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IN THE MATTER OF THE APPLICATION OF THE TOWNSHIP OF SOUTH BRUNSWICK FOR A JUDGMENT OF COMPLIANCE AND REPOSE AND TEMPORARY IMMUNITY FROM MOUNT LAUREL LAWSUITS	SUPERIOR COURT OF NEW JERSEY LAW DIVISION MIDDLESEX COUNTY DOCKET NO.: MID-L-003878-15 CIVIL ACTION – *MOUNT LAUREL*

BRIEF IN SUPPORT OF MOTION IN LIMINE FOR ORDER THAT THE TOWNSHIP HAS SATISFIED ITS 842 UNIT PRIOR ROUND (1987-1999) OBLIGATION

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STATEMENT OF FACTS AND PROCEDURAL HISTORY

On October 2, 2013, Defendant/Intervenor South Brunswick Center, LLC (SBC), filed a rezoning application with the Township of South Brunswick (Township) wherein it sought a rezoning of its property from Office Research to some undesignated zone that would permit a mixed use development of commercial and planned residential development, with a proposal to build 1,000 homes plus 150,000 square feet of commercial development. On March 26, 2014, the South Brunswick Planning Board (Board) held a hearing on the application, after which the Board recommended that the Township Council (Council) deny the rezoning request. Before the Council rendered a decision on the rezoning application, SBC filed a complaint on or about June 13, 2014. On August 22, 2014, a conference was held before the Hon. Douglas K. Wolfson, J.S.C. After discussion, SBC indicated that it would seek leave to file an amended complaint alleging a Mt. Laurel "Builder's Remedy" lawsuit. On August 26, 2014, the Council denied the application for rezoning.

On or about November 18, 2014, SBC filed a Motion for Leave to file an Amended Complaint to pursue a Builder's Remedy lawsuit against the Township, which was granted on December 19, 2014. As a result of a Case Management Conference held on January 30, 2015, Christine Nazzaro-Cofone, PP, was appointed by the court as a Special Master. Pursuant to the January 30, 2015, order, SBC and the Township forwarded certain documents to the Special Master to assist her in "resolving the preliminary issue of whether there is an unmet need for affordable housing [in the Township of South Brunswick] pursuant to COAH's Second Round Rules, and if so, what is required of the Township to remedy that." (SBa 1-2).

Pursuant to a Case Management Order dated February 27, 2015, both SBC and the Township were directed to submit their respective expert's reports to the Special Master that

specifically addressed whether the Township had any unmet need remaining from its Prior Round (1987-1999) obligation (SBa 3). SBC submitted a report by John T. Chadwick, IV, P.P., dated March 2015 (SBa 4-14). In his report, Mr. Chadwick indicated that "[t]he Township's Second Round obligation was 841 units plus 36 rehabilitation units." (SBa 6). The Township submitted a report by Mary Beth Lonergan, PP, AICP, dated April 16, 2015 (SBa 15-30). In her report, Ms. Lonergan indicated that "[t]he Township's 1987-1999 cumulative Second Round obligation, as determined by COAH per N.J.A.C. 5:93, consisted of a 937-unit pre-credited need (842 new construction/95 rehabilitation)." (SBa 19). The court's February 27, 2015, order directed that "the parties and the Special Master shall reconvene for a Case Management Conference on May 8, 2015 at 11:00 AM, at which time the Special Master shall advise the Court as to her interpretation and evaluations of the reports and as to her findings and assessments on the ultimate issue of whether the Township has or has not violated its Second Round COAH obligations." (See SBa 3).

On March 10, 2015, the Supreme Court determined in In Re Adoption of N.J.A.C. 5:96 and 5:97 by N.J. Council on Affordable Housing, 221 N.J. 1 (2015) (Mount Laurel IV), that COAH is not capable of functioning as intended by the Fair Housing Act (FHA), and thus municipalities must submit to judicial review for a determination of their compliance with the constitutional obligation to provide for opportunities for the development of low and moderate income housing. Id. at 25-26. In this regard, municipalities were permitted to file a Declaratory Judgment Action seeking an Order for temporary immunity from "builder's remedy" lawsuits as well as entry of a Judgment of Compliance and Order of Repose, protecting them from such suits. Id. at 5.

Pursuant to the court's Case Management Order dated May 8, 2015, the Township was

directed "to file [if it chose to do so] a declaratory judgement action for immunity from builder's remedy litigations" on or before July 8, 2015 (SBa 31). The Special Master was directed to confer with both SBC and the Township and thereafter serve upon all counsel and the court a final report on the satisfaction of the Township's Prior Round obligation on or before June 5, 2015. Another Case Management Conference was scheduled for July 17, 2015.

On June 5, 2015, the Special Master issued a report on the Township's Second Round compliance (SBa 32-41). In the report, the Special Master indicated:

> In 1993, COAH issued its cumulative second round (1987-1999) Municipal Low and Moderate Income Housing Need allocations.
>
> The Township's 1987-1999 cumulative Second Round obligation, as determined by COAH per N.J.A.C 5:93, consisted of a 937 unit pre-credited need (842 new construction/95 rehabilitation.
>
> On March 6, 1995, the Township petitioned COAH with its adopted 1987-1999 cumulative Second Round Housing Element and Fair Share Plan.
>
> On February 4, 1998 the Township received Second Round Substantive Certification from COAH.
>
> In both the Certification of Mary Beth Lonergan dated February 13, 2015 as well as "Planner's Report For The Township of South Brunswick Middlesex County, New Jersey South Brunswick Center, LLC, Plaintiff v. Mayor and Municipal Council of the Township of South Brunswick, et al., Defendants Docket No. MID-L-3669-14" the following units were identified to satisfy the Township's Second Round new construction obligation.

Development	**Units**
Deans Apartments	40 (prior cycle credits)
Charleston Place I	54 (prior cycle credits)
Regal Point	5 (affordable family sales)
Monmouth Walk	43 (affordable family sales)
Nassau Square	49 (affordable family sales)
Woodhaven	80 (affordable family rentals)
Charleston Place II	30 (affordable senior rentals)
Summerfield	70 (affordable family sales)
Deans Pond Crossing	20 (affordable family sales)
Southridge/Southridge Woods	124 (affordable family rentals)
CIL-Wynwood	7 (alternative living arrangements)

CIL Woods	16 (alternative living arrangements)
Wheeler Rd Group Home	3 (alternative living arrangements)
Major Rd Group Home	3 (alternative living arrangements)
Oak Woods	73 (affordable senior rentals)
Buckingham Place	23 (affordable senior rentals)
ARC of Middlesex County	15 (alternative living arrangements)
Dungarvin/Eclipse	8 (alternative living arrangements)
Community Options	8 (alternative living arrangements)
Triple C Housing	6 (alternative living arrangements)
REACH (Market to Affordable)	18 (affordable family sales)
Rental Bonuses (Prior Round)	187
TOTAL CREDITS	882

> Based upon my review, the aforementioned 882 units have been approved by COAH, and appropriate documentation as to their legitimacy, including appropriate deed restrictions have been put in place. Essentially, they are "live" units which would satisfy the Township's Second Round 842 new construction obligation. (SBa 36-37).

Although the Special Master found that the Township had a deficiency in its 95 unit Second Round Rehabilitation obligation, the Special Master specifically concluded that:

> The Township's 1987-1999 cumulative Second Round obligation, as determined by COAH per N.J.A.C 5:93, consisted of a 937 unit pre-credited need (842 new construction/95 rehabilitation). The Township has provided sufficient evidence/crediting for the 842 unit new construction obligation (SBa 37-38).

On July 1, 2015, the Township filed its declaratory judgment action in compliance with the Case Management Order of May 8, 2015, and Mount Laurel IV. On July 31, 2015, the court entered various orders: (1) granting intervention to certain interested parties as well as Fair Share Housing Center (FSHC); (2) granting an initial five-month period of immunity to the Township; and (3) consolidating the SBC complaint into the Township's declaratory judgment action (SBa 42-43).

LEGAL ARGUMENT

The Township has Satisfied its 842 Unit Prior Round (1987-1999) Obligation; thus its Motion in Limine Should be Granted

A. There is no dispute that the Township's Prior Round (1987-1999) Obligation was 842 units

Based on the evidence and expert opinions present in this case, there can be no dispute that the Township's Prior Round (1987-1999) obligation was 842 units.

- In his expert's report for SBC, John T. Chadwick, IV, indicated that "[t]he Township's Second Round obligation was 841 units plus 36 rehabilitation units." (SBa 6).
- In her expert report for the Township, Mary Beth Lonergan indicated that "[t]he Township's 1987-1999 cumulative Second Round obligation, as determined by COAH per N.J.A.C. 5:93, consisted of a 937-unit pre-credited need (842 new construction/95 rehabilitation)." (SBa 19).
- In both his April 2015 and July 2015 calculations of the Township's Prior Round (1987-1999) obligation, Dr. David Kinsey, expert for FSHC and others, concluded that the Township's Prior Round (1987-1999) obligation was 841 units (SBa 44-45).
- Similarly, Econsult Solutions, Inc., indicates in its calculations that the Township's Prior Round (1987-1999) obligation is 842 units (SBa 46).
- The Special Master indicated in her June 5, 2015, report, "[i]n 1993, COAH issued its cumulative second round (1987-1999) Municipal Low and Moderate Income Housing Need allocations. The Township's 1987-1999 cumulative Second Round obligation, as determined by COAH per N.J.A.C. 5:93, consisted of a 937 unit pre-credited need (842 new construction/95 rehabilitation)." (SBa 36).

As such, it seems that there is universal agreement that the Township's Prior Round (1987-1999) obligation is no more than 842 units. This should not have to be litigated as part of the upcoming trial, since it appears that there is no dispute on this point.

B. The Township has already demonstrated that it has satisfied its Prior Round (1987-1999) 842 Unit Obligation.

The Township has already submitted to the Special Master the "appropriate documentation,…including appropriate deed restrictions [that] have been put in place" to prove that the Township has satisfied its Prior Round (1987-1999) 842 unit obligation. Indeed, the Special Master specifically found in her June 5, 2015, report that "[t]he Township has provided sufficient evidence/crediting for the 842 unit new construction obligation." (SBa 38). Since all parties agree that the Township's Prior Round (1987-1999) obligation is 842 units, and the Special Master, as the court's representative, has already found that the Township has satisfied this obligation, the Township should not be forced to prove again that it has satisfied its 842 unit Prior Round obligation. Instead, the court should accept the Special Master's findings and enter an order at the outset of the trial indicating that the Township has satisfactorily met this aspect of its obligation.

Use of Special Masters in affordable housing litigation was sanctioned and specifically encouraged by the Supreme Court in Southern Burlington County N.A.A.C.P. v. Mount Laurel Tp., 92 N.J. 158 (1983) (Mt. Laurel II). In that case, the Supreme Court stated:

> [t]hese impartial experts use their skills to help the parties formulate a remedy that will comply with the trial court's order and supply information that the parties may not have available to them. (citation omitted). They differ from traditional masters, whose roles are usually limited to serving as fact-finders and supervising procedural tasks, in that special masters work with the parties to devise a remedy that will meet with the court's approval. Mt. Laurel II, supra., at 282.

Although the Court in Mt. Laurel II indicated that the Special Master's opinion is not binding on the trial court, id. at 284, in a later case the Court clarified that:

> [c]ourts generally defer to a special master's credibility findings regarding the testimony of expert witnesses. State v. Chun, 194 N.J. 54, 96 (2008) (citing State v. Locurto, 157 N.J. 463, 471 (1999)). We evaluate a special master's factual findings in the same manner as we would the findings and conclusions of a judge sitting as a finder of fact. We therefore accept the fact findings to the extent that they are supported by substantial credible evidence in the record, but we owe no particular deference to the legal conclusions of the Special Master. State v. Henderson, 208 N.J. 208, 247 (2011).

After judging the credibility of the statements made by the expert witnesses in the case, and examining the documentary evidence presented by the parties, the Special Master found as a fact that the Township had satisfied its Prior Round 842 unit obligation. These findings have gone unchallenged since they were made in June 2015. If this were a case involving a Reference to a Master to make such determinations pursuant to R. 4:41-1, et seq., the trial court would be obligated to accept the Master's findings of fact unless those findings were contrary to the weight of evidence. If a party failed to object to such finding within ten (10) days, that party would be precluded from thereafter challenging the Master's findings. See R. 4:41-5(b). In such context, the Master's findings would constitute the "law of the case," and be binding on the parties.

The "law of the case" doctrine

> 'applies to the principle that where there is an unreversed decision of a question of law or fact made during the course of litigation, such decision settles that question for all subsequent stages of the suit.' Wilson v. Ohio River Company, 236 F.Supp. 96, 98 (S.D.W.Va.1964), aff'd 375 F.2d 775 (4 Cir.1967). This rule is based upon the sound policy that when an issue is once litigated and decided during the course of a particular case, that decision should be the end of the matter. United States v. U.S. Smelting Refin. & M. Co., 339 U.S. 186, 198 (1950).
> .
> .
> The doctrine of "law of the case" is also applied to the question of whether or not a decision made by a trial court during one stage of the litigation is

> binding throughout the course of the action. (citation omitted). The use of the doctrine in this situation avoids repetitious litigation of the same issue during the course of a single trial. Slowinski v. Valley National Bank, 264 N.J. Super. 172, 179-180 (App. Div. 1993)(quoting State v. Hale, 127 N.J. Super. 407, 410-11 (App.Div.1974)).

Although the "law of the case" is not an absolute rule, as "the court is never irrevocably bound by its prior interlocutory ruling," Jacoby v. Jacoby, 427 N.J. Super. 109, 117 (App.Div.2012), "when a judge decides not to follow the law of the case doctrine, it is incumbent on the judge to explain the reasons for that departure." L.T. v. F.M., 438 N.J. Super. 76 (App. Div. 2014). Moreover, if the doctrine applies, it generally prohibits a contrary ruling in the same case in the absence of additional developments or proofs that differ with the earlier ruling. See Hart v. City of Jersey City, 308 N.J. Super. 487, 497 (App. Div. 1998).

In the instant matter, SBC and the Township were required by the court to submit detailed documentation and expert reports on the Township's satisfaction of its Prior Round (1987-1999) obligation. The issue was thoroughly documented and examined by the Special Master, and the Special Master had the opportunity to review and confirm and/or refute the Township's documentation and all of the facts related to satisfaction of the Prior Round obligation. After concluding this painstaking and searching review, the Special Master specifically determined that "[t]he Township has provided sufficient evidence/crediting for the 842 unit new construction obligation." (SBa 38). The Special Master found this to be so even in the face of SBC's expert opinion offered in opposition to this proposition. Thus, the Special Master's June 5, 2015, finding settled this issue for purposes of the SBC litigation. Since the SBC case was thereafter consolidated into the present declaratory judgment action by order dated July 31, 2015, it should be a settled fact and binding on all parties in the instant matter. It is of no moment to the Special Master's finding of fact that the present matter is a declaratory judgment

action rather than the original SBC litigation. The issues and underlying facts are identical, were thoroughly reviewed and concluded by the Special Master.

Even if the Special Master's finding on June 5, 2015, is not "binding" in the strict sense, it is strong and compelling evidence that the Township has satisfied its Prior Round (1987-1999) 842 unit obligation. The Township should not be forced to once again resubmit all of the evidence already submitted to and reviewed by the Special Master on this issue. Such an exercise would be a complete waste of time and resources -- for the parties, the Special Master and the court. In a trial that already promises to be lengthy, it would serve no purpose whatsoever to relitigate an issue that has already been firmly determined by the Special Master.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the court grant the Township's Motion in Limine and enter an order indicating that the Township has satisfied its 842 unit Prior Round (1987-1999) obligation.

Respectfully submitted,

TOWNSHIP OF SOUTH BRUNSWICK

s/ Donald J. Sears

Donald J. Sears

Dated: April 25, 2016