PARKER McCAY
ATTORNEYS AT LAW

COPY

Parker McCay P.A.
Three Greentree Centre
7001 Lincoln Drive West
P.O. Box 974
Marlton, NJ 08053-0974

P: 856-596-8900
F: 856-552-1427
www.parkermccay.com

Ronald C. Morgan, Esquire
856-985-4010

April 24, 2009

File No. 14502-0001-RCM

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NJ DEPT OF
COMMUNITY AFFAIRS
OFFICE OF SMART GROWTH

David Dech, Planning Director
County of Warren
Warren County Planning Offices
165 Route 519 South, Suite 111
Belvedere, NJ 07823-1949

Re: EAI Investments, LLC Affordable Housing Parcel
Block 93, Lots 4 & 5 – Pohatcong Township, Warren County
Request for State Planning Area Re-designation Through
The Cross-Acceptance Process

Dear Mr. Dech:

This office represents EAI Investments, LLC ("EAI") which is the owner of Block 93, Lots 4 and 5, a 170 acre parcel in Pohatcong Township, Warren County (the "Property"). The Property was first designated by the Pohatcong Planning Board to facilitate the production of affordable housing in 1988. It has been designated as an affordable housing site since then, a designation that has been repeatedly affirmed by the Law and Appellate Divisions (most recently by order the Honorable Allison Accurso, JSC, by Order dated April 15, 2009), and by Pohatcong Township, which granted preliminary major subdivision and site plan approval in January, 2007.

It is our understanding that the State Planning Commission is currently entertaining revisions to the State Development and Redevelopment Plan but, in doing so, has designated the Property as a PA-4. The purpose of this letter is to request that the Property be placed in a Metropolitan Planning Area 1 (PA-1) in the manner contemplated by the Fair Housing Act and the Highlands Water Protection and Planning Act. The reasons for this request follow.

The property is surrounded on three sides by fully improved higher density residential and nonresidential uses that are designated as Planning Area 1 ("PA-1") in the State Development and Redevelopment Plan ("SDRP") which are benefitted by centralized sewer and water utilities. Indeed, there is an apartment complex across the street that was constructed a number of years ago at a density of 12.5 units per acre and neighboring single-family homes and two-family dwellings are all constructed on modest sized lots. Inexplicably, the affordable housing parcel was nonetheless placed in Planning Area 4 ("PA-4") in the State Plan.

The Law Division of the Superior Court approved a Settlement Agreement to conclude first and second round affordable housing litigation in 1996 which designated the parcel as Pohatcong's sole affordable housing site. The Agreement documents that the community believes that the parcel is the only property in the entirety of the Township that is appropriate for the construction of higher density affordable housing. The Settlement Agreement was approved by the Court and the Township thereafter adopted a second round Housing Element and Fair Share Plan (collectively "Compliance Plan") which relied upon the production of affordable housing on the property to fully satisfy the community's cumulative 12-year second round fair share obligation. The Compliance Plan was approved by the trial court which thereafter entered a second round Final Judgment of Compliance and Repose in 1998.

Several residents and groups that oppose affordable housing production filed an appeal of the 1998 Final Judgment which was ultimately disposed of by the Appellate Division by the issuance of the enclosed written decision under date of June 20, 2000. The Court determined that the property is ideally suited to facilitate the production of affordable housing in satisfaction of Pohatcong's second round fair share obligation despite the fact that it is inappropriately designated as PA-4 in the SDRP. As you can see, the Appellate Division determined that the parcel is surrounded by high density uses and is in fact a growth area in-fill parcel that is a *de facto* "center" in the State Plan.

The affordable housing project that EAI intends to construct has since received Court-ordered general development plan approval and preliminary major subdivision and site plan approval from the Pohatcong Land Use Board. Moreover, the project has also received a host of approvals from the New Jersey Department of Environmental Protection ("DEP") that confirms that applicable environmental regulations are being addressed.

EAI's staff was heretofore advised by representatives of the Office of Smart Growth ("OSG") that the planning area designation of the property would be changed during the pending cross-acceptance process to either PA-1 or PA-2 in the next iteration of the State Plan. A "draft" of the forthcoming SDRP was recently made available for public inspection on the OSG's website and it appears as if an error has been made and that the planning area designation for the affordable housing parcel has not been changed to either PA-1 or PA-2. In this regard, the Honorable Allison Accurso and the Court's Mount Laurel Master (Frank Banisch) have taken the opportunity to re-review the suitability of the EAI parcel for affordable housing production in connection with declaratory judgment proceedings that the Township filed with the Court with respect to its third round affordable housing initiatives. As a result of the foregoing, Judge Accurso entered the enclosed Order on April 15, 2009 confirming that Block 93, Lots 4 & 5 continue to remain suitable and viable for affordable housing production in satisfaction of the Township's second and third round fair share obligations.

In light of the Appellate Division's and the trial court's determinations on this issue and the error that was made by the OSG and the State Planning Commission in failing to ensure that

the planning area designation for the property is changed from PA-4 to PA-1 or -2, EAI and the Mount Laurel beneficiaries are respectfully requesting that the County notify the State Planning Commission and the OSG of the planning area designation error and request that the planning area designation be changed to PA-1 or PA-2.

Thank you for your time and consideration and please feel free to contact me should you have any questions.

Very truly yours,

RONALD C. MORGAN

RCM/lkc
Encl.

cc: Edward McKenna, Esq., Chairman, NJ State Planning Commission
Benjamin Spinelli, Ex. Dir. – OSG
Lucy Vandenburg, Ex. Dir. – COAH
Melissa Orsen, Esq. – COAH
Frank Banisch, P.P. – Court Master
Neil Yoskin, Esq.
Rob Helfgott
Bob Geiger
Jim Biegen, P.E.

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-3804-97T1

PENN FARM GROUP, a New Jersey General Partnership, and PENN FARM GROUP, L.P., a New Jersey Limited Partnership, and BLAZING STAR REALTY, successor to PENN FARM GROUP, a New Jersey General Partnership,

Plaintiffs,

and

STEVEN R. HOWE, PETER W. ANDRESEN and RDS REALTY, INC., a New Jersey Corporation,

Plaintiffs-Respondents,

v.

THE TOWNSHIP OF POHATCONG, a Municipal Corporation of the State of New Jersey and THE TOWNSHIP COMMITTEE OF THE TOWNSHIP OF POHATCONG,

Defendants-Respondents,

and

THE PLANNING BOARD OF THE TOWNSHIP OF POHATCONG, RICHARD WILKINS, ROGER SIMONDS, MARY VAN LIEU, DAVID OSTILE, JERRY CLYMER, SAL VANGELI, MARGARET SLACK, GERTRUDE FREY, TERRY MAHER, and JONATHAN BEST, in their capacity as members of the Planning Board of the Township of Pohatcong,

Defendants,

FILING DATE
APPELLATE DIVISION

JUN 20 2000

Clerk

and

PHILLIPSBURG-RIVERVIEW ORGANIZATION, LOUIS HAJDU, JOHN MACK, LAURA OLTMAN and MICHAEL NEWMAN,

Intervenors-Appellants.

Argued May 23, 2000 - Decided JUN 2 0 2000

Before Judges Skillman, Newman and Fall.

On appeal from Superior Court of New Jersey, Chancery Division, Warren County.

Scott J. Ely argued the cause for appellant Phillipsburg Riverview Organization (Steven J. Madonna, attorney; Mr. Ely, on the brief).

Timothy P. Neumann argued the cause for respondents Steven R. Howe, Peter W. Andresen and RDS Realty Inc. (Broege, Neumann, Fischer & Shaver, attorneys; Mr. Neumann, on the brief).

Lyn Paul Aaroe argued the cause for respondent Township of Pohatcong.

PER CURIAM

Intervenors Phillipsburg Riverview Organization, Louis Hajdu, John Mack, Laura Oltman and Michael Newman (PRO) appeal from a final judgment of compliance approving a settlement of Mount Laurel litigation[1] between plaintiffs Steven R. Howe, Peter W. Andresen and RDS Realty, Inc. (RDS) and the Township of Pohatcong.

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[1] Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel, 92 N.J. 158 (1983).

On December 11, 1989, a developer, plaintiff Penn Farm Group (Penn Farm), filed a Mount Laurel action against Pohatcong. On September 19, 1990, another developer, RDS, filed a similar action. In 1991, Pohatcong entered into a settlement pursuant to which it agreed to rezone both developers' tracts for large scale residential development containing some units affordable to low and moderate income families. Pohatcong agreed to rezone the Penn Farm property to permit a development known as Riverwalk, consisting of 1026 single-family and multi-family homes, including 54 affordable units, and it agreed to rezone the RDS property for 550 dwelling units, including 55 affordable units. Thereafter, a court-appointed master recommended approval of the settlement, concluding that both sites were suitable for the proposed developments and that the proposed construction of lower income housing on the sites would bring the Township into compliance with its Mount Laurel obligation.

A compliance hearing for approval of the settlement began in 1996. The trial court denied intervenors' motion for leave to intervene, but this court subsequently entered an order allowing intervention as part of a settlement of an interlocutory appeal from the denial. The evidence presented by PRO at the compliance hearing was primarily directed at the unsuitability of the Riverwalk site for high density development.

During the compliance hearing, there was a change in the methodology of the Council on Affordable Housing (COAH) for

determining a municipality's Mount Laurel obligation, which resulted in a substantial reduction in Pohatcong's obligation. Due to this reduction, the number of Mount Laurel units planned for either the Riverwalk or the RDS site became sufficient to satisfy the new construction component of Pohatcong's revised Mount Laurel obligation. In August 1996, as a result of the reduction in its Mount Laurel obligation and public opposition to the Riverwalk development, Pohatcong entered into a new agreement solely with RDS for the satisfaction of its Mount Laurel obligation.

At the conclusion of the compliance hearing, Judge Mahon issued a comprehensive oral opinion approving the settlement agreement between Pohatcong and RDS and entered a judgment of compliance in favor of Pohatcong. In his oral opinion of August 18, 1997, Judge Mahon found that the RDS site offered a "sound, feasible and realistic opportunity for the development of Mt. Laurel housing." He also found that RDS' proposed development would satisfy the Township's Mount Laurel obligation.

On appeal, PRO argues that the trial court erred in approving Pohatcong's Mount Laurel compliance plan because the proposed development of the RDS site does not conform to the State Development and Redevelopment Plan (SDRP). PRO also argues that the plan for the development of the RDS site would result in construction of an excessive number of market units. We reject both arguments and affirm the judgment of compliance.

Initially, we note that the PRO never urged the trial court to disapprove the proposed development of the RDS site to satisfy Pohatcong's Mount Laurel obligation. Instead, PRO's participation at the compliance hearing focused upon opposition to the proposed development of the Riverwalk site. Consequently, PRO's arguments could be rejected on the ground that they were not raised below. See Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973). Nevertheless, we have elected to address the merits of PRO's arguments.

The purpose of a Mount Laurel compliance hearing is "to ensure that the settlement adequately protects the interests of the lower-income persons on whose behalf the suit was brought." East/West Venture v. Borough of Fort Lee, 286 N.J. Super. 311, 326 (App. Div. 1996). The standard for approval of a compliance plan is whether it provides a realistic opportunity for satisfaction of a municipality's Mount Laurel obligation. See id. at 335. We are satisfied, substantially for the reasons set forth in Judge Mahon's oral opinion, that RDS' development plan provides that realistic opportunity.

We are also satisfied that the RDS development plan is not fundamentally inconsistent with the SDRP or COAH regulations. The Fair Housing Act N.J.S.A. 52:27D-301 to -329 (FHA), does not require a trial court reviewing a Mount Laurel compliance plan to refer the issue of compliance with the SDRP to the Office of State Planning or COAH. However, the Supreme Court has indicated

that a trial court presiding over a Mount Laurel case "should conform wherever possible to the decisions, criteria and guidelines of [COAH]." Hills Dev. Co. v. Township of Bernards, 103 N.J. 1, 63 (1986).

The FHA requires COAH to give "appropriate weight" to the State Plan adopted by the State Planning Commission pursuant to the State Planning Act, N.J.S.A. 52:18A-196 to -207. N.J.S.A. 52:27D-307(e). Pursuant to this directive, COAH reached a memorandum of understanding with the State Planning Commission, under which COAH agreed that developments containing Mount Laurel housing should be located in "centers," as identified by the State Plan's Resource Planning and Management Map (RPMM). N.J.A.C. 5:93, Appendix F. COAH regulations define a "center" as:

> [A] compact form of development with a core or node (focus of residential, commercial and service development) and a community development area that ranges in scale from an urban center to a regional center, town, village, and hamlet.
>
> [N.J.A.C. 5:93-13.]

COAH regulations generally disfavor developments with Mount Laurel housing in rural areas outside of centers. N.J.A.C. 5:93-5.4. However, "[w]here [COAH] determines that a municipality has not created a realistic opportunity within the development boundaries of a center to accommodate that portion of the municipal inclusionary component that the municipality proposes to address within the municipality, [it] shall require the

municipality to identify an expanded center(s) or a new center(s) and submit the expanded or new center(s) to the State Planning Commission for designation." Ibid.

Pohatcong's planner characterized the RDS plan as "in-fill" development, because the RDS site is generally surrounded by developed areas having a population density similar to that proposed by RDS. Specifically, to the north of the RDS site is a developed area of Phillipsburg, adjacent to the east are existing developed areas of Pohatcong, and to the east and south are developed areas of the Borough of Alpha. Interstate 78 forms the western boundary of the property. Consequently, the Pohatcong's planner concluded that the RDS site was appropriate for Mount Laurel housing.

PRO's planner reached the same conclusion:

> The RDS site from everything I have been able to determine is an appropriate site for affordable housing. It certainly could be characterized as a site to which utility infrastructure can be easily extended. It adjoins areas of development.

Consistent with its planner's testimony, PRO supported development of the RDS site, stating in post-trial proposed findings of fact:

> [S]ubsequent to the initiation of the hearings, Pohatcong Township agreed that its entire Mt. Laurel compliance could take place on the RDS site. There is no planning reason why this could not occur and it would in fact be better planning to concentrate affordable housing development on the RDS site.

Moreover, RDS' planner testified that he had met with representatives of the State Planning Commission, and they viewed the site as an appropriate center.

COAH recognizes that the area surrounding a developer's site dictates whether it meets the criteria of a "center." 26 N.J.R. 2312, Comment and Response 106 (June 6, 1994). COAH also recognizes that one of the primary criteria for determining whether a site is appropriate for high density housing, including Mount Laurel units, is accessibility to infrastructure. 25 N.J.R. 5775, Comment and Response 166 (December 20, 1993). The RDS site has access to existing infrastructure, and there is nothing in the record to indicate that a vacant site suitable for affordable housing exists in the small portion of the municipality previously designated as a metropolitan area suitable for high density development. Moreover, COAH approved Pohatcong's judgment of compliance in November 1999, thereby confirming that Pohatcong's compliance plan conforms with COAH's rules and regulations. Therefore, even though the Office of State Planning has not designated the RDS site as a center appropriate for high density development, the development of that site in accordance with the RDS development plan would not conflict with the basic policies of the State Planning Act or the COAH rules.

We also reject PRO's argument that the judgment of compliance should be reversed because the RDS development plan is

larger than is required to satisfy Pohatcong's Mount Laurel obligation. Initially, we note that PRO never raised this argument at the compliance hearing. Therefore, Judge Mahon never considered whether Pohatcong's compliance plan should be disapproved on the ground that the RDS development plan provides for excessive development and more Mount Laurel housing than is required under the present COAH rules.

In any event, the argument is clearly without merit. So long as a municipality's fair-share plan creates a realistic opportunity for the construction of the lower income housing required to satisfy its Mount Laurel obligation and is consistent with sound zoning principles, it must be approved by the court. As we explained in upholding a settlement agreement with a ten percent set-aside:

> We do not read Mount Laurel II as mandating that every development which is part of a compliance plan include a minimum of twenty percent affordable housing units. . . . [T]he suggested "twenty percent" minimum pertained to inclusionary developments, and was made in the context of contested litigation, not, as here, in deciding the fairness of a proposed settlement agreement, reached after careful review and input by a court-appointed master. In fact, COAH regulations require a twenty percent minimum set-aside only when a municipality receives a vacant land adjustment. See N.J.A.C. 5:93-5.6(b)1. Otherwise, the municipality is free to determine its own set-aside level, subject to COAH review. N.J.A.C. 5:93-5.6(b).
>
> [East/West Venture, supra, 286 N.J. Super. at 334.]

necessary and reasonable to motivate a property owner to build

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[2] Blazing Star also filed an appeal from the judgment of compliance entered in favor of Pohatcong. Our opinion in that appeal is also being filed today.

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I hereby certify that the foregoing is a true copy of the original on file in my office.
for
Clerk

TRUE COPY

FILED

APR 15 2009

SUPERIOR COURT OF NEW JERSEY

Mailed 4/15/09

BENBROOK & BENBROOK, LLC
1734 Route 31 North, Suite 1
Clinton, New Jersey 08809
(908) 735-8100
Attorneys for Petitioner, Township of Pohatcong

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
SOMERSET COUNTY

DOCKET NO. L-1767-05
DOCKET NO. SOM-L-625-04

In the Matter of the Application of THE TOWNSHIP OF POHATCONG, a Municipal Corporation of the State of New Jersey,

Petitioner.

Civil Action
(Mount Laurel)

ORDER TO EXTEND JUDGMENT OF REPOSE

THIS MATTER having come before the Court upon application of Petitioner Township of Pohatcong ("Township" and/or "Pohatcong") for an Order to extend the Township's second round Judgment of Compliance and Repose which was originally entered by the trial Court on January 30, 1998 and thereafter extended (a) by Court Order entered on December 17, 2004, (b) by operation of the Appellate Division's decision in In re Adoption of N.J.A.C. 5:94, 390 N.J. Super. 1 (App. Div. 2007), and (c) due to delays in revised third round rulemaking by the New Jersey Council on Affordable Housing ("COAH"); and the Court having considered that:

(hereinafter "the Project")

1. There is an existing, second round affordable housing project approved by the Court with respect to property identified on the Township's tax map as Block 93, Lots 4 and 5 that has been allocated existing sewerage capacity by both Phillipsburg and Pohatcong pursuant to Court Order.

2. The entire Township, including the Project, is now under the regional planning jurisdiction of the Highlands Water Protection and Planning Council ("Highlands Council") as a result of the adoption of the Highlands Water Protection and Planning Act ("Highlands Act") on August 10, 2004 at N.J.S.A. 13:20-1, *et seq.*, and the Highlands Regional Master Plan ("RMP") which took effect on September 8, 2008, see 40 N.J.R. 5852(b).

3. The Highlands Act designates Block 93, Lots 4 and 5 in Pohatcong Township as one of several parcels in Pohatcong that are in the Highlands "Planning Area."

4. Preliminary Major Subdivision and Site Plan approval with respect to Block 93, Lots 4 and 5 has been granted by the Pohatcong Land Use Board to facilitate the production of affordable housing in accordance with the 1998 Judgment of Compliance and Repose with extended vested rights in accordance with the Municipal Land Use Law. The *

5. The New Jersey Department of Environmental Protection ("DEP") is currently reviewing an amendment to Pohatcong's Wastewater Management Plan ("WMP") the effect of which would be to designate Block 93, Lots 4 and 5 as a "sewer service area" in accordance with N.J.A.C. 7:15-1, *et seq.* ~~and COAH's rules such that sewer extension permits can be issued to facilitate affordable housing production.~~

* 1998 Final Judgment of Compliance and Repose was reviewed and sustained by the Appellate Division in a per curiam decision dated June 20, 2000 under Docket no. A-3804-97T1.

6. Section 25.b of the Highlands Act [N.J.S.A. 13:20-23.b] states that "[n]othing in this act shall affect protections provided through a grant of substantive certification or a judgment of repose granted prior to the date of enactment of this act."

7. The Highlands RMP placed Block 93, Lots 4 and 5 in a "Conservation Zone" and "Environmentally Constrained Sub-zone" and the Highlands Council provided DEP, in accordance with N.J.A.C. 7:38-1.1(k), a ~~Consistency~~ Determination ~~finding~~ that the proposed project is inconsistent with the goals and objectives of these Zones in the Highlands Regional Master Plan.

8. The Township must conform its Master Plan and land use ordinances to the Highlands RMP and has adopted a Resolution approved by the Highlands Council indicating its intention to opt in to the Highlands RMP with respect to the entirety of the Township, including the Planning Area wherein Block 93, Lots 4 and 5 are located.

9. Pursuant to Executive Order 114 signed by Governor Corzine, the Highlands Council and COAH have entered into a Memorandum of Understanding that, inter alia, contemplates an extension of time within which municipalities located in the Highlands Region can submit third round compliance plans such that those plans can take into account the impact of the Highlands RMP on affordable housing obligations.

10. In light of the foregoing, the Court finds and determines that it is appropriate to extend Pohatcong Township's second round period of repose against exclusionary zoning challenges in order for it to develop a cumulative third round compliance plan that is consistent with the Highlands RMP while allowing the second round compliance project to continue in pursuit of its pending WMP amendment.

IT IS on this 15th day of April, 2009, **ORDERED** as follows:

1. The foregoing findings and determinations are incorporated by reference herein.

2. The Township of Pohatcong is granted a continued Judgment of Repose through December 8, 2009. By virtue of said repose, the Township of Pohatcong shall have complete immunity and repose from any and all litigation challenging the Township's compliance with the Mount Laurel doctrine and the provisions of the Fair Housing Act.

3. Counsel for the Petitioner, Township of Pohatcong, shall forward a copy of this Order to counsel for EAI Investments, LLC, the Council on Affordable Housing, and the New Jersey Highlands Council within five (5) days of receipt.

Allison E. Accurso
ALLISON E. ACCURSO, J.S.C.