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October 29, 2020

Andy S. Norin, Esq.
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RE: Borough of New Milford Midpoint Review

Dear Mr. Norin:

As you know, this firm represents the Borough of New Milford, New Jersey. This letter is in response to your October 9, 2020 letter to the Borough Administrator/Clerk regarding the Borough's Midpoint Review Report.

I. SETTLEMENT AGREEMENT

The Borough disputes your conclusion that the Borough has not provided adequate incentives for development of affordable housing. The delay is in fact caused by a developer which seeks to maximize its profits after it has already reaped the benefits of commercial redevelopment.

The belated claim that the President of Inserra Associates "unwittingly" signed the NMRA Settlement Agreement is ludicrous. Mr. Inserra is a well-respected, experienced and successful businessman and developer of real estate. He sits on the boards of Lakeland Bank and Hackensack University Medical Center. How could such an experienced corporate officer claim that Inserra "was not concerned with the viability of the PUD Zoning" when it signed the NMRA Settlement Agreement?

Inserra's "development partner" Crossroads Companies ("Crossroads") is essentially an alter ego corporation within the Inserra organization. Four years after the execution of the NMRA Settlement Agreement, Crossroads "discovered" that there was insufficient profit to redevelop the River Road site with a land price determined by Inserra Associates.

The fundamental flaw in your analysis is the premise that Inserra only signed the NMRA Agreement as an accommodation to the other parties and that it is not bound by the Settlement Agreement which it signed. Please note that Inserra Associates, is not just a mere signatory, but is the identified Redeveloper of the River Road Property and a party to this agreement.

You correctly state that in accordance with the Fair Share Plan, both the Inserra River Road property and the NMRA Madison Avenue Property were rezoned for "PUD Zoning" to enable the relocation of Shop Rite to the NMRA site and to provide for redevelopment of the Inserra Property for an inclusionary affordable housing development. As you state, the Inserra Property is now the only property in New Milford with an opportunity for producing affordable housing.

There were obvious incentives for Inserra to join in the Agreement. In addition to the financial incentives for the unusually high density residential and commercial zoning on the four-acre River Road site, Inserra negotiated a profitable long-term lease with the owner of the Madison Avenue site for relocation of its business to a new state of the art Shop Rite retail facility. Your argument fails to acknowledge or include any discussion of the economic incentives created by the PUD rezoning of the Madison Avenue site which is now occupied by Inserra.

Having received the benefit of its bargain, Inserra cannot now argue that the River Road site should be assessed as a "stand-alone project". This is pure sophistry, and grossly ignores the clear language of the Agreement. The Borough of New Milford insisted that Inserra sign the NMRA Agreement because the two PUD zones were integrally linked and the Madison Avenue parcel was the "engine" that gave rise to the opportunity for housing. This linkage was the sine qua non of the deal. You cannot deny the plain language of the NMRA Agreement signed by Inserra that the NMRA Property is "an integral element of creating a realistic opportunity for development of low- and moderate-income housing".

The NMRA Settlement Agreement was signed before a notary by Lawrence Inserra as "Authorized Member of Inserra Associates, an entity named in this Instrument", who "signed this instrument as the act of each that entity." In addition, he was represented by Counsel.

The NMRA Agreement contains the following definitions:

"b. "Developer" means the Madison Avenue Developer or the River Road Developer or both, as the context may require."

"g. "Party" means any party in In the Matter of the Application of the Borough of New Milford, Docket No. BER-5681-15, as well the Madison Avenue Developer and the River Road Developer and the successors and assigns of any of those parties."

"h. "River Road Developer" means the developer of the River Road Site under the terms of this Agreement. Except as otherwise provided in this Agreement, the River Road Developer is Inserra Associates."

Inserra Associates is the River Road Developer. The River Road Developer is a Party to the Agreement.

The agreement states that the two properties are integrally linked:

“2d. **Availability of the River Road site.** The parties stipulate that the River Road Site is available for inclusionary development only because the 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.”

Lawrence Inserra of Inserra Associates, 20 Ridge Road, Mahwah, New Jersey and Bruce E. Ritter, Esq. are specifically listed in Section 29 of the Agreement among the persons to receive written Notices under the Settlement Agreement.

The analysis of the Court-appointed Master Francis J. Banisch III, in his letter report to the Court on March 3, 2017 clearly describes the relationship of the two properties:

“The 12-28-16 draft Settlement Agreement between the Borough of New Milford and NMRA provides that NMRA will swap the 13.6 acre Madison Avenue site, owned by NMRA and the only remaining substantial vacant developable site in New Milford, for the River Road site, which is currently occupied by a supermarket that is owned and operated by an affiliate of Inserra Associates. Inserra will construct a new supermarket on the Madison Avenue site and will make the River Road site available for development of low and moderate income housing.

Under the terms of the settlement agreement, the River Road site will be rezoned Mixed Use Planned Unit Development Zone, and would provide for development of 27 low and moderate income housing units. This compares favorably with development at COAH’s default density and set aside requirements (6 units per acre with a 20 percent set aside for low and moderate income housing units, N.J.A.C. 5:93-5.6), which, if applied to the Madison Avenue site, would yield only 17 low and moderate income units. However, the new zone will provide an opportunity for the creation of 27 low and moderate income units in a walkable in-town location. New Milford Ordinance No. 2017:01 was adopted by the Borough on February 27, 2017, as required by the Settlement Agreement between the Borough of New Milford and New Milford Redevelopment Associates, LLC, as revised to 12-28-2016.”

The Special Master concluded that “(T)he two-site development program proposed by NMRA maximizes the affordable housing that might be developed from these properties”, emphasis added, page 4.

The Special Master’s March 3, 2017 Report was served on all Parties on Mailing List including Lawrence Inserra and the Inserra Attorney Bruce E. Ritter, Esq.

It should also be noted that there were three consolidated lawsuits before the Court when the Judgment of Compliance and Repose was entered. In addition to the Declaratory Judgment

action, there was a suit arising out of NMRA's attempts to develop the Madison Avenue site for a mixed use project including and inclusionary affordable residential development. The affordable housing obligation of the undeveloped Madison Avenue site did not disappear. There was a "swap" or transfer of the obligation which was enabled by the economic incentives resulting from the rezoning of the NMRA Madison Avenue which was only remaining substantial vacant developable site in New Milford.

Since no affordable housing units were created on the Madison Avenue site, if Inserra seeks to alter the terms of the settlement agreement, the Madison Avenue Site should be subject to the Borough's Development Fee Ordinance which would require a payment by the Madison Developer of \$437,000.00.

II. REALISTIC OPPORTUNITY

The Borough did not summarily or arbitrarily reject the proposed changes requested by Inserra. The Borough requested and received additional information from Inserra and determined that Inserra and its corporate alter ego Crossroads Companies assigned a land acquisition cost which maximized the real estate profit to Inserra Associates.

The Borough submits that there is a realistic opportunity to develop the River Road property with the present PUD zoning if the property were offered for sale in an arm's length transaction to an unrelated Developer-Purchaser.

The density of 135 multifamily units on the approximately four-acre site provides for a density of 35 residential units per acre in accordance with the provisions of the Borough's adopted MPUD Ordinance. Inserra's consultants failed to mention that this density is greatly in excess of the 6 units per acre default density requirements in N.J.A.C. 5:93-5.6. In fact, this density far exceeds the density in similar affordable projects in Bergen County and is far greater than densities for similar properties in New Milford. The PUD Zone is also consistent with the 20 percent set aside found in N.J.A.C. 5:93-6. The Settlement Agreements give the Developer the option of sale or rental units.

As stated above, the economic incentives received by the owner of the Madison Avenue site and by its long-term Lessee Inserra must be included in the analysis of whether the two-site development program provides a realistic opportunity that lower income housing will actually be constructed. Even without the incentives derived from the Madison Avenue site, the residential densities with the set aside percentages, and the 12,500 square feet of commercial rezoning of the River Road property on its own, do in fact provide the realistic opportunity for an unrelated developer to proceed with construction as presently zoned.

The Borough submits that by affirmatively rezoning the two PUD properties it has provided the necessary incentives to provide a realistic opportunity for construction of lower income housing as required by the *Mount Laurel II* decision, *So. Burlington Cty. N.A.A.C.P. v. Mount Laurel Tp.* 92 NJ 158 (1983). The Supreme Court described Incentive Zoning with mandatory set asides as an effective inclusionary device for municipalities to meet their fair share obligations. *Id.* at 266-267. "For an opportunity to be 'realistic' it must be one that is at least sensible for

someone to use.” *Id.* at 261. A bona fide unrelated developer has the necessary zoning in place at the River Road Property to produce such affordable housing.

The Borough’s inclusionary densities utilizing mandatory set asides and density bonuses in accordance with *N.J.S.A. 52:27D-311* (a)1 and (h), are consistent with the criteria which were set forth in *N.J.A.C. 5:93-5.6* (b) 1.

The argument raised by Inserra’s consultant, Mr. Art Bernard, regarding RDP is mistaken. Although the River Road site is technically not “vacant”, as anticipated by *N.J.A.C 5:93-4.2*, it was part of a “swap” for the larger, vacant undeveloped Madison Avenue site. Municipalities have flexibility in addressing housing obligations. In this case the Borough, with the agreement of two property owners, created a “two-site development program” which maximized the affordable housing that might be developed from these properties, one of which was the only remaining substantial vacant site in New Milford.

The argument that there is some obligation for a municipality to provide a PILOT is specious. There is no legal precedent for mandating a municipality to grant a PILOT for an affordable housing project. Subsidies are one type of affirmative measures that a municipality can use to make the opportunity for affordable housing realistic. *Mount Laurel II*, at 262. The Supreme Court contemplated municipal governments facilitating subsidies granted by other levels of government (federal or state subsidies). *Id.* at 263-265. Mount Laurel Courts have the power to require a municipality to cooperate with a developer’s attempt to obtain a subsidy (such as in Section 8 programs or CDBG Block Grants programs). There is no mandate for a municipality to approve a Payment In Lieu of Taxes (PILOT). The municipality may utilize the technique of tax abatement. It shall consider, but is not required, to use the technique of tax abatements. *N.J.S.A. 52:27D-311(a)*.

The tax abatement provisions of *N.J.S.A. 40A:12A-4.1* and *N.J.S.A. 40A:12-4.2* are also inapplicable.

III. LEGAL RESPONSE

There are several legal reasons why Inserra Associates should be barred from asserting its claim for what amounts to a second rezoning of its River Road property and alteration of the existing settlement agreement.

Inserra argues that it is not a party to either of the Borough Settlement Agreements, yet it seeks relief pursuant and raises an objection under provisions of the Borough’s Settlement Agreement with the Fair Share Housing Center.

N.J.S.A. 52:27D-313 is referenced in the FSHC Settlement Agreement. The Council on Affordable Housing has not established procedures for midpoint review. Nonetheless, the Borough did comply with the agreement and provided a Midterm review report.

Inserra Associates was aware of, and had notice of the Fairness Hearing conducted by Judge Meehan on March 9, 2017 pursuant to *East/West Venture v. Borough of Fort Lee*, 286 *N.J. Super.* 311,326 (App. Div. 1996). The Court entered a Declaratory Judgment of Compliance and

Repose on March 21, 2017. Inserra Associates was aware of the terms and provisions of the Settlement Agreements which were approved by the Court, including the PUD rezoning of the River Road site which was the site of the existing Inserra Shoprite.

Inserra presented no objections to approval of the proposed settlements or to the Borough's proposed Fair Share Plan.

The Borough, acting in good faith and has complied with all its obligations under the terms of the agreement. Now, over three years later, Inserra Associates seeks to challenge the findings and orders contained in the March 21, 2017 Court Order.

Paragraph 17 of the Declaratory Judgment of Compliance and Repose states:

“By this Final Judgment of Compliance and Repose, the Court declares the Borough of New Milford to be in compliance with this obligation to have provided and to provide a realistic opportunity for the development of affordable housing to low and moderate income households as defined in what are commonly known as the Mount Laurel cases, and in the New Jersey Fair Housing Act, N.J.S.A. 52:27D-301, et. seq., as amended. Entry of the Judgment of Compliance and Repose will bar through 2025 any claim that The Borough of New Milford is failing to provide a sufficient realistic opportunity for the development of housing for low- and moderate-income households.”

Inserra Associates, which has accepted the benefits of the two PUD Zone ordinances adopted by the Borough should not be allowed to attack the Order at this late date. See generally R. 4:50-1 and R. 4:40-2. Likewise, the provisions of laches, collateral estoppel and res judicata are applicable. Inserra Associates had a fair opportunity to raise its objections at the Fairness Hearing. It now seeks to relitigate the issues which were determined. Such a challenge is precluded since Inserra is a “party”. *Wadeer v. New Jersey Mfrs. Ins. Co.* 220 N.J. 591, 606-609 (2015). Alternatively, under the principle of collateral estoppel, relitigation of decided issues is barred. *Villanueva v. Zimmer*, 431 N.J. Super 301, 311-312 (App. Div.) cert. denied. 216 N.J. 430 (2013).

For the reasons stated above, Inserra Associates should be treated as a party to the Settlement Agreements and the agreements should be enforced against Inserra.

It is well-settled law that public policy wisely encourages settlements, *McDermott v. AmClyde*, 511 U.S. 202, 215, 114 S.Ct. 1461, 1468, 128 L.Ed.2d 148, 160 (1994), and that “[t]he settlement of litigation ranks high in our public policy,” *Jannarone v. W.T. Co.*, 65 N.J. Super. 472, 476 (App. Div.), cert. denied, 35 N.J. 61 (1961), in part, to “promote the amicable resolution of disputes and lighten the increasing load of litigation faced by . . . courts.” *DuHamell v. Renal Care Group East, Inc.*, 431 N.J. Super. 93, 97 (Law Div. 2013).

Settlements are routinely enforced given the strong public policy favoring settlement of litigation. *Nolan v. Lee Ho*, 120 N.J. 465, 472 (1990). Courts will therefore give effect to the terms of settlement agreements and enforce them whenever possible. *Dep't of Pub. Advocate v. N.J. Bd. Of Pub. Utils.*, 206 N.J. Super. 523, 528 (App.Div.1985).

Furthermore, Courts have the equitable authority to enforce settlements and quasi-contractual obligations. "Equity" will not suffer a wrong without a remedy, *Crane v. Bielski*, 15 N.J. 342, 349 (1954); *Thompson v. Atl. City*, 386 N.J. Super. 359, 375 (App. Div.), *certif. granted*, 188 N.J. 490 (2006), nor "knowingly become an instrument of injustice." *Weisbrod, v Lutz*, 190 N.J. Super. 181, at 186 (App. Div. 1983).

The Borough of New Milford in reliance upon the promises and representation of Inserra Associates entered into Settlement Agreements which rezoned both the existing and future locations of Inserra's ShopRite. This is a clear case of Promissory Estoppel in which a clear and definite promise was made with the expectation that the promisee would rely, and there was reliance by the promisee to its detriment. *See, East Orange Sch. Board by SCC*, 405 N.J. Super 132, 148 (App. Div. 2009).

The principle of Equitable Estoppel is also applicable. The conduct of Inserra Associates was intended and expected to be acted upon by the Borough and the Borough did in fact rely thereon in good faith in prejudicially changing its position. *See D'Agustino v. Maldonado*, 2016 N.J. 168, 200 (2013). As a "party," Inserra should also be subject to the principal of judicial estoppel.

IV. CONCLUSION

For all the above reasons the Borough submits that it has and continues to meet its contractual and constitutional obligation to provide a realistic opportunity for the creation of affordable housing in the Borough of New Milford.

Very truly yours,

KELLY, KELLY, MAROTTA & TUCHMAN, LLC

By: 

KEVIN P. KELLY

cc: Fair Share Housing Center
New Milford Redevelopment Associates
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