

Superior Court of New Jersey
Middlesex County Courthouse
56 Paterson Street
New Brunswick, NJ 08903

FILED

JAN 30 2015

JUDGE DOUGLAS K. WOLFSON

SOUTH BRUNSWICK CENTER, LLC

V.

**MAYOR AND MUNICIPAL COUNCIL
OF THE TOWNSHIP OF SOUTH
BRUNSWICK IN THEIR OFFICIAL
CAPACITIES; TOWNSHIP OF SOUTH
BRUNSWICK; PLANNING BOARD OF
TOWNSHIP OF SOUTH BRUNSWICK**

**SUPERIOR COURT OF NEW JERSEY
LAW DIVISION – Middlesex County
Docket No. MID-L-3669-14**

CASE MANAGEMENT ORDER

THIS MATTER having come before the Court for a Case Management Conference on January 30, 2015, and counsel for each party having attended the conference, and for good cause show:

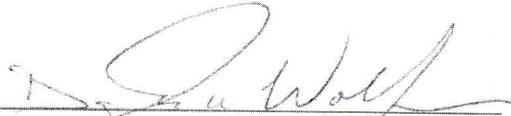
IT IS on this 30th day of January, 2015:

ORDERED THAT:

1. The Court has determined that appointment of a special master is necessary to assist in resolving the preliminary issue of whether there is an unmet need for affordable housing pursuant to COAH's Second Round Rules, and if so, what is required of the Township to remedy that. The special master is hereby authorized and instructed to work with the Township Planning Board and Township Council to assist in resolving this issue and all others related to this litigation. Counsel will consult with their respective clients to confirm that either/both of the two proposed special masters are acceptable, and will then confer with one another to select one of the two proposed special masters;

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2. Plaintiff shall set up an escrow account with the Township and deposit an initial \$5,000 to be used as payment for the special master, who shall send all bills to the Township and be paid out of said escrow account;
3. The parties are to confer with one another to determine what materials and case information will be needed by the special master and will supply the special master with such information on or before **February 13, 2015**;
4. All other issues in controversy in the Amended Complaint are bifurcated and stayed, as well as corresponding discovery issues thereto, pending resolution of the above mentioned preliminary issue;
5. The parties shall reconvene for a Case Management Conference on **March 2, 2015 at 10:00 AM**;
6. This Order shall be served on all parties within 7 days of the date hereof.



DOUGLAS K. WOLFSON, J.S.C.

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FEB 27 2015

JUDGE DOUGLAS K. WOLFSON

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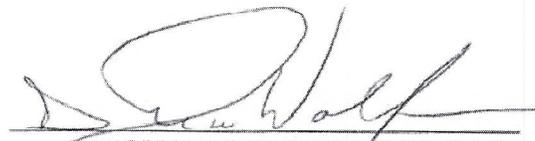
CASE MANAGEMENT ORDER

THIS MATTER having come before the Court for a case management conference on February 27, 2015, and counsel for each party having attended the conference, with the Special Master Christine Nazzaro-Cofone also present, and for good cause shown,

IT IS on this 27th day of February, 2015,

ORDERED THAT:

1. Plaintiff's planner/expert shall complete his/her written report concerning the Township's alleged unmet Second Round affordable unit obligation, which Plaintiff shall serve upon the Special Master and all Defendants on or before March 20, 2015;
2. Defendants' planner/expert shall complete his/her written report concerning the same issue, which Defendants shall serve upon the Special Master and the Plaintiff on or before April 17, 2015;
3. The Special Master shall commence review of those reports on or about April 17, 2015;
4. 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 evaluation 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; and
5. This Order shall be served on all parties and on the Special Master within 7 days of the date hereof.


DOUGLAS K. WOLFSON, J.S.C.

SBa 3

**PLANNING EVALUATION
OF
SECOND ROUND
HOUSING ELEMENT
AND
FAIR SHARE PLAN
FOR
SOUTH BRUNSWICK TOWNSHIP,
MIDDLESEX COUNTY
AND
PROPOSED
SOUTH BRUNSWICK CENTER
AFFORDABLE HOUSING PLAN**

Prepared by:
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(732) 297-7669

March 2015

The original of this document was signed & sealed according to law John T. Chadwick, IV, PP License No. 995

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INTRODUCTION

The purpose of this report is twofold. The first component is a factual assessment of South Brunswick's Second Round Housing Element and Fair Share Plan and Amended Third Round Housing Element and Fair Share Plan, adopted on December 10, 2008. The second component is an outline of South Brunswick Center LLC's (SBC) proposal.

The Township's Second Round Plan was submitted to the New Jersey Council on Affordable Housing (COAH) and received Substantive Certification on February 4, 1998. The Township's Second Round obligation was 841 units plus 36 rehabilitation units. The Township's plan included ineligible projects (CIL Woods and Buckingham Place), did not fully address its obligation and did not establish a rehabilitation program or provide funding for same. I estimate the Second Round deficient by 183 units even as planned by the Township in 1996.

The Township's deficiency since publication of its Second Round Plan in 1996 has only further accrued, ranking the Township among the Region's least compliant. As most recently measured in Technical Appendices published by COAH staff, the Township's "past unanswered prior obligation" to develop affordable units stands at 1,157 units as of 2014. (See, COAH Technical Appendix, at p. 108, Township's "Past Unanswered Obligation" is 1,157 units; See also, p. 73, Township's Projected Need From 2014 is 712 units.)

SBC is the owner of a large tract of land providing an immediate opportunity for inclusionary development in South Brunswick Township. The Township's Second Round Plan does not propose any sites for inclusionary zoning other than Township sponsored projects. The Third Round Plan continues that policy – no inclusionary zoning.

SUMMARY OF EVALUATION

There are multiple critical defects in South Brunswick Township's Amended Second Round Housing Element and Fair Share Plan. The principle and fundamental defect is the absence of rezoning to permit affordable family housing. The Third Round plan perpetuates this policy.

Failure to Consider Lands Appropriate for Affordable Housing

South Brunswick refuses to genuinely consider lands in the Township that are appropriate for affordable family housing construction, including the lands of developers that have expressed a willingness to commit to provide affordable housing. This is a fundamental requirement for a Housing Element set forth at N.J.S.A. 52:27D-310 and specifically referenced at N.J.A.C. 5:97-2.3(a).1. There is no discussion of realistically available sites in the Second Round Plan.

In the Third Round Plan the only “Consideration of Lands Appropriate for Affordable Housing” in the December 10, 2008 plan is found on page 38, where the Township first broadly states its intent to intersperse affordable housing throughout the existing residential neighborhoods in the Township and in proximity to transportation corridors and Route 130. The Township dismissed all inclusionary zoning sites as “not needed” to meet the obligation and asserts that in the future the Township will consider properties for 100% affordable housing development.

The Township’s Second and Third Round Plans are briefly summarized below:

The Township proposes to address its housing obligation. The total units required (Second Round deficit plus Third Round) is 908 units.

However, the Township’s affordable housing program has failed to produce affordable family housing units, particularly family units. The basic reason for significant absence of family housing is the Township refusal to zone land for inclusionary development. The Third Round continues the policy of no rezoning for inclusionary family units.

The Third Round Plan proposes the following:

1. Construction by developers of two (2) approved age restricted developments identified as the Baker and Matzel projects. These projects would provide 61 affordable age restricted units. In its Third Round submission the Township seeks a “Compliance Bonus,” pursuant to N.J.A.C. 5:97-3.17 for a total of 122 credits.
2. Extension of controls on affordability on forty (40) units within the existing Woodhaven Terrace. [Published Third Round rules do not credit extended controls. There is no

affordable housing planning rationale for a municipality with a significant unmet unit obligation to be credited for renewals of existing units.]

3. Creation of 108 new units of supportive and special needs housing and seeks credit for four (4) existing units.
4. Purchase and subsidize 146 market units so that they are affordable to low and moderate income households. [The latest filing by the Township shows just 18 units accomplished over the past 7 years.]
5. Sponsor the construction of 184 affordable senior rental units on the Stover site, with 176 units addressing the third round obligation and 8 units addressing the second round obligation. [The site remains vacant and no progress toward development is shown in Township filings. The suitability for development is suspect due to site contamination.]
6. Construct 176 affordable family rental units at “two (2) future sites” which have not been identified. The Township seeks an additional 176 unit credit for these projects pursuant to COAH’s rental bonus. [These phantom projects represent a substantial portion of the Township’s Fair Share Obligation.]

COAH projected South Brunswick’s Second Round Growth Share Obligation at 841 and the Third Round Growth Share Obligation at 948.

The Township’s Second and Third Round Plans propose that the Township purchase, subsidized and/or build 847 of the required 948. There are not in place resources or plans to implement the plan. The Township’s unmet obligation continues to expand. The Township’s projects, Stover and market to affordable program, amount to 230 units. No plan let alone delivery dates are available. In the case of the Stover Site, there is no reasonably reliable prospect of development.

Waiver of Market to Affordable Program Cap Exceeded

The Township proposes to address 146 units of its Third Round obligation through a market to affordable sales/rentals program to be credited against Second Round rehabilitation unmet obligation.

COAH's Rules (N.J.A.C. 5:97-6.9(b)4) provide that up to 10% of the municipality's Third Round obligation may be addressed initially through a market to affordable program. This limits the Township to a 94 unit market to affordable program. The Township is seeking a waiver of the 10% initial cap. The Township offers no analysis that it has the resources or expertise to implement or manage a large program as proposed. In fact, over the past seven (7) years only eighteen (18) market to affordable units have been completed.

RESIDENTIAL GROWTH CONSTRAINED

The Township's Fair Share Plan relies exclusively on programs that either make use of existing housing units or propose the use of Township and/or other funds to create 100% affordable housing developments. South Brunswick Township thwarts private residential construction. The Township has many tracts of land that are zoned for non-residential purposes that have yet remained vacant which could yield a substantial number of new affordable housing units as part of inclusionary residential developments if rezoned for that purpose. The SBC site is an outstanding candidate for rezoning. The SBC site is the best prospect for genuine compliance contribution. It is the largest available site, is development ready (with approvals and infrastructure) and has an owner/developer ready, willing and able to invest. This site has been historically intended for dense development. South Brunswick has chosen to maintain the non-residential zoning of these parcels to prevent additional residential development, inclusionary or otherwise. The Township Council says that the Master Plan rules out residential use of the SBC Site.

New Jersey Supreme Court's 1983 Mount Laurel II decision requires that a municipality's zoning provide a realistic opportunity for the construction of the municipality's fair share of the regional need for low and moderate income housing. South Brunswick's plan does not provide a realistic opportunity for the construction of units to meet its fair share obligation. The Township's compliance is to be assessed on an objective basis: "Good or bad faith, at least on this issue, will be irrelevant." Mount Laurel II, 92 N.J. at 221-222.

SBC EFFORTS

The SBC site is a substantial and well known tract of land in the Township. SBC has made known, over a period of many years, its willingness to construct a residential development which could include a substantial set aside of affordable housing. SBC's efforts have been thwarted. In August 2014, the Township Council resolved not to consider either rezoning of the SBC Site from the current office research use which continues to be non-viable, as it has been for 25 years, or revision of the Township Master Plan. On December 23, 2014, the Township Council resolved that it was in compliance and "immune" from remedy.

SBC SITE

The SBC site comprises approximately 480 acres, of which approximately 172 acres are developable uplands. The site is appropriate for inclusionary development when measured against COAH criteria for site suitability:

1. State Development and Re-Development Plan – The site is located in Planning Area PA-2. COAH's rules favor development in PA-2.
2. Regional Agency Land Use Policies – The site is not within the jurisdiction of any regional land use agency.
3. Wetlands Constraints – A NJDEP LOI issued February 2, 2009, and recently extended, shows wetland and transition areas on the SBC site. This same LOI also shows that there are approximately 172 accessible and developable acres of land on the site. The NJDEP approved wetlands delineation does not preclude development of the SBC site for inclusionary development.
4. Category One Waterbody Constraints – There are no "Category One" water bodies on the SBC site.
5. Flood Hazard Area Constraints – The site is sufficiently large that flood hazard areas on the site do not materially affect the developability of the site for a mixed use inclusionary development.
6. Steep Slope Constraints – There are no steep slopes in excess of 15% of the site that materially affect development.

7. Register of Historic Places – The SBC site is not adjacent to and does not include properties on the State or National Register of Historic Places.
8. Clear Title – Title to the SBC Site is clear with the only encumbrances including typical utility easements which do not preclude development of the site.
9. Compatible Land Uses – The SBC site is adjacent to compatible land uses. To the east and west of the site are lands zoned for residential use. The northern portion of the site is adjacent to Route 1, public lands and single family residential uses. The front portion of the site will be developed for supporting non-residential use with zoning change. The residential component is approximately 2000 feet from Route 1. On the south, the site is bordered by residential uses under R-2 zoning, PRD-1 zoning and public lands (South Brunswick Middle School) and the Conrail mainline.
10. Streets – The site has access on the north bound side of Route 1. SBC has also constructed approximately 8,800 feet of Northumberland Way from Route 1 through the site.
11. Sewer – The site is within a sewer service area. The site is served by developer constructed sewer infrastructure.
12. Water – The site is serviceable by water infrastructure.
13. RSIS – The 172 acres of developable uplands are substantial enough in size to allow compliance with the Residential Site Improvements Standards (RSIS).
14. Other Agency Regulations – The site is sufficiently large enough to allow design which would comply with all applicable approving agencies including but not limited to NJDOT and NJDEP.

The SBC Site, which was historically intended to be densely developed, has approximately 172 acres of developable uplands and access on Route 1 North. A concept design for a mix of residential uses on the interior of the site is proposed. The residential component would include a substantial affordable housing set aside (concept plan/appendix). The plan proposed 1850 units. This equates to a gross density of slightly less than 4 units/acres.

SUMMARY

In brief, this evaluation concludes:

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1. The Township has failed to demonstrate that present zoning will accommodate COAH's estimated fair share obligation;
2. The Township proposes to somehow address its Second and Third Round Housing Obligation with credits and Township sponsored units with only 176 new family rentals. At least 50% of the affordable units must be for family housing;
3. The plans rely largely upon the Town becoming principal builder and property manager. There is no cost analysis. Under the best of conditions, significant funding is required. Developable sites must be secured. The historical record shows that the Township, acting as inclusionary housing developer, has failed to build more than a relatively few units. Without demonstration of the will and the capacity to develop, the obligation to provide low and moderate income housing is not met;
4. The SBC site ought be re-zoned for a residential development which would contribute a substantial number of affordable units toward the Township's second and third round cumulative obligation. Infrastructure is in place. The site is prime and ready for immediate development; and
5. The Township's response to SBC's rezoning application, relying, once again, on unimplemented plans and professed aspirations for municipally managed development of inclusionary units, is insufficient. As the Supreme Court's statement in Mount Laurel II, regarding such an approach to compliance, is applicable here:

...proof of a municipality's bona fide attempt to provide a realistic opportunity to construct its fair share of lower income housing shall no longer suffice. Satisfaction of the *Mount Laurel* obligation shall be determined solely on an objective basis: if the municipality has *in fact* provided a realistic opportunity for the construction of its fair share of low and moderate income housing, it has met the *Mount Laurel* obligation to satisfy the constitutional requirement; if it has not, then it has failed to satisfy it.
Mount Laurel II, 92 N.J. at pages 220 to 221.

By any objective measurement, the Township has failed to provide a realistic opportunity to develop badly needed inclusionary housing on the SBC Site.

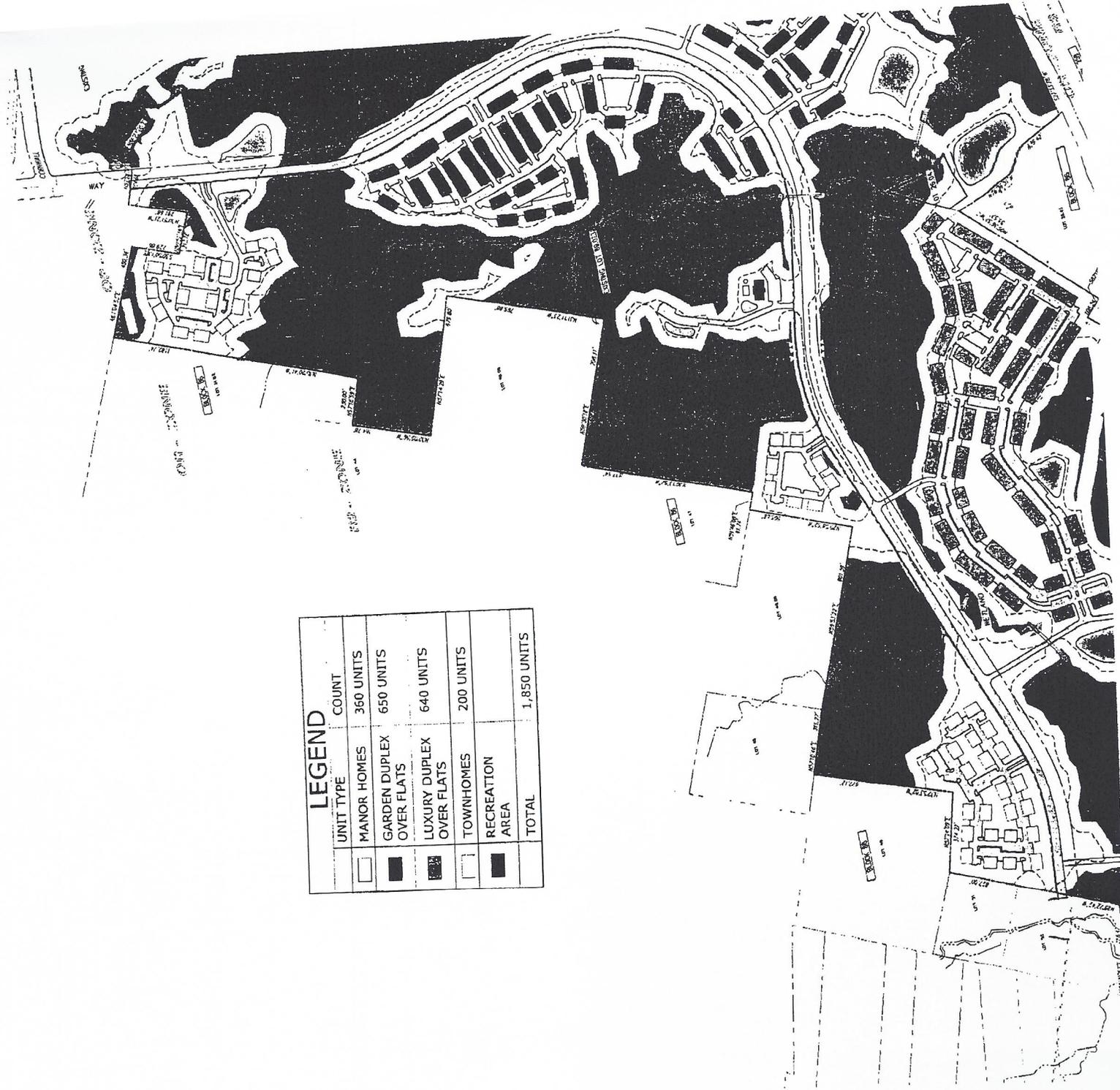
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APPENDIX

CONCEPT PLAN

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LEGEND	
UNIT TYPE	COUNT
MANOR HOMES	360 UNITS
GARDEN DUPLEX OVER FLATS	650 UNITS
LUXURY DUPLEX OVER FLATS	640 UNITS
TOWNHOMES	200 UNITS
RECREATION AREA	
TOTAL	1,850 UNITS

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