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October 9, 2020

**VIA FEDERAL EXPRESS & EMAIL (cdemiris@newmilfordboro.com)**

Ms. Christine Demiris  
Borough Administrator/Clerk  
930 River Road  
New Milford, New Jersey 07646

Re: Inserra Associates' and NMLRI, LLC's Comments to Borough of New Milford  
Midpoint Review

Dear Ms. Demiris:

This firm represents Inserra Associates and NMLRI, LLC (collectively, "Inserra"), the owners of 810-820 River Road, designated as Block 501, Lots 9 and 10 on the Borough of New Milford's Tax Map (the "Inserra Property"). On behalf of Inserra, we reviewed the Borough's Midpoint Review, dated June 2020 (the "Midpoint Review").<sup>1</sup> As set forth in our detailed comments below and in the enclosed reports prepared by Dr. Robert Powell and Mr. Art Bernard, the current zoning for the Inserra Property does not provide a realistic opportunity for the development of affordable housing as contemplated by the Borough's Housing Element and Fair Share Plan.

We approached the Borough nearly two (2) years ago to discuss specific ways to create a realistic development opportunity on the Inserra Property, but our overtures were rejected without explanation, which the Midpoint Review ignores entirely. The Borough cannot continue to avoid this fundamental defect in its Housing Element and Fair Share Plan. It must revise the plan and amend the zoning for the Inserra Property to allow for greater density and to lower the percentage of the affordable housing set-aside (yielding the same number of affordable units). Of equal importance, the Borough must also provide a payment in lieu of taxes ("PILOT") for the proposed project to alleviate the heavy property tax burden that is stifling the potential for redevelopment. Without these changes, the Borough will continue its failure to fulfill its constitutional obligation to ensure a realistic opportunity for the construction of affordable housing to satisfy the Borough's share of the region's affordable housing need.

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<sup>1</sup> Although the Midpoint Review is dated June 2020, it was not posted to the Borough's website and made available to the public until on or about August 5, 2020.

## I. BACKGROUND

On June 29, 2015, the Borough filed an action in Superior Court, Bergen County, seeking a declaration of the Borough's compliance with its constitutionally mandated affordable housing obligation and the Fair Housing Act, N.J.S.A. 53:27D-301 et seq. (the "Declaratory Action"). The Borough and Fair Share Housing Center ("FSHC") settled the Declaratory Action pursuant to a letter agreement dated December 29, 2016 (the "FSHC Settlement Agreement"). The FSHC Settlement Agreement established the Borough's prospective need at 311 units, a Realistic Development Potential ("RDP") of twenty-seven (27) units and an unmet need of 258 units.

New Milford Redevelopment Associates, LLC ("NMRA"), the owner of Block 1309, Lot 1.02 on the Borough's official Tax Map (the "NMRA Site"), intervened in the Borough's Declaratory Action and also previously filed suit against the Borough, the Borough Planning Board and the Borough Zoning Board regarding NMRA's attempts to develop the NMRA Site (the "NMRA Litigation"). On or about December 30, 2016, NMRA and the Borough entered into a Settlement Agreement resolving the Declaratory Action and the NMRA Litigation (the "NMRA Settlement Agreement"; and together with the FSHC Settlement Agreement, the "Settlement Agreements"). Inserra was not a party to the Declaratory Action or the NMRA Litigation, and therefore, was not a party to the NMRA Settlement Agreement, nor was it involved in the settlement negotiations. However, after the settlement agreement was finalized, the parties requested that Inserra sign the Agreement as owner of the Inserra Property, and Inserra complied.

The Borough adopted its Housing Element and Fair Share Plan on May 16, 2017 (hereinafter, the "Fair Share Plan"), which outlines how the Borough will address its affordable housing obligation in accordance with the Settlement Agreements. To effectuate the Settlement Agreements and the Fair Share Plan, the Borough rezoned the Inserra Property and the NMRA Site. At the time, the Inserra Property was occupied by a ShopRite grocery store and a bank. The rezoning created separate planned unit development zones for the Inserra Property and for the NMRA Site (the "PUD Zoning"), which enabled the relocation of the ShopRite and the bank to the NMRA site and allowed the Inserra Property to be redeveloped with a 135-unit residential community, including a twenty (20%) percent affordable housing set-aside (i.e. twenty-seven (27) units – the Borough's entire RDP) and up to 12,500 square feet of commercial space. The affordable housing requirement in the PUD Zoning is in stark contrast with the less onerous affordable housing requirement for any other project that may be constructed in the Borough, which provides for only a fifteen (15%) percent set-aside for affordable units. FAIR SHARE PLAN at p. 20-21.

Since the Settlement Agreements were executed nearly four (4) years ago, the NMRA Site has been developed with the new ShopRite and bank. However, there has not been any progress with respect to the redevelopment of the contemplated inclusionary mixed-use project on the Inserra Property, despite Inserra's strong desire to move forward with redevelopment. In September of 2018, Inserra engaged its development partner, Crossroads Companies ("Crossroads"), to spearhead the redevelopment of the Inserra Property. Crossroads quickly concluded that the PUD Zoning did not allow a financeable project to be built on the Inserra Property, and that the heavy burden of conventional real estate taxes posed a barrier to

redevelopment of the Inserra Property with inclusionary housing. As a result, Inserra engaged this firm, and we promptly reached out to the Borough to discuss the project and these concerns in December of 2018. On March 15, 2019, representatives of Inserra, Crossroads and this firm met with Borough officials. By letter from the Borough's counsel, Kevin Kelly, Esq., dated April 5, 2019, the Borough summarily rejected our request for changes to the PUD Zoning and a PILOT. Inserra then engaged the firm of Skoloff Wolfe, P.C. to prepare a detailed analysis demonstrating the need for a PILOT to facilitate the project, and explaining how the Borough would benefit from a PILOT. On September 23, 2019, we submitted the Skoloff Wolfe memorandum for consideration by the Borough. We met again with Borough officials on December 18, 2019 to discuss the need for a PILOT. By email from Mr. Kelly on February 19, 2019, the Borough again rejected the request without explanation.

## **II. COMMENTS TO MIDPOINT REVIEW**

### **A. THE FAIR SHARE PLAN DOES NOT CREATE A REALISTIC OPPORTUNITY FOR THE CONSTRUCTION OF THE BOROUGH'S FAIR SHARE OF THE REGION'S AFFORDABLE HOUSING NEED BECAUSE THE PUD ZONING, WITH CONVENTIONAL, AD VALOREM TAXES DOES NOT ALLOW FOR A FINANCEABLE PROJECT ON THE INSERRA PROPERTY.**

"The Mount Laurel cases recognized that the power to zone carries a constitutional obligation to do so in a manner that creates a realistic opportunity for producing a fair share of the regional present and prospective need for housing low- and moderate-income families." In re Adoption of N.J.A.C. 5:96 & 5:97 by the New Jersey Council on Affordable Housing, 221 N.J. 1, 3-4 (2015) (emphasis added). A "realistic opportunity" means that there is a "likelihood... that the lower income housing will actually be constructed." S. Burlington Cty. N.A.A.C.P. v. Twp. of Mount Laurel, 92 N.J. 158, 222 (1983). The Council on Affordable Housing ("COAH") regulations echoed this constitutional mandate by requiring that municipal fair share plans create a "realistic opportunity" to meet the municipality's fair share of the regional need for low and moderate income housing. See N.J.A.C. 5:93-1.3; N.J.A.C. 5:93-5.1(b) ("A municipality's housing element shall be designed to achieve the goal of providing affordable housing to meet present and prospective housing needs, with particular attention to low and moderate income housing."). In particular, "every municipality shall have an obligation to create a realistic opportunity to construct rental units." N.J.A.C. 5:93-5.15(a).

The Borough's current PUD Zoning pursuant to its Fair Share Plan and the Settlement Agreements fails to live up to this constitutional obligation. The Inserra Property is an integral component of the Borough's Fair Share Plan. The PUD Zoning for the Inserra Property was intended to produce twenty-seven (27) affordable housing units – the entirety of the Borough's RDP. The Borough's RDP is just a fraction of the Borough's overall affordable housing obligation of 311 units, most of which consists of unmet need. Not a single unit of the Borough's RDP or unmet need has been satisfied in the nearly four (4) years since the Borough entered into the Settlement Agreements. Furthermore, the Midpoint Review acknowledges that the Borough does not currently anticipate the construction of any affordable units satisfying unmet need. Thus, the Inserra Property is the only property in New Milford with any prospect of producing affordable

housing. Yet, despite Inserra's desire and willingness to move forward with redevelopment, the Inserra Property remains idle and stagnant. This is a direct result of the fact that the current PUD Zoning, along with the high rate of projected real estate taxes, does not allow Inserra to attract a developer and the capital necessary to finance construction of the project.

Inserra discovered this approximately two years ago when it engaged Crossroads to evaluate the development potential of the Inserra Property. Inserra then diligently proceeded to approach the Borough with these findings and sought relief from the Borough. Specifically, Inserra requested to increase the density allowed under the PUD Zoning from 135 units to 180 units, and to reduce the set-aside from twenty (20%) percent to fifteen (15%) percent, thereby maintaining the required twenty-seven (27) units of affordable housing. Inserra also requested a PILOT to mitigate against the substantial real estate tax burden in New Milford. Over the course of more than a year, Inserra met with the Borough on multiple occasions and provided concept plans showing its proposed project and detailed information to support its request. The Borough summarily rejected Inserra's request without explanation. Moreover, the Borough failed to mention any of these facts in its Midpoint Review.

In response, in connection with our review of the Borough's Midpoint Review, and to independently assess Crossroads' conclusions, this firm engaged Dr. Robert Powell of Nassau Capital<sup>2</sup> to prepare an analysis of the financial feasibility of a project conforming to the current PUD Zoning, with conventional real estate taxes (the "PUD Zoning Project"). Dr. Powell's report, dated October 8, 2010, which summarizes his findings, is enclosed as Exhibit A (the "Powell Report"). The Powell Report contains a comprehensive financial model of the PUD Zoning Project. The Powell Report concludes that at the current density and set-aside, and with conventional, ad valorem real estate taxes in place (which Dr. Powell notes are the fifth highest in Bergen County out of 70 municipalities), the PUD Zoning Project will not attract the investment needed for construction, and, therefore, "the inclusionary zoning plan currently in place does not create a realistic financial opportunity to produce the 27 affordable housing units." POWELL REPORT at p. 4.

**B. TO CREATE A REALISTIC OPPORTUNITY FOR THE CONSTRUCTION OF TWENTY-SEVEN (27) AFFORDABLE HOUSING UNITS ON THE INSERRA PROPERTY, THE PUD ZONING MUST BE AMENDED TO ALLOW 180 RENTAL UNITS WITH A FIFTEEN (15%) PERCENT SET-ASIDE AND THE BOROUGH MUST GRANT A PILOT FOR THE PROJECT WITH AN ANNUAL SERVICE CHARGE CALCULATED AT TEN (10%) PERCENT OF GROSS REVENUE.**

Dr. Powell also ran a financial model for the PUD Zoning Project with a PILOT at ten (10%) percent of gross revenue. Though a PILOT would substantially improve the viability of the project, Dr. Powell still concludes that "even with a PILOT agreement, the project at the density

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<sup>2</sup> Dr. Powell holds a Ph.D. in economics and public affairs from the Princeton School of Public and International Affairs, Princeton University, and is one of the preeminent experts in establishing the financial feasibility of inclusionary housing projects in the State of New Jersey. Dr. Powell's qualifications are appended to the Powell Report.

of 135 multi-family units and a twenty (20%) percent affordable housing set-aside, does not provide a realistic financial opportunity to produce the 27 affordable units.” Finally, Dr. Powell ran a model of a revised project with an increased residential density from 135 units to 180 units with a fifteen (15%) percent affordable housing set-aside and a ten (10%) percent gross revenue PILOT. Only then does Dr. Powell’s model indicate an internal rate of return and yield on cost within a range that could attract investment. Though Dr. Powell indicates that these measures of profitability are “still lower than the thresholds required by many capital providers for a project of this nature”, it is his opinion that they are “sufficient to create a realistic financial opportunity for the creation of the affordable units.” POWELL REPORT at p. 5

This firm also engaged Art Bernard<sup>3</sup> to provide guidance regarding the appropriate planning response by the Borough given the background of this case and Dr. Powell’s conclusions. Mr. Bernard’s report, dated October 8, 2010 is enclosed as **Exhibit B** (the “**Bernard Report**”). Mr. Bernard concludes that, given that the Inserra Property was a developed site at the time the Fair Share Plan was adopted, it should not have been included as RDP. Rather, any proposal to redevelop the Inserra Property should be treated as satisfying the Borough’s unmet need, which triggers a process for evaluating the measures required to produce affordable housing on a particular site. Regardless, Mr. Bernard concludes that because the PUD Zoning does not create a realistic opportunity for the construction of affordable housing on the Inserra Property, the Midpoint Review is the appropriate time to reconsider the PUD Zoning and make revisions consistent with the Powell Report so that the Fair Share Plan satisfies the Borough’s constitutional obligation to ensure the construction of affordable housing.

**C. THE CONCLUSION IN THE MIDPOINT REVIEW THAT THE FAIR SHARE PLAN CONTINUES TO PRESENT A REALISTIC OPPORTUNITY FOR THE CONSTRUCTION OF AFFORDABLE HOUSING ON THE INSERRA PROPERTY IS WRONG AND IS BASED ON A MISTAKEN VIEW OF THE LAW AND A FAILURE TO MAKE ANY MEANINGFUL INQUIRY INTO THE FINANCIAL FEASIBILITY OF THE PUD ZONING PROJECT BOTH AT THE TIME THE BOROUGH ENTERED IN THE SETTLEMENT AGREEMENTS AND AGAIN IN RESPONSE TO THE INFORMATION PROVIDED BY INSERRA OVER THE COURSE OF THE PAST TWENTY-TWO (22) MONTHS.**

**1. The Midpoint Review misconstrues the meaning of realistic opportunity.**

The Midpoint Review ignores the information provided by Inserra and its repeated requests since December of 2018, and concludes that the Fair Share Plan continues to present a realistic opportunity for the construction of affordable housing units on the Inserra Property. This conclusion constitutes a net opinion without any support, and is made in reliance on a fundamental misunderstanding of the law.

The Midpoint Review references the NMRA Settlement Agreement in which the Borough stipulated that the Inserra Property was, “to the best of its knowledge, “approvable”, “available”,

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<sup>3</sup> Mr. Bernard is a licensed professional planner and one of the foremost affordable housing experts in the State of New Jersey. His credentials are included in his report.  
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“developable” and “suitable” (as those terms are defined in [COAH Regulations]) for the purpose of construction of 135 housing units, of which 20 percent would be set aside for low and moderate income households.” NMRA SETTLEMENT AGREEMENT at p. 7. The Midpoint Review then states that these conclusions mean that the Inserra Property provides a “realistic opportunity” for the construction of affordable housing. In doing so, the Midpoint Review conflates two entirely different concepts. The first is whether a site is able to support the construction of affordable housing. The second is whether there is a realistic chance that affordable housing actually will be constructed on that site.

Whether a site is “approvable”, “available”, “developable” and “suitable” is certainly a predicate of whether there is a realistic opportunity for inclusionary development on the subject site, but satisfying those standards alone does not end the inquiry. Those criteria only deal with title to the property, the physical characteristics of the site, the presence of necessary infrastructure for development and conformance with regulatory requirements. See N.J.A.C. 5:93-1.3. They do not address whether the zoning and other incentives put in place will provide sufficient stimulus to create a realistic opportunity that the units will actually be built. In other words, contrary to what the Midpoint Review says, it is not the physical site itself that “provide[s] a realistic opportunity for the construction of affordable housing”, but the Borough’s zoning regulations and other incentives established by the Borough. See S. Burlington Cty. N.A.A.C.P. v. Twp. of Mount Laurel, 67 N.J. 151, 174 (1975) (making it abundantly clear that it is a municipality’s zoning regulations that must create a realistic opportunity for low and moderate income housing by concluding that “every such municipality must, by its *land use regulations*, presumptively make realistically possible an appropriate variety and choice of housing” and “more specifically... cannot foreclose the opportunity... for low and moderate income housing and in its *regulations* must affirmatively afford that opportunity” (emphasis added)).

As the New Jersey Supreme Court stated in Mount Laurel II, whether an opportunity is realistic “depend[s] on whether there is in fact a likelihood-to the extent economic conditions allow-that the lower income housing will actually be constructed.” Mount Laurel II, 92 N.J. at 222. This constitutional obligation was incorporated into the Fair Housing Act and COAH’s regulations. The Fair Housing Act provides that when preparing a fair share plan municipalities shall consider “[r]ezoning for densities necessary to assure the economic viability of any inclusionary developments.” N.J.S.A. 52:27D-311.a(1) (emphasis added). In addition, COAH’s regulations provided that when evaluating a municipal plan to zone for inclusionary development, it was imperative to assess not only whether a site is “approvable, available, developable and suitable”, but also “the present ability of a developer to construct low and moderate income housing at a specific density.” N.J.A.C. 5:93-5.6(b). COAH Regulations were explicit that increased density could be required when necessary to provide an opportunity for inclusionary development to actually be constructed. N.J.A.C. 5:93-5.6(c).

It is also instructive that when a municipality sought a reduction in its affordable housing obligation based on housing that had yet to be constructed, COAH was obligated not just to review sites for suitability, but also to “determine if the previously zoned sites present a realistic opportunity for low and moderate income housing”. N.J.A.C. 5:93-3.5(a). In doing so, the Council must analyze the “likelihood of the current zoning to result in the creation of low and moderate

income housing during the period of substantive certification.” *Id.* This review “may result in requirements for zoning amendments.” *Id.* Thus, determining that a site is suitable for housing is not, in and of itself, sufficient. Zoning regulations must provide sufficient incentive for the suitable site to be developed. The Mt. Laurel obligation would be meaningless if a site with clear title, unencumbered by environmental constraints, with access to sewer and water that could otherwise be developed in a manner consistent with all other applicable rules and regulations, is not zoned to allow for a financially viable project that can actually be constructed.

Indeed, in instances such as this, if zoning alone will not create a realistic opportunity for construction of affordable housing, a municipality is required to take other affirmative steps to satisfy its constitutional obligation. As the Supreme Court stated in *Mount Laurel II*, “if the *Mount Laurel* principle requires municipalities to provide a realistic opportunity for such housing through their land use regulations but leaves them free to prevent subsidies through non-action, that obligation is a charade.” 92 N.J. 158, 264; see also In re Adoption of N.J.A.C. 5:94 & 5:95 By The New Jersey Council On Affordable Housing, 390 N.J. Super. 1, 73-74 (App. Div. 2007) (finding that “[p]ermittting municipalities to demand that developers build affordable housing without any additional incentives provides municipalities with an effective tool to exclude the poor . . .”). As a result, the Supreme Court has made explicit that it does “expect municipal officials in appropriate cases to do more than pass land use regulations conforming to *Mount Laurel I*. Where appropriate, municipalities should provide a realistic opportunity for housing through other municipal action inextricably related to land use regulations.” *Mt. Laurel II*, 92 N.J. at 264. Specifically, the courts “have the power to require a municipality to cooperate in good faith with a developer's attempt to obtain a subsidy and to require that a tax abatement be granted for that purpose pursuant to applicable New Jersey statutes where that abatement does not conflict with other municipal interests of greater importance.” *Id.* at 265. This constitutional requirement was incorporated into the Fair Housing Act, which mandates municipalities to consider the use of “[t]ax abatements for purposes of providing low and moderate income housing.” N.J.S.A. 52:27D-311.a(6).

Thus, as is specified in the Bernard Report, to create a realistic opportunity for the construction of affordable housing at the Inserra Property, the Borough must create an economically viable project by amending the PUD Zoning to increase the density and reduce the set-aside percentage, and grant a PILOT for the project.

**2. When the Court approved the Settlement Agreements, there was not a meaningful review of whether the PUD Zoning creates a realistic opportunity for the construction of affordable housing at the Inserra Property.**

The Midpoint Review indicates that the conclusion that the Inserra Property was approvable, available, developable and suitable, which alone satisfied the realistic opportunity requirement, was confirmed by the experts who testified at the Court Fairness Hearing. Again, however, whether the Inserra Property was approvable, available, developable and suitable is not and was never in question. The relevant issue is whether the PUD Zoning provides the requisite incentive for the property to actually be developed. The NMRA Settlement Agreement is silent with respect to this question. We do not believe that there was ever any economic feasibility analysis performed to determine whether the density and set-aside in the PUD Zoning would

actually result in a realistic opportunity for the construction of the contemplated affordable housing units. This question was never addressed during the course of the Fairness Hearing or Compliance Hearing by any of the parties or their experts.<sup>4</sup>

Inserra acknowledges that, at the time, it was not concerned with the viability of the PUD Zoning. Inserra is not an experienced residential developer and had not engaged a development consultant or tried to enlist a development partner to vet the PUD Zoning. Inserra's sole focus, at the time, was cooperating with the Borough and NMRA to ensure that its affiliate Inserra Supermarkets, Inc. could relocate its store from the Inserra Property to the NMRA Site. Likewise, NMRA had no interest in the Inserra Property and was not concerned with the viability of a subsequent inclusionary development on the Inserra Property. Its only stake in the process was protecting its own interest in developing the NMRA Site and securing the bank and ShopRite as long-term tenants. Thus, while all parties at the time agreed that the Inserra Property was an ideal site for affordable housing, we do not believe there was ever any scrutiny regarding whether the PUD Zoning actually created a realistic opportunity for that housing to be constructed. Indeed, the PUD Zoning was shackled with a burdensome requirement from the start that seems designed to prevent, rather than facilitate, the construction of affordable housing.

In particular, the PUD Zoning requires a twenty (20%) percent set-aside for rental housing. This is neither customary nor consistent with COAH regulations, which established a presumptive set-aside of fifteen (15%) percent for rental projects. N.J.A.C. § 5:93-5.15(c)(5). This is evidenced by the Borough's own Fair Share Plan, which provides that any other rental project built in the Borough must only include a fifteen (15%) percent set-aside. The Fair Share Plan and PUD Zoning, therefore, place a significant undue burden on the Inserra Property that hinders the viability of construction of affordable housing.

Though Inserra explicitly raised this issue with the Borough, the Midpoint Review does not contain any rationale as to why the Inserra Property was, or should continue to be, singled out and treated differently than every other inclusionary rental development in the Borough. The fact that Inserra unwittingly signed off on these unreasonable requirements is irrelevant. What is relevant is whether the PUD Zoning does in fact create a realistic opportunity for development of affordable housing. It does not. Therefore, as Mr. Bernard concludes, the PUD Zoning must be amended.

**3. The Midpoint Review fails to make any meaningful review of the financial viability of the development of the Inserra Property in accordance with the PUD Zoning.**

Even if the Borough, FSHC, NMRA and Inserra all had the well intentioned belief, when the Settlement Agreements were executed, that the PUD Zoning of the Inserra Property provided a realistic opportunity for the construction of the contemplated twenty-seven (27) affordable rental

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<sup>4</sup> Inserra was not a party to the Declaratory Action and requests all documents and information submitted to the Court in the Declaratory Action. Inserra further requests copies of all transcripts of court proceedings including the Fairness Hearing and the Compliance Hearing with respect to the court's approval of the Borough's Fair Share Plan. Inserra also requests a copy of the Judgement of Compliance and Repose, dated March 21, 2017 and any other decisions or orders of the Court in connection with the Declaratory Action.



units, new information and changed circumstances now conclusively show that the current PUD Zoning for the property does not provide a realistic opportunity for the development of affordable housing on the Inserra Property. However, the Midpoint Review concludes its brief discussion of the Inserra Property by stating that “there have been no changes of conditions or circumstances which require any revision or supplementation to the PUD development regulations for the River Road Site.” MIDPOINT REVIEW at p. 2. This ignores Inserra’s repeated pleas to the Borough that the PUD Zoning is not sufficient to attract the necessary capital to actually construct the contemplated affordable units, and that conventional real estate taxes are an impediment to the redevelopment of the Inserra Property. The Midpoint Review fails to even mention the information submitted to the Borough in support of Inserra’s claims, much less provide any analysis of the issues raised by this information.

This falls far short of the Borough’s obligation to undertake a midpoint review of its Fair Share Plan pursuant to the FSHC Settlement Agreement and constitutes a breach of the Borough’s obligation under Section 15.a of the FSHC Settlement Agreement. The Borough has an obligation to consider this information and take action in response. The Borough must amend the PUD Zoning and provide other incentives (namely a payment in lieu of taxes) in order to fulfill its constitutional obligation to ensure the construction of its share of the region’s affordable housing need.

**D. NMRA AND INSERRA ARE NOT DEVELOPING THE NMRA SITE AND THE INSERRA PROPERTY JOINTLY, AND THE DEVELOPMENT OF THE INSERRA PROPERTY MUST BE TREATED AS A DISTINCT PROJECT FOR THE PURPOSE OF EVALUATING THE REALISTIC OPPORTUNITY FOR THE CONSTRUCTION OF AFFORDABLE HOUSING.**

The Midpoint Review recites that the NMRA Settlement Agreement provides that the NMRA Property is “an integral element of creating a realistic opportunity for development of low and moderate income housing.” MIDPOINT REVIEW at p. 1. The Midpoint Review takes this language out of context and intimates that the development of the NMRA Site and the Inserra Property constitute one project that has been “implemented halfway”, and that “the Borough is waiting for the Developers to complete the second half of the PUD Rezoning development.” *Id.* The insinuation that NMRA and Inserra are joint “Developers” as if they are partners working together to develop the NMRA Site and the Inserra Property is totally inaccurate. If the Midpoint Review is suggesting that the Inserra Property and the NMRA Site must be treated as a combined development for the purpose of evaluating whether there is a realistic opportunity for the development of inclusionary housing on the Inserra Property, there is no basis in fact or reality to support such a position.

A reading of the entirety of the relevant section of the NMRA Settlement Agreement demonstrates that the NMRA Site was only “an integral element of creating a realistic opportunity for development of low and moderate income housing” because the Inserra Property was “available for inclusionary development only because the rezoning of the [NMRA Site] [made] possible the demolition of the existing supermarket on the [Inserra Property].” NMRA Settlement Agreement §2.d. However, there is no, and was never, any partnership between NMRA and

Inserra. The PUD Zoning must, therefore, be assessed as a stand-alone project as any developer, construction lender or equity investor would do. That is the only way to evaluate whether the PUD Zoning Project can attract financing for construction. And, as thoroughly demonstrated by the Powell Report, it cannot. In order for the Inserra Property to be redeveloped with inclusionary housing, the density must be increased to 180 units, the set-aside must be reduced to fifteen (15%) percent and the project must receive a PILOT. Therefore, as Mr. Bernard concludes, the Borough must take affirmative steps to change the zoning and provide the necessary incentives to ensure that there is a realistic opportunity for affordable units to actually be constructed on the Inserra Property.

This is, in fact, the entire purpose of the midpoint review process – to provide an opportunity for municipalities, FSHC and other interested parties to revisit fair share plans and the assumptions made when designing them to determine whether a realistic opportunity existed or still exists without having to wait the full term of the ten (10) year period of repose. The Constitution does not require that low income households in the region wait another half a decade while a property that all interested parties agree is ideal for inclusionary affordable housing sits stagnant because the Borough is not providing the proper incentives for development, particularly given that the proper incentives can be easily implemented without any detriment to the community, and in fact would result in substantial public benefit independent of the affordable housing provided. Indeed, the midpoint review process would be unnecessary if prior agreements (which may have been established based on faulty assumptions or information) were inviolate and could not be altered when new information comes to light.

### III. CONCLUSION

We appreciate the Borough's prompt response to our comments and we look forward to working constructively with the Borough to facilitate the expeditious redevelopment of the Inserra Property. Thank you for your consideration.

Very Truly Yours,

*Andy S. Norin*

Andy S. Norin

Cc: Fair Share Housing Center (via Federal Express & Email: [adamgordon@fairsharehousing.org](mailto:adamgordon@fairsharehousing.org))  
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