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September 10, 2020

Via eCourts

Hon. Michael C. Gaus, J.S.C.
 Superior Court of New Jersey
 Sussex County Judicial Center
 43-47 High Street
 Newton, New Jersey 07860

**Re: IMO the Application of the Township of Chatham,
 Docket No. MRS-L-1659-15**

Dear Judge Gaus:

Fair Share Housing Center (FSHC) writes to respectfully respond to the two objections it received to the July 23, 2020 Amended Settlement Agreement (Amended Agreement) between FSHC and the Township of Chatham.

The Amended Agreement supplements the December 13, 2018 Settlement Agreement and January 10, 2019 First Amendment that the Hon. Maryann L. Nergaard, J.S.C. (ret.), approved on February 22, 2019. A fairness and preliminary compliance hearing on the Amended Agreement is currently scheduled for September 17, 2020.

The purpose of the upcoming fairness hearing is to determine if the terms of the Amended Agreement adequately "protect lower-income persons by satisfying, in whole or in part, the municipality's constitutional obligation to provide affordable housing." East/West Venture v. Borough of Fort Lee, 286 N.J. Super. 311, 326-27 (App. Div. 1996).

The hearing "is not a plenary trial and the court's approval . . . is not an adjudication of the merits of the case. Rather, it is the court's responsibility to determine . . . whether the settlement is 'fair and reasonable,' that is, whether it adequately protects the interests of the persons on whose behalf the action was brought." Morris Cnty. Fair Hous. Council v. Boonton Twp., 197 N.J. Super. 359, 370-71 (Law Div. 1984) (emphasis added), aff'd o.b., 209 N.J. Super. 108 (App. Div. 1986).

On July 28, 2020, Your Honor issued an order scheduling the fairness and preliminary compliance hearing, and the order set forth that the Township would have to publish the necessary public notices. It also required all exhibits and other materials to be relied on to be submitted at least 14 days in advance of the hearing.

On August 6, 2020, the notice was published in the Daily Record, and on August 13, 2020, the notice was published in the Chatham Courier. The notice informed any member of the public that

[w]ritten objections or comments by any interested party, including any supporting documentation, proposed exhibits, and/or expert reports intended to be introduced at the Fairness and Preliminary Compliance Hearing, must be filed with the Court no later than September 3, 2020

The public notice issued by the Township is consistent with the procedure established by Judge Skillman in the seminal Morris County Fair Housing Council case and affirmed by the Appellate Division in East/West Venture.

In Morris County, Judge Skillman explained that the appropriate process to be followed included requiring that “[a]ny written objections must be filed within three weeks of the notice,” and “[t]he court will determine after receiving all documentary material submitted in connection with the proposed settlement whether to take testimony on the proposal and, if so, what areas testimony should cover and how extensive it needs to be.” Morris Cnty. Fair Hous., 197 N.J. Super. at 374; see also East/West Venture, 286 N.J. Super. at 321 (“It also provided that any interested party may file objections to the proposed agreement and may appear at the hearing scheduled by the trial judge to present evidence in support of any objections to the agreement.”).

On September 3, 2020, there were two submissions in response to the public notice of the Amended Agreement and the scheduled fairness hearing. The first was made by the Silverman Group, LLC, and the second was made by Kronos Holdings, LLC. Below is FSHC’s response to each submission.

I. Silverman Group, LLC

Through counsel, the Silverman Group filed a one-paragraph letter that alleges that it is “the contract purchaser of multiple properties located in the Township of Chatham, including the property located at 522 Southern Boulevard, Chatham,” which is the chosen site of a 100% affordable family rental development that the Township of Chatham has committed to sponsor, per the Amended Agreement.

The Silverman Group does not argue against the fairness of the Amended Agreement nor does it make any argument at all. Instead, it writes that it

intends to participate in the fairness hearing . . . where Silverman will present objections to the Township’s proposed settlement and cross-examine all witnesses presented for testimony. Further, Silverman reserves the right to present the affirmative testimony of its own witnesses.

FSHC strenuously objects to the Silverman Group being permitted to present objections and testimony at the fairness hearing when it failed to do so in writing ahead of time. The Silverman Group and its counsel were evidently on notice that any “[w]ritten objections . . . , including any supporting documentation, proposed exhibits, and/or expert reports” were due by September 3. This deadline and process was consistent with that set forth by Judge Skillman in Morris County Fair Housing Council and affirmed by the Appellate Division in East/West Venture.

If the Silverman Group had reasons to object to the Amended Agreement, it should have submitted them to Your Honor and the parties in this matter. Instead, it appears to be treating the fairness hearing like some sort of “gotcha game”: hiding whatever arguments and testimony it intends to present until the day of the hearing and trying to catch the parties to this matter by surprise.

This approach is highly prejudicial because it did not afford FSHC, the Township, the Special Master, or Your Honor with adequate time to review, consider, and/or prepare responses to whatever objections may exist. It also is not in compliance with the unambiguous public notices that were published.

Case law and New Jersey's Rules of Court both expressly forbid these kinds of surprise tactics. See Wymbs v. Twp. of Wayne, 163 N.J. 523, 543 (2000) ("Although the discovery rules are to be construed liberally and broadly, '[c]oncealment and surprise are not to be tolerated.'" (quoting Lang v. Morgan's Home Equip. Corp., 6 N.J. 333, 338 (1951))).

The parties to this matter should not be forced to confront at the fairness hearing new arguments and testimony that they were not given a full and fair chance to investigate and consider in advance. See Thomas v. Toys R Us, Inc., 282 N.J. Super. 569, 582 (App. Div. 1995) (holding that where "surprise is clearly evident" and where the party being surprised "had prepared a case built around a theory" that did not involve the late submission "prejudice is significant" and "the trial judge did not err by excluding reference to" it).

Furthermore, to the degree that any testimony that the Silverman Group would seek to proffer is expert testimony, it would violate clear rules to permit such testimony without an expert report having been furnished first. See, e.g., R. 4:23-5(b); see also Gaido v. Weiser, 227 N.J. Super. 175, 192 (App. Div. 1988) ("[T]he trial court may exclude expert testimony which does not fall within the scope of the [expert] report.")

In conclusion, FSHC respectfully submits that the Silverman Group, an entity represented by counsel, should not be allowed to present objections and testimony at the hearing after it made a conscious decision to not file a substantive written objection and ignored unambiguous notices and a clear process.

II. Kronos Holdings, LLC

Through counsel, Kronos filed a motion to intervene and a supporting brief on September 3, which is returnable on September 25, after the September 17 fairness hearing.

It is unclear to FSHC why Kronos chose to file its motion at this late date when Your Honor issued a July 21 letter to counsel for Kronos – prompted by a letter from Kronos – that notified it that if it wanted to try to participate formally in this matter, it would have to do so via motion.

By delaying and filing its motion now, Kronos has by its own making created procedural complexity. FSHC will file a response to Kronos's motion in due course, but it submits this preliminary response because Kronos's moving brief for intervention claims that "it also serves as Kronos' formal objection" to the fairness hearing.

Kronos alleges that it is the "owner of property located at 522 Southern Boulevard, Chatham Township," which is the chosen site of a 100% affordable family rental development that the Township of Chatham has committed to sponsor, per the Amended Agreement.

From what FSHC can tell from the brief, Kronos appears to be preparing a prerogative writ complaint in response to the Township's decision to designate the site an area in need of

condemnation redevelopment. And Kronos asks that the court adjourn the fairness hearing to some unspecified date until it does so and that action is adjudicated.

Although counsel for Kronos appears to be a fan of highbrow fiction – comparing a well-supported exercise of municipal authority to “a Kafka novel” – it appears to miss the fact that the upcoming fairness hearing “is not a plenary trial and the court’s approval . . . is not an adjudication of the merits of the case. Rather, it is the court’s responsibility to determine . . . whether the settlement is ‘fair and reasonable,’ that is, whether it adequately protects the interests of the persons on whose behalf the action was brought.” Morris Cnty. Fair Hous., 197 N.J. Super. at 370-71 (emphasis added).

The Amended Agreement and the schedule attached thereto anticipates that the Township of Chatham will engage in bona fide negotiations to purchase 522 Southern Boulevard for use as the site of a 100% affordable family rental development, and only if those negotiations prove unsuccessful will the Township take action compliant with the required process to condemn the site.

This is a lawful exercise of well-established municipal authority, and it is supported by both the New Jersey Fair Housing Act and the Local Lands and Buildings Law. See N.J.S.A. 52:27D-325 (“Notwithstanding any other law to the contrary, a municipality may purchase, lease or acquire by gift or through the exercise of eminent domain, real property and any estate or interest therein, which the municipal governing body determines necessary or useful for the construction or rehabilitation of low and moderate income housing or conversion to low and moderate income housing.”); N.J.S.A. 40A:12-5(a)(1) ([A]ny municipality, by ordinance, may provide for the acquisition of any real property, capital improvement, or personal property: (1) By . . . condemnation”); see also Deland v. Twp. of Berkeley, 361 N.J. Super. 1, 19 (App. Div. 2003) (“The Legislature has delegated broad authority to municipalities to acquire private property by eminent domain for public uses”); State by State Highway Comm'r v. Union Cty. Park Com., 89 N.J. Super. 202, 210 (Law Div. 1965) (“[T]he right of eminent domain is of very ancient origin and is inherent in all governments and requires no constitutional provision to give it force. It is an inherent and a necessary right of the sovereignty of the state.”).

If Kronos wants to challenge the Township’s exercise of its authority and seek to maximize its leverage in negotiations over the purchase of the site, it may do so, but that does not in any way justify delaying the upcoming fairness hearing – a hearing more than five years after this matter was initiated. The lower-income families who have a constitutional right to the promised housing should not be forced to wait an unspecified amount of time simply to placate Kronos. It can pursue any claims it files without delaying progress in this Mount Laurel matter.

Indeed, it is settled law that prerogative writ challenges, if brought parallel to the substantive certification process, even on sites that are in a municipality’s fair share plan, are to proceed separately from the substantive certification process.

For example, in Alexander’s Dept. Stores, which was affirmed by the New Jersey Supreme Court, the Appellate Division held that a challenge to a specific ordinance or developer’s agreement that was part of a municipality’s fair share plan could be pursued in a separate prerogative writ action, and there was no need to slow down or stop the substantive certification process from proceeding. Alexander’s Dep’t Stores of N.J., Inc. v. Paramus, 243 N.J. Super. 157, 170 (App. Div. 1990), aff’d, 125 N.J. 100 (1991). (“The six-year period of

repose is a special res judicata bar, designed by the Supreme Court and accepted by the Legislature, against repeated challenges from various sources to the municipality's reviewed and certified plan to fulfill its Mt. Laurel obligations. It was not designed to bar timely prerogative writ challenges to the legality of any of the components of the plan.”).

Likewise, in Sartoga v. Borough of W. Paterson, 346 N.J. Super. 569, 576 (App. Div. 2002), the Appellate Division held that even the “grant of substantive certification . . . does not preclude . . . challenge to the validity of the ordinance rezoning,” and the challenge to the ordinance could proceed separately.

Finally, after the fairness hearing is held and if the Amended Agreement is approved by Your Honor, there will be many additional and adequate opportunities for Kronos to voice concerns, including before the appropriate municipal bodies and at the final compliance hearing in this matter.

There is no need to prejudice the poor by stopping now.

Thank you for your attention to this matter.

Respectfully submitted,



Bassam F. Gergi, Esq.
Counsel for Fair Share Housing Center

c: Brian M. Slauch, Special Master
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