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June 11, 2020

**Via Electronic Mail**

Diana P. McGovern, Esq.  
Zimmerer, Murray, Conyngham & Kunzier  
Park 80 West, Plaza Two  
250 Pehle Avenue, Suite 108  
Saddle Brook, New Jersey 07663

**Re: Block 7800, Lots 1, 2, 3 & 25  
Amended Affordable Housing Settlement – Proposed Modification of  
Zoning Board Condition**

Dear Ms. McGovern:

This firm represents the Township of Nutley (the “Township” or “Nutley”) in its affordable housing litigation. The purpose of this correspondence is to advise the Township’s Zoning Board of Adjustment (the “Zoning Board”) of recent developments in the Township’s affordable housing litigation and corollary issues for the Zoning Board to consider in connection with previously-approved developments. We believe that it is helpful to provide a brief historical backdrop for the Zoning Board, which is set forth in greater detail below.

The history of affordable housing in New Jersey is a long one, going back nearly 40 years. In 1975, the Southern Burlington County NAACP challenged the zoning ordinance of Mount Laurel Township on the grounds that it excluded low- and moderate-income households from obtaining housing. As a result of this lawsuit, the New Jersey Supreme Court ruled that the New Jersey State Constitution requires each developing municipality to provide zoning which creates a realistic opportunity for the construction of its “fair share” of low- and moderate-income housing. This decision was the first of its kind and is commonly referred to as “Mt. Laurel I.”

In 1983, following years of additional litigation, the Supreme Court affirmed its holding in Mt. Laurel I and created a mechanism to enforce fair share obligations. This decision is

commonly referred to as “Mt. Laurel II,” and the mechanism it created is called the “builder’s remedy.” If a developer proves that a municipality is non-compliant with its fair share obligation, it is awarded a builder’s remedy. A builder’s remedy provides the developer with court-ordered zoning and density for multi-family housing without municipal oversight that is usually provided under the planning and/or zoning board application process.

On July 2, 1985, in response to the Supreme Court’s decision in Mt. Laurel II, the Legislature enacted the Fair Housing Act. The Fair Housing Act did two important things: first, it created a state agency referred to as the Council on Affordable Housing (“COAH”), which was charged with calculating and assigning fair share obligations to affected municipalities. COAH established “rounds,” which are time frames within which municipalities are required to provide a reasonable opportunity for affordable housing to be built. Round One was 1987 – 1993, Round Two was 1993 – 1999, Round Three is 1999 – 2025, and Round Four is 2025 forward. Second, it provided municipalities with a voluntary administrative process through which towns could satisfy their fair share obligations instead of litigating builder’s remedy lawsuits in the courts.

For decades, Nutley, like hundreds of other municipalities, participated in the administrative process established by COAH, and consistently satisfied its affordable housing obligation. However, COAH became politically paralyzed and never adopted constitutionally compliant regulations for Round Three.

On March 10, 2015, following years of inaction by COAH and litigation, the New Jersey Supreme Court, in another landmark decision, ruled that the agency’s administrative process had failed and assigned affordable housing compliance to the courts. The Supreme Court established a process by which towns could file declaratory judgment actions and prove their compliance with fair share obligations. The Court also afforded towns with some protection from builder’s remedy lawsuits while fair share obligations were determined, but such protection was contingent on a town acting in good faith.

In July 2015, the Board of Commissioners directed our firm to file a declaratory judgment action as outlined by the Supreme Court. Due to the Township’s history of compliance with its fair share obligation, we received temporary immunity from builder’s remedy actions. It is worthwhile to note that the Township was not alone in this endeavor - approximately 300 other towns throughout New Jersey filed similar cases. Experts were engaged by all sides to determine municipal affordable housing obligations for the Third Round.

Fair Share Housing Center’s expert initially estimated that the Township’s obligation was approximately 500 affordable units, which was firmly disputed by the Township. We then engaged in lengthy litigation and settlement negotiations with Fair Share Housing Center.

While these negotiations were ongoing, two applications for development were filed with the Township's Zoning Board, including the Russ project located at Block 7800, Lots 1, 2, 3, & 25, and the Oliver project located at Block 5902, Lots 28 & 29. Given the uncertain state of affairs as to the Township's affordable housing obligation, we recommended that the Zoning Board impose an affordable housing set-aside on both projects, as is commonly done throughout the State, to strengthen our settlement position with Fair Share Housing Center. In short, the Russ project was ultimately approved by the Zoning Board and a memorializing resolution adopted on or about November 13, 2017. Critically, Condition 1(c) in the subject resolution imposed a fifteen percent (15%) set-aside on the project, thus requiring 4 units to be reserved and designated as affordable housing.

Approximately one year later, in November 2018, the Township approved a settlement agreement with Fair Share Housing Center. This agreement established the Township's Third Round obligation at 85 affordable units. A significant part of this obligation was satisfied *vis a vis* existing affordable unit in the Nutley Parkside Apartments, while balance of the Third Round obligation, totaling 55 affordable units, was required to be met through zoning on the Prism Redevelopment site. The affordable units from the Russ and Oliver projects were ultimately classified as surplus credits in the settlement agreement, meaning that they were not necessary for the Township to satisfy its Third Round obligation.

This agreement was subsequently endorsed by the Superior Court, Essex County, in January 2019. Subsequent thereto, the Special Master assigned to the Township's declaratory judgment action expressed concerns that the Russ project was not creditworthy because the approved site plan did not meet the bedroom distribution requirements set forth in the Uniform Housing Affordability Controls, i.e., it did not include three-bedroom units.

In an effort to resolve the issue, we then engaged in another round of lengthy negotiations with Fair Share Housing Center. Ultimately, the parties resolved the issue as follows: (i) the Township would assess a fee in lieu of each affordable unit required for the Russ project at the rate of \$50,000.00 per affordable unit, for a total of \$200,000.00; (ii) the developer of the Russ project would pay said fee to the Township's affordable housing trust fund; (iii) the in-lieu fees would be partially utilized by the Township for its home rehabilitation program, which is only available for Nutley residents; and (iv) a portion of the fee would be granted to a rooming house located on Hillside Avenue for capital repairs and maintenance. Additionally, the rooming home operator would deed restrict ten of its single-resident bedrooms for low-income individuals, thus creating and preserving affordable housing while not impacting the Township's public services.

The above-noted negotiations were subsequently memorialized in an amended settlement agreement that was approved by the Board of Commissioners on or about June 4, 2020. A fully-

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executed copy of the same will be provided to the Zoning Board upon receipt of Fair Share Housing Center's signature page.

In order to effectuate the above, we advised the Township that the developer of the Russ project would have to seek relief from Condition 1(c) in the Zoning Board's resolution of approval. While we defer to your review of the issue, in our opinion, the removal of the condition, coupled with the payment in lieu which will create additional affordable housing within the Township, does not constitute the removal of a significant condition which would necessitate public notice under N.J.S.A. 40:55D-12(a).

Please feel free to contact us with any questions concerning the foregoing.

Very truly yours,

/s/ John P. Inglesino

JOHN P. INGLESINO

JPI/dwo

cc: Dave Berry (via electronic mail)