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October 12, 2022

Hon. Stephen Hansbury, J.S.C.
Courtroom 151
Morris County Courthouse
Court Street and Anne Street
Morristown, NJ 07960

Re: I/M/O Borough of Chatham Application for Judgment of Compliance with Third Round Mount Laurel Affordable Housing Obligation, Docket No. MRS-L-1906-15
Response to Master's Status Report on the BCUW 100% Affordable Family Rental Project and to FSHC's October 12, 2022 Letter

Dear Judge Hansbury:

As you may recall, I represent plaintiff / petitioner Borough of Chatham (the "Borough") in the above matter. In accordance with your Honor's Order granting the Borough's motion to enforce litigant's rights entered on August 25, 2022, I am writing to respond to the court's special master's report addressing the status, feasibility and timing of the proposed BCUW 100% affordable family rental housing project. I am also writing to respond to the October 12, 2022 letter submitted to your Honor by Rachel Lokken, Esq. on behalf of FSHC.

As to the court's special master's report, the Borough agrees with it and is in the process of making a few changes to

address the three issues raised by the master in the report. Once those changes are completed, I will submit the revised documents at issue to the court with copies to the master as well as to counsel.

The Borough takes issue with the October 12, 2022 letter submitted by FSHC to the extent that it criticizes the master for not analyzing the BC UW proposal against the initial Post Office Plaza Redevelopment Plan which, in essence, is an attempt to reargue the motions to enforce litigant's rights which your Honor previously decided. Attached with this letter is a transcript of the oral argument and your Honor's bench opinion. The Borough has no objection to your Honor directing the master to issue a supplemental compliance report on planning issues, but the report as issued by the master does exactly what you directed the master to do both in your bench opinion and in the Order entered on August 25, 2022.

The Borough also takes issue with FSHC's decision to disapprove the BC UW proposal as an alternative mechanism to replace the 15-units of affordable housing, which decision Ms. Lokken has announced in her October 12, 2022 letter. The BC UW proposal, as will be revised to address the master's three concerns, will also address those concerns of FSHC which are legitimate concerns, namely, revisions to the timeline to expand it a bit and correction of the cited affordability controls to reference the UHAC regulations (which was clearly a typographical mistake due to a holdover from a prior agreement drafted by the Borough's special redevelopment counsel).

Finally, the Borough urges the court to reject FSHC's argument that the BC UW project will take longer to construct than SV's proposed 100-unit inclusionary development for the simple reason that SV does not own or control enough property to meet the 1-acre minimum required to construct any project under the Post Office Plaza Redevelopment Plan that was in effect (but has since been vacated). It is simply not true that FSHC consenting to the BC UW proposal as an alternative mechanism will add delay, let alone "considerable delay" to the construction of affordable housing in the Post Office Plaza redevelopment area. FSHC's rejection of the BC UW proposal as will be revised to address the master's three concerns would be arbitrary, capricious and unreasonable and violate the Order enforcing litigant's rights which require FSHC to "review in good faith" the BC UW proposal.

The Borough reserves the right to expand on these issues during the compliance hearing.

Respectfully submitted,

STICKEL, KOENIG, SULLIVAN & DRILL, LLC



By:

JONATHAN E. DRILL

Copy via eCourts and email:

Joseph H. Burgis, AICP, PP (court special master)

Rachel N. Lokken, Esq. (attorney for defendant intervenor FSHC)

Craig M. Gianetti, Esq. (attorney for objector SV joint venture)

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION, CIVIL OF PART
MORRIS COUNTY, NEW JERSEY
DOCKET NO.: MRS-L-1906-15
A.D. NO.:

IN RE THE BOROUGH OF)
CHATHAM MOUNT LAUREL)
COMPLIANCE)
) TRANSCRIPT
) OF
) COMPLIANCE HEARING & MOTION
) TO INTERVENE & MOTION TO
) ENFORCE LITIGANT'S RIGHTS

Place: Morris County Courthouse
Washington & Court Streets
Morristown, NJ 07963

Date: August 25, 2022

BEFORE:

HON. STEPHAN C. HANSBURY, J.S.C.

TRANSCRIPT ORDERED BY:

JONATHAN E. DRILL, ESQ.
(Stickel, Koenig, Sullivan & Drill, LLC)

APPEARANCES:

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(Stickel, Koenig, Sullivan & Drill, LLC)
Attorney for the Plaintiff, Borough of Chatham.

CRAIG M. GIANETTI, ESQ.
(Day Pitney, LLP)
Attorney for the Defendant-Intervenor, SV Chatham PO
JV, LLC.

RACHEL N. LOKKEN, ESQ.
(Fair Share Housing Center)
Attorney for Intervenor-Defendant, Fair Share Housing
Center.

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1 THE COURT: All right. This is the matter of
2 The Borough of Chatham Mount Laurel Compliance; docket
3 number MRS-L-1906-15.

4 And may we have appearances, please?

5 MR. DRILL: Yes. Jonathan E. Drill from
6 Stickel, Koenig, Sullivan & Drill on behalf of the
7 plaintiff petitioner, Borough of Chatham.

8 THE COURT: Good afternoon, Mr. Drill.

9 MR. DRILL: Good afternoon, Your Honor.

10 MR. GIANETTI: Good afternoon, Your Honor.
11 Craig Gianetti of the law firm Day Pitney on behalf of
12 SV Chatham PO JV, LLC interested party.

13 THE COURT: Thank you, sir.

14 MS. LOKKEN: Good afternoon, Your Honor.
15 Rachel Lokken on behalf of Fair Share Housing Center.

16 THE COURT: And hello again.

17 All right. As you know today was really scheduled
18 to be the compliance hearing, and before Judge Gaus.
19 When he and I talked about it, it was his position, and
20 I agree with it, and Mr. Gianetti's correspondence
21 yesterday also agreed with it, because of the pending
22 motion it's not really appropriate to do the compliance
23 hearing today. It is better to adjourn it, so that
24 once the plan is solidified after these motions, then
25 the matter can be heard again.

1 We have a link to Sussex County I'm told, because
2 that's where it was originally noticed. So, I -- I'm
3 told that --

4 THE CLERK: (Indiscernible).

5 THE COURT: All right, but I need to know if
6 anybody's there.

7 THE CLERK: Let me just check.

8 THE COURT: All right. We're going to check
9 to make sure that no one's in Sussex, otherwise --

10 (Record paused.)

11 THE COURT: -- clean up anything needs to be
12 clean up regardless of the outcome of today. And my
13 clerk is going to check to make sure there's nobody up
14 in Sussex.

15 MR. DRILL: And do you have a time for that,
16 Your Honor?

17 THE COURT: Well, if 1:30 is okay with you,
18 it's okay with me. It seems to work pretty well.

19 MR. DRILL: Yup.

20 MR. GIANETTI: I would just say Your Honor if
21 it's a potential of it being a contested compliance
22 hearing with witness, it might -- it could take longer
23 a morning start is better.

24 THE COURT: It could take longer than a day
25 too.

1 MR. GIANETTI: That's true, Your Honor, it
2 could.

3 THE COURT: Well, how about 10 o'clock? We
4 could do it at 10:00, that's a valid point.

5 MR. DRILL: That's fine.

6 THE COURT: Okay. So, we are now adjourning
7 the compliance hearing to October 27th at 10 a.m.
8 Because today was the properly noticed date, there will
9 be no obligation to renotice everybody, because by
10 virtue of this hearing, as we've done before with other
11 of these cases, this serves as sufficient notice. And
12 the order will go out with that in there so.

13 MR. DRILL: Okay. And -- and Your Honor, I
14 filed a proof of publication and proof of service via
15 eCourts on August 22, and I assume that's what you've
16 reviewed to make the determination that it's proper
17 notice?

18 THE COURT: I have. And yes, it is proper
19 notice, and no further notice is required to schedule
20 it to October 27.

21 MR. DRILL: Thank you.

22 THE COURT: Okay. There's three motions
23 filed pending, so let's do them in order. Mr.
24 Gianetti, I guess you filed first, so we'll be glad to
25 hear from you.

1 MR. GIANETTI: Yes. Thank you, Your Honor,
2 and may it please the Court. This is a motion made by
3 interested party and movant, SV Chatham PO JV, LLC,
4 motion to intervene, and enforce litigant's rights.
5 And these motions come out of the Borough's affordable
6 housing declaratory judgment case, a case that has been
7 ongoing for seven years -- over seven years already.

8 During which time Fair Share Housing Center in 2021 --

9 THE COURT: Can you hold up just a second.

10 Jessica, do we -- do we know if there's a link to
11 Sussex?

12 THE CLERK: I haven't confirmed that
13 anybody's showed up there yet; I'm still trying to work
14 on that.

15 THE COURT: Okay. We need to know if
16 anybody's there.

17 THE CLERK: I'm working on it, Judge.

18 THE COURT: We don't need to hook them, but
19 we need to know if they're there.

20 THE CLERK: I made three phone calls, and I
21 can't get anyone on the phone.

22 THE COURT: Okay, fair enough. I apologize,
23 but I'd like to wrap that up.

24 MR. GIANETTI: Understood, Your Honor, no
25 problem.

1 So, again, an affordable housing declaratory
2 judgment case, we're over seven years into it. During
3 that time Fair Share Housing Center had to file a
4 separate lawsuit challenging the Borough for
5 noncompliance.

6 We also had a midpoint review which, again, was
7 also challenged. And as a result of that midpoint
8 review, which highlighted shortcomings in the town's
9 Affordable Housing Plan, resulted in an amended
10 Settlement Agreement which is the subject of these
11 motions today. And here we are yet again with another
12 motion filed by my client, as well as Fair Share
13 Housing Center concerning noncompliance by the Borough,
14 and still no affordable housing being built.

15 Now, these motions are the result of what is
16 effectively your classic bait and switch the town's
17 used with respect to their Affordable Housing Plans,
18 and delaying compliance.

19 If Your Honor recalls from the paper, the Post
20 Office Plaza Redevelopment Plan was adopted in 2019.
21 Through 2020 and 2021 when Fair Share Housing Center
22 filed that lawsuit against the Borough where AST, who
23 was a ready and will developer for inclusionary housing
24 on a separate site, was raised in the midpoint view --
25 review challenge. During that midpoint review process,

1 the town issued a supplemental midpoint review saying
2 hey, look at all the things we're doing for affordable
3 housing. And one of those things was look, we adopted
4 the Post Office Plaza Redevelopment Plan, which is
5 going to -- a inclusionary development for affordable
6 housing, and we designated a redeveloper which was my
7 client.

8 So during that time there's a Redevelopment Plan,
9 we are the designated redeveloper, and the town is
10 using our client in this redevelopment project as a
11 shield against another attack by another developer.
12 But all the while the town is behind the scenes using
13 their best efforts to thwart that inclusionary
14 development, and ensure it doesn't happen.

15 Now, the motion as Your Honor knows is -- is two
16 parts. First we're seeking intervention, and then
17 enforcement of -- of litigant's rights.

18 The intervention is sought to enforce the court
19 orders requiring compliance with that June, 2021 Fair
20 Share Housing -- Fair Share Housing Center Settlement
21 Amendment. And specifically, the requirements in it
22 with respect to Post Office Plaza was also in those
23 court orders from December, 2021 and January, 2022.
24 And they required -- in those court orders those
25 requirements involved partially my client's property,

1 as well as the designation of redeveloper which my
2 client was at the time.

3 Now with respect to intervention, the law is
4 pretty well settled, both on the mandatory and the
5 discretionary side Rule 1 or Rule 4:33-1 that this is
6 supposed to be liberally construed. And there's that
7 four part test on the mandatory side. One, is in -- is
8 interest related to that property which is the subject
9 of this case. I think it's clearly established, I
10 don't think anyone really disputes that. Second, that
11 it's so situated that disposition of action may as a
12 practical matter impair or impede the ability to
13 protect the interest. Third, the interest is not
14 adequately represented by existing parties. And
15 fourth, the application is timely.

16 As to the disposition apportionment of these
17 orders, it cannot be done and effectively go forward,
18 and would have an impact and impair my client's
19 interest.

20 Now the Borough argues well, that should be the
21 subject of a separate prerogative writ action, and you
22 should bring a separate prerogative writ action related
23 to that.

24 Initially doesn't make sense, cause we're looking
25 to enforcement a Settlement Agreement and court orders

1 in this case. And I'm not sure why one would file a
2 separate action with respect to that.

3 Second, their argument was summarily rejected in
4 the Appell -- by the Appellate Division in the Warner
5 v. Sutton case which was discussed in the Meehan v.
6 K.D. Partners case, which also involved a land use
7 matter, also involved a prerogative writ matter. And
8 in that case after there was a settlement between two
9 parties, between a board and an applicant, party moved
10 in to intervene. And one of the parties said oh, they
11 can file a separate prerogative writ action for based
12 upon whatever was settled. And the court specifically
13 said didn't make any sense; they had a right to file in
14 this action. And that filing a separate action the
15 prosecution of such case would be circuitous, and would
16 unnecessarily expend judicial and financial resources.

17 And that's the case here. Everything is relating
18 to the Borough's Affording Housing Plan, and their
19 Affordable Housing Compliance.

20 Further, SV's interest is not adequately by any
21 other party. Honestly, Fair Share Housing Center and
22 my client's interest are currently aligned, and
23 involved in the same thing, but the -- the interests
24 are distinct. Where our interests are specifically
25 with this property, and inclusionary development

1 contemplated by the Post Office Plaza Redevelopment
2 Plan, and its prior designation as redeveloper. And
3 it's worth nothing that Fair Share Housing Center has
4 supported our request for interva -- intervention.

5 And as to the timely matter, again, when you look
6 at the case law concerning timely filing and even the
7 Meehan case, it's not how long has the case been going
8 on, and when did you come in. It's for what purpose
9 are you coming into the case, and was that action
10 timely.

11 And here our purpose is to enforce Settlement
12 Agreement and the court orders from December, 2021,
13 January, 2022. And they provided a deadline of June
14 1st, 2022 for the Borough to enter into a Redeveloper's
15 Agreement and designate a redeveloper or come up with
16 something else to the satisfaction of Fair Share
17 Housing Center. After that deadline was missed and not
18 complied with, SV immediately filed its motion. So,
19 it's timely for what it's looking to enforce.

20 Now the Borough also argues, which is a typical
21 argument by municipalities; this is a backdoor
22 builder's remedy. This is not a backdoor builder
23 remedy. I assure you if we were seeking a builders
24 remedy, we would be seeking a lot more units a lot more
25 units then the pared down minimum 100 units we're

1 seeking as part of the relief in our motions. All the
2 developer is seeking is what was permitted under the
3 Post Office Plaza Redevelopment Plan, and was
4 contemplated by those settlement agreements.

5 Now, moving to our enforcement of litigant's
6 rights, and why those should be granted. And, again,
7 the -- the -- there was a Settlement Agreement
8 concerning the requirements of Post Office Plaza.
9 Those requirements were also specifically stated in
10 court orders in December of 2021 and January of 2022
11 which is what we're looking to enforce.

12 Now in 2021 Fair Share Housing Center Amendment
13 was not your (indiscernible) settlement amendment, was
14 not your average settlement. You know your typical
15 we're settling the case, and you know we're to go for
16 judgment compliance.

17 I just remind -- I want to remind Your Honor,
18 again, of the tortured history in this case. April,
19 2021 Fair Share Housing Center files lawsuit against
20 the Borough for noncompliance of its affordable housing
21 obligation due to the River Road redevelopment not
22 having affordable housing requirements. There was also
23 a pending motion for the midpoint review, which we're
24 highlighting shortcomings in the town's Compliance
25 Plan. That all resulted in this June, 2021 Fair Share

1 Housing Settlement Amendment. And even the -- the --
2 the section 8(b) of that amendment specifically says
3 that in light of the concerns raised by the Borough or
4 as part of the Borough's July 1st, 2020 midpoint
5 review, you know these are the things that have to
6 happen.

7 So, this is not your average settlement. This was
8 a settlement based upon a bad actor that was then the
9 town getting the benefit of continued immunity so long
10 as they took certain actions as required in that
11 agreement.

12 So now referring to section 8(b)(iii) of that
13 Amended Settlement Agreement, at its core it's clear
14 from the language as acknowledged by Ms. Lokken for
15 Fair Share Housing Center, at its core the Borough's
16 provided or is to provide a minimum 100 unit
17 inclusionary development, has produced a minimum of 15
18 affordable units based upon a 15 percent set-aside.
19 You do the math it is contemplated a 100 unit
20 development.

21 Specifically when you break it down, it required
22 the Borough to amend the Post Office Plaza
23 Redevelopment Plan to provide for a minimum 15 family
24 non or nonage restricted affordable rental units as
25 part of an inclusionary development, it required the

1 Borough to use best efforts and act with all continuity
2 of purpose to enter into a Redeveloper's agreement, and
3 to designate a redeveloper for the inclusionary
4 development by June 1st, 2022. And then it had you
5 know the last section that and despite these best
6 efforts or if these best efforts fail, the Borough and
7 Fair Share could extent it, or Fair Share Housing
8 Center and the Borough can agree on an alternate
9 mechanism to Fair Share Housing Center's satisfaction.

10 Now, the best efforts language and act with all
11 continuity of purpose, presumably that language is
12 there at least to somewhat at the time protect the
13 Borough, so any redeveloper just doesn't come in with a
14 -- an egregious hey, 400 units you got to agree to a
15 redeveloper's agreement. So, at least they'd have to
16 show or protect them from an unreasonable proposal.
17 But it's clear from that language again that was
18 contemplating a minimum 100 unit project, a minimum of
19 15 affordable units with a 15 percent set-aside.

20 Now, the record is clear that the Borough has
21 failed to satisfy those obligations, and breached the
22 Settlement Agreement and violated the court orders.

23 Now, the one thing I would note is probably the
24 only thing they did do is designate the redeveloper.
25 At the time of that order my client was the designated

1 redeveloper. In a few months after that Settlement
2 Agreement, the Borough extended my client's designation
3 as redeveloper. But, again, all the while the Post
4 Office Plaza Redevelopment Plan permitted up to 50
5 units per acre, and up to 5 stories of development.
6 But despite what was permitted there, the town was
7 using the Redevelopment Agreement to usurp that, and
8 pare down the project despite what was permitted.

9 Now even months before that Settlement Agreement,
10 it was noted in the record and it wasn't challenged by
11 the Borough, the developer proposed months earlier a
12 scale down 118 unit inclusionary development with 18
13 affordable units, and a pilot. Again, completely pare
14 down to what was permitted under the Post Office Plaza
15 Redevelopment. In the end, the Borough never entered a
16 Redeveloper's Agreement for an inclusionary development
17 by that deadline, and no alternative was accepted by
18 Fair Share Housing Center to their satisfaction.

19 And the record is also clear that the Borough did
20 not use best efforts to enter and act with all
21 continuity of purpose to enter into that Redeveloper's
22 Agreement for an inclusionary development by June 1st.
23 To the contrary, they were using their best efforts to
24 do anything but an inclusionary development. Fair
25 Share Housing Center acknowledged it; expect the Court

1 Master would acknowledge it, even the Borough's own
2 professionals acknowledged it. The Settlement
3 Agreement contemplated a minimum of 100 units to
4 produce a minimum of 15 affordable housing units, based
5 upon 15 percent set-aside.

6 In my supplemental certification submitted, we
7 provided the transcript. Mr. Drill himself said at a
8 public hearing based upon their financial expert,
9 Robert Powell -- Powell's, analysis 100 units is the
10 minimum, and that from an economic viability standpoint
11 the developer cannot do less. And that was at the
12 April 18th, 2022 meeting.

13 Even the Borough's planner, Ms. Lelie, in response
14 to a member from the public said well, when you do the
15 math what does that require from -- does that require a
16 minimum size project of 100 units? She said correct.

17 So, everyone's acknowledging 100 units is the
18 minimum, and their own enviro -- their own economic
19 expert determining that is the most or the least that's
20 viable.

21 So in a last ditch effort and based upon the
22 conclusion of their own professionals, my client met
23 with three council members and proposed what we call
24 the Goldilocks Proposal, right, you know too big, too
25 small, just the right size. You said it was a minimum

1 100 units; you need to have 15 affordable units. We
2 made that proposal at 3 and 1/2 stories, cause there
3 was a concern as to height, and the pilot, despite,
4 again, the Redevelopment Plan permitting much more than
5 that. Despite this the Borough Council by a split vote
6 refused to enter into the Redeveloper's Agreement or
7 even discuss a Redeveloper's Agreement for that
8 project. Instead, they chose to pursue a speculative
9 rushed non-inclusionary project without the consent or
10 approval of Fair Share Housing Center.

11 In our motion too we highlight you know not only
12 was it not using best efforts, but there was bad faith.
13 First, again, you have seven years we have been dealing
14 with this. Chatham has produced nothing but paper,
15 legal fees, planning fees. They went through three
16 different planners for this Post Office Plaza
17 Redevelopment Project, what they have not produced is
18 affordable housing. And at some point enough is
19 enough. They use my client's project in their
20 designation as redevelopment -- a redeveloper as a
21 shield when being attacked by another developer saying
22 they weren't doing enough. They said look, we're --
23 we've designated Post Office Plaza, we designated that
24 redevelop -- redeveloper. All the while behind the
25 scenes they were trying to undercut it and thwart it.

1 Further, in the Fall of 2021 the town effectively
2 gave a take it or leave it proposal. If you don't take
3 it, we're not extending immunity. And that proposal
4 was 67 units, 45 year ground lease that reverts back to
5 the Borough, and 15 affordable units resulting in a 22
6 percent set-aside. Despite that unreasonable offer, a
7 month later they sign a consent order saying they're
8 going to continue to use best efforts to enter into a
9 Redeveloper's Agreement for an inclusionary
10 development, and they do it again in January.

11 Now with respect to the relief being sought as
12 part of this motion and I thought about the relief. We
13 could have come in here and saying Your Honor, revoke
14 their immunity, we've been at this seven years, they
15 haven't done it, and their action with respect to this
16 Settlement Agreement in the Post Office Plaza warrants
17 their immunity being stripped. But I looked at it, and
18 said what's the best way this actually can get
19 affordable housing being produced? And what we propose
20 as the relief in this motion is make it clear there is
21 a consequence. You determined an inclusionary
22 development town, you adopted that Redevelopment Plan,
23 you designated that redeveloper, you're own expert says
24 a minimum of 100 units. They gave you a Goldilocks
25 Proposal of 100 units with 15 affordables in the pilot

1 3 and 1/2 stores. Your own professional determined
2 that is a minimum sized development that the developer
3 can do. You have 30 days to enter into that
4 Redeveloper's Agreement before your immunity is
5 stripped.

6 Now, I just want to touch base on the motion filed
7 by the Borough seeking to force the Court to approve or
8 force Fair Share to accept the 15 unit affordable
9 housing development. Now, I hope the irony is not
10 lost on anyone, that the Borough is specifically
11 obligated by these agreements to use best efforts and
12 act with all continuity of purpose. He failed to do
13 so. Yet now they're asking the Court to unilaterally
14 modify a Settlement Agreement, a Settlement Agreement
15 that resolved affordable housing deficiencies of the
16 Borough, and force Fair Share to accept something that
17 the Borough agreed would have to be something that
18 would be to Fair Share Housing Center's satisfaction.

19 In my mind the motion reeks of desperation. It's
20 a you know as I've noted in my papers they're looking
21 at it as the best defense is to go on the offense. But
22 as the mayor put -- put it, and I quote it in our
23 brief, where he said with respect to the 100 units
24 we're getting boxed in, but the process is not over.

25 All this time Your Honor, the Court should make it

1 over, and we ask that you grant our motion for
2 intervene or for intervention, and to enforce
3 litigant's rights. Thank you.

4 THE COURT: The designation as a redeveloper
5 was not renewed in January of this year as I understand
6 it; correct?

7 MR. GIANETTI: Correct.

8 THE COURT: All right. And when you talk
9 about 100 units at a minimum, that's in order to
10 produce 15 low and moderate units; right?

11 MR. GIANETTI: Correct.

12 THE COURT: So, it turn -- not particularly
13 relevant to their proposal were there's self funded 15
14 units; right?

15 MR. GIANETTI: I'm sorry, can you repeat that
16 question Your Honor.

17 THE COURT: Their proposal is 15 self funded
18 units, so they don't need the 100 if we go with the 15;
19 right?

20 MR. GIANETTI: Their proposal is for a
21 standalone --

22 THE COURT: Right.

23 MR. GIANETTI: -- inclusionary development.

24 THE COURT: Right.

25 MR. GIANETTI: Which has a lot more involved,

1 cause you're -- you're -- you're not dealing with your
2 typical inclusionary development. Again, I'll come
3 back to the Settlement Agreement; it specifically
4 called for and required an inclusionary development,
5 inclusionary to clear.

6 THE COURT: Right.

7 MR. GIANETTI: Requires market rate units,
8 and affordable units. And there's a lot of policy and
9 planning reasons as to why an inclusionary development
10 mixed in with market rate units built to the same
11 standard as market rate units would be preferable, over
12 a standalone 15 unit affordable development that is
13 subject and relying upon a lot of, and a significant
14 amount of public subsidy that's competitive, and you
15 never know if they'll get it.

16 THE COURT: I'm sorry, say that last thing
17 again?

18 MR. GIANETTI: That the subsidies are
19 competitive, and you'll never know if they get it.

20 THE COURT: Okay.

21 MR. GIANETTI: It's not just Borough subsidy,
22 we're talking about State subsidies.

23 THE COURT: Right. No, I saw that. Okay,
24 thank you.

25 MR. GIANETTI: Thank you.

1 THE COURT: I don't know which of you wants
2 to go next. You filed second I guess so.

3 MR. DRILL: Well, actually, Fair Share then
4 filed a cross motion to enforce litigant's rights.

5 THE COURT: Well, why don't you go as to
6 this application?

7 MR. DRILL: Yeah. Thank you, Your Honor.
8 First, I want to correct something --

9 THE COURT: In fact, I should put on the
10 record we do have confirmed that nobody is in Sussex.
11 So, that there was no -- the issue coming down here was
12 apparently well known, because anybody who's interested
13 is here so.

14 MR. DRILL: Yeah. Just so Your Honor knows
15 we posted it up on the Borough's website.

16 THE COURT: I -- I saw that yeah, thank you.

17 MR. DRILL: First Your Honor, Jonathan Drill
18 on behalf of the Borough.

19 THE COURT: Right.

20 MR. DRILL: I want to correct some factual
21 inaccuracies that SV's attorney made on the record.
22 First of all, Fair Share did not file an action to
23 enforce the Settlement Agreement for noncompliance.
24 They filed a -- an appeal of an approval of that other
25 project. And we had said listen, we'll take care of

1 your concern, but they had to file it because they were
2 close to the 45th day.

3 THE COURT: Right.

4 MR. DRILL: We told them file it, don't serve
5 it. They filed it, they didn't serve it. We took care
6 of the problem, it was then voluntarily dismissed.

7 Second, the midpoint review. The midpoint review
8 is required by the statute. And the midpoint review
9 sometimes reveals issues that come up. And the reason
10 the statute was amended to require the midpoint review
11 was because the statute was also amended to give the
12 judgment of compliance and repose, instead of being
13 valid for six years it increased it to ten years. So,
14 the legislature obviously thought at five years we got
15 to check in. So, it's true that another developer in
16 another unmet need overlay zone said this zone wasn't
17 going to realistically produce any affordable housing,
18 if there's redevelopment in that zone. And we could
19 not come to an agreement to increase the density or
20 height in that zone. So, the Borough agreed to adopt
21 two other zones Gateway I and Gateway II zones, which
22 are overlay zones.

23 Also during the midpoint review, Fair Share said
24 listen, you have this Post Office Plaza Redevelopment
25 Plan, it's not clear how many affordable housing units

1 have to be produced. That's why a settlement was
2 reached to specify. Now, we could argue all day about
3 what that language means. I cited Black Law's
4 Dictionary, and another online dictionary, it doesn't
5 mean there has to be constant negotiations. But the
6 biggest factual inaccuracy, which is blatantly false,
7 is when SV's counsel says all that's been produced in
8 the Borough is paper and fees, no housing.

9 Your Honor, there is the River Road development is
10 under construction. I mean anyone can drive by. It's
11 on the corner of River Road and Watchung. It is --
12 there are multiple contractors working in several areas
13 of that site, and that is an RDP site not an unmet need
14 site. And that RDP site, which is under construction,
15 is going to produce a total of 245 dwellings, and of
16 that 37 are low and moderate income units. So, that's
17 a false blatant misstatement of fact.

18 Second, there's a smaller development, the Averett
19 Development. It's only going to produce eight units,
20 one of them is affordable housing, and that
21 construction has started there. The site work has
22 started; you could drive by there, that address is 312
23 Hillside Avenue, and see that that's under
24 construction.

25 There's another site 246 Main Street where the --

1 the Board just granted an extension on that one,
2 because they're waiting for an existing tenant to
3 vacate.

4 I think the Court should take judicial notice that
5 we've had -- we've had a COVID pandemic, and if it
6 weren't for COVID at the -- the BNE project, the one at
7 River Road, would have been started a lot sooner. But
8 that's just something that's outside the Borough's
9 control, and that should be corrected for the record.

10 Now, the issue in this case the Borough has
11 complied with all its obligations in the First
12 Amendment, except the obligation in paragraph 8.b.iii
13 is unresolved. And as Your Honor noted in the
14 beginning of the compliance hearing when you adjourned
15 it, that's right, how you going to -- you can't do a
16 full compliance unless you have 8.b.iii resolved. But
17 the counsel for SV is making it sound like the Borough
18 is the worse municipality in the State of New Jersey.
19 They haven't constructed any housing, and they're not
20 complying with their obligations. Right now we're in a
21 dispute as to paragraph 8.b.iii.

22 Now had Fair Share stayed neutral on this motion,
23 I wouldn't have filed a cross motion. But they didn't
24 stay neutral, they filed a cross motion to enforce
25 litigant's rights saying that everything SV said was

1 true. And it wasn't true, and I -- I filed a
2 certification based on personal knowledge. There were
3 two instances which SV's counsel pointed out in the
4 brief where I should have used different words, I
5 should have said appears, I should have said you can
6 imply. Maybe I should have taken it out of there and
7 put in the brief. I tried to cut down on the amount of
8 paper going to the Court, so I incorporated by
9 reference. I did a certification, and in my brief I
10 incorporated that as my procedural history and
11 statement of facts. I apologize if I went over the
12 line with that, but everything in that certification is
13 based on personal knowledge, based on documents. I
14 mean I submitted exhibits A through Z with the
15 certification, and double a and double b and double c.

16 So, the issue on this motion is whether or not the
17 fact that there was not a Redevelopment Agreement with
18 a redeveloper under the alternate language in 8.b.iii,
19 which said we can have a replacement mechanism, whether
20 that is a substantial violation of that First Amendment
21 to result in the relief they're seeking. And the
22 Borough submits it's not. In fact, June 1 -- there was
23 a deadline June 1 we had to have a Redeveloper's
24 Agreement. And they note we didn't hit the June 1
25 deadline. There's no record in the letter, and I can

1 make a representation, Fair Share didn't send us
2 something saying you're in violation. We kept on
3 talking, we kept on talking.

4 Now, no documents that I submitted were marked
5 confidential negotiations. There's a lot of
6 confidential negotiations documents between Ms. Lokken
7 and myself. I only put in there things that were not,
8 documents that were not confidential negotiations. I
9 said I want to make it a formal proposal for the 15
10 unit 100 percents projects, since we couldn't come to
11 an agreement on the density and the height. And Ms.
12 Nokken -- Ms. Lokken correctly notes that they didn't
13 formally reject it in the letter. But I said in my
14 certification she told me on the phone it's rejected,
15 what did the Borough do? We vacated the designation of
16 Nouvelle, and we designated Bergen County United Way,
17 which has been accepted by Fair Share throughout the
18 State on various small -- smaller 100 percent projects.

19 Now, those are the factual misstatements that have
20 to be corrected.

21 As to the law, law and intervention. The law
22 regarding enforcement of litigant's rights, and the
23 relief.

24 I'm going to start off with intervention, because
25 to me that's -- that's clear cut. SV is not a party,

1 they're an interested entity. They have the right to
2 object at the compliance hearing, and in fact they are
3 objecting at the compliance hearing. Their objections
4 are legal objections, but they have the right to do
5 that. They are not a party to the First Amendment.
6 They are trying to become a party in the litigation by
7 intervening, so that they can argue they're a party in
8 the litigation so they can force litigant's rights that
9 don't belong to them. The litigant's rights in this
10 case are between Fair Share and the Borough. So,
11 number one, they don't have standing to intervene.

12 Secondly, they are trying to attempt to obtain a
13 backdoor builder's remedy. So, their counsel states
14 we're -- we're only asking for an order that says you
15 have to continue to negotiate. But when you look in
16 their brief, they actually say they need an order from
17 the Court that can negotiate, because otherwise you
18 should vacate their immunity. And it's common
19 knowledge if immunity is vacated, that means they're
20 going to file a builder's remedy suit.

21 Under Mount Laurel IV, Your Honor would have to
22 make a ruling that the Borough was constitutionally
23 noncompliant. And then give the Borough the
24 opportunity to correct it, which under the Mount Laurel
25 II case is typically 90 days, and then if the Borough

1 didn't, then and only then does the Supreme Court Mount
2 Laurel IV say that a builder's remedy would be
3 appropriate. Well, this is an attempt at a backdoor
4 builder's remedy.

5 Now, as to SV's motion not Fair Share's yet
6 responding to SV, their motions not timely. They sat
7 on the sidelines, they waited, they even when things
8 were happening they did nothing, they waited until the
9 eve of the compliance hearing. And what I said in my
10 certification and I should have said in my brief, and
11 I'm going to say now you can imply by that that they
12 waited to the last minute on purpose to try to put a
13 wrench in the gears, and they have. They've been succe
14 -- they successfully put a wrench in the gears. And
15 that's -- but that's not right, that's not what
16 intervention is supposed to be for.

17 As to my argument in my brief that this doesn't
18 belong here, this dispute belongs in a separate
19 prerogative writ. The Court could take judicial notice
20 they filed a separate prerogative writ, it -- it's
21 pending. That's where if they think that under any
22 documents, whether it's an agreement that they entering
23 into the Borough for a temporary payment of escrow
24 fees; whether it's if they think that the Borough
25 arbitrarily, capricious, and unlawfully and

1 unreasonably didn't renew their redesignation; or if
2 they think they have any rights coming out of this
3 First Amendment, that belongs in their prerogative writ
4 which they filed after I noted in the brief that that's
5 where it belongs. Well, they've done that.

6 So, to now say that somehow this case is going to
7 hurt their rights, let's assume that Your Honor rules
8 against them. Meaning denies their intervention motion
9 and says no, you have no litigation rights to be
10 enforced. They still have the prerogative writ
11 pending. And let's further assume that after that the
12 Borough and Fair Share enter into an agreement for some
13 hundred percent project. I'm not -- not even going to
14 speculate as to how many units. It's going -- it would
15 be 15 would be the minimum. If the Borough did
16 something wrong to SV, they still have the prerogative
17 writ action. If they could get an order out of the
18 prerogative writ that the Borough has to approve
19 something, so there's going to be more affordable
20 housing. They don't lose their right, in other words
21 to challenge whatever they think the Borough wrongfully
22 did to them.

23 Now, as to their argument for enforcement of
24 litigant's rights, they talk about the fact they say
25 there was an unreasonable offer 67 units, 15

1 affordable. And they also in their brief, and their
2 counsel mentioned it, that I and that's a correct -- he
3 correctly quoted me, I at a meeting and the Borough
4 planner at a meeting said in response to a question
5 from the audience 100 is the minimum that they can do.
6 And it was based on financials that they had submitted,
7 and we reviewed. That was before I filed with my
8 certification the certification of Robert Powell, who's
9 our financial expert. That was before we discovered
10 that, number one; SV doesn't own those two lots. These
11 two entities created by Mr. Feldman owed those two
12 lots. Now, they probably have some agreement that they
13 have control over those two lots. But what we
14 discovered when we pulled the deeds is they overpaid by
15 35 percent for those lots. And what Mr. Powell says in
16 his certification and what I dovetail and say in mine
17 factually, that's why their saying they need 100 units.
18 Had I known that, had Mr. Powell known that, or had
19 Kendra Lelie, the Borough's planner, known that the
20 night we were at that public meeting, we wouldn't have
21 said that 100 is the minimum they need based on the
22 financials. Because we would have said the financials
23 are skewed, because the basis for the purchase of the
24 two lots is 35 percent higher than it should have been.

25 Unless Your Honor has any questions for me as to

1 the SV motion, then I have nothing to add. But I will
2 have stuff to say about the Fair Share cross motion,
3 and even though they've -- they've joined in. In other
4 words do you want to hear all the reasons why we --

5 THE COURT: No, I'd rather hear from Fair
6 Share --

7 MR. DRILL: Yeah.

8 THE COURT: -- before you respond to it.

9 MR. DRILL: Yeah.

10 THE COURT: Okay.

11 MR. DRILL: You -- if you --

12 THE COURT: Ms. Lokken.

13 MS. LOKKEN: All right. Your Honor, thank
14 you, and may it please the Court. So --

15 THE COURT: Please state your name.

16 MS. LOKKEN: Rachel Lokken on behalf of Fair
17 Share Housing Center I apologize

18 THE COURT: Okay, thank you.

19 MS. LOKKEN: Your Honor, we set forth in our
20 -- in our papers we do not object to the intervention
21 of SV. We defer to Your Honor for the adjudication of
22 SV's bad faith claims, and -- and simply state that
23 with that in mind that the Court would direct the
24 Special Master to work with the parties to establish to
25 establish a set of regulatory controls to address the

1 redevelopment for -- an inclusionary redevelopment at
2 Post Office Plaza.

3 So with respect to SV's motion that is -- would be
4 the response of Fair Share Housing Center in -- in
5 terms of the motion to intervene.

6 I can go into my cross motion, if -- if you're
7 prepared to hear that.

8 THE COURT: Please.

9 MS. LOKKEN: So Your Honor, Chatham is in
10 clear violation of paragraph 8.a.iii under the First
11 Amendment. It failed to designate a -- a redeveloper,
12 and enter into a Redeveloper's Agreement by the June 1
13 deadline. It failed to either request or secure an
14 extension of that deadline from Fair Share Housing
15 Center, and it failed to secure an agreement with Fair
16 Share Housing Center for an alternative unmet need
17 mechanism to Fair Share Housing Center's satisfaction
18 for an inclusionary development at Post Office Plaza.
19 I don't think the Borough is denying the first two
20 points that I just made.

21 In assessing the Borough's failure to comply with
22 the terms of the First Amend -- First Amendment;
23 however, it's critical to note that there's nothing in
24 paragraph 8.b.iii that requires that the Redeveloper
25 Agreement be with SV. As such, the fact that Chatham

1 and SV were unable to come to terms, and did not --
2 that did not relieve Chatham of its obligation to use
3 its best efforts to enter into a Redeveloper's
4 Agreement for the inclusionary development at Post
5 Office Plaza by the deadline.

6 In an eleventh hour desperate attempt, however,
7 they (indiscernible) motion to enforce litigant's
8 rights against Fair Share Housing Center, which alleges
9 that the -- that Fair Share Housing Center unreasonably
10 rejected an untimely deficient, and questioned the
11 viable alternative mechanism.

12 In doing so Chatham attempts to write into the
13 First Amendment a requirement that simply is not there,
14 which is that Fair Share Housing Center has some
15 requirement or obligation within the provisions of the
16 Settlement Agreement to approve an alternative
17 mechanism which it doesn't.

18 For context between May and the end of July, 2022,
19 Fair Share Housing Center and the Borough did engage in
20 a number of numerous confidential settlement
21 discussions regarding redevelopment at Post Office
22 Plaza. And the parties, including SV started mediating
23 with the Special Master on June 8th. Unfortunately,
24 for reasons Fair Share Housing Center does not quite
25 understand counsel for the Borough has referenced these

1 communications in the certifications attached to his --
2 his motion papers. These violate Rule 408 of the New
3 Jersey Rules of Evidence, and should be excluded as an
4 inadmissible confidential settlement communications.

5 With that said despite having designated SV as the
6 developer in July, 2019, it wasn't until June 1st of
7 2022, the very day of the deadline within the First
8 Amendment, that -- that Chatham presented to Fair Share
9 Housing Center a Redeveloper's Agreement with Nouvelle,
10 LLC. However, the Nouvelle Agreement wasn't for an
11 inclusionary development, it was for a 15 -- a 15 unit
12 100 percent affordable project. It was unsigned, the
13 proforma was facially deficient, and Fair Share Housing
14 Center had not agreed to an alternative mechanism to
15 the required inclusionary development.

16 What's more, is that shortly after receiving that
17 unsigned Redeveloper's Agreement with Nouvelle, Fair
18 Share Housing Center learned that Nouvelle planned to
19 prematurely terminate the deed restrictions in
20 violation of the Uniform Housing & Affordability
21 Controls, and the provisions of the First Amendment.
22 As if that alone doesn't provide a basis to reject the
23 project.

24 The Borough was only providing limited funding to
25 Nouvelle, which meant that Nouvelle would need to apply

1 for several outside competitive funding sources that
2 may or may not come to fruition, which would further
3 delay the production of affordable housing at Post
4 Office Plaza. The inclusionary development planned for
5 Post Office Plaza has been in -- has been provided for
6 since the first Settlement Agreement in 2015.

7 Contrary to Mr. Drill's representations, Fair
8 Share Housing Center most certainly advised the Borough
9 of all of its concerns with respect to the Nouvelle
10 Proposal, and never had an opportunity to officially
11 reject it, because the Borough rescinded it.

12 Thereafter, on July 12th, a month -- a month after the
13 June 1 deadline and after SV filed its motion papers,
14 Chatham was present -- Chatham presented Fair Share
15 Housing Center with the Bergen County United Way
16 Proposal. Like the Nouvelle Proposal, it relied
17 heavily on several highly speculative competitive
18 outside funding sources which may or may not
19 materialize further delaying the provision of housing
20 at Post Office Plaza.

21 Notably, however, Fair Share Housing Center had
22 already advised the Borough of its concerns regarding
23 potential delay for the construction of housing at that
24 site. In an email dated April 13th, 2022, which is
25 attached to as Exhibit B to the certification, attached

1 to Fair Share Housing Center's cross motion, this email
2 is addressing the Borough's request for Fair Share
3 Housing -- Housing Center to consider a market to
4 affordable project at Post Office Plaza. In that email
5 Fair Share Housing Center advised the Borough "Fair
6 Share Housing Center expects the Borough to comply with
7 its contractual obligations and the Court's orders to
8 use its best efforts to execute a Redevelopment
9 Agreement for inclusionary development at POP, Post
10 Office Plaza, by June 1, 2022. Stated differently,
11 Fair Share Housing Center is not willing to consent to
12 alternative mechanism that will further delay the
13 provision of affordable housing in the Borough, when
14 there is one or more develop -- developers with viable
15 redevelopment plans ready and willing to provide for
16 the affordable housing contemplated under the
17 Settlement Agreement. We remain hopeful that the
18 Borough will abide by its obligations under the First
19 Amendment, and subsequent court orders."

20 Mr. Drill read the contents of the April 13th
21 email to the public at the town held meeting on April
22 18th, at least parts of that email, which is further
23 indication that the -- of the Borough's awareness of
24 Fair Share Housing Center's concerns regarding timing.
25 Thus, given the questionable viability of the Bergen

1 County United Way Proposal, Fair Share Housing Center
2 did reject that proposal as an alternative mechanism.
3 And it is the only proposal for an alternative
4 mechanism that Fair Share Housing Center has rejected.
5 To be sure the only alternative mechanism provided by
6 the Borough by the June 1 deadline --

7 THE COURT: Wait, say that last part again,
8 it's the only one you rejected.

9 MS. LOKKEN: It's the only Fair Share Housing
10 Center has rejected.

11 THE COURT: Tell me what that means?

12 MS. LOKKEN: That the re -- although Mr.
13 Drill's motion papers refer to the Nouvelle project, as
14 well as -- I think it's just the Nouvelle project, we
15 haven't -- we haven't -- and even the first market to
16 affordable Your Honor, Fair Share Housing Center didn't
17 reject those proposals. So, the only one that --

18 THE COURT: Are you -- are you saying you've
19 not rejected the Bergen County proposal?

20 MS. LOKKEN: That's the only one we have
21 rejected, Your Honor.

22 THE COURT: Well, then what's the point of
23 what you said, I'm lost?

24 MS. LOKKEN: Just that it's not the -- the
25 presentation is that Fair Share Housing Center is being

1 unreasonable, right, that we're -- we're creating
2 frivolous reasons to --

3 THE COURT: Well, that's a characterization,
4 you can buy or not. But the point is you have rejected
5 two proposals from Chatham; right?

6 MS. LOKKEN: One.

7 THE COURT: Well, you just said Nouvelle and
8 -- and United Way.

9 MS. LOKKEN: We did not reject Nouvelle. We
10 did not reject Nouvelle, Your Honor.

11 THE COURT: Oh, so --

12 MS. LOKKEN: We didn't have a chance to, they
13 rescinded it.

14 THE COURT: So, it's okay if we put Nouvelle
15 in instead of United Way?

16 MS. LOKKEN: It is not, because they want to
17 terminate the deed restrictions in advance.

18 THE COURT: Right, which means you rejected
19 it. I -- I --

20 MS. LOKKEN: Well, we didn't officially
21 reject it Your Honor, which is the point. We didn't
22 have a chance to reject it.

23 THE COURT: Well, if I look at official, I'd
24 say that you didn't officially reject Bergen either,
25 because there's an email that just says we don't like

1 it. Does say -- even explain why.

2 MS. LOKKEN: We --

3 THE COURT: That's all right.

4 MS. LOKKEN: Okay.

5 THE COURT: I'm -- I'm taking it you want to
6 ask for something that we really -- really don't need
7 to deal with. Nouvelle is not acceptable to you no
8 matter how you phrase it, and Bergen County is not
9 acceptable to you; right?

10 MS. LOKKEN: Exactly, Your Honor.

11 THE COURT: Okay.

12 MS. LOKKEN: That is correct.

13 So, Fair Share offered -- Fair Share Housing
14 Center did offer suggestions on how the Bergen County
15 -- Bergen County United Way proposal could be more
16 viable for consideration. Contrary to paragraph 64 of
17 the certification attached to the Borough's cross
18 motion to enforce, constructing that 30 unit 100
19 percent affordable project on a municipally owned lot
20 simply just was not a suggestion that was made.

21 In truth, it was Chatham not Fair Share Housing
22 Center that initially suggested that it was exploring
23 larger 100 percent affordable projects at Post Office
24 Plaza. That too is -- is -- can be seen in an email
25 dated March 11th, 2022 that's attached to Fair Share

1 Housing's certification --

2 THE COURT: So, again --

3 MS. LOKKEN: -- as Exhibit --

4 THE COURT: -- I apologize for interrupting.
5 But your saying you've advised them what could make
6 Bergen County workable?

7 MS. LOKKEN: We've made suggestions on how
8 that project could become more viable.

9 THE COURT: I didn't see emails to that
10 effect in the papers that I saw.

11 MS. LOKKEN: No, Your Honor. I had not
12 disclosed any emails that could potentially --

13 THE COURT: Okay. All right, that's fair.

14 MS. LOKKEN: -- be confidential
15 communications. But we also had a coup -- a num -- a
16 number of discussions too.

17 THE COURT: All right. I understand, thank
18 you.

19 MS. LOKKEN: So Your Honor, in -- in a March
20 11th email Mr. Drill advised Fair Share Housing Center
21 -- the Borough advised Fair Share Housing Center that
22 the Borough was considering five proposals for
23 redevelopment at Post Office Plaza. The email says
24 "one of the alternatives is the traditional Caree (ph.)
25 Redevelopment, but there are other alternatives as

1 well. By not involving the actual redevelopment of the
2 building in which the Post Office is located, will
3 actually produce more affordable units than the
4 settlement requires."

5 This wasn't the only occasion whereby the Borough
6 claimed that a project would yield more affordable
7 housing in Post Office Plaza, that that -- that such a
8 proposal was forthcoming. While Fair Share Housing
9 Center never made any agreement contingent upon the
10 provision of greater units, we certainly indicated that
11 we would consider it. However, at each instance the
12 Borough neglected to follow through with such a
13 proposal.

14 The Borough's argument that Fair Share Housing
15 Center's approval of other 100 percent affordable
16 projects in other municipalities under drastically
17 different circumstances, that that somehow obligates
18 Fair Share Housing Center to approve alternative
19 mechanisms at Post Office Plaza is most certainly a red
20 herring. Critically, there's nothing in the First
21 Amendment that obligates Fair Share Housing Center to
22 approve an alternative mechanism to the inclusionary
23 development long plan for Post Office Plaza. Moreover,
24 as explain to the Borough on multiple occasions, Fair
25 Share Housing Center has never approved a 100 percent

1 affordable project over the objections of a private
2 developer and property owner presenting viable
3 redevelop -- redevelopment plans that is ready,
4 willing, and able to construct a very inclusionary
5 development that is contemplated under -- under the
6 Fair Share Housing Center's Settlement Agreement.

7 None of the examples cited by the Borough -- by
8 Borough's counsel are -- were approved in lieu of an
9 inclusionary development contemplated. Moreover,
10 according to SV, its Goldilocks Plan falls squarely
11 within the inclusionary development contemplated. It
12 does not require competitive funding programs, and it
13 will not result in additional delay.

14 An alternative mechanism that is that is dependent
15 on a number of highly speculative funding sources that
16 can take years to assemble, cannot be said to be to
17 result more quickly in the construction of affordable
18 housing. And Fair Share Hou -- Housing Center
19 certainly has no object -- has no obligation, excuse
20 me, to approve such an alternative mechanism.

21 Funding these smaller projects is very difficult.
22 And despite having communicated our concerns regarding
23 delay and speculative funding to the Borough, they have
24 never once attempted to address our concerns. What the
25 Borough has provided is -- is a sketch on a piece of

1 paper, it's -- it's not real. And even the Special
2 Master in his supplemental report identified
3 information that needed to be provided to support the
4 Bergen County United Way Proposal, and identified --
5 decided what was -- what was -- had been provided was
6 insufficient. Moreover, Bergen County United Way is a
7 popular, 100 percent affordable developer. But they
8 recently were taken off of a project, because they
9 couldn't -- because they're so busy they were unable
10 able to con -- to construct the -- the project by which
11 they had been designated.

12 Here we have a bona fide vetted option available
13 that fits squarely within the development envisioned.
14 If the Borough were to propose some form of a superior,
15 a even comparable proposal, we would consider it in the
16 interest of our -- our -- the class that we represent.
17 But everything that has been submitted by the Borough
18 has simply been inferior.

19 In short, the Borough's obligation to create an
20 opportunity for an inclusionary development at Post
21 Office Plaza dates back to 2016. The First Amendment
22 purposely provides for the Borough, and the -- and the
23 Borough contractually agreed to 15 residential units at
24 a 15 percent set-aside at Post Office Plaza, which
25 means that by math a 100 unit inclusionary development

1 is what the parties agreed to be bound to. Chatham may
2 have abandoned the inclusionary development at Post
3 Office Plaza, but Fair Share Housing Center has not,
4 and we seek to enforce what the -- what the -- what
5 Chatham has contractually agreed to do.

6 With respect to the Borough's motion, Fair Share
7 Housing Center has no obligation to prove an
8 alternative mechanism. It has not acted in bad faith
9 in rejecting an untimely, deficient, and questionably
10 viable proposal by Chatham. And there's no basis to
11 grant Chatham's motion to enforce, because there's
12 simply no right for the Court to enforce against Fair
13 Share Center under Rule 1:10-3. So that indeed the
14 motion lacks merit and it should be denied.

15 With respect to Fair Share's cross motion, in turn
16 the Court should grant Fair Share Housing Center's
17 cross motion. Chatham has failed to comply with the
18 terms of the -- of the First Amendment, despite having
19 ample time to do so. And given its noncompliance we
20 simply request that the Court enter the Fair Share
21 Housing Center's proposed order, which directs the
22 Special Master to propose a plan for an inclusionary
23 development at Post Office Plaza within 45 days, order
24 a period of comments, and to grant Fair Share Housing
25 Center's request for fees and costs.

1 MR. DRILL: Your Honor, can I reply to their
2 argument before --

3 THE COURT: Can I --

4 MR. DRILL: -- he replies to mine?

5 THE COURT: -- can I just make sure she's
6 done first?

7 MR. DRILL: Oh.

8 MS. LOKKEN: Thank you, Your Honor.

9 THE COURT: I wasn't sure you were done.

10 MS. LOKKEN: I am -- I am finished, Your
11 Honor. I don't know if you have any questions for me.

12 THE COURT: I don't.

13 MR. DRILL: Can I --

14 MR. GIANETTI: I have a few questions.

15 MR. DRILL: -- reply to Fair Share's argument
16 before --

17 THE COURT: I want to hear what he --

18 MR. GIANETTI: I would like to reply in the
19 order that we've gone, Your Honor.

20 THE COURT: What are you replying to?

21 MR. GIANETTI: Mr. Drill's comments to my
22 motion.

23 THE COURT: Well, why don't we hear from Mr.
24 Drill, and then you may have additional comments.

25 MR. DRILL: Thank you, Your Honor.

1 THE COURT: Is Mr. Burgis here by the way?

2 MR. DRILL: Yes, right over there.

3 MR. BURGIS: I'm right here, behind the
4 screen.

5 THE COURT: Oh, I'm sorry, I didn't see you
6 over there. Okay.

7 MR. DRILL: He's watching.

8 THE COURT: Well, the -- my s -- the screen
9 is in the way here so.

10 MR. DRILL: The fact that Fair Share doesn't
11 object to SV's intervention that's not the test. I
12 don't want to spend any time, Your Honor is well aware
13 of the test.

14 Now, Fair Share says that the Borough never
15 formally requested to extend the date beyond June 1.
16 The Borough's position is that they implicitly granted
17 an extension by continuing to talk with us, and by not
18 sending us anything saying hey, you're in violation,
19 your beyond June 1.

20 We also -- the Borough also says we were in
21 substantial compliance by submitting Nouvelle, which
22 okay, they didn't formally reject it, because they told
23 me on the phone. So, I'm not stupid, I don't want to
24 wait you know one or two or three days for the thing to
25 come in. And it's not like we then pulled Bergen

1 County United Way out of thin air. The -- SV
2 complained in their papers that at this public meeting
3 we wouldn't reveal who the 100 percent developer was.
4 That's because we were negotiating with both Nouvelle
5 and Bergen County, and we didn't want to mess up those
6 negotiations. Messed up is not a legal term, but I
7 think you know what I mean.

8 If there is a violation of the First Amendment
9 through not having a Redeveloper's Agreement with some
10 alternate mechanism, it's not a significant violation
11 to warrant the relief that SV is seeking. Now, the al
12 -- alternatively, we are seeking an order that Your
13 Honor require Fair Share to approve the 15 unit
14 project. Alternatively, you might want to consider at
15 least ordering them to negotiate in good faith with us
16 over a replacement mechanism project.

17 And what I said in the papers, again, this is
18 something that -- and I said it in the pa -- she told
19 me over the phone that listen, if we do 100 percent
20 project it's not just going to be 15 units, it's going
21 to have to be a minimum of 30. That wasn't an offer, I
22 never said it was an offer. But that -- Your Honor,
23 how do I show the Court that Fair Share has been
24 negotiating in bad faith, if I'm not allowed to tell
25 the Court that that's what their position was? And if

1 you look at rule -- Evidence Rule 408, it says that I
2 can't use something in negotiations to prove that in
3 court. Well, I'm not seeking to use anything in ne --
4 negotiations to prove that they agreed to a 15 unit,
5 that they agreed to a 30, that they agree to -- agreed
6 to a 45. I'm using what was said to me to -- in my
7 motion to cr -- to enforce the settlement, which
8 actually the authors of the Evidence Rule says that
9 that's what that alternate language, it's another
10 sentence in the rule, and you can use that. So, I
11 don't think I did anything wrong, I think I had no
12 choice to -- to cite what she had told me over the
13 telephone.

14 Now, funding is very interesting. I'm glad that
15 they brought that up, because that really hasn't been
16 in the papers. So once they formally rejected Bergen
17 County United Way. So, we had this agreement signed by
18 Bergen County United Way, it's attached as Exhibit X to
19 my certification. We were also mediating, and SV said
20 hey, listen, we don't want to have try to go in for a
21 preliminary injunction, can you agree that the mayor
22 won't sign it? And I said how about this, we agree the
23 mayor won't sign it till July --

24 MR. GIANETTI: Objection, Your Honor. He's
25 been testifying for like half of his arguments.

1 MR. DRILL: It's in my footnote. It's in the
2 brief. You haven't -- you haven't said --

3 MR. GIANETTI: You're testifying as to --

4 MR. DRILL: -- that there's anything wrong
5 with it.

6 MR. GIANETTI: -- communications.

7 MR. DRILL: That's not -- we --

8 THE COURT: How is that a problem? Are you
9 saying that --

10 MR. GIANETTI: Him testifying?

11 THE COURT: Are they confidential
12 communications?

13 MR. GIANETTI: No, and none of this is in the
14 record.

15 MR. DRILL: Yes it is.

16 THE COURT: He just said it is.

17 MR. DRILL: It's in my brief. I got a
18 footnote in my brief.

19 THE COURT: Go ahead.

20 MR. DRILL: It's in my certification. We
21 said okay, the mayor won't sign it until July 28th.
22 Well then when Fair Share rejected Bergen County, we
23 stopped talking with Bergen County. Because you know
24 what I was afraid of, I'm afraid that if I kept on
25 talking to Bergen County, we'd have allegations of bad

1 faith.

2 Now, I was very happy to hear Ms. Lokken say that
3 she'd like to continue talking to us about what we
4 could do to get Bergen County into a satisfactory
5 shape. We would love to do that. So, the alternative
6 relief if you don't order them to approve it, at least
7 order them to talk to us about it.

8 Be -- and -- but the funding thing -- okay, I
9 agree Ms. Lokken said -- she said they had concerns
10 with what if their funding -- they're applying funding,
11 what if it doesn't come through? Well, Exhibit R to my
12 certification is the Borough's Adopted Spending Plan.
13 I sent that to them before we had it adopted. On page
14 9 -- Exhibit R, page 9 it says in the event of any
15 shortfalls and revenues occur, the Borough will bond to
16 satisfy the gap in funding, okay.

17 Also, the Bergen County Redevelopment Agreement,
18 which as I said before is Exhibit X in my
19 certification, says in paragraph 4.2 on page 12 --
20 pardon me, it's Exhibit Z not Exhibit X. It's Exhibit
21 Z, paragraph 4.2 on page 12 says that if we have to
22 we're going to have to provide funding. So, and COAH's
23 second round rule, N.J.A.C. 5:93-5.5(a)3.ii provides
24 that a municipality may bond to guarantee the funding
25 for 100 percent municipality sponsored affordable

1 housing project.

2 So not only will I state in court and make a
3 representation that the Borough will adopt a resolution
4 of intent to bond, but our spending plan says that we
5 would do it. The agreement that we haven't signed,
6 we'd like to, but I don't want to get accused of bad
7 faith, says if we have to we'll do it. The COAH rule
8 says it, and anything else that they want or Mr. Burgis
9 wants we're willing to do. We just want the chance to
10 talk about it without being accused of when we have to
11 talk to Bergen County of having more bad faith claims.

12 And lastly, the submission of the Bergen County
13 United Way Proposal on July 12. Again, we submit that
14 that's substantial compliance in light of the fact that
15 we tried with Nouvelle, they rejected it. And I must
16 say for Nouvelle we were surprised like they were about
17 Nouvelle not wanting to abide by the 45 year. And so,
18 okay, they were right. So, we went to our second
19 bidder Bergen County United Way.

20 My final point is the relief SV seeks to have Your
21 Honor order us to basically do the deal with them is I
22 don't know how the Court could order that. Because the
23 Post Office Plaza Redevelopment Plan provides that the
24 minimum lot size, there's two sides of the
25 redevelopment zone. One side has a 1.25 acre minimum,

1 one side as a 1 acre minimum. Their side has a 1 acre
2 minimum. The two lots they control that the Feldman
3 entities own total 0.75 acres. That's in Bob -- Robert
4 Powell's certification. The Redevelopment Plan, which
5 I believe is attached to one of their -- SV, one of the
6 principals certifications, does not require the Borough
7 to sell its public land to the developer. In fact, the
8 Redevelopment Plan has a section 5, and item b talks
9 about submission of information if a redeveloper wants
10 to use publicly owned land.

11 And as I said in my certification based on what --
12 what Mr. Powell said there were two huge problems. The
13 first problem was once we found out that Feldman
14 overpaid for the lots that that throws off their
15 justification for the 100 units.

16 The second problem is, and this is in my
17 certification, their saying that we have to deed the
18 publicly owned land fee simple absolute. The
19 Redeveloper's Agreement says terms and conditions of
20 sale, and it doesn't require it, it said if the Borough
21 wants to include but not limited to sale/lease. So,
22 the fact that -- that they say it's got to be a sale,
23 and the Borough has reached an agreement with Bergen
24 County United Way for lease for 45 years should say
25 something.

1 The other thing is if it weren't for the fact that
2 the United States Postal Service, this is also in my
3 certification, re-up their lease for that sorting
4 facility in Chatham, they probably could have had
5 enough land, and we probably wouldn't be here today.
6 But USPS re-ups its lease, that's now off the table.
7 There's nothing in the Redevelopment Plan that requires
8 condemnation. So, the relief they're seeking brought
9 out to its logical conclusion is not only does the
10 Borough have to approve that, we got a deed, publicly
11 owned land which the plan doesn't required, and I just
12 don't see how the Court does that. And with that Your
13 Honor I'll rest.

14 THE COURT: Okay. Sir.

15 MR. GIANETTI: Thank you, Your Honor. So,
16 there's a lot to digest there, I'll try and make it
17 flow. We've had a lot of discussion about this
18 standalone 15 unit non-inclusionary development, and a
19 lot of discussion back and forth between Mr. Drill and
20 Ms. Lokken regarding it, and putting aside the planning
21 issues and policy issues of inclusionary development
22 over a standalone development.

23 Mr. Drill keeps referring to the Settlement
24 Agreement as if they have the option to do this
25 alternate mechanism at their choice. They don't. It

1 has to be an inclusionary development, and they have to
2 use their best efforts to do it. They only get to this
3 alternate mechanism, and I'll read it straight to you,
4 if despite its best efforts the Borough has not entered
5 into a Redeveloper's Agreement for the inclusionary
6 development by June 1st, then they can go to possibly
7 extending with Fair Share or an unmet need mechanism to
8 Fair Share Housing Center's satisfaction.

9 So you'll only get to that alternate, if they use
10 best efforts for an inclusionary development. Which
11 they have not done, everything shows all their efforts
12 was to not do an inclusionary development. And that's
13 what the violation is of the Settlement Agreement.

14 Mr. Drill then refers to our motion was timed to
15 the delay. It wasn't timed to the delay. June 1st
16 came and went, they didn't have anything, we filed our
17 motion. It was a lengthy motion, it took a week or so
18 to put together, but it was timely. And the reality is
19 they were not going to a compliance hearing. The
20 original one was scheduled June -- June 24th. At that
21 time they didn't have a plan for Post Office Plaza.
22 They didn't have our Redeveloper's Agreement. And they
23 rush to get this Nouvelle Agreement. Wh -- which was,
24 again, the fact that it was rushed showed why it never
25 came about, all the provisions in the Redeveloper's

1 Agreement not complying with the U.H.A.C. regulations.
2 It was rushed just as the Bergen United Way Proposal
3 was rushed.

4 If it all goes to timing, if we had a
5 Redeveloper's Agreement you know back in May if it was
6 4/3 vote in our favor, we would have our Planning Board
7 approval right now, and we'd be proceeding to
8 resolution compliance and going for construction.
9 Instead, they want to delay it further, the Borough
10 does, to now explore this other concept.

11 And Ms. Lokken's done this a ton. I do this a
12 lot, even the Court Master. When these affordable
13 housing projects are in plans, they're not just thrown
14 in last minute nilly-willy. They're planned out cause
15 of funding and sources, in cause of the timing issues.
16 There are -- there are timeframes on when you can apply
17 for these funding sources. So, even when Mr. Drill
18 says oh, we'll -- we'll -- the Borough will back
19 something. When? A year and a half from now, two
20 years from now when they know they don't have the
21 funding available. Redevelop's Agreement, if you read,
22 I think its Exhibit Z, there's no concept plan attached
23 to that. When does a court ever approve 100 percent --
24 100 percent affordable development without a concept
25 plan? The project schedule, that's a defined term,

1 says as defined in section 2a. 2a says project
2 schedule will be determined in 90 days or so. There's
3 no approved project schedule. How can you approve 100
4 percent affordable development? It was, again, another
5 act of desperation to do anything but what was provided
6 for in the Redevelopment Plan, and was provided for in
7 that Settlement Agreement.

8 Now, again, he says oh, now we find out the land
9 costs were so high. Well first of all, none of that
10 was a reason for them not doing the Redeveloper's
11 Agreement. Mr. Powell just came up with this a few
12 weeks ago in putting their opposition together. But
13 it's wholly irrelevant. And, again, it's another red
14 herring trying to distract the Court of the fact what
15 was in the Settlement Agreement for an inclusionary
16 development.

17 I rely on my client as an experience developer
18 knowing what it needs to pay for land in order to get
19 the land, and to develop it, land that was going to be
20 under a redevelopment study.

21 So how Mr. Powell from an academic standpoint
22 determines they paid too much for the land, he's not
23 buying and to develop it. You think my client wanted
24 to overpay, so he can increase the density? That's not
25 how it works. They paid what was required to be paid

1 to get that land in order to develop it for
2 redevelopment.

3 And, again, just kind of highlighting, and Ms.
4 Lokken makes an excellent point. The town -- Fair
5 Share's approved this in all these other towns. First
6 of all, they never -- 15 unit standalone affordable
7 developments are not easy developments. I represent a
8 number of low income housing tax credit developers that
9 do 100 percent affordable. They are normally a lot
10 higher in the 40's or 50's, because the amount of
11 subsidies needed and what you're paying per unit. But,
12 again, not only are they planned for a while as part of
13 a Town's Affording Housing Plan, they're never used to
14 undo a ready and willing, able developer to do an
15 inclusionary development that was contemplated as part
16 of the Redevelopment Plan, and contemplated as part of
17 the Settlement Agreement.

18 Ms. Lokken is correct also, it's an inferior plan.
19 A standalone 15 unit development stuck behind the Post
20 Office parking lot, as opposed to a inclusionary
21 development, luxury development with the units mixed
22 in, same amenities, same features, same look. There's
23 a lot of reasons why the inclusionary development is a
24 superior plan, then the standalone affordable
25 development.

1 So, again, I -- I think the records clear. I mean
2 there's a lot of -- we keep talking about this non-
3 inclusionary, cause I know that was part of his motion.
4 They only get to that if they use their best efforts to
5 do an inclusionary development, and the record is clear
6 that they did not do that. Instead, they use all that
7 effort to do anything but an inclusionary development.

8 That's why we ask Your Honor to grant the relief
9 we requested, give us the period of time 40 to 45 days
10 for the town to come to a Redeveloper's Agreement,
11 based upon the Goldilocks Plan, otherwise the immunity
12 is stripped. It's clear not just Chatham, other towns.
13 If there's not a consequence, actions aren't going to
14 happen. So, it needs to be clear what the consequence
15 is if they do not meet what was contemplated in the
16 Settlement Agreement, and what was contemplated in the
17 Redevelopment Plan.

18 THE COURT: So amplify for me, if you would,
19 why an inclusionary development is better for low and
20 moderate income, than -- than an exclusive unit? Tell
21 me why, I don't -- I don't?

22 MR. GIANETTI: Well, because it's -- it's
23 their -- by COAH's regulations they have to be mixed in
24 with the market rate units, right, so it's part of an
25 overall development. They're relying on building

1 market rate units for a certain type, certain look,
2 certain feel. They get the same type of unit. As
3 opposed to standalone affordable unit, they -- you know
4 it's limited funding. I mean there's State subsidy,
5 but it's not complete subsidy.

6 THE COURT: Most of the units up separate --
7 segregate the Mount Laurel units.

8 MR. GIANETTI: I'm sorry.

9 THE COURT: Most of the units -- most of the
10 developments that I am aware of segregate the Mount
11 Laurel units.

12 MR. GIANETTI: Absolutely, Your Honor, that
13 is not the case --

14 THE COURT: Oh, I know it's the case. The
15 Moore property, Arrowgate up here.

16 MR. GIANETTI: There might be instances, and
17 there are instances --

18 THE COURT: There's many, now maybe it's
19 under old regulations. But it's absolutely the fact
20 that many of the developments, perhaps older ones
21 segregate, and there's no doubt about that.

22 MR. GIANETTI: Well Your Honor, I'm not sure
23 of the specific project you're referring to. I could
24 tell you almost all of --

25 THE COURT: I just told you the Moore

1 property is one, Arrowgate is up here, there's some
2 other in Randolph that are segregated.

3 MR. GIANETTI: I mean I could rattle off just
4 as many that they're integrated --

5 THE COURT: Well, the point is do --

6 MR. GIANETTI: -- and the COAH regulations
7 were clear.

8 THE COURT: -- do they have to be is what I'm
9 asking?

10 MR. GIANETTI: COHA regulations were -- COAH
11 regulations effectively require it. Fair Share Housing
12 Center requires in most instances. Sometimes where it
13 doesn't, and I've been involved in it, is where you
14 might have for sale units in apartments.

15 THE COURT: All right. So, let's say they're
16 integrated, how is that an advantage?

17 MR. GIANETTI: Because it's part of an
18 overall community development. There's no -- there's
19 no --

20 THE COURT: It's part of an overall community
21 of Chatham.

22 MR. GIANETTI: Yeah, but there's no stigma
23 being a standalone, those are the affordable units
24 right there stuck behind the Post Office. It's part of
25 a larger development. I mean that's why it's a -- it's

1 a favored type of development --

2 THE COURT: At least in --

3 MR. GIANETTI: -- it's integrated.

4 THE COURT: -- the old days they had
5 different heating. They had electric heating versus
6 gas --

7 MR. GIANETTI: Your Honor, I --

8 THE COURT: -- because it was cheaper.

9 MR. GIANETTI: I will put on the record Your
10 Honor, they will be integrated, and they will have the
11 same features and -- and fixtures, and you know
12 requirements as the market rate units.

13 THE COURT: Okay.

14 MR. GIANETTI: They're not going to be
15 separate, and they -- and they won't be downgraded from
16 the market rate units.

17 THE COURT: Okay. Anything else, Ms. Lokken?

18 MS. LOKKEN: Yeah. Your Honor, I just wanted
19 to add if I may that I have a lot of respect for Mr.
20 Drill, he's apparently confusing conversations. It is,
21 one, ridiculous to suggest that the Borough had
22 implicit authority to not abide by the terms of the
23 agreement, because Fair Share Housing Center didn't
24 tell them that they were in violation. They can read
25 their agreement just as well as anybody else can. It

1 expressly states what it states. There is no 30 unit
2 minimum project that Fair Share Housing has presented
3 to the Borough. I don't -- I simply don't have the
4 authority to require that.

5 The other finally, Your Honor, is the -- the
6 funding issues. The Bergen County United Way would
7 have to apply for like several dif -- I think it's like
8 up to four different funding sources. They all have
9 different application deadlines. They all have
10 different delivery dates. It is very, very
11 competitive. All of these projects are all competing
12 for the same funding. So, what -- what -- why is the
13 -- the project better if it's inclusionary with a
14 developer that's ready, willing and able to go, I think
15 that's what Your Honor asked. It's because it gets
16 built now. We have waited so long in Chatham for the
17 provision of housing. That midpoint review identified
18 that not a single unit had -- of housing had been built
19 in four years. Then we've got to -- had to file a
20 complaint and prerogative writ to get the redevelop --
21 the River Road in order. And the First Amendment
22 included the River Road requirements for a development,
23 integrated development potential for at the River Road
24 redevelopment area. But then it supplemented Chatham's
25 unmet need mechanisms with Post Office Plaza.

1 So, we have been -- we negotiated for that, we
2 contracted for it. And -- and most importantly, in
3 this instance, the language doesn't require Fair Share
4 Housing Center to agree to an inferior mechanism. And
5 I think that that should be (indiscernible). Thank
6 you.

7 THE COURT: I meant to ask you is there an
8 independent PW action filed?

9 MR. GIANETTI: Oh, with respect -- yes, but
10 it's on a pro -- it's challenging the resolution
11 designating and approving the Redevelopment Agreement
12 of Bergen United Way on procedural grounds, and
13 substantive grounds.

14 THE COURT: And the end result of that could
15 be if it goes your way?

16 MR. GIANETTI: All it does is it un -- it
17 undoes the Redeveloper's Agreement with Bergen County
18 United Way. It doesn't give us any relief that we're
19 seeking as part of this case or doesn't give us any
20 relief with respect to I'm not even sure -- you know
21 we're not seeking to get you know money back from the
22 Borough. We're seeking rights that were contemplated
23 under the Settlement Agreement under those court
24 orders. That's not being litigated as part of that
25 prerogative writ action.

1 THE COURT: Yeah, but you're successful,
2 you're setting aside an agreement as I gather; right?

3 MR. GIANETTI: Potentially, yes. But it
4 doesn't give us any rights, and -- and it doesn't allow
5 us to move forward. The Borough could move forward
6 with Bergen United Way during this time. I mean that's
7 --

8 THE COURT: Is there a scheduling order in
9 place?

10 MR. GIANETTI: No. I don't even think the
11 Borough's filed an answer yet.

12 THE COURT: Okay. All right, thank you.
13 Yes, sir.

14 MR. DRILL: Two quick points, again, to
15 correct SV's representations on the record. The COAH's
16 second round rules do not require integration of units.
17 They recommend it, but they don't require it. And Your
18 Honor is right, it's not just in Morris County, there
19 are other developments where the units are not
20 integrated.

21 And the second thing is SV can amend the
22 complaint. They -- right, they have one count to knock
23 out Bergen County. All they got to do is amend it, and
24 add another count to put -- that's where this thing
25 belongs. It doesn't belong in this declaratory

1 judgment action. And with that I sit down.

2 THE COURT: Anything else?

3 Well, I'll tell you how I'm looking at this. In
4 most of the Mount Laurel cases that be -- that have
5 come before me or in which I've been involved in,
6 allegations of bad faith always come up. They just
7 always, always, always come up. And this is a little
8 bit of historical trivia, but in 1986 when Mount Laurel
9 III was argued, and I was one of the attorneys involved
10 in that case, it was argued that a court should not
11 transfer court cases to COAH, because the towns were
12 acting in bad faith. Well, the Supreme Court rejected
13 that argument. I don't know if it's in the decision,
14 but since I argued it I know what they did.

15 And I think that's relevant here. We're talking
16 about a municipality, the people that govern it; the
17 people that live there. I'm being given an option
18 between 15 units and 100 units, knowing the town does
19 not want 100 units. Simplistic way to look at it, but
20 that's the way I'm looking at it.

21 I did read a lot of the relevant agreement with
22 BC UW, and in page 12 just as represented by Mr. Drill,
23 section 4.2 source of funding. To the extent of a
24 shortfall in funds raised pursuant to paragraph a, and
25 paragraph a talks about obtaining conventional funding,

1 etcetera, etcetera. And paragraph b, the Borough will
2 also provide funding. So, there is funding there.
3 Will it take a little bit of time? Yeah, probably
4 will.

5 But you're looking at putting up buildings that
6 will live there presumably for a long, long time. And
7 you're looking at having 85 market units, nothing wrong
8 with market units. But that's 85 additional families
9 into the town which require police protection, they
10 require schools. And the town doesn't want to do that,
11 the town wants 15 units.

12 Are they late in the game? Yes, clearly they are.
13 But I think I am going to give the town the opportunity
14 to -- to develop a plan with -- with BC UW in order to
15 see if they can pull off a 15 unit individual housing
16 project. If they can, they've saved themselves a great
17 deal of money eventually. And I know we're not
18 supposed to talk in terms of school obligation for
19 Mount Laurel Housing, yes, you need. In other words,
20 school -- the cost of -- of these developments is not a
21 defense to Mount Laurel, I get that, but that's not
22 what I'm talking about. The choice is there is an
23 option of 15 units or 100 units, and at this point in
24 time I am prepared to accept that both provide
25 realistic opportunities. If the town wants 15 and does

1 not want the additional 85, I think they have every
2 right to understand, and to try and implement that as
3 best they can.

4 I will just say a few other things here. And I
5 recognize that the good -- bad faith argument is here.
6 I recognize that the contract -- well, the contract
7 does allow for negotiations beyond if -- if no
8 development agreement is reached by June 1st, it does
9 provide for that. And the only way I would not allow
10 that, would not see that, not -- would not read it is
11 if I were to conclude negotiations were in bad faith.
12 That's why I said at the beginning bad faith in my view
13 is not the per se decision maker here, it's the
14 interest.

15 I have an obligation I think, number one, to
16 implement Mount Laurel, no question about it. All
17 courts do, all judges do, that's what the Supreme Court
18 has repeatedly told us for I don't know how many years,
19 73 I think it was, that's 50 years we've been told
20 that. I get that, that's not what I'm saying. But a
21 town has the right to manage -- the governing has the
22 right to manage its town, and its land uses within the
23 confines of the law. That's the secondary right as far
24 as I'm concerned. So, if we can accomplish the Mount
25 Laurel obligation and respect the municipality's

1 decisions, then that's what I should do.

2 So, for all those reasons I will give the town the
3 time to implement -- to attempt to implement the 15
4 units. So, I guess I'm saying the town's application
5 -- but let me start that -- in fact, I should look at
6 the precise orders which I have here so I can.

7 And some of this timing is relevant I think too,
8 so let me talk about that. I'm looking at three
9 resolutions of Chatham Township. One of them was
10 adopted on May 2nd. And May 2nd it says be it further
11 resolved Borough Council declares it shall proceed with
12 the necessary steps and procedures to amend the Post
13 Office Plaza Redevelopment Plan, rescind the
14 designation of the entirety of the Post Office Plaza as
15 an area in need of redevelopment. So in May, a month
16 before the deadline, they rescinded the redevelopment.

17 Then we've got May 31st. May 31st talks about the
18 Nouvelle property. So, again, that's before the June
19 deadline.

20 And then, finally, the resolution adopted June 22
21 talks about -- talks about following basically the
22 meeting of May 21 where they iden -- where they
23 identified Nouvelle. They go on and say now for
24 various (indiscernible) as follows. Bergen County
25 United Way is hereby designated as the substitute

1 redeveloper for the 15 unit single building residential
2 affording housing project.

3 So, did they act as promptly necessary? No, they
4 didn't, they should have done more quicker. But that
5 doesn't mean in my view that they should lose the
6 opportunity to attempt to implement the plan that they
7 believe they now have. And if it's developed in a
8 reasonably expeditious manner, and we'll talk about
9 that in a minute, Fair Housing is not defeated, there's
10 15 units. And it's interesting, one of the ways -- I
11 kind of looked at this, and -- and having heard
12 argument I'm not sure this is valid anymore. But one
13 could argue that Fair Housing is now -- is now taking a
14 position that the town doesn't have to have not 15
15 units, that the town has to have 85 market units.
16 That's the ultimate result of what they're saying.
17 Well, I don't think that's what they're supposed to be
18 doing either.

19 So, let me look at the order of Day Pitney. One
20 is the motion of proposed intervenor is -- okay, and we
21 talked about intervention, you're right, we need to get
22 to that. Let me a piece of paper out. This is in one
23 of the briefs, and I believe its SV's brief, it talks
24 about this is on page 4, it says the motion to
25 intervene standard. Motions to intervene are to be

1 liberally construed, and intervention should be granted
2 unless "it will unduly delay or prejudice the rights of
3 the original parties." Citing the Meehan case.

4 Well, if I granted intervention that's exactly
5 what their intervention would do, it would delay this.
6 They have every right to come back on October 27th in
7 order to object to the plan if they can pull it off.
8 And, again, we'll talk about that in a minute.

9 So, the motion to intervene is denied. I do not
10 believe that their interest in this property, other
11 than on their own is appropriate. So, I don't believe
12 they met the standards for intervention. Their
13 appearance is not necessary, because their interests
14 are adequately re -- the interests of Mount Laurel, the
15 15 units are adequately represented certainly by Fair
16 Housing, and to some extent by the municipality. So,
17 that's denied.

18 The motion of intervene -- to enforce litigant's
19 rights obviously is denied. Without being in the case
20 they can't enforce litigant's rights, cause they don't
21 have litigant's rights. So that takes care of that
22 motion.

23 In terms of the Borough's motion I'm not going to
24 order Fair Housing to approve the project, that that's
25 not reasonable and appropriate. They have every right

1 to review the project, and give their position having
2 once obtained the necessary information. So, I will
3 order them to negotiate in good faith, but that's
4 really the extent of it.

5 I'm not going to award attorney's fees, I don't
6 think that's warranted here.

7 And then, finally, we have Fair Share Housing's
8 motion. Well, the cross motion to enforce litigant's
9 rights, which I guess is in favor of SV, that's denied.

10 And I will -- I'll put in the order, and I'm going
11 to talk about this in a minute about Mr. Burgis.

12 And, again, I don't think any attorney's fees are
13 appropriate as I said.

14 Bad faith to me is not the disposable -- not the
15 end all to the cases such as this. The public interest
16 at large is the most appropriate outcome, and I think
17 I've reached that conclusion. However, I am going to
18 indicate I want a report from Mr. Burgis in 30 days as
19 to how far along this SV -- the proposal from Bergen
20 County is. And anybody else can respond to that. So,
21 let's say Burgis in 30 days, and other parties 10 days
22 thereafter. And I'll put that in the order too.

23 And that could trigger another conference with the
24 parties, all depends on what happens. But the town
25 deserves an opportunity, in my view, to come up with a

1 way to implement their obligation with a standalone
2 unit. And if they can do it cool, sobeit, it'll be
3 included in the Compliance Plan that we her in two
4 months. If they can't, then we'll revisit this
5 application again. But they deserve a chance to do it
6 and I've -- and I've -- today I've given it to them so.

7 Any questions, any lack clarity?

8 MR. DRILL: No. Thank you --

9 THE COURT: Okay.

10 MR. DRILL: -- very much, Your Honor.

11 THE COURT: All right. I'll sign orders in a
12 few minutes. They'll be in eCourts today or shortly
13 thereafter.

14 And by the way I did -- I should have mentioned
15 this earlier. I did receive Mr. Burgis' very
16 thoughtful report on Tuesday, and his supplement on
17 Wednesday, so I was aware of those.

18 Okay, thank you everybody.

19 MR. DRILL: And, again, thank you, Your
20 Honor.

21 MR. GIANETTI: Thank you, Your Honor

22 MS. LOKKEN: Thank you, Your Honor.

23 (The proceedings are adjourned.)

24

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CERTIFICATION

I, Deborah Mastrantonio, the assigned transcriber, do hereby certify the foregoing transcript of proceedings, index number from 1:37 to 3:03, is prepared in full compliance with the current Transcript Format for Judicial Proceedings and is a true and accurate non-compressed transcript of the proceedings as recorded.



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Deborah Mastrantonio

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Agency Name

Date