

NEW MILFORD REDEVELOPMENT ASSOCIATES, LLC, a limited liability company organized under the laws of the State of New Jersey,

Plaintiff,

VS.

BOROUGH OF NEW MILFORD, MAYOR AND COUNCIL OF THE BOROUGH OF NEW MILFORD and the PLANNING BOARD OF THE BOROUGH OF NEW MILFORD,

Defendants.

SUPERIOR COURT OF NEW JERSEY  
BERGEN COUNTY—LAW DIVISION  
DOCKET NO. BER-L-9726-13

NEW MILFORD REDEVELOPMENT ASSOCIATES, LLC, a limited liability company organized under the laws of the State of New Jersey,

Plaintiff,

VS.

ZONING BOARD OF ADJUSTMENT OF THE BOROUGH OF NEW MILFORD,

Defendant.

SUPERIOR COURT OF NEW JERSEY  
BERGEN COUNTY—LAW DIVISION  
DOCKET NO. BER-L-5465-14

CIVIL ACTION

In the Matter of the Application of the Borough of New Milford,

Plaintiff.

SUPERIOR COURT OF NEW JERSEY  
BERGEN COUNTY—LAW DIVISION  
DOCKET NO. BER-5681-15

**SETTLEMENT AGREEMENT**

NEW MILFORD REDEVELOPMENT ASSOCIATES, LLC (hereinafter “the Plaintiff”) and defendants THE BOROUGH OF NEW MILFORD, THE PLANNING BOARD OF THE BOROUGH OF NEW MILFORD, and the ZONING BOARD OF ADJUSTMENT OF THE

BOROUGH OF NEW MILFORD (hereinafter collectively “the Defendants”), being desirous of settling the lawsuits entitled In the Matter of the Application of the Borough of New Milford, Docket No. BER-5681-15, New Milford Redevelopment Associates, LLC v. Borough of New Milford et al, Docket No. BER-L-9726-13, and New Milford Redevelopment Associates, LLC v. Zoning Board of Adjustment of the Borough of New Milford, Docket No. BER-L-5465-14, without the risk, cost or burden of further litigation, agree in exchange for their mutual promises, terms and conditions and other sufficient consideration as follows:

1. **Definitions.** Unless the context plainly requires a different meaning, the following terms have the following meanings for purposes of this Agreement.
  - a. “Agreement” means this agreement.
  - b. “Developer” means the Madison Avenue Developer or the River Road Developer or both, as the context may require.
  - c. “Madison Avenue Site” means Block 1309, Lot 1.02 on the Borough’s official tax map, consisting of 13.6 acres located at the corner of at the corner of Main Street and River Road in New Milford, sometimes formerly referred to as “the United Water Site” or the “NMRA Site.”
  - d. “River Road Site” means Block 501, Lot 10 on the Borough’s official tax map, consisting of approximately 4.4 acres with a street address of 814-20 River Road, New Milford.
  - e. “Madison Avenue Developer” means the developer of the Madison Avenue Site under the terms of this Agreement. Except as otherwise provided in this

Agreement, the Madison Avenue Developer is New Milford Redevelopment Associates, LLC.

- f. “Nonappealable” means that the period for appeal has expired without any appeal having been filed by any party or that an appeal has been filed and all trial and appellate proceedings have concluded affirming the municipal actions that were the subject of the appeal.
- g. “River Road Developer” means the developer of the River Road Site under the terms of this Agreement.

2. **Purpose.** The purpose of this agreement is to fully resolve all issues raised by the all parties in New Milford Redevelopment Associates, LLC v. Borough of New Milford et al, Docket No. BER-L-9726-13, New Milford Redevelopment Associates, LLC v. Zoning Board of Adjustment of the Borough of New Milford, Docket No. BER-L-5465-14, and In the Matter of the Application of the Borough of New Milford, Docket No. BER-5681-15, through the rezoning of the Madison Avenue Site and River Road Site as identified below.

- a. **Development of the Madison Avenue Site.**--The Madison Avenue Site, namely, Block 1309, Lot 1.02 on New Milford Borough’s official tax map. will be subdivided into two areas, shown on the attached conceptual plan as Area A, consisting of approximately 4.15 acres, and Area B, consisting of approximately 9.5 acres. The Defendants will adopt a Mixed Use PUD Ordinance rezoning Area B, to permit construction of a bank, retail uses, including a supermarket, parking, and accessory uses to those uses, as set forth in more detail in Paragraph 2 below.

The Defendants will adopt a PUD Mixed Use Ordinance rezoning Area A to permit construction of recreational field, parking, and specified accessory uses as set forth in more detail in Paragraph 3 below. Upon receipt of certificates of occupancy for the retail and bank uses, the Madison Avenue Developer will dedicate Area B to the Borough on terms provided in a Developer's Agreement as set forth in more detail in Paragraph 7 below.

- b. **Rezoning the River Road Site.** The Borough will adopt a Mixed Use PUD Ordinance rezoning the River Road Site, namely, Block 501, Lot 10 on the Borough's official tax map, to permit development of 135 multifamily housing units, of which 20 percent will be reserved for and affordable to low and moderate income households, 12,500 square feet of retail space.
- c. **Developer's Agreement.** In connection with development of each of the Madison Avenue Site and the River Road Site, the Madison Avenue Developer or the River Road Developer, respectively, shall apply for General Development Plan approval for that site. This General Development Plan may, in the applicant's discretion, encompass both sites. In the Developer's discretion, the Developer may apply for such approval either prior to, or simultaneously with, application for preliminary site plan approval. In connection with the application for General Development Plan approval, the Developer and the Borough shall enter into a Developer's Agreement for that site. The Developer's Agreement shall, among other things, provide for the provision of recreation and community facilities, as set forth in more detail in Paragraph 7 below.

- d. **Availability of the River Road Site.** The parties stipulate that the River Road Site is available for inclusionary development only because rezoning of the Madison Avenue Site makes possible the demolition of the existing supermarket on the River Road Site and construction of replacement supermarket on the Madison Avenue Site. The rezoning of the Madison Avenue Site in accordance with this Agreement is an integral element of creating a realistic opportunity for development of low and moderate income housing in the Borough of New Milford.
3. **Rezoning.** Within 90 days of the effective date of this Agreement, Defendants shall take all steps necessary to adopt and implement the zoning ordinance amendment to create Mixed Use PUD zones encompassing the Madison Avenue Site and the River Road Site, in the form attached as Exhibit B, and incorporated herein by reference, including amendment of the municipal master plan in a manner acceptable to the Developer, to permit development of those properties in accordance with the terms of this Agreement.
  - a. **Area A of the Madison Avenue Site.** The Mixed Use PUD zone shall permit development of Area A of the Madison Avenue Site for recreational fields, parking, drainage facilities, and accessory uses.
  - b. **Area B of the Madison Avenue Site.** The Mixed Use PUD zone shall permit development of Area B of the Madison Avenue Site for a retail uses including a supermarket, bank, parking, and stormwater management facilities in accordance with the bulk standards set forth in Exhibit C and incorporate herein by reference.

- c. **River Road Site:** The Mixed Use PUD shall permit development of the River Road Site for 135 multifamily housing units, of which 20 percent will be reserved for and affordable to low and moderate income households, 12,500 square feet of retail space in accordance with the bulk standards set forth in Exhibit C and incorporate herein by reference.
  - d. **Absence of Linkage.** Except as provided in Paragraphs 7 and 8 below, the Mixed Use PUD Zone shall not restrict the timing or sequence of development on the Madison Avenue and River Road Sites or either of them.
- 4. **Amendment of the Master Plan and Housing Element and Fair Share Plan.** The Borough and Planning Board shall amend the New Milford Borough Master Plan to provide, in accordance with this Agreement, for mixed use development of the Madison Avenue and River Road Sites in and shall amend the Housing Element and Fair Share Plan to incorporate of the River Road Site as an inclusionary housing site.
- 5. **Suitability of the Properties.** Defendants are familiar with the Madison Avenue and River Road Sites, their topography, location, highway access, and environmental constraints.
  - a. **Madison Avenue Site.** Defendants stipulate that Area A of the Madison Avenue Site is suitable for recreation fields and parking and that Area B of the Madison Avenue Site is suitable for development of a retail uses including a supermarket, bank, parking in accordance with the Mixed Use PUD Zone ordinance amendments attached as Exhibit B and the Concept Plan attached as Exhibit A.

- b. **River Road Site.** Defendants stipulate that the River Road Site is “approvable,” “available,” “developable,” and “suitable” (as those terms are defined in the regulations of the New Jersey Council on Affordable Housing) for the purpose of construction of 135 housing units, of which 20 percent would be set aside for low and moderate income households, in accordance with the terms of Mixed Use PUD Zone ordinance amendments attached as Exhibit B.
6. **Concept Plan.** Defendants have informally reviewed the plan for the Madison Avenue Site dated August \_\_, 2016, a copy of which is attached as Exhibit A. While recognizing that this plan has not yet been fully engineered and is subject to further revisions, defendants stipulate that this plan represents an acceptable concept plan for development of Area B of the Madison Avenue Site under the terms of the Mixed Use Zone ordinance amendments attached as Exhibit B.
7. **Recreational and Community Facilities.** The Developers Agreements shall provide the following recreational and community facilities:
  - a. The Developer’s Agreement for the Madison Avenue Site shall provide that, as a condition of receipt of certificates of occupancy for a supermarket or bank on Area B of the Madison Avenue Site as provided for by this Agreement, the Madison Avenue Developer shall dedicate to the Borough Area A of the Madison Avenue Site, provided that if the Madison Avenue Developer has not applied for certificates of occupancy within one calendar year after the adoption of a resolution by the New Milford Planning Board of granting final and unappealable site and subdivision approval for the development on Area B for a supermarket or

bank as provided for in this Agreement, the Madison Avenue Developer shall dedicate to the Borough Area A of the Madison Avenue Site within 60 days of receipt of a written demand by the Borough.

i As dedicated to the Borough, the site shall contain the following

improvements to enable the provision of recreational and community facilities:

A A recreational field of dimensions 360 feet by 180 feet, or such smaller lesser dimensions as the Borough may specify, graded with a drop of not more than 1 percent from the center crown to the edges of the field, but without installation of natural grass or other turf or landscaping and without any special preparation for the installation of natural grass or other turf or landscaping;

B A paved parking lot containing 103 9 x 19 parking spaces conforming to municipal standards for construction of commercial parking lots;

C Stormwater management facilities for both Area A and Area B that provides for sufficient underground stormwater detention to accommodate a 50-year storm event without substantial ponding on the recreation field or parking lot. The parties stipulate that incremental cost of this improvement over the cost of the improvements otherwise necessary to comply with state and

municipal storm water management standards and state and municipal flood hazard standards for the proposed development in Area A and Area B is approximately \$400,000.

- b. Simultaneously with dedication of Area A, the Developer shall pay to the Borough \$750,000, which may be utilized for development of recreational and community facilities on Area A and \$50,000 which may be used for cleanup or rehabilitation of recreational and community facilities on Area A if they become flooded.
8. **Setaside for Low and Moderate Income Households.** Twenty percent of the housing units constructed on the River Road Site shall be reserved for, and affordable to, low and moderate income households. If 135 units are constructed, a total of 27 units will be low and moderate income units.
- a. 50 percent of the low and moderate income housing units will be moderate income housing and 50 percent will be low income housing. If the low and moderate income units are rental units, 20 percent of the low income units will be very low income housing, as those terms are defined N.J. S.A. 52:27D-304.
  - b. Low and moderate income housing units will comply with standards established in the Uniform Housing Affordability Controls, N.J.A.C. 5:80-26.1 et seq.
  - c. Low and moderate income housing units shall be constructed on the following schedule:

Minimum Percentage of Low and Moderate Income Units Completed	Percentage of Market Housing Units Completed
0	25

10	25 + 1
50	50
75	75
100	90

- d. For purposes of the scheduled set forth in Paragraph (c) above, a newly constructed unit shall be considered complete when the certificate of occupancy is issued.
- 9. **Cooperation.** The Borough, Planning Board, and all officers, employees, and agents of the Borough shall take all reasonable steps to foster and facilitate development of the Madison Avenue Site and the River Road Site in accordance with this Agreement. They shall cooperate with all efforts by the Developer to secure necessary municipal, county and state permits, approvals, licenses, waivers, exceptions, variations and variances in an expeditious fashion.
- 10. **Expedited Processing.** The Borough and Planning Board shall expedite the processing of applications for development of the Madison Avenue Site and River Road Site. At the request of the Developer, the Planning Board shall schedule special meetings to facilitate expedited processing of such applications. Except as otherwise provided in this Agreement, the development application process shall be governed by the standards set forth in N.J.A.C. 5:93-10.
- 11. **Cost-Increasing Requirements.** Neither the Borough nor the Planning Board may impose any procedural or substantive requirement that adds to the burden or cost of development of the Madison Avenue Site or the River Road Site which is not necessary to protect public health or safety, except as specifically provided in Paragraph 7.

12. **Studies in Connection with Development of the Madison Avenue Site.** The Planning Board shall not require the submission of additional reports or studies on environmental impact, traffic impact, community impact, fiscal impact or economic feasibility for development of the Madison Avenue Site beyond those previously submitted to the Milltown Borough Zoning Board of Appeals. To the extent such studies are provided for by any ordinance, it shall waive those requirements. It may require submission of a stormwater management plan or flood hazard area plan, but, if the Developer seeks permits that require approval of the stormwater management plan or flood hazard area plan by the NJDEP, the Planning Board shall not make an independent assessment of the stormwater management plan, but shall simply condition any development approvals upon approval of the stormwater management plan or flood hazard area plan by the NJDEP.
13. **Additional Charges.** Neither the Borough nor the Planning Board shall require the developer of the Madison Avenue Site or the River Road Site to construct, or pay for, any off-site improvements or to pay any impact fees, development fees, or linkage fees, including but not limited to open space fees, except as provided in paragraph 7 above.
14. **Dispute Resolution.** At the request of the Madison Avenue Developer, the River Road Developer, or the Defendants, the court-appointed special master shall decide on an expedited basis any dispute that arises as to whether any procedural or substantive requirement imposed by the Borough or the Planning Board impedes, or adds to the cost of, development of the Madison Avenue Site or River Road Site or is necessary to protect

- public health or safety. Any decision by the court-appointed special master shall be final, binding on all parties, and enforceable by any party.
15. **Extended Vesting.** Any preliminary or final site plan approval granted to the Madison Avenue Site or the River Road Site under the terms of this Agreement shall be granted extended vesting by the Planning Board for a period of at least ten years.
  16. **Amendment of Ordinances.** Neither the ordinances adopted or amended pursuant to this Agreement nor the current ordinances governing development or use of the Madison Avenue Site or the River Road Site may be added to, amended, modified, or repealed without the written consent of the Madison Avenue Developer or the River Road Developer, respectively, while this Agreement remains in force.
  17. **Further Assistance.** If adoption of any ordinance or resolution, execution or endorsement of any document, entry into any agreement by the Borough or Planning Board other than or in addition to those expressly provided for in this Agreement is necessary to effectuate or implement this Settlement Agreement, the Borough or Planning Board shall take that action promptly upon notice and request by the Developer.
  18. **Legal Challenges by Third Parties.** If any third party files a legal challenge to, or appeal from, this Agreement, or the ordinance and master plan amendments adopted pursuant to this Agreement, either the Defendants or the Developer may, by written notice within 60 days of the filing of such legal challenge or appeal, terminate this Agreement. So long as the Agreement remains in force, the parties agree to jointly defend against any third party legal challenge to, or appeal from, this Agreement, or the ordinance and master plan amendments adopted pursuant to this Agreement and any

action taken by the Borough or Planning Board in implementation of this Agreement. All parties will be responsible for their own legal costs in any such defense.

19. **Captions and Titles.** Captions and titles to this Agreement and the several sections are inserted for convenience of reference only and are in no way to be construed as defining, limiting or modifying the scope and intent of the various provisions of this Settlement Agreement.
20. **Invalidity.** If any provision of this Agreement is held by the Court to be invalid, void or unenforceable, the parties shall, after the exhaustion of all appeals, attempt with the assistance of the court-appointed special master to modify this Agreement. If they are unable to do so within 20 days, either the Borough or the Developer may by written notice to all other parties terminate this agreement and reinstate the litigation. Alternatively, the parties may jointly request that the Court reform the agreement.
21. **Violation.** If any party fails to perform any obligation required to be performed by this Agreement, such failure shall constitute a violation of this Agreement. Upon violation of the Agreement, any party for whose benefit such obligation is intended may enforce the agreement by motion in aid of litigants' rights or any other remedy available at law or equity.
22. **Waiver.** Any waiver of any provision of this Settlement Agreement will be effective only if made in writing. Failure to enforce any of the provisions of this Agreement by any of the parties shall not constitute a waiver of these provisions.
23. **Entire Agreement.** This Agreement and the Exhibits attached hereto contain the entire agreement between the parties. No representative, agent or employee of any party has

been authorized to make any representations or promises with reference to this

Agreement or to vary, alter or modify the terms hereof except as stated herein. No additions, changes or modifications, renewals or extensions hereof, shall be binding unless reduced to writing and signed by the parties hereto.

24. **Covenants Run with Land.** It is the intention of the parties that this Agreement constitutes a set of covenants that run with the land. This Agreement shall inure to the benefits of and be binding upon the parties, the Madison Avenue Developer, the River Avenue Developer, and their successors in interest and assigns. Wherever reference in this Agreement is made to the Developer, the Madison Avenue Developer, or the River Avenue Developer, that reference shall also mean the successors in interest and assigns of Madison Avenue Developer or the River Avenue Developer, respectively.
25. **Assignment.** The benefits and obligations of this Agreement may be assigned by the Developer in whole or in part.
26. **Notice.** The parties agree to provide each other with immediate notice of any lawsuits, action or governmental declaration threatened or pending of which they are actually aware which may affect the provisions of this Agreement or implementation thereof.
27. **Construction of Agreement.** The parties acknowledge that this Agreement was prepared jointly and, therefore, this Agreement shall be construed on a parity between the parties.
28. **Governing Law.** This Agreement has been entered into and shall be construed, governed and enforced in accordance with the laws of the State of New Jersey.
29. **Written Notices.** All written notices required under this Settlement Agreement shall be given by Certified Mail, Return Receipt Requested as follows:

Douglas M. Cohen  
Vice President  
10 Sterling Blvd  
Suite 401  
Englewood, NJ 07631

and

Stephen Eisdorfer, Esq.  
Hill Wallack LLP  
21 Roszel Road  
Princeton NJ 08543

Borough of New Milford

Christine Demiris  
Borough Clerk  
Borough of New Milford  
930 River Road  
New Milford, NJ 07646

and

Mark D. Madaio, Esq.  
29 Legion Drive  
Bergenfield, NJ 07621-2387

Planning Board of the Borough of New Milford

Lisa Sereno  
Planning Board Secretary  
Borough of New Milford  
930 River Road  
New Milford, NJ 07646

and

Marc E. Leibman, Esq.  
Kaufman Semeraro & Leibman LLP  
Two Executive Drive, Suite 530  
Fort Lee, New Jersey 07024

30. **Authority.** Each of the parties represents that it has authority to execute this Settlement Agreement. Each party shall provide legally sufficient documentation of its authority to execute this Agreement upon request by any other party, the court-appointed master, or the Court.
31. **Change of Law.** The validity and terms of this Agreement shall not be affected by any change in law subsequent to its effective date. In particular, the parties are aware that lawsuits are pending in the trial courts and the appellate courts following the decision of the Supreme Court in In re Adoption of N.J.S.A. 5:96, 221 N.J. 1 (2015), and that decisions might be rendered in these lawsuits. The parties are also aware that the Council on Affordable Housing might resume its former functions. Finally, the parties are aware that statutes might be adopted by the Legislature concerning the provision of low and moderate income housing. The validity and terms of this Agreement shall not be affected by any of these events.
32. **Judicial Approval.** Upon the adoption of the zoning ordinance amendments provided in Paragraph 3 and the Master Plan and Housing Element and Fair Share Plan amendments provided for in Paragraph 3, the parties shall jointly submit this Agreement to the Court for its approval. The parties shall jointly support entry of an order approving this Agreement in settlement of all the pending litigation. If the Court declines to approve this Agreement the parties shall attempt with the assistance of the court-appointed special master to modify this Agreement. If they are unable to do so within 20 days, either the Defendants or the Plaintiff may by written notice to all other parties terminate this agreement.

33. **Judgment of compliance.** Within 120 days of the effective date of this Agreement,

Defendants will complete all steps necessary to secure entry of a final judgment of compliance in the Superior Court.

- a. These steps shall including, but not limited to,
  - i adoption of an amended Housing Element and Fair Share Plan that is both consistent with the terms of this Agreement and acceptable to the special master and to the court as meeting New Milford's fair share housing obligation, and
  - ii adoption of any additional ordinance necessary to implement that amended housing element and fair share plan.
- b. The Plaintiff will cooperate with and support Defendants' request for entry of a judgment of compliance based upon such an amended Housing Element and Fair Share Plan.
- c. If for any reason the Borough fails to secure a final judgment of compliance, the Developer may, in its sole discretion, elect to maintain and enforce this agreement or to terminate this agreement. If judgment of compliance is granted but subsequently terminated, revoked, or invalidated through no fault of Developer, Developer may, in its sole discretion, elect to maintain and enforce this agreement or to terminate this agreement.

34. **Zoning Board Litigation.** Upon entry of judicial approval of this Agreement and entry of a non-appealable judgment of compliance, the Developer shall dismiss the New

Milford Redevelopment Associates, LLC v. Zoning Board of Adjustment of the Borough of New Milford, Docket No. BER-L-5465-14 with prejudice and without costs,

35. **Attorney and Expert Fees.** Each party shall bear its own attorney fees and costs of litigation.
36. **Effective Date.** This Agreement shall become effective upon execution. Nothing in this Agreement, however, shall operate in derogation of the duty of the Borough and the Planning Board to conform in good faith with the procedural requirements of the Municipal Land Use Law and the requirements of the Open Public Meetings Act.
37. **Termination of Agreement.** Upon the failure of the Defendants to adopt in a timely manner the zoning ordinance amendment to create Mixed Use PUD Zones encompassing the Madison Avenue Site and the River Road Site provided for in Paragraph 3 or the Master Plan amendments provided for in Paragraph 3, either party may by written notice terminate this Agreement.
38. **Period of Agreement.** Unless terminated sooner either by written agreement of the parties or unilaterally as provided for by Paragraphs 18, 33 and 37 above, this Settlement Agreement shall remain in force until the occurrence of the last of the following events:
  - a. ten years from the date of the entry of a judgment of compliance;
  - b. expiration of the extended vesting period for any development approvals granted for either the Madison Avenue Site or the River Road Site;
  - c. expiration of the period of repose established by the judgment of compliance, including any extensions of the period of repose granted by the Court or any state agency authorized to grant such extensions.

- 39. **Effect of Termination or Expiration of Agreement.** Termination or expiration of this Agreement shall not affect the validity or vesting of any approvals or permits received by the developer and shall not automatically repeal or amend any ordinances or master plan amendments adopted pursuant to this Agreement. The litigation shall be reinstated and all parties shall be in the same position as they were on the date the Agreement was executed.
  
- 40. **Consent by Owner of River Road Site.** The parties stipulate that, as shown by the duly executed Owner Consent attached as Exhibit C, the owner of the River Road Site has consented to the terms of this Agreement insofar as they affect the River Road Site. The owner of the River Road Site is not a party to this Agreement but has certain rights to enforce this Agreement if it becomes the Developer of the River Road Site or pursuant to Paragraph 21.

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Dated:

Mayor of the Borough of New Milford  
 For the Borough of New Milford

\_\_\_\_\_

Dated:

Chairperson of the Planning Board of the Borough of New Milford  
 For the Planning Board of the Borough of New Milford

\_\_\_\_\_

Dated:

Chairperson of the Zoning Board of Adjustment of the Borough of New Milford  
 For the Zoning Board of Adjustment of the Borough of New Milford

\_\_\_\_\_

Dated:

Peter Hekemian

