IN THE MATTER OF THE APPLICATION OF THE BOROUGH OF EMERSON, NEW JERSEY, FOR A DECLARATORY JUDGMENT,

Petitioner.

SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION

DOCKET NO. A-238-23

Submitted: February 21, 2024

ON APPEAL FROM A FINAL ORDER OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, BER-L-6300-15

Sat Below: Hon. Gregg Padovano, J.S.C.

AMENDED BRIEF OF APPELLANT INTERESTED PARTY EMERSON REDEVELOPERS URBAN RENEWAL SEEKING ENFORCEMENT OF THE TRIAL COURT'S CONDITIONAL JUDGMENT COMPELLING THE BOROUGH OF EMERSON TO BUILD AFFORDABLE HOUSING

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[1] Appellant is not maintaining an appeal of the January 30, 2023 Order.

PRELIMINARY STATEMENT

Interested Party Emerson Redevelopers Urban Renewal, LLC appeals the trial court's order declining to enforce its five-year-old Mount Laurel judgment—including the construction of seven off-site affordable housing units by the redeveloper—leaving Emerson to continue its historic noncompliance. In the years since the agreed-upon, special-master recommended, and court-ordered settlement with Fair Share Housing Center, Emerson has refused to even consider redeveloper's application for the off-site units. While the court found violations of other components of the judgment by Emerson and appointed an implementation monitor, it denied any relief on the off-site units. The 2019 judgment is clear on Emerson's affordable housing obligations; the Borough's violations of the off-site component are uncontested; and the court should have imposed a remedy. Its failure to do so was error.

First, the trial court, while "certainly concerned by the apparent failure of the timely development of affordable housing," held the four-year delay in compliance did not appear to amount to "exclusionary zoning." While that is the wrong standard for enforcement of an existing order, it also overlooks defiance by Emerson of affordable housing obligations spanning more than twenty years. In 2001, Judge Harris held that "Emerson, New Jersey persists as a bastion of exclusionary zoning. It has steadfastly resisted taking affirmative steps to

provide realistic opportunities for affordable housing within its borders. . . The time has come to end this constitutional breakdown." Thereafter, Emerson attempted to bring itself into compliance with a settlement with Fair Share Housing Center, but the current Mayor campaigned and was elected on a platform of "scal[ing] back" affordable housing and the court-ordered project. As Emerson admitted, up through 2020, in two decades of Mount Laurel litigation, "no affordable units have been physically rehabilitated or constructed within the Borough."

Second, the trial court characterized the relief sought by redeveloper as the "extreme" remedy of "automatic site plan approval," not warranted when there are "alternative" avenues such as a variance. But Emerson took the position it could not even consider a variance and only the council could allow a fully affordable residential building, which departs from the code requirement of ground-floor commercial. Well established precedent holds that the sole requirement for court-ordered Mount Laurel housing is "site suitability," and cost generative zoning requirements can and should be set aside so long as, after a full hearing, the site is determined to be suitable for the proposed fully-affordable housing development. There is nothing "automatic."

Third, the trial court incorrectly relied on the fact that the judgment does not specifically set forth the location of the off-site units. This shifts the burden:

it is Emerson's obligation as part of the judgment to provide a realistic opportunity for satisfaction of its share of affordable housing, including identifying a location for the seven off-site units. The undisputed record before the court was that the prior administration selected the location for the off-site units, prevailed upon the redeveloper to purchase the property, and agreed with redeveloper to construct the off-site units there. Regardless of whether the judgment specifically identified the property, it is the only property Emerson ever selected to satisfy its obligation for the off-site component, and in the five years since the judgment Emerson has never approached the Special Master, the Implementation Monitor, or Fair Share Housing Center with any alternative. It was utterly silent at the midpoint review when it was required to disclose the realistic opportunity for completing construction. It was the Borough's obligation—not redeveloper—to demonstrate its efforts at compliance. The only proposal raised to meet this obligation, made by the prior administration, accepted by the redeveloper, and approved by the Special Master, was the off-site property purchased by redeveloper at Emerson's request: Block 610, Lot 1.

Considering the admitted noncompliance of the Borough, the trial court should have held a site suitability hearing on the location selected by the prior administration for the off-site units, with the benefit of Emerson's planners and the special master, to determine suitability as the criterion for approval.

STATEMENT OF FACTS[2]

a. The Parties, Emerson Station Redevelopment Project, And Off-site Units

Interested party Emerson Redevelopers Urban Renewal, LLC ("ERUR" or the "Redeveloper") is the designated redeveloper of Block 419, Lots 1, 2, 3, 4, 6.01, 6.02, 7, 8, 9 and 10, on the tax map of Emerson, New Jersey, ("Emerson Station"), which consists of a four-story, 147-unit, mixed use inclusionary development for property located on Kinderkamack Road with Borough of Emerson. 178a, 183a. As part of Emerson Station, ERUR has constructed twenty-two low-and-moderate-income affordable housing units on site and will construct seven units off-site (the "Off-site Units"), for a total of twenty-nine units, 183a ¶ g, representing the majority of Emerson's court ordered Mount Laurel obligations, 242a ("RDP of 53 units").

Through the end of 2018, Emerson's elected representatives were required to confront satisfaction of Emerson's longstanding deficient affordable housing obligations pursuant to the Mount Laurel doctrine. 22a, 367a, 422a. They developed an agreement to build affordable housing with ERUR, 115a, reached a settlement with Fair Share Housing Center ("FSHC"), 163a, a Supreme Court-designated interested party in affordable housing litigation, and obtained a

[2] This brief refers to appellant's appendix as "_a."

judgment, 240a. Emerson selected a location for the Off-site Units, across the street from Emerson Station, on Block 610, Lot 1 (the "Off-site Property"), and instructed ERUR to purchase the lot, which it did. 82a ¶ 10.

But as of January 1, 2019, a new administration was elected, led by Mayor Danielle DiPaola, ("DiPaola") who ran on an anti-affordable housing platform, vowing publicly to stop the Emerson Station project. 615a, 624a. Over five years have passed since defendant Emerson finally adopted a plan that was accepted by the courts—after two decades of judicially recognized noncompliance—to provide a realistic opportunity for affordable housing. 240a. Yet even now, the DiPaola administration has refused to hear ERUR's application for the Off-site Property selected by the prior administration, nor has it proposed to FSHC or the special master any realistic alternative to bring itself into compliance with its constitutional obligations related to the Off-site Units. 293a.

b. Courts Have Found Emerson Delinquent In Its Constitutional Affordable Housing Obligations For Over Twenty Years, And Emerson Remains In Violation Of The Courts' Orders

Emerson's noncompliance with its constitutional affordable housing obligations extends over decades. On October 19, 2001, the Hon. Jonathan N. Harris, J.S.C., delivered an opinion striking down Emerson's zoning ordinances and requiring it to implement a new zoning scheme to provide affordable

housing, which occupied the Borough for the next dozen years. 367a. The court held:

> Emerson, New Jersey persists as a bastion of exclusionary zoning. It has steadfastly resisted taking affirmative steps to provide realistic opportunities for affordable housing within its borders. It has further failed to enact the necessary legislation to authorize the expenditure of its considerable affordable housing trust funds for regional or local housing needs. The time has come to end this constitutional breakdown. The New Jersey Constitution shall not be permitted to merely remain a vague rumor in Emerson.

368a. The Court had held that "Emerson's zoning ordinance was invalid and unconstitutional insofar as it failed to provide a realistic opportunity for the development of affordable housing," and, as a remedy, imposed an "interlocutory injunction restraining certain land development activities until a final determination could be made concerning Emerson's ability to comply with its Mt. Laurel II obligations." 371a. After the trial, the Court found Emerson "has woefully failed to comply" and imposed "the exceptional affirmative remedies of the type outlined in Mt. Laurel II and require Emerson to adopt specific amendments to its zoning ordinance and other land use regulations as will enable to finally meet its Mt. Laurel II obligations." 384-85a. It noted there "is not a single unit of affordable housing in Emerson. Its record of compliance with Mt. Laurel II is ghastly, embarrassing, and sorely in need of remediation. Its very conduct throughout this litigation confirms the need for affirmative

steps to remedy its almost two decades effort to encourage poor people to live elsewhere." 396a. Indeed, the Court observed, the "limited opportunities for developing inclusionary affordable housing appear to have been squandered by the municipality at almost every step. . . Emerson seems to have never missed an opportunity to miss an opportunity for affordable housing." 396-97a. The Court advised Emerson of the consequence of further failures:

> all development regulations in Emerson shall be permanently invalidated. All land shall be treated as unzoned, not subject to local site plan review, and developable at the will of the developer, subject only to applicable state and federal law, including, of course, the Uniform Construction Code. . . The facts of this case reveal a legacy of cavalier inattention by a succession of Emerson governing bodies that produced a pattern of land use strikingly unfriendly to poor people. Spanning decades, the inaction of Emerson requires an immediate and robust response. Since opportunity has not knocked, it is time to build a door.

412-13a. In assessing compliance the following year, the Court itemized Emerson's willful attempts to stymie affordable housing "spanning decades":

> I have already determined that Emerson officials have relentlessly preserved and exacerbated economic and class segregation throughout the Borough. There appeared to me to be a remarkably consistent and extreme pattern of exclusionary efforts characterized by what appears to be developing again. That is, concentrated native opposition to affordable housing in certain areas of the Borough and acquiescence in that opposition by Borough officials. In my October 2021 opinion I catalogued a variety of missed opportunities, failures of will and lack of resolve by governmental actors spanning decades regarding the Borough's obligation to provide a realistic opportunity for

> low and moderate income housing. I remain dumbfounded, that notwithstanding all of the accumulated history of this State's exclusionary zoning litigation and the perils attendant thereto, that Emerson appears to have overlooked its lessons, and is consigned to repeat the costly blunders of the past.

423-24a. Judge Harris had appointed a Special Master to draft implementing ordinances, "given the bankruptcy of action by the Emerson governing bodies over the years. . . stemm[ing] from the long-standing litany of inaction and the palpably invidious discrimination that it worked." 426a. When Emerson criticized the Special Master's proposal, without offering any realistic alternative to meet its obligations, the Court faulted Emerson for its obstruction:

> Emerson's entrenchment is again on display in this proceeding, where although it correctly points out the technical errors of the Special Master's compliance plan, **it** neglects to provide a meaningful alternative to the affordable housing crisis within its borders. Once the Law Division has issued a valid order to remedy the effects of a prior specific Constitutional violation, as here, elected officials are expected to act with dispatch to remedy the wrong. At this point the Constitution itself imposes an overriding definition of the public good. And public officials sworn to uphold the Constitution may not avoid a constitutional duty by bowing to the political effects of prejudice and self-interest. Defiance at this stage results, in essence, in a perpetuation of the very Constitutional violation at which the remedy is aimed. At the conclusion of the trial I was convinced that it would be a vain and futile act to commit this Constitutional remedy to the very intractable officials who appeared to be incapable of taking meaningful action... I am left adrift again by a Municipality that has been content to dispatch New Jersey Constitution to serve as mere background noise in Emerson...

424-25a. The court again threatened to permanently invalidate Emerson's zoning ordinance, blocking "all development applications, from the smallest to the largest, until compliance is achieved." 426a.

c. To Bring Itself Into Compliance, Emerson's Prior Administration Reached An Agreement With FSHC, So Ordered By The Court, To Have ERUR Construct, Among Other Things: (1) Emerson Station Containing 22 Units Of Affordable Housing; and (2) The Off-site Building Containing 7 Units, Which Plan, If Implemented, Would Meet The Majority Of Emerson's Outstanding Constitutional Obligations

Emerson's prior administrations began taking steps to secure compliance. On February 3, 2004, the Council authorized an investigation to declare the blocks containing Emerson Station and the Off-site Property, Block 419 and Block 610, among others, as areas in need of redevelopment and on September 7, 2004, declared a need for redevelopment. 266a. By 2006, Emerson put in place a Redevelopment Plan to provide affordable housing:

> In addition, the redevelopment plan shall include the provision of affordable housing in accordance with the "Fair Housing Act". All development within the designated redevelopment area shall provide for the appropriate number of affordable dwellings. The number of affordable units shall be provided pursuant to the State of New Jersey Council On Affordable housing third round rules that mandate a minimum of one affordable housing unit for every eight units of market rate housing and one affordable housing unit for every twenty-five jobs created.

448a. Emerson adopted the redevelopment plan on July 11, 2006. 266a. After hearings throughout 2008, the Planning Board adopted revisions to the

redevelopment plan on February 19, 2009. 480a. On December 20, 2016, the Borough amended the Redevelopment Plan, with the "purpose" of, among other things, to "provide for affordable housing in an appropriate location within the Borough," including the locations Blocks 419 and 610, among others. 271a.

On July 8, 2015, upon forming a plan to meet its obligations, Emerson filed this action by verified complaint seeking a declaratory judgment to "declare that its fair share plan is in compliance with the requirements of the Mt. Laurel Doctrine and issue a judgment of repose insulating the Borough from exclusionary zoning lawsuits . . . ." 22a, 29a. The Borough restated the findings of Judge Harris a decade prior, and its efforts to cure the deficiencies identified therein. 25a.

On June 26, 2016, ERUR and Emerson entered a Redevelopment Agreement by and between the Borough of Emerson and Emerson Redevelopers Urban Renewal, LLC ("Redevelopment Agreement"). 115a. It addressed how the Borough would utilize ERUR's development to satisfy the Borough's affordable housing requirements.

> 4.03 Affordable Housing Requirement. The Parties recognize and acknowledge that the Project will generate a fair share housing requirement for Redeveloper pursuant to the Affordable Housing Requirements established by the State of New Jersey and the Council on Affordable Housing. . . The presumptive percentage of set aside units to be built shall be twenty percent (20%). . . Alternative COAH Location. The Redeveloper and the Borough shall explore alternative sites

> to accommodate all of the Low and Moderate Housing obligations associated with his Project at another location in the Borough, subject to any necessary court approval and such court approval to be funded by Redeveloper as set forth in Section 4.03 hereinabove.

131a. On January 17, 2017, Emerson reaffirmed by resolution the designation of certain blocks as areas in need of redevelopment, including among others, Block 419 and 610, "to fulfill its affordable housing obligations." 508a. The Council voted to amend the Redevelopment Agreement on July 18, 2017, to clarify that fifteen percent of the affordable housing set aside would be placed on-site at Emerson Station and five percent may be "construct[ed] . . . elsewhere within the Borough ('Off-site')." 155a. Pursuant to the formula set forth therein, fifteen percent of all units at Emerson Station equals twenty-two affordable units on-site, and five percent yields seven Off-site Units. See ibid.

With a plan in place for realizing the construction of affordable housing and a willing partner to build it, on November 21, 2017, Emerson and FSHC entered a Settlement Agreement (the "Settlement Agreement"), with a corresponding obligation to provide twenty-two units on Block 419 and the option to provide seven units off-site. 163a. The Settlement Agreement states:

> The Block 419 Project has a minimum 15% set-aside, or 22 units, with an option for off-site provision or payment-in-lieu for the remaining 7 units. If such option is exercised, the Borough will show at the midpoint review how it will provide a realistic opportunity for the remaining 7 units, in accordance with the provisions of this Agreement.

165a. The Settlement Agreement made clear that Emerson must, by midpoint review—by 2020—provide a realistic plan for constructing the seven Off-site Units. Ibid.

After conducting a fairness hearing, on June 29, 2018, the trial court entered an order accepting the settlement agreement, significantly reducing the otherwise-applicable affordable housing obligations based on "consideration of the Settlement Agreement," subject to further recommendations by Special Master Mary Beth Lonergan, PP, AICP, and a further fairness hearing. 235-36a.

d. Emerson Failed To Controvert With Any Competent, Record Evidence The Testimony Of Both Parties To The Transaction—LaMatina For The Emerson Council And Klugmann For ERUR—That The Borough Council, In An Effort To Comply With The Requirement Of The Settlement Agreement And Forthcoming Order To Provide For A Seven Off-site Units Of Affordable Housing, Selected A Suitable Site For The Off-site Building At Block 610 Lot 1

As certified by then-mayor Louis Lamatina and the redeveloper's principal Jack Klugmann, in 2017, Emerson identified the Off-site Property, Block 610, Lot 1, as suitable and essential to fulfilling Emerson's fair-housing obligations. 81a ¶ 5; 78a ¶¶ 45-46. Lamatina—in coordination with the Council's redevelopment subcommittee, the Borough's professionals, and ERUR's personnel—began searching the available land for an alternative affordable-housing site pursuant to the Redevelopment Agreement's requirement, in Section 4.03, to "explore alternative sites to accommodate"

affordable housing. 131a; 81a ¶ 6. By early 2017, it was clear that some units would need to be located off-site, and Emerson had identified the specific property to be utilized because of its suitability: Block 610, Lot 1. Ibid. Lamatina requested, and on March 17, 2017, received a concept plan from planning firm Dykstra Walker for "affordable housing building" on "Block 610 Lot 1." 87a; 81a ¶ 6. Other configurations for the Off-site Property were explored as well, including several architectural renderings prepared by the Borough architect Axis Architectural Group on June 1, 2017. For Block 610, Lot 1. 89a-91a; 81a ¶ 6. Although each of these early renderings involved different numbers of units and types, all were located on the Off-site Property, Block 610, Lot 1. 81a ¶ 7. This was the only identified suitable property, and accordingly, the location never changed. Ibid; 79a ¶ 46. Emerson's redevelopment subcommittee examined the available space in the Borough; convened subcommittee meetings among members of the council, redevelopment counsel, affordable housing counsel, and the town planner, and determined based on the need for affordable housing, that Block 610, Lot 1 was appropriate. 81a ¶¶ 6, 8. While there were some inconsistences between the existing redevelopment plan and the Off-site Property, notably the ground floor residential component, Emerson committed to being flexible to ensure that the

court-ordered Off-site affordable housing receive governmental approvals, just as it had with Emerson Station. 82a ¶ 9.

At first, Mayor Lamatina urged the Borough to acquire the Off-site Property itself and then sell it to the developer. 82a ¶ 10. But ultimately Emerson expressly instructed ERUR to purchase the Off-site Property as part of the project. 82a ¶¶ 10, 12; 79a ¶ 46. In reliance upon the Borough's instructions, ERUR entered a contract for the Off-site Property in 2018, 94a, 84a ¶ 14, 79a ¶ 46, and took title the following year, 259a.

At a meeting of Emerson Council's Redevelopment Subcommittee on March 9, 2018, ERUR and Emerson again confirmed the details of the Off-site Building: seven units to be constructed by ERUR on Block 610, Lot 1. 84a ¶ 14. The meeting was attended by, among others, the members of the Council on the redevelopment subcommittee and ERUR personnel Kevin Codey and Joseph Forgione (by telephone). Ibid. Lamatina prepared notes of the subcommittee meeting, which states: "129 KK out K out $500K 7 affordable close to signing K." 94a. As Lamatina certified, this reflected that the subcommittee received an update on 129 Kinderkamack Road, also known as Block 610, Lot 1, the Off-site Property, including that the current resident was close to entering an agreement with ERUR to sell for $500,000, which would allow ERUR to

construct the remaining seven affordable housing units at the Off-site Property, as ERUR and Emerson had previously agreed. 84a ¶ 14.

Emerson did not submit a single piece of evidence or testimony to rebut or controvert any of these facts adduced by ERUR below. Before the trial court, there was no dispute of fact that at the time the settlement agreement was accepted by the court and Emerson granted site plan approval: (1) Emerson endorsed, and indeed instructed, ERUR to build affordable housing at the Off-site Property at Block 610, Lot 1; (2) that the Off-site Property would include exactly seven units; and (3) that Emerson admitted the Off-site Property was suitable for the construction of seven affordable units.

e. Based On This Agreed Upon Plan Between Emerson, ERUR, And Fair Share, Emerson Obtained The Conditional Judgment, With The Express Obligation Of Emerson To Account For And Disclose At Midpoint Review Whether The Off-site Mechanism Remained Realistic

Once this decision was reached, the parties prepared plans and attended hearings making clear the decision to locate twenty-two units on-site and seven Off-site. ERUR's architect Devereaux and Associates Architects, Inc., submitted a November 15, 2018 site plan for Emerson Station with "COAH Dwelling Units 15% of Unit Total . . . 22 Units." 174a. Similarly, as set forth in a public notice issued for the December 10, 2018 land use board hearing for site plan approval of Emerson Station: "Applicant is seeking preliminary and final major site plan approval for the construction of a 4-story building consisting of

147 residential rental units (22 of which shall be affordable housing units)." 176a. At the land use board hearing on ERUR's application for Emerson Station on December 10, 2018, the minutes reflect the both ERUR and the Borough's planner Bridgett Bogart confirmed there would be precisely twenty-two affordable-housing units on-site and seven affordable units off-site:

> The building would consist of 14,700 square feet of retail on the first floor and 147 residential units, including 22 units dedicated to Fair Share Housing on the second through fourth floors....
>
> Ms. Bogart addressed the Fair Share Housing. She said of the 15% of the 147 apartments, there would be 2 studios, 15 – 2 bedrooms units and 5 -3 bedroom units. She said the Administrator would determine how to allocate the apartments based on income and need...
>
> Ms. Bogart clarified the number of apartments required for the Affordable Housing Element. She said there would be 22 apartments on site and **7 apartments off site** which was agreeable to the Court Master.

101a (emphasis added). It was with this understanding and context that the Conditional Final Judgment was entered.

On December 14, 2018, Special Master Mary Beth Lonergan filed a Master's Report for a Mount Laurel Compliance Hearing, Borough of Emerson ("Special Master's Report"). 339a. It advised the Court that there is a realistic probability of Emerson fulfilling its affordable housing needs, including because

Emerson and ERUR have agreed to build Emerson Station and the Off-site Property:

> Pursuant to the Settlement Agreement, the redeveloper will provide 29 affordable units, including 22 on-site affordable units and seven (7) affordable units through an off-site mechanism and/or a PIL as established in the redeveloper's agreement.

346a.

On December 28, 2018, the land use board issued a resolution granting governmental approvals to Emerson Station, and confirming Emerson and ERUR's understanding that there would be seven units at the Off-site Property

> The Redevelopment Agreement and the Settlement Agreement, among other things, require the Applicant to provide for a total of twenty nine (29) affordable housing units. The project will have 147 residential units including 22 COAH or Affordable units on site and Applicant will comply with the requirement of seven (7) off-site affordable units. The residential units will be on the ground floor along Lincoln Boulevard and on the ground floor in the rear parking lot.

183a ¶ (g).

On December 21, 2018, the Court held a final fairness hearing regarding the plan for Emerson to realistically fulfill its fair-housing obligations. 240a. On January 25, 2019, the Court entered the Conditional Final Judgment:

> The Court hereby accepts the Housing Element and Fair Share Plan and finds that it creates a realistic opportunity for satisfaction of the Borough of Emerson's Fair Share of low and moderate-income housing. . . The Court hereby accepts the Housing Element and Fair Share Plan and finds that it creates a realistic opportunity for satisfaction of the Borough

> of Emerson's Fair Share of low and moderate-income housing.

241a. However, the Court required that the Borough provide an accounting of status at the midpoint review:

> 9. The Fair Housing Act includes two provisions regarding action to be taken by the Borough during the Repose period provided in this Order. The Borough shall comply with those provisions as follows:
>
> a. For the midpoint realistic opportunity review due on July 1, 2020, as required pursuant to N.J.S.A. 52:27D-313, the Borough will post on its municipal website, with a copy provided to Fair Share Housing Center, a status report as to its implementation of its Plan and an analysis of whether any unbuilt sites or unfulfilled mechanisms continue to present a realistic opportunity and whether any mechanisms to meet unmet need should be revised or supplemented. Such posting shall invite any interested party to submit comments to the municipality, with a copy to Fair Share Housing Center, regarding whether any sites no longer present a realistic opportunity and should be replaced and whether any mechanisms to meet unmet need should be revised or supplemented.

245a. Per the Special Master's Report, Emerson was required, "at the July 2020 midpoint review, [to account for] how [Emerson] will provide a realistic opportunity for the affordable units provided off-site or through a PIL." 346a.

f. Following Mayor Danielle DiPaola's Election, Emerson Obstructed Both Emerson Station And The Off-site Property, Leading The Court To Find A Violation Of The Judgment And Appoint An Implementation Monitor

As set forth above, through the end of 2018 Emerson, through its elected officials, was supportive of redeveloping the property since it (1) held the key

to satisfy 55% of its affordable housing obligations under Mt. Laurel, (2) provided protection against builder's remedy lawsuits, and (3) dramatically reduced its affordable housing obligation. Such builder's remedy lawsuits would result in much higher density obligations of affordable housing. See 240-41a. However, with the election of 2018, all of that changed when Emerson elected DiPaola, who ran a political campaign openly hostile to the Project and promising the electorate that she will impede or stop the Project in the form that it was approved by the court. On November 8, 2018, DiPaola was quoted as saying:

> Since 2010, DiPaola has served the borough as a councilwoman, but said she decided to run for mayor because she "didn't like the direction the town was going in," with particular concerns about overdevelopment in the downtown. . .
> On a larger scale, DiPaola, who served on the borough's Land Use Board in the past, would like to ensure development in the downtown is done in a "reasonable" way "that isn't four-story buildings."
>
> "Everyone has this idea that I'm against development, but I'm not against it," said DiPaola. "I'm against eminent domain. I would like to move forward and bring positive change to the downtown."

607a. She called her election "a referendum on overdevelopment," publicly demanded that "the governing body, out of respect to the voters, take no further action [on redevelopment] until January," and "questioned where additional affordable housing is expected to go." 625a, 101a. She consistently emphasized her opposition to the Borough's mechanism for satisfying affordable housing,

Emerson Station, questioning whether this was "really what you want to see in the downtown for the next 100 years." 618a. She told business leaders, "We're trying to scale this back." 635a. Reiterating that her opposition was specifically to affordable housing, she stated the Borough has lost "seven of its thriving businesses due to redevelopment in the name of affordable housing." 547a. In order to get 29 affordable housing units, Emerson "lost seven businesses so far." Ibid.

True to her word, after she took office on January 2, 2019, DiPaola and her administration immediately interfered with the construction of Emerson Station, despite its final, non-appealable receipt of site plan approvals. The Borough refused to issue demolition permits for any lot, 68a ¶ 18; repeatedly conditioned building permits upon nonexistent and unreasonable demands, 73a ¶ 25-30; and imposed new conditions on approvals that were never part of the final, non-appealable resolution issued by the land use board, 68a, ¶ 16.

ERUR filed an application in aid of litigants' rights seeking redress for Emerson's violations of the Conditional Judgment and, on March 16, 2021, the Court granted in part, appointing a "Mt. Laurel Implementation Monitor" and compelling that "all applications for building permits, or for other governmental approvals, sought by [ERUR] from the Borough of Emerson shall be reviewed . . . on an expedited basis." 35a. The trial court noted it was,

> concerned by the apparent failure of the timely development of affordable housing in the Borough and is more concerned that the development was directly approved and ordered by the court. The undisputed facts now presented reveal that the Borough has failed to provide evidence of final satisfaction of all conditions identified and referenced under the court's January 25, 2019 order of conditional final judgment of compliance and repose. Over two years have passed since the entry of the court's January 25, 2019 order. The Settlement Agreement executed in this is matter during November 2017 identified Redeveloper's property, the "Block 419 Project," as the parcel within the municipality designated the majority of its third round realistic development potential. The Borough was obligated under the very specific terms of the Settlement Agreement to assist in the development of the Block 419 Project to assure the timely development of affordable housing units and timely compliance with the Borough's Constitutional obligations under the Mount Laurel doctrine... However, [] the record reveals that the Borough has failed to provide evidence of final compliance and failed to request further extension for timely compliance. Redeveloper and FHSC have provided sufficient information revealing that the Borough has not adequately proceeded with fulfillment of the terms and obligations under the approved Settlement Agreement.

42a. On April 22, 2021, the trial court again found that "Emerson has not proceeded to fulfill the terms and obligations of the approved Settlement Agreement," and appointed the Hon. Harry G. Carroll, J.A.D. (Ret.), as an implementation monitor "for the purpose of ensuring that the Settlement Agreement and Conditional Final Judgment are fully complied with and that the Mt. Laurel housing necessary for Emerson to fulfill its constitutional obligation

be constructed on an expedited basis as contemplated by the Settlement Agreement and Conditional Final Judgment." 46a.

g. Emerson Refuses To Hear ERUR's Application For The Off-site Property, Which The Special Master Found To Be Suitable And Developable To Satisfy The Borough's Obligations Under The Conditional Judgment

Consistent with the prior administration's direction and agreement to construct the seven Off-site Units at the Off-site Property, Block 610, Lot 1, following Mayor DiPaola's election, ERUR continued to communicate with Emerson regarding the property. On May 30, 2019, an ERUR representative reminded the administration that they had "recently purchased" properties including Block 610, Lot 1, and noted its intent to have certain lots "demolished" but that, for the time being "129 Kinderkamack Rd - Block 610, Lot 1 is to stay occupied." 204a. Indeed, as Mayor DiPaola confirmed in a public statement as late as February 2020, the seven Off-site Units would be placed across the street from Block 419, opposite the Dunkin' Donuts.

> Regarding the planned 29 affordable housing units, 22 will be incorporated into Emerson Station as three-, two-, and one-bedroom units. The remaining seven units, DiPaola said, will comprise a standalone building across from Dunkin' Donuts.

549a.

On August 11, 2021, ERUR prepared a Preliminary and Final Site Plan for Emerson Station, Block 610, Lot 1, 212a, and submitted an application for

development to Emerson's land use board, 276a. Although the application was scheduled for a hearing, on November 1, 2021, Emerson's counsel advised ERUR that the application would not be considered because it purportedly required an "amendment to the Redevelopment Plan." 293a. Emerson asserted that "[u]nless and until the Mayor and Council adopt an amendment to the Redevelopment Plan to include [ground floor residential], the application cannot proceed." 294a.

Tellingly, Emerson entirely failed to address the Off-site Property in its statutory midpoint review dated June 1, 2020. 544a. Despite the judgment commanding that Emerson address its "status report as to its implementation of its Plan and an analysis of whether any unbuilt sites or unfulfilled mechanisms continue to present a realistic opportunity," 245a, and incorporation of the Special Master's explicit demand that at the "Borough will show at the midpoint review how it will provide a realistic opportunity for the remaining 7 units" through the "off-site" mechanism, 165a, the Borough's two-page midpoint review does not once mention the Off-site Units. 545a. Instead, it notes "no affordable units have been physically rehabilitated or constructed within the Borough." Ibid.

In a February 28, 2022, report on "Off-Site Affordable Housing Production Block 610/Lot 1," Special Master Lonergan determined, in

connection with ERUR's application to the Implementation Monitor, that the use was suitable and the Court should exercise its powers to grant site specific relief at the Off-site Property:

> Pursuant to the NJ Supreme Court-upheld 'site suitability' regulations of the Council on Affordable Housing ("COAH"), I do find that the proposed location of the seven (7) off-site affordable units appears to be approvable, available, developable and suitable as those terms are defined. . . The site proposed for seven (7) multi-family affordable housing units also appears 'suitable' as the multi-family use will be adjacent to compatible land uses. . . The Borough has found that at least preliminarily, the site is not 'approvable' due to a previously adopted Redevelopment Plan and resulting Ordinance 1535-16 which requires commercial uses on the first floor of a mixed-use (commercial/residential) building. As the Developer has proposed no commercial use on the first floor of the proposed multi-family residential structure, the Borough believes the Developer would first need Borough approval for a revision in the Redevelopment Plan . . . In my analysis of the site's approvability, it's important to note that COAH's regulations state that a site may be 'approvable' for affordable housing although not currently zoned for low and moderate income housing.

356a. The Special Master further offered the opinion to the Implementation Monitor that compliance with the ordinary approval process would interpose "impediments to the Developer's off-site affordable housing production proposal" that may frustrate the ability to "move the proposal ahead in a timely, efficient way." 358a. The Special Master concluded:

> I am guided by the Court's stated charge to assist in eliminating impediments to the Developer's off-site

> affordable housing production proposal in a timely, efficient way to assist in the production of much needed affordable family rental housing in the Borough. This is especially true in light of the fact that Judge Padovano approved Emerson Borough's Housing Element and Fair Share Plan by Order dated January 25, 2019 and, more than three years later, there remain significant outstanding conditions of compliance for the Borough to address As discussed below, I would recommend that Your Honor provide the Developer with site-specific relief to permit the site to be developed solely as multi-family residential affordable housing without the requirement for first floor commercial uses. . . I find the fact of the existing small and irregular lot size, COAH's charge to eliminate cost-generative features of inclusionary zoning and the Court's specific grant of site specific relief to Your Honor, outweigh the Borough's desire for first floor commercial uses at this site.

358a-359a.

To date, Emerson remains in violation of the court's judgment: it has not approved the construction of the Off-site Units or advised the court, the Special Master, or the Implementation Monitor as to how it intends to offer a reasonable probability of providing the ordered seven units. The only plan ever offered by Emerson is the one at Block 610, Lot 1, selected by the prior administration, acquired by the developer, and recommended by the Special Master. But Emerson has refused to hear ERUR's application for same. Emerson's violations of the court's order warrant remedial action.

PROCEDURAL HISTORY

On July 8, 2015, the Borough of Emerson filed a Verified Complaint seeking a declaratory judgment of compliance with its Mount Laurel obligations. 22a. On November 21, 2017, Emerson settled with FSHC, 163a, which settlement was approved by the trial court and incorporated into a Conditional Final Judgment of Compliance and Repose dated January 25, 2019, 239a.

On March 16, 2021, the trial court granted ERUR's motion in aid of litigant's rights and found that Emerson had violated the Judgment and settlement agreement through an "apparent failure of the timely development of affordable housing . . . approved and ordered by the court." 35a. Through an order dated April 22, 2021, the trial court appointed Hon. Harry Carroll, J.A.D. (Ret.) as an implementation monitor to "oversee all actions of the Parties with regard to the Project with the overriding goal and purpose of expediting construction and completion of the Project . . . by eliminating all impediments which either stop or delay such construction." 45a.

On January 30, 2023, the trial court clarified and amended the order appointing the implementation monitor by stating that he did not have authority to grant site plan or use variance relief without further order of the court. 109a. On March 1, 2023, ERUR filed a motion in aid of litigants' rights with respect to the Off-site Property, seeking to enforce the conditional judgment and the

location of the Off-site Property at 610, Lot 1 as instructed by the prior administration. 62a.

On May 12, 2023, the trial court denied ERUR's motion. It held that because the specific location of the Off-site Property was not set forth as Block 610, Lot 1 in the judgment, no violation had purportedly occurred. Notwithstanding that Emerson had failed to build the required number of affordable units, or identify any other off-site location, the trial court declined to order any remedies:

> The court is certainly concerned ed by the apparent failure of the timely development of affordable housing in the Borough. It is undisputed the Borough has failed to provide evidence of final satisfaction of all conditions identified and referenced under the court's January 25, 2019 order of conditional final judgment of compliance and repose which was entered over four years ago. However, the argument and information presented in movant's papers, i.e. the certifications of Klugmann and former Mayor Lamatina, does not provide the court with evidence warranting the relief now sought. It is undisputed that the Settlement Agreement executed in this matter during November 2017 did not identify Redeveloper's Off-Site Property located at Block 610, Lot 1 as the parcel specifically designated for the seven subject units. The court concludes that there is nothing in the record presented which supports the somewhat extreme relief requested, that is, an order to compel the Borough to grant site plan approval (including variances) for the construction of seven affordable units on Block 610, Lot 1 without the Borough's Land Use Board's approval and without amendment to the Redevelopment Agreement.

12a. It asserted that there "is nothing in the record which compels approval of the Off-Site Project when other avenues of compliance are available to the Redeveloper." 13a. ERUR moved for reconsideration on June 1, 2023, 360a, which was denied on August 28, 2023, 14a.

On September 22, 2023, ERUR filed a notice of appeal. 555a.

LEGAL ARGUMENT

I. THE AFFORDABLE HOUSING CONDITIONAL JUDGMENT IS PROPERLY ENFORCED THROUGH R. 1:10-3. CONSIDERING THE HISTORY OF RECALCITRANCE IN SECURING COMPLIANCE WITH AFFORDABLE HOUSING MANDATES, IT IS ESSENTIAL THAT COURTS USE AVAILABLE TOOLS TO COMPEL OBEDIENCE BY FOOT-DRAGGING MUNICIPALITIES (10A)

R. 1: 10-3 provides, in relevant part:

> Notwithstanding that an action or omission may constitute a contempt of court, a litigant in any action may seek relief by application in the action ... The court in its discretion may make an allowance for counsel fees to be paid by any party to the action to a party accorded relief under this rule.

"Rule 1:10-3 is a device enabling litigants to obtain enforcement of a court order." Milne v. Goldenberg, 428 N.J. Super. 184, 198 (App. Div. 2012) (citing In re N.J.A.C. 5:96 & 5:97, 221 N.J. 1, 17 (2015)). It enables a court to "command[] a disobedient party to comply with a prior order," id. and allows "litigants to obtain enforcement of a court order." Lipsky v. N.J. Ass'n of Health Plans, Inc., 474 N.J. Super. 447, 463 (App. Div. 2023). "Once the court determines the non-compliant party was able to comply with the order and unable to show the

failure was excusable, it may impose appropriate sanctions." Milne, 428 N.J. Super. at 198. "The scope of relief in a motion in aid of litigants' rights is limited to remediation of the violation of a court order." Abbott v. Burke, 206 N.J. 332, 371 (2011). Traditionally, parties to Mount Laurel consent judgments have sought to protect their rights through motions to enforce litigants' rights. See Toll Bros. Inc. v. Twp. of W. Windsor, 303 N.J. Super. 518 (Law Div. 1996), aff'd o.b., 334 N.J. Super. 109 (App. Div. 2000), certif. granted in part, 167 N.J. 599, 600 (2001), aff'd, 173 N.J. 502 (2002).

The Supreme Court has repeatedly cautioned that a systemic threat to judicial authority emerges when litigants—particularly public officers—flout the trial court's commands, warranting immediate coercive action. The "orderly processes of the administration of justice is necessarily dependent on full compliance with all lawful orders of the courts." In re Tiene, 17 N.J. 170, 181 (1954). In courts' relations with other units of state or local government, the rule of law hinges on courts' ability to "compel immediate compliance if the court is to be equal to its responsibility under government." In re Fair Lawn Educ. Ass 'n, 63 N.J. 112, 115-16 (1973). Indeed, "[i]t is of no moment that the recalcitrant defendants are public officials," remedies ranging from enforcement orders to contempt are "universally recognized as particularly appropriate in the case of those, including public officials, who have willfully violated court orders or

judgments in the nature of mandamus requiring the performance of duties imposed by law." Essex Cnty. Bd. of Taxation v. Newark, 139 N.J. Super. 264, 271 (App. Div. 1976). Failure to vigilantly police such public wrongs risks further "willfulness, an indifference to the court's command . . . challeng[ing] the authority of government . . . ." Dep't of Health v. Roselle, 34 N.J. 331, 337(1961). "[C]ourts accordingly have no choice, if they are to do their duty in administering justice, but to punish" those who "deliberately flouted the lawful subpoenas and orders of the courts." Tiene, 17 N.J. at 181. Thus, when a litigant disregards an order's requirements, it "mandates a coercive remedy." In re Fair Lawn Educ. Ass 'n, 63 N.J. at 116.

Appellate courts "review a court's order enforcing litigant's rights under Rule 1:10-3 for an abuse of discretion." Savage v. Tp. of Neptune, 472 N.J. Super. 291, 313 (App. Div. 2022). "An abuse of discretion occurs when a decision was 'made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis.'" Id. (quoting Flagg v. Essex Cnty. Prosecutor, 171 N.J. 561, 571 (2002)). "[A] judge's legal decisions are subject to [appellate court's] plenary review." Milne, 428 N.J. Super. at 197-98.

II. IN VIEW OF (1) EMERSON'S DECADES OF RECALCITRANCE; (2) ADMITTED NONCOMPLIANCE WITH THE FIVE-YEAR-OLD MANDATE OF THE JUDGMENT; (3) REFUSAL TO ADVANCE THE OFF-SITE UNITS AGREED UPON BY THE PRIOR ADMINISTRATION; AND (4) FAILURE TO IMPLEMENT WITH THE SPECIAL MASTER OR FSHC A REASONABLE ALTERNATIVE FOR THE OFF-SITE UNITS, THE TRIAL COURT SHOULD HAVE FOUND A VIOLATION AND GRANTED *MOUNT LAUREL II* REMEDIES (11A, 21A)

Emerson now, years after entry of the Conditional Judgment and despite the parties' settlement agreement, claims that variances and zoning amendments are required to move forward with the Off-site Units at Block 610, Lot 1, purportedly including lack of ground floor commercial use, lot size, and setback purported requirements, among others. It further alleges that it purportedly need not even consider any application for variances until the redevelopment plan is amended. 293a. Emerson's newly asserted pretextual justifications, concocted to further delay and obstruct ERUR's affordable-housing project, are precisely the kind of local "cost-generating" procedures that the Supreme Court demanded municipalities eliminate, and that the court is empowered to circumvent.

Our courts have long faced municipal recalcitrance over affordable housing and the Supreme Court has conferred wide authority to deter it and bring municipalities into compliance:

> Papered over by studies, rationalized by hired experts, the ordinance at its core is true to nothing but Mt. Laurel's determination to exclude the poor. Mt. Laurel is not alone; we believe that there is widespread non-compliance with the

> Constitutional mandate of our original Opinion in this case. . . . We have learned from experience, however, that unless a strong judicial hand is used, Mt. Laurel will not result in housing, but in paper, process, witnesses, trials and appeals.

S. Burlington County N.A.A.C.P. v. Twp. of Mt. Laurel, 92 N.J.158 (1983).

As set forth below, the local zoning laws must yield to the constitutionally-mandated, Court-ordered construction of affordable housing required by law. Emerson cannot reap the benefit of protection from Builders' Remedy lawsuits if it continues to obstruct the very affordable-housing development it relied upon in Court for such immunity. As repeatedly held by the Supreme Court, constitutional constraints supersede the municipality's claim to local control over zoning, and Courts have routinely ensured constitutional compliance by preempting the role of the local zoning authorities and issuing whatever local variances or approvals are needed to complete the project, conditioned only upon "site suitability." Here, site-suitability for the Off-site Building was admitted by Emerson, and further explained in the certifications of ERUR principal Jack Klugmann and former Mayor Louis J. Lamatina. The parties always understood the Off-site Building would be constructed on the Off-site Property with seven units, and Emerson conceded that the site was suitable for the Off-site Building.

a. The Constitutional Right To Fair Housing Prevails Over Any Local Ordinance—Including Those Purporting To Regulate Particular Uses, Setbacks, Or Size—Which Would Otherwise "Significant[ly] Imped[e]" An Affordable-Housing Development (9a, 17a)

The exercise of local control over "[l]and use regulation [that] is encompassed within the state's police power" is nevertheless constrained by the New Jersey Constitution. S. Burlington County N.A.A.C.P. v. Mount Laurel, 67 N.J. 151, 174-75 (1975) ("Mount Laurel I"). "The constitutional power to zone, delegated to the municipalities subject to legislation, is but one portion of the police power and, as such, must be exercised for the general welfare." S. Burlington County N.A.A.C.P. v. Mount Laurel, 92 N.J. 158, 208 (1983) ("Mount Laurel II"). On the other hand, local zoning decisions that are "contrary to the general welfare [are] invalid." Mount Laurel I, 67 N.J. at 175.

When a local ordinance, procedure, or zoning decision "by a municipality affects something as fundamental as housing, the general welfare" is implicated, it triggers constitutional constraints. Mount Laurel II, 67 N.J. at 208. Correspondingly, the general welfare is imperiled whenever a local decision functions to obstruct affordable housing: "It is plain beyond dispute that proper provision for adequate housing of all categories of people is certainly an absolute essential in promotion of the general welfare required in all local land use regulation." Mount Laurel I, 67 N.J. at 179. Thus, the municipality exceeds its statutory authority, and violates the constitution, when it enforces local land-

use restrictions that contravene the general welfare by depriving the public of affordable housing. See id.

The "remedial consequences" of a municipality's obstruction of affordable housing through local zoning decisions include, among others, the judicial "elimination of unnecessary cost-producing requirements and restrictions." Mount Laurel II, 92 N.J. at 217. "[M]unicipalities, at the very least, must remove all municipally created barriers to the construction of their fair share of lower income housing." Id. at 258-59. Some examples of "cost-generating provisions" that impede the construction of affordable housing include "large lot zoning …, limitations on multi-bedroom homes and units, … excessive minimums for frontages, setbacks, front yards, and home sizes." Id. at 295. In other words, where a municipality's zoning decisions function to obstruct a developer's affordable-housing construction that is necessary to meet the municipality's fair housing obligations, a court must set aside these purported municipal "requirements" because they generate unconstitutional costs that delay and hinder the right to fair housing. See Toll Bros., Inc. v. Twp. of Windsor, 173 N.J. 502, 557-58 (2002) (ordering township to waive planning board's "sewer construction and financing requirements [as] unduly cost-generative" because they "presented a 'significant impediment' to the potential development of affordable housing").

b. The Local Zoning Authority's Ordinary Power Over The Grant Or Denial Of A Variance Is Supplanted By The Court's Remedial Authority, And Must Be Exercised Based Not Upon The Local Standards For Grant Of An Ordinance, But Merely "Site Suitability" (9-13a)

When a development significantly contributes to a municipality's unmet affordable-housing obligations, it is not the local land use standards that govern approval of the proposal, but merely the requirement that the Court find that the site for affordable housing is "suitable." Mount Laurel II, 92 N.J. at 276 (holding that where a municipality fails to comply with its affordable-housing obligation, a local land use prohibition on a particular non-permitted use absent a variance must be circumvented and, "assuming a suitable site is available, they must be allowed."). The Supreme Court analogized this power of the court to act in the place of local zoning authorities as similar to other instances where courts compel local land use decisions:

> the ordinance is effectively amended to permit a use explicitly excluded, or in some cases to exclude one explicitly permitted. Sometimes the action of the court comes even closer to ordering, indeed declaring, that an ordinance has been changed, see West Point Island Ass'n v. Township Committee of Dover Twp., 54 N.J. 339 (1969), where this Court, in effect, affirmed the decision of a trial court ordering a municipality to take certain action, which action could be taken only by the adoption of a resolution that the municipality had not adopted. As noted above, we did not hesitate, in Madison, to order amendment of the municipal zoning ordinance. Similarly, in Lusardi v. Curtis Point Property Owners Ass'n, 86 N.J. 217 (1981), relying on the judiciary's power to regulate zoning in the public interest, we effectively modified an ordinance that conflicted with the

> state's policy of affording recreational opportunities on the Atlantic seafront for as many citizens as possible.

Id. at 288 (citing cases where court amended or modified local ordinances even though the modified ordinance was not adopted by resolution of the governing body). Indeed, the very concept of "site-specific relief," refers to the Court's ability to authorize the construction of affordable-housing, despite a contrary ordinance. See Shire Inn, Inc. v. Borough of Avon-By-The-Sea, 321 N.J. Super. 462, 467 (App. Div. 1999) (noting "site specific relief [would] grant plaintiff affirmative zoning for the property as a rooming house" despite the use being prohibited under the zoning ordinance).

For example, where a municipality barred mobile homes as a permitted use, and the board rejected the affordable-housing project based on the proposed mobile-home use, the Court ordered issuance of the governmental approval nonetheless because the site was "plainly suited for mobile home development." Mount Laurel II, 92 N.J. at 308; Bi-County Dev. of Clinton v. Borough of High Bridge, 174 N.J. 301, 318 (2002) (relying upon Samaritan Center, Inc. v. Borough of Englishtown, 294 N.J. Super. 437, 440 (Law Div. 1996), where the court compelled municipal sewer connection to eliminate cost-generating municipal requirements that otherwise obstructed an affordable-housing development); Toll Bros., 173 N.J. at 560. In Toll Brothers, the Court affirmed

the trial court's circumvention of the typical local land use process by directly awarding a governmental approval based upon the court's analysis of site suitability. Id. at 560. The Supreme Court observed that, "[u]nder the zoning in place at the time, Toll Brothers' plan necessarily would require variances. . . [and the] site was not a good candidate for variances because of the size of the property." (internal quotation marks omitted). Faced with the typical variance requirements under the local zoning laws, the court was empowered to sidestep the Planning Board and directly issue approvals to ensure affordable housing. See id.; Dowel Assocs. v. Harmony Twp. Land Use Board, 403 N.J. Super. 1, 24 (App. Div. 2008) ("While we acknowledge that, under a normal scope of review, the record would support the Board's resolution and denial of subdivision approval . . . [but here] the Township had already committed the site to satisfy its affordable housing obligation, its Land Use Board can no longer protect its uniquely local interest or exclusively exercise its right to prevent approval in the way a local Planning Board otherwise would.").

With this clear guidance from the appellate courts, trial courts have shown no hesitation in making decisions in the place of local authorities on developer's applications for governmental approvals with respect to affordable-housing developments. See Cranford Development Associates, LLC v. Township of

Cranford, 445 N.J. Super. 220, 228 (App. Div. 2016); Toll Bros., 173 N.J. at 560. The governing test was not whether the applicant met the traditional local requirements for a variance, but whether "the site was unsuitable for the project." Id. at 234. Indeed, the Court or its designee may consider items such as setback, height, and other appropriate "planning considerations," only in the context of the analysis of whether the site was "suitable." Id.

Critically, a finding of bad faith or recalcitrance by the municipality is not required: the evidence shall "include proof of the municipality's fair share of the regional need and defendant's proof of its satisfaction. Good or bad faith, at least on this issue, will be irrelevant." Mount Laurel II, 92 N.J. at 222.

c. The Trial Court Erred As A Matter Of Law When It Concluded That No Violation Of The Judgment Occurred By Emerson's Failure To Proceed With The Seven Units At The Off-Site Property Because Block 610, Lot 1 Was Not Identified In The Judgment. What Is Relevant Is That—In The Five Years The Judgment Has Been In Place—Emerson Still Has Not Provided A Realistic Opportunity For Construction Of The Off-site Affordable Units, In Violation Of The Judgment (11-12a, 17a, 21a)

In its May 12, 2023 Opinion and Order, the trial court appeared to consider that the years' long delay was not sufficient to grant the remedy requested. The Court noted "[i]t is undisputed the Borough has failed to provide evidence of final satisfaction of all conditions identified and referenced under the court's January 25, 2019 order of conditional final judgment of compliance and repose which was entered over four years ago." 11a. However, it held this was

purportedly insufficient: "While the delay in final compliance in development of agreed upon affordable housing is troublesome, the court here does not find that the Borough's actions (or inaction), when reviewed in the broad scope of all of the facts and circumstances presented, does not now warrant automatic site plan approval of the Off-Site Property." 12a. The Court also appeared to rely upon the fact that "the record reveals that the Borough has not engaged in exclusionary zoning." Ibid.

First, in assessing the "delay," the trial court narrowly examined the—albeit still lengthy—four years of noncompliance, it did not account for the decades of obstruction and longstanding pattern of exclusionary zoning that persisted from Judge Harris' 2001 order through today. Then, the court held Emerson has "steadfastly resisted taking affirmative steps to provide realistic opportunities for affordable housing . . . The time has come to end this constitutional breakdown." 368a. It noted Emerson "has woefully failed to comply" with its obligations and imposed "the exceptional affirmative remedies of the type outlined in Mt. Laurel II." 385a. It granted relief included "restraining certain land development activities" in the Borough. 371a. Emerson's conduct was "ghastly, embarrassing, and sorely in need of remediation." 396a. A year later, the court confirmed "Emerson officials have relentlessly preserved and exacerbated economic and class segregation

throughout the Borough" culminating in a "extreme pattern of exclusionary efforts." 423a. The court faulted "elected officials" who are "sworn to uphold the Constitution [and] may not avoid a constitutional duty by bowing to the political effects of prejudice and self-interest." 425a. Then, the court noted that there "is not a single unit of affordable housing in Emerson." 396a. These failures are compounded by the fact that, fifteen years later, when Emerson finally prepared a plan to remedy these constitutional deficiencies and obtained a Court-ordered judgment, candidate DiPaola campaigned on stopping affordable housing, won, and lived up to her promise to the electorate. This led the trial court to note the "apparent failure of the timely development of affordable housing in the Borough" and appoint an implementation monitor for Emerson Station. 35a. As Emerson itself noted in 2020, [a]s of July 1, 2020, no affordable housing units have been physically rehabilitated or constructed within the Borough." Thus, when the trial court held that the delay in constructing the Off-site Units was not so extreme as to warrant Mount Laurel II remedies, it failed to consider the context and history of Emerson's noncompliance, and thereby downplayed the violations. In review of a discretionary decision, the court "examines whether there are good reasons for an appellate court to defer to the particular decision at issue." State v. Burney,

255 N.J. 1, 20 (2023). The trial court's lack of consideration of the continuing history of exclusionary zoning militates against such deference.

Second, the trial court rested its decision on the fact that the judgment does not expressly state Block 610, Lot 1 is the location for the Off-site Units, ignoring the fact of the violation of Emerson failing to construct the Off-site Units. This was an error of law. The judgment does not specify the location of any of the Court-ordered affordable housing. Indeed, it only references "Block 419 redevelopment" once concerning the need to have "family rental units," without mentioning the number of affordable units. 243a. Instead, it set the "Realistic Development Potential (RDP)" of "53 units," without specifying where each unit would be located. The location was set by agreement of the parties and there is no dispute of fact on the record before the trial court that ERUR and Emerson had agreed to locate the seven Off-site Units at Block 610, Lot 1. Both Emerson's representative and ERUR's representative submitted sworn certifications that Emerson selected Block 610, Lot 1 for the Off-site Property, instructed ERUR to purchase it, and ERUR did so in reliance thereon. 82a ¶¶ 10-14, 12; 79a ¶ 46.

Third, the violation was uncontested. Emerson has not constructed the RDP of 53 units. The Off-site mechanism of seven Off-site Units identified in the Special Master's Report, 346a, Settlement Agreement, 165a, and resolution

granting governmental approval, 183a ¶ (g), each preceding the Conditional Judgment, has not been implemented by the Borough as agreed upon. In the five years since entry, Emerson has no plan to satisfy the Off-site affordable units, and thus has failed to comply with the RDP of 53 units set forth in the Judgment.

d. The Only Location Ever Identified By The Borough As Providing A Realistic Opportunity To Construct The Off-site Affordable Units Was Block 610, Lot 1. Emerson Failed To Come Forward At The Midpoint Review, Or At Any Time, To The Special Master, Implementation Monitor, Or FSHC With Any Viable Alternative (3-7a, 17-18a, 20-21a)

The trial court seemingly placed the burden on ERUR to demonstrate the Off-site Property Block 610 as the location for the seven Off-site affordable units was set forth in the judgment, itself. This shifts the burden. It is the Borough's obligation as part of the Settlement Agreement and Judgment to provide a realistic opportunity for satisfaction of the Borough of Emerson's Fair Share of low and moderate-income housing, including the location for the seven Off-site units. See In re Adoption of N.J.A.C. 5:94 & 5:95 By N.J. Council On Affordable Hous., 390 N.J. Super. 1, 73 (App. Div. 2007) ("[T]he essence of the Mount Laurel doctrine . . . requires that municipal land use ordinances create a realistic opportunity" for affordable housing); In re Six Month Extension of N.J.A.C. 5:91-1 et seq., 372 N.J. Super. 61, 100 (App. Div. 2004) (holding that the municipality's proposal at the time of application for certification must be compared to its actions at the midpoint review, with "a realistic opportunity

review," meaning that "there is in fact a likelihood--to the extent economic conditions allow--that the lower income housing will actually be constructed."); N.J.S.A. § 52:27D-313 (requiring that the municipality provide a "realistic opportunity review at the midpoint of the certification period."). The undisputed record evidence is that the Borough considered with its professionals the available land for development and decided the Off-site Property located at Block 610, Lot 1 would be the selected mechanism for satisfaction of that component of the Judgment. 81a ¶¶ 6, 8. Likewise the court-appointed Special Master opined that the Off-site Property was "approvable, available, developable and suitable," 356a, and set aside the Borough's claim that it was noncompliant with the ground floor commercial requirement as "cost-generative features." 358a-359a. Considering that more "than three years later, there remain significant outstanding conditions of compliance for the Borough to address," the special master opined that these "impediments" should be set aside to "permit the site to be developed solely as multi-family residential affordable housing without the requirement for first floor commercial uses." Ibid. In the five years that have now elapsed since the Conditional Judgment was entered, Emerson has never proposed a realistic alternative to Block 610, Lot 1. By simply vetoing the only proposal ever selected—for which the Redeveloper purchased property at the Borough's direction to accommodate it—Emerson will

succeed in ensuring that the affordable housing is never built. It has not approached the Special Master, Implementation Monitor, or FSCH to fix an alternative site for the Off-site units. It apparently has not undertaken a search for available, developable land. It was utterly silent at the midpoint review. 544a. The reality is that Emerson has no plan, and certainly no realistic one, to complete the affordable housing it bound itself to in the Judgment to gain the benefit of protection from builders' remedy lawsuits, just the hope that it will continue to be able to skirt its obligations as it has for the last two decades. In improperly placing the burden on ERUR to justify a written, enforceable order requiring the Off-site Units be located at Block 610, Lot 1, the trial court overlooked that it was Emerson's burden to select a location to provide a realistic opportunity for the development of affordable housing and the only location ever identified and selected by the Borough—based on the uncontested record evidence—was Block 610, Lot 1.

e. The Trial Court Held That "Automatic Approval" Was Too Extreme Of A Remedy, Overlooking The Various Well Accepted Vehicles Available To Secure Compliance With The Judgment (11-13a, 16-17a)

The trial court characterized the only relief before it as "automatic site plan approval" of the Off-site Property. Not so. Well established precedent requires a hearing on "site suitability," however, any cost generative measures will be set aside. When a developer proposes a development substantial amount of

affordable housing and the municipality is court ordered to build such housing, either as a result of developer's outright victory or, as here, through a settlement and final judgment, there must be a hearing regarding site suitability: "i.e. . . . [whether the] site is environmentally constrained or construction of the project would represent bad planning." Toll Bros. v. Twp. of W. Windsor, 173 N.J. 502, 537 (2002). While there must be a public hearing, when court-ordered affordable housing is involved, it is not a planning board hearing based on the municipal zoning ordinance, it is a court or implementation monitor hearing informed by a report of the special master solely on the issue of site "suitability." Cranford Dev. Assocs., LLC v. Twp. of Cranford, 445 N.J. Super. 220, 234 (App. Div. 2016) (site suitability for affordable housing assessed by court after special master report). The Court analyzes "the land's suitability and the need for lower income housing," Mount Laurel II, 92 N.J. at 302, and in making this determination "the trial court and master should make as much use as they can of the planning board's expertise and experience so that the proposed project is suitable for the municipality," id. at 280; id. ("municipal planning board . . . [may be] closely involved").

Far from automatic approval, the recognized relief affords Emerson every opportunity to contest suitability of the property for the project in an open public hearing. As the Appellate Division held in Dowel Associates, once a

municipality "committed the site to satisfy its affordable [housing] its Land Use Board can no longer protect its uniquely local interest or exclusively exercise its right to prevent approval in the way a local Planning Board otherwise would," and it is instead subject to the separate test of site suitability. 403 N.J. Super. 1, 24 (App. Div. 2008). This procedure allows courts and implementation monitors to respect local concerns regarding suitability while being empowered to "eliminat[e] unnecessary cost-producing requirements and restrictions," Mount Laurel II, 92 N.J. at 217, including, among others, "minimums for frontages, setbacks, front yards, and home sizes." Id. at 295. Any local zoning requirement that imposes a "significant impediment" to the court-ordered affordable housing is set aside to accomplish the constitutional objective. Toll Bros., Inc. v. Twp. of Windsor, 173 N.J. 502, 557-58 (2002).

f. The Trial Court's Assertion That The Redeveloper Should Have Sought Alternative Relief Through A Variance Overlooks The Municipality's Claim That There Was No Mechanism Available For Variance Relief By A Zoning Board, Rather The Only Option Was The Municipal Council Amending The Redevelopment Plan (13a, 21a)

The trial court asserted the Redeveloper could have pursued alternatives including variance relief. The law is clear that there is no requirement to first seek, and be denied, zoning approval before obtaining relief from the Court. In, Toll Bros., 173 N.J. at 559, the Supreme Court categorically rejected the municipality's argument that the developer of affordable housing was required

to "first seek approval for its development from the Township, thereby denying it the opportunity to hear the application." Instead, the developer had no obligation to "apply[] to the Planning Board," including because it was "not a good candidate for variances" considering the size and shape of the property. Following Toll Bros, the Appellate Division in Cranford Development Associates, LLC, 445 N.J. Super. at 228, rejected the claimed need to "exhaust any local administrative remedy." When the municipality "instructed [developer] CDA to submit its proposal to the Planning Board," the trial court "properly rejected the Township's claim that CDA failed to exhaust administrative remedies by making a rezoning application to the Board." Id. The Appellate Division affirmed, holding the "Township's arguments on this point are without sufficient merit to require further discussion." Id.

Moreover, as set forth above here, the trial court overlooked that the Redeveloper did seek a variance, but Emerson took the position that no variance relief was possible under the existing redevelopment plan. It held any hearing on a variance in abeyance until such time as the Emerson council changed the zoning ordinance or redevelopment plan. The "alternative" proposed by the Court was already pursued and futile; it was no basis to deny relief.

CONCLUSION

For the foregoing reasons, the court should reverse the trial court's decision to decline to enforce the judgment, and remand for a site suitability hearing with respect to the Off-site Property.

Respectfully submitted,

s/Joseph B. Fiorenzo
Joseph B. Fiorenzo

Dated: February 21, 2024

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IN THE MATTER OF THE APPLICATION OF THE BOROUGH OF EMERSON, NEW JERSEY, FOR A DECLARATORY JUDGMENT,

Respondent.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
APPEAL NO.: A-238-23

CIVIL ACTION

ON APPEAL FROM:

Order of the Law Division
Bergen County

Docket No.: BER-L-6300-15

SAT BELOW: Hon. Gregg A. Padovanno, J.S.C.

BRIEF OF PLAINTIFF-RESPONDENT BOROUGH OF EMERSON IN OPPOSITION TO DEFENDANT'S APPEAL OF THE TRIAL COURT'S DENIAL OF ITS MOTION IN AID OF LITIGANT'S RIGHTS

On the Brief: Brian T. Giblin, Sr., Esq.
Brian T. Giblin, Jr., Esq.

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PRELIMINARY STATEMENT

This appeal comes before the Court pursuant to the Trial Court's Order denying "Emerson grant site plan approval for the construction of a seven unit, fully affordable housing building on Block 610, Lot 1, pursuant to the Settlement Agreement, without the need for further variance or amendment to the Redevelopment Plan." The requested relief itself fails on its face, as 129 Kinderkamack Road, Block 610, Lot 1, is not mentioned in the Settlement Agreement.

After erroneously quoting, at length, Judge Harris' decision, written *over twenty years ago*, the crux of ERUR's appeal argues a theory of estoppel based on a purported "back-room deal" made verbally in 2017 between Louis Lamatina, the former Mayor of Emerson, and ERUR, that was never memorialized in *any* written agreement between the Borough and ERUR, regarding a property that neither of the parties owned.

ERUR further argues that the Court should act in place of a duly elected Mayor and Council and the local land use board to amend the Borough's redevelopment ordinance and grant any and all approvals, variances and waivers necessary for the Redeveloper to build seven (7) residential units on a small, undersized, irregularly shaped lot acquired by the Redeveloper, after a "site suitability" hearing.

The import of ERUR's argument is that if the site contains *any* affordable housing, it should not be required to abide by either existing zoning ordinances nor the mandated land use board applications. ERUR argues that the Borough "contemplated and agreed to" the seven (7) units being placed, despite it not being in any resolution, the developer's agreement, the redevelopment plan ERUR *itself* negotiated, the settlement agreement, nor the agreement between the Borough and Fair Share Housing Center, or memorialized in any other writing. Rather, ERUR relies on a hearsay certification from former Mayor Louis Lamatina, that the Borough "agreed" to put seven units on the property. It is respectfully submitted that the former Mayor did not have the authority to bind the Borough to such an agreement.

The appeal further asks the Court to disregard and usurp the following powers of the Borough of Emerson; 1) Authority to adopt Ordinances pursuant to N.J.S.A. 40A:6-6; 2) Authority of the governing body to Zone pursuant to N.J.S.A. 40:55D-62; 3) Authority to designate areas in need of redevelopment pursuant to N.J.S.A. 40A:12a-1 to 89; 4) Authority to enter Redevelopment Agreements pursuant to N.J.S.A. 40A:12a-1 to 89; and, 5) Authority of local land use board to hear and approve site plan applications pursuant to N.J.S.A. 40:55D-25.

ERUR now appeals both the denial of the "automatic approval of seven off-site units," and its Motion for Reconsideration of that Order, wherein it claims the relief it sought originally, which is noticeably absent and completely different from their original notice of Motion and proposed Order, was for a Hearing on "site suitability" and thereafter "automatic approval." Not only is this improper under the standard of reconsideration and the within appeal, but it is entirely without merit.

First, the situation in Emerson from over 20 years ago that ERUR discusses once again, at length, is not before the Court, and has nothing to do with the issue at hand. In fact, the Court may take Judicial notice that the RDA and related documents outline a plan the Borough VOLUNTARILY agreed to - a broad and far reaching redevelopment of its central business district to address its affordable housing needs. This effort included the willingness to proceed with condemnation of ten (10) properties, some of which had thriving businesses and some of which were residential, the relocation of the Borough ambulance corps, the granting of a PILOT to the Developer, a density bonus to the developer, and removal of restrictions on building height to address the development, lastly, vacating/donating a paper street to the Developer. In essence, the Borough accepted a project that was as far reaching as a remedy granted in a builder's remedy suit, *voluntarily*.

STATEMENT OF FACTS/PROCEDURAL HISTORY[1]

By way of background, the dispute in this case concerns the redeveloper's desire to construct seven (7) two bedroom units of affordable housing on an irregularly shaped, substandard lot at 129 Kinderkamack Road. [65A] The property was never formally designated as an additional site for affordable housing to be built by ERUR. It does not appear in any of the three Amendments to the Redevelopment Agreement, or for that matter, as part of the "Property" on which the "Project" is to be built as defined in the Redevelopment Agreement or the Exhibit "A" listing all blocks and lots included in the "Project/' This omission is even more pronounced because additional lots were added to the "Property" via the First Amendment to the Redevelopment Agreement. All of the Amendments and the Redevelopment Agreement require modifications to be in writing, and the Agreements and Amendments are otherwise deemed complete, absent a written modification, and supersede any prior discussions. [114A]

129 Kinderkamack Road does not appear in the settlement agreement with Fair Share Housing, or the Conditional judgment of Compliance and Repose, nor is it mentioned in the resolution of approval granted by the Land Use Board on December 28, 2018. [515A] 129 Kinderkamack, however, was the subject of

[1] The Procedural History of Appellant is largely adopted by Respondent, therefore the Procedural History and Statement of Facts are represented together for the Court's convenience and to avoid repetition

actions taken at public meetings during the period of time that the ERUR's self proclaimed "supportive" and "good administration" was in power. [95a]

On December 6, 2016, the Mayor and council discussed 129 Kinderkamack Road during the public section under Unfinished Business, Section VII. At that meeting, the Borough was then a party to a contract of sale for the purchase of an easement in the front of the said property required for the Kinderkamack Road widening project, at a cost of $55,000. [484A] For an additional sum of $395,000.00 (total $450,000.00, the appraised value) the property could be purchased under an option expiring at the end of the year. *Id.*

The minutes of that discussion are reproduced below, as included in the copy of the December 6, 2016 minutes of the Meeting of the Mayor and Council.

> **The Governing Body debated if the purchase was necessary, and if purchased, what the Borough would do with it. Options included turning it into a park or for commuter parking.**
>
> **Councilman Lazar was opposed to the purchase of the property on the grounds that it was fiscally irresponsible. Members of the Governing Body agreed. In addition, they noted that there was a lack of clear vision for its purpose, the small number of parking spaces it would allow, and a preference to use the funds for another purpose. There was general agreement that it was an eyesore and a less than ideal spot for a park due to its location next to Kinderkamack Road and the railroad tracks. Mayor**

Lamattina asked Mr. Ascolese to sketch out the number of parking spaces that could be placed there.

Accordingly, 129 Kinderkamack Road was not purchased. At that same meeting, the Borough proceeded with its First Reading of Ordinance 1535-16, which is described earlier, to amend the Redevelopment Plan and add the restrictions discussed concerning multifamily housing and ground floor retail, and which ERUR now seeks to disregard.

Fast forwarding to Mr. Fiorenzo's October 15, 2021 letter to the Implementation Monitor, it was requested that "Your Honor instruct the Borough to immediately move forward expeditiously with an amendment to the Redevelopment Plan to permit the off-site construction." The "construction" in the previous sentence refers to the Redeveloper's Plan to construct seven (7) units on a 9,245 square foot, undersized and substandard lot, located on Kinderkamack Road. The seven (7) units are a component of the Redeveloper's Affordable Housing obligation which emanates from its approval to build a mixed use development on a portion of Block 419 which is located on Kinderkamack Road in the center of downtown Emerson."

In his November 3, 2021 letter, Mr. Fiorenzo even states that "there should be no need to amend the redevelopment plan….. the settlement agreement and court orders should trump and essentially supersede the redevelopment plan." The

redeveloper's position in this regard cannot be sustained and is directly contrary to one of the provisions of the Local Redevelopment and Housing Law N.J.S.A. 40a:12a-1 to 89 ("LRHL").

The Borough remained anxious and willing to consider the Redeveloper's request for rezoning, however it should not be divested of its authority to change either the Redevelopment Plan or the zoning for the subject site. Indeed, the Borough has done nothing to interfere with the Redeveloper's property rights on the subject property and, in fact, any hardship claimed by the Redeveloper is self created.

The Borough and the Redevelopers executed a Redevelopment Agreement dated June 27, 2016. [114A] That redevelopment Agreement is the product of negotiations between the municipality and the Redeveloper. *Id.* Subsequently, the Redeveloper made applications to the Emerson Land Use Board to permit the development of Block 419, Lots 1,2,3,4, 6.01, 6.02, 7, 8, 9, and 10 with a "mixed use" development consisting of ground floor retail, one hundred forty seven (147) residential units, a parking garage and other amenities. *Id.* The plan presented by the redeveloper was entirely consistent with the redevelopment plan that had previously been negotiated. *Id.* That application was approved after a single meeting and memorialized in a Resolution of the Emerson Land Use Board dated December 28, 2018. The resolution of approval states in ¶10 that "the Settlement

Agreement requires twenty nine (29) affordable units, seven (7) of which **may be** provided off site." Clearly, the quoted language permits, but does not mandate, that seven (7) of the affordable units be located off site, and is completely absent of any mention of 129 Kindkamack. [153A]

In order to meet its obligations to provide a total of twenty-nine (29) affordable units, the redeveloper decided to take advantage of the language in both the redevelopment agreement and land use approval which allowed seven of the units to be located off site. [114A]. In furtherance of its plan, the redeveloper purchased property located at 129 Kinderkamack Road, also known as Lot 1 Block 610. [359A] The Deed to the property reflects that it was transferred to the redeveloper on March 19, 2019. *Id.*

The lot the redeveloper purchased is a triangular shaped parcel in the CBD-15, central business district zone. [211A] The lot is undersized for the zone at 9,245 square feet where 15,000 square feet are required and further has insufficient lot depth of 40.8 feet where 75 feet is required. *Id.*

The redeveloper later filed an application with the Emerson Land Use Board seeking to construct seven (7) affordable housing units on the property. *Id.* In addition to the deficient lot area and lot depth referenced above, the application also requests "c" variances for the following:

1. Insufficient front yard setback from Kinderkamack Road;

2. Insufficient rear yard setback;
3. Insufficient number of parking spaces; and,
4. Improper or insufficient sidewalks.

The variances are detailed in the report from the Board's Planner, Christopher P. Statile, PA, dated October 1, 2021. [259A]

Of greater importance for the purposes of this appeal, is the fact that the application also requires a "D" or use variance. [211A] Rather than propose a conforming use, the redeveloper proposes to construct an entirely residential structure with residential dwelling units at grade. *Id.*

The relevant portions of Ordinance 290.68 C (2), which sets forth the permitted uses in the zone, was amended by Ordinance 1535-16, which was adopted by the Mayor and Council on December 20, 2016, some six (6) months after the Redevelopment Agreement was entered into, but more than two years prior to the redeveloper's acquisition of 129 Kinderkamack Road. [484A] One of the changes made by Ordinance 1535-16 was to change the permitted uses in Ordinance 290-68A to include, *inter-alia*, the following:

1. Multi-family residential dwellings above at-grade, retail, commercial and other principal permitted uses.
2. Multi-family residential dwellings including buildings above at grade parking only in areas where the building is behind a building that fronts Kinderkamack Road.
3. Multi-family residential dwellings are at grade only where they front on Lincoln Boulevard and only in areas where the building is behind a building that fronts on Kinderkamack Road. *Id*

Based upon the uses permitted under the ordinance, it is obvious that the Borough zoning for the central business district seeks to maintain the commercial, "downtown" appearance of the area. It was the Redeveloper who chose to request that seven (7) of the affordable units be permitted to be located off site, rather than as part of the Block 419 development. [211A] **The redeveloper made that request even though it apparently did not own any property at the time which was suitable for the development of the seven (7) units.** [259A] The mere fact that the Emerson Land Use Board acquiesced to the proposal does not mean that the redeveloper does not have to comply with the Borough's Zoning Ordinances. The Court should also be aware that the Ordinance which the Redeveloper now objects to, namely Ordinance 290-68 C (2), **was actually the product of recommendations by both the Borough and the Redeveloper**, which were made after the redeveloper was chosen and after the redevelopment agreement was executed. [484A]

Specifically, one of the "Whereas" clauses of Ordinance 1535-16 states:

> Whereas, On November 21, 2016, the Mayor and Council held a meeting whereby the Planner and designated redeveloper presented its comments and recommendations for additional amendments to the Redevelopment Plan; and

Ordinance 1535-16 also states, at Section 6A, the following:

> Deviation Requests. The Borough may grant deviations from the regulations in the within Ordinance where permitted by the provisions of the Municipal Land Use Law. Notwithstanding the above, any changes to the uses permitted in the within Redevelopment Plan

> Ordinance shall only be permitted by an amendment to this Ordinance by the Mayor and Council upon a finding that such deviation would be consistent with and in furtherance of the goals and objectives of this Ordinance. *Id.*

Consequently, the redevelopers' assertion that it does not require the zoning ordinance to be amended by the governing body is incorrect.

ERUR's application for a "use" zoning variance before the Borough's Land Use Board is a breach of contract pursuant to Article 12. Section 12.1. It provides:

> Redeveloper agrees to proceed in good faith and at its own cost and expense to obtain all Governmental Approvals to develop and construct the Project in accordance with the Redevelopment Project Schedule.
>
> **Redeveloper agrees that it shall not seek any use variances pursuant to N.J.S.A. 40:55D-70(d) in connection with its applications for the Governmental Approvals.** (emphasis added)

Further, the redeveloper has a number of options available to satisfy its obligation to construct the seven (7) units. The Redeveloper may:

1. Redesign the project at 129 Kinderkamack Road so that it does not require a Use Variance;

2. Purchase other suitable property within the Borough of Emerson on which to build the units;

3. Designate seven (7) additional units in the Block 419 development to be affordable units.; or,

4. Some combination of the three items above.

While the Redeveloper is free to determine which combination of the above proposals best suits its need to construct the seven additional off site units, it may not simply claim that the fact that it is providing affordable housing trumps the Borough's zoning laws. As the Appellate Division has held:

> We recognize that the questions of sound planning and the "fairness" of providing affordable housing are overlapping concepts. There is no doubt that any fair share proposal raises substantive zoning and planning concerns for the municipality. Imposition of the constitutionally-mandated obligation to provide affordable housing "does not require bad planning." *East/West Venture v. Borough of Fort Lee*, 266 N.J. Super. 311 (1996) The specific location of "decent housing for lower income groups" continues "to depend on sound municipal land use planning considerations in this State." *Id.* at 211, 456 *A.*2d 390.

The sound municipal land use planning that resulted in the restrictions that the redeveloper now complains of should not be disturbed merely to allow the redeveloper to maximize its profit to the detriment of the Borough and its residents.

As to the new argument that the Borough never "provided another site" to ERUR, it should be noted that ERUR has never asked for alternative locations for construction of the seven units. In fact, it was originally proposed by ERUR that Habitat for Humanity would construct the seven off-site units. [162]A It is only upon the continued request of the Borough for information regarding the proposal from Habitat that ERUR apparently abandoned that plan. Subsequently, according to the filed Deed transferring ownership of 129 Kinderkamack Road, ERUR purchased that lot with the hopes of developing the seven units on it. [259A] However, ERUR never advised the Borough that it was purchasing the Lot, nor

consulted with the Borough regarding the feasibility of constructing all seven off site units there. In fact, as set forth more fully in the Borough's original Opposition, ERUR purchases the property knowing full well that its proposal was not permitted under the existing zoning.

The Borough also notes that at no time has ERUR requested that the Borough provide alternative sites for seven off-site units, and, despite that, the Borough has, in fact, proposed an alternative site for construction of the seven units. [553A]

It is unequivocally clear that the 129 Kinderkamack Road site now before the Court was not intended for seven units, as it is not mentioned anywhere in the Settlement Agreement, nor any other document.

Further, as the Borough has stated previously, the redeveloper has a number of options available to satisfy its obligation to construct the seven (7) units. The Redeveloper may:

1. Redesign the project at 129 Kinderkamack Road so that it does not require a Use Variance;
2. Purchase other suitable property within the Borough of Emerson on which to build the units;
3. Designate seven (7) additional units in the Block 419 development to be affordable unit;
4. Accept other Borough property previously offered to them for the construction of units; or,
5. Some combination of the items above that results in seven additional affordable units.

LEGAL ARGUMENT

POINT I

ERUR KNEW OF THE RESTRAINTS ON THE PROPERTY PRIOR TO PURCHASING IT AND IS OBLIGATED TO FOLLOW STATE LAW WITHOUT COURT INTERVENTION [Not Addressed Below]

The Redeveloper purchased the subject property at 129 Kinderkamack Road with the knowledge that it was located Central Business District 15 (hereinafter CBD 15) and that the proposal to construct 7 residential units on the site would need not only several bulk variances, but would also require a use or "D" variance pursuant to N.J.S.A. 40:55D-70d. Further, the Redeveloper knew that the Emerson Land Use Board would not have the authority to grant a "D" variance pursuant to the ordinance creating the Central Business District 15 zone, in which the property is located. As the CBD 15 ordinance, which has not been amended since 2014, states:

> 290-68 C. (2) Any deviations from the standards provided herein that result in a "D" variance pursuant to N.J.S.A. 40:55D-70d shall be addressed as an amendment to the Redevelopment Plan rather than via variance relief through the Borough Land Use Board.

The above quoted language is specifically mandated by the New Jersey Local Redevelopment and Housing Law, N.J.S.A. 40 A:12A-9, which states:

> a. All agreements, leases, deeds and other instruments from or between a municipality or redevelopment entity and to or with a redeveloper shall contain a covenant running with the land requiring that the owner shall construct only the uses established in the current redevelopment plan;

Since the use proposed by the Redeveloper, a residential structure at grade, is not permitted under the Redevelopment Plan, it would only be possible if the Mayor and Council were to amend the Redevelopment Plan, the very same plan which the Redeveloper has agreed to abide by.

In addition to the Redeveloper's proposal violating the mandate of the Redevelopment law, it is also, as stated previously, contrary to the zoning ordinance applicable to the property.

The zoning of the property was established by a duly enacted ordinance of the Mayor and Council of Emerson. In a borough form of government, such as Emerson, the authority to enact ordinances is vested in the Council pursuant to N.J.S.A. 40A:60-6 which states:

Pursuant to N.J.S.A. 40A:60-6. Powers of the council:

> a. The council shall be the legislative body of the municipality.
>
> b. The council may, subject to general law and the provisions of this act:
>
> (1) pass, adopt, amend and repeal any ordinance or, where permitted, any resolution for any purpose required for the government of the municipality or for the accomplishment of any public purpose for which the municipality is authorized to act under general law;

Therefore, the Redeveloper is also requesting that the Court disregard the statutory authority of the Borough to adopt ordinances.

It is also worth noting that the authority of a municipality to zone has been confirmed by the New Jersey Supreme Court. *In the matter of Lusardi vs. Curtiss Point Property Owners Assn.* 86 N.J. 217 (1981) the Court held:

> Zoning is an exercise of the State's power to protect the public health, safety and morals, and to promote the general welfare. *Taxpayers Association of Weymouth Tp., Inc. v. Weymouth Tp.* 80 N.J. 6, 364 A.2d 1016 (1976). Local governments have the power to zone only through legislative delegation of the State's police power. N.J. Const. (1947), Art. IV, par. 2. This delegation of power is currently embodied in the Municipal Land Use Law. N.J.S.A. 40:55D-1 to-92.
>
> Like other municipal ordinances, zoning ordinances are accorded a presumption of validity that can be overcome only by an affirmative showing that an ordinance is arbitrary or unreasonable. Id. at 226.

Turning to the Municipal Land Use Law, it provides, at N.J.S.A. 40:55D-62, as follows:

> 49. Power to zone. a. The governing body may adopt or amend a zoning ordinance relating to the nature and extent of the uses of land and buildings and structures thereon…

In addition to giving municipalities the authority to zone, the Municipal Land Use Law also requires, pursuant to N.J.S.A. 40:55D-25, a proposal for development to be submitted to the Planning Board for site plan review. This requirement is also echoed specifically in the CBD 15 Zone, wherein the Ordinance provides, "All development must be approved by the Borough Land Use Board and shall be submitted through the normal site plan and subdivision procedures as identified by N.J.S.A. 40:55D et seq., and the Borough Land Development Regulations." (BTG Cert. Ex. "P")

The Trial Court confirmed the Subject Property not being mentioned in ANY document over the span of eight (8) years, stating:

> The Off-Site Property is not identified in the Settlement Agreement, or in the Order of Conditional Judgment of Compliance and Repose. The court finds no basis to grant automatic site approval where the Off-Site Project undeniably would require multiple variances which have not been properly reviewed or approved by the Local Land Use Board. There is nothing in the record which compels approval of the Off-Site Project when other avenues of compliance are available to the Redeveloper.

ERUR's main cited legal authority for Court intervention are both factually inapposite to those presented here.

The case of Cranford Development Associates v. Cranford 445 N.J. Super 220 (2016) is factually distinct from the instant matter. In Cranford, the Court was considering a Builders Remedy case in which the Court found that "Cranford still has an unmet housing obligation of four hundred ten (410) housing units, and the township's Fair Share Housing Plan, filed after the lawsuit was instituted, was seriously deficient." *Id at 224*.

In this case, the Borough of Emerson filed a Declaratory Judgment complaint which resulted in an Order dated June 29, 2018, at ¶2 that "the settlement sets forth and otherwise incorporates mechanisms to address the affordable housing obligation. The Court fined, upon the Special Master's Report, testimony and recommendation, that the Borough's affordable housing obligation,

including the unmet need, is adequately and sufficiently addressed by the mechanisms provided for in the Settlement Agreement."

The Borough has done nothing to modify or amend its zoning ordinances in any way since that Order was entered, and it is therefore inappropriate to suggest that the Borough is attempting to obstruct affordable housing through local zoning decisions. In fact, the Redeveloper was well aware of the zoning in place for the property located at 129 Kinderkamack Road when it purchased the property in 2019. It should, therefore, not be heard to complain that the Borough has maintained the existing zoning ordinances that the Redeveloper, the Court and the Special Master were all well aware of at the time Your Honor entered the Order.

In the Toll Brothers v. Township of West Windsor 173 N.J. 502 (2002), also cited by the movant, was also a Builders Remedy case and one in which a Court had previously held that West Windsor "was not in compliance with the Mount Laurel Mandate and, thus, ... had violated ... the New Jersey Constitution and the New Jersey Fair Housing Act." Tolls Brothers vs. Township of West Windsor 303 N.J. Super 418, 574 (Law Div. 1996).

In addition, based upon a review of all of the sites that West Windsor had claimed credit for, the Court found that "based on its extensive and careful evaluation of those sites, the trial court found that the maximum potential of affordable housing yield was five hundred five (505) units, one hundred eighty

three (183) units short of defendants obligation of six hundred eighty eight (688) units. Therefore, in Toll Brothers Inc., the Court was confronted with a municipality that clearly had not met its obligation to provide affordable housing, which is not the case here.

The situation faced by the Court in Toll Brothers, Inc. is further distinguished from the case at bar as the Redeveloper was given an option, by both the Redevelopment Agreement and the Planning Board, to locate seven (7) of its required affordable housing units off-site. Clearly, this is an advantage to the Developer, since it allows for the construction of more market rate units in the redevelopment area. However, the Redeveloper, not satisfied with the bonus of an ability to construct affordable units at any other site in Emerson, now effectively, is asking the Court to remove all zoning restrictions and requirements for obtaining site plan approval, just because it chose a specific site to develop. That clearly was not contemplated in either the Redevelopment Agreement or the Resolution adopted by the Planning Board and should not be permitted by this Court. Following ERUR's logic, they would be permitted to place seven (7) units on any property they purchased in the Borough.

The Trial Court agreed with the foregoing, stating:

> The court finds that Redeveloper's reliance on the holding in Cranford Development is misplaced. In that matter, the Township of Cranford enacted ordinances which prohibited the construction of adorable housing

> whereas here, the court does not find any evidence suggesting that the Borough has affirmatively enacted zoning which now prevents compliance with the terms of the Settlement Agreement. See Cranford Development, 445 N.J. Super. At 223-225.
>
> The Redeveloper's reliance on the holding in Tolls Bros., supra, is also misplaced. The Facts and circumstances in Toll Bros are clearly distinguishable from those presented here. In Toll Bros., the
> trial court found that the Township of West Windsor had engaged in exclusionary zoning entitling the developer to a builder's remedy. Toll Bros., 173 N.J. at 510. The Appellate Division and Supreme Court each affirmed. Id. At 559-567. Here, the record reveals that the Borough has not engaged in exclusionary zoning. Furthermore, the proposed off-site development does not offer a "substantial" amount of affordable housing nor has there been any credible finding as to the Off- Site Property's suitability for use.
>
> While the delay in final compliance in development of agreed upon affordable housing is troublesome, the court here does not find that the Borough's action (or inaction), when reviewing in the broad scope of all the facts and circumstances presented, does not now warrant automatic site plan approval of the Off-Site Property.

The Redeveloper is asking the Court to ignore or violate the Borough's Redevelopment Plan, disregard the governing body's right to zone, overturn a validly enacted zoning ordinance and to usurp the Land Use Board's authority to conduct site plan review. Such action is inappropriate where 129 Kinderkamack was never contemplated previously, and there has been no bad faith actions by the Borough.

With respect to ERUR's request that the Court grant relief regarding the seven (7) off-site units proposed, it is respectfully submitted that the Court should not divest both the governing body and the Emerson Land Use Board of their statutory powers for a property not previously designated for affordable housing.

POINT II

THE BOROUGH NEVER AGREED TO ALLOW SEVEN (7) UNITS TO BE PLACED ON 129 KINDKAMACK ROAD [See Order dated May 12, 2023 specifically at 11a]

The basis of ERUR's Motion to Enforce heavily relies on the Certification of the former Mayor, Louis Lamatina. While the Borough maintains this Certification should be disregarded in its entirety due to numerous violations of the Court Rules governing same, even if considered, it does not support any legal authority for the arguments made.

The Borough submits that these Certifications should be disregarded in their entirety based upon the gross deviation from the N.J. Court Rules governing such Certifications and their contents, and further submits that the allegations contained therein are not only immaterial to the question before the Court, but also contain inaccuracies and falsehoods. For the Borough to point out each inconsistency would waste judicial time and resources, and therefore only a few of the several major discrepancies shall be discussed.

Indeed, the Trial Court agreed, stating:

> However, the argument and information presented in movant's papers, i.e., the certifications of Klugmann and former Mayor Lamatina, does not provide the court with evidence warranting the relief now sought. It is undisputed that the Settlement Agreement executed in this matter during November 2017 did not identify Redeveloper's Off-Site Property located at Block 610, Lot 1, as the parcel specifically designated for the seven subject units. The court concludes that there is nothing in the record presented which supports the somewhat extreme relief requested, that is, an order to compel the Borough to grant site plan approval (including variances) for the construction of seven affordable units on Block 610, Lot 1 without the Borough's Land Use Board's approval and without amendment to the Redevelopment Agreement.

It is too well established to cite authority for the proposition that while a public body may make contracts as an individual, it can only do so within its express or implied powers; and that those who deal with a municipality are charged with notice of the limitations imposed by law upon the exercise of that power. A public body may only act by resolution or ordinance; it contracts on behalf of the public and even its representatives have no power to bind it to an illegal and void contract. *Midtown Properties, Inc. v. Madison T.*, 68 N.J. Super. 197 (1961).

The Borough of Emerson has a "weak Mayor" form of government whereby the Mayor has only those powers authorized under N.J.S.A. 40A:60-5. That statute provides that the Mayor shall not even vote on matters to come before the governing body, except in the case of a tie. In no way does N.J.S.A. 40A:60-5

authorize the Mayor to enter into or bind the municipality contractually without the authorization of the Council, which is the legislative body of the municipality.

The powers of the Council are set forth at N.J.S.A. 40A:60-6. That statute specifically sets forth that one on the powers of the Council is to "pass, adopt, amend and repeal any ordinance or, where permitted, any resolution for any purpose required for the government of the municipality or for the accomplishment of any public purpose for which the municipality is authorized to act under general law" Clearly the ability of Borough of Emerson to enter into a contract is vested, statutorily, in the Council. It is just as clear, pursuant to the same section of the Ordinance, that the only way that the Council can act is through its ability to pass, adopt, amend and repeal any ordinance, or where permitted, any resolution. No such ordinance or resolution has been presented by Lamantina or ERUR that even hints at any agreement by the Borough regarding 129 Kinderkamack Road let alone approves of a specific agreement.

It should also be noted that any "agreement" concerning amending the Redevelopment Plan or amending the Borough's Zoning ordinances could only be accomplished by action taken at a public meeting. The legislative findings and declarations contained in the Open Public Meetings Act at N.J.S.A.10:4-7 state:

> The Legislature finds and declares that the right of the public to be present at all meetings of public bodies, ands to witness in full detail all phases of the deliberation,

> policy formation, and decision making of public bodies, is vital to the enhancement and proper functioning of the democratic process; that secrecy in public affairs undermines the faith of the public in government and the public's effectiveness in fulfilling its role in a democratic society, and hereby declares it to be the public policy of this State of insure the right of its citizens to have adequate advance notice of and the right to attend all meetings of public bodies at which any business affecting the public is discussed or acted upon in any way except only in those circumstances where otherwise the public interest would be clearly endangered or the personal privacy or guaranteed rights of individuals would be clearly in danger of unwarranted invasion.

The Certification of former Mayor Lamatina, is an example of exactly the type of behavior the statute was enacted to prevent. All of the purported discussions between "the Borough" (the meaning of which Lamatina fails to identify) are appropriate subjects for the governing body to discuss at an open public meeting, yet is appears that those public discussions never took place. Further, to the extent that the discussions took place at a meeting that did not comply with the Act, any subsequent action by the Mayor and Council would be voidable

Lamatina states, "the location and suitability of the Off-site Property were never in question. Both the Borough and ERUR had a consistent understanding that this site was suitable for the Off-site Building of affordable housing" (LaMatina Cert Par. #7) No document evidences this "understanding." Lamatina

also states, "the Borough and the Developer were in complete agreement that to comply with the Borough's obligation to build affordable housing, whatever necessary amendments to the Redevelopment plan would be accomplished..." (Lamatina Cert. Par. #9) yet, the Redevelopment that was subsequently entered into does not mention the Property. Both statements are directly disputed by Meeting Minutes of the Mayor and Council and other documents.

It is also directly contrary to what was in fact being contemplated at the time for the seven-off site units, namely "rehabilitated" units through the Habitat for Humanity program. (See Email to ERUR Counsel dated February 10, 2022 attached to BTG Cert. as Ex. L referencing a prior meeting on January 9, 2020 wherein ERUR planned on using Habitat for Humanity for the remaining units outside the Block 419 Project)

LaMatina states at Paragraph 5 and 6 of his Certification that "It became clear to the Borough that the affordable housing component of the development constructed by ERUR would need to include, in addition to affordable units constructed on-site as Block 419, a separate off-site development of affordable housing..." and "By early 2017 at the latest the Borough examined the available space for such an off-site building and settled upon Block 610 Lot 1 for its construction (the off-site property). Correspondingly, the Borough obtained from an engineering firm a Concept Plan for entirely affordable-housing building

located on the off-site property. A true and correct copy of which is annexed hereto ad Exhibit A. ...." In fact, the requirement for seven (7) off-site units was not identified by the Redeveloper in 2017, and, the desire to purchase 129 Kinderkamack Road and develop affordable housing was suggested not by the Redeveloper, but by Luciano Bruni, the owner of Novelle, LLC. (BTG Cert. Exhibit M is a copy of an email August 22, 2017 which was sent from Luciano Bruni to the Borough Administrator at the time, Robert Hoffman.) Mr. Bruni's interest in the property was completely unrelated to the Redeveloper.

In it, Mr. Bruni states that he "wanted to share the Concepts Sketch based upon the CADD plans." In fact, it was Mr. Bruni who engaged the engineer firm, Dykstra Walker and commissioned the sketches to be done not by the Borough, as stated by Lamatina. In addition, the Certification of Brian Giblin, Esq. attaches an email dated August 22, 2017 from then Borough Administrator Hoffman to the then Borough Attorney in which the Administrator states "I spoke with Luciano Bruni this afternoon (Tuesday, August 22, 2017). Luciano told me that he had sent Beverly and David a letter of intent to buy 129 Kinderkamack Road. He referred to it as a LOI. Luciano also stated that he has called Beverly and David three (3) times and probably four (4). They have not returned his calls or emailed him. Luciano is interested in purchasing their property to build affordable housing units. ..."

Mr. Lamatina's Certification is therefore incorrect and misleading at ¶6 as well as at ¶10 and ¶13 where Mr. Lamatina stated "It should be noted that we declined to identify the block and lot to the general public or place the location in publicly accessible documents to avoid the then-owner of the property substantially raising its price." As the email from Mr. Bruni and attached Plans describe, the owner of 129 Kinderkamack Road was well aware, as of 2017, that another developer was seeking to purchase it to construct affordable housing units.

Lastly, the statement of Lamatina in ¶13 of his Certification, wherein he states "it should be noted that we declined to identify the Block and Lot to the general public or place the location in publicly accessible documents to avoid the then-owner of the Property substantially raising the price" demonstrates, if true, that he was specifically avoiding the mandates of the Open Public Meetings Act in order to manipulate the price of a piece of property. This is the type of "secrecy in public affairs [that] undermines the faith of the public in government" that the Act refers to and was designed to prevent.

ERUR's entire Motion is to "enforce" a non-existing agreement to allow seven units on 129 Kinderkamack, and paint the Borough as acting in bad faith. However, the Implementation Monitor has held meetings with the Borough and Redeveloper, and has submitted two separate status reports to the Court dated August 31, 2021 and February 22, 2022. Neither of the status updates to the Trial

Court by Judge Carroll paint the harrowing picture of bad faith delays by the Borough described by ERUR, but rather, depict a municipality that is fully abiding by the Redevelopment Agreement and its statutory obligations.

In fact, in the Trial Court's Order (referenced numerous times in Appellant's papers) dated March 16, 2021, it specifically states "There clearly has been a delay in implementation of the previously approved plan and timeline provided for under the Settlement Agreement and subsequent orders. **What is not clear at this time is whether the Borough's actions, or inactions, are solely responsible for the delay at this state**."

POINT III

ERUR HAD NO STANDING TO BRING MOTION TO ENFORCE LITIGANT'S RIGHTS BELOW [Not Addressed Below]

A. The Borough Has Not Violated any Judgment or Order [See Order dated May 12, 2023 11a and 21a]

The appeal filed by ERUR is procedurally defective as 129 Kindkamack Road is not contemplated, mentioned, or alluded to in any Judgment or Order entered in this case.

A motion to enforce litigant's right is governed by Rule 1:10–3. "Rule 1:10–3 provides a 'means for securing relief and allow[s] for judicial discretion in fashioning relief to litigants when a party does not comply with a judgment or order.' " *N. Jersey Media Grp., Inc. v. State Office of the Governor*, 451 N.J.

Super. 282, 296 (App. Div. 2017) (citation omitted) (quoting In re N.J.A.C. 5:96, 221 N.J. 1, 17–18 (2015)).

It is impossible for ERUR to demonstrate the Borough has violated any prior Judgment or Order regarding 129 Kinderkamack Road since it is not mentioned or contemplated in any prior Order, and, in fact, at the time the Orders were entered, ERUR did not even own the Property. Therefore, the Movant is improperly attempting to expand the concept of a Motion to Enforce Litigant's Rights, where it is procedurally inappropriate.

B. ERUR Did Not Exhaust Its Administrative Remedies [See Order dated May 12, 2023 at 13a]

Since ERUR began the process of attempting to secure approval with the Borough but abandoned same, the Motion to Enforce is premature

- ERUR first submitted an application to the Emerson Land Use Board on August 13, 2022. (BTG Cert. Ex. "G")
- Counsel for the Emerson Land Use Board, John McDermott, Esq., sent a letter to ERUR on November 1, 2021, advising that the Board did not have jurisdiction to hear the application, noting, " Section 290-68C (2) of the Borough's Zoning Ordinance provides as follows: "Any deviations from the standards provided herein that result in a "D" variance pursuant to N.J.S.A. 40:55D-70d shall be addressed as an amendment to the Redevelopment Plan rather than via variance relief through the Borough Land Use Board…." (BTG Cert. Ex. "H")
- On December 7, 2021, counsel to ERUR, David Phillips, Esq.,

attending a meeting of the Mayor and Counsel wherein a lengthy discussion occurred regarding an amendment to the Redevelopment Plan. (BTG Cert. Ex. "J") The meeting ended with Counsel to the Borough, John McCann, Esq., advising that the governing body would submit questions to ERUR to further illuminate the request. Id.

- Mr. McCann forwarded said request to Mr. Phillips via email on December 16, 2021. (BTG Cert. Ex. "K")
- ERUR never responded to the written questions of the Mayor and Council.
- ERUR petitioned the Implementation Monitor to take the place of the Emerson Land Use Board, who advised a Motion should be filed in Superior Court for clarification of his authority as an Implementation Monitor.
- Your Honor entered an Order dated January 30, 2023 stating:

  Based upon the court's review of the Settlement Agreement, prior Order and associated facts and circumstances, determines that the Monitor, while specifically permitted to address "site specific relief" was not empowered to assume the authority of the Emerson Land Use Board with regard to granting, approving or otherwise authorizing site plan approval, use or other variances in connection with the Subject Application under the April 22, 201 order...

  The Courts April 22, 2021 order does not permit the Monitor to relive the Redeveloper of its obligations under the municipal Land Use Law in connection with proposed development of the 129 Kinderkamack Road property.

  While the Court recognizes that land use ordinances shall yield to the plans for affordable housing, there is nothing in the record

> which reveals that the development of the potential limitations of development of the subject property is the result of a recalcitrant municipality seeking to place a road block to construction of affordable housing. (BTG Cert. Ex. "D")

It is respectfully submitted that Your Honor's statements stand true today, as the Borough of Emerson has not engaged in any behavior to limit development on subject property, rather only asks ERUR to comply with Local Municipal Land Use Law.

POINT IV

ERUR'S MOTION TO APPEAL IMPROPERLY SEEKS ENTIRELY DIFFERENT RELIEF THAN THE ORIGINAL MOTION [See Order dated August 28, 2023 at 20a-21a].

NJ. Court Rule 1:6-2 states: (a) Generally. A motion, other than one made during a trial or hearing, shall be by notice of motion in writing unless the court permits it to be made orally. Every motion shall state the time and place when it is to be presented to the court, the grounds upon which it is made and **the nature of the relief sought..."**

Incredulously, ERUR states that the Court misinterpreted the relief originally sought and that its original Motion sought "a public hearing on site suitability." ERUR continues, "ERUR did not seek outright approval, rather it sought to have the Court or the Implementation Monitor conduct a hearing

regarding the suitability of the site for Mount Laurel housing..." Id. (emphasis added)

Initially, the undersigned was unsure if there was a different Motion filed we were unaware of, as the Motion to Enforce Litigant's Rights filed by ERUR plainly states in its Notice of Motion, that it sought relief from the Court in the form of:

> Ordering that Emerson grant site plan approval for the construction of a seven unit, fully affordable housing building on Block 610, Lot 1, pursuant to the Settlement Agreement, without the need for further variance or amendment to the Redevelopment Plan;

The Proposed Order in the original Motion to Enforce Litigant's rights, likewise states as the relief sought as:

> Emerson shall grant site plan approval for the construction of a seven unit, fully affordable housing building on Block 610, Lot 1, pursuant to the Settlement Agreement, without the need for further variance or amendment to the Redevelopment Plan;

It is hard to fathom how anyone reading the original Notice of Motion or Proposed Order could read it to mean they were seeking a "hearing on site suitability."

The relief now sought, that the Court to "hold a hearing to assess site suitability and thereafter grant site plan approval for the construction of a seven-unit fully affordable housing building on Block 610 Lot 1" is entirely different than that which the original Motion sought, and it should therefore be denied.

The Trial Court agreed, stating:

> The court once again finds that the argument and information present in movant's papers in support of its Motion in Aid of litigant's rights, i.e., the Certifications of Klugmann and former Mayor Lamatina, does not provide the court with evidence warranting the relief now sought. The court also reiterates that the Settlement Agreement executed in this matter during November 2017 did not identify Redeveloper's Off-Site Property located at Block 610, Lot 1 as the parcel specifically designated for the seven subject units. Nonetheless, the Redeveloper's proposed order filed with its motion in aid of litigant's rights included the following language.
>
> Emerson shall grant site plan approval for the construction of a seven unit, fully affordable housing building on Block 610, Lot 1, pursuant to the Settlement Agreement, without the need for further variance or amendment to the Redevelopment Plan. [Redeveloper's Proposed Order]
>
> As noted in the Rider to the May 12, 2023 Order, "the court does not find any evidence suggesting that the Borough has affirmatively enacted zoning which now prevents the compliance with the terms of the settlement agreement.
>
> Mere dissatisfaction with the court's ruling does not satisfy the demonstration required by ERUR to be granted relief. There has been no demonstration that the court's orders were incorrect when made, or hasbeen rendered incorrect, and the interest of justice are only served if the Motion is denied.

POINT V

EMERSON HAS OFFERED THE DEVELOPER ALTERNATIVE SITES FOR DEVELOPMENT[See Order dated August 28, 2023 at 21a]

At no time until the present, notwithstanding ERUR's initial Motion in Aid or at any time before or after that, did ERUR indicate that it was moving ahead in the absence of Emerson identifying a site and purchasing the triangle block - nor did it ever demand that the Borough identify a site - not at the midpoint review, not in its original motion in aid, and not at the meeting in March of 2019 where it met with the Borough to outline the Borough's responsibilities as a new administration under the agreements in place. Curiously, it does not do so today, and has never done so.

ERUR alleges the Borough has not proposed any alternative to Block 610 for the construction of seven (7) off-site units, which is patently false. In fact, the Borough has discussed numerous options and sites with ERUR for the construction of the additional units, including a lot that the Borough Engineer believes is suitable for between eight (8) and twelve (12) units.

In fact, when concerns were raised by ERUR regarding a wetlands buffer impacting the site, the Borough went so far as to have its own professionals review prior site plans and create a sketch depicting a proposed buildable area on an alternative site for ERUR to review, which were shared most recently in December of 2022.

The Borough Engineer opined that looking at the survey if you held a 20' front yard setback it appears you could fit about a 60x120' building on the property by utilizing wetlands buffer averaging. Even without wetlands buffer averaging, the site would accommodate an approximate 50'x75' building.

Lastly, despite the foregoing, the Borough has held several discussions with ERUR regarding alternative sites for development of the off-site units.

The Trial Court agreed, stating:

> Even under the liberal approach of R. 4:42-2, the court finds that good cause has not been shown which warrants reconsideration of the May 12, 2023 Order. The court finds no basis to compel approval of the Off-Site Project when other avenues of compliance, such as site suitable for between eight (8) and twelve (12) units, are available to the Redeveloper. The court does not find basis to compel site plan approval for the Off-Site Project which requires multiple variances and is located on an insufficient lot.

POINT VI

THE SUITABILITY OF THE SITE IS NOT RELEVANT GIVEN THE PROPERTY'S CONSTRAINTS, WHICH WERE KNOWN TO ERUR AT THE TIME OF PURCHASE [Not Addressed Below]

Should the Court look past the first two issues raised, ERUR's requested relief and its alleged support for same lacks merit and should not be considered.

Even if the Court or Special Master were to determine the site was suitable for the affordable units, it does not alleviate or change the reality of the zoning

restrictions applicable to the site which Redeveloper KNEW OF when the site was purchased.

The lot the redeveloper purchased is a triangular shaped parcel in the CBD-15, central business district zone. The lot is undersized for the zone at 9,245 square feet where 15,000 square feet are required and has insufficient lot depth of 40.8 feet where 75 feet is required.

The redeveloper later filed an application with the Emerson Land Use Board seeking to construct seven (7) affordable housing units on the property. In addition to the deficient lot area and lot depth referenced above, the application also would have required "c" variances for the following:

1. Insufficient front yard setback from Kinderkamack Road;
2. Insufficient rear yard setback;
3. Insufficient number of parking spaces; and,
4. Improper or insufficient sidewalks.

The variances are detailed in the report from the Board's Planner, Christopher P. Statile, PA, dated October 1, 2021.

Of greater importance for the purposes of this appeal, and as set forth in the Borough's original Opposition, is the fact that the application also requires a "D" or use variance. Rather than propose a conforming use, the redeveloper proposes to construct an entirely residential structure with residential dwelling units at grade.

The relevant portions of Ordinance 290.68 C (2), which sets forth the permitted uses in the zone, was amended by Ordinance 1535-16, which was adopted by the Mayor and Council on December 20, 2016, some six (6) months after the Redevelopment Agreement was entered into, but more than two years prior to the redeveloper's acquisition of 129 Kinderkamack Road. One of the changes made by Ordinance 1535-16 was to change the permitted uses in Ordinance 290-68A to include, *inter-alia*, the following:

1. Multi-family residential dwellings above at-grade, retail, commercial and other principal permitted uses.

2. Multi-family residential dwellings including buildings above at grade parking only in areas where the building is behind a building that fronts Kinderkamack Road.

3. Multi-family residential dwellings are at grade only where they front on Lincoln Boulevard and only in areas where the building is behind a building that fronts on Kinderkamack Road.

The Ordinance also provides that since it pertains to a redevelopment area, it states that: "Deviation Requests. The Borough may grant deviations from the regulations in the within Ordinance where permitted by the provisions of the Municipal Land Use Law. Notwithstanding the above, any changes to be uses permitted in the within Redevelopment Plan Ordinance shall only be permitted by an amendment to this Ordinance by the Mayor and Council upon a finding that such deviation would be consistent with and in furtherance of the goals and objectives of this Ordinance." (Ordinance 1535-16 §6a). Therefore, the Borough

submits that, even a determination of site suitability would not be sufficient to permit the development of 129 Kinderkamack Road that ERUR is requesting. Rather, what the appeal actually seeks is, as set forth in the Borough's brief herein, the Court disregard and usurp the following from the Borough:

· Authority to adopt Ordinances pursuant to N.J.S.A. 40A:6-6;

· Authority of the governing body to Zone pursuant to N.J.S.A. 40:55D-62;

· Authority to designate areas in need of redevelopment pursuant to N.J.S.A. 40A:12a-1 to 89;

· Authority to enter Redevelopment Agreements pursuant to N.J.S.A. 40A:12a-1 to 89; and,

· Authority of local land use board to hear and approve site plan applications pursuant to N.J.S.A. 40:55D-25.

Lastly, ERUR's application for a "use" zoning variance before the Borough's Land Use Board is a breach of contract pursuant to Article 12. Section 12.1 It provides:

> Redeveloper agrees to proceed in good faith and at its own cost and expense to obtain all Governmental Approvals to develop and construct the Project in accordance with the Redevelopment Project Schedule.

Redeveloper agrees that it shall not seek any use variances pursuant to N.J.S.A. 40:55D-70(d) in connection with its applications for the Governmental Approvals.

CONCLUSION

As the foregoing makes clear, no Court intervention should be required as all the Redeveloper needs to do is comply with its obligations under well established State Law, the Borough Code, Municipal Land Use Law, and the Redevelopment Agreement. The Borough of Emerson and its officials have done everything in their power to facilitate the Project being expeditiously completed and providing alternative sites for the construction of offsite units. The Redeveloper, rather than operate under the law, has instead attempted to bypass all of the foregoing in an attempt to usurp any inconvenience it can conceive. It is respectfully requested the Court deny all prayers for relief by the Redeveloper, and instead allow the Redeveloper to present its case to the Mayor and Council, and then, if need be, the local land use board.

Respectfully submitted,

GIBLIN & GANNAIO, ESQS.

By: *Brian T. Giblin, Esq.*

Brian T. Giblin, Esq.

IN THE MATTER OF THE APPLICATION OF THE BOROUGH OF EMERSON, NEW JERSEY, FOR A DECLARATORY JUDGMENT, **Petitioner.**	**SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION** **DOCKET NO. A-238-23** **Submitted: November 1, 2024** **ON APPEAL FROM A FINAL ORDER OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, BER-L-6300-15** **Sat Below: Hon. Gregg Padovano, J.S.C.**

REPLY BRIEF OF APPELLANT INTERESTED PARTY EMERSON REDEVELOPERS URBAN RENEWAL SEEKING ENFORCEMENT OF THE TRIAL COURT'S CONDITIONAL JUDGMENT COMPELLING THE BOROUGH OF EMERSON TO BUILD AFFORDABLE HOUSING

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PRELIMINARY STATEMENT

On the record before the trial court, and now on appeal, it remains undisputed: (i) that the Borough of Emerson was obligated under a binding judgment to provide a realistic opportunity for the construction of the seven units of affordable housing; (ii) that in the six years since the new administration took over in 2019, Emerson has no plan to build the seven units, let alone a realistic one, for complying with the trial court's judgment; (iii) that the only plan to build the seven units of affordable housing was the prior administration's decision, after review of available vacant land, to locate the seven units on the off-site property Block 610, Lot 1; that Emerson instructed redeveloper Emerson Redevelopers Urban Renewal LLC to purchase the lot, which it did; and (iv) that the court-appointed special master found the off-site property suitable and urged the implementation monitor and the court to approve the off-site property for construction of the seven affordable units in compliance with the judgment. Indeed, the only record evidence before the trial court was uncontested: former mayor Lamatina certified under oath that the council's redevelopment subcommittee selected the off-site property and directed ERUR to purchase same; and ERUR principal Jack Klugmann's undisputed certification that he did so. These undisputed facts compel the conclusion that, as the trial court found, Emerson is in default of the judgment. It has not built the seven units. It has not

offered a new or alternate plan to the court, the implementation monitor, or the special master to provide a realistic opportunity for the construction of the court-ordered affordable housing. Emerson is in violation of the court's judgment.

But the remedy selected by the trial court, more process from Emerson in a seemingly endless string of roadblocks, was error. A finding of a violation of an order without a corresponding remedy does not appropriately induce compliance with the judgment by a defaulting party, particularly in the Mount Laurel setting. Under similar circumstances such as this—a party in violation of an affordable housing judgment and with no realistic plan to comply—courts have held site suitability hearings, setting aside cost generative measures including zoning and land use ordinances, that obstruct or make more costly the constitutionally required affordable housing. The trial court should have compelled a suitability hearing here for the off-site property.

Emerson contends that it cannot be in violation of the judgment because the off-site property is not identified by name in it. But what is in the judgment is the court-ordered number of units. Emerson cannot shirk a judgment compelling it to build seven off-site units merely by protesting that the location of the off-site units is not specified. This is the very municipal recalcitrance identified by the Supreme Court, which should have been rectified with corrective Mount Laurel II remedies, and a far cry from compliance.

Emerson responds by mischaracterizing ERUR's claim as one for "estoppel" or enforcement of an oral agreement. ERUR does not seek an order for governmental approvals on the basis of statements by the former mayor and council, or a "back room deal" as claimed. It seeks an order for a site suitability hearing under the Mount Laurel doctrine because Emerson is in violation of a court order, has no plan to comply with the judgment, and the undisputed plan of the prior administration to achieve compliance (approved by the special master) is the only plan that is suitable. ERUR never argues the land use board is bound to grant site plan approvals because the former mayor said so, rather, Emerson should be compelled to hold a site suitability hearing because the off-site property is the only viable option Emerson has ever put forward to the court and court-appointed professionals to meet Emerson's constitutional obligations in the judgment.

Finally, Emerson misrepresents the law, claiming the court lacks authority to "disregard and usurp" the power of the municipality to zone. Not so. As the trial court explicitly recognized, upon a finding of a municipality's failure to comply with its obligations—as here—courts are empowered to set aside cost generative measures that frustrate the constitutional goal, including provisions of a municipal zoning ordinance.

Once the trial court found noncompliance, a remedy should have followed.

LEGAL ARGUMENT

I. EMERSON'S ARGUMENT, THAT ANY PLAN TO MEET COURT-ORDERED AFFORDABLE HOUSING OBLIGATIONS MUST COMPLY WITH THE MUNICIPAL ZONING ORDINANCE, HAS BEEN REJECTED BY THE COURTS

Emerson contends it has sole authority to "enact ordinances" and that duly exercised authority cannot be usurped. It asserts that approval of the off-site property for affordable housing would "only be possible if the Mayor and Council were to amend the Redevelopment Plan." Pb14-15. To the contrary, the trial court itself affirmed that it had such powers: "the court certainly recognizes the powers and authority to act under the Mount Laurel doctrine" and "the court recognizes that land use ordinances shall yield to the plans for affordable housing." 111a. Until this appeal, no party disputed such power. Emerson quotes the Local Redevelopment and Housing Law, and the power of the municipality to zone in general (outside of constitutional constraints), but fails to even acknowledge the existence of a fundamental tenant of the Mount Laurel doctrine, that courts are empowered to "eliminat[e] unnecessary cost producing requirements and restrictions" in municipal zoning that frustrate affordable housing. S. Burlington Cnty. N.A.A.C.P. v. Mount Laurel Twp., 92 N.J. 158, 217 (1983) (Mount Laurel II). Tellingly, Emerson does not discuss the Mount Laurel doctrine at all, mentioning it a single time in the text of a quoted passage from a case. Pb18. The imperative to eliminate cost generating local zoning laws

includes, among others, duly adopted ordinances for "minimums for frontages, setbacks, front yards, and home sizes." Id. at 295. Any local zoning requirement that imposes a "significant impediment" to the court-ordered affordable housing is set aside to accomplish the constitutional objective, subject to suitability. Toll Bros., Inc. v. Twp. of Windsor, 173 N.J. 502, 557-58 (2002). Emerson further argues that ERUR cannot build the agreed-upon seven units of affordable-housing on the off-site property because there is "insufficient front yard setback," rear setback, parking, or the need for a variance. But these are the very requirements courts can, and must, set aside when court-ordered and constitutionally required affordable-housing is at issue. See id. In Mount Laurel II itself, the issue was whether the affordable-housing proposal had to comply with a local zoning ordinance requirement for a (d) use variance for mobile homes. The Court ordered the construction of affordable housing proceed, notwithstanding the cost generative variance requirement, because the site was "plainly suited for mobile home development" and the mobile home requirement imposed a significant impediment. Mount Laurel II, 92 N.J. at 308

Emerson next claims ERUR is not entitled to relief because "ERUR did not exhaust its administrative remedies." Pb29. The law is clear that there is no requirement to first seek, and be denied, zoning approval before obtaining relief from the Court. As set forth in ERUR's opening brief, the Supreme Court in Toll

Bros. v. Twp. of W. Windsor, 173 N.J. 502, 559 (2002) rejected the argument that the developer of affordable housing was required to "first seek approval for its development from the Township, thereby denying it the opportunity to hear the application." In any event, ERUR applied to the land use board for a variance and was denied a hearing.

Emerson contends "there has bee no bad faith actions by the Borough." Pb20. For this assertion, Emerson sites nothing, and does not dispute the substantial evidence of bad faith on the record. 64a-85a. Regardless, on issues of "the municipality's fair share of the regional need and defendant's proof of its satisfaction. Good or bad faith, at least on this issue, will be irrelevant." Mount Laurel II, 92 N.J. at 222. Here, there is no dispute that the municipality has failed to comply with the judgment: it is the remedy, or total absence of one, imposed by the trial court to which ERUR objects.

II. THERE EXISTS AN UNDISPUTED VIOLATION OF THE COURT'S JUDGMENT COMPELLING EMERSON TO PROVIDE A REALISTIC OPPORTUNITY FOR CONSTRUCTION OF THE 29 AFFORDABLE UNITS (INCLUDING WITH RESPECT TO THE SEVEN OFF-SITE UNITS) REGARDLESS OF WHETHER THE CONTEMPLATED PROPERTY, BLOCK 610, LOT 1 WAS ITSELF IDENTIFIED IN THE COURT'S ORDER

It is Emerson's sole obligation under the settlement agreement, the judgment, and the law, to satisfy its agreed upon realistic development potential with a concrete proposal for how it will realistically be achieved. Emerson's

settlement agreement with Fair Share Housing Center states that the "Borough will show at the midpoint review how it will provide a realistic opportunity for the remaining 7 units . . . ." 165a. The judgment, incorporating the settlement agreement, 245a ¶ 9, provides: "[f]or the midpoint realistic opportunity review due on July 1, 2020, as required pursuant to N.J.S.A. 52:27D-313, the Borough will post on its municipal website, with a copy provided to Fair Share Housing Center, a status report as to its implementation of its Plan and an analysis of whether any unbuilt sites or unfulfilled mechanisms continue to present a realistic opportunity . . . ." Id. N.J.S.A. § 52:27D-313 requires that the municipality provide a "realistic opportunity review at the midpoint of the certification period." See also In re Six Month Extension of N.J.A.C. 5:91-1 et seq., 372 N.J. Super. 61, 100 (App. Div. 2004) (holding that the municipality's proposal at the time of application for certification must be compared to its actions at the midpoint review, with "a realistic opportunity review," meaning that "there is in fact a likelihood--to the extent economic conditions allow--that the lower income housing will actually be constructed.") Emerson never advised the court of any new plan for the off-site units; it did not seek input from the special master or Fair Share Housing Center; and it put nothing in its midpoint review report. 544a. Indeed, the midpoint review does not even mention the 7 off-site affordable units, displaying Emerson's apparent effort to evade its

obligation. By trying to improperly shift its burden to ERUR, Emerson seeks to conceal from the court that, in the six years since the new administration took power, it has not even contemplated a plan for a realistic mechanism to satisfy the seven units required by the court's judgment. While Emerson emphasizes the fact that the judgment itself makes no explicit reference to Block 610 Lot 1 sought to be utilized for the seven off-site units, there is no dispute of fact that Emerson has an obligation to provide a realistic opportunity to build the seven units and has never sought approval for any other location that the off-site property.

It is similarly undisputed, at the time of execution of the judgment, Emerson had considered the vacant land available, determined to locate the seven units at Block 610, and instructed ERUR to purchase the lot. 82a-85a ¶¶ 11-19. Emerson submits attorney argument that "ERUR [never] indicate[d] that it was moving ahead in the absence of Emerson identifying a site and purchasing the triangle block," Pb34, without citation to a single fact. Instead, the undisputed testimony—never controverted on the record below by competent evidence—is that the council selected Block 610 based on the "firm belie[f] the site was suitable" considering the limited "available space for such an Off-site Building," and instructed developer to purchase the Lot. 81a ¶¶ 6-8. Emerson does not point to a shred of record evidence in opposition to this. At the time

of execution of the judgment under former mayor Lamatina, Emerson had a demonstrable plan to satisfy its Court-ordered obligation: a realistic proposal to construct seven units directly across from the main project. Since repudiating that agreement and understanding, six years later, the new administration has not put forward to Fair Share or the special master any alternative.

In a half-hearted attempt to contest these facts, Emerson claims it plans to move forward with an "alternative site[]" where the "Borough Engineer believes [it] is suitable for between eight (8) and twelve (12) units" surrounding "wetlands," purportedly allowing for a "about a 60x120' building.'" Emerson's two-page argument on this point is asserted as fact without a single record citation or basis in the record below. Emerson cannot offer its engineer's opinions on appeal. Tellingly, if there really was an appropriate, suitable site, Emerson would have advised Fair Share and the special master and sought their signoff. There is no record evidence that the Borough's claimed alternative is suitable, nor that Emerson has taken any action to designate it as such.

Emerson points out that it has been twenty years since Judge Harris called Emerson a "bastion of exclusionary zoning," claiming that Harris' opinion has "nothing to do with the issue at hand." Pb3. Just the opposite. It is part of Emerson's pattern of disregard for its affordable-housing obligations stretching back twenty years. Emerson says "the situation in Emerson from 20 years ago"

is different now, but in those twenty years and up through the midpoint review, in Emerson's own words, "no affordable housing units have been physically rehabilitated or constructed within the Borough." 545a. Emerson, having failed when given the opportunity to implement a plan for realistically securing affordable housing with respect to the seven off-site units, should have been ordered to adhere to the only plan that ever existed for the construction of the seven off-site units; the plan that undisputedly existed at the time the judgment was entered; and the only plan that has a realistic opportunity to lead to the actual construction of the affordable housing envisioned by the court.

III. THE BOROUGH'S EVIDENTIARY OBJECTIONS, NEVER ENDORSED BY THE TRIAL COURT, ARE WITHOUT MERIT

The Borough submits conclusory attorney argument attacking the sworn certifications by individuals with direct, personal knowledge of these facts, see Pb21 (arguing certification "should be disregarded in its entirety due to numerous violations of the Court Rules," without specifying a single alleged violation). Notably, the trial court did not endorse Emerson's argument that the certification is "hearsay," Pb2.[1] While it is difficult to tell on the appellate

[1] On appeal, the Borough attacks the credibility of Lamatina, asserting that the counsel was divided about what to do with Block 610. It suggests that Lamatina's assertion that the council agreed to use Block 610 to fulfill the off-

record (because it is not squarely argued) what Emerson claims represents "hearsay," statements by an Emerson representative to a party adverse to it in this litigation, ERUR, are not hearsay but statements of a party opponent. See N.J.R.E. 803(b)(1), (4) (a "party-opponent's own statement" and "statement by the party-opponent's agent" are exempt from hearsay when "offered against a party-opponent"). The statement by a member of the Borough to Emerson that the council has selected the off-site property and instructing ERUR to purchase same, are not hearsay.

Contrary to Emerson's contention, ERUR does not offer this undisputed testimony concerning the selection of Block 610 for the off-site units to establish a "back room deal" as Emerson claims. ERUR does not claim "estoppel" in this action, that because the former mayor told ERUR to use Block 610 for the seven affordable units, the municipality is bound. Rather, the uncontested facts demonstrate a selection process by the former council, an analysis of vacant land, and a decision: in short, a concrete plan. By contrast, the new administration abandoned the plan and never created a new one to provide a

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site portion is false. Pb5-6. But the Borough cites from meeting minutes from December 2016—a year before the events in the certification—when in late 2017, early 2018, Lamatina certifies he and the council instructed ERUR to purchase Block 610. 83a ¶¶ 11-12. That the council may have been unsure of its decision in 2016 does not mean it failed to make a decision in 2018.

realistic opportunity to fulfill its court-ordered affordable housing obligation set forth in the judgment. That is a violation for which Mount Laurel II provides a remedy.

IV. THE REQUESTED RELIEF WAS BEFORE THE TRIAL COURT

Emerson does not deny that the appropriate remedy to secure compliance with an Order compelling the construction of affordable housing is an analysis focused on site suitability. Instead, Emerson claims the hearing on site suitability is improper purportedly because "relief they sought [wa]s noticeably absent and completely different from their original notice of Motion and proposed Order." Pb3. Emerson claims ERUR only sought "automatic approval" and nothing else. Id. Not so. In ERUR's motion, it noted that the "Court [must] find that the site for affordable housing is 'suitable,'" and that such decision should involve the "municipal planning board . . . [to] make as much use as they can of the planning board's expertise and experience so that the proposed project is suitable for the municipality." ERUR's Br. 5 (Trans. ID LCV2023743141); see also ERUR Original Mot. Reply Br. 10 ("The Court Must Hold A Public Hearing On Site Suitability") (Trans ID LCV20231044792). ERUR then moved for reconsideration on the very relief sought: a site suitability hearing. The argument that ERUR did not raise this relief in its original motion is frivolous.

CONCLUSION

For the foregoing reasons, the court should reverse the trial court's decision, which found a violation but declined to order a remedy, and remand for a site suitability hearing with respect to the Off-site Property.

Respectfully submitted,

s/Joseph B. Fiorenzo
Joseph B. Fiorenzo

Dated: November 1, 2024