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Honorable Menelaos W. Toskos, J.S.C.
Superior Court of New Jersey
Bergen County Justice Center
Chambers Room 424
10 Main Street
Hackensack, New Jersey 07601

**Re: In the Matter of the Application of the Borough of East
Rutherford For a Judgment of Compliance and Repose
Docket No.: BER-L-5925-15
Plaintiff's Letter Brief in Support of its Motion for Immunity**

Your Honor:

Please accept this Letter Brief in support of Plaintiff, Borough of East Rutherford's, Motion for an Order granting East Rutherford immunity from exclusionary zoning (builder's remedy) lawsuits while East Rutherford prepares an updated, constitutionally compliant, Housing Element and Fair Share Plan ("HEFSP").

STATEMENT OF FACTS

In 2003 Tomu Development Co. filed a builders' remedy suit against the Boroughs of East Rutherford and Carlstadt, their Planning Boards and the New Jersey Meadowlands Commission. On November 28, 2005 the Honorable Jonathan Harris, J.S.C. entered an order in the matter entitled *Tomu Development Co. v. Borough of East Rutherford, et al.* ("*Tomu*"). That order determined that East Rutherford's affordable housing obligation under the then effective "Second Round" rules to be as follows:

| | |
|------------------|-----------|
| Indigenous Need | 34 units |
| New Construction | 70 units |
| Total Obligation | 104 units |

The *Tomu* Court's order awarded a builder's remedy to Tomu, providing for construction of 420 units in East Rutherford, 360 at market rate and 60 affordable rental units.

On June 1, 2006 Judge Harris entered final judgment in *Tomu* which, among other things, appointed Robert T. Regan, Esq. as Mount Laurel Compliance Monitor (the "Monitor") and required the Monitor to file a petition with COAH for substantive certification of the Borough's Housing Element and Fair Share Plan.

On June 5, 2006 the Monitor issued a letter directive setting forth the Monitor's directives with regards to land use procedures within the Borough of East Rutherford (the "Monitor's Directive".) Both the *Tomu* decision and the Monitor required East Rutherford to develop and submit a proposed Housing Element and Fair Share Plan to the Monitor for approval.

On December 15, 2008, the Borough's Planning Board adopted a Housing Element and Fair Share Plan. That plan was endorsed by the Mayor and Council on December 16, 2008, and submitted to COAH in support of the Borough's petition for substantive certification filed on December 31, 2008. The Borough's petition was deemed complete by COAH on June 8, 2009. No determination has yet been issued by COAH on the Borough's petition.

The Borough's HEFSP was prepared pursuant to COAH's third round rules. Under those rules, the 2008 HEFSP was required to address a total obligation of 213-units comprised of: an adjusted rehabilitation component of 3-units; a prior round obligation of 90-units; and a growth share component of 120-units. The HEFSP provided the opportunity for the production of 201 of the 213-units, given the claim for bonus credits for the prior round in excess of the allowable bonus credit.

On the other hand, following Judge Harris's findings in *Tomu*, which were affirmed on appeal, East Rutherford was only required to provide 70 units to satisfy the prior round obligation. This reduced the total East Rutherford obligation from 213 units to 193 units. The East Rutherford HEFSP provided for 201 units thereby satisfying its obligation as determined in *Tomu*.

Consistent with the *Tomu* court's decision, since the issuance of the Monitor's Directive in 2006 all land use applications within East Rutherford, both in and out of the Hackensack Meadowlands District, have been subject to the Monitor's review. Affordable housing has been a consideration in every significant land use application in East Rutherford, and, as a result, the following land use developments have been approved with and affordable housing set-aside:

| Development | Approved Use | Affordable Housing Units |
|--|--------------------------------|------------------------------------|
| 132 Union, LLC | 30 units | 6 (3 on site -3 "in lieu payments) |
| M& M Investment (Van Winkle Avenue) | 33 units | 6 (3 on site -3 "in lieu payments) |
| GFM Builders LLC | Retail/office with 24 units | 5 |
| Capodagli | 45 units | 9 |
| Group at 3 (Phase 1) | 316 units | 32 (pursuant to COAH order) |
| Group at 3 (Phase 2) (planned) | 434 units | 44 (pursuant to COAH order) |
| 384 Paterson LLC | 7 units | 1 |

The Group at 3 approval contains a provision which requires Group at 3 to provide additional affordable units, not to exceed 20%, under certain circumstances.

The Borough's Planning Board has completed public hearings and now has under consideration an application for 208 units of which the Monitor has required 30 units to be affordable. The Planning Board is expected to consider final action on this application at its August, 2015 meeting.

In addition, the Borough now has under review a Redevelopment Plan for the Central Avenue Redevelopment Area (May 7, 2015). This plan, which is intended to stimulate mixed-use transit oriented development, requires the redeveloper to address affordable housing obligations by a 20% set-aside, with provisions for relaxation if economically infeasible.

Finally, East Rutherford committed the balance of \$140,000 in its affordable housing trust fund to a project proposed by the Housing Authority of Bergen County (“HABC”). This project would create at least 2 additional units of affordable housing.

Since the issuance of the Monitor’s Directive, East Rutherford has affirmatively sought to include affordable housing in all appropriate land use developments. Moreover, in light of the decision of the Supreme Court, East Rutherford is currently in the process of preparing a revised HEFSP that will fully comply with East Rutherford’s constitutional affordable housing obligations once those obligations are identified.

Notwithstanding that, as a result of the Supreme Court’s decisions invalidating COAH’s third round criteria, there are insufficient criteria and guidelines established at this time, especially as to East Rutherford’s share of the regions “need” for East Rutherford to prepare a HEFSP which this Court could evaluate to determine its constitutional compliance.

In order to identify the third round obligation, Rutgers University’s Center for Urban Policy Research (“CUPR”) has been retained by a consortium of municipalities to prepare revised statewide and municipal third round housing obligations. East Rutherford is a member of the consortium. CUPR had also prepared the municipal obligations of rounds one and two.

At such time as the CUPR housing obligation has been determined, the Borough will then be in a position to craft a HEFSP that satisfies its obligation.

ARGUMENT

1. **EAST RUTHERFORD FILED ITS PETITION WITH COAH IN ACCORD WITH THE THEN EFFECTIVE COAH REGULATIONS. EAST RUTHERFORD IS, THEREFORE, A “PARTICIPATING MUNICIPALITY.”**

On or about December 32, 2008, East Rutherford filed its Third Round Housing Element and Fair Share Plan with COAH with the approval of the Monitor. At that point, East Rutherford was a participant in the COAH process. As such, East Rutherford became a “Participating Municipality” entitled to all of the rights and benefits accruing to that designation.

2. **AS A “PARTICIPATING MUNICIPALITY”, THE SUPREME COURT’S 2015 DECISION GRANTS EAST RUTHERFORD WITH THE SAME RIGHTS AND PROTECTIONS AS EAST RUTHERFORD WOULD HAVE HAD UNDER THE FHA.**

In In the Matter of the Adoption of N.J.A.C. 5:96 and 5:97 by the Council on Affordable Housing, 221 N.J. (2015), the Supreme Court determined that a Participating Municipality (such as East Rutherford) is entitled to the same treatment in this litigation as would have been provided by COAH under the Fair Housing Act (the “FHA”). *221 N.J. at 27.*

As a Participating Municipality, East Rutherford had five months from the submission of a resolution to COAH to prepare and file its Housing Element and Fair Share Plan. See *N.J.S.A. 52:27D-316*. East Rutherford did that, and more. In addition to filing the participation resolution, East Rutherford actually filed a Housing Element and Fair Share Plan in a timely manner. That Housing Element and Fair Share Plan remains pending on COAH’s docket.

3. THE FHA WOULD PROTECT “PARTICIPATING MUNICIPALITIES” SUCH AS EAST RUTHERFORD FROM EXCLUSIONARY ZONING (“BUILDER’S REMEDY”) LAWSUITS DURING THE PENDENCY OF THE COAH PROCEEDING. THEREFORE, UNDER THE SUPREME COURT’S 2015 DECISION, EAST RUTHERFORD IS ENTITLED TO IMMUNITY FROM SUCH LAWSUITS.

Since East Rutherford was proceeding before COAH as a Participating Municipality, East Rutherford was then entitled to the protections against builder’s remedy suits as provided in the Fair Housing Act. *N.J.S.A. 52:27D-316b* provides, in pertinent part:

In the event [a] municipality adopts a resolution of participation within the period established in [N.J.S.A. 52:27D-309(a)], [any] person [challenging a municipality’s zoning ordinance with respect to the opportunity to provide for low and moderate income housing] shall exhaust the review and mediation process of [COAH] before being entitled to a trial on his complaint.

N.J.S.A. 52:27D-309 provides the protection set forth in *N.J.S.A. 52:27D-316(b)* if East Rutherford files a HEFSP with COAH prior to the commencement of Affordable Housing litigation. In this case, East Rutherford did so, filing its Housing Element and Fair Share Plan in December of 2008. Under the FHA, any person challenging East Rutherford’s ordinance is required to exhaust its administrative remedies before COAH. See *N.J.S.A. 52:27D-316.b*, for example, *Elon Associates, LLC v. Township of Howell*, 370 N.J. Super. 475 (App. Div. 2004), and *Sod Farms Associates v. Township of Springfield*, 366, N.J. Super. 116 (App. Div. 2004).

In Matter of the Adoption of N.J.A.C. 5:96 and 5:97 by the Council on Affordable Housing, 221 N.J. 1, 27 (2015), the Supreme Court determined that Participating Municipalities such as East Rutherford should be entitled to the same treatment in the Superior Court as it would have received in COAH. In light of that, East Rutherford is entitled to immunity from exclusionary zoning (builder’s remedy) during the pendency of this action.

4. PUBLIC POLICY, AS ANNOUNCED BY THE SUPREME COURT IN THE 2015 DECISION, BARS EXCLUSIONARY ZONING (BUILDER'S REMEDY") LAWSUITS WHILE THIS DECLARATORY JUDGMENT ACTION IS PENDING.

Not only does application of the principles set forth in the Fair Housing Act, by virtue of the Supreme Court's recent Opinion, provide an ample basis for the grant of immunity to East Rutherford, but public policy also supports such a grant.

The Supreme Court's 2015 Decision expressly limits the type of challenge that a third party may bring for a Participating Municipality's Housing Element and Fair Share Plan. Until the proposed Housing Element and Fair Share Plan are determined to be constitutionally non-compliant, a third-party has only a right to "limited participation" in the Declaratory Judgment matter. *221 N.J. at 29*. That "limited participation" goes only to the question of constitutional compliance of the Housing Element and Fair Share Plan. No site specific relief can be placed in issue. Only after the proposed Housing Element and Fair Share Plan is determined to be non-compliant, would an exclusionary zoning ("builder's remedy") case be allowed. *221 N.J. at 33*.

Here, East Rutherford's actions reflect good faith compliance with its constitutional obligations. This Declaratory Judgment action is another step in the compliance process. East Rutherford is entitled to the protections afforded by the Fair Housing Act and by the public policy announced by the Supreme Court.

CONCLUSION

For the foregoing reasons, East Rutherford submits that the Court should grant the instant motion and enter an Order granting East Rutherford temporary immunity against exclusionary zoning (“builder’s remedy”) lawsuits.

Respectfully Submitted,

KIPP & ALLEN, L.L.P.

By: 

Richard J. Allen, Jr.