



TOWNSHIP OF SOUTH BRUNSWICK

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

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

Via Email and Regular Mail

April 28, 2016

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

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

Dear Judge Wolfson:

Please accept this Letter Memorandum in opposition to the Motion in Limine filed by Intervenor Avalon Bay, which the other intervenors in the case have joined, which seeks to bar the testimony of Robert Powell of Nassau Capital, and those portions of the opinion of Peter Angelides of Econsult Solutions, Inc., which rely upon and/or refer to the opinion of Robert Powell.

All parties rely upon the legal argument submitted by Avalon Bay. In its argument in support of its motion to bar Dr. Powell's testimony, Avalon Bay argues that his opinion and testimony, and such portions of the Econsult opinion/report that rely upon and/or refer to Powell's opinion and testimony, should be barred as irrelevant pursuant to N.J.R.E. 702 and 402. For the reasons set forth herein, the motion should be denied.

Legal Standard

N.J.R.E. 702 states: "if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise." The rule itself sets forth the standard to be used by which a trial court is to determine if proffered expert testimony should be placed before the trier of fact. That standard is "helpfulness to the trier of fact". See N.J.R.E. 702, Comment 1.

N.J.R.E. 402 is not a rule of prohibition, but rather a rule of inclusion of "all relevant evidence". Indeed, the rule itself makes clear that "except as otherwise provided in these rules or by law, all relevant evidence is admissible". Under N.J.R.E. 402 "unless relevant evidence is specifically excluded elsewhere in the Evidence Rules, or by statute, it is admissible. See Brenman v. Demello, 191 N.J. 18, 30 (2007). Thus, unless the intervenors "can point to a specific rule or exclusion, or unless the court agrees to exclude evidence under N.J.R.E. 403, the proffered witness may testify and the proffered

TOWNSHIP OF SOUTH BRUNSWICK

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

evidence is admissible.” Reinhart v. E. I. DuPont De Nemours, 147 N.J. 156, 164 (1996). There is a presumption in favor of admitting relevant evidence. Thus, any factors favoring an exclusion under N.J.R.E. 403 must substantially outweigh the probative value of the contested evidence. State v. E.D., 348 N.J. Super 336, 345 (App. Div.), certif. den. 174 N.J. 192 (2002).

The intervenors’ arguments in support of the motion to bar this evidence are based solely on the relevancy of the proffered evidence. N.J.R.E. 401 defines “relevant evidence” as “evidence having a tendency in reason to prove or disprove any fact of consequence to the determination of the action.” The test for relevance is broad and favors admissibility. State v. Deatore, 70 N.J. 100, 116 (1976). Courts have repeatedly stated that if the evidence offered makes the inference to be drawn more logical, then the evidence should be admitted unless otherwise excludable by a rule of law. See State v. Bakka, 176 N.J. 533, 545 (2003).

Asserted Basis for Exclusion

In the instant case, the intervenors argue that Dr. Powell’s opinion and testimony is irrelevant because “prior round methodologies did not include an analysis of the amount of housing that could be generated through inclusionary development.” That is essentially the only basis asserted to support the request that Dr. Powell’s testimony should be barred as irrelevant. Contrary to the intervenors’ argument, however, Dr. Powell’s testimony is highly relevant to issues that the intervenors themselves have injected into this case, and thus the Motion in Limine to bar Dr. Powell’s testimony should be denied.

Reasons to Deny the Motion

1) Limitations of Inclusionary Development

One of Dr. Powell’s opinions submitted in this case is that the inclusionary zoning strategy is not able to attract sufficient private capital to create the number of affordable housing units suggested by Fair Share Housing Center. Ultimately, it is the Township’s obligation to provide a realistic opportunity for affordable housing. The Second Round Rules provided a variety of compliance mechanisms that are available to the Township to meet that obligation. These mechanisms include inclusionary development, 100% affordable development, municipally-sponsored projects, alternative living arrangements, accessory apartments, purchase of housing units that have never been occupied and vacant housing units, write-down/buy-down units, age-restricted housing, etc. See N.J.A.C. 5:93-5.1, et seq. The Township has presented a plan which has a variety of compliance mechanisms that includes alternative living arrangements, write-down/buy-down (market to affordable), extensions of controls (which were specifically approved by the Supreme Court), inclusionary developments, acquisition and preservation of a mobile home park, 100% municipally-sponsored and tax-exempt bond-financed projects. The intervenors have consistently criticized the Township’s Plan because there was “not enough inclusionary development.” The intervenors have objected to the Township’s Plan, arguing that the various compliance mechanisms other than inclusionary zoning are not “realistic”, and that any municipally-sponsored programs are “unrealistic” projects, which should be rejected by the court.

TOWNSHIP OF SOUTH BRUNSWICK

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

The viability of increasing the amount of inclusionary developments in the Township's proposed Plan is therefore an issue in the case because of the intervenors' consistent position advocating for more inclusionary zoning. As such, Dr. Powell's opinions regarding the lack of viability of the inclusionary zoning strategy for producing affordable housing are directly relevant to support the Township's Plan and refute the intervenors' claims.

In his latest report dated April 25, 2016, even Dr. Kinsey states:

“Inclusionary zoning is certainly one strategy that municipalities may use in meeting their Fair Share obligations. But it is not the primary strategy. Nor is it given special status by the case law or the Fair Housing Act. Mount Laurel II has an extensive, and explicit, discussion of public subsidies. The Fair Housing Act lists inclusionary zoning as one mechanism that may be used to meet “all or part of a municipality's fair share” and also explicitly authorizes numerous other techniques such as “utilization of municipally-generated funds toward the construction of low- and moderate-income housing” and “rental housing units in a community residence for the developmentally disabled.” Kinsey report, April 25, 2016, at p. 90-91.

As such, even Dr. Kinsey agrees that inclusionary zoning is not the primary compliance mechanism typically utilized by a municipality in its Fair Share Plan. Despite this, the intervenors persist in their assertion that the Township's Plan is inadequate because it does not have “enough” inclusionary developments. Dr. Powell's testimony on the limitations of the inclusionary zoning strategy is therefore directly relevant to an assessment of the Township's Plan.

Moreover, Dr. Powell's testimony will assist the court by putting the Township's Plan -- 29 percent of which consists of inclusionary compliance mechanisms -- in proper perspective, given that private sector inclusionary developments have accounted for only 28 percent of all affordable units built in New Jersey during the period 1980-2014. See Kinsey report, at p. 92. As such, the Township's Plan has slightly more inclusionary zoning compliance mechanisms than would be expected given the 34-year history of affordable housing production in this State. Nevertheless, the intervenors continue to criticize the Township's Plan as not having “enough” inclusionary developments. Once again, Dr. Powell's opinion -- which in this instance appears to be supported by Dr. Kinsey as well -- will assist the court in evaluating the limited viability of additional inclusionary zoning compliance mechanisms in the Township's Plan. The Township has a right to present Dr. Powell's opinion and evidence on these limitations.

In addition, the intervenors have objected to the Township's Plan because it contains the Wilson Farm 9% low-income housing tax credit project and the RPM non-competitive 4% tax-exempt bond financing project. The intervenors argue that these do not present a realistic opportunity for development of affordable housing, and argue that these developments should be removed from the Plan and replaced with inclusionary development sites. Once again, Dr. Powell's testimony on this issue is relevant to a determination of the viability of these projects. In his April 25, 2016, report, Dr. Kinsey states:

TOWNSHIP OF SOUTH BRUNSWICK

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

“According to the most recent data from COAH from 2014, 100% affordable-municipally sponsored developments have been, by far, the most significant “strategy” for municipalities to meet their obligation, accounting for 57% of built affordable housing counted by COAH and attributable to the Mount Laurel doctrine...” Kinsey report, at p. 92-93.

In the Township’s Plan, the Wilson Farm and RPM projects together account for only 36.25 percent of the Township’s overall Plan, far below the percentage of total units built using these development strategies over the last 34 years. Arguing that these projects should be replaced with inclusionary zoning is contrary to even Dr. Kinsey’s report, which makes abundantly clear that historically 100% affordable-municipally sponsored projects are the “most significant strategy for municipalities to meet their obligation.” Replacing these with more inclusionary developments is contrary to Dr. Kinsey’s report, the historical data published by COAH and sound planning. Thus, Dr. Powell’s opinion on these issues will aid the court in determining that the Township’s proposed mix of compliance mechanisms actually enhances the realistic opportunity for development of affordable housing in South Brunswick.

2) Households with less than 20% of median income.

Dr. Powell also opines that households with income less than 20% of the median income should be excluded from a municipality’s obligation since those households will never have sufficient household income to afford to purchase even a low-income unit in an inclusionary development. To rebut this, Dr. Kinsey argues that there are “many mechanisms to meet fair share housing obligations [that] do serve households with incomes below 20% of the median.” Kinsey report, at p. 95. These include projects for the disabled or blind adults, group homes and other forms of special needs housing with supportive services, which Dr. Kinsey characterizes as “a key compliance mechanism, third most significant housing type strategy by units built.” Kinsey report, at p. 95-96.

Once again, the intervenors criticize the Township’s Plan for having group homes, and extension of controls on group homes, and not more inclusionary development. The Township once again has the right to present the opinion of Dr. Powell on the limitations of inclusionary development for producing housing for this sector of the population and establishing other compliance mechanisms to provide a realistic opportunity to address the needs of these households.

Without question, Dr. Powell’s opinion and his report constitute relevant evidence, having a tendency in reason to prove or disprove a fact of consequence to the determination of whether the Township’s Plan provides a realistic opportunity for affordable housing. Indeed, even Dr. Kinsey’s April 25, 2016, report supports the relevance of Dr. Powell’s opinions. Since this evidence is relevant, it is clearly admissible pursuant to N.J.R.E. 402 and 702. Inclusion of Dr. Powell’s opinion and testimony will certainly “assist the trier of fact to understand the evidence or to determine a fact in issue” in this case. As such, the motion to bar Dr. Powell’s opinion and testimony, and by extension that portion of the Econsult opinion that relies upon Dr. Powell’s opinion and testimony, should be denied.

TOWNSHIP OF SOUTH BRUNSWICK

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

3) South Brunswick Center financial analysis.

Wholly apart from this, Dr. Powell has also rendered a financial analysis of the Township's proposed development of the South Brunswick Center site. In the Township's Plan, a portion of the South Brunswick Center site is proposed for retail commercial, while another portion is proposed for residential. The residential component consists of 500 residential units in a mix of for-sale and rental products, with a 15 percent set-aside, on approximately 41 acres (a density of approximately 12 units/acre). It is the Township's obligation to show that this offers a realistic opportunity for the development of affordable housing.

Dr. Powell's financial analysis of this proposed development shows that such a proposal will provide the property owner with a significant return on investment, thus presenting a reasonable and realistic opportunity for development. The Township should not be prohibited from presenting Dr. Powell for this purpose.

Conclusion

For the foregoing reasons, the intervenors' motion to bar the testimony of Robert Powell, and those portions of the opinion of Peter Angelides which rely upon and/or refer to the opinion of Dr. Powell, should be denied.

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

Respectfully submitted,

s/Donald J. Sears

Donald J. Sears
Director of Law

DJS/lw

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