SUPERIOR COURT OF NEW JERSEY

SOMERSET, HUNTERDON AND WARREN COUNTIES
VICINAGE 13

Chambers of
THOMAS C. MILLER
Presiding Judge - Civil

Somerset County Superior Court
P.O. Box 3000
Somerville, NJ 08876-1262
(908) 332-7700 Ext. 13590

FILED ON ECOURTS

September 11, 2019

Jeffrey Lehrer, Esq.

Keith Davis, Esq.

Adam Gordon, Esq.

Peter Flannery, Esq.

Derrick R. Freijomil, Esq

RE: In the Matter of the Application of the Township of Warren
Docket No. SOM-L-904-15

Dear Counsel:

Enclosed herewith is the Court's opinion with regards to the Hearing held by this Court which has been AMENDED on this day to include a supplement on page 15 concerning a post-hearing written response received from Linda Coughlin dated September 9, 2019.

Be advised that I am requiring that the Township's Attorney submit an Order to the Court for consideration that is reflective of the Court's opinion as a "Five Day Order."

Also, the Township shall serve this opinion and its proposed Order to all Intervenors and Interested Parties (as this Court does not have a means to do same through eCourts).

Thank you.

Very truly yours,

/S/ THOMAS C. MILLER, P.J.Cv.

THOMAS C. MILLER P.J.Cv.

TCM/jml
Enclosure
CC: Frank Banisch, Special Master

IN THE MATTER OF THE APPLICATION OF TOWNSHIP OF WARREN, A Municipal Corporation of the State of New Jersey, Petitioner.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION SOMERSET COUNTY DOCKET NO. SOM-L-904-15 CIVIL ACTION (Mount Laurel) **AMENDED ON 9/11/2019**

I. Parties and Counsel

Township of Warren, represented by Jeffrey B. Lehrer, Esq. of the Law Firm of DiFrancesco Bateman.

Fair Share Housing Council, represented by Adam Gordon, Esq.

Intervenor, Chase Partners Warren, LLC and Chase Partners Warren 2, LLC, represented by Keith Davis, Esq. of the Law Firm of Nehmad Perillo & Davis

Intervenor, K. Hovnanian North Jersey Acquisitions, represented by Peter Flannery, Esq. of the Law Firm of Bisgaier Hoff, LLC

Interested Party, Warren Township Sewerage Authority, appeared through its counsel, Derrick R. Freijomil, Esq. of the Law firm of Riker Danzig Scherer Hyland & Perretti, LLP

Interested Party, Mark McCarthy, appeared as a self-represented litigant on his own behalf.

Interested Party, Rick dePinho, appeared as a self-represented litigant on his own behalf.

Interested Party, Linda Coughlin[1], addressed a written objections which were considered by the Court even though she was unable to appear

Interested Party/Objectors, George and Debbie Vetter, addressed a written objection which was considered by the Court even though they did not appear

1 Ms. Coughlin also requested an adjournment of the matter which was denied by the Court on the basis that (1) this matter involved the scheduling of many parties and experts so that rescheduling presented a hardship to the interested parties; (2) public policy warrants that the Court proceed with this Affordable Housing matter; (3) Ms. Coughlin was given an opportunity to provide her written comments which were considered by the Special Master and the Court.

Interested Party, Citizens Improving Affordable Housing (CIAH), addressed written objections dated June 20 and June 27, 2019 authored by James Burd of Hopewell Township.

Frank J. Banisch, III, PP, AICP, of Banisch Associates, Inc., appeared and testified as to Court Appointed Special Master.

2. Public Notice

The Township provided public notice of the "Compliance Hearing" to be held by the Court held on August 28, 2019. The Notice was marked in evidence as P-1. The Court finds that the public notice was proper and in accordance with applicable law.

3. Court's Analysis and Decision

A) In General

Previously this Court approved the Settlement Agreement ("Settlement") between the Township of Warren and Fair Share Housing Center (FSHC). That Agreement had been approved by the governing body of the Township on October 10, 2018. That Agreement was fully executed on October 12, 2018. The settlement agreement included component agreements with the intervenors, K. Hovnanian North Jersey Acquisitions, LLC, Premier Development, LLC, Chase Partners Warren, LLC, 284 King George Road, LLC, American Properties at Mount Bethel Road, LLC and North Hill Developers, Inc. The Settlement has been previously reviewed for fairness according to the standards set out in East/West Venture v. Borough of Fort Lee, 286 N.J. Super. 311, 328-329 (App. Div. 1996) and approved by the Court.

The narrow issue before this Court in this "Compliance Hearing" is whether the Township has met or complied with the "conditions" established by the Court when it reviewed the Agreement for "fairness" and if so, whether the Township is eligible for a Judgment of Compliance and Repose.

B) Matters in Evidence Before the Court

The Court considered the following documents which were provided by the Township, Intervenors and Interested Parties to the Court, which were marked into evidence and which were considered by the Court.

P-1 Affidavit of Service of Notice of Compliance Hearing

P-2 Warren Township Housing Element and Fair Share Plan dated 1/17/2019

P-3 Warren Township Housing Element and Fair Share Plan dated 1/17/2019 and Re-Adopted by Planning Board on 8/12/2019

C-1 Letter from Mark McCarthy

C-2 Letter from George and Debbie Vetter

C-3 Special Master Frank J. Banisch Report regarding Final Judgment of Compliance

C-4 8/11/19 and 8//16/19 letters from Linda Coughlin

C-5 8/11/19 letter from Linda Coughlin

C-6 7/2/19 letter from Mark McCarthy

C-7 4/27/19 Letter from Linda Coughlin with CD

C-8 6/20/19 Letter from James Burd – President of CIAH

C-9 6/27/19 Letter from James Burd – President of CIAH

C-10 7/2/19 Letter from Rick de Pinho

C-11 6/28/19 Letter from Mark McCarthy

Additionally, the Court considered the testimony of the parties who appeared at the Hearing, including Special Master Frank Banisch of Banisch Associates, Inc.; Interested Party Mark McCarthy; and Interested Party Rick de Pinho.

3. COURT'S ANALYSIS AND DECISION

1. Actions taken by the Township

Prior to the Compliance Hearing, the Court was advised that the Township adopted several Resolutions and Ordinances which actions were designed to fulfill the conditions that this Court set at the Fairness Hearing for the Township. Copies of those documents were provided to the Court as part of the periodic updates that the Court receives in its pending "Mt. Laurel" matters. The documents are "on file" with the Court.

The Court will review those conditions and the evidence that has been offered that purports to satisfy these conditions.

> *Condition 1. The proposals contained in "Exhibit A and B" and the applicable terms of the executed Settlement with FSHC shall be referenced in the Housing Element and Fair Share Plan.*
>
> On January 28, 2019 the Warren Planning Board adopted a Housing Element and Fair Share Plan based on the settlement agreement (PB-04A). The Warren Township Committee endorsed the adopted Plan on February 7, 2019 (Resolution No. 2019-058).

The HE/FSP shall be prepared according to the requirements of the Fair Housing Act (FHA), which identifies the "Essential components of the municipality's housing element" at N.J.S.A. 52:27D-310.

Mr. Banisch opined that the HE/FSP has been prepared as required by law and regulation and that it satisfies the condition. The Court concurs.

Condition 2. The Fair Share Plan document should include any proposed Ordinances and Resolutions needed to implement the Plan, including zoning amendments, an Affordable Housing Ordinance, a Development Fee Ordinance, an Affirmative Marketing Plan, a Rehabilitation Program description and Manual, a Spending Plan, resolutions appointing an Administrative Agent and a Municipal Affordable Housing Liaison, a resolution adopting the Housing Element and Fair Share Plan (Planning Board) and a resolution endorsing the Housing Element and Fair Share Plan (Governing Body).

The following ordinances and resolutions were adopted by the Township in order to address those requirements:

- Ordinance 19-07 - Establishing the AH-1 Zone adopted on February 28, 2019 (K. Hovanian, Block 208, Lots 4 & 10)
- Ordinance 19-08 - Establishing the AH-2 Zone adopted on February 28, 2019 (Hillcrest Crossing, Block 205, Lots 58, 29, 60, 61 & 62)
- Ordinance 19-12 - Establishing the AH-3 Zone adopted on March 14, 2019 (Wagner Farm, Block 83, Lot 4)
- Ordinance 19-13 - Establishing the AH-4 Zone adopted on April 11, 2019 (Chase Partners Stage IV, Block 85.01, Lots 1, 2, 3, and 4)
- Ordinance 19-14 - Establishing the AH-5 Zone adopted on March 14, 2019 (Berlandt, Block 92, Lot 1)
- Ordinance 19-15 - Establishing the AH-6 Zone adopted on March 14, 2019 (Berlandt, Block 90, Lot 2)
- Ordinance 19-16 - Establishing the AH-7 Zone adopted on March 14, 2019 (Berlandt, Block 89, Lot 4)
- Ordinance 19-17 - Establishing the AH-8 Zone adopted on March 14, 2019 (North Hill, Block 69, Lot 8.01)
- Ordinance 17-18 - Adopting the Redevelopment Plan for an "Area in Need of Redevelopment" for Block 114, Lots 22.03 and portion of 22.04, adopted on October 5, 2017 (Lindberg Avenue - PIRHL)
- Ordinance 17-20 - Adopting the Redevelopment Plan for an "Area in Need of Redevelopment" for Block 88.04, Lot 15, adopted on October 15, 2017 (Flag Plaza)
- Ordinance 17-21 - Adopting the Redevelopment Plan for an "Area in Need of Redevelopment" for Block 78, Lot 15.01 and 15.02, adopted on October 5, 2017 (American Properties/Mt. Bethel)

- Ordinance 17-25 - Adopting the Redevelopment Plan for an "Area in Need of Redevelopment" for Block 71, Lot 37.01, adopted on December 14, 2017 (Mt. Horeb and Mt. Bethel Roads area)
- Ordinance 19-11 - Adopting the Amended Redevelopment Plan for an "Area in Need of Redevelopment" for Block 88.04, Lot 15, adopted on April 11, 2019 (Flag Plaza)
- Ordinance 18-15 Development Fee Ordinance, adopted July 12, 2018
- Ordinance 19-33 Amending the Development Fee Ordinance, adopted May 9, 2019
- Ordinance 19-30, Amending the Affordable Housing Ordinance, adopted May 9, 2019
- Resolution 2019-122, establishing an Affirmative Housing Marketing Plan, adopted May 9, 2019
- Resolution 2019-123, Appointing an Administrative Agent, adopted May 9, 2019
- Resolution 2019-126 Intent to Bond for costs associated with Block 114, Lot 22.03 (PIRHL) adopted May 9, 2019
- Resolution 2019-125, Appointment of Municipal Housing Liaison, adopted May 9, 2019
- Resolution 2019-145 endorses and adopts the May 17, 2019 Spending Plan, adopted June 13, 2019
- Rehabilitation Manual, prepared by Rehabco, Inc., adopted July 18, 2019

The Court agrees with the Master's recommendation that those adopted ordinances satisfy the condition.

Condition 3. The Spending Plan must be prepared, submitted to the Special Master for review and comment, adopted by the Planning Board as part of the Plan and by the Township Committee as a separate action and submitted to the Court for approval before the Township will be permitted to expend any funds from its Affordable Housing Trust Fund.

Warren adopted the Spending Plan on June 13, 2019. Mr. Banisch reviewed and analyzed the Plan and opined that it addressed the statutory and regulatory requirements related to spending development fee revenues from the Affordable Housing Trust Fund. The Court concurs.

Condition 4. All proposed inclusionary and 100 percent affordable housing development zoning amendments must be prepared, reviewed by the Special Master, and adopted and submitted to the Court prior to the entry of an Order granting a final Judgment of Compliance and Repose.

The following compliance ordinances have been adopted as required:

- Ordinance 19-07 - Establishing the AH-1 Zone adopted on February 28, 2019 (K. Hovanian, Block 208, Lots 4 & 10)

- Ordinance 19-08 - Establishing the AH-2 Zone adopted on February 28, 2019 (Hillcrest Crossing, Block 205, Lots 58, 29, 60, 61 & 62)
- Ordinance 19-12 - Establishing the AH-3 Zone adopted on March 14, 2019 (Wagner Farm, Block 83, Lot 4)
- Ordinance 19-13 - Establishing the AH-4 Zone adopted on April 11, 2019 (Chase Partners Stage IV, Block 85.01, Lots 1, 2, 3, and 4)
- Ordinance 19-14 - Establishing the AH-5 Zone adopted on March 14, 2019 (Berlandt, Block 92, Lot 1)
- Ordinance 19-15 - Establishing the AH-6 Zone adopted on March 14, 2019 (Berlandt, Block 90, Lot 2)
- Ordinance 19-16 - Establishing the AH-7 Zone adopted on March 14, 2019 (Berlandt, Block 89, Lot 4)
- Ordinance 19-17 - Establishing the AH-8 Zone adopted on March 14, 2019 (North Hill, Block 69, Lot 8.01)
- Ordinance 17-18 - Adopting the Redevelopment Plan for an "Area in Need of Redevelopment" for Block 114, Lots 22.03 and portion of 22.04, adopted on October 5, 2017 (Lindberg Avenue - PIRHL)
- Ordinance 17-20 - Adopting the Redevelopment Plan for an "Area in Need of Redevelopment" for Block 88.04, Lot 15, adopted on October 15, 2017 (Flag Plaza)
- Ordinance 17-21 - Adopting the Redevelopment Plan for an "Area in Need of Redevelopment" for Block 78, Lot 15.01 and 15.02, adopted on October 5, 2017 (American Properties/Mt. Bethel)
- Ordinance 19-11 - Adopting the Amended Redevelopment Plan for an "Area in Need of Redevelopment" for Block 88.04, Lot 15, adopted on April 11, 2019 (Flag Plaza)

The Master and the Court have analyzed these documents and found that the condition has been satisfied.

Condition 5. The Township will need to prepare and adopt an Affordable Housing Ordinance that reflects all provisions of the settlement agreement as well as applicable UHAC and COAH Rules.

- Ordinance 19-30, Amending the Affordable Housing Ordinance, was adopted May 9, 2019

That Ordinance satisfies the condition.

Condition 6. If it has not done so already, the Township will need to contract with one or more Administrative Agents.

- Resolution 2019-123, Appointing an Administrative Agent, was adopted May 9, 2019

That condition is satisfied.

Condition 7. If it has not done so already, the Township will need to create the position of Municipal Housing Liaison by Ordinance and fill that position by Resolution of the Governing Body.

- Resolution 2019-125, Appointment of Municipal Housing Liaison, was adopted May 9, 2019

Again, the Court finds that the condition is satisfied.

4. CONSIDERATION OF THE OBJECTIONS FILED IN THIS MATTER

A) The Special Master reviewed and considered the timely objections that were filed in writing by several of the parties. The Master's Report included the following summary of those objections:

Linda Coughlin, July 2, 2019

Ms. Coughlin reiterates her previous objections outlined in my Fairness Report. Ms. Coughlin states that there are significant stormwater issues on her property, and in the area in general, from the neighboring schools which have not been resolved. She states that the development of the Warren Family Lindbergh Avenue site will further exacerbate the drainage deficiencies in the area and on her property.

Mark McCarthy, July 2, 2019

Mr. McCarthy objects to the lack of transparency and inclusion of the public in the hearing process. Mr. McCarthy states that resident comments and concerns were not adequately addressed or reflected in the process and that the Governing Body has not fully investigated issues surrounding the sites depicted in the plan. In addition, Mr. McCarthy states that the Court process also did not adequately evaluate information provided to the court related to specific site concerns.

Mr. McCarthy specifically addresses concerns related to Block 114, Lot 22.03 (Lindbergh Avenue site). Issues raised for this site by Mr. McCarthy includes lack of sewer capacity and environmental concerns including; threatened and endangered species, wetland area identification errors, and possible site contamination. Mr. McCarthy also states that traffic congestion from the High School will be further exacerbated with any new development in the area.

Mr. McCarthy requested that his objection letter dated November 21, 2018 be included in this report. As stated in my prior Fairness Hearing report:

"Mr. McCarthy's (November 2018) objections to the settlement agreement include that the proposed affordable housing developments will place affordable housing

units within single buildings and not distributed throughout the development, that site suitability and sewer capacity issues exist on the proposed sites, that the settlement agreement places a large amount of affordable housing in the northwest corner of the Township.

Mr. McCarthy also states that the negotiation process was not transparent and that the settlement agreement is unclear on the actual total number and distribution of affordable housing."

Rick de Pinho, July 2, 2019

Mr. de Pinho objects to the inclusion of Block 90, Lot 2 as an affordable housing site. Mr. de Pinho states that the process to submit formal complaints and review and receive adequate responses throughout the process has not been satisfactory. He believes contact with the Court Master was difficult and that the Township Committee has not had an open discussion on the issues concerning the development of the site which include environmental constraints, traffic, roadway conditions, and inconsistency with the Township's Master Plan.

Mr. de Pinho also feels that the properties objected to by Berkley Heights were given an elevated status with concerns addressed through ordinances 19-07 and 19-08. Block 90, Lot 2 was not afforded the same consideration and specific language to alleviate his previously stated concerns was not included in the ordinance.

The foregoing timely objections were reviewed as they relate to whether the compliance sites meet COAH suitability criteria, meaning the sites are all "available", "approvable", "developable" and "suitable" as defined in N.J.A.C. 5:93-1. Site specific concerns should be addressed during the development review process.

Based on my review of site conditions and my involvement in mediation, including discussions regarding sewer service, I believe the sites proposed meet site suitability criteria and will create a realistic opportunity for the production of Warren's third round affordable housing obligation.

The Court has conducted its own independent review and analysis of the "objections" filed by the various intervenors. Also, as part of that review, the Court has considered the oral testimony of Mr. McCarthy and Mr. de Pinho which was offered at the public hearing. As such, the Court has performed the following review of the objections expressed by the various objectors:

1) *Vetter Objection*

The objection filed by Vetter included complaints regarding the suitability of two of the

particular properties that were included in the Township's Plan (King George Road-Chase and the Wagner Farm Property). They submit that the properties were not suitable because (1) they are not "characteristic" projects for those locations; (2) the projects will cause increases in traffic; (3) they will adversely affect the rural character; (4) there is a lack of sewer and water service; (5) the development may adversely affect their property; and (6) there are environmental issues that may limit the proposed developments.

Again, most of these concerns that address suitability of the chosen sites were addressed at the Fairness Hearing.

The Court is satisfied that these concerns were raised and addressed at the Fairness Hearing. That being said, the Court understands that there is no guarantee that these projects will be able to be developed in the manner and density that is anticipated in the broad brush suitability review that has been performed by the Township, the Intervenors and the Special Master.

Understandably, the Vetters do not understand that these issues have been previously raised and addressed and thus are not really within the scope of this Compliance Hearing.[2]

2) *Linda Coughlin*

Ms. Coughlin addressed the Court in two letters dated August 11, 2019 and August 16, 2019. Her primary concerns still appear to be water runoff and drainage as a result of the water runoff that negatively affect her property. She also voiced criticism about the local process for the approval of the Township's Plan. Ms. Coughlin also advocates that she has "septic problems at her home" which she believes may be exacerbated by the new developments.

While the Court is sympathetic to the issues that Ms. Coughlin has brought to the Court's attention, those issues have little to do with the issues before the Court in this "Compliance"

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[2] The Court also received a post hearing letter from Mr. Vetter dated September 2, 2019. It does not appear that the letter was provided to the Township or any other parties in the case. In his letter, he raised issues about (1) negative effects from a cell tower that has been erected on the site; (2) whether the commercial well that must be installed will have sufficient capacity; (3) pollution from nearby Route 78; and (3) the negative effects of septics on the property.

Again, if those issues are determined to be issues during the development phase, they "may possibly" affect the "developability or suitability" of the site. At this juncture there is no evidence other than conjecture that those concerns will come to fruition.

Mr. Vetter also indicated that "DEP gave the Township $400,000 as a grant to purchase the property." It is the Court's impression that the property is <u>not</u> deed restricted in a way that would preclude development. If it is demonstrated that the property in question is deed restricted in a manner that affects suitability, that fact may be poignant. At this juncture there is no evidence before the Court to support such a proposition.

Hearing. Those issues would only become significant if and when and if the development proposal is made near to Ms. Coughlin's residence and it can be shown that the effects of the development have negative effects for Ms. Coughlin's property. It is certainly conceivable that a development in the Lindbergh Avenue area may be used to rectify or improve Ms. Coughlin's circumstances.

In any event, the Court has considered Ms. Coughlin's comments as part of the Court's decision making.

3) *Mark McCarthy*

Mr. McCarthy addressed the Court including by an undated letter (C-1) and letter dated July 2, 2019 (C-2).

Mr. McCarthy had several objections to the Warren Township Plan. He indicated that he does not object to "Affordable Housing overall" as the need for it is well documented. His objections to the Warren Plan include (1) the process used by Warren Township to develop its plan and explain it to the public; (2) he believes that many legitimate criticisms and comments made to the Township Officials at the public hearing, only the comments made by "Berkeley Heights legal counsel" were deemed worthy of "special conditions" included in the Resolution and Ordinances that comprise the Township's Compliance Package; (3) that the environmental issues relating to each of the affected parcels has not been satisfactorily investigated; (4) the cumulative impact of all of the projects proposed by Warren Township and for that matter in the County and Region have not been considered; (5) the Affordable Housing concept as enunciated in the Mt. Laurel decision is no longer valid since "young people and working people" prefer to live in urban areas.

Mr. McCarthy also presented specific data that he had compiled to indicate that one or more of the Mt. Laurel sites in Warren Township are unsuitable because (1) lack of sewerage capacity; (2) lack of transportation opportunities; (3) environmental conditions have not been satisfactorily addressed, including wetlands and endangered species.

Mr. McCarthy testified at the hearing but he did not present or authenticate the data that he used to form his opinions. Nor did he qualify as an expert witness on any of the subjects that were embedded in his written or oral presentation.

Most of the issues presented by Mr. McCarthy were presented by him at the Fairness Hearing and were considered and addressed by the Court at that time. The issues generally involve claims of "suitability" of the site for their development into affordable housing projects.

As this Court has previously ruled at the Fairness Hearing in this matter, to find that a settlement agreement is fair to low and moderate income households, a court must find that it creates sufficient realistic opportunities for the provision of safe, decent housing affordable to low and moderate income households to satisfy the negotiated housing obligation. Livingston Builders, Inc. v. Livingston, 309 N.J. Super. 370, 380 (App. Div. 1998). In this respect, the role of a court in reviewing a proposed settlement agreement is analogous to that of the Council on Affordable Housing ("COAH") under the Fair Housing Act. In re Adoption of N.J.A.C. 5:96, 221 N.J. 1, 29 (2015) ("Mount Laurel IV"), A failure by COAH to make such affirmative findings required the reviewing court to reverse the decision by COAH granting a municipal petition. In re Petition for Substantive Certification, Twp. of Southampton, 338 N.J. Super, 103 (App Div. 2001); In re Denville, 247 N.J. Super. 186, 200 (App. Div. 1991); In re Township of Warren, 132 N.J, 1 (1993) (no finding that the site designated for construction of public housing is "suitable"); Elon Associates, L.L.C. v. Howell, 370 N.J. Super, 475, 480 (App. Div. 2004) (site zoned for inclusionary development lacked sewer services). As set forth in the decision of the Appellate Division in Livingston Builders, supra, a court reviewing a settlement agreement for the purpose of determining whether it is fair to low and moderate income households is guided by COAH's criteria in determining whether the agreement creates sufficient realistic housing opportunities to satisfy the negotiated housing obligation.

The Fair Housing Act ("FHA"), specifically, N.J.S.A. 52:27D-314, provides that unless an objection is submitted, COAH (now the Mount Laurel trial courts under Mount Laurel IV, 221 N.J. 1, 6, 23-24, 29 (2015)) "shall" review a petition for substantive certification (now a declaratory judgment action) and "shall" approve it if it finds that (a) the municipality's fair share plan is consistent with the rules adopted by COAH, and (b) the ordinances and affirmative measures in the municipality's housing element and fair share plan make the achievement of the municipality's fair share of low and moderate income housing realistically possible. Under this statutory standard, the municipality has the initial burden of producing evidence but, once it satisfies that initial burden, the burden shifts to any objectors who come forward to challenge the municipal compliance plan.

This is consistent with long standing New Jersey law that the burden of proof initially is a burden of producing evidence to make a prima facie case to obtain the relief the party seeks but, once the party makes its prima facie case, the burden of proof shifts to any party challenging the relief

sought. Hughes v. Atlantic City & S.R. Co., 85 N.J.L. 212, 216 (E&A 1914). As explained by the court in Kappish v. Lotsey, 76 N.J. Super. 215, 224-225 (Cty. Ct. 1962), burden of proof applies to the parties in litigation not by their party designation (i.e., plaintiff or defendant) but by "their actual relative position in the litigation as it proceeds."

The Court notes that for a proposed inclusionary project, as part of the standards for the review of plans to zone for inclusionary development (N.J.A.C. 5.93-5.6), the COAH regulations require a determination as to whether a site is approvable, available, developable and suitable pursuant to N.J.A.C. 5:93-1.3, Definitions. The site criteria and general requirements for new low and moderate income projects are similarly set forth in N.J.A.C. 5:93-5.3. These terms are defined as follows:

> "Approval site" means a site that may be developed for low and moderate income housing in a manner consistent with the rules or regulations of all agencies with jurisdiction over the site. A site may be approvable although not currently zoned for low and moderate income housing.
>
> "Available site" means a site with clear title, free of encumbrances which preclude development for low and moderate income housing.
>
> "Developable site" means a site that has access to appropriate water and sewer infrastructure, and is consistent with the applicable area-wide water quality management plan (including the wastewater management plan) or is included in an amendment to the area-wide water quality management plan submitted to and under review the Department of Environmental Protection (DEP).
>
> "Suitable site" means a site that is adjacent to compatible land uses, has access to appropriate streets and is consistent with the environmental policies delineated in N.J.A.C. 5:93-4.

To determine whether terms of the Settlement Agreement are fair to low and moderate income households, the Court is to evaluate the Township's designation of properties as inclusionary sites based on the above criteria and the additional relevant standards outlined in N.J.A.C. 5:93-5.3, 5.4 and 5.6. Under N.J.A.C. 5:93-5.3(b),"[m]unicipalities shall designate sites that are available, suitable, developable and approvable, as defined in N.J.A.C. 5:93-1. In reviewing sites, the Council shall give priority to sites where infrastructure is currently or imminently available." Under N.J.A.C. 5:93-5.3(c), "[f]or each site designated for new construction of low and moderate income units, the municipality shall provide the following minimum documentation:

(1) A general description of each site to be used for inclusionary development, including, but not limited to the following: acreage, current zoning, surrounding land uses, and street access. Maps shall be submitted showing the location of all sites.

(2) A description of any environmental constraints including steep slopes, wetlands and flood plain areas. The municipality shall include calculations of the amount of acreage that is environmentally constrained and any remaining buildable acreage. Documentation shall include the appropriate wetland and flood plain maps required pursuant to N.J.A.C. 5:93-5.1.

(3) Information shall be submitted regarding location, size and capacity of lines and facilities within the service area, as well as the status of the applicable areawide water quality management plan including the wastewater management plan. Documentation shall include maps showing the location of the sewer and water facilities; and

(4) For each site, the total number of housing units; the gross and net density of the proposed development; the total number of low and moderate income units; and the number of low and moderate income units that will be for sale and for rent.

Under N.J.A.C. 5:93-5.6(a), municipalities that choose to provide zoning for inclusionary development shall select sites that conform to the criteria in N.J.A.C. 5:93-5.3 and shall submit the information required in N.J.A.C. 5:93-5.3.

N.J.A.C. 5.93-5.6(b) provides that:

> "[t]he Council's review of municipal plans to zone for inclusionary development shall include, but not necessarily be limited to: the existing densities surrounding the proposed inclusionary site; the need for a density bonus in order to produce low and moderate income housing; whether the site is approvable, available, developable and suitable pursuant to N.J.AC 5:93-1.3: the site's conformance with the SDRP pursuant to N.J.A.C. 5:93-5.4; the existence of steep slopes, wetlands and floodplain areas on the site; the present ability of a developer to construct low and moderate income housing at a specific density; the length of time an inclusionary site has been zoned at a specific density and set-aside without being developed; and the number of inclusionary sites that have developed within the municipality at specific densities and set-asides.

Under N.J.A.C. 5:93-4.3(a):

> (a) When a community has sufficient land, but insufficient water and/or sewer to support inclusionary development, the Council shall review each possible site for inclusionary development to determine if it is realistic for the site to receive the required water and/or sewer during the period of substantive certification. The

> Council shall require sufficient information to determine the site's prospects of receiving infrastructure, and the site's prospects of inclusion in an areawide water quality management plan amendment, developed in accordance with the rules of the DEP. If the site had been zoned for inclusionary development, the Council shall consider how long the site had been zoned and if the developer had filed a development application.
>
> (b) If the Council determines that a site may receive water and/or sewer during the period of substantive certification, it shall require the site to be zoned for inclusionary development, or, if the site had already been zoned for inclusionary development, it shall require the continuation of that zoning. If the Council determines that a site may not receive water and/or sewer during the period of substantive certification, the Council shall not require inclusionary zoning, but may require overlay zoning requiring inclusionary development (if water and sewer become available) and/or the imposition of a development fee consistent with N.J.A.C. 5:93-8.

At the Fairness Hearing, the Court found that the Intervenors, Warren Township and their professionals and the Court's Special Master considered the applicable standards for examining suitability and met their burden to find each of those sites as available and suitable. Although Mr. McCarthy has raised those issues again here (including by his reference to his correspondence and testimony in that hearing), those issues are not before the Court in this Compliance Hearing.[3]

4) *Rick de Pinho*

Mr. de Pinho addressed correspondence to the Court dated July 2, 2019. He also testified before the Court.

Like Mr. McCarthy, Mr. de Pinho criticized the process employed by the Township in developing and approving the Plan. That process is not an issue that has been raised in any action brought before the Court.

Mr. de Pinho also raised issues concerning "suitability" which the Court has addressed above.

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[3] Mr. McCarthy also provided a post hearing email and letter to the Court dated September 3, 2019. Again, it does not appear that the Township or any other parties in this case received the email and letter.

Mr. McCarthy raised many of the same concerns that relate to the suitability or consultability of development on the project that is located near his home. The Court's opinion has addressed those issues.

Mr. McCarthy also defended his use of OPRA to obtain records from the Township on this matter since that issue was commented on by Mr. Lehrer at the Hearing. Regardless, the OPRA issues, if there are any issues, are not before the Court in this matter. Nor are the issues pertaining the criticisms or complaints that Mr. McCarthy and Mr. de Pinho had with the process employed by the Township.

5) *Citizens Improving Affordable Housing (CIAH)*

The CIAH filed letter objections dated June 20 and June 27, 2019. The CIAH objections (which were also voiced at the Fairness Hearing via the testimony of its President, James Burd) advocates a more comprehensive, statewide approach to the issue of affordable housing. Both Mr. McCarthy and Mr. de Pinho expressed similar criticisms.

The Court must defer those issues to the Legislature as they present issues beyond the jurisdiction of this Court and the scope of the issues before the Court.

None of the interested parties presented any testimony or criticism which pertains to (1) the conditions that this Court established at the Fairness Hearing; or (2) whether those conditions have been satisfied or complied with; or (3) why the Court should not find that the Township has complied with the conditions previously established by the Court or not issue a Judgment of Compliance and Repose.

Also, the objections of the interested parties that were reviewed as part of this Compliance Hearing, were similar to, if not the same, as objections that were provided by them at the Fairness Hearing. Those objections were previously considered and addressed by the Court at that time in its prior opinion.

5. SEPTEMBER 11, 2019 SUPPLEMENT

At the Public Hearing this Court noted that since Objector Linda Coughlin was not able to appear that the Court would entertain a post-hearing written response from her. Ms. Coughlin did provide an email response dated September 9, 2019 at 8:37 p.m. which the Court has now reviewed and considered.

Ms. Coughlin indicated that she has now listened to the audio of the hearing before this Court. She has also reviewed the maps included in the Township's submission and she states that she now realizes, for the first time, that the project that is located near her home has already been approved, even though she missed the hearing that presumably occurred before the local Planning Board.

Ms. Coughlin is concerned that the Planning Board may not have consider the drainage issues that are affecting her home or the traffic issues that she perceives will occur in the vicinity near her home. While those concerns are certainly valid and should be explored by her, those issues are more properly addressed to the local agencies where those issues are cognizable. In other words, those

issues are not pertinent to the Compliance Hearing that was held by this Court in this matter.

6. COURT'S FINDING

The Court has reviewed and considered the testimony of the witnesses, documents provided to the Court as part of this Hearing as well as the report and testimony provided at the Public Hearing in this matter by the Court's Special Master. The Court finds that based upon its review of the documentation provided by Warren Township as well as the Court's consideration of the recommendations of the Special Master, Frank Banisch, that the Township has "complied" with the conditions established by the Court at the Fairness Hearing so that it is entitled to a grant of a Final Judgment of Compliance and Repose.

Counsel for the Township shall submit an Order in accordance with the Court's opinion under the appropriate Five Day Rule.