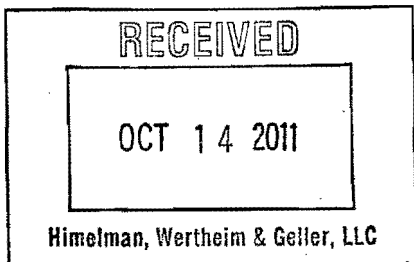


SUPERIOR COURT OF NEW JERSEY

CHAMBERS OF
JAMES P. HURLEY
JUDGE



MIDDLESEX COUNTY COURTHOUSE
P.O. BOX 964
NEW BRUNSWICK, N.J. 08903-0964



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Re: SB Building Associates, et als. V. Boroufgh of Milltown, et als.
Docket No.: Mid-L-9439-06



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Dear Counselors:

The property that is the subject of this case is referred to as the Ford Avenue Redevelopment Site (also referred to herein as the “subject property”¹), is approximately 22.4 acres in area, is a crescent-shaped parcel, and is located adjacent to Mill Pond on the south side of Ford Avenue, east of Main Street in the Borough of Milltown. The majority of the site is bordered by Lawrence Brook and Mill Pond. It is identified on the Borough’s tax map block 58, lots 1.01, 1.02, 1.03 and 1.07. The site is currently developed with a complex of industrial buildings (P-3) first occupied by the Meyer Rubber Company, subsequently occupied by the India Rubber Company, then the International Rubber Company, and eventually the Michelin Tire Company, which vacated the site in 1930. Since 1930, the buildings in the complex have been leased to various tenants occupying portions of the site. For many years, a number of the buildings on the site have remained vacant. The impervious surface coverage is about 86.2%. The site is environmentally contaminated, which will be the subject of a remediation process regulated by the New Jersey Department of Environmental Protection (NJDEP).

Plaintiffs, SB Building Associates, L.P. (“SB Building”), SB Milltown Industrial Realty Holdings, LLC (“SB Milltown”) and Alsol Corp. (“Alsol”) bring this action in lieu of prerogative writs against the various defendants seeking relief in five counts. Plaintiffs’ first count seeks a site specific builder’s remedy for the subject property. Plaintiffs’ second count seeks a declaration from this court that the defendant, Boraie Development, LLC (“Boraie”), is without standing to pursue a development application as Milltown’s designated redeveloper. Likewise, Plaintiffs’ third count seeks a similar declaration from this court that Boraie does not have standing to pursue a wetlands letter of interpretation from the NJDEP. The fourth count seeks a declaration that Boraie’s agreement to contribute \$1 million toward the construction of

¹ The use of “subject property” is to distinguish Milltown’s redevelopment plan from that of the Plaintiffs’ who propose the addition of approximately 1.5 acres apparently owned by USRL.

a new firehouse is in violation of law “as concluded in opinions such as *Nunziato v. Edgewater Planning Bd.*, 225 N.J. Super. 124 (App. Div. 1988).” The Plaintiffs’ fifth and final count is directed against the County of Middlesex and its Freeholders (although not individually named) seeking to enjoin the County from instituting any condemnation proceedings. Through motions brought by the defendants, the second, third, fourth and fifth counts were dismissed. The reasons for the dismissals were placed upon the record, and need not be repeated here.

The Defendants are the Borough of Milltown along with its mayor and council (collectively “Milltown”) (because of the declaration that the property in question has been declared an area in need of redevelopment along with subsequent actions relating to zoning); the Planning Board of the Borough of Milltown (because of its participation in recommending that the subject property be declared an area in need of redevelopment, and for having accepted Boraie’s site plan application); Boraie Development, LLC (because it is the designated redeveloper); Milltown Ford Avenue Redevelopment Agency (“Agency”) (because of its Redevelopment Agreement with Boraie); and the County of Middlesex (because of its desire to acquire a portion of the subject property). For reasons I’ll explain later, this court has been careful not to say that the plaintiffs are the owners of, or otherwise have an interest in, the subject property.

The subject property has been deemed an area in need of redevelopment, so a condensed history of proceedings is important to interject at this point. In February, 2001, Milltown instituted proceedings to designate the subject property as an area in need of redevelopment pursuant to the Local Redevelopment and Housing Law (LRHL), *N.J.S.A.* 40A:12A-1 *et seq.* The Borough Council directed the Planning Board to conduct an investigation to determine whether the subject property met the factual and legal criteria to be deemed an “area in need of redevelopment.” In May, 2001, the Planning Board adopted a resolution recommending that the subject property be so designated. In September, 2001, the

Borough created the Redevelopment Agency. In March, 2002, the Borough adopted the Ford Avenue Redevelopment Plan which provided for the subject property to be redeveloped as a mixed use development, consisting of residential, office and retail uses. In April, 2002, the Borough adopted a "redevelopment overlay zone" to govern development of the subject property in accordance with the redevelopment plan. In 2003, the Agency selected Boraie from among four applicants as the designated redeveloper of the subject property. A redevelopment agreement was entered into between the Redevelopment Agency and Boraie on May 11, 2004. The 2004 Redevelopment Agreement required Boraie (i) to develop up to 324 units of age-restricted housing in single-family homes, townhouses and multi-level units, (ii) to construct up to 75,000 square feet of office and/or retail space, (iii) to provide for open space; (iv) to contribute \$1,000,000 to the acquisition and construction of an off-site firehouse, and (v) to pay for all of the costs of site investigation and remediation. Of the 324 age-restricted units, none were specifically required to be set aside for affordable housing, although the developer was charged with providing "a plan as to how the residential portion of the Project will meet a portion of the Borough's affordable housing obligation." Boraie was authorized to acquire and develop the subject property. (J-20). In July, 2004, Milltown adopted a revised redevelopment plan. In August, 2004, Milltown then adopted an ordinance approving the revised redevelopment plan. Also in 2004, an amended redevelopment plan clarified that the existing single-family lots along Ford Avenue did not need to be developed with age-restricted housing; altered the density, coverage, lot area and setback requirements applicable to townhouses; refined the regulations for what were now called the mid-rise age-restricted and senior housing buildings; added specific regulations for commercial and business uses; added a requirement that an unspecified number of affordable housing units be provided within the mid-rise age restricted buildings "consistent with the Amended Housing Plan Element and Fair Share Plan of Milltown...adopted May 6, 2003". By resolution dated August 22, 2005, the

Borough ratified its prior determination that the subject property was an area in need of redevelopment.

In November of 2005, the Redevelopment Agreement was amended to reduce the total number of dwelling units permitted to no more than 276. (J-26). The amendment was based upon the County of Middlesex's desire to acquire approximately four acres of the subject property for the purpose of establishing a 100 feet buffer adjacent to Mill Pond, some of which would be owned by Middlesex County, and the balance would be restricted by the redeveloper as part of the redevelopment of the subject property. The 276 units would continue to be age-restricted, but the permitted housing mix was amended to include owner-occupied townhouses and multi-level dwellings with a minimum of 50 units in an age-restricted apartment building (no more than 25% of the units having two bedrooms). According to the terms of the 2005 amended Redevelopment Agreement, if the County failed to acquire the four acres by March 30, 2006, the previously executed 2004 Redevelopment Agreement would remain in effect.

In the fall of 2006, Boraie submitted a site plan for the redevelopment of the subject property. The site plan provided for a total of 276 housing units, 40 percent of which were to be age-restricted, and the balance of which were to be family or non-age-restricted units. All of the affordable units were proposed to be non-age-restricted rental units. The plan would have satisfied Milltown's entire second round new construction obligation, although it did not address any portion of its third round growth share obligation. The foregoing represents a brief, but not detailed, history of the proceedings.

On May 6, 2003 a Housing Element and Fair Share Plan was prepared and adopted by Milltown's Planning Board. This document was submitted to COAH on July 8, 2003, along with a resolution adopted by Milltown's governing body petitioning for substantive certification of the Milltown's second round Housing Element and Fair Share Plan. The Housing Element and Fair Share Plan had requested an adjustment in the 64 unit new

construction portion of Milltown's total 107 unit 1987-1999 fair share obligation from 64 units to 16 units due to insufficient vacant land. During the course of this litigation, an evaluation was jointly undertaken by all parties, which confirmed Milltown's contention of insufficient vacant land. (T1:65, 1-10)². All 16 units were to be addressed through the redevelopment of the subject property (with 9 age-restricted for sale units, 4 age-restricted rental units, one age-restricted rental bonus and 3 non-age-restricted for sale units). The plan to provide three (3) affordable non-age-restricted units was never implemented when the Redevelopment Plan was amended in 2004. The 2004 Redevelopment Plan continued to permit only age-restricted housing. The plan was reviewed by COAH; additional information was requested. (J-2). According to COAH's report (J-2), "Milltown petitioned for substantive certification after June 6, 2000, and as such, the borough may receive interim second round substantive certification for a period less than the standard six years. This interim certification will be valid for up to one year after the effective date of COAH's third round methodology and rules."³ On December 30, 2005, COAH dismissed Milltown's petition on the grounds that Milltown had failed to submit a resolution from its governing body by February 20, 2005 committing to petition for third round substantive certification from COAH by December 20, 2005. (J-3). The Borough is therefore susceptible to a builder's remedy lawsuit because it failed to maintain its status before COAH and to resolve issues concerning its fair share of the regional need for affordable housing. Because there is insufficient vacant land within Milltown to support any substantial housing development, the redevelopment of the subject property is essential to Milltown's satisfaction of its Mt. Laurel obligations.

² T1:65, 1-10) represents the transcript of the trial on June 15, 2011 at page 65, lines 1 through 10. T2 will be the transcript of June 16, 2011, and T3 will be the transcript of June 17, 2011.

³ This leaves a question, but not addressed here, whether or not the interim protection would still be valid in light of the Appellate Divisions striking of the relevant portions of the third round rules. The petition was dismissed before the Appellate Division struck the rules, but the decision had retroactive impact.

At the outset of this decision, I did not identify the owner(s) of the subject property. Although Mr. Eisdorfer, in his opening statement, indicated that SB Realty is the owner of the subject property (T1:19, 19-20), there have been no specific proofs submitted in that regard. Lawrence Berger testified that he is the president of United States Land Resources, L.P. (“USLR”), which is either the general partner of, or has otherwise a controlling interest in, the plaintiff entities. Exhibit P-4, drawn by George Ritter, the plaintiffs’ planner, designates USLR for whom the plan was drawn. Ritter, during direct examination, identified a 1.5 acre parcel as part of the plaintiffs’ plan. That 1.5 acre parcel is shown on P-4, and identifies the owner as USLR. USLR is not a named plaintiff. Berger did testify that ALSOL owns a portion of the subject property (but did not identify which part), and that the other plaintiffs acquired other portions of the subject site (again without specifying which portions). (T2:25,22 to 26,9). There was no documentary proof presented by the plaintiffs to confirm that any of the plaintiffs have any interest in the subject property, legal or equitable.

Berger testified that USLR is the general partner of the plaintiff, SB Building (T2:22, 14-17); that the plaintiff, SB Milltown, is a limited liability company in which USLR is a member; and that the plaintiff, ALSOL Corp., is controlled by USLR. (T2:24, 9-17). Berger referred to the plaintiff entities as being owned “directly or indirectly” by USLR. It therefore appears that there is a common interest among USLR and the plaintiff entities. USLR manages the economics of the plaintiff entities. (T2:22, 1-13). That common interest has been utilized to insulate one company from loses that may be occasioned by another. (T2:22,14 to 23,17). When asked by the court what he meant by “indirectly” Berger responded, “...some smart guy on Wall Street came up with the idea that it’s a good idea to make entities that borrow money quote ‘bankruptcy remote’. So they make you insert another entity between the actual general partner and the entity so that if there’s a bankruptcy filing, it doesn’t take down the whole

portfolio of properties.” The court concludes from Berger’s testimony that the plaintiffs are convenient entities created to protect the assets of USLR.

Berger did not appear to be sure of his facts. For example, when asked if USLR is a general partner of SB Building he responded “I think that’s true”. (T2:22, 14-17). He wasn’t sure if the stock of ALSOL was owned by USLR or one of the other entities. He simply concluded that USLR has a controlling interest in ALSOL. (T2:24, 16). In his testimony Berger contends that he wasn’t aware of the project until 2005. He received a letter relating to the redevelopment, which he thought was from the Mayor, in 2005, which he said, “shocked me”. (T2:48, 4). But, in a letter Berger wrote to the Agency on May 30, 2006, he says, “(w)e have noted the Redevelopment Plan for our property *since its inception* (emphasis added).” (P-5). These statements confirm that Berger was well aware of the redevelopment process the entire time despite his testimony to the contrary. Berger also testified that after this complaint was filed that “we had a contract subsequent to the lawsuit to sell the property to a developer for 25 million dollars to a developer.” (T2:14, 19-21). The developer was identified by Berger as Ray Rice (T2:37, 1-3), but the contract was not produced at trial. Neither the terms of the contract nor Rice’s qualifications were disclosed. Mr. Rice was not called as a witness. Berger’s testimony was not persuasive.

The court is aware that *Mount Laurel II* requires that a builder's remedy be granted if the builder has succeeded in the litigation, and proposes to construct a substantial amount of lower income housing. *Southern Burlington County NAACP v. Tp. of Mt. Laurel*, 92 N.J. 158, 279-280 (1983). To avoid the remedy the municipality must prove that the proposed project would either substantially harm the environment or be otherwise clearly contrary to sound land use planning. *Id.* Where remedies are awarded, the remedy should be carefully conditioned to

assure that in fact the plaintiff-developer⁴ *constructs* a substantial amount of lower income housing. *Id.* A substantial amount, by implication, must also be realistic. This court denies a site specific builder's remedy as requested by the plaintiffs.

The proofs clearly show that the plaintiffs, as related to this litigation, are speculators looking for an approved project that can be spun off to a real builder. (T1:179, 12-19). Berger testified that he had never been involved in a redevelopment process. (T2:47, 10-11). The plaintiffs have owned the land for about 20 years, and have yet to put a shovel in the ground. (T2:26, 5-9). Ritter agreed that a redevelopment agreement with a redeveloper would contain a covenant to build. (T1:162, 3-6). Plaintiffs have not shown that ability. The subject property was bought to have it developed in the future for retail uses. (T2:26, 10 to 27, 22). The evidence shows that plaintiffs have never constructed a multi-family residential development, and more specifically that they have never built any affordable housing of any type. (T2:25, 4-14). To grant plaintiffs their suggested relief would be akin to requiring Milltown to adopt a zoning amendment, and hope that a builder would come forward with a conforming plan. Instead, Milltown has Boraie, a builder with demonstrated experience, and with a plan that has been submitted to the Milltown Planning Board for review and approval. In essence, as the redeveloper, plaintiffs will hope to market and sell the subject property; Boraie will build it. The covenant to build required by *N.J.S.A. 40A:12A-9* is the best assurance that the public goal at issue will be achieved. Because plaintiffs are clearly not builders but investors, there is no constructive advantage to the public by awarding a builder's remedy to plaintiffs. Boraie presents a realistic opportunity to provide Milltown with sufficient affordable housing to meet its second round obligation and then some. Obviously Boraie's plan will have to be amended to comport with this decision.

⁴ "Builder" and "developer" are used synonymously throughout Mt. Laurel case law with the common thread being the assurance of affordable housing construction.

The defendants' contention that the plaintiffs brought this suit in bad faith has some merit. The plaintiffs' 550 unit plan was developed only after they filed their complaint. (T1:20, 14-20). A redevelopment process, which was duly noticed to the public, as well as to the property owners, began in April, 2001. (J-5, J-6, J-9). This was followed by notices regarding an ordinance to create the Redevelopment Agency in September of 2001 (J-12, J-14), an ordinance to adopt the Redevelopment Plan in April of 2002 (J-17, J-18), a request for proposals to be designated the redeveloper in 2003, an ordinance to amend the redevelopment plan in August of 2004 (J-22, 23, 24), and a resolution in 2005 reaffirming that the subject property is an area in need of redevelopment. (J-25). During this entire process, plaintiffs did not appear at any stage of the process. They did not approach Milltown to construct affordable housing on the subject property, nor did they advise Milltown that they believed the Borough's redevelopment plan failed to adequately address its affordable housing obligation. The plaintiffs' complaint post dates Boraie's application to the Planning Board.

It is clear that the plaintiffs want finality to the redevelopment process, but its own actions have caused a delay. The one application made to NJDEP, a Letter of Interpretation ("LOI") filed by Boraie was interrupted by plaintiffs. The NJDEP did not act on the application because plaintiffs advised NJDEP that they had not authorized the redeveloper to file an LOI on its behalf. Thus the wetlands line has not yet been verified by the NJDEP. (T3:59, 4 to 60, 6). The LHRL does not provide a time within which finality is to occur. I have said on a number of occasions that one problem with the LRHL is that once property is deemed in need of redevelopment a cloud hangs over the title because the property is then subject to being acquired through eminent domain. Is the condemning authority going to acquire the property, and if so when? A property owner would have difficulty selling or even leasing the property because of that cloud. It is the threat of condemnation that is at the heart of the plaintiffs' complaint. Berger and Boraie met about eight times to discuss the acquisition

of the subject property. According to Berger, Boraie offered \$7.5 million for the subject property (T2:37, 17) contending estimated costs of \$12.5 million for environmental cleanup, \$5 to \$6 million for demolition and \$7 million for electrical infrastructure improvements (T2:18-22). It was after Berger and Boraie could not agree on the value of the land, that this complaint was filed. It is not Milltown's lack of attentiveness to its affordable housing obligation that caused the plaintiffs to file their complaint, but rather the failure of Boraie to come to an agreement on the value of the land. Care must be taken to make certain that *Mount Laurel* is not used as an unintended bargaining chip in a builder's negotiations with the municipality. *Mt. Laurel*, 92 N.J. at 280. Berger is an attorney, and a shrewd investor. Maximizing the number of units that can be built on the property will maximize the value to be received in compensation when condemnation occurs. (T2:44, 18-23). The plaintiffs are entitled to receive the fair market value for the subject property, but that value is to be determined by the fact finder in the condemnation trial. The plaintiffs' objective here is to achieve a litigation advantage, not to advance the public interest. The fact that Boraie will build a number of units less than that proposed by plaintiffs is an issue to be left to another court and to the fact finder assessing the fair market value of the subject property. Issues involving the impact of the contamination will have to be addressed then. *New Brunswick Housing Authority v. Suydam Investors*, 177 N.J. 2 (2003).

Plaintiffs simply conclude that because Milltown's zoning regulations do not comply with the constitutional mandate, and because they have suggested a project that provides a substantial amount of affordable housing, they are entitled to a builder's remedy. In their summation the plaintiffs say, "[f]ar from condemning the desire by builders to maximize profits, the Supreme Court created a judicial remedy that would provide exactly that reward to builders who act as an instrument to enforce the constitution. The Supreme Court expressly declared that it is the promise of 'profitable projects' that creates the 'incentive' for builders to

assume the burden of enforcing the constitution (*citing Mt. Laurel II* at 279 n. 37; *Toll Bros. v. W. Windsor*, 173 N.J. 502, 562 (2002)).” The plaintiffs have not proven that they are “builders”. The plaintiffs produced no evidence to show that the construction of 550 units would be a “profitable project”, which contributed to this court’s conclusion that the motive behind this law suit was other than the public interest. Maximizing the number of units to meet an affordable housing obligation can be defeated by proposing a project that is not economically feasible to build. Art Bernard, defendants’ planner, testified that the 550 unit plan was excessive in part because of the “unusual parking arrangements.” (T3:84, 1-10). Specifically, plaintiffs proposed both underground parking and stacked parking. It was Bernard’s opinion that the underground parking was a costly way to do parking and that most of the underground parking failed to provide a turnaround area – resulting in “a recipe for a mess.” (T3:73, 17 to 74, 10). He also criticized the 210 stacked parking spaces as “a problem waiting to happen” if one person doesn’t understand the parking arrangements . (T3:76, 1-13). Elizabeth McKenzie, the court’s special master, also concluded that the plaintiffs’ proposed plan is excessive. (T2:45, 18-25).

Plaintiffs advocate that this court make its determinations as of the date on which the complaint was filed. They rely on *Toll Bros. v. W. Windsor Tp.*, 303 N.J. Super. 518 (Law Div. 1996), *aff’d* 334 N.J. Super. 109 (App. Div. 2000), *aff’d*, 173 N.J. 502 (2002). The reasoning behind *Toll Bros.* is sound, but distinguishable from the case at bar. In *Toll Bros.*, the plaintiff builder made an application to West Windsor’s governing body to rezone its property, and presented a plan which included an affordable housing component. The zoning was thereafter amended to the detriment of the builder. For the court to have applied the time of decision rule in that case would defeat the ability of the builder to produce the proposed affordable housing. The court then applied the snap shot theory. It is true that Berger approached the Redevelopment Agency, as he put it, “to dump” Boraie, and to let the plaintiffs

become the redeveloper, but the Agency could not comply because it had a binding agreement with Boraie. Here, plaintiffs had no plan on the date the complaint was filed. There was no attempt by the Agency or Milltown to thwart a realistic plan offered by the plaintiffs. However, Milltown was not in compliance with its affordable housing obligation on the date the complaint was filed.

Some remedy is mandated by the circumstances. Milltown has been recalcitrant in its dealings with COAH, and unless this court intervenes, it is likely that Milltown's fair share obligation may be unjustifiably reduced by the under utilization of the subject property. Plaintiffs' planner (Ritter) agrees that Milltown's current obligation is 64 second round units and 10 rehabilitation units. (T1:67, 8-10). None of the planners that testified was able to offer an estimate as to what Milltown's growth share might be or even if such an obligation may exist in the future. Ritter, however, suggests that "some additional housing (be) built on the subject property to cover any future needs." (T1:91, 17-21). Ritter concluded that it is "pretty remote" that Milltown could provide additional new construction for affordable housing through the redevelopment process (T1:91, 9-16), but isn't that what Milltown did here? The court's special master testified that there could be other sites in Milltown that are eligible for redevelopment. (T2:98, 9-19).

Plaintiffs' suggested builder's remedy would set aside the Redevelopment Agreement, terminate Boraie as the redeveloper, and replace the plaintiffs as the redeveloper. In this case, such would violate the doctrine of *Mount Laurel*. The plaintiffs are not builders with a realistic plan of development. Their plan is excessive, ignores the problems associated with NJDEP regulations, and has been designed to produce the maximum number of units without considering good planning techniques relating to parking, internal circulation patterns and recreation. The plaintiffs' plan was also developed without consideration to remediation costs or costs of infrastructure improvements. Supplying electricity to accommodate the project is a

cost that must be considered. Milltown maintains its own electric utility, which is in need of modification. The issue was so critical that the court had to appoint an engineer to work with the special master to address the concern. Although costs cannot preclude a site from consideration, it can be considered in the extent of the project.

The court's special master recommended that the subject property be developed with 350 units with a 70 unit set aside which works out to be a net density of 22 to 23 units per acre. (T2:105, 2-11). McKenzie opined that limiting the proposed construction of units to no more than 350 units on the subject property was "perfectly appropriate." (T2:107, 4). She also made the following recommendation: "The Appellate Division did endorse COAH's determinations of the municipal prior round obligations and the municipal rehabilitation shares, however, and municipalities continue to be required to comply with these allocations. In Milltown's case, this means that Milltown has a 64 unit prior round obligation and a 10 unit rehabilitation share. The Borough may well be assigned a third round obligation in the future, but, at this point, we do not know what that third round obligation will be. It is my recommendation that the litigation proceed with the objective of at least bringing Milltown into compliance with its prior round obligation and the rehabilitation share, with the understanding that at some point in the future, the Borough will have to address a third round obligation." (J-50). The suggestion made by the special master is a reasonable solution. If in the future it is determined that Milltown has a third round obligation, both the Fair Housing Act and COAH's rules allow a municipality to apply for an adjustment for insufficient vacant land. (T2:153, 17-20).

The remedy here is to compel Milltown to amend its redevelopment plan to provide for a specific number of affordable units. Whether the court applies a time of decision rule or the snap shot rule is of no consequence. Milltown's second round obligation, at the time the complaint was filed is the same as it is today. The plaintiffs' planner (Ritter) and the court appointed special master (McKenzie) agree. Milltown is to provide for at least 64 (new

construction) affordable units and 10 rehabilitation units. No one was able to predict how the third round growth factor will or will not affect Milltown's second round obligation, which is being considered here. Boraie testified that the subject property can support from 300 to 400 units (T3:122, 24), of which 70 affordable housing units will be mandated. A well thought out plan can produce more than enough affordable housing units to comply with Milltown's second round obligation, and will provide a buffer against any new third round regulations that may impact Milltown. As addressed by the court's special master, other methods of meeting Milltown's third round rehabilitation obligation are also available. (T2:101, 22 to 102, 1).

Ralph Albanir, Director of Parks and Recreation for Middlesex County, testified that in 1995 the voters of Middlesex County approved a referendum permitting the County to establish an open space trust fund for the purpose of purchasing open space and developing recreational facilities within the County. (T3:32, 10-20). Thereafter, the County adopted the Middlesex County Open Space and Recreation Plan ("Open Space Plan") in 2003. (DM-16). Within the Open Space Plan, the Lawrence Brook linkage is identified which includes the subject property along Mill Pond. (T3:34,5 to 36,12). There is nothing in COAH's rules that precludes a redeveloper from dedicating land to provide a buffer. (T3:71, 17-23). Even Ritter agreed that having a pedestrian access along the face of Mill Pond is a very positive benefit. "I think having a walking area and a sidewalk in that area, I think would be part of any plan." (T1:127, 6-9). With that in mind, Milltown's second round obligation can be met, and the County's plan accomplished.

The engineers who testified disagreed as to whether the plaintiffs' plan violates NJDEP regulations. By choosing Boraie's approach to developing the subject property, the decision made by this court errs on the side of caution. It avoids the regulated areas more so than does the plaintiffs' plan. The public goal is to provide affordable housing and to assure that Milltown meets its obligation as quickly as possible.

This is clearly a unique situation. We have a municipality that is clearly not in compliance with its affordable housing obligation. We have a designated redeveloper who has expended time and money in being declared the redeveloper and in preparing plans to be submitted to the Planning Board. The preparation of those plans includes various studies involving state development regulations, local planning, environmental conditions and traffic analyses that impact the subject property and the community. Boraie is an experienced builder who is willing to go forward with the project. There has been no evidence presented to even hint that Boraie has acted in bad faith. Plaintiffs on the other hand have caused unnecessary delays by failing to participate in the redevelopment process from its inception and by resisting efforts by Boraie to undertake the necessary investigation of the subject property. Therefore any remedy must not penalize Boraie for any wrongs occasioned by Milltown's non-compliance.

Plaintiffs apparently own the subject property, although not proven, but ownership doesn't seem to be disputed by the defendants. It is the plaintiffs' burden to show which plaintiff is seeking the builder's remedy. The plaintiffs are controlled directly or indirectly by USLR who is not a party to this litigation. USLR is the owner of a 1.5 acre parcel that is not within the redevelopment area, but included in the plaintiffs' plan. The USLR parcel is clearly not developable if it stands alone, but plaintiffs have presented no proof why it should be incorporated into the redevelopment site. Obviously the only reason is to allow a larger number of units on the subject property while limiting the developable area to the subject property. If plaintiffs felt so strongly about including USLR's parcel, they should have raised the issue when the area was to be designated in need of redevelopment, but they did nothing.

In order to develop the subject site, the plaintiffs need a third party to acquire the property and become the redeveloper or otherwise joint venture a project in order for it to come to fruition. This litigation has been going on for more than five years. COAH has developed

third round rules that have been set aside by the Appellate Division, particularly as those rules relate to a future growth obligation. COAH's third round rules were based in part on the 2000 census. We now have a 2010 census. None of the experts who testified at trial would even render a guess as to what Milltown's third round obligation will be. The solution must be one that brings Milltown into compliance with at least its second round obligation without penalizing Boraie, and one that benefits the plaintiffs while assuring that affordable housing will be developed on the subject property. Therefore, this court concludes that it can grant a remedy to the plaintiffs, limited to a Mt. Laurel type remedy, but not a site specific builders' remedy.

The redevelopment agreement requires Boraie to contribute \$1 million dollars toward the construction of a new firehouse in Milltown. This issue was previously addressed by motions brought by the parties. The court's decision was placed on the record, but will be modified here for reasons other than those presented in response to the prior motion. *Nunziato v. Pl. Bd., Borough of Edgewater*, 225 N.J. Super. 124 (App. Div. 1988) is distinguishable. The \$1 million contribution could be an impediment to the construction of affordable housing, and must be removed from the redevelopment agreement.

Milltown is to amend its redevelopment plan to specify that the redeveloper is to present a plan for the subject property that provides for at least 350 residential units of which no less than 70 affordable housing units are to be allocated. The density of the development will be based on gross acreage and other bulk regulations, which are to be determined by Milltown.⁵ Milltown's housing element of the master plan and its fair share plan are to be amended to be consistent with the redevelopment plan. The Authority and Boraie are to amend the redevelopment agreement to be consistent with and implement the redevelopment plan.

⁵ If Boraie elects to restrict areas along Mill Pond by easement only, then the easement area may be included in gross acreage. The number of units may increase depending on the density and height regulations contained in the amended zoning ordinance.

The requirement that the redeveloper contribute \$1 million to the construction of a firehouse is to be eliminated from the redevelopment agreement. The cost of improving the infrastructure (i.e., water, sewer, electric) may be borne by the redeveloper upon the proviso that Milltown and the redeveloper enter into a reimbursement agreement whereby Milltown is to reimburse the redeveloper a prorata share of costs which are not directly related to the redevelopment project. The terms of such an agreement are to be mutually agreed upon and incorporated into the amended redevelopment agreement. McKenzie is to remain involved in the process, and shall oversee Milltown's compliance with the terms of this decision. Upon Milltown's compliance with the provisions of this court's judgment, McKenzie is to submit a report to the court confirming that all of the terms and conditions of this court's judgment have been satisfied.

If within two years from the date on which this judgment is entered, Boraie determines that it is no longer economically feasible for it to complete the project in accordance with the parameters of this decision, the redevelopment agreement may be terminated without liability to either/any party. The Agency will then be free to seek requests for proposals duly advertised to attract the highest possible responses.

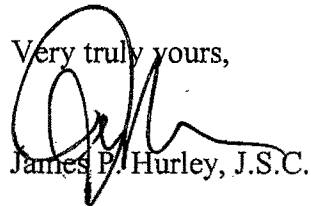
By this decision, the court is not intending to maximize the number of units that can be built on the subject property. Boraie is to propose a plan that includes at least 350 units with a mandated 20% set aside for affordable housing. This is in keeping with McKenzie's recommendation. If the property owner(s) and the redeveloper cannot agree on the market value of the subject property and eminent domain proceedings are undertaken, the extent of development can be then considered by the fact finder, and the fair market value then determined.

Milltown is also to develop a plan to address its indigenous need. The plan is to produce 10 additional units and may be in conjunction with the assistance of the County of Middlesex. The court will grant a period of repose of three years from the date the judgment is

signed to comply with its second round obligation as stated herein. If during the period of repose, COAH produces its third round obligations then Milltown will be required to address its obligation then. The period of repose will be extended, and will be the later of three years from the date of this judgment or one year after the third round rules are promulgated.

As part of this decision, the court grants to Milltown a period of repose of three years from the date of the judgment entered herein. The three year period provides Milltown with sufficient time (i) to amend its redevelopment plan and zoning ordinance and to establish its plan to provide ten rehabilitated units to satisfy its second round obligation in that regard. It provides the Agency and Boraie the opportunity to amend the redevelopment agreement and provides Boraie with sufficient time to complete its investigation and process its application before the Milltown Planning Board. As part of the amended redevelopment agreement, Boraie is attempt to acquire the subject property by consent of the property owner(s) within six months after the date on which Boraie obtains preliminary approval from the Planning Board. If Boraie is unable to do so within the time provided, the Agency, with the funding provided by Boraie, is to institute eminent domain proceedings in order to acquire the subject property. By this decision, this court is not determining the date of valuation or the number of units that can be constructed on the property. It is the intent of this court to set the minimum number of units to be constructed in order for Milltown to provide 70 affordable units.

Mr. Eisdorfer is to draft the form of judgment consistent with this decision, and submit it to the court under the five day rule, with copies to all other attorneys in this case.

Very truly yours,

James P. Hurley, J.S.C.

cc: Elizabeth C. McKenzie