

ELIZABETH C. MCKENZIE, P.P., P.A.

COMMUNITY PLANNING AND DEVELOPMENT

9 MAIN STREET

FLEMINGTON, NEW JERSEY 08822

TELEPHONE (908) 782-5564

TELEFAX (908) 782-4056

## REPORT OF THE SPECIAL MASTER

### RECOMMENDATIONS CONCERNING BUILDERS' REMEDIES

for

LIVINGSTON TOWNSHIP, ESSEX COUNTY, NEW JERSEY

In the Consolidated Cases of

Joseph Kushner Hebrew Academy, Inc., and TMB Partners, LLC, v. Township of

Livingston, et al., Docket No.: ESX-L-9126-07,

Squiretown Properties, LLC, v. Township of Livingston, et al.,

Docket No.: ESX-L-9785-07,

Hillside-Northfield Partners, LLC, v. Township of Livingston, et al.,

Docket No.: ESX-L-7509-08,

Peter Boockvar, et al. v. Township of Livingston Planning Board, et al.,

Docket No.: ESX-L-8653-09,

and

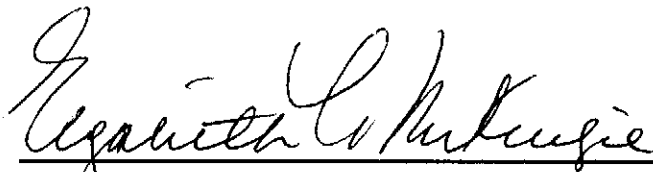
Township of Millburn v. Township of Livingston, et al.,

Docket No.: ESX-L-8909-09

Submitted to

The Honorable Dennis F. Carey, III, JSC

March 17, 2010



Elizabeth C. McKenzie, AICP, PP

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## INTRODUCTION

The purpose of this report is to make recommendations concerning the disposition of three of the four sites that are the subjects of three separate but now consolidated “builder’s remedy” lawsuits filed against the Township of Livingston in Essex County. The three lawsuits are captioned, respectively, Joseph Kushner Hebrew Academy, Inc. and TMB Partners, LLC, v. Township of Livingston, et al., Docket No.: ESX-L-9126-07, Squiretown Properties, LLC, v. Township of Livingston, et al., Docket No.: ESX-L-9785-07, and Hillside-Northfield Partners, LLC, v. Township of Livingston, et al., Docket No.: ESX-L-7509-08. Lawsuits also have been filed against the Township of Livingston and the Planning Board of the Township of Livingston by two other entities, both of whom object to the inclusion of one of the sites (the TMB site) in the Township’s adopted Housing Element and Fair Share Plan. These lawsuits are captioned Peter Boockvar, et al. v. Township of Livingston Planning Board, et al., Docket No.: ESX-L-8653-09, and Township of Millburn v. Township of Livingston, et al., Docket No.: ESX-L-8909-09.

All of the lawsuits were recently consolidated for purposes of adjudication by The Honorable Dennis F. Carey, III, JSC.

## BACKGROUND SUMMARY

All of the plaintiffs in the first three lawsuits have filed claims against the Township of Livingston asserting that the Township has failed to provide a realistic opportunity, through its zoning and development regulations, for the construction of housing affordable to low and moderate income households sufficient to meet the Township’s own indigenous needs plus the Township’s fair share of the region’s present and prospective low and moderate income housing needs. All of these plaintiffs have sought judgments permitting their sites to be used for the construction of inclusionary

residential developments containing both market priced housing units and low and moderate income housing units at densities quite a bit higher than otherwise permitted by Livingston Township's Zoning Ordinance.

In response to the first of these lawsuits, Livingston Township undertook settlement negotiations with both Joseph Kushner Hebrew Academy (Kushner) and TMB Partners (TMB) and ultimately agreed to settlements with each of these plaintiffs that would have provided for high density inclusionary zoning on these two plaintiffs' respective sites. The proposed settlements were submitted to the Court for a Fairness Hearing. The proposed settlements were reviewed by the Special Master in a letter to the Court dated January 14, 2009, and the Special Master opined that both of the proposed settlements were fair to low and moderate income households. Shortly before the Fairness Hearing, however, Millburn Township and Peter Boockvar (and others) provided information to the parties and to the Court Master about the TMB site that had not previously been made available. In response to the new information, the Fairness Hearing on the TMB settlement was deferred.

The Fairness Hearing on the Joseph Kushner Hebrew Academy settlement went forward as scheduled on January 28, 2009, and was approved by the Court. The Kushner Academy settlement has been fully executed, and the 11.65 acre Kushner Academy site will be developed with a total of 226 units, of which 45 (or 20%) will be affordable to low and moderate income households.

Ultimately, Livingston Township backed out of its proposed settlement with TMB, as it was apparent that the original plan for the property (on which the proposed settlement agreement had been based) could not be built, and the alternative plan that had been proposed by TMB in response to the new information was not acceptable to the Township. TMB has renewed its claim for a builder's remedy. This report evaluates not only the revised builder's remedy plan for the TMB site, but also the builder's remedy plans for the Squiretown and Hillside-Northfield sites.

## SCOPE OF THE REPORT

Livingston Township adopted a new Housing Element and Fair Share Plan in 2009. This report does not attempt to evaluate that document. That Housing Element and Fair Share Plan is expected to require revision to incorporate the builders' remedies, should the Court approve the recommendations in this report, and may also need to be revised to address pending changes in the applicable affordable housing law and regulations. Additionally, any of the Township's proposals for yet-to-be-built affordable housing projects, no matter how worthy, must be treated at this stage of the litigation as an indication of the Township's preferences for addressing its affordable housing obligation, but they cannot be considered ahead of or as alternatives to the plaintiffs' builder's remedy proposals. The Court, in Mount Laurel II, was quite specific that a builder's remedy "should not be denied solely because the municipality prefers some other location for lower income housing, even if it is in fact a better site."

Additionally, while it is acknowledged that Livingston will likely be entitled to a significant downward adjustment in its third round "growth share" obligation, due to the extent of the development that has taken place in the Township over the years and the relative scarcity of vacant, developable land, such an adjustment is an entitlement that accompanies ***voluntary and timely*** compliance with COAH's requirements. A Court may also approve such an adjustment upon a ***voluntary and timely*** submission to the Court for a declaratory Judgment of Compliance and Repose. When a municipality has been sued for exclusionary zoning, however, such an adjustment is only appropriate once the municipality has reached the point where its Housing Element and Fair Share Plan is ready for approval based on the municipality's compliance efforts following the award of a builder's remedy or the settlement of Mount Laurel litigation or. A municipality is not entitled to an adjustment in its fair share obligation when it is has been sued by a developer who is ready, willing and able to build affordable housing unless and until the Court or the parties (as a result of a settlement) has/have first

resolved the question of how much of the fair share obligation can appropriately be accommodated on the plaintiff's site (in this case, the plaintiffs' sites).

In Mount Laurel lawsuits, adjustments to the fair share obligation are never used to obviate an inclusionary development or to reduce the density of development on a plaintiff's site if such development is otherwise appropriate from a planning and environmental perspective. That would defeat the underlying purpose of the builder's remedy, which is to reward a developer that brings a non-compliant municipality to the attention of the Court for the time and expense involved in such an undertaking. Only after the determination has been made that a plaintiff is (or is not) entitled to a builder's remedy, and what that remedy should be, should the assessment be made of the capacity of the municipality to address its remaining obligation, if there is one.

According to the Mount Laurel II decision, if a Mount Laurel lawsuit is filed against a municipality that is subsequently found not to be in compliance with its constitutional obligation to provide for its fair share of low and moderate income housing, then the plaintiff is presumptively entitled to a builder's remedy, provided that the plaintiff is proposing a substantial amount of affordable housing and further provided that there are no environmental or other planning issues that would preclude the use of the plaintiff's site for inclusionary residential development.

With this premise in mind, and before recommending any adjustments to Livingston's fair share obligation at this time, this report will examine each of the plaintiffs' sites and development proposals, reviewing the Township's and objectors' (in the case of the TMB property) positions as to the environmental and planning issues associated with each site, and then formulate a recommendation to the Court regarding each plaintiff's proposed builder's remedy.

## TMB PROPERTY

TMB is the owner of a property located at 650 South Orange Avenue, at the southeast corner of South Orange Avenue and White Oak Ridge Road. It is identified on the Livingston Township Tax Map as Block 7001, Lot 1, and encompasses a total of 4.275 acres of land. The builder's remedy proposal is for the development of 100 flats in a single building having a length of about 380 feet and consisting of four residential stories over parking – an effective height ranging from 5 to 6 stories, depending on the number of exposed parking levels. Of the 100 flats, 20 would be affordable to and limited to occupancy by qualified low and moderate income households.

TMB has submitted an expert planner's report prepared by Art Bernard, PP, that supports the proposed builder's remedy. According to the Bernard report, despite certain limitations and issues, the site is suitable, developable, approvable and available for the level of development proposed. This conclusion has been challenged by the planning experts for plaintiffs Millburn Township and Peter Boockvar and others. It has also been challenged by the planning expert for Livingston Township.

A little over half of the 4.275 acre TMB site is already developed with a building and parking lot once occupied as a restaurant and now leased out to a child care center. A dwelling was previously located in the east-central portion of the property, but it has been removed. There is a billboard facing South Orange Avenue and located at the eastern end of the property. About one quarter of the property remains wooded and relatively undisturbed.

The property abuts residential lots located within the Township of Millburn to the south or rear. These lots are separated from the subject site by a small stream, which is a tributary to Canoe Brook.

The lot immediately to the east and the land to the west and north all lie within Livingston Township. A gas station is located at the northeast corner of the intersection

of South Orange Avenue and White Oak Ridge Road (opposite the subject property), and there are single-family homes along South Orange Avenue to the east of the gas station. To the west of White Oak Ridge Road, north and south of South Orange Avenue, are large tracts of land owned by the East Orange Water Reserve.

The TMB site is a shallow, wide site, with 730 feet of frontage along South Orange Avenue and 227 feet of frontage along White Oak Ridge Road. As indicated above, its rear property line is roughly coterminous with a stream that is a tributary to Canoe Brook. The stream flows west under White Oak Ridge Road to the lands owned by the East Orange Water Reserve. The TMB property contains some steep slopes along the stream and in the still wooded eastern portion of the property. There is a drop in elevation from northeast to southwest across the property of some 34 feet.

From a land use planning perspective, the combination of the TMB property's width, shallowness and topography is an issue for the neighbors to the south, since these characteristics of the site make it difficult to hide the view of whatever is developed on the site from the south and southeast. This is particularly true during the winter months when any intervening deciduous trees on both sides of the stream have lost their leaves.

Environmental concerns have been raised with respect to the TMB site by the objectors. These concerns have been identified in the expert planning reports submitted by Millburn Township (by Paul Phillips, PP) and Peter Boockvar and others (by Peter Steck, PP). The environmental limitations found on the TMB site are also the subject of a report by James Cosgrove, Jr., PE, of Omni Environments, LLC, that was prepared on behalf of Millburn Township. Additionally, Millburn has submitted a traffic report on the TMB proposal, prepared by Maser Consulting.

The environmental concerns, which had been brought to light just before the January, 2009, Fairness Hearing, made it clear that the original settlement plan for the development of the TMB property would have to be revised. These concerns can be summarized as follows:

1. Although most of the subject property is located in Planning Area 1 on the State Plan (Planning Area 1 is the Metropolitan Planning Area, where development and redevelopment are encouraged), a portion of it lies in Planning Area 5, the Environmentally Sensitive Planning Area, and this fact was (according to the other planning experts) not considered in the Bernard report. Moreover, the stream that drains the property flows into Planning Area 5, so that whatever occurs on the subject site impacts the Environmentally Sensitive Planning Area.
  
2. The property is acknowledged by all of the experts to be served by public utilities. Sewerage service for this site is not through Livingston, however, but through Millburn. The site is covered by an intermunicipal agreement that actually prohibits sewage flows from apartment buildings and limits total sewage flows from the site to ten (10) units. To resolve this limitation, a new agreement would have to be executed between Livingston and Millburn Townships.
  
3. The tributary to Canoe Brook that is located along the rear lot line has been classified by the NJDEP as State open waters (by Letter of Interpretation issued to TMB Partners, LLC, by the NJDEP, June 12, 2009; Division File No.: 0710-09-0002.1; Activity No.: FWW-FWLI4-090001). According to the NJDEP, a riparian buffer is not required by the Freshwater Wetlands Protection Act, but will be required under the Flood Hazard Area Control Act Rules. The objectors to the development proposed on the TMB site have alleged that a 150 foot riparian buffer is required by the NJDEP, since the stream that drains it flows to lands that provide a habitat for threatened and endangered species. The Cosgrove report alleges that the TMB site itself includes some of this habitat area, and that the Wood Turtle has actually been sighted in the vicinity of the TMB site. However, the Cosgrove report acknowledges that an individual permit may be granted by the NJDEP for development within previously disturbed areas that lie within a required riparian buffer, as long as a minimum distance of 25 feet is maintained to the top of the stream bank.

4. The proposed density of the TMB builder's remedy plan (23.4 dwelling units per acre at 100 units) and the proposed height of the buildings (at 5 to 6 stories, with parking levels) represent a significant departure from the density and height of development on surrounding properties in both Millburn and Livingston. According to the planners for the objectors, the builder's remedy plan will result in a discordant land use pattern. Moreover, the 380 foot length of the proposed building together with its proposed 5-6 story height will create an enormous building mass that will be unable to be adequately screened from view from any vantage point, but particularly from the south and southeast. All of the planning reports deal extensively with the density, height and building mass issues. The Bernard report provides other examples of large apartment buildings adjacent to single family homes in the region. The objectors' planners focus on the Livingston zone plan and the differences between the TMB proposal and its environs and the examples given by Bernard.

As a consequence of the above factors, the conclusion of the objectors is, essentially, that the TMB site does not satisfy the criteria of being approvable, developable or suitable for the builder's remedy that has been requested.

The report prepared by the planner for Livingston Township, Janice Talley, PP, concurs with the objectors regarding the environmental limitations of the site and also provides specific reasons why the revised builder's remedy plan put forward by TMB is unacceptable to the Township. Essentially, the revised plan pushes the building closer to White Oak Ridge Road and closer to the neighbors to the south (in TMB's effort to maximize use of previously disturbed areas of the site), resulting in an "overwhelming visual impact".

The Talley report addresses both the revised 100 unit proposal for the development of the TMB site that is the target of the other planning reports and a subsequent 80 unit proposal that evolved from further (failed) efforts at settlement, but found neither plan to be acceptable for essentially the same reasons.

The Talley report references the then draft (and now adopted) Housing Element and Fair Share Plan for the Township of Livingston. The Housing Element and Fair Share Plan includes the TMB site as an inclusionary development site, but provides for its development at a significantly lower density than proposed by the plaintiff. The Township's plan recommends a density of 12 to 15 units per acre on the site (depending on whether the affordable units will be for sale or for rent), with a set-aside for low and moderate income sales units of 25% and a set-aside for low and moderate income rental units of 20%. The 15 units per acre density recommended in the Livingston Plan for rental affordable units, which are proposed by the plaintiff, works out to a maximum of 64 units, with 13 of the units being affordable.

The fact that the Township has included the TMB site in its Housing Element and Fair Share Plan is an indication that, as long as the density is reduced to an acceptable level, the Township views the site as a suitable site for an inclusionary residential development.

Based upon my analysis of all of the expert reports I have reviewed, it is my opinion that the TMB site is indeed suitable for inclusionary residential development, provided a revised sewer service agreement is executed with Millburn. The issue is not whether the site can support an inclusionary residential development, but how much development should be permitted on the site, what form that development should take and what portions of the site should be included in the development.

The environmental issues that have been raised in regard to the development of the TMB site, while not fatal to its development, are nevertheless very real and must weigh heavily in the determination of an appropriate builder's remedy. It appears that it will be necessary to limit the development of the site to those areas that have been previously disturbed such that they no longer provide a potential habitat for endangered or threatened species plus any undisturbed upland areas that may lie outside of required riparian buffers. Such a plan will still require approval of an Individual Permit from the NJDEP to develop previously disturbed areas within a required riparian buffer.

It is evident from TMB's revised plan that, while there are still other legitimate planning issues concerning the revised layout, all or most of what TMB is proposing could be restricted to areas of the site that have already been disturbed.

The Township's adopted Housing Element and Fair Share Plan acknowledges that in order for the TMB site to accommodate an inclusionary residential development, Livingston will have to revise its agreement with Millburn Township regarding sewerage service for the site. There appears to be no issue regarding sewage treatment capacity, which is provided by the Joint Meeting. Water supply is also available to the site. Consequently, the site is "developable" as that term has been defined by COAH and used by the Courts. Furthermore, based upon the information contained in the previously cited NJDEP Letter of Interpretation and the Cosgrove report, it is "approvable".

The site is also "suitable" for an inclusionary residential development. It has access to appropriate streets, although those streets, and particularly South Orange Avenue, experience heavy volumes of traffic during peak hours. It is adjacent to a combination of commercial, residential and conservation open space land uses.

Compatibility with the adjacent residential uses is not a matter of the nature of the use, which will also be residential, but of the form that the development will take – the building's vertical and horizontal dimensions (its overall mass), its architectural features, and the use of opportunities for screening.

On the issue of the form of the development, the reports of all of the planning experts have placed a lot of emphasis on the proposed density of the development. I do not believe that density alone is the issue, except to the extent that it informs the scale, height and overall massing of the building(s) to be constructed. Numerous garden apartment developments were constructed after World War II at densities well in excess of 15 units per acre and often up to 24 units per acre – in buildings that retained a residential scale and did not exceed the height of nearby single-family homes. The

individual units in these developments were far smaller than in more recent multi-family residential developments, ceiling heights were lower, and the number of parking spaces offered per unit tended to be fewer than the average of two spaces per unit called for in the Residential Site Improvement Standards (N.J.A.C. 5:21). If the proposed market units on the TMB site will be targeted at households that are expecting more in the way of space, height, and amenities, then bigger buildings will be necessary to accommodate even the lowest end of the density range proposed by Livingston. It is my recommendation that the permitted density could fall within the range of 15 to 18 units per acre, as long as other parameters governing building heights and setbacks and massing are used to fix the actual density that is allowed to be developed on the site.

The height of the building or buildings constructed on this site is perhaps the single biggest concern, since, beyond a certain point, it is impossible to screen a tall building from view. Nevertheless, if this particular site is to be zoned for inclusionary residential development, the density bonus needed to justify the required affordable housing set-aside together with the environmental issues that constrain how much of the site's area can be developed will inevitably produce a building height greater than that applicable to a single-family residential zone. The exposed 5 and 6 story height (including parking and living levels) contemplated in the builder's remedy plan, however, is too high for the area. A lowering of the maximum height by even one level overall would make a significant difference in the site's impact on the neighbors to the south, especially if the vertical limitation were to be coupled with a horizontal treatment, either reduced building width(s) or a significant variation in height along the length of a longer building, giving the appearance of two separate buildings. Recognizing the limited area available for landscaping, it is my recommendation that the site be designed using berms and/or retaining walls and as much landscaping as it is possible to plant within the developable areas of the site in order to help screen views of the lowest level(s) of the building(s) from both the north and the south (along the longest building walls).

In sum, it is recommended that the density of an inclusionary residential development on the TMB site could be permitted to fall somewhere between 15 and 18 units per acre (64 to 76 units) provided that the highest vertical dimension of the building(s) be set at least one level lower than the 5 and 6 stories (4 residential stories plus 1 to 2 levels of parking) shown on the builder's remedy plan and further provided that the horizontal building mass be correspondingly reduced. To achieve the latter, it is suggested that there be a limitation of not more than 200 feet of continuous building length in excess of three stories. This can be achieved in a number of ways: by separating the development into two separate buildings; by constructing a single building consisting of two wings of not more than 4 to 5 stories joined by an intervening element not exceeding 2 and ½ stories; or by constructing a single building with one higher element flanked by two wings not exceeding 2 and ½ stories each.

As a further measure to achieve a more acceptable visual impact, since there will be no way to hide the view of the building, the long front and rear planes of the building(s) should be broken into structural bays of 50 to 75 feet in width. These bays should be symmetrically arranged along the façade of the building and should be demarcated by strong architectural elements that are integral to the structure and style of the building, not tacked on as afterthoughts. Building entrances in both the front and rear of the building(s) should be defined with porticos or porches, and parking levels should be given an architectural treatment that is either similar or complementary to that of the residential floors above. If a parking level cannot be adequately screened from view from the south, then it should be designed to look like the residential floors above. These requirements should be part of any Ordinance adopted to regulate the development of this site.

If the foregoing can only be achieved at a density of 15 units per acre or less, then so be it. If it can be achieved at an 18 units per acre density, then the interests of low and moderate income households would argue that the higher number of units should be permitted on the site.

The recommended density range is acknowledged to be higher than the minimum presumptive densities called for in COAH's Rules (8 units per acre in Planning Area One; 12 units per acre for rental projects). However, Livingston has limited land resources remaining for accommodating its affordable housing obligations. Suitable sites will have to accommodate densities higher than COAH's minimums in order to create a realistic opportunity to satisfy the Township's fair share obligation. On the other hand, the TMB site probably cannot accommodate a density as high as that approved by the Court for the Kushner Academy site (19.4 units per acre), based upon its environmental constraints, its topography and dimensions, and its cultural environs.

The recommended density range for the TMB site would yield between 13 and 15 affordable units, assuming a 20% set-aside for rental affordable units. If the affordable units are for sale, the 25% set-aside rate would increase the yield to between 16 and 19 affordable units.

Although a higher density than the range I have recommended would yield more affordable units, there are two other builder's remedy sites to be considered. Moreover, Livingston has adopted a Housing Element and Fair Share Plan that includes a number of other ways to make up the "lost" affordable units on the TMB site. Additionally, there is pending legislation that may allow the Township to complete (if it chooses to do so) the 22 unit Regional Contribution Agreement it was preparing to implement prior to the Legislature's adoption of the amendments to the Fair Housing Act in July of 2008 that eliminated RCAs as a permissible compliance mechanism.

#### SQUIRETOWN PROPERTY

The Squiretown property is identified on the Livingston Township Tax Map as Lot 35, 36, 37, 42 and 44.01 in Block 5900. Together, these contiguous lots encompass 21.8 acres of land. The site lies within Planning Area One (the Metropolitan Planning Area) on the State Plan.

The site is located along the west side of Eisenhower Parkway and on the south side of Old Road. It is bounded on its west and south sides by a JCP&L Company right-of-way containing high tension overhead electrical transmission lines. To the west of the JCP&L Co. right-of-way is a school. There are perhaps a dozen dwellings, as well as a church, scattered along the Old Road frontage in the vicinity of the Squiretown site. The north side of Old Road forms the rear property line for several commercial uses fronting on Route 10. To the north of Route 10, along both sides of Eisenhower Parkway, there are larger scale non-residential uses. A neighborhood of single family residences is located to the southwest of the Squiretown site, on the other side of the JCP&L Co. right-of-way.

Much of the Eisenhower Parkway frontage of the Squiretown property is constrained by a large pocket of wetlands, which has remained wooded. Behind the wooded wetlands and the required transition area, however, there remains a substantial area (12.369 acres) of developable land. The positioning of this wooded wetlands area is fortuitous in that it helps to screen the development on the site from Eisenhower Parkway and vice-versa.

The Township of Livingston has not considered this site for inclusionary residential development in its adopted Housing Element and Fair Share Plan, as the Township intends to acquire the site for use as a Public Works facility. A portion of the site has been included in the analysis of Livingston's entitlement to an adjustment of its growth projections, however, using COAH's minimum presumptive density of 8 units per acre for Planning Area One, the State Plan Planning Area encompassing the Squiretown property.

The Squiretown plaintiff proposes a builder's remedy consisting of 250 dwelling units in 6 apartment buildings of 5 stories each (4 residential stories over a level of parking). Fifty (50) of the units (reflecting a set-aside of 20%) are proposed to be affordable rental

units. Recreational amenities are proposed in the center of the site and at its north end, near Old Road.

The gross density of the development proposed by Squiretown is only 11.38 units per acre. After deducting the wetland areas, however, the resulting net density is 20.21 units per acre.

This site is a suitable site from the perspective of surrounding land uses and environmental suitability. Letters of Interpretation from the NJDEP approving the mapped locations of the wetlands on the Squiretown property have been obtained. A permit for a wetlands crossing will be needed to create access to and from Eisenhower Parkway, and NJDEP approval is expected to be sought for transition area averaging, as well.

The site also has access to both Eisenhower Parkway (right in/right out only) and to Old Road. The latter connects the site to Walnut Street to the west and dead-ends just east of the site before the Route 10/Eisenhower Parkway Circle. Despite its frontage on two streets, the site does have an access limitation in that the left turn is prohibited onto Eisenhower Parkway. Northbound, westbound and some of the eastbound traffic from the site will need to take Old Road west to Walnut Street. Walnut Street provides connections to Mount Pleasant Avenue (Route 10), Eisenhower Parkway and Hobart Gap Road. While the Township is understandably concerned about the potential traffic impacts on Old Road and Walnut Street (and its intersections) from the development of this site, the fact that there will be increased traffic from the development is not a basis for determining that a site is unsuitable for inclusionary residential development. The Traffic Evaluation Report prepared by Hamal Associates, Inc., for Squiretown suggests that there may be a need for some improvements to Old Road (speed tables, posting of speed limit signs) to help slow traffic and avoid conflicts between the increased vehicular traffic and pedestrian traffic. Subject to such improvements (to be determined

at the time of site plan approval), the site satisfies the criterion of having access to appropriate streets.

The site is developable. As indicated in the Site Suitability Analysis report prepared by Creigh Rahenkamp, PP, on behalf of Squiretown, both potable water supply and sanitary sewer service are available in Livingston Township and can be provided to the site, although it is acknowledged by Rahenkamp that there may need to be improvements to the distribution/collection lines in Old Road to accommodate the development of the Squiretown property with as many as 250 units. Since the Squiretown property will be the beneficiary of such improvements, it is presumed that Squiretown will bear all of the costs of these improvements.

The Rahenkamp report states that there are no easements or title encumbrances that would preclude the use of the Squiretown tract for inclusionary development. It is noted that the Township has indicated an intention to acquire the site for a public works garage, but no condemnation proceedings have been initiated to date.

The site is clearly approvable, subject, of course, to a rezoning for inclusionary residential development. It can be developed in accordance with the Residential Site Improvement Standards, and it appears that the NJDEP permits that will be required for the development of the site are of the types that are typically approved. Should there be an issue with respect to the Eisenhower Parkway access from either the NJDEP or the NJDOT, access could reasonably be confined to Old Road, subject to a determination at the time of site plan approval of the improvements needed to ensure both pedestrian and vehicular safety.

Janice Talley, PP, the planner for Livingston Township, argues in her report, entitled Response to Site Suitability Analysis for Squiretown Site, that this property had been included as part of Livingston's RDP (Realistic Development Potential) calculation in its Court-approved second round Housing Element and Fair Share Plan, and that any

affordable housing yield from this site was already addressed in that plan, albeit not on this site. This argument is not relevant in light of COAH's current Rules, however, which require that any unmet need from the prior round also be addressed, in addition to the calculated RDP.

The grant of a “vacant land adjustment” in the prior round is viewed as having essentially divided a municipality’s affordable housing obligation into that which had to be addressed within the scope of the prior round plan (the RDP) and that which could be addressed over time as opportunities presented themselves (the unmet need) through “softer” mechanisms designed to capture unforeseen affordable housing opportunities.

If a plaintiff in a Mount Laurel lawsuit proposes a suitable site for inclusionary residential development and such development will address part of the unmet need, it cannot now be exempted from consideration merely because the site was not needed to meet the Court-approved RDP.

The Talley Report acknowledges the same environmental constraints (wetlands and required transition areas) that encumber about half of the Squiretown site as were identified in the Rahenkamp Report (and these constraints are further addressed in a supplementary planning report by Rahenkamp in response to the Talley Report). The proposed builder’s remedy does not propose any development in the wetlands area, except for the crossing to create a driveway at Eisenhower Parkway.

The Talley Report points out that the Squiretown site rises well above the elevation of Eisenhower Parkway, a fact that Rahenkamp minimizes by emphasizing the relatively gentle average slope within the developable portion of the property. I concur with the Talley Report that the difference in elevation between the Squiretown site and Eisenhower Parkway is such that the 5 story, 67-73 foot height of the buildings that are proposed by the plaintiff will appear even taller than they are proposed to be where they

will be visible from Eisenhower Parkway, even overtopping the height of the intervening trees.. While this is unlikely to be much of a problem during the summer months, when the trees have leafed out, since drivers are unlikely to be looking up over the treetops, the views through the trees during the winter months will be less obstructed, and the buildings will seem much taller than they are proposed to be due to their higher base elevation. A reduction in the overall height of the closest three buildings, the two that run parallel to Eisenhower Parkway and the one at the south end of the site, by one story each, to a maximum of 4 stories (3 residential levels over a level of parking), would help to alleviate the potentially towering visual impact of this development when viewed from Eisenhower Parkway as well as from the residential neighborhood to the south.

The foregoing recommendation is likely to lower the total number of units that can be built on the site by some 30 +/- units, reducing the affordable housing yield proposed by the plaintiff to roughly 44 units instead of 50 units. This would also reduce the gross density of development to something on the order of 10.9 units per acre, which is low for a rental project, although the net density would still be quite high (18.6 units per acre). I believe that this reduction in the site's yield as a result of the recommendation to reduce the height of three of the buildings is appropriate in this case and still allows the site to make a substantial contribution to Livingston's affordable housing stock. The Talley Report recommends an even lower density for the site (12 units per gross acre for affordable units that will be for sale with a 25% set-aside and 15 units per gross acre for rental affordable units with a 20% set-aside). I would be hesitant to recommend any further reduction in the site's yield below that resulting from a net density of 18.6 units per acre without more information as to the probable costs of the off-tract improvements that may be needed (for sewer, water, streets and, possibly, stormwater) to accommodate the development.

## HILLSIDE-NORTHFIELD PROPERTY

The Hillside-Northfield property is the site of the former Dubrow Nursery and two single-family homes. It is identified on the Livingston Township Tax Map as Block 5500, Lots 7, 8 and 9 and a portion of Lot 5. Together these lots encompass a total of 4.52 acres of land fronting on West Northfield Avenue near its intersection with Hillside Avenue. The site is located in Planning Area One (the Metropolitan Planning Area) on the State Plan.

The site in its current state is somewhat of an anachronism compared to most of the surrounding development, which includes both attractive older homes of various sizes and newer, large homes (directly across the street). There is also a variety of large-scale non-residential development along West Northfield Avenue, including the Livingston Presbyterian Church two lots north of the subject site, Temple Emmanuel on the opposite side of West Northfield Avenue opposite the Presbyterian Church, a banquet facility further north along West Northfield Avenue, and the Livingston Township Community Center behind the site, to the west, fronting on Hillside Avenue.

The plaintiff is proposing to demolish the existing structures and to redevelop the site with an 80 unit development, including 16 rental affordable units. The development is proposed in four 3-story buildings that will occupy the center of the site. A clubhouse of one or two stories will be located between the 4 proposed residential buildings and West Northfield Avenue. Parking will be located at the perimeter of the site as well as in garages within the buildings.

The site is a suitable site. It has access to appropriate streets (West Northfield Avenue) and it is adjacent to land uses that are compatible in both use and scale to the buildings proposed on the subject site. The layout of the proposed development on the site has evolved since the initial builder's remedy plan submission, and the plaintiff has made an effort to arrange the buildings so that the long walls will all be perpendicular to West

Northfield Avenue, yet the sides of the buildings that will face the street will be designed as front facades. This will help to minimize the perception of how much development is really being accommodated on the site when it is viewed from West Northfield Avenue. The site's existing condition and its proximity to the Livingston Community Center make it a strong candidate for redevelopment as an inclusionary residential project.

The single-family homes that will remain on the lots to the north and south of the Hillside-Northfield property are very deep lots, and the homes are located close to the fronts of those lots. The plaintiff has proposed to maximize the open space on either side of the entrance to the development, so that a buffer will be provided against the existing uses on the adjacent properties.

The Planner's Report prepared for Hillside-Northfield Partners, LLC, by Art Bernard, PP, states that the site has sewerage and water service from the Township of Livingston. A July, 2009, report from Omland Engineering Associates suggests that, while these services are available to the site, it is not currently served by them. According to the Omland Report, however, these services are available in West Northfield Road, and there is plenty of water supply and sewage treatment capacity to accommodate the demand generated by the plaintiff's proposal. The Omland report also addresses a variety of other developability issues, and concludes that the site is developable in accordance with the plaintiff's proposal, and I find no reason to disagree with this conclusion.

The site is available and approvable. There are no known environmental constraints on the site that would preclude development. The potential intrusion of a transition area associated with an off-site wetlands may exist along the western boundary of the Hillside-Northfield property, according to a June, 2009, report from Ecolsciences, but the conclusion of that report is that the area is so small that it can either be avoided in the development of the site or a transition area averaging plan could be submitted for

approval by the NJDEP, and that, in either case, the it need not interfere with the development contemplated by the plaintiff.

There are areas of the site where contamination from pesticides has been identified, undoubtedly related to the nursery/landscaping business. The contaminated areas will have to be cleaned up to an acceptable level to accommodate residential development, pursuant to NJDEP criteria, but this requirement is, if anything, a positive outcome of the redevelopment contemplated by the plaintiff. A 2008 Phase I Environmental Site Assessment Report prepared for the plaintiff by Ecolsciences concludes that the site can be remediated to meet residential development standards.

The Bernard Report states (and the builder's remedy plan provided by the plaintiff supports this assertion) that the property can be developed in compliance with the Residential Site Improvement Standards.

In sum, this site is not only a suitable, developable, approvable and available site, but the builder's remedy plan is well done from a design perspective, allowing the site to accommodate a comparatively high density of development (17.7 units per acre) in a manner that is respectful of its environs.

Livingston Township's expert, Janice Talley, PP, has raised a legitimate issue regarding the inclusion of Lots 8 and 9 within the subject property. Each of these lots contains an existing single-family home and is less than 2 acres in area. Talley cites the Fanwood amendment to the Fair Housing Act (N.J.S.A. 527.D-311.1 and 313.1), which specifically exempts single-family homes on lots of 2 acres or less from being required to be demolished to make way for inclusionary development. The Fair Housing Act does, however, articulate certain extenuating circumstances under which such demolitions would be permissible.

Among these circumstances is a situation where the residential structure in question has either been declared to be unfit for human occupancy or is found to be unfit but not

as a result of negligent or willful action during the preceding 3 years. If it has been declared to be unfit or is found to be unfit, but not as a result of negligent or willful action during the preceding 3 years, it is not exempted.

To address this issue, the plaintiff has submitted a Building Inspection Report prepared in July of 2009 by Dico Building Inspection Service, Inc. The Dico Report indicates that these two homes are extensively deteriorated due to age, lack of maintenance, poor quality of remodeling, termite damage, rot, mold, asbestos, structural issues and building code violations, and that the cost to renovate and restore these homes to a standard condition would exceed the cost of replacement. It is clear from the report that these homes were not willfully rendered unsuitable for human habitation (the report does not suggest vandalism or sabotage). They have obviously suffered from deferred maintenance for a long time. What is not known is when these properties were acquired by the plaintiff or its immediate predecessor and whether anything could have been done in the past 3 years to avoid the level of deterioration that is now evident.

The Bernard Report addresses the Fanwood issue from a different perspective, arguing that a municipality that is before the Court in a Mount Laurel lawsuit loses the protections afforded to municipalities that voluntarily comply with the Fair Housing Act and COAH's regulations. He further argues that the Fanwood Act was adopted by the Legislature in 1989, prior to the State Planning Commission's adoption of the first State Plan, which established a policy of promoting redevelopment in Planning Areas One and Two. Moreover, COAH's Rules encourage redevelopment as a means of addressing affordable housing obligations, especially in areas with insufficient vacant developable land. According to Bernard, "to allow redevelopment to take place for every possible use except affordable housing is absurd." I am inclined to agree with this last statement. If the houses were to remain and were to be resold on minimum 15,000 square foot lots, as the current zoning requires, they would doubtlessly be demolished and rebuilt with new houses.

In light of the documented condition of the two homes on Lots 8 and 9, and considering the difference the inclusion of these two lots makes to the configuration and development of the balance of the property, it is appropriate to include these lots in the builder's remedy as part of the plaintiff's site. While these lots are not required to be included as "vacant, developable land" in any analysis of that resource, allowing them to be redeveloped in connection with Lot 7 is both appropriate and reasonable from a land use planning perspective. For this reason, I am recommending that they be permitted to be included as part of the plaintiff's builder's remedy site.

Should the Court disagree with my recommendation concerning the inclusion of all of Lots 8 and 9 as part of the builder's remedy site, then 30,000 square feet (15,000 square feet per dwelling, reflecting the current zoning) would have to be deducted from the total site area, reducing it to 3.83 acres. Based on a correspondingly reduced number of multi-family units, the Hillside-Northfield site would yield approximately 68 total units instead of 80, of which 13-14 rather than 16 would be affordable.

### SUMMARY OF FINDINGS ON BUILDER'S REMEDY SITES

It is the recommendation of this report that all three of the remaining plaintiffs' sites are suitable for some form of inclusionary residential development. The issue, with each site, is not whether the site is suitable for such development, but, in the case of TMB and Squiretown, how much development should be permitted, and in the case of Hillside-Northfield, how much of the plaintiff's proposed site should be included in the builder's remedy.

As to TMB, I have recommended that the amount of development to be allowed on the site should be more of a design issue than a density issue – that the building mass should be limited as to both its vertical and horizontal dimensions and mitigated through the use of specific architectural and landscaping treatments. I have suggested a density range that can probably accommodate the specific design parameters I have recommended, but, if these design parameters cannot be accommodated, then it is the

density that will need to be adjusted. I am projecting that the TMB site will yield between 64 and 76 total units, of which 13 to 15 would be affordable family rental units.

For the Squiretown site, I have recommended that three of the six proposed buildings should lose a story to reduce the visual impact of the development from off-site, considering the property's elevation above Eisenhower Parkway. Based upon this recommendation, it is projected that the Squiretown site will yield approximately 220 units, of which 44 would be affordable family rental units.

On Hillside-Northfield, with the inclusion of Lots 8 and 9, I am recommending the acceptance of the plaintiff's proposal for 80 units, of which 16 would be affordable family rental units. Should the Court disagree with this recommendation and decline to permit the homes on Lots 8 and 9 to be demolished to make way for the development, then the reduced site area would likely accommodate about 68 units, with a corresponding reduction in the number of affordable units (to 13 or 14).

Assuming the Court approves the recommendations in this report as to the three builder's remedies, Livingston stands to gain as many as 75 and not fewer than 70 affordable "family" rental units (none of the developments are proposed to be age-restricted) that can all be used to help fulfill the Township's fair share obligation.

#### RELATIONSHIP OF BUILDERS' REMEDIES TO LIVINGSTON'S FAIR SHARE OBLIGATION

The 1985 Fair Housing Act established the Council on Affordable Housing (COAH) as the State agency to review and approve and oversee implementation of municipal Housing Elements and Fair Share Plans and to create rules and regulations regarding the development of low and moderate income housing in the State. COAH has established both Procedural and Substantive Rules for municipalities to adhere to in addressing their affordable housing obligations. To receive certification from COAH, a municipality must not only adopt the required Housing Element of the Master Plan but

must also adopt a Fair Share Plan that includes all of the implementation strategies, including the specific ordinances, plans, timetables and resolutions that are needed to carry out the plan. Once certified by COAH, a municipality's Housing Element and Fair Share Plan is entitled to a *ten-year* presumption of validity against a Builder's Remedy challenge, as long as the municipality continues to implement its plan in accordance with COAH's approval.

Jurisdiction over Livingston's Housing Element and Fair Share Plan rests with the Court and not COAH, as a result of the filing of the Mount Laurel lawsuits. Nevertheless, the evaluation of Livingston's status with respect to its constitutional mandate to provide a realistic opportunity for the fulfillment of the Township's fair share of low and moderate income housing has, to date, been guided by COAH's methodology for assessing the Township's obligation as well as by COAH's Rules for fulfilling that obligation.

It is acknowledged that the legislative and regulatory landscape for determining and fulfilling affordable housing obligations at the municipal level may soon be changing. While such changes would not alter the recommendations presented herein concerning the builder's remedies, it may have an impact on the ultimate analysis of Livingston's remaining affordable housing obligations and the compliance mechanisms the Township proposes to use to address them.

In my January 14, 2009, letter to the Court concerning the fairness of the TMB and JKHA settlements, I had stated that the Township's cumulative third round fair share number has been calculated by the Council of Affordable Housing ("COAH") to be a total of 700 units, broken down into three components as follows:

prior round obligation - 375 units

rehabilitation share - 17 units

third round obligation - 308 units

The third round “growth share” obligation is based upon COAH’s *projections* of new housing and employment growth in Livingston Township from 2004 to 2018. The 308 unit figure was calculated by COAH based upon its projections of 649 new housing units divided by 5 (129.8) and 2,844 new jobs divided by 16 (177.75).

I had stated in 2009, and still believe, that, given the largely developed condition of Livingston Township, it is quite possible that the COAH projections (particularly the employment projection) will prove to be too high. If this is the case, the Township should be permitted to seek an adjustment in these projections as part of the third round Housing Element and Fair Share Plan it ultimately submits to the Court. COAH’s Rules provide a methodology for such an adjustment, if it is warranted.

The 375 unit prior round obligation had been the subject of previous litigation. The Township received a final judgment of repose from the Court in 2000. The Court’s approval of the Township’s prior round compliance plan had included an adjustment for insufficient vacant land, reducing the Township’s realistic development potential (RDP) to 193 units and leaving an unmet need of 182 units. As indicated in the discussion of the Squiretown property, the grant of a “vacant land adjustment” in the prior round is not considered to be a permanent pass on the obligation to address the unmet need – it is more of a “durational adjustment” on a portion of the obligation, essentially dividing the affordable housing obligation into that which was required to be addressed within the scope of the prior round plan (the RDP) and that which is permitted to be addressed over a longer period of time as opportunities present themselves (the unmet need) through less predictable mechanisms designed to capture unanticipated affordable housing opportunities.

According to all of the Response to Site Suitability Reports issued by Janice Talley, PP, addressing each of the plaintiff’s sites, Livingston implemented its Court-approved prior round Housing Element and Fair Share Plan, which fully addressed the Court-determined RDP of 193 units. Before COAH approved Livingston’s final Regional Contribution Agreement (RCA) for 22 of these units, the Legislature amended the Fair

Housing Act, prohibiting approval of any new Regional Contribution Agreements. There is a bill pending in the Legislature that could reverse this position, freeing the Township to go ahead with the RCA as originally planned, should it choose to do so, but it has not yet been adopted as of this writing.

According to the Talley Reports, as a result of its implementation efforts, the Township of Livingston has already produced 65 new affordable housing units within the Township, has rehabilitated 64 units in Linden through RCAs, has provided 53 units in existing or approved group home facilities, and has earned 37 bonus credits.

Not counting the 22 additional RCA units that could not be implemented before the law changed, the numbers presented in the Talley Reports indicate that Livingston has earned 196 credits so far toward the fulfillment of its affordable housing obligations. In addition, its settlement with the Kushner Academy plaintiff in the current litigation will earn the Township at least another 45 credits (with the potential for additional credits in the form of rental bonuses, depending on how the credits are counted).

Subtracting all of these earned credits from the 700 unit total obligation - that represents the RDP and unmet need components of the prior round obligation plus the current rehabilitation obligation plus the projected third round fair share obligation established by COAH - leaves a balance of 459 units. Of these 459 units, 17 units can and should be addressed through a housing rehabilitation program, leaving a new construction obligation of 442 units. This 442 unit obligation is comprised of the 308 unit COAH-projected third round obligation and the remaining unmet need from the prior round of 134 units.

All of the 70 to 75 affordable units to be produced by the three builder's remedy sites addressed in this report are proposed to be "family" rental units (similar to those approved on the Kushner Academy site). Thus, the Township is potentially eligible for rental bonuses for a significant number of these units. The number of rental bonuses the Township will be eligible to count will ultimately depend upon the extent of the

adjustment the Court is willing to approve to COAH's 308-unit projection of the third round obligation.

The foregoing discussion is not to be construed as a recommendation regarding how credits should be allocated (to the prior round RDP, the prior round unmet need or the third round). That issue can be decided later. The import of the discussion is that the number of affordable housing units yielded by all four plaintiffs' sites, including the Kushner Academy site as well as the three sites addressed herein (a maximum of 120 affordable units altogether), still leaves room for a significant downward adjustment of the COAH-projected third round obligation and still leaves room for the implementation of some of the Township's own proposals for meeting its affordable housing obligations as set forth in the adopted Housing Element and Fair Share Plan. Simply put, the builders' remedies do not produce too much affordable housing when compared to Livingston's obligation.

Once the Court has ruled on the builders' remedies sought in this case, the Township should proceed with a new evaluation of the adjustments in the fair share number to which it may be entitled and with the development of a plan to allocate credits and address the adjusted fair share obligation. The objective would be to prepare a compliant Housing Element and Fair Share Plan for the Court's review and approval so that the Township will be eligible for a Judgment of Compliance and Repose that would protect it from further Mount Laurel lawsuits through the year 2018.

## **CREDENTIALS**