peculiar to the site, including the high groundwater table, its environmental history and the extensive and costly demolition and environmental remediation work, both past and prospective, associated with the property, result in increased development costs including: approximately $70,000 to relocate a sanitary sewer line beneath in a now vacated street; approximately $300,000 in groundwater monitoring costs; $450,000 for the installation of a vapor barrier; $150,000 for capping the site with clean soil; and $180,000 to remove potentially unusable fill (brick and concrete from the demolished industrial buildings and extra-deep foundations).

Mr. Haney, on November 9, 2015, testified in support of the amended application and compared the prior filed site plans with the revised plans filed on October 26, 2015, which he concluded were an improved concept, and an improvement from an engineering perspective. Elimination of the wrap deck parking structure will not, however, result in a substantial decrease in construction costs; costs associated with the parking deck would, in part, be utilized in the construction of the buildings themselves.

Mr. Haney informed the Board that the initial application was for two residential buildings that were three stories at grade. The revised/amended plans place residential units in each of the two structures above ground-level parking, resulting in two four-story structures, each with a maximum permitted height of four stories and 55 feet. Mr. Haney testified that the height of the proposed buildings, as depicted in Exhibit AA-10, is within the maximum permitted height set forth in §389-56E(10); the height of both Building 1 and Building 2 is 54 feet $2^{5}/_{16}$ inches in height.

Mr. Haney further testified that the revised plan provides the required number of parking spaces (398), with 176 garage spaces and 222 at grade/surface parking spaces, including 16 parking spaces on grass pavers.

Mr. Haney informed the Board that the site lighting on the revised site plans has not changed and remains compliant. Stormwater is easier to manage under the design as revised in October 2015. There is no change in the volume of runoff and, at grade, the inlets will allow for adequate drainage. Compared with existing conditions, the project results in increased green space, and reduces impervious coverage, resulting in enhanced absorption of surface water and a reduction in run off.

With respect to the variance from the prohibition on parking in the front yard, the witness testified that the proposed drive aisles, as depicted on the plans, would be located in the front yard resulting in a technical 5-foot encroachment. The witness noted that the site is unique and that its odd shape and size results in frontage on three streets. Mr. Haney pointed out that no vehicles would be backing out into any Borough street.

At the hearing on December 14, 2015, the witness addressed the sign variance, indicating the proposed locations of the three monument (freestanding) signs to be located at the intersection of Oak Street and Central Avenue, the intersection of Paterson Avenue and Oak Street, and along Central Avenue. Mr. Haney testified that the signs (Exhibit AA-9) were outside the 18 foot line of sight, as required by the Ordinance. The enhanced size of the signs (24 ft. each side) enhances the signs' visibility, providing better notification. The witness testified that the proposed directional sign would be located near the northwest corner of Building 1, some 50 feet into the Property, and, therefore, did not require a variance.

The witness testified with respect to the requested waivers from East Rutherford's site plan ordinance related to: driveway grade, §327-46; landscape screening, §327-55B (and §327-39); parking stall size, §327-41B; and the width of sidewalk between parking and the building, §327-62D. The witness testified that, in his opinion, all waivers meet acceptable engineering standards.

2.8 Thomas Brennan, AIA, was sworn and the Board accepted his credentials and qualified him to be an expert in the field of architecture.

Testimony was provided to the Board on the proposed architectural elements of the project, common areas and community facilities.

Mr. Brennan also testified with respect to the proposed fire suppression systems, including the fire zones per Exhibit AA-10. The witness testified that the project would include a 3-hour rates separation between the ceiling of the garage and the residential units above; a 2-hour fire wall between segments of the building; sprinkler systems in the garages and buildings; standpipes in the stairwells; manual pull stations; and an annunciation system.

2.9 Jarrett Kest, PLA, testified on behalf of the application as follows. The Board accepted his credentials and qualified him to be an expert in the field of landscape architecture.

The witness explained that the original plans, and the revised plans filed on October 26, 2015, featured two courtyards to be located on the property. Without the parking deck, the landscaping features are improved because there is more open space and air, improved circulation and green space. The north courtyard (Exhibit AA-7.2) was designed with a plaza type feel with putting green, lawn areas, and buffering along the entire perimeter. The landscaping will soften the "hard" corners of building; substantial tree plantings are proposed along all streets.

The witness testified that the south courtyard (Exhibit AA-7.3) was designed to convey a hotel-resort feel featuring a swimming pool, located so as to receive ample sun, with areas for lounges, cabanas, a fire pit, and lush landscaping consisting of perennial plantings. Buffering will include certain pine species that will not overwhelm the parking space. There will be a fence for security and trees will enhance privacy.

2.10 Jeffrey Fiore, P.E., testified in support of the application as follows. The Board accepted his credentials and qualified him to be an expert in the field of professional engineering, specifically traffic engineering.

The witness identified the Traffic Impact Study prepared by Maser Consulting, P.A. dated January 23, 2015, which was marked by the Board as Exhibit A-21. The witness described the existing conditions, including volume on adjacent streets, provided the traffic counts performed by Maser and the capacity analysis that included a level of service review under build/no build conditions at specific nearby intersections. The witness testified that the proposed multi-family residential use is a permitted use in the zone, and that the proposed development is less than the maximum permitted density and height for the zone. The proposed residential use will generate less traffic than other permitted uses and the availability of mass transit, including the nearby Rutherford train station, will have a positive impact on traffic conditions in the area. Mr. Fiore testified that recent census data indicates that 20% of municipal residents use mass transit. The witness concluded that, after the improvements are constructed, the level of service at the intersections noted will be the same or similar to existing conditions. In his professional opinion, the sight distances from the driveways are adequate based upon ASHTO standards and the proposed landscaping along the driveways will not impede turning vehicles.

Mr. Fiore, on November 9, 2015, testified in support of the amended application, noting that the number of units (208) and the location of the driveways remains the same. He concluded that the change in bedroom

mix does not impact the Traffic Impact Study. Pursuant to the ITE Trip Manual, traffic impact calculations are based on number of dwelling units rather than the number of bedrooms. Pursuant to the ITE Manual section on Apartments in Urban Areas, the parking ratio is 1.61 parking spaces per housing unit, resulting in a parking demand of 335 spaces (based upon 208 units). The witness testified that this is well under the 398 total spaces based on RSIS (and shown on the revised plans filed on October 26, 2015) that will be available at the site. RSIS parking requirements include a factor equal to half of a parking space per unit to accommodate visitors to the site; there will be at least 104 parking spaces on the site for visitors and vendors.

Mr. Fiore testified about the circulation patterns for fire truck access (Exhibits AA-3.1, 3.2, 3.3 and AA-12). The witness testified that trucks can enter via the Central Avenue access point, move along the eastern property line, come through the middle of the parking lot and exit onto Oak Street. This is the main change in terms of fire truck access without the wrap deck parking structure. The witness testified that all the other fire truck patterns remain the same because other aisles and driveways remain at the same locations as proposed originally. With respect to the turning radii for fire trucks as shown on the plans, Mr. Fiore testified that there is adequate turning room on site for trucks to maneuver safely. Mr. Fiore also pointed out the location where the 16 formerly-banked spaces would be constructed with grass pavers. The witness testified that both the large driveway and the grass pavers can support the weight of the Borough's largest piece of firefighting equipment.

2.11 Donald W. Barree, AIA, testified on behalf of the application as follows. The Board accepted his credentials and qualified him to be an expert in the field of architecture.

At the Applicant's request, the witness evaluated the buildings with respect to fire protection, specifically, the National Fire Protection Association's (NFPA) 13 Sprinkler System versus the 13R Sprinkler System. Mr. Barree testified that, on the first floor, the parking garages will be built using fireproof construction. In addition, there will be horizontal fire separation on the roof deck of the parking garage. A horizontal fire barrier (firewall) will separate the parking area beneath each building and the above residential area into two distinct "buildings", from a fire protection standpoint, which can be constructed using different fire protection systems. Pursuant to code, assembly spaces and the residential floors above parking levels will utilize a NFPA 13R system. First floor parking

will be constructed with a NFPA 13 sprinkler system; residences above will utilize a NFPA 13R system, which is typical for residential construction.

The witness identified several additional fire safety features including: stairways constructed of block; firewalls that will extend all the way up to the roof; firebreaks between residential floors; every individual unit will have a one-hour rating, both horizontally and vertically; and a sprinkler suppression system.

2.12 Jeffrey Garfinkel, the Director of Acquisitions and Development for the Applicant, testified in support of the application as follows. The witness has substantial experience in the field of site acquisition and costs attributable to the development of a site. The witness testified that the site's unusual features, including a high groundwater table and environmental contamination attributable to its use as a former industrial site, result in extra costs including approximately: $300,000 in groundwater monitoring costs; $150,000 to cap the site with clean soil; $450,000 for a vapor barrier; $70,000 to relocate a sanitary sewer line; and $180,000 to remove potentially unusable fill material. The witness testified that he confirmed the accuracy of the estimated costs and that these costs are consistent with costs in the industry. The witness testified that based upon the additional development costs attributable to the peculiar features and history of this property, it would not be economically feasible to develop the site for multi-family residential use with a 20% affordable housing set aside.

On December 14, 2015, Mr. Garfinkel testified as to the necessity of erecting three double-faced, free-standing signs, each with a sign area of 24 s.f. (4 ft. by 6 ft. per side). He further testified that the need to have more than one such enlarged sign would also be helpful in protecting the health, safety and welfare of members of the public who might come to the development.

2.13 Steven Lydon, PP, testified on behalf of the application as follows. The Board accepted his credentials and qualified him to be an expert as a Professional Planner.

The witness testified in support of the original application and as well on the application filed on October 26, 2015. Mr. Lydon opined that the application filed on October 26 constituted an amended application rather than a new application and proffered the following reasons in support of his conclusion. The physical property location has not changed, been

subdivided or gotten larger; the Board is dealing with the same physical property. The number of units (208) has not changed.

Most of the key components have stayed the same. The two residential buildings are largely in the same location as initially proposed. Access points in both applications remain the same; circulation patterns have not changed. While the placement of parking underneath the buildings represents a change, both applications proposed some additional exterior parking.

While the bedroom distribution differs in the October 26 application, Mr. Lydon testified that the change is not significant because the Borough's ordinances speak in terms of units and density, not bedroom distribution. Factors such as school age children and traffic are also based on density, which has remained the same. The witness concluded that the amended application represents an improved development, in part because building coverage and impervious coverage are decreased.

Mr. Lydon's testimony initially described the surrounding neighborhood and the site's unique conditions, including its topography, frontage on three streets, a sanitary sewer that transects the property, a high water table, debris remaining from prior demolition, environmental contamination, and the poor condition of Oak Street. The witness testified that the proposed development furthers the following goals of East Rutherford's Master Plan: preservation of the Borough's residential character; the provision of various housing types, including affordable housing; the revitalization of vacant buildings and sites; and focusing economic development in existing commercial districts to reinforce existing businesses. The witness testified that the proposed development furthers the State's Plan, which calls for the revitalization of communities through the promotion of growth in compact forms, thereby avoiding sprawl patterns of growth.

On two occasions, the witness testified in support of the variance to locate drive aisles in the front yard setback. Mr. Lydon testified that the parking locations in the revised plan and the original plan, relative to the drive aisles, are the same. With respect to the location of the drive aisles in the front yard setback, front yard parking ordinances are often designed to prevent people from backing out into public rights of way, because of the site design, there will be no backing out into the street. In support of the requested variance, the witness testified that: impervious coverage on the site is far below the maximum; much of the parking will be screened by landscaping, thus it will be satisfactory from an aesthetic standpoint; the deviation is needed because of the unique configuration of the property,

including frontage on three streets; the encroachment is a minimal 5 feet; the parking spaces themselves are not located within the setback. The variance is somewhat a function of the site with its tremendous frontage on all three streets. The witness explained that the need for a variance to locate a drive aisle in the front yard setback is a combination of the need to provide parking, the need to have the drive aisle, and the configuration of the property. If the variance application is not granted, it will create a real hardship, because the development's proposed density is less than the maximum permitted in the AHO-B zone. Mr. Lydon testified that there would be no substantial detriment, because the parking is well buffered by landscaping. The witness testified that, in his opinion as a licensed professional planner, the application met the positive and negative criteria for a flexible or (c)(2) variance.

With regard to the proposed variance from the affordable housing set aside, the witness previously provided a brief overview and history of affordable housing in the State of New Jersey. He noted that the maximum 20% set aside in the ordinance creating the AHO-B was adopted during COAH's Third Round housing cycle, which included a "growth-share" methodology that the Supreme Court later invalidated. There has been a move away from 20% set-aside requirements. The recent March 2015 Supreme Court decision directed the use of COAH's Second Round Regulations, a factor that constitutes changed circumstances. The Second Round Regulations includes a presumptive set aside of 15% for inclusionary rental projects, such as that proposed by the Applicant.

Mr. Lydon explained that since he first testified, nothing has changed that would alter his conclusion that an appropriate number of COAH units have been set aside based on the conditions that the site presents. The witness testified that the Applicant proposes a 14% set-aside, rather than 10% as in the original application, yielding 30 units affordable for persons of low and moderate income. COAH's Second Round rules include a double credit for rental projects, with the potential that the Borough could receive 60 credits of affordable housing for the 30 proposed affordable units. Mr. Lydon indicated that COAH had proposed new numbers in 2014 relative to affordable obligations of the municipalities and that the Borough's new construction obligation reflected in those proposed number went from 210 units to 96 units.

With the recognition that planning is a balance act, Mr. Lydon concluded that a 14% set aside (30 units) strikes an appropriate balance between COAH and the ordinance's requirements and the financial feasibility of developing the site. If a project is not financially feasible, the project does

not move forward. Without a variance from the 20% set aside, the project will not be developed, no affordable housing will be built, and instead of double affordable housing credits, East Rutherford will not receive any affordable housing credits.

The proposed superior design, the environmental cleanup, the return of a non-productive property to productive use, and the production of affordable housing, all improve and benefit the Borough of East Rutherford, and further the general welfare and purposes of zoning. In Mr. Lydon's opinion, there is no negative impact upon the surrounding uses and there is no negative impact upon the Master Plan or the Zoning Code. Mr. Lydon concluded that there exists a (c)(2) basis for granting the requested variance relief for a reduced percentage of affordable housing set aside.

The witness testified that there is also a (c)(1) basis for the grant of the variance. The remaining construction remnants, the high water table and, most importantly, the environmental legacy that must be cleaned up, collectively result in an extraordinary and exceptional situation uniquely affecting the subject property. Strict application of the 20% affordable set aside would result in peculiar and exceptional difficulties and create an undue hardship. These physical features of the site generate exceptional development costs, making economically unfeasible to reserve 20% of the units for affordable housing. Not granting the requested variance will result in exceptional or undue hardship to the Applicant and the public will also have lost the real opportunity to realize the construction of affordable units. Mr. Lydon testified that, in his opinion as a licensed professional planner, and based upon the testimony and evidence in the record, that the application meets both the positive and negative criteria.

Mr. Lydon also testified in support of a deviation from §327-49C of the Borough's site plan ordinance to allow the Applicant to charge for additional parking spaces beyond the first parking space, for which there will be no additional charge. The witness opined that there exists a (c)(1) basis for granting the requested variance. The overall number of required spaces (398) will be provided; each unit will however receive one parking space without additional charge. The site's configuration precludes the Applicant from securing the maximum number of dwelling units permitted by the ordinance. The proposed density falls below the maximum allowable density due, in large part, to the amount of frontage and the configuration of the lot itself. The cost associated with placing parking under the building is nearly the same as constructing a separate parking deck, which supports the variance request.

Environmental costs are frontloaded and must be met; this, in part, drives the Applicant's request to charge residents for additional parking spaces. The witness testified that there is not much residential use in the surrounding area, and there are ways, other than to prohibit a parking fee or charge, for the Borough to address concerns about tenants parking on the street. The witness testified that the Borough could enforce no-parking regulations on adjacent streets. Given the proximity of the site to the bus and train stations, Mr. Lydon opined that the 1.61 cars-per-unit parking ratio is probably excessively high and will yield a surplus of spaces. In his professional opinion, there will not be any negative impact that would result if the Applicant were to charge for parking units beyond the one included parking space. Mr. Lydon testified that given the extraordinary costs associated with making this project work, which are attributable partly to environmental factors, and the impact of the lot's configuration upon the maximum permitted density on site, there is adequate reason to grant a (c)(1) variance.

At the hearing on December 14, 2015, Mr. Lydon testified with respect to the proposed sign variance, which he considers a safety issue. The witness noted that the more than 7 acre size of the Property and the proposed building setbacks. He noted that the setback at Central Avenue is 50% more than required by the ordinance; at Oak Street, the setback is three times more than the required distance, while at Paterson Avenue, the setback is more than 7 times the distances required by the Ordinance. The proposed variance would add 36 square feet of signage, a relatively small variance. In the opinion of the witness, the facts supported the c(1) variance.

In weighing the benefits and detriments of the proposed sign variance, the witness noted the "way finding" nature of the variance. People need to read the signs and find the buildings; signs that cannot be read are potentially dangerous. The number/size of the signs and the frontage represents an improvement. The proposed design of the project and the signs are high quality and aesthetically appealing. In the opinion of the witness, there exists a c(2) basis for granting the variance.

The witness also testified on the requested waivers from East Rutherford's site plan ordinance related to the following:

(1) Driveway grade, §327-46: A typical cross section of a road is up to 3%, which is difficult to detect. The 3% grade proposed for the site will assist with drainage and is not so steep as to cause vehicles to bottom out. The proposed grade will provide smooth transition,

proper storm water disposal and, in the opinion of the planner, a waiver should be granted.

(2) Landscape screening, §327-55B (duplicated in §327-39B): The proposed plan offers adequate landscape screening and will be aesthetically pleasing. The intent of the ordinance, to provide a desirable visual environment, is met, and, in the opinion of the planner, a waiver should be granted.

(3) Parking stall size, §327-41: The Borough's ordinances require slightly larger parking spaces (9 ft. x 20 ft.) than the industry standard (9 ft. x 18 ft.) and, in the opinion of the planner, there is no reason not to grant a waiver that would permit parking stall size consistent RSIS.

(4) Loading docks, §327-51A: The proposed loading areas will not interfere with access to the buildings or cross traffic, and will achieve the same purpose as loading docks. The planner opines that the loading bays will provide adequate loading capability and that the Board should grant the requested waiver.

(5) Width of sidewalk between parking and the building, §327-62D: In some areas the site complies with requirement of 3 ft. separation between building and sidewalk, but not in all. Areas where sidewalk is closer to building do not create a problem and are suitable for pedestrian traffic and because of landscaping there is no visual impairment. The sidewalks are wide enough to accommodate handicapped individuals. In the opinion of the planner, a waiver can be granted without issue; the intent of ordinance will be satisfied.

(6) Banking of parking spaces, §327-48: Testimony in support of the 16 land-banked spaces was rendered moot after the Applicant chose to construct the proposed land-banked spaces with grass pavers.

FINDINGS:

The Board finds that the testimony of the expert witnesses who testified on behalf of the Applicant were both credible and uncontroverted. The Board also finds that the testimony of the Applicant's representatives to be credible.

The Board has considered reports dated March 2, 2015, November 6, 2015, and December 10, 2015 from Remington & Vernick, the Borough's planners. The Board also considered the reports dated March 6, 2015, April 9, 2015 and

November 9, 2015 prepared by Glenn Beckmeyer, P.E., its professional engineer, and the December 10, 2015 letter containing comments from the Borough Fire Department. This Board has been presented with correspondence from Mr. Beckmeyer that the Applicant has satisfied the Borough Engineer's questions and concerns regarding storm water run off, and that Mr. Beckmeyer, in light of the Applicant's agreement, has no objection to the project, and further determines that the Applicant's agreement to locate and construct 16 parking spaces on grass pavers is acceptable to him and the Borough. Subsequently, the Applicant notified the Board that it has withdrawn its request for a waiver with respect to land-banked parking spaces.

The Applicant sought a waiver to deviate from the prohibition, in §327-49C of East Rutherford's Site Plan Ordinance, on imposing a charge or fee for above-ground parking spaces. The Borough's planner determined that the requested deviation constituted a variance rather than a waiver, and the Applicant introduced expert planning testimony in support of a variance from §327-49C.

The Board has heard and considered the testimony of the Applicant's engineer and has reviewed the filed revised/amended plans which reflect that residential units in each of the two structures are located above ground-level parking. On November 14, 2015, the Board accepted the comments of Borough Engineer Beckmeyer, confirming Mr. Haney's testimony, that the amended plans place five units at the ground level of Building 1, six units at ground level of Building 2, and ancillary offices, storage areas, utility rooms and lobbies at, and on, the ground level adjacent to the provided ground-level parking, and the Board has determined and finds that the filed amended plans, as aforesaid, are consistent with §386-56E(10), and therefore permit the construction of the two structures, each 4 stories in height, with a maximum permitted height of 55 feet.

The Board accepts the statement of its planner that, having been apprised of the location of the proposed directional sign at the hearing on December 14, 2015, the Board's planner concluded that the directional sign is not within the line of sight and does not require variance relief and the Board planner's comments in the December 16, 2015 letter as they relate to the directional sign are withdrawn.

3. **Surrounding Development Patterns.**

3.1. The subject property is located in the AHO-B Zone and consists of an irregularly shaped 7.339-acre parcel located at the intersections of Oak Street, Central Avenue and Paterson Avenue. The site has been vacant for several years, following the demolition of multiple industrial buildings that were used in the manufacture building and roofing materials. The neighborhood encompasses portions of neighboring Carlstadt and

Wallington. Adjacent uses include an active railroad line to the east with commercial properties beyond, the four-story Wallington Self Storage facility is located to the north, various commercial/warehouse properties and a single family residential dwelling are located to the west of the property in question, and commercial and warehouse uses are located to the south.

4. **The Impact of the Project.**

4.1. The Board finds that the project will have no negative impact upon the surrounding properties, which are largely commercial or industrial, nor will it negatively impact the Zoning Code of the Borough of East Rutherford.

4.2 The Board finds that the reuse of a currently vacant, unattractive and environmentally-challenged former industrial property and construction of a 208 unit aesthetically pleasing inclusionary multi-family residential development will be an asset to the Borough and the entire neighborhood. The Board finds that granting the requested variances and waivers, particularly the variance seeking a reduction in the affordable housing set aside, is necessary in order to make the project financially viable. The construction of housing for persons of low and moderate income will also assist the Borough in fulfilling any affordable housing obligation that it may have in the future. The proposed multi-family residential development, because it includes affordable units, contributes to the Borough of East Rutherford's constitutional and statutory obligation to provide a realistic opportunity for affordable housing.

5. **The Zoning Ordinance and Master Plan.**

5.1 Goals of the Borough's Master Plan that are relevant to the application are:

(1) To create and maintain an optimum community scale through proper guidance of development densities.

(2) To preserve the residential character of the borough while permitting and encouraging the development of a variety of housing types for households of all ages.

(3) To encourage good design, amenities and proper landscaping in new and rehabilitated buildings.

(4) To encourage the construction of affordable housing.

(5) To encourage the revitalization of vacant buildings and sites.

(6) To focus economic development on existing commercial districts and to reinforce existing business districts.

5.2 The Board finds that the proposed development, as applied for, is not inconsistent with either the Master Plan or with the Zoning Ordinance.

6. <u>Bulk Variance Application</u>.

6.1 The purposes of zoning which are applicable to this application are:

(1) "To encourage municipal action to guide the appropriate use or development of all lands in this State, in a manner which will promote the public health, safety, morals and general welfare."

(2) "To secure safety from fire, flood, panic and other natural and man-made disasters."

(3) "To provide adequate light, air and open space."

(4) "To promote the establishment of appropriate population densities and concentrations that will contribute to the well-being of persons, neighborhoods, communities and regions and preservation of the environment."

(5) "To provide sufficient space in appropriate locations for a variety of agricultural, residential, recreational, commercial and industrial uses and open space, both public and private, according to their respective environmental requirements in order to meet the needs of all New Jersey citizens."

(6) "To promote a desirable visual environment through creative development techniques and good civic design and arrangement."

6.2 The Board finds that the Applicant has satisfied the criteria under subsection (c)(1) of the relevant statue. The Board finds that an extraordinary and exceptional situation exists that uniquely affects the property in question. The Board finds that the physical constraints of the property, including a high groundwater table, debris from the demolition of the former industrial buildings on the site, the remaining and extensively deep footings and foundation of the former structures, along with an abandoned sewer line which must be relocated for the development to

occur, and the environmental factors arising from the site's history as a former industrial establishment, create an extraordinary and exceptional situation uniquely affecting this property. Strict application of a 20% affordable housing set aside would result in peculiar and exceptional practical difficulties and/or undue hardship to the Applicant. Strict application of a 20% set aside would result in a project that is not economically feasible, which, in turn, would result in no affordable housing being built. The increase in sign area and frontage is needed due to the size of the Property, and its unique configuration with frontage on three streets. Denying the waiver would create a hardship, while granting the variance would advance the safety of the walking public.

6.3 The Board finds that the Applicant has satisfied the criteria under sub-section (c)(2) of the relevant statue. The Board finds that: (1) the application relates to a specific piece of property; (2) the purposes of the Municipal Land Use Law would be advanced by a deviation from the Zoning Ordinance's requirements; (3) the variances can be granted without substantial detriment to the public good; (4) the benefits of the deviation substantially outweigh any detriment; and (5) the variances will not substantially impair the intent and purpose of the zone plan and Zoning Ordinance. The requested variance with respect to the location of a drive aisle in the parking setback, and the increase in permitted signage are minor. The proposed increase in the size and quantity of signs identifying the development, on this 7.339-acre site with frontage on three streets, will promote public safety. The general welfare and purposes of zoning will be advanced by allowing the project to proceed, resulting in the remediation of environmental conditions on the site, returning the vacant and unsightly property to a productive use, and creating an opportunity for affordable housing in an aesthetically pleasing inclusionary residential development. The Board finds that granting the variances will not have a substantial detrimental impact upon the neighborhood, the Master Plan or the Zoning Ordinance. The Board finds that, based upon the expert testimony and evidence presented by the Applicant, there exists a (c)(2) basis for granting the requested relief.

7. **No Negative Impact.**

7.1 The Board finds there will be no negative impact from granting the requested variances. The Board finds that a large portion of the neighborhood is currently devoted to commercial or warehouse uses, with a residential use located further to the west. The property is environmentally challenged and consists of a vacant former industrial site, which still retains

the remnants of the industrial buildings that were demolished several years ago.

7.2 The Board finds that the Applicant also satisfied the negative criteria. The negative criteria establishes that the variances can be granted without substantial detriment to the public good, that the benefits of the deviation would outweigh any detriment, and that it will not substantially impair the intent and purpose of the zone plan and Zoning Ordinance.

7.3 The Board has taken into consideration all testimony with respect to the application. The Board notes that no neighbors or interested parties appeared to testify in opposition to the proposed multi-family residential development. The Board also notes that a number of residents and interested parties posed questions to the applicant through the Board which questions were positively and adequately responded to by the applicant and its professional witnesses.

NOW, THEREFORE, HAVING MADE THE ABOVE-STATED FINDINGS AND CONCLUSIONS, BE IT RESOLVED by the Planning Board of the Borough of East Rutherford that the Board concludes that the Applicant has met its burden of proof and the following variances are hereby granted from the requirements of the Zoning Ordinance for the Borough of East Rutherford:

Ordinance	Variance
§389-37F(5)	Three double-sided freestanding signs, each with a sign area of 24 square feet (4 feet by 6 feet) per side, and more than one sign per frontage.
§389-54F(2)	Drive aisles can be located in the front yard, resulting in a 5-foot encroachment
§389-56E(3)	An affordable housing set aside of 30 units based upon 208 total units (including 178 market rate units)

The action of the Board in granting a variance from the affordable housing set aside in Ordinance §389-56E(3), resulting in 30 affordable units based upon a 208 unit development, is based upon a decision of the Monitor, and a determination of this Board that the substantial evidence in the record with respect to the Property in question, including the site environmental conditions, and the consequential costs of remediation, justify a set aside of 30 affordable housing units.

BE IT FURTHER RESOLVED by the Planning Board of the Borough of East Rutherford that the waivers from the Land Subdivision and the Site Plan Review Ordinance of the Borough of East Rutherford, as requested by the Applicant and as shown on the plans accompanying the amended application filed on October 26, 2015, are hereby granted, except that the Applicant has withdrawn the waiver request to land bank 16 parking spaces and has confirmed with the Borough Engineer that 16 parking spaces will be constructed with grass pavers.

BE IT FURTHER RESOLVED by the Planning Board of the Borough of East Rutherford that the Applicant's request for a deviation and variance from the limitation in §327-49C so that the Applicant may impose a fee or charge for parking spaces, provided that the project will afford, without additional charge, one (1) parking space for each market rate unit, and up to two (2) parking spaces for each low/moderate income (affordable) unit, provided that all tenants who own or lease or have documented responsibility for the care and custody of the vehicles, and presents proof of ownership, lease relationship or care and custody to the Applicant, is hereby granted.

BE IT FURTHER RESOLVED that the filed amended/revised plans submitted to the Board place residential units of each structure above ground-level parking, adjacent to ancillary offices, storage areas, utility rooms and lobbies, and the Board hereby finds and approves that each structure is consistent with §389-56E(10) and may be constructed to a height of four stories and up to the maximum permitted height of 55 feet.

BE IT FURTHER RESOLVED by the Planning Board of the Borough of East Rutherford that the Applicant's plans, as submitted, reviewed and agreed to, are in conformity with the Land Subdivision and the Site Plan Review Ordinance of the Borough of East Rutherford, as well as the Zoning Ordinance for the Borough of East Rutherford.

BE IT FURTHER RESOLVED by the Planning Board of the Borough of East Rutherford that the application for preliminary and final site plan approval, in accordance with the plans marked as Exhibits at the hearings for preliminary, amended preliminary and final site plan approval with variance relief and waivers from East Rutherford's site plan requirements, is hereby approved, subject to and upon the following conditions:

1. The affordable units shall be developed in accordance with the phasing schedule set forth in N.J.A.C. 5:97-6.4(d), or any successor regulation or decisional law governing the phasing in of affordable units in an inclusionary development.

2. A minimum of twenty (20%) percent of the thirty (30) affordable units, or six (6) units, shall be three bedroom units. No more than twenty (20%) percent of the thirty (30) affordable units, or six (6) units, may be one bedroom units.

3. The affordable units shall be affirmatively marketed in such manner as is required by the Borough, any applicable regulation of the Council On Affordable Housing ("COAH") or successor agency, or decisional law so as to ensure that the Borough receives appropriate crediting for the affordable units consistent with its Housing Element and Fair Share Plan.

4. The Applicant shall execute a Developer's Agreement to be prepared by the Board attorney, which shall detail the full performance by the Applicant of its obligations under the terms and conditions of the Developer's Agreement, including but not limited to the payment of all fees and posting and maintenance of all bonds, deposits and escrows as required by Borough Ordinance and applicable law. The Developer's Agreement will also describe the engineering detail and the Applicant's responsibility to assume the reasonable costs of installing curbing and reconstructing and repaving the full width of Oak Street where it abuts the Property which is the subject of this application, with the following construction method: 6 inches thick, dense graded aggregate base course; 4 inches bituminous stabilized base course 25M64; and 2 inches bituminous concrete surface course, 9.5M64. The Applicant shall not be responsible for the cost of installing curbing along any portion of Oak Street, which is located on private property or that is not owned by the Applicant or the Borough.

5. The Applicant shall comply with the site details as shown on all plans submitted through their respective dates, with any deviation therefrom requiring further review and approval by the Board. Any cosmetic deviation or minor change in design detail shall be resolved by the Board Engineer and the Board Attorney. In the event that the Applicant does not agree with the position of the Board Engineer and Board Attorney the Applicant shall present the issue to an appointed member, the Design Liaison, of the Planning Board along with the Board Engineer and Board Attorney. In the event that the Applicant does not agree with the position of the Design Liaison then the Applicant shall present the issue to the full Planning Board.

6. A bond or letter of credit (as provided within N.J.S.A. 40:55D-53) in an amount as determined by the Board Engineer shall be posted to guarantee performance for and of the work and improvements in the public right-of-way as required and approved by the Board, and the maintenance of such improvements for such time as permitted by law after the project has been completed. A copy of an acceptable form of letter of credit shall be included and/or attached in the Developer's Agreement.

7. Fees and deposits consistent with applicable Ordinance shall be posted so as to reimburse the Borough for money paid to its professionals in connection with the development application, as well as the inspection of the work to be performed pursuant to this approving resolution.

8. The Applicant agrees to supply and install streetscape improvements pursuant to the Borough of East Rutherford Streetscape design standards, as previously provided by the Borough Engineer to the Applicant's engineers, Maser Consulting, PA, which streetscape is reflected in the filed site plans.

9. Approvals of all other government agencies and utilities having jurisdiction over any aspect of the Project.

10. The Board retains jurisdiction as to any interpretation of this resolution.

11. The Applicant shall encourage and allow a commuter shuttle service to be available at the project for use by tenants in commuting to and from the New Jersey Transit Rutherford train station. The applicant as Landlord shall encourage the use of the shuttle service to bring about a high level of use by the tenants.

12. Borough shall provide on-site pick up of recycling and garbage for the project.

MOTION TO APPROVE

Introduced by:

Seconded by:

In favor of granting:

Oppositions:

Abstentions:

MOTION APPROVED

Chairman of Planning Board

The foregoing is a true copy of a Resolution adopted by the Planning Board of the Borough of East Rutherford at the meeting of ~~December 29, 2015~~ January 18, 2016, and authorized to be released for publication.

Cheryl Wloch-Rapetti, Secretary

SECOND SETTLEMENT AGREEMENT

THIS SECOND SETTLEMENT AGREEMENT is made and entered into this day of _____, 2012 between **GROUP AT ROUTE 3, LLC,** with a mailing address of 16 Microlab Road, Suite A, Livingston, New Jersey, 07039 ("the Developer" or "Group"), and **ROBERT T. REGAN, ESQ.,** Mount Laurel Compliance Monitor for the Borough of East Rutherford with a mailing address of 345 Kinderkamack Road, P.O. Box 214, Westwood, New Jersey 07675 ("the Monitor"), (collectively, "the Parties").

WHEREAS, the Developer is the owner of property with frontage on the Route 3 Service Road leading to the N.J. Turnpike Exit 16W, known and designated as Block 108.04 Lots 1 and 5 on the official tax maps of the Borough, consisting of approximately 42.3 acres, ("the Property"); and

WHEREAS, the Parties and Borough of East Rutherford, a municipal corporation of the State of New Jersey, with offices located at Borough Hall, 1 Everett Place, East Rutherford, New Jersey 07073 ("the Borough" or "East Rutherford"), entered into a Settlement Agreement, last executed on October 26, 2010, ("the Settlement Agreement" annexed hereto as **Exhibit A**), to provide for the Revised Project (as defined in the Settlement Agreement) and for the Parties to jointly seek approval ("the Joint Motion") from the Council on Affordable Housing ("COAH") for, among other things, a reduced set-aside for the Revised Project of 8.26%, due to economic feasibility, and a determination that the Borough would not be liable for the difference between an 8.26% set-aside and a standard 20% set-aside ("the Differential"); and

WHEREAS, the Parties made the Joint Motion on November 12, 2010 and COAH, by Resolution entered March 22, 2011, ("the COAH Decision," annexed hereto as **Exhibit B**), granted the Parties' request for a reduced set-aside, but denied the Parties'

request, without prejudice, that the Borough is not obligated for the Differential , citing In re N.J.A.C. 5:96 and 5:97, (App. Div. October 8, 2010) invalidating part of COAH's 3rd Round Rules, ("the Court Decision"), and COAH thus finding that it could not calculate the Borough's prospective obligation and therefore would not grant relief from the Differential; and

WHEREAS, the Court Decision has been stayed by the Supreme Court and the Court has also granted certification to review that decision, and various legislative proposals may be in the offing, which may affect the calculation of the Borough's affordable housing obligation; and

WHEREAS, the Developer will (i) seek Governmental Approvals to proceed with Phase One of the Revised Project (modified as described in this Second Settlement Agreement); and (ii) provide affordable housing units as part of the Revised Project but in an amount calculated as a 10% set-aside of the total units in each respective Phase, in view of that aspect of the COAH Decision which declined relief for the Differential; and (iii) will indemnify the Borough for any liability for the Differential which may be determined to arise from Phase One, ("the Phase One Differential"), and Phase Two ("the Phase Two Differential"), under the terms and conditions hereafter set forth; and

WHEREAS, pursuant to an Order entered by the Superior Court on February 2, 2005, ("the "2005 Order"), Robert T. Regan, Esq. was appointed Mount Laurel Compliance Monitor for the Borough with powers, among other things, to direct and oversee the implementation of measures to address the Borough's affordable housing obligation (the "2005 Order Powers"); and

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WHEREAS, the Monitor, acting pursuant to his 2005 Order Powers, hereby binds the Borough to this Second Agreement, and shall and does direct the Borough to cooperate with the Developer in the implementation of the Revised Project in order that the Borough may realize affordable housing units where it would not under the Approved Project to address part of its affordable housing obligation;

NOW, THEREFORE, in consideration of the mutual promises contained herein, the Parties agree as follows:

SECTION 1

RECITALS, DEFINITIONS AND SETTLEMENT AGREEMENT

1.01 Recitals and Definitions. The Recitals are incorporated and made a part of this Second Settlement Agreement. All terms, words and phrases which have been defined or ascribed to have a meaning in the Recitals and the Settlement Agreement shall have the same meaning as hereafter used in this Second Settlement Agreement.

1.02 Construction. Except as expressly amended and supplemented by this Second Settlement Agreement, the Settlement Agreement remains in full force and effect. The Parties, including the Borough through the Monitor acting pursuant to his 2005 Order Powers, hereby ratify and reaffirm it in its entirety. The Borough is hereby bound, through the Monitor acting pursuant to his 2005 Order Powers, to satisfy any duty or obligation set forth in this Second Settlement Agreement. Nothing herein shall be deemed to construe or limit the Monitor's 2005 Order Powers as it relates to the Borough and the Monitor may, consistent with those powers, undertake any action otherwise reserved to the Borough under this Second Agreement. Any reference to "the Parties" throughout this Second Settlement Agreement shall be understood to include the Borough when a reasonable construction of the term would so indicate. The terms of this Second

Settlement Agreement supersede any conflicting terms contained in the Settlement Agreement.

1.03 Jurisdiction of NJMC. The Parties recognize that the Property is located within the Meadowlands District and subject to the regulations of the New Jersey Meadowlands Commission ("NJMC") regarding development and that an application for approval of the Revised Project must be submitted to NJMC.

SECTION 2

THE REVISED PROJECT

2.01. The Revised Project.

(a) The Revised Project shall consist of seven-hundred fifty (750) total units, with three-hundred sixteen (316) units being constructed in Phase One and four-hundred thirty-four (434) units constructed in Phase Two, as described in the Settlement Agreement, subject to the following modifications:

(i) Parking shall be provided consistent with NJMC regulations with any relief from those requirements that the Developer may obtain upon a variance application.

(ii) The Developer shall provide affordable housing as a component of each respective Phase of the Revised Project calculated at ten-per cent (10%) of the units for that Phase ("the Phase Affordable Units"). For example, if Phase One consists of 316 units, as contemplated, 10% or 32 units will be set-aside for affordable housing units.

(b) The Developer reserves the right to modify the Revised Project due to (i) market conditions; (ii) an inability to obtain Revised Governmental Approvals for

the Revised Project as proposed, with reasonable conditions; or (iii) an inability to obtain financing for the Revised Project; *provided* however that the number of affordable housing units provided by the Developer arising out of or related to a Phase, (as same may be further revised pursuant to this Section), shall be ten-per cent (10%) of the total units for that Phase and provided further that the Developer shall indemnify the Borough from any resulting Differential as hereafter set forth in Sections 2.02 and 2.03.

2.02 Affordable Housing Component of the Revised Project.

(a) In addition to the affordable housing units described in Section 2.01, the Developer will indemnify the Borough (in the manner described in Section 2.03) for any difference between the applicable Phase Affordable Units provided and any obligation imposed upon the Borough by a change in governing administrative regulations, statute, or in an applicable judicial determination, (a "Change in Law"), to provide for affordable housing related to a Phase of the Revised Project, in excess of 10% of the total units of a Phase, but not to exceed 20% of the total units in a Phase of the Revised Project ("the Phase Differential").

(b) Developer's obligation to indemnify the Borough for the Phase Differential shall be initiated by Notice from the Borough or Monitor to the Developer. Upon receipt of such Notice by the Developer, the Parties agree to confer, within fourteen (14) days, to address how the Developer's obligation to indemnify the Borough may be satisfied, in accordance with the alternative means hereafter set forth or other means as may be agreed to by the Parties. Nothing herein shall prohibit any Party from taking any action to contest or stay the Borough's obligation to provide the Phase Differential Any such challenge shall be at the sole cost and expense of the party making such challenge. No other party shall have any obligation to join in or cooperate with such challenge and

any party may oppose such challenge. If a good faith challenge is filed with a court or administrative agency with jurisdiction, the Developer's obligation to indemnify the Borough shall be held in abeyance until any such challenge is resolved.

(c) In the event of a Change in Law resulting in a reduction of the Borough's obligation to provide affordable housing arising out of or relating to the Revised Project, the Developer shall be entitled to take advantage of any such Change in Law by reducing the number of affordable units to be thereafter provided, and any Party may give Notice to another, and the Parties agree to confer within fourteen (14) days of the receipt of such Notice to determine how such a reduction may be accommodated. Notwithstanding the preceding sentence, however, the Developer's obligation to provide affordable housing arising out of or relating to a Phase of the Revised Project shall never be less than the Phase Affordable Units described in Section 2.01 and 2.02.

2.03 Means of Addressing a Phase Differential.

(a) The Developer agrees to provide for the Phase Differential applicable to Phase One, if any, under any combination of the following techniques, or any other technique available, or made available by a Change in Law, all at the Developer's sole discretion, but subject to the limitations provided herein:

(i) the Developer may seek from the Borough, and the Borough will reasonably consider any such request, for rental credits available to address the Borough's prospective need obligation, but only as provided in Section 2.04; and/or

(ii) the Developer may provide for the Phase Differential applicable to Phase One in the Second Phase of the Revised Project; and /or

(iii) the Developer may provide for the Phase Differential applicable to Phase One under a rehabilitation program agreed to by the Parties, under terms acceptable to the Borough in its sole and absolute discretion; and/or

(iv) The Developer may provide for the Phase Differential applicable to Phase One in an off-site affordable housing project, provided the Borough supplies the land at no cost to the Developer, water, sewer and utility connections exist on or adjacent to the site, the Developer is not responsible for any environmental remediation of the site, and the Property is otherwise suitable and developable in accordance with COAH or other applicable regulations; and provided further that the Borough may refuse to provide any such land in its sole and absolute discretion.

(b) The Developer agrees to provide for the Phase Differential applicable to Phase Two, if any, under any combination of the following techniques, or any other technique available, or made available by a Change in Law, all at the Developer's sole discretion, but subject to the limitations provided herein:

(i) the Developer may seek from the Borough, and the Borough will reasonably consider any such request, for rental credits available to address the Borough's prospective need obligation, but only as provided in Section 2.04; and/or

(ii) the Developer may provide for the Phase Differential applicable to Phase Two under a rehabilitation program agreed to by the Parties, under terms acceptable to the Borough in its sole and absolute discretion; and/or

(iv) The Developer may provide for the Phase Differential applicable to Phase Two in an off-site affordable housing project, provided the Borough supplies the land at no cost to the Developer, water, sewer and utility connections exist on or adjacent to the site, the Developer is not responsible for any environmental

remediation of the site, and the Property is otherwise suitable and developable in accordance with COAH or other applicable regulations; and provided further that the Borough may refuse to provide any such land in its sole and absolute discretion.

2.04 Rental Bonus Credits.

(a) The Parties acknowledge that under the current state of the law, a municipality is to provide a minimum of 25% of its prospective need obligation as rental units ("the Rental Housing Requirement"). N.J.A.C. 5:97.3.10(b)3. The Borough's currently calculated prospective need obligation is 123 units, thereby requiring 31 rental units (123 x 25% = 31, rounded up) to meet the Rental Housing Requirement.

(b) The Borough's Housing Element and Fair Share Plan, (dated December 15 and 16, 2008), ("the 2008 Plan"), as submitted to COAH, estimated that 20 rental units would be produced from other inclusionary projects known as the Tomu Site and the 480-484 Paterson Avenue site. This leaves a Rental Housing Requirement balance of 11 units (31 – 20 = 11).

(c) Under Phase One of the Revised Project, the Developer proposes an inclusionary housing project of 316 rental units, of which 32 units will be the Phase One Affordable Units. At least 11 of these 32 units will be rental units with such attributes so as to allow those units to be credited against the Borough's Rental Housing Requirement.

(d) The Parties recognize that rental units provided in excess of the Rental Housing Requirement are eligible for 2:1 rental bonus credits, N.J.A.C. 5:97-3.6(a), but such credits are capped at 25% of a municipality's prospective need. N.J.A.C. 5:97-3.20(b). Here, the Borough's prospective need is 123 units and thus the cap on the total amount of credits the Borough may receive is 31 (25% x 123 = 31, rounded up).

(c) Consequently, the Developer may apply for, and the Borough or Monitor may allocate, in its sole and absolute discretion, up to 31 rental unit credits to the Developer or towards any new inclusionary project to be developed in the Borough to address prospective need.

2.05 Denial of Approvals.

(a) If the Revised Governmental Approvals for Phase One are not satisfactory to the Developer, the Developer may cancel this Second Settlement Agreement by written Notice to the Monitor and the Borough. This Section shall supersede Section 2.04 Denial of Approvals as set forth in the Settlement Agreement.

(b) If this Second Settlement Agreement is cancelled pursuant to its terms, then the Parties shall otherwise return to their position as it may have existed prior to the Settlement Agreement.

(c) An approval or condition shall be "reasonable" or "satisfactory to the Developer" if, considering the scope and magnitude of the Revised Project, that approval or condition does not contain a provision which: (i) was not foreseeable by a developer with the experience of Developer (taking into account the reasonable and customary expectations of the developer's professional advisors) and/or (ii) adds an unreasonable burden to the Developer in terms of cost or delay.

SECTION 3

MISCELLANEOUS

3.01. Severability of Provisions.

(a) The obligation of the Borough to cooperate with the Developer as provided herein, and the obligation of the Developer to provide affordable housing to the Borough are mutually dependant. Therefore, if any section or term of this Second

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Settlement Agreement shall for any reason be adjudged by a court to be invalid and such invalidity adversely affects another party's rights as provided in this agreement (as determined by that party in its sole and absolute discretion) , the adversely affected party may cancel this agreement in which event the parties shall be governed by Section 2.05(b).

(b) Except as provided in Section 3.01(a), if any section or term of this Second Settlement Agreement shall for any reason be adjudged by a court to be invalid, such judgment shall not affect the remaining sections and terms of this Second Settlement Agreement. The provisions of this Second Settlement Agreement are intended to be severable.

3.02. Successors Bound. This Second Settlement Agreement shall be binding upon the successors and assigns of the Parties signing it and each of the provisions of this Second Settlement Agreement shall have the same force and effect as if set forth at length as conditions of the grant of land use approvals by any agency exercising jurisdiction in regard to this matter.

3.03 Counterparts. This Second Settlement Agreement may be executed in any number of counterparts, each of which when so executed shall be deemed to be an original and all of which taken together shall constitute one and the same Second Settlement Agreement. This Second Settlement Agreement may be executed by facsimile signature.

3.04 Effective Date. This Second Settlement Agreement shall be effective upon the date on which this Second Settlement Agreement is finally executed by all Parties or such other date as may be agreed to by the Parties

3.05. Notices. All notices shall be served by certified mail, return receipt requested and regular mail upon the Parties at the addresses shown on page one. Copies of all notices shall be delivered to the Parties' attorneys via regular mail and fax:

As to Developer:

Larry Pantirer
Group at Route 3, LLC
16 Micro Lab Road
Livingston, New Jersey 07039
Developer

with a copy to:

Edward J. Boccher, Esq.
DeCotiis, FitzPatrick & Cole, LLP
Glenpointe Centre West
500 Frank W. Burr Boulevard, Suite 31
Teaneck, New Jersey 07666

And

Glenn C. Kienz, Esq.
Weiner Lesniak, LLP
629 Parsippany Road
P.O. Box 0438
Parsippany, NJ 07054-0438

As to the Monitor:

Robert T. Regan, Esq.
345 Kinderkamack Road
Westwood, New Jersey 07675

3.06 Headings. The headings and captions used in this Second Settlement Agreement are for convenience only and shall not be used to interpret or otherwise affect the meaning of this Second Settlement Agreement.

SIGNATURE PAGES FOLLOW

IN WITNESS WHEREOF the Parties have executed this Second Settlement Agreement on the day and year written at the top of the first page.

ATTEST

_____

GROUP AT ROUTE 3, LLC

By:_____
Larry Pantirer

ATTEST:

Patricia N. Cross

ROBERT T. REGAN, ESQ.
MOUNT LAUREL COMPLIANCE MONITOR

By:_____
Robert T. Regan, Esq.

STATE OF NEW JERSEY :
: SS:
COUNTY OF BERGEN :

I CERTIFY that on March 6, 2012 ROBERT T. REGAN personally came before me and acknowledged under oath, to my satisfaction, that this person (or if more than one, each person):

(a) is named in and personally signed this document, and
(b) signed, sealed and delivered this document as his or her act and deed.

Patricia N Comiso
Notary Public
New Jersey
My Commission Expires April 8, 2016

STATE OF NEW JERSEY :
: SS:
COUNTY OF BERGEN :

I CERTIFY that on , 2012 Larry Pantirer personally came to me known and known to me to be an individual described in and who executed the foregoing instrument, and such person duly acknowledged to me that he understood the meaning of the instrument and that he executed the same as his act and deed, and as a Member of the Limited Liability Corporation named therein, and with full authority to act on behalf of such LLC., and that he is over the age of 18.

Attorney-at-Law of the State of New Jersey

RECORD AND RETURN TO:
Edward J. Boccher, Esq.
DeCotiis, FitzPatrick, Cole & Wisler, LLP
Glenpointe Centre West
500 Frank W. Burr Boulevard, Suite 31
Teaneck, New Jersey 07666

SETTLEMENT AGREEMENT

THIS SETTLEMENT AGREEMENT is made and entered into this day of _____, 2010 between **GROUP AT ROUTE 3, LLC**, with a mailing address of 16 Microlab Road, Suite A, Livingston, New Jersey, 07039 ("the Developer" or "Group"), the **BOROUGH OF EAST RUTHERFORD**, a municipal corporation of the State of New Jersey, with offices located at Borough Hall, 1 Everett Place, East Rutherford, New Jersey 07073 ("the Borough" or "East Rutherford"), the **EAST RUTHERFORD PLANNING BOARD**, with offices at Borough Hall, 1 Everett Place, East Rutherford, New Jersey 07073 (the "Planning Board"), and **ROBERT T. REGAN, ESQ.**, Mount Laurel Compliance Monitor for the Borough with a mailing address of 345 Kinderkamack Road, P.O. Box 214, Westwood, New Jersey 07675 ("the Monitor").

WHEREAS, the New Jersey Meadowlands Commission (the "NJMC") by Resolution No. 03-66, adopted November 24, 2003, declared property with frontage on the Route 3 Service Road leading to the N.J. Turnpike Exit 16W, known and designated as Block 108.04 Lots 1 and 5 on the official tax maps of the Borough, consisting of approximately 42.3 acres, ("the Property") an area "in need of redevelopment" within the scope of N.J.S.A. 13:177-20 et. seq.; and

WHEREAS, the NJMC by Resolution No. 04-09, dated February 25, 2004, adopted the Route 3 East Redevelopment Plan for the Property, which permits residential development along with a variety of services, amenities and commercial uses compatible with housing and the surrounding area; and

WHEREAS, the Developer is the owner of the Property; and

WHEREAS, the Developer submitted an application for a zoning certificate for approval to develop a 4.25 acre area of the overall 42.3 acres of the Property, which was approved by the NJMC on May 4, 2005 ("the NJMC Approvals"); and

WHEREAS, the NJMC Approvals permit the construction of a 614-unit rental residential project to be constructed in two 20-story, steel construction towers over shared parking, together with five thousand (5,000) square feet of ancillary retail ("the Approved Project"); and

WHEREAS, the NJMC Approvals for the Approved Project do not contain a requirement that the Approved Project provide any affordable housing; and

WHEREAS, the Developer asserts that it has been issued every federal, state, county, local and regulatory permit related to the construction of the Approved Project (collectively with the NJMC Approvals, "the Governmental Approvals"); and

WHEREAS, the Governmental Approvals for the Approved Project have been extended pursuant to the Permit Extension Action of 2008 (N.J.S.A. 40:55D-136.1); and

WHEREAS, pursuant to an Order entered by the Superior Court on February 2, 2005 Order, Robert T. Regan, Esq. was appointed Mount Laurel Compliance Monitor for the Borough with powers, among other things, to oversee the implementation of the Borough's affordable housing obligation; and

WHEREAS, the Borough, with the concurrence of the Monitor, has submitted a Housing Element and Fair Share Plan ("the Fair Share Plan") to the Council on Affordable Housing ("COAH") proposing to provide 213 affordable housing units through new construction, rehabilitation and bonus credits, of which 120 units represent the Borough's "growth share" obligation; and

WHEREAS, the Borough's Fair Share Plan includes the Approved Project as part of its compliance mechanism and provides that the Borough will request that the NJMC require that the Approved Project set-aside 20% of its units for affordable housing not withstanding the NJMC Approvals; and

WHEREAS, because the NJMC Approvals for the Approved Project do not include any affordable housing requirement, and were granted to the Developer without any incentives to accommodate an affordable housing component, the Developer has objected to the Borough's Fair Share Plan and the matter is pending before COAH; and

WHEREAS, the Developer has informed the other parties that it intends to seek modifications to the existing Governmental Approvals, and obtain any necessary new Governmental Approvals, to allow for the construction of a revised project of approximately seven hundred fifty (750) units, utilizing low-rise, mid-rise, or high-rise structures, and as part of such a project, to provide an affordable housing component of sixty-two (62) affordable units, providing for a 8.26% set-aside for affordable housing, together with certain other conditions or waivers hereafter set forth ("the Revised Project"); and

WHEREAS, approval of the Revised Project will facilitate implementation of a project for the Developer and will provide for the construction of affordable housing, to assist the Borough in meeting its affordable housing obligation; and

WHEREAS, while the Parties recognize that an inclusionary project generally requires that 20% of the total units be set-aside for affordable housing, Developer contends that such a set-aside for the Revised Project is not economically feasible (even given the increase in density from the Approved Project); and

WHEREAS, although the NJMC is the "permitting authority," for purpose of awarding NJMC Approvals, it has deferred to the expertise of COAH in determining whether a reduced set-aside and other waivers respecting a municipal affordable housing obligation are warranted; and

WHEREAS, COAH is authorized to consider a joint application from a developer and a municipality to approve reduced affordable housing set-asides or increased densities to ensure the economic feasibility of an inclusionary development, *see,* N.J.S.A. 52:27D-311i; and

WHEREAS, a municipality may seek a waiver of COAH regulations governing, among other things, the calculation and implementation of a municipal affordable housing obligation, *see,* N.J.A.C. 5:96-15.1, and COAH is authorized to grant such waivers if the waiver will, among other things, foster the development of affordable housing, *see,* N.J.A.C. 5:96-15.2; and

WHEREAS, subject to the terms and conditions of this Agreement, the Parties agree to make a joint application to COAH to allow for the construction of the Revised Project with sixty two (62) affordable rental housing units based on the assertion that a 20% set-aside for affordable units is not economically feasible, provided that COAH also determine, by a waiver of its rules or otherwise, that: (i) the affordable housing obligation of the Borough shall be reduced by at least the same amount of affordable housing that represents the difference between the amount of affordable units to be provided under the Revised Project and the number of affordable units in the Borough's Fair Share Plan allocable to the Approved Project ("the Differential"); and (ii) the Borough shall not be liable in any fashion for, or to produce additional affordable housing units to cover, the

Differential (together the "Borough Adjustment"), and further subject to other conditions set forth in this Agreement;

NOW, THEREFORE, in consideration of the mutual promises contained herein, the Parties agree as follows:

SECTION 1

RECITALS, DEFINITIONS AND PURPOSE

1.01 Recitals and Definitions. The Recitals are incorporated and made a part of this Agreement. All terms, words and phrases which have been defined or ascribed to have a meaning in the Recitals shall have the same meaning as hereafter used in this Agreement.

1.02 Purpose. The Parties agree to exercise their best efforts to seek COAH approval of the affordable housing component of the Revised Project together with a determination of COAH granting the Borough Adjustment, together with other waivers from COAH rules and subject to certain conditions hereafter set forth. It is the purpose of this Agreement to set forth the terms, conditions and process by which such an application to COAH will be made.

SECTION 2

SCOPE OF APPLICATION TO COAH FOR THE REVISED PROJECT AND RELIEF FROM THE DIFFERENTIAL

2.01. COAH Approval of Revised Project. The Parties recognize that COAH is authorized to consider a joint application from a developer and a municipality to approve reduced affordable housing set-asides or increased densities to ensure the economic feasibility of an inclusionary development, *see,* N.J.S.A. 52:27D-311i, in combination with the request of the Borough for the Borough Adjustment (together "the Feasibility

Application").The Parties agree to submit the Feasibility Application to COAH, pursuant to COAH's motion practice, or in any other format as may be directed by COAH. The Developer will undertake the preparation of all documents, exhibits and any other information COAH may require, at the Developer's sole cost and expense, subject to review and approval by the Borough and the Monitor. Any reasonable cost charged to the Borough or the Planning Board by the Monitor or by the professionals of the Borough or the Board for services relating to this Agreement, the Revised Project or the Feasibility Application shall be paid by Developer within 30 days of billing from the Borough. While the Parties recognize that COAH cannot grant all of the approvals or permits that may be required for the Revised Project, it is considered important by the Parties that the scope of the Project which the Developer will undertake, and which the Borough and the Monitor will agree to, be set forth in this Agreement, together with other conditions of the Feasibility Application.

2.02 Reduction of Affordable Housing Set-Aside and No Obligation Upon the Borough. The Feasibility Application will seek approval from COAH, pursuant to N.J.S.A. 52:27D-311.1(i), to allow for the construction of the Revised Project and request that COAH also grant the Borough Adjustment, and further subject to other conditions set forth in this Agreement.

2.03 Revised Project.

(a) In addition to the Borough Adjustment, the Feasibility Application will address, among other things the scope of the Revised Project, and the anticipated application for new or revised Governmental Approvals for the Revised Project ("the Revised Governmental Approvals"). The Revised Project will generally consist of the following subject to the conditions also set forth:

1. The Revised Project will consist of seven hundred fifty (750) units, (including sixty-two (62) affordable low and moderate income units), to be constructed in buildings containing, at a minimum, four (4) stories of residential use over amenities and up to 5,000 square feet of commercial space, consistent with the Approved Project, may be included in the Revised Project. The parking ratio for the Revised Project shall be one (1) space per each affordable moderate rental unit and 1.7 spaces per market rate unit.

2. The Revised Project will be undertaken in two overall phases with sixty-two (62) affordable units divided between the two phases. Subject to receipt of all Revised Governmental Approvals which may be required for the Revised Project, Phase One would contain three hundred sixteen (316) units with fifteen (15) affordable moderate income rental units; and Phase Two would contain four hundred thirty-four (434) units and the remaining forty-seven (47) affordable low and moderate income rental units built on a percent complete basis in accordance with N.J.A.C. 5:97-6.4(d). The Developer will provide for a split of thirty-one (31) low and thirty-one (31) moderate income affordable rental units, provided however, that Phase One will contain fifteen (15) moderate income units. All affordable units shall be rental units for so long as required by COAH to qualify the Borough for such rental bonuses as may be provided in COAH regulations. This Agreement is subject to the Developer being permitted to proceed with the construction of Phase One as it seeks Revised Governmental Approvals for Phase Two.

3. Subject to Paragraph 5 below, the Developer shall construct Phase One of the Revised Project on the approximate four (4) acre area of the Property for which the Approved Project was to be constructed and to construct Phase

Two on an adjacent, similar sized portion of the Property under the ownership of the Developer.

4. The Developer shall secure Revised Governmental Approvals for Phase One and Phase Two of the Revised Project. Upon receipt of the Phase One Revised Governmental Approvals, the Developer will commence construction of Phase One. Contemporaneously with or shortly after the issuance of Revised Governmental Approvals for Phase One, the Developer will seek Revised Governmental Approvals for Phase Two.

5. The commencement of construction of Phases One and Two are subject to, in the Developer's reasonable judgment (i) acceptable market conditions; (ii) receipt of Revised Governmental Approvals for the Revised Project as proposed with reasonable conditions acceptable to the Developer; and (iii) financing.

6. The Developer reserves the right to modify the Revised Project due to (i) unacceptable market conditions; (ii) an inability to obtain Revised Governmental Approvals for the Revised Project as proposed, with reasonable conditions; or (iii) an inability to obtain financing for the Revised Project; *provided* however that any such revision shall provide that the Developer is entitled to construct a maximum of seven hundred fifty (750) total residential units and shall provide a corresponding percentage of affordable units based on the 62/750 ratio. Notwithstanding that, however, no such modification shall adversely affect any approval of the Borough's Housing Element and Fair Share Plan by COAH, adversely affect the Borough Adjustment or increase the Borough's affordable housing obligation contemplated upon approval of the Revised Project. (For example, if the Developer is unable to secure Revised Governmental Approvals for Phase Two as proposed and has only completed the

first building of Phase One consisting of one hundred fifty (150) units in a four story building over parking, the Parties shall not object to Developer's construction of a larger building with greater building height and more units to make up for its inability to secure Revised Governmental Approvals for Phase Two, such as three hundred (300) units in a high-rise building including fifteen (15) affordable rental units.)

7. The Developer represents that Revised Governmental Approvals shall include, but not be limited to: permits and approvals from the New Jersey Department of Environmental Protection for waterfront development, stream encroachment, water and sewer; New Jersey Department of Transportation for access; New Jersey Meadowlands Commission for amendments to the Redevelopment Plan for the Route 3 East Redevelopment Area and zoning certificates; Bergen County Soil Conservation Service for soil erosion and sediment control; County of Bergen for site plan; and Borough of East Rutherford for building construction; a permit from the U.S. Army Corp of Engineers to fill up to +/- five (5) acres of wetlands; and all other permits and approvals necessary for development of the Revised Project.

2.04 Amendment to the Borough's Fair Share Plan and the Developer's Withdrawal of its Objection to the Fair Share Plan.

(a) Should COAH approve the Feasibility Application, the Borough shall undertake and complete within sixty (60) days of such COAH decision, or within such other time as required by COAH, an amendment to its Fair Share Plan to remove that provision which includes the Approved Project as part of its proposed compliance mechanism and substituting therefore the Revised Project (as same may be amended pursuant to Section 2.03(a) 6 (the "Revised Fair Share Plan.").

(b) Should COAH approve the Feasibility Application, upon the Borough's amendment of its Fair Share Plan as described in Section 2.04 (a), Developer shall withdraw its objection to the Borough's Fair Share Plan.

2.05 Cooperation of the Parties. The Parties agree to use their good faith efforts to support approval of the Feasibility Application, and the procurement of the Revised Governmental Approvals.

2.06 Denial of Approvals. If any of the following are not approved by the Governmental Agency having jurisdiction:

- the Feasibility Application, as submitted, including the Borough Adjustment, satisfactory to the Developer; or
- the Revised Governmental Approvals for Phase One and as described in Section 2.03(a)2 satisfactory to the Developer; excluding such approvals for Phase Two; or
- the Revised Fair Share Plan.

any party may cancel this Agreement by written notice to the others given in accordance with Section 3.03.

(b) If this Agreement is cancelled pursuant to its terms, then: (i) nothing shall affect any approvals granted to the Borough Adjustment or the Revised Fair Share Plan; and (ii) the Parties shall otherwise return to their position as it may have existed prior to the execution of this Agreement.

SECTION 3

MISCELLANEOUS

3.01. Severability of Provisions. If any section or term of this Agreement shall for any reason be adjudged by a court to be invalid, such judgment shall not affect the remaining sections and terms of this Agreement. The provisions of this Agreement are intended to be severable.

3.02. Successors Bound. This Agreement shall be binding upon the successors and assigns of the Parties signing it and each of the provisions of this Agreement shall have the same force and effect as if set forth at length as conditions of the grant of land use approvals by any agency exercising jurisdiction in regard to this matter.

3.03 Counterparts. This Agreement may be executed in any number of counterparts, each of which when so executed shall be deemed to be an original and all of which taken together shall constitute one and the same Agreement. This Agreement may be executed by facsimile signature.

3.04 Effective Date. This Agreement shall be effective upon the date on which this Agreement is finally executed by all Parties or such other date as may be agreed to by the Parties

3.05. Notices. All notices shall be served by certified mail, return receipt requested and regular mail upon the Parties at the addresses shown on page one. Copies of all notices shall be delivered to the Parties' attorneys via regular mail and fax:

As to Developer:

Larry Pantirer
Group at Route 3, LLC
16 Micro Lab Road
Livingston, New Jersey 07039
Developer

with a copy to:	Edward J. Boccher, Esq. DeCotiis, FitzPatrick & Cole, LLP Glenpointe Centre West 500 Frank W. Burr Boulevard, Suite 31 Teaneck, New Jersey 07666
As to the Borough:	Danielle Lorenc, Borough Clerk Borough of East Rutherford Borough Hall One Everett Place East Rutherford, New Jersey 07073
As to the Planning Board:	John Giancaspro, Planning Board Secretary East Rutherford Planning Board Borough Hall One Everett Place East Rutherford, New Jersey 07073
With a copy to:	Richard J. Allen, Jr., Esq. Kipp & Allen, LLC 52 Chestnut Street P.O. Box 133 Rutherford, New Jersey 07070
As to the Monitor:	Robert T. Regan, Esq. 345 Kinderkamack Road Westwood, New Jersey 07675

3.06 Headings. The headings and captions used in this Agreement are for convenience only and shall not be used to interpret or otherwise affect the meaning of this Agreement.

3.07 Satisfactory or Reasonable Conditions. An approval or condition shall be "reasonable" (as that term is used in Section 2.03) or "satisfactory to the Developer" (as that phrase is used in Section 2.06) if, considering the scope and magnitude of the Revised Project, that approval or condition does not contain a provision which: (i) was not foreseeable by a developer with the experience of Developer (taking into account the reasonable and customary expectations of the developer's professional advisors) and (ii) adds an unreasonable burden to the Developer in terms of cost or delay.

IN WITNESS WHEREOF the Parties have executed this Agreement on the day and year written at the top of the first page.

ATTEST:

_____

GROUP AT ROUTE 3, LLC

By: _____
Larry Pantirer

ATTEST:

_____
Danielle Lorenc, Municipal Clerk

BOROUGH OF EAST RUTHERFORD

By: _____
James L. Cassella, Mayor

ATTEST:

_____

EAST RUTHERFORD PLANNING BOARD

By: _____
Richard Evans, PhD. Chairman

ATTEST:

_____

ROBERT T. REGAN, ESQ.
MOUNT LAUREL COMPLIANCE MONITOR

By: _____
Robert T. Regan, Esq.

1174609-1

IN WITNESS WHEREOF the Parties have executed this Agreement on the day and year written at the top of the first page.

ATTEST:

_____

GROUP AT ROUTE 3, LLC

By:_____
Larry Pantirer

ATTEST:

Danielle Lorenc, Municipal Clerk

BOROUGH OF EAST RUTHERFORD

By:_____
James L. Cassella, Mayor

ATTEST:

_____

EAST RUTHERFORD PLANNING BOARD

By:_____
Richard Evans, PhD. Chairman

ATTEST:

_____

ROBERT T. REGAN, ESQ.
MOUNT LAUREL COMPLIANCE MONITOR

By:_____
Robert T. Regan, Esq.

STATE OF NEW JERSEY :
: SS:
COUNTY OF BERGEN :

I CERTIFY that on , 2010 personally came before me and acknowledged under oath, to my satisfaction, that this person (or if more than one, each person):

(a) is named in and personally signed this document, and
(b) signed, sealed and delivered this document as his or her act and deed.
(c)

Attorney-at-Law of the State of New Jersey

STATE OF NEW JERSEY :
: SS:
COUNTY OF BERGEN :

I CERTIFY that on , 2010 James L. Cassella personally came before me and acknowledged under oath, to my satisfaction, that this person (or if more than one, each person):

(a) this person is the Mayor of the Borough of East Rutherford, the municipal corporation named in this document.
(b) this person is the attending witness to the signing of this document by James L. Cassella, the proper corporate officer who is the Mayor of the municipal corporation;
(c) this document was signed and delivered by the municipal corporation as its voluntary act duly authorized by a proper resolution dated;
(d) this person knows the proper seal of the municipal corporation which was affixed to this document; and
(e) this person signed this proof to attest to the truth of these facts.

Danielle Lorenc, Municipal Clerk

Sworn and Subscribed to before me
this ____day of _____, 2010

(Notary Public)

IN WITNESS WHEREOF the Parties have executed this Agreement on the day and year written at the top of the first page.

ATTEST:

_____

GROUP AT ROUTE 3, LLC

By:_____
Larry Pantirer

ATTEST:

Danielle Lorenc, Municipal Clerk

BOROUGH OF EAST RUTHERFORD

By:_____
James L. Cassella, Mayor

ATTEST:

_____

EAST RUTHERFORD PLANNING BOARD

By:_____
Richard Evans, PhD. Chairman

ATTEST:

_____

ROBERT T. REGAN, ESQ.
MOUNT LAUREL COMPLIANCE MONITOR

By:_____
Robert T. Regan, Esq.

IN WITNESS WHEREOF the Parties have executed this Agreement on the day and year written at the top of the first page.

ATTEST:

_____

GROUP AT ROUTE 3, LLC

By:_____
Larry Pantirer

ATTEST:

_____
Danielle Lorenc, Municipal Clerk

BOROUGH OF EAST RUTHERFORD

By:_____
James L. Cassella, Mayor

ATTEST:

_____

EAST RUTHERFORD PLANNING BOARD

By:_____
Richard Evans, PhD. Chairman

ATTEST:

_____

ROBERT T. REGAN, ESQ.
MOUNT LAUREL COMPLIANCE MONITOR

By:_____
Robert T. Regan, Esq.

STATE OF NEW JERSEY :
: SS:
COUNTY OF BERGEN :

I CERTIFY that on , 2010 personally came before me and acknowledged under oath, to my satisfaction, that this person (or if more than one, each person):

(a) is named in and personally signed this document, and
(b) signed, sealed and delivered this document as his or her act and deed.
(c)

Attorney-at-Law of the State of New Jersey

STATE OF NEW JERSEY :
: SS:
COUNTY OF BERGEN :

I CERTIFY that on , 2010 James L. Cassella personally came before me and acknowledged under oath, to my satisfaction, that this person (or if more than one, each person):

(a) this person is the Mayor of the Borough of East Rutherford, the municipal corporation named in this document.
(b) this person is the attending witness to the signing of this document by James L. Cassella, the proper corporate officer who is the Mayor of the municipal corporation;
(c) this document was signed and delivered by the municipal corporation as its voluntary act duly authorized by a proper resolution dated;
(d) this person knows the proper seal of the municipal corporation which was affixed to this document; and
(e) this person signed this proof to attest to the truth of these facts.

Danielle Lorenc, Municipal Clerk

Sworn and Subscribed to before me
this ____day of _____, 2010

(Notary Public)

IN WITNESS WHEREOF the Parties have executed this Agreement on the day and year written at the top of the first page.

ATTEST:

_____

GROUP AT ROUTE 3, LLC

By:_____
Larry Pantirer

ATTEST:

_____
Danielle Lorenc, Municipal Clerk

BOROUGH OF EAST RUTHERFORD

By:_____
James L. Cassella, Mayor

ATTEST:

_____

EAST RUTHERFORD PLANNING BOARD

By:_____
Richard Evans, PhD. Chairman

ATTEST:

Patricia N. Comiso
Patricia N. Comiso

ROBERT T. REGAN, ESQ.
MOUNT LAUREL COMPLIANCE MONITOR

By:_____
Robert T. Regan, Esq.

1174609-1

STATE OF NEW JERSEY :
: SS:
COUNTY OF BERGEN :

I CERTIFY that on Oct. 26, 2010 ROBERT T. REGAN personally came before me and acknowledged under oath, to my satisfaction, that this person (or if more than one, each person):

(a) is named in and personally signed this document, and
(b) signed, sealed and delivered this document as his or her act and deed.
(c)

Patricia N. Comiso

Patricia N. Comiso
Notary Public of New Jersey
No. 2010525
My Commission Expires April 8, 2011

STATE OF NEW JERSEY :
: SS:
COUNTY OF BERGEN :

I CERTIFY that on , 2010 James L. Cassella personally came before me and acknowledged under oath, to my satisfaction, that this person (or if more than one, each person):

(a) this person is the Mayor of the Borough of East Rutherford, the municipal corporation named in this document.
(b) this person is the attending witness to the signing of this document by James L. Cassella, the proper corporate officer who is the Mayor of the municipal corporation;
(c) this document was signed and delivered by the municipal corporation as its voluntary act duly authorized by a proper resolution dated;
(d) this person knows the proper seal of the municipal corporation which was affixed to this document; and
(e) this person signed this proof to attest to the truth of these facts.

Danielle Lorenc, Municipal Clerk

Sworn and Subscribed to before me
this ____day of _____, 2010

(Notary Public)

1174609-1

STATE OF NEW JERSEY :
: SS:
COUNTY OF ESSEX :

I CERTIFY that on , 2010 personally came to me known and known to me to be an individual described in and who executed the foregoing instrument, and such person duly acknowledged to me that he understood the meaning of the instrument and that he executed the same as his act and deed, and as a Member of the Limited Liability Corporation named therein, and with full authority to act on behalf of such LLC., and that he is over the age of 18.

Attorney-at-Law of the State of New Jersey

RECORD AND RETURN TO:
Edward J. Boccher, Esq.
DeCotiis, FitzPatrick, Cole & Wisler, LLP
Glenpointe Centre West
500 Frank W. Burr Boulevard, Suite 31
Teaneck, New Jersey 07666

I. d.

RESOLUTION GRANTING IN PART, DENYING IN PART AND DECLINING TO ACT ON IN PART, A TRI-PARTY MOTION FROM THE MUNICIPALITY, THE COURT APPOINTED MOUNT LAUREL MONITOR, AND A DEVELOPER FOR A REDUCED SET-ASIDE AT THE GROUP AT ROUTE 3 PROJECT IN EAST RUTHERFORD BOROUGH, BERGEN COUNTY

COAH DOCKET # 10-2271

WHEREAS, P.L. 2008, Ch. 46, amended N.J.S.A. 52:27D-311(i) to state that "[t]he Council, upon the application of a municipality and a developer, may approve reduced affordable housing set-asides or increased densities to ensure the economic feasibility of an inclusionary development;" and

WHEREAS, the Council on Affordable Housing (COAH) has considered a joint motion received on November 12, 2010, from the Borough of East Rutherford (Bergen County), the Court-appointed Mount Laurel Monitor (Robert Regan, Esq.) and a developer (The Group at Route 3, LLC, "the Group", now known as Millennium Homes) seeking a reduced affordable housing set-aside at a proposed inclusionary project pursuant to N.J.S.A. 52:27D-311(i); requesting a finding of no additional affordable housing liability for the Borough; seeking permission for the Borough to amend its plan to include such proposed project; and seeking the grant of associated relief; and

WHEREAS, the movants have requested that COAH determine the economic feasibility of the proposed Group at Route 3 project, supporting a reduction in the 20 percent affordable housing set-aside, which is ordinarily required of all developments within a Regional Planning Area entity (since the amendment to the New Jersey Fair Housing Act at N.J.S.A. 52:27D-329.9(a)), and approval of an 8.26 percent set-aside; and

WHEREAS, specifically, East Rutherford's joint motion, in the form of a letter, requests that the Council issue an Order:

1. "approving a reduced set-aside for an inclusionary project ("the Project") to 8.26 percent, allowing for the construction of sixty-two (62) affordable housing units, to ensure the economic feasibility of the Project pursuant to N.J.S.A. 52:27D-311(i)";

2. "providing that the affordable housing obligation of the Borough shall be reduced by at least the same amount of affordable housing that represents the

difference between the amount of affordable units to be provided under the project and the number of affordable units in the Borough's fair share plan allocable to a predecessor project on the site of the Project (the Differential)";

3. "providing that the Borough shall not be liable, in any fashion for, or to produce, additional affordable housing units to cover the Differential (together with the Differential, 'the Borough adjustment')";

4. "authorizing the Borough to amend its fair share plan to take into account the Project and remove a prior reference to a predecessor project";

5. "providing that COAH's approval of the within Motion is subject to the Group at Route 3 obtaining all governmental approvals necessary for the Project";

6. "providing that the Group at Route 3's objection to the Borough's fair share plan is withdrawn in the event this motion is granted in its entirety";

7. "for such other relief as may be necessary to implement the Project as proposed"; and

WHEREAS, East Rutherford Borough petitioned COAH for third round substantive certification of its Housing Element and Fair Share Plan on December 31, 2008; and

WHEREAS, notice of the third round petition was published on June 15, 2009, commencing the public comment period, and five objections were received as to East Rutherford Borough's Housing Element and Fair Share Plan; and

WHEREAS, COAH mediation has not yet been scheduled; and

WHEREAS, the Borough of East Rutherford's December 2008 petition for third round substantive certification of its Housing Element and Fair Share Plan is the Borough's first involvement in the COAH process; and

WHEREAS, a 2003 exclusionary zoning lawsuit brought against the Borough resulted in a 2005 Court decision, which determined that East Rutherford "failed to … provide realistic opportunities for affordable housing" and the developer was granted an order for a builder's remedy; and

WHEREAS, the Borough prepared a new plan, however the Court declined to issue a Judgment of Compliance and Order for Repose, and instead, in 2006, named Robert Regan, Esq. (a party to this motion) to the newly created position of an independent judicial officer known as a Mount Laurel Compliance Monitor; and

WHEREAS, the Court transferred all municipal zoning power to the Monitor, and charged the Monitor with the creation of rules and regulations to address Mount Laurel obligations and the oversight of the crafting of a Housing Element and Fair Share Plan for a petition to be filed with COAH for substantive certification; and

WHEREAS, East Rutherford's fair share plan relied on affordable housing units to be created at the Group at Route 3 project and the plan included a statement that East Rutherford would 'request' that the NJMC 'force' the developer to provide a 20 percent set-aside of affordable housing units at the site; and

WHEREAS, the Group at Route 3 project was included in the Borough's 2008 third round Housing Element and Fair Share Plan as a project providing affordable housing units albeit with NJMC approvals that did not include the creation of affordable housing units; and

WHEREAS, on July 31, 2009, the Group at Route 3 submitted to COAH a formal objection to the Borough's plan noting that the NJMC approvals did not include the creation of affordable housing and asserting that should the project be required to provide affordable housing it must receive compensatory benefits mandated for developers providing affordable housing units; and

WHEREAS, COAH's approval of the economic feasibility analysis for the proposed project is required to validate the Group at Route 3's contention that its proposed project amendment [which would increase the density on site from 614 market-rate units to 750 total units, including 62 affordable units] can only proceed with an affordable housing set-aside no higher than 8.26 percent; and

WHEREAS, pursuant to item 9 within the March 31, 2009 Memorandum of Understanding between the NJMC and COAH, *Coordination of Planning Process*, "any request for a waiver to the requirement that a project provide a twenty percent set-aside for affordable housing, based on economic feasibility, shall be made to COAH, which has

the responsibility to determine the economic feasibility of a project pursuant to the Fair Housing Act. Such economic feasibility determination will be made after reviewing any technical information provided by the NJMC"; and

WHEREAS, the NJMC provided a comment to this motion on February 10, 2011 (Exhibit A), and expressed technical concerns regarding the viability of the project as nearly half of the proposed development would be reliant upon the issuance of Army Corps of Engineers' permits for extensive wetlands fill within an area deemed to be regulated jurisdictional waters of the United States; while the original approvals permitted the developer to create 614 market-rate unit and no affordable housing units; and

WHEREAS, the Army Corps' original approvals permitted the filling of less than one acre of wetlands and the creation of an outfall structure to discharge site stormwater into adjacent wetlands, however, according to the revised project concept, roughly 350 units, or just nearly half of the newly proposed 750-unit development, would be developed on this section and the completion of the remaining development, including 400 housing units, parking, and ancillary structures, would require the partial filling of an extensive area of wetlands; and

WHEREAS, the NJMC is concerned that the additional phase(s) of the project, and the concomitant provision of affordable housing units, might not be developed, thereby reducing the number of affordable housing units that would otherwise be provided at the site; and

WHEREAS, the Group at Route 3 received a zoning certificate from the NJMC, and the approval permitted the development of 614 market-rate residential units on 4.25 acres of the Group at Route 3's 42.3 acres and included two 20-story towers over shared parking with five thousand square feet of ancillary retail space; and

WHEREAS, building permits for this project were issued by the Borough in early 2007, however, construction was never commenced; and

WHEREAS, the parties to this motion executed a Settlement Agreement on October 26, 2010, which would resolve the Group at Route 3's objection to the Borough's 2008 petition; and

WHEREAS, the Borough has not yet entered into developer's agreements with the four remaining objectors; and

WHEREAS, subsequent to the 2008 amendments to the New Jersey Fair Housing Act, COAH contracted with Econsult Corporation of Philadelphia, Pennsylvania, to develop a financial feasibility model to be used by COAH in making feasibility determinations; and

WHEREAS, this model uses standardized inputs provided by developers that enable the economic impact of affordable housing set-asides to be evaluated by comparing the proposed reduced set-aside against the required 20 percent set-aside; and

WHEREAS, the Group at Route 3 began working with COAH staff in 2009 to evaluate the economic feasibility of the project and subsequently provided the required input data with which Econsult ran the model in February of 2010; and

WHEREAS, the Econsult analysis evaluated the project with the developer's proposed 62-unit set-aside (8.26 percent) and determined that the resulting return on investment would be lower than what would typically be expected for this type of development, but that it would, nonetheless, result in a positive return on investment; and

WHEREAS, subsequent to the initial run of the model, the developer made minor revisions to its construction schedule to account for delays anticipated as a result of newly required approvals to develop the project and revised financial inputs were received with the motion submission in November 2010; and

WHEREAS, the model is sensitive to time lapses associated with the approval process and construction scheduling due to related impacts on debt service costs; a new analysis with these revised parameters and resulting recommendations was provided by Econsult on February 15, 2011 (Exhibit B); and

WHEREAS, the revised analysis continued to conclude that the financial feasibility of the project, as presented, would be jeopardized if an additional set-aside were to be imposed; and

WHEREAS, due to the time-sensitive nature of the real estate market, if construction has not advanced by July 1, 2012 (where construction advancement is

defined as a minimum expenditure of five percent of the construction budget by June 30, 2012) the economic feasibility analysis must be revisited; and

WHEREAS, no comments in opposition to the motion have been received; and

WHEREAS, at meetings on January 26 and February 25, 2011, a COAH task force considered the joint motion and recommended that the Council grant item number one of the movant's motion for a reduced set-aside based on the task force's determination the economic feasibility analysis for the Group at Route 3 project is 'reasonable,' pursuant to the New Jersey Fair Housing Act, as amended, at N.J.S.A. 52:27D-311(i); and

WHEREAS, the task force recommended that:

1. Concerning **items number 2 and 3**, the Council should deny without prejudice any recalculation of the municipality's third round prospective affordable housing need, in light of the Appellate Division's invalidation of the third round growth share methodology for determining third round prospective affordable housing obligations. It should be noted, however, that the requirement for a 20-percent low- and moderate-income set-aside of residential units constructed in a regional planning area is a statutory requirement set forth at N.J.S.A. 52:27D-329.9. This provision as noted by the motion requires that the set-aside be "economically feasible". The municipality's prospective affordable housing obligation will be determined upon the adoption of revised third round rules or through pending legislative action;

2. Concerning **item number 4**, the Council should decline to specifically authorize the Borough to amend its plan to include the Group 3 project due to the October 8, 2010 Appellate Division decision. Additionally, it should be noted that a municipality is always free to petition the Council for an amendment to its certified plan, and may at any time withdraw one petition so as to re-petition with another Housing Element and Fair Share Plan;

3. Concerning **item number 5**, the Council should decline to make the Borough's proposed amendment to its plan contingent on the developer

receiving amended governmental development permits, including new approvals from the NJMC, as the Council takes no position on the validity of the proposed amendment; and NJMC's development review is entirely independent of the COAH process;

4. Concerning **items number 6 and 7**, the Council should decline to respond as these issues are not within its purview; and

WHEREAS, the Council concurs with the task force's recommendations.

NOW THEREFORE BE IT RESOLVED that the Council grants the parties' motion for relief as to item number one which requests a determination that the economic feasibility of the Group at Route 3 project is such that it is not reasonable to require an affordable housing set-aside greater than 8.26 percent (62 units) at this project, as currently proposed; and

BE IT FURTHER RESOLVED that the Council denies without prejudice items two and three from the motion regarding any recalculation of the municipality's third round prospective affordable housing need, in light of the Appellate Division's invalidation of the third round growth share methodology for determining third round prospective affordable housing obligations; and

BE IT FURTHER RESOLVED that the Council declines at this time to address items four through seven for the reasons stated above; and

BE IT FURTHER RESOLVED that this determination is based on the parameters of the economic feasibility analysis as outlined in the New Jersey Fair Housing Act, as amended, at N.J.S.A. 52:27D-311(i) and the Council has determined that the analysis provided by the movants is 'reasonable' according to these parameters; and

BE IT FURTHER RESOLVED that acceptance of such a determination by the Council's consultant implies neither approval of an amendment to the Borough's Housing Element and Fair Share Plan nor approval of the proposed project, which must be developed in a manner consistent with the rules or regulations of all agencies with jurisdiction over the site; and

BE IT FURTHER RESOLVED that this recommendation is based on the analysis conducted by Econsult, which applies very specifically to the proposed project as defined by the movants; and must be revisited should there be any changes to the project, such as a change in the number of market-rate units, affordable units, or total units; or if construction has not advanced by July 1, 2012.

I hereby certify that this Resolution was duly adopted by the Council on Affordable Housing at its meeting on March 22, 2011

Stacey Smith Bohn

Stacey Smith-Bohn
Council Secretary

Exhibit A

New Jersey Meadowlands Commission

Administration Building: One DeKorte Park Plaza ⁂ Phone: 201-460-1700 ⁂ Fax: 210-460-1722
Meadowlands Environment Center: Two DeKorte Park Plaza ⁂ Phone: 201-460-8300 ⁂ Fax 201-842-0630
Lyndhurst, NJ ⁂ 07071 Website: www.njmeadowlands.gov

February 10, 2011

Sean Thompson
Acting Executive Director
Council on Affordable Housing
101 South Broad Street
P.O. Box 813
Trenton, NJ 08625-0813

Re: Group at Route 3, NJMC File No. 04-241
Borough of East Rutherford

Dear Mr. Thompson:

The NJMC is in receipt of your letter dated January 24, 2011, regarding COAH's request for technical input from the NJMC. The request is in regard to the Council's review of a feasibility study related to a motion requesting a reduced affordable housing set-aside for the proposed expansion of a previously-approved project at the Group at Route 3 site, located at Block 108.04, Lot 5, in the Borough of East Rutherford, New Jersey.

As background regarding the approved project, on May 4, 2005, the NJMC approved a zoning certificate, ZC-04-241, for a 20-story, 614-unit residential development, inclusive of 5,000 square feet of accessory retail space, at the subject site. This zoning certificate was approved prior to the issuance of the Appellate Division's decision on May 21, 2007, which stated that the NJMC is authorized to affirmatively plan for affordable housing in the Meadowlands District. IMO Adoption of N.J.A.C. 19:3, 393 N.J. Super. 173 (App Div.2007). As such, affordable housing units were not a required element in the NJMC's zoning certificate approval for the proposed development. Site work commenced on the project within one year of the issuance of the zoning certificate and, accordingly, the approval of the 614-unit residential development remains valid.

The project site, Block 108.04, Lot 5, contains 32.90 acres, including approximately four acres of uplands and 29 acres of wetlands. The wetlands were verified by the US Army Corps of Engineers (the Corps) in a Jurisdictional Determination (JD) letter, dated January 16, 2004. The JD letter from the Corps determined that the subject site contains jurisdictional waters of the United States based on the presence of wetlands which met certain criteria. The Corps strongly recommended that "the development of the site be carried out in such a manner as to avoid as much as possible the discharge of dredged or fill material into the delineated waters of the United States."

The footprint of the previously approved (ZC-04-241) 20-story, 614-unit residential building and associated site improvements comprises approximately 4.25 acres and is predominantly located within the upland portion of Lot 5, as verified by the Army Corps JD. On February 2, 2006, the applicant received Corps approval to fill 0.89 acres of wetlands located within the predominantly uplands portion of the subject property, as well as to construct an outfall structure from the development pad to discharge stormwater runoff to the adjacent wetlands.

The new project concept is set on an expanded footprint. Approximately half of the footprint of the newly proposed concept, including approximately 350 total units, is located on the uplands portion of the site, in the same location where the 20-story, 614-unit residential building has been previously approved. The other half of the new project is located on portions of the site deemed to be jurisdictional waters of the United States, including wetlands, per the aforementioned JD. Prior to applying to the NJMC for development approval on the wetlands portion of the site, the applicant would need to obtain a permit from the Army Corps to fill the wetlands.

That being said, although the applicant has already received Corps approval for wetlands fill, the extent of fill required to create a new development pad, large enough to support half of the new project concept, would most likely require a Section 404 Individual Permit from the Corps. The wetlands area proposed for new development in the new concept is part of a vast swath of wetlands that extends from the subject site to the Berry's Creek Canal.

In conclusion, the NJMC has technical concerns regarding the viability of a project of which half of the development is reliant upon the issuance of Corps

permits for expansive areas of wetlands fill. As such, it is recommended that the inclusionary set-aside percentage decided upon by COAH be evenly distributed over the entire project.

Sincerely,

Marcia A. Karrow
Executive Director

Cc: Mayor James Cassella, East Rutherford
Lawrence Pantiere, Group at Rt. 3
Kate Butler, COAH

Exhibit B

ECONSULT
CORPORATION

Sixth Floor
3600 Market Street
Philadelphia, PA 19104

Voice *(215) 382-1994*
Fax *(215) 382-1995*
Web: *www.econsult.com*

MEMORANDUM

Date: February 15, 2011
To: Keith Henderson / COAH
From: Peter Angelides / Econsult
Re: Economic Feasibility Analysis of Development Submission from Millennium Homes

INTRODUCTION AND PROJECT SUMMARY

Millennium Homes ("Millennium") has proposed a 750 unit residential development on a 41.7-acre lot in East Rutherford Township, New Jersey. The project would gross over 800,000 square feet and include 688 for-sale market rate units, 62 affordable units, and 1,280 parking spaces. Table 1 provides further detail on the specifications for each building. Millennium plans to construct and sell out four buildings between 2012 and 2022.

Table 1: Millennium Development Project Summary

	Building #1	Building #2	Building #3	Building #4	Project Totals
Gross SF Residential	167,200	167,200	112,000	360,000	806,400
Net SF Residential	145,464	145,464	96,320	309,600	696,848
Market Units	158	143	53	334	688
Affordable Units	-	15	47	-	62
Parking Spaces	325	217	170	568	1,280
Average SF / Unit	921	940	1,108	927	929
Market Units $ / SF	$345	$376	$471	$ 440	$411

Based on revenue, cost and financing information provided by Millennium, Econsult Corporation ("Econsult") analyzed the potential economic feasibility of this residential development under current market conditions, both at the proposed level of 62 affordable units, and in a scenario with 150 affordable units to reflect statutory requirements that are subject to financial feasibility findings.

Our analysis applies to the project as defined by Millennium. If there are changes to the project, such as a change in the number of market rate, affordable, or total units, then the analysis is no longer valid.

ANALYSIS

We used the economic feasibility model and the data provided by Millennium to examine three scenarios:

- Scenario 0 analyzes the economic feasibility of the proposed development to match the results provided by the developer. Each developer's method of calculating interest, return, and feasibility can be different, and the purpose of this scenario is to analyze the project using the developer's assumptions and methods. As such it is a diagnostic tool, and cannot be compared to a scenario 0 calculation of a different proposal.
- Scenario 1 analyzes the economic feasibility of the proposed development using a standard methodology, including the calculation of interest and returns. This scenario uses the developer's proposed mix of market rate and affordable units. This scenario will be comparable to a scenario 1 prepared for a different proposal.
- Scenario 2 analyzes the economic feasibility of the proposed development, provided that 20 percent of the total units were sold at affordable prices. This scenario represents compliance with current statutory requirements for affordable housing in new developments located in special resource areas.

This analysis was conducted for each of the four phases of development (one for each of the four buildings). The four phases of the proposed development were analyzed as four separate projects, and the cash flows from each phase were consolidated to determine the cash flows for the entire project.

Supplemental schedules provided by Millennium revealed two significant differences in modeling methodology compared to the standard method:

- Upfront Funding from Cash Allocation: The standardized model assumes that developers will fund the project with their equity contribution at the start of the project and utilize debt once their total equity contribution amount has been made. Millennium utilizes both debt and equity financing each month over the life of their project according to the ratio specified on their input sheet. This difference is significant because under the standard method, debt is held for a shorter period of time and thus interest expense and ultimately total development costs are lower than the method used by Millennium. On the other hand, the assumption that equity contributions are made at the beginning of the project requires Millennium to expend funds earlier, which lowers returns.[1]
- Land Cost Allocation: The standard method assumes that land is purchased at the beginning of the project whereas Millennium allocates a portion of land acquisition costs to the beginning of each phase. Under the standardized methodology, interest expense is greater since interest is accrued on the entire land cost for a longer period of time.

For the purposes of this analysis Scenario 0 uses the same "constant share" method implemented by Millennium to calculate upfront cash contributions and land cost allocation. Scenario 1 uses the model's standardized "upfront cash" method, which shows the impact of these methodological differences on the project's internal rate of return. Scenario 2 assumes that the compliant level of affordable housing is equal to 20 percent of total units, and is otherwise identical to Scenario 1.

[1] Millennium's plans to finance the project are: 70 percent of total development costs with senior debt, 15 percent with mezzanine debt, and 15 percent with developer equity.

RESULTS

Table 2 shows that the development generates $286 million in revenue at the proposed level of affordable housing, and $262 million in revenue with a compliant level of affordable housing. The reduction in revenue is approximately $24 million, or approximately $270,000 per incremental affordable unit.

Table 2: Results

ALL PHASES	Scenario 0- As Submitted 8% Affordable	Scenario 1- Standardized 8% Affordable	Scenario 2- Standardized 20% Affordable
Number of Total Units	750	750	750
Number of Affordable Units	62	62	150
Affordable set-aside ratio	8%	8%	20%
Development Expenditure (m)	$272	$263	$265
Revenue (m)	$286	$286	$262
Developer Equity Contribution (m)	$39	$44	$40
Interest (m)	$27	$18	$22
Performance Measures			
Developer IRR	negative	negative	negative
Partner IRR	16%	16%	16%
Developer and Partner	9%	7%	4%
Developer NPV (7%)	($3.4)	($15.0)	($22.8)
Partner NPV (7%)	$5.2	$15.6	$15.5
Developer and Partner NPV (7%)	$1.8	$0.6	($7.3)

Development expenditures range from $263 million to $272 million. The difference in development expenditures arises primarily from differences in interest expenses, which is mostly due to alternative financing assumptions. This difference is approximately $9 million.

The developer's Internal Rate of Return ("IRR") is not positive in any scenario. Using the standard methodology, the IRR for the combined developer / partner is 7 percent with 62 affordable units and 4 percent with 150 affordable units.

The Net Present Value (NPV), discounted at 7 percent, of the development project for the developer is negative for all scenarios. However, the NPV for the combined developer / partner is positive for the scenarios with 62 affordable units, and negative with 150 affordable units.

Potential Increase in Revenue

Our analysis uses revenue assumptions provided by Millennium. We have compared these assumptions to current market conditions, and believe that Millennium's revenue assumptions are appropriate at present. However, when the housing market recovers, one potential effect is increased prices. Accordingly, we have analyzed the developer's return if revenue were 15 percent greater than currently assumed, leaving all other assumptions, including cost and timing, the same. The increased revenue boosts returns, as indicated in Table 3. Note that this analysis is illustrative only, and is intended to demonstrate the sensitivity to revenue assumptions, and to point to the need to reevaluate a relief request if market conditions change significantly.

Table 3: Returns Based on Increased Revenues (In $Millions)

ALL PHASES	Scenario 0- As Submitted	Scenario 1- Standardized	Scenario 2- Standardized
Original Revenue	$286	$286	$261
15% Increased Revenue	$328	$328	$299
Original Return	negative	negative	negative
Return with 15% increased Revenue	49%	16%	3%

CONCLUSION

Feasibility

Based on the information provided, the proposed development with approximately 62 affordable units will not yield positive returns to the developer, and will yield returns of approximately 7 percent to the combined developer / equity partner, and a NPV of $0.6 million. The development with 150 affordable units will not yield positive returns to the developer, and will yield returns of approximately 4 percent to the combined developer / equity partner, and a NPV of -$7.3 million. If revenue were 15 percent greater than currently expected, the return on the proposed development would likely be sufficient to induce a developer to commence construction, whereas the return on a development with 20 percent affordable units would be too low to induce development.

Duration

Market conditions are very challenging for developers at this time, and will not permit the construction of affordable units at a 20 percent set-aside. Market conditions are expected to improve in the next few years, though it is impossible to tell exactly when or by how much. As demonstrated by the preceding analysis, changed market conditions can have significant impacts on returns. Therefore, if the Millennium project is granted relief from COAH compliant standards, we recommend that the relief have a limited duration.

Millennium's construction schedule shows that they plan to start construction in February 2012, and begin occupancy of phase 1 in February 2014. This occupancy date is three years from now, which gives substantial time for the market to recover. Therefore, and based on the discussion in the following "Trigger Event" discussion, we recommend that any relief last no longer than June 30, 2012. If construction has not advanced substantially, as discussed below, by July 1, 2012, the feasibility analysis should be revisited.

Trigger Event

It is very difficult to delineate when construction has commenced, because there are so many steps in the construction process. However, evidence of intent to complete is best provided by substantial, irrevocable investments in construction activities. Millennium's construction schedule calls for the first certificate of occupancy for Phase 1 to be issued 24 months after the initiation of construction. Therefore, we recommend that construction should be deemed to have commenced if Millennium expends 5 percent of its construction budget within four months of its scheduled start date (i.e., by June 30, 2012). The construction budget should include only funds that need to be expended between December 2011 and the completion of construction.

ADVISORY, CONSULTATIVE, DELIBERATIVE

MEMORANDUM

To: The Council

From: Kate Butler, PP/ AICP

Date: March 10, 2011

Re: Joint Application of the Borough of East Rutherford, the Mt. Laurel Compliance Monitor and the Group at Route 3 for Approval of a Reduced Set-Aside at an Inclusionary Project, Pursuant to N.J.S.A. 52:27D-311(i), Finding no Additional Liability of the Borough, to Amend the Borough's Fair Share Plan and for Associated Relief.

Issue

P.L. 2008, Ch. 46, amended N.J.S.A. 52:27D-311(i) to state that "[t]he Council, upon the application of a municipality and a developer, may approve reduced affordable housing set-asides or increased densities to ensure the economic feasibility of an inclusionary development." The Borough of East Rutherford, the Court-appointed Mount Laurel Monitor and a developer have submitted to COAH a motion seeking a reduced affordable housing set-aside at a proposed inclusionary project pursuant to N.J.S.A. 52:27D-311(i); requesting a finding of no additional affordable housing liability for the Borough; seeking permission for the Borough to amend its plan to include such proposed project; and seeking the grant of associated relief.

Background

Three parties have filed this joint motion with the Council. The Borough of East Rutherford (Bergen County), Robert Regan, Esq. (court-appointed Mount Laurel Compliance Monitor) and the Group at Route 3, LLC, (current owner of proposed development within the Borough, "the Group" and now known as Millennium Homes) have all requested that COAH make a determination regarding the economic feasibility of the statutory requirement that the Group project include a 20-percent affordable housing set-aside. This request is based on provisions in the New Jersey Fair Housing Act (NJFHA) which allow a municipality and a developer to ask COAH for relief from regulations that require a 20 percent set-aside in newly constructed development in a Regional Planning Entity area of the state pursuant to N.J.S.A. 52:27D-329.9(a). This site is under the jurisdiction of the New Jersey Meadowlands Commission (NJMC). The joint motion requests a reduction from the mandated 20 percent

affordable housing set-aside to a set-aside of 8.26 percent. Along with this determination comes a request from the parties for COAH to permanently waive the balance of the Borough's reduced obligation for this project, and for permission for the Borough to amend its Housing Element and Fair Share Plan so as to include the Group project as a provider of affordable housing.

The Group has received full approval from the NJMC to construct a 614-unit market-rate residential development with no affordable units. This approval pre-dates amendments to the NJFHA in 2008 that require a 20 percent set-aside in newly constructed developments in specified Regional Planning Entity areas of the state. The Group seeks to amend its approvals to allow 750 total units, including 62 affordable units and contends that financial feasibility limitations impede their ability to provide more than 62 affordable housing units, amounting to an 8.26 percent set-aside.

Pursuant to item 9 within the March 31, 2009 Memorandum of Understanding between the NJMC and COAH, *Coordination of Planning Process,* "any request for a waiver to the requirement that a project provide a twenty percent set-aside for affordable housing, based on economic feasibility, shall be made to COAH, which has the responsibility to determine the economic feasibility of a project pursuant to the NJFHA. Such economic feasibility determination will be made after reviewing any technical information provided by the NJMC."

The NJMC provided comment to this motion on February 10, 2011 (Exhibit A) and expressed technical concerns regarding the viability of the proposed project as approximately half of the development would be reliant upon the issuance of Army Corps of Engineers' (Corps) permits for extensive wetlands fill within an area previously deemed to be regulated jurisdictional waters of the United States. For the original project, the Corps approved the filling of less than one acre of wetlands and the creation of an outfall structure to discharge site stormwater into those adjacent wetlands, resulting in a developable area for roughly 350 units, or nearly half of the newly proposed 750-unit development. Completion of the remaining development, including 400 housing units, parking, and ancillary structures, requires the partial filling of an extensive area of wetlands. The NJMC is concerned that the additional phase(s) of the project, and the concomitant provision of affordable housing units, might not be developed, subsequently reducing the number of affordable housing units that would otherwise be provided at the site.

Procedural History

The Borough of East Rutherford's December 2008 third round petition is the Borough's first involvement in the COAH process. On August 14, 2003, two lawsuits were filed alleging that Carlstadt and East Rutherford, both of Bergen County, engaged in patterns of exclusionary zoning. These lawsuits were filed by a developer, TOMU, which owned property that was located in both municipalities. This suit resulted in a Court decision dated November 10, 2005, which determined that both municipalities "have failed to comply with their express obligations to provide realistic opportunities for affordable housing within their borders" and had acted in ways which were "unbecoming local government in New Jersey." The developer was granted an order for a builder's remedy. The order further directed both municipalities to prepare affordable housing plans for the Court. The municipalities prepared plans and submitted them to the Court with a request for a Judgment of Compliance and Order for Repose. On June 1, 2006, the Court denied these motions and determined that the land use regulations remained "invalid and unconstitutional insofar as such provisions continue past exclusionary practices." Instead, the Court created the position of an independent judicial officer ('Mount Laurel Compliance Monitor') for both municipalities and named Robert Regan, Esq., to the position. (Regan is a party to the instant motion before COAH.)

Upon the Borough's failure to provide a viable Housing Element and Fair Share Plan, the Court transferred all municipal zoning power to the Monitor, charged the Monitor with the creation of rules and regulations to address Mount Laurel obligations and charged the Monitor with overseeing the creation of a Housing Element and Fair Share Plan for eventual submission to COAH as a petition for substantive certification. After the Court Monitor's oversight of the creation of a Housing Element and Fair Share Plan, East Rutherford petitioned COAH for third round substantive certification, on December 31, 2008, with a housing plan that included the Group project as a provider of affordable housing. The Group project was included in the plan albeit with NJMC approvals that did not include the creation of affordable housing units. The Group submitted to COAH a formal objection to the Borough's plan, noting that the NJMC approvals for the project specified market-rate and not affordable housing units. In addition, the Group asserted that should the project be required to provide affordable housing it must receive compensatory benefits mandated for developers providing affordable housing units. As East Rutherford's fair share plan relied on affordable housing units to be created at the Group project,

the plan included a statement that East Rutherford would 'request' that the NJMC 'force' the developer to provide a 20 percent set-aside of affordable housing units at the site.

Motion

East Rutherford's joint motion, in the form of a letter, requests that the Council issue an Order:

1. "approving a reduced set-aside for an inclusionary project ("the Project") to 8.26 percent, allowing for the construction of sixty-two (62) affordable housing units, to ensure the economic feasibility of the Project pursuant to N.J.S.A. 52:27D-311(i)";
2. "providing that the affordable housing obligation of the Borough shall be reduced by at least the same amount of affordable housing that represents the difference between the amount of affordable units to be provided under the project and the number of affordable units in the Borough's fair share plan allocable to a predecessor project on the site of the Project (the Differential)";
3. "providing that the Borough shall not be liable, in any fashion for, or to produce, additional affordable housing units to cover the Differential (together with the Differential, 'the Borough adjustment')";
4. "authorizing the Borough to amend its fair share plan to take into account the Project and remove a prior reference to a predecessor project";
5. "providing that COAH's approval of the within Motion is subject to the Group obtaining all governmental approvals necessary for the Project";
6. "providing that the Group's objection to the Borough's fair share plan is withdrawn in the event this motion is granted in its entirety";
7. "for such other relief as may be necessary to implement the Project as proposed."

Project overview:

Just days before the Court imposed a scarce resource restraint on all developable and redevelopable lands within the Borough, the Group received a zoning certificate from the NJMC. The NJMC approval permitted the development of 614 market-rate residential units on 4.25 acres, of the Group's 42.3 acres, within the Borough. This project was to include two 20-story

towers over shared parking with five thousand square feet of ancillary retail space. Building permits for this project were issued by the Borough in early 2007. Site work commenced within one year, but project construction was never begun.

The parties to this motion executed a Settlement Agreement on October 26, 2010, which would resolve the Group's objection to the Borough's 2008 petition for substantive certification through the increased density associated with the Group's 750-unit proposal that would include 62 affordable housing units. The Borough has not yet entered into developer's agreements with the four remaining objectors.

Economic Feasibility Study

Pursuant to the terms of the NJFHA at N.J.S.A. 52:27D-329.9(a), developments consisting of newly-constructed residential units located within the jurisdiction of the NJMC, shall be required to reserve, for occupancy by low- or moderate-income households, at least 20 percent of the residential units constructed, to the extent this is economically feasible. Subsequent to the 2008 amendments to the New Jersey Fair Housing Act, COAH contracted with Econsult Corporation of Philadelphia, Pennsylvania, to develop a financial feasibility model to be used by COAH in making feasibility determinations as required by the NJFHA. The model that was developed entails the use of standardized inputs provided by developers that enable the economic impact of affordable housing set-asides to be evaluated by comparing the proposed reduced set-aside against the required 20 percent set-aside.

The Group at Route 3 began working with COAH staff in 2009 to evaluate the economic feasibility of the project and subsequently provided the required input data with which Econsult ran the model in February of 2010. The Econsult analysis evaluated the project with the developer's proposed 62-unit set-aside (8.26 percent) and determined that the resulting return on investment would be lower than what would typically be expected for this type of development, but that it would, nonetheless, result in a positive return on investment.

Subsequent to the initial run of the model, the developer made minor revisions to its construction schedule to account for delays anticipated as a result of newly required approvals. The model is sensitive to time lapses associated with the approval process and construction scheduling due to related impacts on debt service costs; and revised financial inputs were received with the motion submission in November 2010. A full analysis of the revised financial

information was conducted by Econsult and is summarized in a final report dated February 15, 2011 (Exhibit B). The revised analysis concludes that the return on the proposed development with 20 percent affordable units continues to be too low to induce development and supports a reduction in the set-aside.

Two caveats apply to the Econsult recommendation. The analysis conducted by Econsult applies very specifically to the proposed project as defined by the movant. The project must be developed in a manner consistent with the rules or regulations of all agencies with jurisdiction over the site. If there are changes to the project, such as a change in the number of market rate, affordable, or total units, then the analysis is no longer valid and must be revisited. This caveat addresses the concerns raised by NJMC in its letter of February 10, 2010.

Additionally, due to the time-sensitive nature of the real estate market, if construction has not advanced by July 1, 2012, the economic feasibility analysis must be revisited. Construction advancement is defined as a minimum expenditure of five percent of the construction budget by June 30, 2012 which is a four-month buffer after the developer's scheduled start of construction in February 2012.

Opposition

No comments in opposition to the motion have been received.

Recommendation

A COAH task force considered this joint motion on January 26 and February 25, 2011, and recommended that the Council grant the movant's motion with regard to **item number one** which concerns the determination of the economic feasibility of the proposed Group project, based on the data submitted by the Group. This data indicates that 62 affordable units, representing an 8.26 percent set-aside, is a reasonable set-aside for this project, pursuant to the provisions of the NJFHA at N.J.S.A. 52:27D-311(i). The determination by the Council that this economic feasibility analysis is 'reasonable' pursuant to the NJFHA implies neither COAH approval of said proposed amendment to the Borough's Housing Element and Fair Share Plan nor approval of the proposed project, which must be developed in a manner consistent with the rules or regulations of all agencies with jurisdiction over the site.

This recommended determination is based specifically upon the project as defined by the movant and must be revisited if there are any changes to the project, such as a delay in the start of construction beyond June 30, 2012, or a change in the number of market rate, affordable, or total units.

As to the balance of the requests of the motion, the task force recommends that:

1. Concerning **items number 2 and 3**, the Council should deny without prejudice any recalculation of the municipality's third round prospective affordable housing need, in light of the Appellate Division's invalidation of the third round growth share methodology for determining third round prospective affordable housing obligations. It should be noted, however, that the requirement for a 20-percent low- and moderate-income set-aside of residential units constructed in a regional planning area is a statutory requirement set forth at N.J.S.A. 52:27D-329.9. This provision as noted by the motion requires that the set-aside be "economically feasible". The municipality's prospective affordable housing obligation will be determined upon the adoption of revised third round rules or through pending legislative action.

2. Concerning **item number 4**, the Council should decline to specifically authorize the Borough to amend its plan to include the Group 3 project due to the October 8, 2010 Appellate Division decision. Additionally, it should be noted that a municipality is always free to petition the Council for an amendment to its certified plan, and may at any time withdraw one petition so as to re-petition with another Housing Element and Fair Share Plan.

3. Concerning **item number 5**, the Council should decline to make the Borough's proposed amendment to its plan contingent on the developer receiving amended governmental development permits, including new approvals from the NJMC, as the Council takes no position on the validity of the proposed amendment; and NJMC's development review is entirely independent of the COAH process.

4. Concerning **items number 6 and 7**, the Council should decline to respond as these issues are not within its purview.

NEW JERSEY SPORTS & EXPOSITION AUTHORITY
NJSEA

We Bring the World to New Jersey

SEP 23 2015

Sara J Sundell, P.E.,P.P.
Director of Land Use Management
Chief Engineer
201-507-3379 (phone)
201-372-0161 (fax)
sara.sundell@njmeadowlands.gov

September 16, 2015

Hon. James Cassella and Council
Borough of East Rutherford
One Everett Place
East Rutherford, NJ 07073

CERTIFIED MAIL NO.
7005 0390 0006 3336 1718

Re: East Bound Inc./New Residential Development & Variance

Dear Mayor Cassella:

Pursuant to the 1992 amendments to P.L. 1988 c. 136 (C. 13:17-14.1) the New Jersey Meadowlands Commission is hereby forwarding the following application, which is currently under review by this Office:

File No.	Block	Lot	Municipality	Description
15-278	108.04	4	East Rutherford	Zoning Certificate Application for the construction of a 111-unit residential development (88 market-rate units and 23 affordable units), including a variance for number of parking spaces (227 spaces required, 197 spaces provided), and associated site improvements.

If you have any objections or comments to the enclosed application, please contact this Office within ten (10) days of receipt of this letter.

Thank you for your cooperation in this matter.

Sincerely,

Sara J. Sundell, P.E., P.P.
Director of Land Use Management
Chief Engineer

Enclosure
cc: Bergen County Soil Conservation
Mayor and Council of: Carlstadt Rutherford Wallington Secaucus Wood Ridge

New Jersey Meadowlands Commission

One DeKorte Park Plaza ◦ Lyndhurst, New Jersey 07071
Administrative Offices: (201) 460-1700 ◦ Fax: (201) 372-0161

APPLICATION FOR VARIANCE FROM ZONING REGULATIONS

Required fee: $3,000.00 for each use variance
$2,000.00 for all other variances

RECEIVED/NJMC
JUL - 2 2015
LAND USE MANAGEMENT

1. Applicant information

(a) Applicant name ER PARTNERS 3, LLC

(b) Street address 160 MICRO LAB ROAD

(c) Municipality LIVINGSTON State NJ ZIP 07039

(d) Phone number ( ) 973-992-2443

2. Property for which application is made

(a) Location of property - Street ROUTE 3 SERVICE ROAD

Block 108.04 Lot 4 Municipality EAST RUTHERFORD

(b) Property owner's name EAST ROAD, LLC.

(c) Present mailing address 1 WYNWOOD ROAD, PARSIPPANY NJ ZIP 07054

(d) Phone number ( )

3. Variance information

(a) State provisions of zoning regulations from which variance is requested

SEE ATTACHMENT

(b) State reasons for variance request and why compliance is not possible

SEE ATTACHMENT

(c) State resulting hardships if variance request is denied:

SEE ATTACHMENT

3. Variance information

(a) State provisions of zoning regulations from which variance is requested

Applicant is proposing 195 parking spaces for 111 dwelling units (23 of which are affordable units) which is less than the required minimum of 227 spaces per N.J.A.C.19:4-8.4(a) which requires one (1) space per affordable unit, two (2) spaces per market unit and one (1) space for every four (40 units for visitor parking.

(b) State reasons for variance request and why compliance is not possible.

As a residential development with a low and moderate income household component, an efficient design for the market rate units is required to generate a subsidy for the support of the 23 affordable dwelling units. The applicant believes that the on-site parking supply is sufficient to meet the anticipated demand of the project. Requiring more parking spaces than are functionally needed to serve the project is not economically feasible with the number of affordable dwelling units being provided.

This will be addressed in more detail through the testimony of a licensed professional planner and traffic engineer at the public hearing.

(c) State resulting hardships if variance request is denied:

The project is not economically feasible if the request for a parking supply more in line with the functional parking demand is denied.

This will be addressed in more detail through the testimony of a licensed professional planner at the public hearing.

State of New Jersey
Council on Affordable Housing
101 South Broad Street
PO Box 813
Trenton, NJ 08625-0813
(609) 292-3000
(609) 633-6056 (FAX)

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Acting Commissioner

February 11, 2010

The Honorable James L. Cassella
East Rutherford Borough
1 Everett Place
East Rutherford, NJ 07073

RE: Development Fee Ordinance
East Rutherford Borough, Bergen County

Dear Mayor Cassella:

The Council on Affordable Housing (COAH) has reviewed your proposed development fee ordinance.

We are pleased to provide a copy of a COAH report and resolution approving East Rutherford Borough's development fee ordinance. The Borough must file the ordinance with COAH within seven days of adoption. Please note that your municipality may not expend any funds until a spending plan has been approved by COAH.

Please call Kate Butler at (609) 292-4338 if you have any questions. We look forward to working with you to implement your Housing Element and Fair Share Plan.

Sincerely,

Lucy Vandenberg

Lucy Vandenberg, PP, AICP
Executive Director

Enc.
cc: Attached Service List
Joanne Wiggins, COAH Supervising Planner
Kate Butler, COAH Planner
Larissa DeGraw, COAH

Borough of East Rutherford
Development Fee Ordinance

1. Purpose

a) In Holmdel Builder's Association V. Holmdel Township, 121 N.J. 550 (1990), the New Jersey Supreme Court determined that mandatory development fees are authorized by the Fair Housing Act of 1985 (the Act), N.J.S.A. 52:27d-301 et seq., and the State Constitution, subject to the Council on Affordable Housing's (COAH's) adoption of rules.

b) Pursuant to P.L.2008, c.46 section 8 (C. 52:27D-329.2) and the Statewide Non-Residential Development Fee Act (C. 40:55D-8.1 through 8.7), COAH is authorized to adopt and promulgate regulations necessary for the establishment, implementation, review, monitoring and enforcement of municipal affordable housing trust funds and corresponding spending plans. Municipalities that are under the jurisdiction of the Council or court of competent jurisdiction and have a COAH-approved spending plan may retain fees collected from non-residential development.

c) This ordinance establishes standards for the collection, maintenance, and expenditure of development fees pursuant to COAH's regulations and in accordance P.L.2008, c.46, Sections 8 and 32-38. Fees collected pursuant to this ordinance shall be used for the sole purpose of providing low- and moderate-income housing. This ordinance shall be interpreted within the framework of COAH's rules on development fees, codified at N.J.A.C. 5:97-8.

2. Basic requirements

a) This ordinance shall not be effective until approved by COAH pursuant to *N.J.A.C.* 5:96-5.1.

b) Borough of East Rutherford shall not spend development fees until COAH has approved a plan for spending such fees in conformance with *N.J.A.C.* 5:97-8.10 and *N.J.A.C.* 5:96-5.3.

3. Definitions

a) The following terms, as used in this ordinance, shall have the following meanings:

i. "**Affordable housing development**" means a development included in the Housing Element and Fair Share Plan, and includes, but is not limited to, an inclusionary

development, a municipal construction project or a 100 percent affordable development.

ii. **"COAH"** or the **"Council"** means the New Jersey Council on Affordable Housing established under the Act which has primary jurisdiction for the administration of housing obligations in accordance with sound regional planning consideration in the State.

iii. **"Development fee"** means money paid by a developer for the improvement of property as permitted in *N.J.A.C.* 5:97-8.3.

iv. **"Developer"** means the legal or beneficial owner or owners of a lot or of any land proposed to be included in a proposed development, including the holder of an option or contract to purchase, or other person having an enforceable proprietary interest in such land.

v. **"Equalized assessed value"** means the assessed value of a property divided by the current average ratio of assessed to true value for the municipality in which the property is situated, as determined in accordance with sections 1, 5, and 6 of P.L.1973, c.123 (C.54:1-35a through C.54:1-35c).

vi. **"Green building strategies"** means those strategies that minimize the impact of development on the environment, and enhance the health, safety and well-being of residents by producing durable, low-maintenance, resource-efficient housing while making optimum use of existing infrastructure and community services.

4. Residential Development fees

a) Imposed fees

i. Within all zoning districts, residential developers, except for developers of the types of development specifically exempted below, shall pay a fee of 1.5 percent of the equalized assessed value for residential development provided no increased density is permitted.

ii. When an increase in residential density pursuant to N.J.S.A. 40:55D-70d(5) (known as a "d" variance) has been permitted, developers may be required to pay a development fee of 6 percent of the equalized assessed value for each additional unit that may be realized. However, if the zoning on a site has changed during the two-year period preceding the filing of such a variance application, the base density for the purposes of calculating the bonus development fee shall be the highest density permitted by right during the two-year period preceding the filing of the variance application.

Example: If an approval allows four units to be constructed on a site that was zoned for two units, the fees could equal one and a half percent of the

equalized assessed value on the first two units; and the specified higher percentage up to six percent of the equalized assessed value for the two additional units, provided zoning on the site has not changed during the two-year period preceding the filing of such a variance application.

b) Eligible exactions, ineligible exactions and exemptions for residential development

i. Affordable housing developments, developments where the developer is providing for the construction of affordable units elsewhere in the municipality, and developments where the developer has made a payment in lieu of on-site construction of affordable units shall be exempt from development fees.

ii. Developments that have received preliminary or final site plan approval prior to the adoption of a municipal development fee ordinance shall be exempt from development fees, unless the developer seeks a substantial change in the approval. Where a site plan approval does not apply, a zoning and/or building permit shall be synonymous with preliminary or final site plan approval for this purpose. The fee percentage shall be vested on the date that the building permit is issued.

iii. Owner-occupied residential structures demolished and replaced as a result of a fire, flood, or natural disaster shall be exempt from paying a development fee.

5. Non-residential Development fees

a) Imposed fees

i. Within all zoning districts, non-residential developers, except for developers of the types of development specifically exempted, shall pay a fee equal to two and one-half (2.5) percent of the equalized assessed value of the land and improvements, for all new non-residential construction on an unimproved lot or lots.

ii. Non-residential developers, except for developers of the types of development specifically exempted, shall also pay a fee equal to two and one-half (2.5) percent of the increase in equalized assessed value resulting from any additions to existing structures to be used for non-residential purposes.

iii. Development fees shall be imposed and collected when an existing structure is demolished and replaced. The development fee of two and a half percent (2.5%) shall be calculated on the difference between the equalized assessed value of the pre-existing land and improvement and the equalized assessed value of the newly improved structure, i.e. land and improvement, at the time

final certificate of occupancy is issued. If the calculation required under this section results in a negative number, the non-residential development fee shall be zero.

b) Eligible exactions, ineligible exactions and exemptions for non-residential development

i. The non-residential portion of a mixed-use inclusionary or market rate development shall be subject to the two and a half (2.5) percent development fee, unless otherwise exempted below.

ii. The 2.5 percent fee shall not apply to an increase in equalized assessed value resulting from alterations, change in use within existing footprint, reconstruction, renovations and repairs.

iii. Non-residential developments shall be exempt from the payment of non-residential development fees in accordance with the exemptions required pursuant to P.L.2008, c.46, as specified in the Form N-RDF "State of New Jersey Non-Residential Development Certification/Exemption" Form. Any exemption claimed by a developer shall be substantiated by that developer.

iv. A developer of a non-residential development exempted from the non-residential development fee pursuant to P.L.2008, c.46 shall be subject to it at such time the basis for the exemption no longer applies, and shall make the payment of the non-residential development fee, in that event, within three years after that event or after the issuance of the final certificate of occupancy of the non-residential development, whichever is later.

v. If a property which was exempted from the collection of a non-residential development fee thereafter ceases to be exempt from property taxation, the owner of the property shall remit the fees required pursuant to this section within 45 days of the termination of the property tax exemption. Unpaid non-residential development fees under these circumstances may be enforceable by the Borough of East Rutherford as a lien against the real property of the owner.

6. Collection procedures

a) Upon the granting of a preliminary, final or other applicable approval, for a development, the applicable approving authority shall direct its staff to notify the construction official responsible for the issuance of a building permit.

b) For non-residential developments only, the developer shall also be provided with a copy of Form N-RDF "State of New Jersey Non-Residential Development Certification/Exemption" to be completed as per the instructions provided. The developer of a non-residential development shall complete

Form N-RDF as per the instructions provided. The construction official shall verify the information submitted by the non-residential developer as per the instructions provided in the Form N-RDF. The Tax assessor shall verify exemptions and prepare estimated and final assessments as per the instructions provided in Form N-RDF.

c) The construction official responsible for the issuance of a building permit shall notify the local tax assessor of the issuance of the first building permit for a development which is subject to a development fee.

d) Within 90 days of receipt of that notice, the municipal tax assessor, based on the plans filed, shall provide an estimate of the equalized assessed value of the development.

e) The construction official responsible for the issuance of a final certificate of occupancy notifies the local assessor of any and all requests for the scheduling of a final inspection on property which is subject to a development fee.

f) Within 10 business days of a request for the scheduling of a final inspection, the municipal assessor shall confirm or modify the previously estimated equalized assessed value of the improvements of the development; calculate the development fee; and thereafter notify the developer of the amount of the fee.

g) Should the Borough of East Rutherford fail to determine or notify the developer of the amount of the development fee within 10 business days of the request for final inspection, the developer may estimate the amount due and pay that estimated amount consistent with the dispute process set forth in subsection b. of section 37 of P.L.2008, c.46 (C.40:55D-8.6).

h) Fifty percent of the development fee shall be collected at the time of issuance of the building permit. The remaining portion shall be collected at the issuance of the certificate of occupancy. The developer shall be responsible for paying the difference between the fee calculated at building permit and that determined at issuance of certificate of occupancy.

i) Appeal of development fees

1) A developer may challenge residential development fees imposed by filing a challenge with the County Board of Taxation. Pending a review and determination by the Board, collected fees shall be placed in an interest bearing escrow account by the Borough of East Rutherford. Appeals from a determination of the Board may be made to the tax court in accordance with the provisions of the State Tax Uniform Procedure Law, R.S.54:48-1 et seq., within 90 days after the date of such determination. Interest earned on amounts escrowed shall be credited to the prevailing party.

2) A developer may challenge non-residential development fees imposed by filing a challenge with the Director of the Division of Taxation. Pending a review and determination by the Director, which shall be made within 45 days of receipt of the challenge, collected fees shall be placed in an interest bearing escrow account by the Borough of East Rutherford. Appeals from a determination of the Director may be made to the tax court in accordance with the provisions of the State Tax Uniform Procedure Law, R.S.54:48-1 et seq., within 90 days after the date of such determination. Interest earned on amounts escrowed shall be credited to the prevailing party.

7. Affordable Housing trust fund

a) There is hereby created a separate, interest-bearing housing trust fund to be maintained by the Chief Financial Officer for the purpose of depositing development fees collected from residential and non-residential developers and proceeds from the sale of units with extinguished controls.

b) The following additional funds shall be deposited in the Affordable Housing Trust Fund and shall at all times be identifiable by source and amount:

1. payments in lieu of on-site construction of affordable units;
2. developer contributed funds to make ten percent (10%) of the adaptable entrances in a townhouse or other multistory attached development accessible;
3. rental income from municipally operated units;
4. repayments from affordable housing program loans;
5. recapture funds;
6. proceeds from the sale of affordable units; and
7. any other funds collected in connection with [*insert municipal name*]'s affordable housing program.

c) Within seven days from the opening of the trust fund account, the Borough of East Rutherford shall provide COAH with written authorization, in the form of a three-party escrow agreement between the municipality, the bank, and COAH to permit COAH to direct the disbursement of the funds as provided for in N.J.A.C. 5:97-8.13(b).

d) All interest accrued in the housing trust fund shall only be used on eligible affordable housing activities approved by COAH.

8 Use of funds

a) The expenditure of all funds shall conform to a spending plan approved by COAH. Funds deposited in the housing trust fund may be used for any activity

approved by COAH to address the Borough of East Rutherford's fair share obligation and may be set up as a grant or revolving loan program. Such activities include, but are not limited to: preservation or purchase of housing for the purpose of maintaining or implementing affordability controls, rehabilitation, new construction of affordable housing units and related costs, accessory apartment, market to affordable, or regional housing partnership programs, conversion of existing non-residential buildings to create new affordable units, green building strategies designed to be cost saving and in accordance with accepted national or state standards, purchase of land for affordable housing, improvement of land to be used for affordable housing, extensions or improvements of roads and infrastructure to affordable housing sites, financial assistance designed to increase affordability, administration necessary for implementation of the Housing Element and Fair Share Plan, or any other activity as permitted pursuant to N.J.A.C. 5:97-8.7 through 8.9 and specified in the approved spending plan.

b) Funds shall not be expended to reimburse the Borough of East Rutherford for past housing activities.

c) At least 30 percent of all development fees collected and interest earned shall be used to provide affordability assistance to low- and moderate-income households in affordable units included in the municipal Fair Share Plan. One-third of the affordability assistance portion of development fees collected shall be used to provide affordability assistance to those households earning 30 percent or less of median income by region.

i. Affordability assistance programs may include down payment assistance, security deposit assistance, low interest loans, rental assistance, assistance with homeowners association or condominium fees and special assessments, and assistance with emergency repairs.

ii. Affordability assistance to households earning 30 percent or less of median income may include buying down the cost of low or moderate income units in the municipal Fair Share Plan to make them affordable to households earning 30 percent or less of median income.

iii. Payments in lieu of constructing affordable units on site and funds from the sale of units with extinguished controls shall be exempt from the affordability assistance requirement.

d) The Borough of East Rutherford may contract with a private or public entity to administer any part of its Housing Element and Fair Share Plan, including the requirement for affordability assistance, in accordance with N.J.A.C. 5:96-18.

e) No more than 20 percent of all revenues collected from development fees, may be expended on administration, including, but not limited to, salaries and benefits for municipal employees or consultant fees necessary to develop or implement a new

construction program, a Housing Element and Fair Share Plan, and/or an affirmative marketing program. In the case of a rehabilitation program, no more than 20 percent of the revenues collected from development fees shall be expended for such administrative expenses. Administrative funds may be used for income qualification of households, monitoring the turnover of sale and rental units, and compliance with COAH's monitoring requirements. Legal or other fees related to litigation opposing affordable housing sites or objecting to the Council's regulations and/or action are not eligible uses of the affordable housing trust fund.

9. Monitoring

a) The Borough of East Rutherford shall complete and return to COAH all monitoring forms included in monitoring requirements related to the collection of development fees from residential and non-residential developers, payments in lieu of constructing affordable units on site, funds from the sale of units with extinguished controls, barrier free escrow funds, rental income, repayments from affordable housing program loans, and any other funds collected in connection with East Rutherford's housing program, as well as to the expenditure of revenues and implementation of the plan certified by COAH. All monitoring reports shall be completed on forms designed by COAH.

10. Ongoing collection of fees

a) The ability for the Borough of East Rutherford to impose, collect and expend development fees shall expire with its substantive certification unless the Borough of East Rutherford has filed an adopted Housing Element and Fair Share Plan with COAH, has petitioned for substantive certification, and has received COAH's approval of its development fee ordinance. If the Borough of East Rutherford fails to renew its ability to impose and collect development fees prior to the expiration of substantive certification, it may be subject to forfeiture of any or all funds remaining within its municipal trust fund. Any funds so forfeited shall be deposited into the "New Jersey Affordable Housing Trust Fund" established pursuant to section 20 of P.L.1985, c.222 (C.52:27D-320). The Borough of East Rutherford shall not impose a residential development fee on a development that receives preliminary or final site plan approval after the expiration of its substantive certification or judgment of compliance, nor shall the Borough of East Rutherford retroactively impose a development fee on such a development. The Borough of East Rutherford shall not expend development fees after the expiration of its substantive certification or judgment of compliance.

BOROUGH OF EAST RUTHERFORD
ORDINANCE NO. ____

AN ORDINANCE TO AMEND AND SUPPLEMENT CHAPTER 390 OF THE CODE OF THE BOROUGH OF EAST RUTHERFORD ESTABLISHING AN AFFORDABLE HOUSING TRUST FUND, AFFORDABLE HOUSING CONTRIBUTION REQUIREMENTS AND PROCEDURES

BE IT ORDAINED, by the Mayor and Council of the Borough of East Rutherford as follows:

1. A new Chapter 390 is hereby added to Code of the Borough of East Rutherford entitled "Affordable Housing Contribution" to read as follows:

CHAPTER 390
AFFORDABLE HOUSING CONTRIBUTIONS

390-1. Purpose

A. In Holmdel Builder's Association V. Holmdel Township, 121 N.J. 550 (1990), the New Jersey Supreme Court determined that mandatory development fees are authorized by the Fair Housing Act of 1985 (the Act), N.J.S.A. 52:27d-301 et seq., and the State Constitution, subject to the Council on Affordable Housing's (COAH's) adoption of rules or as authorized by the Superior Court of New Jersey acting pursuant to the decision of the New Jersey Supreme Court in In the Matter of the Adoption of N.J.S.A. 5:96 and 5:97 by the New Jersey Council on Affordable Housing, 221 N.J. 1 (2015) ("Mount Laurel IV").

B. Pursuant to N.J.S.A. 52:27D-329.2 and the Statewide Non-Residential Development Fee Act N.J.S.A. 40:55D-8.1 through 8.7, COAH, or the Superior Court pursuant to Mount Laurel IV, is authorized to adopt and promulgate regulations necessary for the establishment, implementation, review, monitoring and enforcement of municipal affordable housing trust funds and corresponding spending plans. Municipalities that are under the jurisdiction of the Council or the Superior Court and have a spending plan approved by COAH or by the Superior Court may retain fees collected from non-residential development.

C. This ordinance establishes standards for the collection, maintenance, and expenditure of development fees. Fees collected pursuant to this ordinance shall be used for the sole purpose of providing low- and moderate-income housing. This ordinance shall be interpreted within the framework of COAH's rules on development fees, codified at N.J.A.C. 5:97-8, or successor regulations and by order of the Superior Court.

390-2. Basic requirements

A. This ordinance shall not be effective until approved by COAH pursuant to N.J.A.C. 5:96-5.1 or by the Superior Court pursuant to Mount Laurel IV.

B. East Rutherford shall not spend development fees until COAH or the Superior Court has approved a plan for spending such fees.

390-3. Definitions

A. The following terms, as used in this Chapter, shall have the following meanings:

(1) "**Affordable housing development**" means a development included in the Housing Element and Fair Share Plan, and includes, but is not limited to, an inclusionary development, a municipal construction project or a 100 percent affordable development.

(2) "**COAH**" or the "**Council**" means the New Jersey Council on Affordable Housing established under the Fair Housing Act which previously had primary jurisdiction for the administration of housing obligations in accordance with sound regional planning consideration in the State.

(3) "**Development fee**" means money paid by a developer for the improvement of property as permitted in N.J.A.C. 5:97-8.3.

(4) "**Developer**" means the legal or beneficial owner or owners of a lot or of any land proposed to be included in a proposed development, including the holder of an option or contract to purchase, or other person having an enforceable proprietary interest in such land.

(5) "**Equalized assessed value**" means the assessed value of a property divided by the current average ratio of assessed to true value for the municipality in which the property is situated, as determined in accordance with N.J.S.A. 54:1-35a through C.54:1-35c.

(6) "**Substantial Change**" means a revision to an approved preliminary or final site plan or subdivision which meets any one (1) of the following limitations:

(a) Five (5) feet of improvements into any yard setback;
(b) Seven (7) feet in building height;
(c) One (1) percent in floor area ratio;
(d) One (1) percent in impervious coverage;
(e) Five (5) feet in building spacing or location;
(f) Three (3) parking spaces;
(g) Five (5) feet in driveway locations;

(h) One (1) percent in site disturbances;
(i) Five (5) feet in lot line locations;
(j) Any change in residential density;
(k) Any new variances pursuant to N.J.S.A. 40-55D-70.c or d;
(l) Any such change encumbered above shall not alter the percentage of low/moderate income housing in an approved project, if applicable.

Notwithstanding the foregoing, a substitution of similar landscaping material, lighting fixtures and signage is not a substantial change as long as there is no change in approved quantities or dimensions.

Where a site plan approval is not required, a zoning and/or building permit shall be synonymous with preliminary or final site plan approval for this purpose. The fee percentage shall be vested on the date that the building permit is issued.

390-4. Residential Development fees

A. Imposed fees

(1) Within the all zoning districts, all residential developers, except for developers of the types of development specifically exempted below, shall pay a fee of up to one and a half (1.5%) percent of the equalized assessed value for residential development provided no increased density is permitted.

(2) When an increase in residential density pursuant to N.J.S.A. 40:55D-70d(5) (known as a "d" variance) has been permitted, developers may be required to pay a development fee of up to six percent (6%) of the equalized assessed value for each additional unit that may be realized. However, if the zoning on a site has changed during the two-year period preceding the filing of such a variance application, the base density for the purposes of calculating the bonus development fee shall be the highest density permitted by right during the two-year period preceding the filing of the variance application.

Example: If an approval allows four units to be constructed on a site that was zoned for two units, the fees could equal one and a half (1.5) percent of the equalized assessed value on the first two units; and the specified higher percentage up to six (6) percent of the equalized assessed value for the two additional units, provided zoning on the site has not changed during the two-year period preceding the filing of such a variance application.

B. Eligible exactions, ineligible exactions and exemptions for residential development

(1) Affordable housing developments, developments where the developer is providing for the construction of affordable units elsewhere in the municipality, and developments where the developer has made a payment in lieu of on-site construction of affordable units shall be exempt from development fees.

(2) Developments that have received preliminary or final site plan approval prior to the adoption of this Chapter shall be exempt from development fees, unless the developer seeks a substantial change in the approval.

(3) Owner-occupied residential structures demolished and replaced as a result of a fire, flood, or natural disaster shall be exempt from paying a development fee.

(4) Single family structures new or renovated that result in no additional residential structures.

(5) Public government agencies and schools, which are classified by the Tax Assessor as exempt from payment of property taxes (Property Classes 15A & 15C), shall be exempt from paying development fees.

390-5. Collection procedures

A. Upon the granting of a preliminary, final or other applicable approval, for a development, the applicable approving authority shall direct its staff to notify the Construction Official responsible for the issuance of a building permit.

B. The construction official responsible for the issuance of a final certificate of occupancy shall notify the Tax Assessor of any and all requests for the scheduling of a final inspection on property which is subject to a development fee.

C. Within 10 business days of a request for the scheduling of a final inspection, the Tax Assessor shall confirm or modify the previously estimated equalized assessed value of the improvements of the development; calculate the development fee; and thereafter notify the developer of the amount of the fee.

D. Should East Rutherford fail to determine or notify the developer of the amount of the development fee within 10 business days of the request for final inspection, the developer may estimate the amount due and pay that estimated amount consistent with the dispute process set forth in N.J.S.A. 40:55D-8.6.

E. The development fee shall be collected as follows:

(1) 50% prior to issuance of any construction permit; and

(2) 50% at the issuance of the certificate of occupancy.

F. Appeal of development fees

(1) A developer may challenge residential development fees imposed by filing a challenge with the County Board of Taxation. Pending a review and determination by the Board, collected fees shall be placed in an interest bearing escrow account by East Rutherford. Appeals from a determination of the Board may be made to the Tax Court in accordance with the provisions of the State Tax Uniform Procedure Law, N.J.S.A. 54:48-1 et seq., within 90 days after the date of such determination. Interest earned on amounts escrowed shall be credited to the prevailing party.

390-6. Affordable Housing trust fund

A. There is hereby created a separate, interest-bearing housing trust fund to be maintained by the Chief Financial Officer for the purpose of depositing development fees collected from residential and non-residential developers and proceeds from the sale of units with extinguished controls.

B. The following additional funds shall be deposited in the Affordable Housing Trust Fund and shall at all times be identifiable by source and amount:

1. payments in lieu of on-site construction of affordable units;
2. developer contributed funds to make ten percent (10%) of the adaptable entrances in a townhouse or other multistory attached development accessible;
3. rental income from municipally operated units;
4. repayments from affordable housing program loans;
5. recapture funds;
6. proceeds from the sale of affordable units; and
7. any other funds collected in connection with East Rutherford's affordable housing program.

C. Within seven days from the opening of the trust fund account, East Rutherford shall provide COAH with written authorization, in the form of a three-party escrow agreement between the municipality, the bank, and COAH to permit COAH to direct the disbursement of the funds as provided for in N.J.A.C. 5:97-8.13(b).

D. All interest accrued in the housing trust fund shall only be used on eligible affordable housing activities approved by COAH.

390-7. Use of funds

A. The expenditure of all funds shall conform to a spending plan approved by COAH or the Superior Court. Funds deposited in the housing trust fund may be used for any activity approved by COAH or the Superior Court to address East Rutherford's fair share obligation and may be set up as a grant or revolving loan program. Such activities include, but are not limited to: preservation or purchase of housing for the purpose of maintaining or implementing affordability controls, rehabilitation, new construction of affordable housing units and related costs, accessory apartment, market to affordable, or regional housing partnership programs, conversion of existing non-residential buildings to create new affordable units, green building strategies designed to be cost saving and in accordance with accepted national or state standards, purchase of land for affordable housing, improvement of land to be used for affordable housing, extensions or improvements of roads and infrastructure to affordable housing sites, financial assistance designed to increase affordability, administration necessary for implementation of the Housing Element and Fair Share Plan, or any other activity as permitted pursuant to N.J.A.C. 5:97-8.7 through 8.9 and specified in the approved spending plan.

B. Funds shall not be expended to reimburse East Rutherford for past housing activities.

C. At least 30 percent of all development fees collected and interest earned shall be used to provide affordability assistance to low- and moderate-income households in affordable units included in East Rutherford's Fair Share Plan. One-third of the affordability assistance portion of development fees collected shall be used to provide affordability assistance to those households earning 30 percent or less of median income by region.

(1) Affordability assistance programs may include down payment assistance, security deposit assistance, low interest loans, rental assistance, assistance with homeowners association or condominium fees and special assessments, and assistance with emergency repairs.

(2) Affordability assistance to households earning 30 percent or less of median income may include buying down the cost of low or moderate income units in the municipal Fair Share Plan to make them affordable to households earning 30 percent or less of median income.

(3) Payments in lieu of constructing affordable units on site and funds from the sale of units with extinguished controls shall be exempt from the affordability assistance requirement.

D. East Rutherford may contract with a private or public entity to administer any part of its Housing Element and Fair Share Plan, including the requirement for affordability assistance, in accordance with N.J.A.C. 5:96-18.

E. No more than 20 percent of all revenues collected from development fees, may be expended on administration, including, but not limited to, salaries and benefits for municipal employees or consultant fees necessary to develop or implement a new construction program, a Housing Element and Fair Share Plan, and/or an affirmative marketing program. In the case of a rehabilitation program, no more than 20 percent of the revenues collected from development fees shall be expended for such administrative expenses. Administrative funds may be used for income qualification of households, monitoring the turnover of sale and rental units, and compliance with COAH's monitoring requirements. Legal or other fees related to litigation opposing affordable housing sites or objecting to the Council's regulations and/or action are not eligible uses of the affordable housing trust fund.

390-8. Monitoring

A. East Rutherford shall complete and return to COAH all monitoring forms included in monitoring requirements related to the collection of development fees from residential and non-residential developers, payments in lieu of constructing affordable units on site, funds from the sale of units with extinguished controls, barrier free escrow funds, rental income, repayments from affordable housing program loans, and any other funds collected in connection with East Rutherford's housing program, as well as to the expenditure of revenues and implementation of the plan certified by COAH. All monitoring reports shall be completed on forms designed by COAH.

390-9. Ongoing collection of fees

A. The ability for East Rutherford to impose, collect and expend development fees shall expire with its substantive certification East Rutherford has filed an adopted Housing Element and Fair Share Plan with COAH, has petitioned for substantive certification, and has received COAH's approval of its development fee ordinance. If East Rutherford fails to renew its ability to impose and collect development fees prior to the expiration of substantive certification, it may be subject to forfeiture of any or all funds remaining within its municipal trust fund. Any funds so forfeited shall be

deposited into the "New Jersey Affordable Housing Trust Fund" established pursuant to N.J.S.A. 52:27D-320. East Rutherford shall not impose a residential development fee on a development that receives preliminary or final site plan approval after the expiration of its substantive certification or judgment of compliance, nor shall East Rutherford retroactively impose a development fee on such a development. East Rutherford shall not expend development fees after the expiration of its substantive certification or judgment of compliance.

2. Each section, subsection, sentence, clause and phrase of this Ordinance is declared to be an independent section, subsection, sentence, clause and phrase, and the finding or holding of any such portion of this Ordinance to be unconstitutional, void, ineffective for any cause, or reason, shall not affect any other portion of this Ordinance.

3. This Ordinance shall be in full force and effect from and after its adoption and publication as may be required by law and upon approval by the Council on Affordable Housing or the Superior Court.

BOROUGH OF EAST RUTHERFORD
ZONING BOARD OF ADJUSTMENT

RESOLUTION NO. 16 -

IN RE THE APPLICATION OF
384 PATERSON AVENUE ER, LLC
FOR MINOR SITE PLAN WAIVERS, BULK VARIANCES
AND A USE VARIANCE
PQ: 384 PATERSON AVENUE
BLOCK 44, LOT 41
USE VARIANCE

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WHEREAS, 384 PATERSON AVENUE ER, LLC, has applied to the Board of Adjustment of the Borough of East Rutherford, Bergen County, New Jersey, for permission to construct a three (3) story mixed use building with seven (7) residential units, one is affordable and a ground floor office on a vacant lot, which requires a use variance as it is not a permitted use and it also requires certain bulk variances upon the premises located at 384 Paterson Avenue; and

WHEREAS, the Board has determined that the Applicant also requires a use variance pursuant to N.J.S.A. 40:55D-70(d) and certain bulk variances pursuant to N.J.S.A. 40:55D-70(c); and

WHEREAS, the Board held public hearings, pursuant to public notice, at the Municipal Building, East Rutherford, New Jersey, at which time it heard testimony and considered the subject application; and

WHEREAS, the Applicant was represented by David Crook, Esq.; and

WHEREAS, at the March 3, 2016 meeting, the Zoning Board of Adjustment, after hearing the testimony and evidence presented by the Applicant, and after due consideration and deliberation has made the following findings of fact and conclusions:

NOW, THEREFORE, BE IT RESOLVED that:

A. **Findings of Fact.** The Board makes the following findings of fact on this application:

1. **Jurisdiction.**

1.1 That the application for the variance was duly made to Zoning Board of Adjustment and that all owners of property situated within 200 feet of the premises to be affected were duly notified in accordance with law.

1.2 The Applicant has presented satisfactory proof to the Zoning Board of Adjustment that a notice of said hearing was duly published.

2. **The Site & Application.**

2.1 Joaquin Bouzas of Inglese Architecture and Engineering, East Rutherford, New Jersey testified on behalf of the Applicant. He was accepted as an expert witness in the area of architecture by the Board.

2.2 Mr. Bouzas testified that the property is L-shaped. It has frontage on Paterson Avenue. The pre-existing rear garages were demolished.

2.3 He testified that the lot area is approximately 12,769 square feet. He testified that the units will be sold as condominiums and will not be rentals. All of the units will be two-family units.

2.4 The density will be 23.8 units per acre. It is a mixed use so the unit per acre would vary. The proposed front yard is 15 feet while 20 feet is required.

2.5 There is a proposed dry well or pit to retain water and prevent run off.

2.6 William Stimmel, P.E., P.P., testified on behalf of the Applicant. Mr. Stimmel's credentials were accepted and the Board permitted him to testify as an expert witness.

2.7 Mr. Stimmell prepared three reports. He prepared an Affordable Housing Production Plan/Report; a Traffic Impact Statement and a report addressing the positive and negative criteria under the statute.

2.8 With respect to the traffic impact, Mr. Stimmel testified that the site would add very low traffic volume. The site should generate approximately 4 vehicles during the morning peak hours and 5 vehicles during the evening peak hours. He testified that the NJ DOT considers the addition of 100 new trips during a peak hour to be significant.

2.9 He testified that the site is particularly suited for the proposed development for the following reasons. He testified that it is located on an arterial

roadway. It is located in close proximity to a gas station. It is located across from a park. All of the parking would be on-site.

2.10 Mr. Stimmel also testified that there are special reasons to grant the use variance. Mr. Stimmel testified that the application furthers numerous purposes of the Municipal Land Use Law set forth in N.J.S. 40:55D-2. The purposes of the act furthered by the application include promoting a desirable, visual environment through creative development techniques and good civic design and arrangement. The development would provide new housing stock which would comply with current building codes. The redeveloped site would also be aesthetically pleasing. It is also an appropriate use for development of the land in a manner which would promote the public health, safety, morals and general welfare.

2.11 He also testified that the variance can be granted without substantial detriment to the public good. He testified that it would not substantially impair the intent and purpose of Zoning Plan and Zoning Ordinance.

2.12 A concern with respect to water retention versus run off was raised by Remington & Vernick Engineers, the Board's own expert witness. The concern is that the retention of run off waters in the parking lot might contaminate the ground water with oil, salt, or other chemicals washed off of the vehicles. The Board was advised that is acceptable to have the water from the roof to be retained on site.

2.13 The Board expert and the Applicant engaged in a colloquy regarding this issue. The Applicant agreed to reconfigure the pitch of the parking area so that the run off from the parking area would be discharged out to the street. The Applicant also agreed to install a french drain or other type of drain to prevent water from freezing on the sidewalk or the entrance to the property.

3. **Surrounding Development Patterns.**

3.1 The property is located within the NC Neighborhood Commercial Zone. Only two dwelling units are allowed in a mixed use development. A use variance under subsection (d)-1 is required.

4. **The Impact of the Project.**

4.1. The Applicant proposes to utilize the property for seven (7) residential units with a 500 square foot office on the first floor.

4.2 The Board accepts the testimony of the expert witness produced by the Applicant, William Stimmel, P.E., P.P. The Board finds that the Applicant met their burden of demonstrating special reasons to justify the granting of the required use variance. The Board also finds that the requested relief can be granted without substantial detriment to the public good and the requested relief will not substantially impair the intent and purpose of the Zone Plan and Zoning Ordinance.

5. **The Zoning Ordinance and Master Plan.**

5.1 The subject property is located within the NC Neighborhood Commercial Zone of the Borough. The Board finds that the proposed use is less intensive than other permitted uses on the property.

5.2 Goals of the Borough's Master Plan include the following which are relevant here:

(a) To provide for economic development that will provide a fully diverse economic base.

(b) To create and maintain an optimum community scale through proper guidance of development densities.

5.3 The Board finds that the proposed use is not inconsistent with the Master Plan and with the Zoning Ordinance.

6. **The Positive Criteria.**

6.1 The Board finds that there are special reasons which justify granting this application. The Board finds that one of the purposes of Municipal Land Use Law is to "provide sufficient space in appropriate locations for a variety of uses to meet the needs of all citizens". Based upon the testimony of the Applicant, the Board finds a growing need for the subject use. No environmental conditions will result from the use of the property. The proposed use furthers the purposes of good zoning and planning for this reason.

6.2 The Board also finds that the proposed site is particularly suited to the proposed use. The site is particularly suited to the proposed development for the following reasons: the property is located on an arterial roadway; it is a larger parcel than is generally available in the area; it is adjacent to a park and other recreational uses; and the unique site can accommodate parking on site.

7. **The Negative Criteria.**

7.1 The Board finds that the Applicant also satisfies the negative criteria. The negative criteria establishes that the variance can be granted without substantial detriment to the public good; that the benefits of the deviation would outweigh any detriment and that it will not substantially impair the intent and purpose of the zone plan and zoning ordinance.

7.2 As set forth above, the Board finds that there will be no detriment to public good. There will be a minimal impact upon any surrounding neighbors. The use is less noxious and less intensive than other uses permitted within the zone.

7.3 There is adequate off-street parking. In addition, the site provides access to transit and the type of units may generate transit-oriented residents, both of which will result in a decrease in parking demand on average.

BE IT FURTHER RESOLVED by the Zoning Board of Adjustment of the Borough of East Rutherford that the application for bulk variances and an use variance to permit the subject site to be utilized for seven (7) residential units and an office as set forth in the application materials and plans submitted to the Board is hereby approved:

1. Approvals of all other government agencies and utilities having jurisdiction over any aspect of the building.

2. Satisfaction by Applicant of the representations and commitments made in the submissions testimony and in the record made available by Applicant before the Board, if any.

3. Deposit of the appropriate amounts into escrow and payment of requisite application fees pursuant to ordinance and reasonable requirements of applicable Borough Professionals.

4. The Applicant shall comply with the requirements of structural, fire and sanitary safety as provided for in the current edition of the New Jersey Uniform Construction Code.

5. The Applicant will pay any developmental fees which may be required under the Ordinances of the Borough of East Rutherford.

6. The Applicant shall comply with all requirements of Robert T. Regan, Esq., the Mount Laurel Implementation Monitor. This compliance shall include, but is not limited to, complying with the Monitor's decision that the

Applicant must provide one (1) affordable housing unit from the total of seven (7) residential units which were approved. The Applicant shall provide the Monitor with a copy of any revised Site Plan or any other revised plans to be filed with the Borough of East Rutherford or any of its professionals. The Board recognizes that the Monitor's initial review occurred some time ago. No permits shall issue until the Applicant confirms that Mr. Regan has reviewed and approved the revised plan and still requires one (1) affordable unit.

7. All approvals hereunder are subject to the Applicant receiving approval from the Bergen County Planning Board.

8. The Applicant shall enter into a Developer's Agreement upon such terms and conditions which may be required by the Borough Attorney for the Borough of East Rutherford.

9. The Applicant shall comply with all of the requirements of Remington & Vernick Engineers.

10. The Applicant shall submit a revised Variance and Waiver Table based upon the comments of the Board professionals and revised plans. The revised plans must provide that the parking lot run off be directed to the street.

MOTION TO APPROVE

Introduced by:	Banca
Seconded by:	Viccaro
In favor of granting:	Ford Polifronio Banca Viccaro Levy Alberta Martin
Oppositions:	None.
Abstentions:	None.

MOTION APPROVED

The foregoing is a true copy of a Resolution adopted by the Zoning Board of Adjustment of the Borough of East Rutherford at the meeting of April 7, 2016.

Cheryl Wloch-Rapetti, Secretary