

TOWNSHIP OF SOUTH BRUNSWICK

Municipal Building • P.O. Box 190 • Monmouth Junction, NJ 08852-0190

Phone
732-329-4000
TDD
732-329-2017
Fax
732-329-0627

Via Email and Regular Mail

January 11, 2016

Honorable Douglas K. Wolfson, J.S.C.
Superior Court of New Jersey
Middlesex County Courthouse
56 Paterson Street
P.O. Box 964
New Brunswick, NJ 08903-0964

Re: In the Matter of the Application of the Township of South Brunswick
Docket No. MID-L-3878-15
Our File No. L1347

Dear Judge Wolfson:

Please accept this Letter Memorandum on behalf of the Township of South Brunswick (“Township”) in reply to the opposition by Richardson Fresh Ponds and Princeton Orchards Associates (“Richardson”) to the Township’s Motion for extension of immunity in the above referenced matter.

Richardson argues a number of points in its assertion that the Court should reject the Township’s application for extension of immunity. Each will be taken in the order in which they appear in the Letter Memorandum submitted by Henry Kent-Smith, Esq., dated January 4, 2016.

Necessity for a Revised Plan

In the January 4, 2016, letter, Richardson indicates that the Court directed the Township to modify its November 9, 2015, Plan (“November Plan”) “because the November Plan failed to provide a realistic opportunity for the development of the Township’s fair share of affordable housing...” Richardson also asserts that the Court directed that “the revised affordable housing plan must be a plan designed to achieve a realistic probability of development of a substantial portion of the 2014 COAH draft projected affordable housing obligation for the 1999-2025 housing period.” Richardson thereafter criticizes the Township’s revised Plan submitted on December 18, 2015 (“December Plan”) as “merely a rehashing of the same failed compliance mechanisms the Court rejected on November 13.” Contrary to Richardson’s assertions, the Court did not reject the entirety of the November Plan, nor did it direct the Township to revise the November Plan for the 1999-2025 housing period. Indeed, Special Master Christine Nazzaro-Cofone stated explicitly that the compliance mechanisms proposed by the Township to address its Unanswered Prior Obligation (1987-2014) were fine. Indeed, Special Master Cofone made

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clear that, based upon the November Plan, the Township had fully satisfied its Unanswered Prior Obligation. This covered the period 1987-2014 (see page 2 of narrative portion of November Plan).

There were only two aspects of the November Plan dealing with the Township's Third Round Prospective Obligation (2014-2024) that were questioned. These included:

1. REACH Market-to-Affordable Program: The Special Master indicated that the Township needed to demonstrate how it would satisfy the proposed REACH affordable family sales units proposed in the Plan. The Special Master and the Court felt that 59 new market-to-affordable units were "too ambitious."
2. Wilson Farm and RPM Henderson Road Development: Each of these is a proposed 100% affordable housing development. The Special Master and the Court felt that these were "phantom projects," which were not viable because of their dependence upon tax credit funding.

As a result of these two areas of deficiency, the Court advised the Township that it needed to revise the November Plan to come up with approximately 300± alternate housing units in its Prospective (2015-2025) Plan that were more realistic than those represented by the above aspects of the November Plan.

In response, the Township revised its November Plan with the December Plan. The December Plan addressed the deficiencies as follows:

1. REACH Market-to-Affordable Family Sales: The 59 units contained in the November Plan was reduced to 32 affordable family sales units plus an additional 9 family rental units in the REACH Program. As indicated in the narrative portion of the December Plan, this reduced the amount of units to be produced as part of the Prospective obligation to 41, which results in a total of 146 units in the Township's REACH Program. This is the exact amount previously reviewed and approved by COAH on October 14, 2009. Thus, the December Plan limits the number of REACH Market-to-Affordable units to that which was already approved by COAH.
2. Wilson Farm and RPM Henderson Road 100% Affordable Developments: The Township adopted a resolution confirming funding for both the Wilson Farm and RPM Developments. The narrative portion of the December Plan sets forth in detail the advanced nature of both projects, especially the Wilson Farm project, and the funding that has already been secured for these projects. Even if the anticipated funding is not obtained by either Wilson Farm or RPM, on December 8, 2015, the Township Council adopted a resolution confirming its commitment to these projects,

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which included an assurance of a stable alternative funding source, such as municipal bonding, pursuant to N.J.A.C. 5:93-5.5(a)(3)(ii).

Notwithstanding the Township’s firm commitment to these projects, the December Plan also included the following additional units, which were added after meeting with all of the objectors proposing development of their properties:

Windsor Associates	
inclusionary family rentals:	11
Stanton Girard	
family rentals:	100
SB Center	
inclusionary age-restricted sales:	<u>100</u>
	211

In addition, the December Plan also added the following units:

Charleston Place I and II	
extension of controls	
(already completed):	84
Hovnanian	
family rentals:	48
Carlyle Group	
inclusionary family rentals:	<u>10</u>
	142

Detailed descriptions of each were included in the narrative portion of the December Plan. As such, even without Wilson Farm and RPM, the Township added an additional 353 units to its proposed Third Round Prospective Plan. Adding available bonuses contributes another 178 credits for a total unit/credit count of 531. This more than satisfies the Court’s direction to propose 300± alternate units in place of the Wilson Farm and RPM units.

As such, Richardson’s assertion that the Township has “utterly failed to meet [the] Court’s direction” and that the Township’s submission was “woefully defective” is simply unfounded.

Estimate of The Township’s 1999-2025 Affordable Housing Obligation

Richardson argues that the Township’s proposed affordable housing compliance plan for the 1999-2025 housing period is inappropriate since it relies upon the 2014 COAH calculations. The basis of Richardson’s criticism of the Township’s Plan in this regard is twofold: (1) the Township does not utilize the projected obligations submitted by Fair Share Housing Center

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(FSHC) or Richardson; and (2) the Township has submitted a report by its expert, Econsult Solutions, which proposes an obligation significantly less than that of FSHC and Richardson. Richardson's argument on these two points (and indeed for the balance of its letter memo) goes to the weight to be accorded these facts and opinions that the Court will ultimately give to each at the time of trial. This does not render the Township's Plan "unresponsive" or inappropriate. Nor does it demonstrate a lack of good faith.

On the contrary, it merely reflects the confusion that persists in this and all other affordable housing matters. At least four separate estimates of the Township's Third Round Obligation have been submitted to the Court. These vary dramatically, even though all purport to comply with the Supreme Court's directive to employ the previous methodologies utilized in the First and Second Round Rules. See In Re N.J.A.C. 5:96 and 5:97, 221 N.J. 1, 30 (2015) ("Mount Laurel IV"). Each expert that has been relied upon to provide estimated obligations asserts that they "adhere to the prior round formula" in arriving at the obligations assigned to the Township. Dr. David Kinsey estimates that number to be 2,968; Mr. Art Bernard estimates the obligation to be 2,427; the 2014 COAH projections estimated that obligation to be 1,677. In this Court's decision related to the 1,000-unit cap issues, assuming use of the Kinsey estimations, the Township's obligation would be 1,533. Econsult has now rendered a report estimating the Township's obligation at 215. Clearly this Court must determine, after a trial where each of these experts testify, which is the more credible estimate, ultimately determining the Township's obligation for the Third Round. Until such time as the Court determines the Township's actual obligation, any plan remains a "draft preliminary" Third Round plan.

Richardson's arguments related to the Township's write down/buy down program and 100% affordable projects have already been addressed. Even if the Court finds that these projects are not realistic, the Township's December Plan has proposed alternate units that more than satisfy the Court's direction to propose 300± alternate units in the Plan. As such, Richardson's continued criticism of these projects does not warrant denial of the Township's request for an extension of immunity.

Rental Bonus Credits

One aspect of Richardson's criticism of the Township's Plan requires further discussion. Richardson criticizes the Township for relying upon 155 rental bonus credits to achieve compliance with its 1999-2014 obligation of 453 units. Richardson argues that the Township is not entitled to these rental bonus credits because of the Appellate Division's decision in In Re N.J.A.C. 5:96 and 5:97, 416 N.J. Super. 462 (App. Div. 2010), *affd*, In Re N.J.A.C. 5:96 and 5:97, 221 N.J. 1 (2015). Richardson's arguments in this regard, however, are incorrect as a matter of law.

That portion of the Appellate Division's 2010 decision that related to the use of rental bonus credits criticized the use of such credits for "prior round" units that remained unbuilt. In his decision, however, Judge Skillman clearly considered the "prior round" to be the period

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1987-1999. Any rental units from this “prior round” period that remained unbuilt as of 2010 would not be eligible for an additional rental bonus. As is clear from the Township’s November Plan, all of the rental bonuses credited to the Township for the prior round have indeed been constructed (see narrative portion of November Plan, page 2, first chart).

The remaining rental bonuses credited to the Township in addressing its Unanswered Prior Obligation of 453 units are actually for the Third Round period (1999-2014). These do not constitute units for the “prior round” (as defined by Judge Skillman) but for a portion of the Third Round, which this Court has also termed the “gap period” obligation. Although COAH’s proposed 2014 rules would have changed the definition of “prior round” to include 1987-2014, those rules were never adopted. As such, there is no prohibition on using bonus credits for unbuilt rental units as a way to address the Township’s Prospective Third Round (or gap period) obligation.

Richardson’s assertion that the rental bonus credits sought by the Township constitute 40 percent of the entire gap period obligation is misleading. The rental bonus credits, and the percentage they represent of the total plan, is not confined to the “gap period” alone, but to the entire 1987-2014 prior obligation (1987-1999) and gap period (1999-2014). The Township’s November Plan shows a total obligation of 1,833 for this period of time. Calculating the percentage of rental bonuses utilized by the Township demonstrates that only 23.7 percent of the total obligation is addressed with rental bonuses. This calculation is set forth in detail as a footnote to the charts shown on page 2 of the November Plan and is fully consistent with N.J.A.C. 5:93-5.14 (a) (prior round senior units) and N.J.A.C. 5:93-5.15 (a) (prior round family rentals). As such, Richardson’s criticism of the Township’s use of these available bonus credits is unfounded.

Moreover, Richardson’s criticism that the Township’s December Plan fails to replace these rental bonuses ignores the fact that the Court and Special Master have already indicated that the Township’s Unanswered Prior Obligation is fully satisfied. Thus, not only is Richardson’s criticism of the Township’s Plan unfounded, Richardson also appears to criticize the Court and Special Master’s indications in this regard.

Alternative Sites

Richardson also criticizes use of the properties of the objectors, Windsor Associates, Stanton Girard and SB Center, as well as the Hovnanian proposal. At the November 13, 2015, Case Management Conference, the Court specifically directed the Township to meet with all objectors regarding their specific sites to determine whether these sites would be appropriate for inclusion in the Township’s Plan. The Township did so, as reflected in the Certification submitted along with the December Plan. As a result of these meetings, the Windsor Associates inclusionary family rental development, the Stanton Girard family rental development, and the SB Center site for inclusionary age-restricted sales units were added to the Plan.

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Richardson's criticism of the SB Center inclusionary age-restricted proposal argues that it is inappropriate since there would not be adequate compensatory benefits to SB Center for the proposed project. Richardson completely ignores the fact that, in addition to 300 age-restricted, single-family homes, the Township's proposal for this site also includes significant commercial development and the purchase of open space, both of which infuses significant compensatory benefits to the landowner. Since open space acquisition by a municipality also provides an exemption from the obligation to pay roll-back taxes or realty transfer fees, the compensatory benefit to the land owner is enhanced through the savings realized by such exemptions. The combined package will more than compensate the landowner for the set aside proposed.

The conclusion of Richardson's ten-page letter memorandum objecting to the Township's December Plan reveals the real basis for its objection. Although Richardson proposed development of its property as part of the meetings held with all objectors, the Township chose not to include Richardson's property in its revised Plan. That is the real basis motivating Richardson's adamant objection to the December Plan. Clearly this type of argument is inappropriate, as Richardson is really arguing to this Court that the Township's "site selections and/or methods of compliance" in its Third Round Plan are deficient. Its real argument to this Court is to suggest that the Richardson property is "superior to, or perhaps, better suited for an inclusionary development." These types of arguments are exactly what were prohibited by this Court in its decision in In the Matter of the Adoption of the Monroe Township Housing Element and Fair Share Plan and Implementing Ordinances, unpublished opinion dated July 9, 2015, Superior Court of New Jersey, Law Division, Docket No. MID-L-3365-15 (In Re Monroe).

As this Court has already determined, in a declaratory judgment action filed by a municipality in response to the decision in Mount Laurel IV, supra., interested parties may intervene, but their intervention is "limited to the question of whether the particular town has complied with its constitutional housing obligations." In Re Monroe, supra., at 9. This right to intervene

.....does not extend so far as to authorize [intervenors] to contest the municipality's site selections and/or methods of compliance by suggesting or claiming that other sites (owned or controlled by them) are superior to, or perhaps, better suited for an inclusionary development. While such parties' "participation" may, of course, include proofs related to whether the proposed affordable housing plan passes constitutional muster, so long as the plan does so, the municipality's choices (including site selection and the manner and methods by which it chooses to satisfy its affordable housing obligations) remains, as it was under the [Fair Housing Act] FHA and [the Council on Affordable Housing] COAH's oversight, paramount. Accordingly, claims that a "better" and/or "more suitable" site is, or may be available will not be entertained in any declaratory judgment action brought by a certified or participating municipality. Simply stated, to hold otherwise would be to permit an interested party to do indirectly that

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which the Supreme Court has specifically prohibited from being done directly. In Re Monroe, supra., at 9-10.

Indeed, Mt. Laurel IV “expressly prohibits exclusionary zoning litigation until after the compliance phase of the declaratory judgment action has concluded”. In Re Monroe, supra., at 14 (citing Mt. Laurel IV, supra., at 35-36).

Conclusion

For the foregoing reasons, as well as those previously expressed to this Court in prior submissions, the Court should grant the Township’s request for an extension of its immunity from “builder’s remedy” lawsuits.

Thank you for your considerations in this matter. If you have any questions or comments, please do not hesitate to contact me.

Respectfully yours,

/Donald J. Sears

Donald J. Sears
Director of Law

DJS/lw

Cc: Robert A. Kasuba, Esq., attorney for AVB
Henry Kent-Smith, Esq., attorney for Richardson
Kenneth D. McPherson, Jr., attorney for SBC
Kevin J. Moore, Esq., attorney for SG
Kevin Walsh, Esq., and Adam Gordon, Esq., attorneys for FSHC
Brett Tanzman, Esq., attorney for Windsor
Benjamin Bucca, Jr., Esq., attorney for SB Planning Board
Christine Nazzaro-Cofone, PP, Special Master

Donald J. Sears, Esq.
Township of South Brunswick
540 Ridge Road
P.O. Box 190
Monmouth Junction, NJ 08852
Phone No.: (732) 329-4000

Attorney for Declaratory Plaintiff,
Township of South Brunswick

<p>IN THE MATTER OF THE APPLICATION OF THE TOWNSHIP OF SOUTH BRUNSWICK FOR A JUDGMENT OF COMPLIANCE AND REPOSE AND TEMPORARY IMMUNITY FROM <u>MOUNT LAUREL</u> LAWSUITS</p>	<p>SUPERIOR COURT OF NEW JERSEY LAW DIVISION MIDDLESEX COUNTY</p> <p>DOCKET NO.: MID-L-3878-15</p> <p>CIVIL ACTION – <i>MOUNT LAUREL</i></p> <p>CERTIFICATION OF LISA WARD</p>
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Lisa Ward, of full age, hereby certifies as follows:

1. I am a Legal Assistant employed by the Township of South Brunswick. As such, I have full knowledge of all of the facts and circumstances surrounding this matter.
2. Letter memorandum on behalf of the Township of South Brunswick in reply to the opposition by Richardson Fresh Ponds and Princeton Orchards Associates to the Township's motion for extension of immunity was served upon Honorable Douglas K. Wolfson, J.S.C., Superior Court of New Jersey, Middlesex County Courthouse, 56 Paterson Street, P.O. Box 964, New Brunswick, NJ 08903-0964 via electronic mail and regular mail on this date.
3. A copy of same was served upon the following via electronic mail and regular mail on this date:

Brett E. Tanzman, Esq.
Wilf Law Firm, LLP
820 Morris Turnpike, Suite 201
Short Hills, NJ 07078

Robert A. Kasuba, Esq.
Bisgaier Hoff, LLC
25 Chestnut Street, Suite 3
Haddonfield, NJ 08033

Kevin J. Moore, Esq.
Sills Cummis & Gross
600 College Road East
Princeton, NJ 08540

Henry L. Kent-Smith, Esq.
Fox Rothschild LLP
997 Lenox Drive, Bldg 3
Lawrenceville, NJ 08648-2311

Kenneth D. McPherson, Jr., Esq.
Waters, McPherson, McNeill
300 Lighting Way
P.O. Box 1560
Secaucus, NJ 07096

Kevin D. Walsh, Esq.
Adam Gordon, Esq.
Fair Share Housing Center
510 Park Blvd
Cherry Hill, NJ 08002

Benjamin Bucca, Jr.
Bucca and Campisano
90 Livingston Avenue
New Brunswick, NJ 08901

Christine A. Nazzaro-Cofone, AICP/PP
Cofone Consulting Group, LLC
126 Half Mile Road – Suite 200
Red Bank, NJ 07701

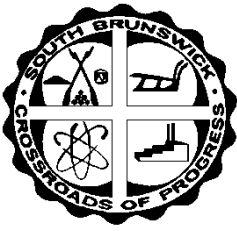
4. Consistent with the court's prior order, I am notifying all those on the attached Service List by sending the attached form of notice to each one via regular mail on this date.

5. I am also posting a copy of these same court filings on the Township's website at www.sbtnj.net on this date.

6. I hereby certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Dated: January 11, 2016

By: /Lisa Ward
Lisa Ward



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Phone 732-329-4000 X7311 Fax 732-329-9026

January 11, 2016

In the Matter of the Application of the Township of
Old Bridge for a Judgment of its Third Round Housing
Element and Fair Share Plan (Mount Laurel)
Docket No. MID-L-3997-15

To All Interested Parties on the attached Service List:

Declaratory Plaintiff, Township of South Brunswick, has submitted a letter memorandum on behalf of the Township of South Brunswick in reply to the opposition by Richardson Fresh Ponds and Princeton Orchards Associates to the Township's motion for extension of immunity.

In the event you wish to receive a copy of the documents that have been filed by the Township, please notify Lisa Ward, Legal Assistant in my office (lward@sbtnj.net) and a copy will be promptly sent to you via electronic mail and/or regular mail, as you designate. A copy of the documents can also be reviewed on the South Brunswick Township website (www.sbtnj.net); at the offices of the Township of South Brunswick; or in the Superior Court – Law Division, Middlesex County Clerk's Office.

If you have any further questions or comments, or wish to discuss this matter further, please do not hesitate to contact my office.

Very truly yours,

/Donald J. Sears

Donald J. Sears
Director of Law

Township of South Brunswick Declaratory Judgment Action Interested Parties Service List

NJ Builders Association
200 American Metro Blvd, Suite 123
Hamilton, NJ 08619

Stephen E. Barcan, Esq.
Wilentz, Goldman & Spitzer, PA
90 Woodbridge Center Drive
Suite 900, Box 10
Woodbridge, NJ 07095-0958

Elizabeth C. McKenzie, PP, AICP
9 Main Street
Flemington, NJ 08822

Ronald Shimanowitz, Esq.
Hutt and Shimanowitz
459 Amboy Avenue
P.O. Box 648
Woodbridge, NJ 07095

Kenneth T. Bills, Esq.
Greenbaum, Rowe, Smith and Davis LLP
Metro Corporate Campus One
P.O. Box 5600
Woodbridge, NJ 07095-0988

John Vogel
Development Director
Avalon Bay Communities Inc.
517 Route 1 S, Suite 5500
Iselin, NJ 08830

Brendan McBride, Vice President
RPM Development Group
77 Park Street
Montclair, NJ 07042
brendanmcb@gmail.com

David Fisher, PP, AICP
VP – Governmental Affairs
K. Hovnanian Homes
110 Fieldcrest Ave, 5th Floor
Edison, NJ 08837

G&J Spilatore, LLC
191 Old Beekman Road
Monmouth Junction, NJ 08852
richardjs78@aol.com
StephCarr001@aol.com

Kenneth D. McPherson, Jr., Esq.
Waters, McPherson, McNeill
300 Lighting Way
P.O. Box 1560
Secaucus, NJ 07096
kmj@lawwmm.com

David N. Kinsey, PP, AICP, PhD
Kinsey & Hand
14 Aiken Ave
Princeton, NJ 08540

Stephen Eisdorfer, Esq.
Hill Wallack LLP
202 Carnegie Center
P.O. Box 5226
Princeton, NJ 08543
seisdorfer@hillwallack.com

South Brunswick Center, LLC
90 Woodbridge Center Drive
Woodbridge, NJ 07095

William Iafe
Atlantic Realty Dev Corp
Camel Creek Inc., Hyde Park Developers
90 Woodbridge Center Drive, Suite 600
Woodbridge, NJ 07095-1142
BILLI@AtlanticRDC.com

Yolanda Rodriguez, Counsel
Toll Brothers, Inc.
670 Spotswood-Englishtown Rd
Monroe Twp, NJ 08831
Vrodriguez2@tollbrothers.com

Henry L. Kent-Smith, Esq.
Fox Rothschild LLP
997 Lenox Drive, Bldg 3
Lawrenceville, NJ 08648-2311

Glenn S. Pantel, Esq.
Drinker Biddle & Reath LLP
500 Campus Drive
Florham Park, NJ 07932-1047

State of New Jersey
Dept of the Public Advocate
240 West State St
P.O. Box 851
Trenton, NJ 08625-0851

Russell H. Richardson, PE, RA
Richardson Fresh Ponds, LLC
15 Smith Bridge Road
P.O. Box 546
Chester Heights, PA 19017
Russ.richardson@rpsc Realtors.com

Kevin D. Walsh, Esq.
Adam M. Gordon, Esq.
Fair Share Housing Center
510 Park Blvd
Cherry Hill, NJ 08002
kevinwalsh@fairsharehousing.org

Greg Kanter, VP of Acquis. & Dev.
American Properties Realty, Inc.
517 Route One South, Suite 2100
Iselin, NJ 08830

Robert E. King, Jr., CEO
Ridge Road Properties, LLC
29 Greenbrier Lane
Greenwich, CT 06831
rking@ridgeprops.com

Jonathan E. Drill, Esq.
Michael A. Jedziniak, Esq.
Jeffrey R. Surenian & Associates, LLC
707 Union Ave, Suite 301
Brielle, NJ 08730
jrs@surenian.com

Ronald S. Ladell, SVP
Avalon Bay Communities, Inc.
517 Route One South, Suite 5500
Iselin, NJ 08830

Sam Tarantini
The Ingerman Group
5 Powell Lane
Collingswood, NJ 08108
starantini@ingerman.com

Edward J. Buzak, Esq.
The Buzak Law Group, LLC
Montville Office Park
150 River Road, Suite N-4
Montville, NJ 07045
ebuzak@buzaklawgroup.com

Stanton Girard, LLC
R E K Hastings, LLC
c/o Kevin J. Moore, Esq.
Sills Cummis & Gross
600 College Road East
Princeton, NJ 08540
Kmoore@sillscummis.com

Lopa Kolluri, VP of Operations
Pennrose
1 Brewery Park, 1301 No. 31st Street
Philadelphia, PA 19121-4495
lkolluri@pennrose.com

Geraldine Callahan, Esq.
Deputy Attorney General
Office of the Attorney General
P.O. Box 112, 25 W. Market St
Trenton, NJ 08625
Geraldine.callahan@dol.lps.state.nj.us

Southridge Woods
c/o Windsor Associates LLC
P.O. Box 746
Short Hills, NJ 07078

Township of South Brunswick Declaratory Judgment Action Interested Parties Service List

Estate of Edith Mendel
M. Marchese, L. Mindel & S. Springberg
New Village Associates
15-R Dadeau Ave
Summit, NJ 07901

John T. Chadwick, IV, PP
3176 Route 27, Suite 1A
Kendall Park, NJ 08824
jtcivplan@comcast.net

Art Bernard, PP
Bernard & Nebenzahl, LLC
77 N Union St
Lambertville, NJ 08530
yukygolfer@aol.com

Richard J. Hoff, Jr., Esq.
Robert A. Kasuba, Esq.
Bisgaier Hoff, LLC
25 Chestnut St Ste 3
Haddonfield, NJ 08033

Jeffery Kantowitz, Esq.
Law Office of Abe Rappaport
195 Route 46 West, Suite 5
Totowa, NJ 07512
Jkantowitz@rappaport-law.com

Sean Thompson, Acting Director
NJ Council on Affordable Housing
NJ Department of Community Affairs
101 South Broad Street
PO Box 800
Trenton, NJ 08625-0800

Raphael Kasen, Community Bldg Specialist
Housing and Comm Dev Network of NJ
145 West Hanover Street
Trenton, NJ 08618
rkasen@hcdnnj.org

Brett Tanzman, Esq.
Wilf Law Firm, LLP
820 Morris Turnpike-Suite 201
Short Hills, NJ 07078
brettt@wilf-law.com

Bellemead Development Corp.
c/o Ms. Lloyd Tubman
Archer & Greiner, P.C.
361 Route 31, Bldg E, Ste 1301
Flemington, NJ 08822
ltubman@archerlaw.com

Traditional Developers, LLC
227 Route 33
Bldg #2, Unit #7
Manalapan, NJ 07726
John J. Ploskonka, Member

Christine A. Nazzaro-Cofone, AICP/PP
Cofone Consulting Group, LLC
125 Half Mile Road - Suite 200
Red Bank, NJ 07701
ccofone@cofoneconsulting.com