

FORD AVENUE REDEVELOPMENT – HISTORICAL NARRATIVE

In February, 2001, Milltown began proceedings to designate the Ford Avenue area (the “Property”) as an area in need of redevelopment pursuant to the Local Redevelopment and Housing Law (LRHL), N.J.S.A. 40A:12A–1. *et seq.* The Borough Council directed the Planning Board to conduct an investigation to determine whether the subject property met the factual and legal criteria to be deemed an “area in need of redevelopment.”

In May 2001, the Planning Board adopted a resolution recommending that the Property be designated as an area in need of redevelopment.

In September 2001, the Borough created the Ford Avenue Redevelopment Agency.

In March 2002, the Borough adopted the Ford Avenue Redevelopment Plan which provided for the Property to be developed as a mixed-use development, consisting of residential, office and retail uses.

In April 2002, the Borough adopted a “redevelopment overlay zone” to regulate the development of the subject property in accordance with the Redevelopment Plan.

In 2003, the Redevelopment Agency selected Boraie Development, LLC (“Boraie”) from among four applicants as the designated redeveloper of the subject property. A redevelopment agreement was entered into between the Redevelopment Agency and Boraie on May 11, 2004. The 2004 Redevelopment Agreement required Boraie to: 1) develop up to 324 units of age-restricted housing in single-family homes, townhouses and multi-level units; 2) construct up to 75,000 square feet of office and/or retail space; 3) provide for open space; 4) contribute \$1 million to the acquisition and construction of an offsite fire house; and 5) pay for all of the costs of site investigation and remediation. Of the 324 age-restricted units, none were specifically required to be set aside for affordable housing, although Boraie was charged with providing a plan as to how the residential portion of the project would meet the Borough’s affordable housing obligation. Boraie was also authorized to acquire and develop the subject property.

In August 2004, Milltown adopted an ordinance approving a revised Redevelopment Plan. Also in 2004, an amended Redevelopment Plan clarified that: 1) the existing single-family lots along Ford Avenue did not need to be developed with age-restricted housing; 2) altered the density, coverage, lot area and setback requirements applicable to townhouses; 3) refined the regulations for what were then called the mid-rise age restricted and senior housing buildings; 4) added specific regulations for commercial and business uses; and 5) added a requirement that that an unspecified number of affordable housing units be provided within the mid-rise age restricted buildings consistent with the Amended Housing Plan Element and Fair Share Plan of Milltown adopted May 6, 2003.

By resolution dated August 22, 2005, the Borough ratified its prior determination that the subject property was an area in need of redevelopment.

In November 2005, the Redevelopment Agreement was amended to reduce the total number of dwelling units permitted to no more than 276. This amendment was based

upon Middlesex County's desire to acquire approximately 4 acres of the Property for the purpose of establishing a 100-foot buffer adjacent to Mill Pond, some of which would be owned by the County, and the balance would be restricted to the redeveloper as part of the redevelopment of the Property. The 276 units would continue to be age-restricted, but the permitted housing mix was amended to include owner-occupied townhouses and multi-level dwellings with a minimum of 50 units in an age-restricted apartment building and no more than 25% of the units having two bedrooms. According to the terms of the 2005 amended Redevelopment Agreement, if the County failed to acquire the 4 acres by March 30, 2006, the previously executed 2004 Redevelopment Agreement would remain in effect.

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

On May 6, 2003, a Housing Element and Fair Share Plan was prepared and adopted by the Planning Board. This document was submitted to the Council on Affordable Housing (COAH) on July 8, 2003 along with a resolution adopted by the Governing Body petitioning for substantive certification of Milltown's second round Housing Element and Fair Share Plan which requested an adjustment in the 64-unit new construction portion of Milltown's total 107-unit 1987-1999 Fair Share affordable Housing obligation from 64 units to 16 units due to insufficient vacant land. All 16 units were to be addressed through the redevelopment of the Property and included 9 age-restricted for sale units, 4 age-restricted rental units, 1 age-restricted rental bonus and 3 non-age-restricted for sale units. The plan to provide three affordable non-age restricted units was never implemented into the Redevelopment Plan when amended in 2004. Accordingly, the 2004 Redevelopment Plan continued to permit only age restricted housing.

The plan was reviewed by COAH which requested additional information. The COAH report provided that "Milltown petitioned for substantive certification after June 6, 2000, and as such, the borough may receive interim second round substantive certification for a period less than the standard six years. This interim certification will be valid for up to one year after the effective date of COAH's third round methodology and rules."

On December 30, 2005, COAH dismissed Milltown's petition on the grounds that it had failed to submit a resolution from its Governing Body by February 20, 2005 committing to petition for third round substantive certification from COAH by December 20, 2005.

As a result, the Borough became susceptible to a builder's remedy lawsuit because it failed to maintain its protected status before COAH and resolve issues concerning its fair share of the regional need for affordable housing. Because there was insufficient vacant land within Milltown to support any substantial housing development, the redevelopment of the subject property was deemed essential to Milltown's satisfaction of its Mount Laurel obligations.

In 2006, a builder's remedy lawsuit was filed by SB Building Associates, L.P., SB Milltown Industrial Realty holdings, LLC and also Alsol Corp. (the "Property Owners"), all entities controlled by Lawrence Berger.

A trial was held in this matter in June 2011. In an Order dated January 18, 2012, the Honorable James Hurley of the Superior Court of New Jersey, Law Division, found:

The Borough's "prior round" unmet fair share housing obligation for the period 1986-1999 (second round) was 64 units and that its unmet indigenous need obligation was 10 units.

That Milltown was in violation of its obligation under the New Jersey Constitution and the Fair Housing Act of 1985 to adequately create sufficient realistic opportunities to provide for the construction of safe, decent housing affordable to low and moderate-income households to satisfy the Borough's fair share of the unmet regional need.

The Property Owner was not entitled to a site-specific builder's remedy but was entitled to other remedies including: 1) the requirement for the Borough to create a realistic mechanism for the rehabilitation of at least 10 physically substandard housing units reserved for and affordable to low and moderate income households; 2) permitting the construction of at least 350 residential units of which at least 70 are to be designated as low and moderate-income units; and 3) of those low and moderate-income units, no more than 25% may be age-restricted.

Boraie shall not be responsible to contribute to the construction of a firehouse.

In 2013, Boraie applied to the Planning Board for preliminary major site plan and subdivision approval to construct a mixed-use development in accordance with the January 18, 2012 Order of Judge Hurley. In September 2013, the Planning Board adopted a resolution requiring Boraie to enter into a developer's agreement that would require it to make payment of its fair share contributions for off-tract improvements to the Borough's infrastructure, i.e., sewerage system, water system, and electrical system.

The Property Owner appealed the decision of the Planning Board to the Superior Court, Law Division, contending that the Planning Board's condition for payment of contributions to off-tract improvements to be illegal.

Judge Hurley dismissed the complaint, however, the Property owner appealed that decision to the Superior Court Appellate Division. The Appellate Division vacated the dismissal of the Property Owner's complaint and remanded the matter for entry of a judgment voiding the requirement for payment of impact fees for off-tract improvements imposed by the resolution and remanding the matter back to the Planning Board for reconsideration.

In its decision rendered in January, 2017, the Appellate Division concluded the imposition of a requirement for a contribution to off-tract electrical improvements was not authorized by the Municipal Land Use Law and that the remaining requirements for permissible

impact fees were not properly determined by the Board. The Appellate Division held that the imposition of a financial contribution for off-tract purposes must be implemented by municipal ordinance and that the Municipal Land Use Law requires a planning board to make certain findings, and for that reason, the Planning Board may not delegate that authority to the governing body or a redevelopment authority. Milltown's ordinance at that time lacked any standards for determining the impact of Boraie's project on off-tract improvements or determining Boraie's pro-rata share.

Another round of litigation involved the New Jersey Supreme Court decision in March 2015 granting the authority and responsibility to review municipal third round affordable housing obligations to the trial courts of the Superior Court of New Jersey following the failure of COAH to take action on this issue.

Based on that NJ Supreme Court decision, the Hon. Douglas Wolfson, J.S.C., who was assigned the matter following the retirement of Judge Hurley, entered an Order precluding the Borough and its Redevelopment Agency from filing a condemnation action to acquire the property and taking any action that would make the Ford Avenue site unavailable to meet a portion of Milltown's post-1999 constitutional fair share housing (third round) obligation until the Court determined what that obligation was and approved a plan for compliance with that obligation.

The key issue to be determined by the Court as it pertains to the Ford Avenue site was whether the Property can and/or should accommodate more than the previously approved 350 residential units and, accordingly, a greater number of low and moderate affordable units.

The property owner contended the Ford Avenue site development should include 560 residential units with 96 low and moderate-income units.

The Borough's position was that the previously approved plan of 350 units, including 70 low and moderate-income units, was the appropriate density and development for the site.

Prior to the trial, Judge Wolfson left the bench and the matter was assigned to the Honorable Arnold Natali, J.S.C.

The trial started and continued during the week of July 10, 2017. Prior to, during and after the trial, the Property Owner made application to the Court to be allowed to submit additional evidence in response to portions of the Special Master's report filed in the matter that were detrimental to the Property Owner's case. At the conclusion of the trial, Judge Natali instructed the parties to submit legal argument and briefs on the issue.

In an Order dated October 16, 2017, Judge Natali allowed some additional evidence and ordered that the Property Owner may call three of its expert witnesses that testified during the trial in July 2017 to present the rebuttal testimony to the Special Master's report and that the defendants (including the Borough of Milltown and its Redevelopment Agency) may present sur-rebuttal testimony.

This led to another round of discovery on these issues and the trial eventually continued on February 26, 2018 and concluded that same week.

In a decision dated July 30, 2018, Judge Natali ruled in favor of the Borough and the Redevelopment Agency on all issues.

Judge Natali has since been assigned to the Superior Court Appellate Division and this matter was assigned to Judge Thomas McCloskey.

Following a case management conference held on October 11, 2018, Judge McCloskey issued a Case Management Order addressing outstanding issues in this litigation.

Tasks to be completed by the Governing Body included:

- Update Affordable Housing Ordinance
- Update Affirmative Marketing Plan
- Update Development Fee Ordinance
- Update Spending Plan
- Update Vacant Land Analysis
- Calculate Borough's Third Round Housing Obligation
- Update Housing Element & Fair Share Plan addressing 3rd Round Housing Obligation

Tasks to be completed by the Redevelopment Agency included:

- Adopt Relocation Plan
- Update Appraisal Report
- Update Planner's Report
- Update demolition cost estimate
- Update environmental remediation cost estimate

There was also the outstanding issue involving the appeal of the prior Planning Board approval which the Superior Court, Appellate Division reversed on the basis it was without authority to determine the amount the redeveloper was obligated to pay for off-tract improvements. The trial court was to enter an order remanding the matter to the Planning Board for a determination consistent with the Appellate Division ruling. The October 15, 2018 Case Management Order accomplished that. The Court ordered that the proceedings before the Planning Board were to be for a 350-unit project consistent with Judge Hurley's Order for Municipal Compliance dated January 18, 2012, and the Milltown Ford Avenue Redevelopment Plan, revised June 2012, except to the extent that the Redevelopment Plan must be modified consistent with court decisions issued subsequent to its adoption in June 2012.

Other items that were to be reviewed for additional action to be undertaken included:

- Amendment to Master Plan to include a Circulation Plan and Utility Service Plan
- Adoption of a zoning ordinance establishing permissible pro rata share contributions
- Amendment to Redevelopment Agreement
- Amendment to Redevelopment Plan

Amendment to Tri-Party Agreement with Middlesex County and the Redeveloper

All tasks required to be taken in order to file a condemnation action were completed and on November 5, 2019, a condemnation action was filed in the Superior Court by the Redevelopment Agency seeking title to the Property.

The case was removed to the United States District Court by the United States of America because the United States and the US Environmental Agency are defendants in the law suit as a result of federal liens on the Property and the US government has the automatic right to remove the case to the federal courts.

Accordingly, the redevelopment of the Ford Avenue Site continues to proceed along two litigation paths.

One involves the condemnation action filed by the Redevelopment Agency to acquire title to the subject property.

The other litigation path involves the builders' remedy suit filed by the property owner and the Borough's compliance with its affordable housing obligation.

Both litigation matters have been delayed significantly by the pandemic.

The only issue present in the federal condemnation matter is the valuation of the subject property. The case before the condemnation commissioners was held during the Spring and Summer of 2021, and the Commissioners award of \$13.5 million was rendered in August, 2021.

Both parties appealed from the award which leads to a jury trial on the value of the property. The litigation is currently in the discovery stage. All expert reports have been prepared and exchanged. Depositions of witnesses are scheduled to be completed by August 31, 2023.

The builders' remedy suit filed by the property owner and the Borough's compliance with its affordable housing obligation remains pending before Judge McCloskey in the New Jersey Superior Court. The compliance hearing on whether the proposed redevelopment plan and its provision for 70 low- and moderate-income housing units continues to be postponed because one of the criteria required to be established at the hearing is that the plan must provide a realistic opportunity for the Borough to meet its affordable housing obligation. Judge McCloskey has indicated that he intends to postpone the hearing until the Redevelopment Agency takes title to the property to help meet this criterion.

In the meantime, Judge McCloskey has extended the Borough's immunity from builders' remedy suits. The judge has indicated he will continue to do so until the compliance hearing is ready to be scheduled, of course, provided the Borough continues to pursue its affordable housing obligation.

In the interim, the County has agreed to increase its acquisition of open space on the property to approximately 11 acres for passive and open space purposes and to that end,

a four-way agreement, dated July 26, 2021, was entered into by the Borough, the redevelopment agency, the County, and the redeveloper.

On June 23, 2022, the Borough adopted Ordinance 22-1511, amending its redevelopment plan to reflect the County's increased open space acquisition and to provide for the construction of 300 residential units on the remainder of the property, inclusive of the 70 required affordable housing units.

Pursuant to a Bankruptcy Court Judgment dated September 15, 2022, the Borough once again referred the matter of the proposed amended redevelopment plan to its planning board for review and reporting. (Note: throughout much of the history of this matter, the property owner has been involved in bankruptcy proceedings which, at times, complicates matters and adds additional levels of review and delays).

Thereafter, on October 24, 2022, the governing body adopted Ordinance 22-1516, again approving the amended redevelopment plan for implementation. The property owner, once again, filed suit challenging the adoption of the ordinance.

A trial was held on March 22, 2022 before Judge McCloskey. In an Order for Judgment dated May 22, 2023, Judge McCloskey found in favor of the Borough and the Planning Board, affirming their decisions in all respects, dismissing the property owner's complaint with prejudice. A Notice of Appeal from Judge McCloskey's decision was filed by the property owner with the New Jersey Superior Court Appellate Division on June 28, 2023.