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LANDMARK DUMONT, LLC Plaintiff, vs. BOROUGH OF DUMONT, A MUNICIPAL CORPORATION OF THE STATE OF NEW JERSEY, COUNTY OF BERGEN; THE MAYOR AND COUNCIL OF THE BOROUGH OF DUMONT; AND THE PLANNING BOARD OF THE BOROUGH OF DUMONT Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: BERGEN COUNTY DOCKET No. BER-L-1297-14
IN THE MATTER OF THE APPLICATION OF THE BOROUGH OF DUMONT, A MUNICIPAL CORPORATINO OF THE STATE OF NEW JERSEY	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: BERGEN COUNTY DOCKET NO. BER-L-6065-15

CIVIL ACTION

OPINION

Fairness Hearing: **May 12, 2016**
Decided: **June 6, 2016**

Honorable William C. Meehan, J.S.C.

Antimo A. Del Vecchio, Esq., (Beattie Padovano, LLC), appearing for the Plaintiff, Landmark Dumont, LLC.

Mark D. Madaio, Esq., (Law Office of Mark D. Madaio) appearing for the Defendant, Planning Board of the Borough of Dumont.

Gregg F. Paster, Esq., (Gregg F. Paster & Associates) appearing for the Defendants, Borough of Dumont and Mayor and Council of the Borough of Dumont and appearing as the Plaintiff in the Matter of the Application of the Borough of Dumont.

PROCEDURAL BACKGROUND

On February 4, 2014 the Plaintiff, Landmark Dumont, LLC (hereinafter "Landmark") filed a complaint in lieu of prerogative writ and for declaratory and injunctive relief seeking a builder's remedy suit under Docket No. BER- L – 1297-14. On May 16, 2014, Defendant, Planning Board of the Borough of Dumont (hereinafter "Board") filed an answer and separate defenses to that action.

On June 30, 2015, in accordance with Mount Laurel IV, In re N.J.A.C. 5:96 & 5:97, 221 N.J. 1, (2015), the Borough of Dumont (hereinafter "Borough") filed a complaint seeking declaratory judgment under Docket No. BER- L – 6065- 15. On August 26, 2015, Docket No. BER-L-1297-14 and Docket No. BER-L-6065-15 were consolidated. On September 14, 2015 Landmark filed its answer as an intervener.

FACTUAL BACKGROUND

On March 8, 2016, Landmark, Borough, and the Board entered into a settlement agreement. There are three different property sites at issue. Pursuant to the agreement, Landmark is the contract purchaser of D' Angelo Farms, Block 212, Lot 20, a 6.09 - acre piece of property (hereinafter "Main Tract") and Block 215, Lot 1, a 1.08 - acre parcel (hereinafter "Second Tract"). The Borough is the fee - simple owner of the 50 Washington Avenue site, which contains the existing vacant Borough Hall municipal building, where trailers are located for police purposes.

There are two alternative plans for the three sites. The first plan (hereinafter "Plan One") allows for 108 units of market-rate housing on the Main Tract, 16 units of market-rate units on the Second Tract, and 18 affordable-housing units with municipal space at 50 Washington Avenue.

The second plan (hereinafter "Alternative Plan") permits 124 units of market-rate housing on the Main Tract and 18 units of affordable housing on the Second Tract.

On April 4, 2016, pursuant to Court Order, a Fairness hearing was scheduled for May 12, 2016. In compliance with the Court Order, notice was provided and published as to all persons on the interested parties' list. Service was provided via certified-mail notice; copy of notice was provided to all owners of properties within 200 feet of the three subject parcels subject to the settlement, 50 Washington Avenue and the D'Angelo Farms Main Tract and Second Tract. Notice of the fairness hearing was published in the Bergen Record Newspaper on April 16, 2016.

On May 12, 2016, the fairness hearing was held where counsel for Landmark, Antimo Del Vecchio, Esq., and counsel for the Borough, Gregg Paster, Esq., and counsel for the Board, Mark Madaio, Esq., appeared. Also present were court-appointed Special Master, Frank Banisch, P.P., AICP, and Kevin D. Walsh, Esq., of Fair Share Housing Center. The public who were residents of Dumont were also permitted to speak at the hearing, as was their representative, Peter Van Den Koy, P.P., AICP. The Court received a petition of 1,216 signatures from the residents of Dumont in opposition to the settlement agreement. Also submitted was correspondences from eight people prior to the fairness hearing: Lynn Vietri, SOD Dumont Farm'd, Dick O' Connor, Judy A. Parker, Jacqueline & James Corless, Reni Schustermann, Adriann & John Green, and Peter Van Den Kooy, P.P., AICP.

At the fairness hearing, the Court heard the testimony of Darlene A. Green, P.P., AICP, a qualified expert in municipal planning and affordable housing. Green testified that she had been retained by Dumont in 2007, 2008, and 2013 to conduct research regarding affordable housing efforts in Dumont. In 2013, a new housing element and fair-share plan was created that entailed information of housing and the municipalities obligations and procedures to satisfy such

obligations. The plan detailed an analysis of elements in the year 2013, such as credits found and categories. The plan relied upon proposed third-round rules (this Court notes that the third-round rules were invalidated by the Supreme Court) In re N.J.A.C. 5:96 & 5:97, 221 N.J. 1, 3 (2015). On December 17, 2013, the Board and the Council adopted and the Council endorsed the plan for the Coalition of Affordable Housing ("COAH"). At the end of the year, in December 2013, a petition to COAH was filed. COAH deemed the petition complete specifically to rehabilitation and prior-round obligations, however round-three rules were not deemed complete, due to the rules being at issue. No action was taken on the petition as to third-round obligations at that time.

Green provided testimony regarding the vacant-land adjustment. Green testified that the Main Tract is classified as commercial according to tax records and was not included in the vacant-land adjustment analysis. The Second Tract of D'Angelo Farm was considered vacant or farmland. The 50 Washington Avenue site was considered public and hence not included in the vacant-land analysis. Green discussed the benefits and risks of the builder's remedy action she said such risks entailed the chance of a high density being imposed upon the municipality if unsuccessful in the builder's-remedy action. The benefits of settlement she said included the certainty of elements between the municipality and builder, such as an awareness of density, height, yard setbacks, units and similar items. It was acknowledged the Board would still have the authority to provide limited review of the overall site plan.

Green viewed the settlement agreement as meeting the applicable standard. Moreover, Green discussed the settlement agreement and acknowledged that the project would involve a $1,000,000.00 site cleanup, upgrades to sewers for necessary construction on the farm sites, and widening of road ways. Construction of the sites would likely begin in the year 2017 and a certification of occupancy would be anticipated by 2017/2018.

The Court heard the testimony of David Kinsey, PHD, FAICP, PP, a qualified expert in the field of professional planning and affordable housing. Kinsey was retained by Landmark and provided testimony addressing the standard of review by the Court to determine whether the settlement agreement was fair and provided a realistic opportunity for affordable housing in Dumont. He noted that the applicable standard of review and crux of the analysis is guided by the five essential factors: 1) the number of affordable-housing units, 2) the methodology of construction, 3) other contributions, 4) other components, and 5) additional relevant factors. East/ West Venture v. Borough of Fort Lee, 286 N.J. Super. 311, 328 (App. Div. 1996).

Kinsey testified that the number of units satisfied the criteria of East/West Venture v. Borough of Fort Lee because there are a large number of families in need of affordable housing within the Dumont area. Although Dumont provides for affordable housing for senior citizens and persons of special needs, there is no affordable housing available for single persons or for families who do not meet the age or special-needs requirement. Such development of 18 affordable housing units would be the first family-unit rental for low-to moderate-income households. Kinsey found the method and fashion of the negotiation was adequate between the developer and Borough as a set-aside of approximately 12.6% of the total number of units. That was less than the usual 15%. The settlement agreement was suitable and fit particular parameters. Kinsey discussed other contributions such as two alternative plan proposals, and a $1,000,000.00 site preparation and cleanup. If in Plan One, a million dollars was spent and four additional units were not constructed, it would equate to $250,000.00 per unit. That cost would not be a payment in lieu of housing obligations. Kinsey mentioned other components to be considered were other substantive elements such as any uncertainty the Borough may have in regards to third-round obligations under COAH.

Kinsey discussed that it was highly likely that post-1999 fair-housing obligations would apply. Kinsey mentioned other relevant factors to be considered, including the suitability of the site.

Following Mount Laurel II, suitability of site entails clear title, adjacent and compatible land use. In respect to the properties at issue, Landmark advised Kinsey there was no issue as to clear title because the land was free of any encumbrances that would prevent development of affordable housing. Next, in respect to adjacent to compatible-land uses, Kinsey testified there would be no functional or aesthetic conflict with the development. New residents would be able to travel without problems by using public transportation and sidewalks. Any potential of storm water or waste water impacts would not negatively affect the function of nearby land uses. Existing and neighboring property would function normally and not be impacted by the replacement of the former farm site. The Borough Hall area consists of mixed commercial and residential uses while the farm-property sites is consistent with residential use. The development of a two-or three-story structure would create no aesthetic conflict between suburban architecture that currently exists.

Moreover, Kinsey further discussed additional factors within the 15-point check list of COAH-based suitability criteria from his report. Kinsey stated the "COAH-based criteria are a useful, well-established, and customary method for evaluating proposed affordable housing sites and projects in the context of Mount Laurel exclusionary litigation and proposed settlements." Kinsey commented that the developing sites provide adequate access to appropriate streets such as Washington Avenue. A Traffic Assessment Report prepared by Dolan & Dean Consulting Engineers, LLC, dated April 25, 2016, found no adverse consequences of development from the perspective of traffic engineering. There would be adequate sewer capacity as the site has immediate access to nearby sanitary sewer lines of the Borough's sanitary system in Stratford Road and at Washington Avenue. The site provides for adequate water capacity as it possesses direct

access to an existing water main in Washington Avenue. Pursuant to Residential Site Improvement Standards ("RSIS") the site is developable in compliance with N.J.A.C. 5:21 as the sites are large and flexible in site design. Kinsey commented that the following criteria were not applicable in this case that is, compliance with regional land use policies, compliance with wetlands and wetlands transition area constraints, compliance with category one waterbody constraints, compliance with flood hazard area constraints, buffer for historic resources, and compliance with steep slopes constraints.

Kinsey testified that the site plans were consistent with State development and redevelopment plan. The sites are located in Planning Area One where growth was encouraged and consistent with State policies. Finally, the development plans have the potential to comply with the rules and regulations of all agencies within the jurisdiction over the site as any environmental issues will or have been addressed and resolved in compliance with applicable regulations.

Frank Banisch, P.P., commented in accordance with prior testimony that the proposed settlement agreement was fair and discussed potential complications with parking if four additional units were created to increase the set-aside to 15%. Kevin Walsh of Fair Share Housing Center also expressed the support of Fair Share Housing Center for the development plan.

The Court heard and considered various comments from residents of Dumont and from Peter Van Der Kooy, P.P., as a representative of the people of Dumont in making its ultimate decision.

RULE OF LAW & DECISION

The purpose of a fairness hearing is to determine whether a settlement agreement provides a realistic opportunity for development of affordable housing for low-and moderate-income

households as required by the New Jersey Constitution. The following factors are to be considered by the trial judge and analyzed during the course of the fairness hearing: "1) the number of affordable housing units to be constructed, 2) the methodology by which the number of affordable units has been derived, 3) any other contribution being made by the developer to the municipality in lieu of affordable units, 4) other components of the agreement which contribute to the municipality's satisfaction of its constitutional obligation, and 5) any other factors which may be relevant to the "fairness" issue." East /West Venture v. Borough of Fort Lee, 286 N.J. Super. 311, 328 (App. Div. 1996). After a "fairness hearing" is conducted, the judge has the discretion to approve or disapprove a *Mount Laurel* litigation. Id. Approval of the settlement is guided by compliance with procedural safeguards. Id. If the judge determines that the settlement agreement is fair then the judge shall evaluate whether any of the provisions are ultra vires or otherwise invalid. Id. Upon making that determination, the judge will then "remand the matter for amendments to the master plan and zoning ordinance necessary to implement the agreement." Id.

Municipalities are obligated under our State Constitution to provide a realistic opportunity for the development of low-and moderate-income housing. Toll Bros. v. Twp. of W. Windsor, 173 N.J. 502, 511 (2002). In respect to Mount Laurel litigation, a builder's remedy allows builders to seek the approval of the Court for construction of a proposed housing project to the municipality during or before a pending action that will preserve a minimum of 20% of the units to low or moderate income housing. Id. at 512. Additionally, Mount Laurel IV, provides that Courts may continue their authority in reviewing Mount Laurel litigations but does not provide assurances of extensions when a municipality fails to act in good faith or abuses the process. Mount Laurel IV provides:

> We repose such flexibility in the *Mount Laurel* – designated judges in the vicinages, to whom all *Mount Laurel* compliance related matters will be assigned post-order,

> and trust those courts to assiduously assess whether immunity, once granted, should be withdrawn if a particular town abuses the process for obtaining a judicial declaration of constitutional compliance. Review of immunity orders therefore should occur with periodic regularity and on notice.

In re N.J.A.C. 5:96 & 5:97, 221 N.J. 1, 26 (2015). "The objective of a Mount Laurel suit is to establish conditions reasonably calculated to result in the construction of a municipality's fair share of affordable housing." Livingston Builders, Inc. v. Twp. of Livingston, 309 N.J. Super. 370, 374 (App. Div. 1998).

In this instant matter, the Court finds that the proposed settlement between Landmark Dumont, and the Borough is a fair settlement to provide the opportunity of affordable housing to low-and middle-income persons in the Borough of Dumont for the foregoing reasons.

All interested parties were given sufficient notice of the fairness hearing, and residents in opposition to the settlement agreement were informed of the procedure and participated at the fairness hearing. Morris Cty. Fair Housing Council v. Boonton Tp., 197 N.J. Super. 359, 484 (Law Div. 1984).

In accordance with testimony provided by Green, Kinsey, and the arguments presented by counsel, the Court is satisfied that the five factors of East/West Venture v. Borough of Fort Lee have been met. The Court adopts the positions of qualified experts Kinsey and Green. Currently, although the Borough of Dumont provides for senior and special-needs housing, it has yet to provide for rental affordable housing for families. The D'Angelo farm properties, due to their location and size, are the last sizable properties and are a viable option to provide for affordable-housing needs of Dumont. This development would be the first affordable housing construction within Dumont for families.

Additionally, the development plans within the settlement agreement adequately provide a set-aside of 12.6% of the 15% usually required. Although 12.6% falls below the usual expectations of COAH, it has been acknowledged by New Jersey Courts that Mount Laurel II does not order every single development part of a development plan to strictly include the specified minimum percent of affordable housing units. See, 286 N.J. Super. 311 at 272. So long as there is no required minimum set-aside pursuant to a vacant-land adjustment, a municipality has the discretion to figure its own set-aside level, dependent on a review by COAH. See, East/West Venture v. Borough of Fort Lee, 286 N.J. Super. 311, 334 (App. Div. 1996); N.J.A.C. 5:93-5.6(b). This Court recognizes that in its role of resolving Mount Laurel issues, it should when possible abide by the applicable criteria and guidelines of COAH. Hills Dev. Co. v. Bernards, 103 N.J. 1, 63 (1986)

The Court acknowledges that four additional units may be placed on the Second Tract to increase the set-aside to meet 15%. However, four additional units shall not be considered or created on the 50 Washington Avenue as complications with parking and traffic and would result. The building would be deficient as to on-site parking and in violation of Residential Site Improvement Standards. Due to this, the Court believes that a slightly lower number of affordable-housing units is the better option than creating a structure in violation of parking requirements. Moreover, other contributions such as the essential differences between the two alternative plans, a million dollar investment in site preparation, clean up, sanitary and sewer costs are also seriously considered by the Court.

Even though the Borough of Dumont is uncertain of its third-round obligations, immunity shall be extended until August 31, 2016, so long as Landmark proceeds on its efforts to construct affordable housing. Additionally, the site is suitable for the proposed development plan. The

farm-sites property would maintain the same residential use while the Borough Hall would continue to utilize a mixed commercial and residential purpose in a mixed neighborhood. There would be no conflict presented between the aesthetic appeals of the surrounding buildings. If Plan One is not used and the alternative plan is chosen there shall be a 15% set-aside, those units will be located on the second tract of D'Angelo Farm and market-rate units will be located on the main tract of the farm. This does not in any way change the obligations of parties as set forth in the settlement agreement.

Further, the sites at issue are not listed as a historic site and therefore shall not be considered as such. The testimony of Dumont resident, Thomas Kelly, provided the history of the municipal building. The rear portion of the Borough Hall was built in 1888, and was a two-room school house. Additions to the building occurred in 1901, 1909, and 1980. An application was commenced in 1977 to label Dumont the Municipal as a historic building, however, it appears ultimately the application was not submitted and approved. The Court notes the issue as to the PILOT program is neither before this Court nor to be determined by this Court. This Court does not have the authority or jurisdiction to discuss the statute in regards to the settlement agreement. The Borough Hall has not been moved or significantly altered since 1977.

In addition, the proposal of development is strongly supported by Fair Share Housing Center, the special master and experts. Accordingly, the Court is satisfied that settlement agreement provides a fair and realistic opportunity for lower-and middle-income persons in the Borough of Dumont.

CONCLUSION

For the foregoing reasons, the Court hereby finds that the proposed settlement agreement between Landmark and the Borough of Dumont is fair and reasonable to accomplish the

requirements of the Borough meeting its obligations under Mount Laurel IV. The settlement agreement is modified to provide for 22 units of affordable housing on the second tract if the alternative plan is used. The Court will grant immunity from builder's remedy law suits until September 1, 2016, and will continue to grant such for so long as progress is made by Landmark in completing its obligations under the settlement agreement.

William C. Meehan, J.S.C.
Retired on Recall

Dated: June 6, 2016