SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1499-17
A-1500-17
A-1501-17
A-1530-17
A-1540-17
A-1553-17

FAIR SHARE HOUSING CENTER, INC.,

Plaintiff-Respondent,

v.

THE ZONING BOARD OF THE CITY OF HOBOKEN,

Defendant-Respondent,

and

ADVANCE AT HOBOKEN, LLC,

Defendant/Third-Party Plaintiff-Respondent/ Cross-Appellant,

v.

CITY OF HOBOKEN and THE MAYOR and COUNCIL OF THE CITY OF HOBOKEN,

Third-Party Defendants-
Appellants/Cross-Respondents.

CITY OF HOBOKEN,

Defendant-Appellant/
Cross-Respondent,

v.

ARTISAN HOBOKEN
APARTMENTS, LLC,

Defendant-Respondent/
Cross-Appellant.

FAIR SHARE HOUSING
CENTER, INC.,

Plaintiff-Respondent,

v.

THE ZONING BOARD OF
THE CITY OF HOBOKEN,

Defendant-Respondent,

and

1415 PARK AVENUE, LLC and BIT
INVESTMENT SIXTY-ONE, LLC,

Defendants/Third-Party
Plaintiffs-Respondents

/Cross-Appellants,

v.

CITY OF HOBOKEN and THE MAYOR and CITY COUNCIL OF THE CITY OF HOBOKEN,

Third-Party Defendants-Appellants/Cross-Respondents.

FAIR SHARE HOUSING CENTER, INC.,

Plaintiff-Respondent,

v.

THE ZONING BOARD OF THE CITY OF HOBOKEN,

Defendants-Appellants/Cross-Respondent,

and

9TH MONROE, LLC and 900 MONROE HOBOKEN, LLC,

Defendants/Third-Party Plaintiffs-Respondents/Cross-Appellants,

v.

CITY OF HOBOKEN and THE MAYOR and CITY COUNCIL OF THE CITY OF HOBOKEN,

Third-Party Defendants-
Appellants/Cross-Respondents.

FAIR SHARE HOUSING
CENTER, INC.,

Plaintiff-Respondent,

v.

THE ZONING BOARD OF
THE CITY OF HOBOKEN,

Defendant- Appellant/
Cross-Respondent,

and

NEW JERSEY CASKET
COMPANY, INC.,

Defendant-Respondent/
Cross-Appellant.

Argued January 8, 2020 – Decided September 30, 2020
Remanded by Supreme Court July 9, 2021
Resubmitted May 26, 2022 – Decided June 9, 2022

Before Judges Haas, Mawla and Mitterhoff.

On appeal from the Superior Court of New Jersey, Law Division, Hudson County, Docket Nos. L-3643-11, L-5052-11, L-0733-12, L-1978-12 and L-4563-15.

Weiner Law Group, LLP, attorneys for appellants/cross-respondents City of Hoboken and

Mayor and Council of City of Hoboken (Ronald D. Cucchiaro, of counsel and on the briefs; Richard Brigliadoro, Donald A. Klein and R. Tombalakian, on the briefs).

Davison, Eastman, Munoz, Lederman & Paone, PA, attorneys for appellant/cross-respondent Zoning Board of the City of Hoboken (Dennis M. Galvin, on the briefs).

John J. Curley, LLC, attorneys for respondent/cross-appellant Artisan Hoboken Apartments (John J. Curley, of counsel and on the briefs; Jason M. Hyndman, on the briefs).

Gibbons PC, attorneys for respondent/cross-appellant Advance at Hoboken LLC (Jennifer Phillips Smith and Cameron W. MacLeod, on the briefs).

Connell Foley LLP, attorneys for respondents/cross-appellants 1415 Park Avenue, LLC, 9th Monroe, New Jersey Casket Company, 900 Monroe Hoboken and BIT Investment (Kevin J. Coakley and Nicole B. Dory, of counsel and on the briefs; Michael Affrunti, on the briefs).

Kevin D. Walsh, attorney for appellant/respondent Fair Share Housing Center, Inc.

PER CURIAM

This matter returns to us following a remand by the Supreme Court for consideration of "the merits of the substantive arguments raised by

[respondents[1]], which arguments were not adjudicated" in our prior opinion, Fair Share Housing Center v. Zoning Board of Hoboken, (Fair Share Housing II), No. A-1499-17 (App. Div. Sept. 30, 2020), "based on [our] holding on procedural grounds." Fair Share Hous. Ctr. v. Zoning Bd. of Hoboken, 247 N.J. 391 (2021); Fair Share Hous. Ctr. v. Zoning Bd. of Hoboken, 247 N.J. 392 (2021); Fair Share Hous. Ctr. v. Zoning Bd. of Hoboken, 247 N.J. 393 (2021). The Court also directed that we consider certain documents respondents included in their appendices concerning the question of whether there was a need for additional affordable housing in the City of Hoboken (City). Ibid. During the course of the remand, we granted respondents 1415 Park Avenue, LLC, BIT Investment Sixty-One LLC, 9th Monroe, LLC, and New Jersey Casket Company, Inc.'s (the 1415 Park respondents) motion to supplement the record to include additional documentation relating to the City's affordable housing need.

We have carefully considered the four substantive arguments respondents raised in Fair Share Housing II. For the reasons that follow, we conclude that respondents failed to show they detrimentally relied on the City's failure to apply

[1] We refer to the petitioners in the Supreme Court as "respondents" here to maintain consistency with our prior opinion.

its 1988 Affordable Housing Ordinance (AHO) to prior developments. Because the provision of affordable housing is an essential municipal function, the trial court erred in holding that the City was equitably estopped from applying the ten percent set-aside required by the AHO. The court also erred in concluding the AHO could not be applied to respondents under the doctrine of selective enforcement because this doctrine only applies to a "class-of-one," and because there was no evidence in the record of any animus toward respondents by the City.

We also reject respondents' contention that the City did not have the authority to require them to provide affordable housing because Hoboken did not have a need for additional units. Neither the Fair Housing Act (FHA), N.J.S.A. 52:27D-301 to -329, nor Mount Laurel[2] case law bar a municipality from requiring developers to provide affordable housing units over and above the affordable housing need established by the Council on Affordable Housing (COAH).

Finally, respondents argue they would suffer a taking of their property if the AHO were enforced because the AHO did not contain the requisite

[2] S. Burlington Cnty. NAACP v. Twp. of Mount Laurel, (Mount Laurel II), 92 N.J. 158 (1983); S. Burlington Cnty. NAACP v. Twp. of Mount Laurel, (Mount Laurel I), 67 N.J. 151 (1975).

"compensating benefits" for the required set-asides. This argument lacks merit because the resolutions approving respondents' applications permitted them to increase the density of their developments and granted each of them a use variance. Therefore, respondents did receive valuable, compensating benefits.

I.

We begin by setting forth the pertinent procedural history. In July 2011, Fair Share Housing Center, Inc. (Fair Share) filed a complaint in lieu of prerogative writs for declaratory and injunctive relief against Advance at Hoboken, LLC (Advance) and the City's Zoning Board, challenging the Board's approval of Advance's final site plan application for failure to require a ten percent affordable housing set-aside as required by the City's AHO. Fair Share filed similar complaints in 2011 and 2012 regarding final site plan approvals granted to 1415 Park Avenue, LLC (1415 Park), 9th Monroe, LLC (9th Monroe), and New Jersey Casket Company, Inc. (N.J. Casket). The record does not contain an answer from the Zoning Board.

Advance filed an answer and a third-party complaint against the City alleging that the AHO was null and void because it was not approved by COAH. In addition, Advance claimed that: (1) the City engaged in selective enforcement of the AHO in violation of 42 U.S.C. § 1983 and the New Jersey

Civil Rights Act, N.J.S.A. 10:6-1 to -2; (2) requiring a ten percent affordable housing set-aside without any benefit constituted inverse condemnation; and (3) the City was estopped from enforcing the AHO because it did not seek to enforce the ordinance before 2011.

1415 Park and 9th Monroe filed nearly identical third-party complaints against the City. The City filed answers to the third-party complaints. N.J. Casket filed an answer but no third-party complaint.

On June 1, 2012, the trial court rendered a decision declaring the AHO invalid because it had not been certified by COAH. On the same date, the court entered an order enjoining the City and the Zoning Board from enforcing the AHO, and dismissed the complaints filed by Fair Share in the Advance and 1415 Park litigation in their entirety, with prejudice. The court denied Fair Share's motion for reconsideration on November 9, 2012, and issued a final judgment on the same date, which replaced the June 1, 2012 order that had stated that all counts in the third-party complaints had been resolved, and reiterated the dismissal of the Fair Share complaints with prejudice.

The trial court also issued an order granting final judgment to 9th Monroe and dismissed Fair Share's complaint against 9th Monroe with prejudice. A

similar order of final judgment was entered as to N.J. Casket. Fair Share and the City filed notices of appeal in all the actions.

On July 28, 2015, this court reversed the order invalidating the AHO. We remanded the matter "to the trial court for such further proceedings as may be necessary to address and adjudicate to finality the remainder of the issues raised by defendants/third-party plaintiffs." Fair Share Hous. Ctr. v. Zoning Bd. of the City of Hoboken, (Fair Share Housing I), 441 N.J. Super. 486, 513 (App. Div. 2015), certif. denied, 224 N.J. 246 (2016).

In November 2015, the City filed a complaint against Artisan Hoboken Apartments, LLC (Artisan), the purchaser of the N.J. Casket property, seeking the developer's compliance with the AHO. Artisan filed an answer in January 2016, which included a counterclaim alleging an unconstitutional taking. On December 1, 2016, the Artisan action was ordered consolidated with the other cases.

In addition, BIT Investment Sixty-One, LLC (BIT) and 900 Monroe Hoboken, LLC (900 Monroe), as successors to 1415 Park and 9th Monroe, respectively, were added as defendants-third party plaintiffs. The court denied the City's motion to remand the matters to the Zoning Board.

After additional discovery had been taken, Fair Share, the City, and respondents all moved for summary judgment. The court heard oral argument on September 29, 2017. On October 16, 2017, the court issued a decision and signed orders granting respondents' motions for summary judgment.

The City, Fair Share, and the Zoning Board filed notices of appeal from these orders. Advance, Artisan, and the 1415 Park respondents filed notices of cross-appeal. We consolidated the appeals.

In our decision in Fair Share Housing II, we held that the trial court "misconstrued the scope of the remand ordered by this court [in Fair Share Housing I] by allowing [respondents] to relitigate the enforceability of the City's 1988 AHO." (slip op. at 3). In addition, we held that respondents "were also precluded from challenging the enforcement of the AHO based on their expressed waiver of those issues in the 2012 litigation." Ibid.

Advance, Artisan, and the 1415 Park respondents filed petitions for certification. As noted above, the Supreme Court issued virtually identical orders remanding the matter to this court to consider "the merits of the substantive arguments raised by" respondents.

Respondents raised the following arguments in Fair Share Housing II that were not addressed by the court in its decision: (1) the trial court correctly

granted respondents summary judgment because the doctrine of equitable estoppel barred enforcement of the AHO; (2) the trial court correctly granted respondents summary judgment based on the selective enforcement doctrine; (3) the trial court should have concluded the City lacked the authority to enact the AHO set-asides because the City had satisfied its affordable housing need; and (4) the trial court should have concluded respondents suffered a taking without just compensation because the AHO did not contain any provisions for compensatory benefits.

In reviewing these contentions, the Court also directed us to consider the documents it declined to strike from respondents' appendices. These documents support respondents' position that the City had satisfied its need for additional affordable housing units. We later granted the 1415 Park Avenue respondents' motion to supplement the record with a settlement agreement entered in related Law Division litigation.[3] We have considered all of these documents. In doing so, we recognize that the City and Fair Share continue to dispute whether the City has satisfied its need for affordable housing. However, we make clear that for purposes of this opinion on remand, we have presumed that the City has no

[3] In re Matter of the Application of the City of Hoboken, Docket No. HUD-L-2664-19.

need for additional affordable housing units, and had no need during the relevant time periods when it considered respondents' development applications.

II.

To place the four issues raised by respondents in context, we now detail the salient facts from the record. The City adopted the AHO in May 1988. The AHO provided three alternatives for the creation of affordable housing: a ten percent set-aside of the total number of an onsite development; housing units offsite in the City at the discretion of the relevant land use board; or a financial contribution in lieu of constructing affordable housing units at the discretion of the relevant land use board. The ordinance further provided:

> All development of residential property in the City of Hoboken, taking place either through the construction of new structures on vacant land or through the substantial rehabilitation of existing structures except as herein provided below, shall include low and moderate income housing in the proportions specified below and consistent with the standards and conditions of this Ordinance.

In addition, the AHO provided that all future residential redevelopment plans in redevelopment areas "shall set forth affordable housing development standards and requirements identical to the standards set forth herein." The AHO also stated that "[n]o preliminary site plan approval shall be granted until and unless the plan has been approved by the [Planning] Board."

The AHO established a Housing Trust Fund, solely for the purpose of financing affordable housing. In addition, the AHO called for an affordable housing corporation to be established to "develop, implement, administer and monitor" approved affordable housing projects. Finally, the AHO required the City's governing body to review the economic impact of the ordinance on an annual basis.

Regarding the enactment of the AHO, former Hoboken Councilman Joseph Della Fave stated in a certification: "The housing crisis was real. It was the talk of the town, constantly in the news . . . . [W]e heard over and over again about the displacement of residents due to rapidly rising real estate values and housing prices." In a letter to Fair Share, Della Fave added that the primary intent of the AHO was to immediately produce more affordable housing and not to generate funds through payments in lieu of housing that would produce housing at a future time.

In February 1995, the Planning Board adopted a master plan reexamination report which stated that the AHO had been invalidated as a result of the Appellate Division's decision in Holmdel Builders Association v. Township of Holmdel, 232 N.J. Super. 182 (App. Div. 1989), aff'd in part, rev'd in part, 121 N.J. 550 (1990). It recommended that the housing plan element of

the zoning ordinance be revised to reflect that decision. The 1998 and 2002 master plan reexamination reports also recommended the repeal or replacement of the AHO. In addition, the 1998 master plan re-examination report stated that under COAH's calculations, the City would have a surplus of 541 affordable housing units in 1999. However, the City did not repeal the AHO.

Instead, the 2004 master plan stated that one of its goals was to update and enforce existing affordable housing regulations in the zoning ordinance. The plan noted that the City "already provides measures mandating the creation of new affordable units in most developments, as well as enabling the collection of money in an affordable housing trust fund." Another goal was to provide additional affordable units in new residential developments. The 2004 master plan listed approximately 5,000 affordable housing units in the municipality that were funded under state and federal programs.

Fred Bado, Hoboken's Director of Community Development from 1976 to 1989, and from 2001 to 2010, stated in his deposition that he could not recall whether the City created an affordable housing corporation. The 1995 master plan reexamination report's reference to the AHO as being invalidated by the Appellate Division decision in Holmdel Builders was one reason the corporation was never established. Bado was not aware of any development that had been

required to have the ten percent set-aside in the AHO. He claimed that low income tax credits and funds from HUD "took care of whatever developments were in terms of affordable housing. . . ." Bado further claimed that the AHO was not enforced due to "political activities[.]"

Brandy Forbes, Hoboken's Director of Community Development beginning in 2010, sent a memorandum to Hoboken's City Council in January 2011 calling the AHO "unnecessary" and not compatible with existing affordable housing regulations. That month, the Hudson Reporter carried a story in which Forbes stated that the AHO was "not enforceable or valid anymore." However, according to Forbes, the City Council determined not to repeal the AHO, but rather to revise it.

Fair Share wrote a letter to Hoboken Mayor Dawn Zimmer, dated March 25, 2011, addressing the "validity and enforceability" of the AHO. Fair Share stated there were no impediments to the enforcement of the AHO, and it "urge[d]" the City to enforce the ordinance.

Zimmer wrote a letter to the City council members in August 2012 stating that she was moving towards awarding a contract for an affordable housing planner and claiming that the AHO had not been enforced until she came into office. The letter stated that "[t]he high density buildings for which variances

have been approved by the Zoning Board during that period were not required to provide affordable housing."

In October 2012, the AHO was repealed, and the City adopted a new affordable housing ordinance. The ordinance stated that use variances "constitute a compensatory benefit when a mandatory set-aside of affordable housing is required . . . ." It further recognized the need for mandatory set-asides, although restricting them to applications that required a use variance. The ordinance applied to applications for development filed after October 18, 2012. The parties concede that the 2012 ordinance does not apply to the applications involved in this appeal.

Forbes stated in her deposition that the City did not adopt an affordable housing trust fund until August 2014. A waterfront redevelopment plan in 2004 and a redevelopment plan for the public works garage in 2006 required the onsite creation of affordable housing units. For every eight marketable units, one affordable housing unit was to be created.

Fair Share claimed in its statement of material facts that only three developments containing affordable housing were constructed in Hoboken between May 1988 and March 2014, and that no project was constructed with the ten percent set-aside. It claimed that 247 affordable housing units were

added between 1988 and 2011. A survey conducted by Hoboken in 2014 confirmed that number.

A. THE DEVELOPMENTS

The proposed developments at issue in these appeals have all been constructed and total 546 housing units. They opened between 2014 and 2017.

1. ADVANCE

Advance owned property at 1316-1330 Willow Avenue. The property was located in the R-2 residential zone. The prior owner had been granted preliminary site plan approval in 2006, with variances, to construct a mixed-used residential and retail project. The resolution granting that approval noted that variances had been granted for, among other things, lot coverage, building height, number of stories and number of dwelling units, 104 where fifty-four were permitted in the zone. The resolution did not mention affordable housing as a condition of approval, although it conditioned the approval on compliance with the necessary requirements of the zoning ordinance and the Municipal Land Use Law (MLUL), N.J.S.A. 40:55D-1 to -136.

In 2010, the Zoning Board passed a resolution granting Advance preliminary site plan approval, which included a variance for 140 dwelling units, thirty-six more than requested by Advance's predecessor. The Board noted that

the site "is particularly well suited for the increased density." In May 2011, the Zoning Board granted Advance final site plan approval for the construction of 140 dwelling units after a hearing in which Advance's architect testified that the project would adhere to the AHO. The resolution of approval stated that Advance was responsible for adhering to "the Municipality's and State's affordable housing regulations."

2. 1415 PARK/BIT

1415 Park owned the property at 1415 Park Avenue. In 2007, the Zoning Board granted preliminary site plan approval and a variance to permit 1415 Park to demolish an existing parking garage and construct a twelve-story mixed-use development project that included 180 residential units, retail space, an elementary school and parking spaces. The property was located in the I-1(W) industrial zone, which did not permit residential uses. The approval was conditioned on compliance with the City's zoning ordinances.

A second application, which included more residential units, was approved by the Zoning Board in 2011. The resolution approving the application stated that 1415 Park was responsible for obtaining all other necessary government approvals, including "the Municipality's and State's affordable housing regulations[.]" In August 2012, the Zoning Board granted

final site plan approval conditioned on the approval of an amendment to 1415 Park's preliminary site plan that the applicant would comply with the AHO should the Appellate Division reverse the trial court's determination that the ordinance was invalid. BIT subsequently took title to the property.

3. 9TH/900 MONROE

9th Monroe owned property at 900 Monroe Street, which consisted of several lots. In October 2005, the Zoning Board granted 9th Monroe preliminary site plan approval and variance relief for the construction of a mixed-use development that included 125 residential units in an I-1 industrial zone which did not permit residential uses. In June 2007, the Zoning Board granted 9th Monroe final site plan approval and variance relief for the construction of a mixed-use development that included 112 residential units, 7,608 square feet of retail space and ten townhouses. The approval resolution did not mention affordable housing, but stated that the applicant "must comply with the necessary requirements" of the zoning ordinances.

In mid-2011, 9th Monroe applied to amend the site plan approval to request additional variances and to expand the number of dwelling units to 135. The resolution approving these requests again stated that the applicant was

responsible for any other necessary approvals including "the Municipality's and State's affordable housing regulations."

The Zoning Board granted final site plan approval in December 2012 conditioned on the applicant complying with the AHO should the Appellate Division reverse the trial court's order declaring the AHO null and void. 900 Monroe purchased the property from 9th Monroe in December 2013.

4. N.J. CASKET/ARTISAN

N.J. Casket owned several lots on Clinton Street and received preliminary site plan approval from the Zoning Board in September 2007 for the construction of a "mixed-use live-work loft building," that included numerous variances. The property was located in the I-1 zone, which prohibited residential uses. N.J. Casket received a use variance to permit the inclusion of sixty-four residential units. While the approval resolution did not mention the AHO, it required the applicant to comply with the requirements of the zoning ordinance and the MLUL.

In January 2011, N.J. Casket received Zoning Board approval to amend the plan, in part to increase the number of residential units from fifty to fifty-nine. The approval resolution additionally required compliance with COAH's regulations. N.J. Casket received final site plan approval in February 2012,

which required that it comply with "the Municipality's and State's affordable housing regulations." A previous Board approval had contained the same condition. Artisan took title to the property in 2014.

B. EXPERT EVIDENCE

Shirley Bishop, the City's planning expert, stated in her certification that affordable housing in Hoboken between 1988 and 2011 had been financed by a low income housing tax credit from the New Jersey Housing and Mortgage Finance Agency, as well as by financing from the U.S. Department of Housing and Urban Development.

David Kinsey, a licensed professional planner, prepared a report on behalf of Fair Share and the City. He concluded that Hoboken had a present need obligation of 241 affordable housing units and that the AHO remained valid. In a certification, Kinsey stated that in inclusionary developments, which combine market rate and affordable housing units, use variances and density bonuses, such as increases in the number of units and in height and floor area, are effective and economically feasible tools. COAH's second round rules established a presumptive minimum gross density of six units per acre with a twenty percent affordable housing set-aside, and ten units per acre with a fifteen percent set-aside. Kinsey concluded that the densities permitted by the City's

general zoning ordinance were "significantly higher than the presumptive densities mandated by COAH . . . ." He added:

> The maximum gross density of [sixty-six] units per acre throughout most of Hoboken is ten times the COAH minimum presumptive gross density of six . . . units per acre. Furthermore, Hoboken's mandatory [ten percent] set-aside is one-half of the [s]econd [r]ound COAH presumptive maximum set-aside. Consequently, the Ordinance is consistent with COAH rules. In brief, COAH prescribes significantly lower inclusionary densities than Hoboken and higher set-asides.

Jon Brody, an appraiser, submitted a report on behalf of Advance in response to Kinsey's report. Brody questioned Kinsey's conclusion that the permitted residential densities approved by the Zoning Board would generate an economically feasible project, and that any increase in residential density would constitute a "bonus" to a developer. Brody opined that "[n]o reasonable appraiser or developer could conclude that a project is economically feasible by analyzing only the residential density permitted by the zoning code. . . . [A] use variance or density variance cannot be presumed to be an 'incentive' without further detailed inquiry into the underlying economic feasibility of the project."

Brody also stated in his deposition that he did not see how Kinsey concluded that the approved variances created value without analyzing the feasibility of Advance's project. Brody stated that while he was not provided

with information regarding the financial feasibility of the project, he believed Advance's project was financially feasible based on seeing it and on the supply and demand for housing in Hoboken. He said the same with respect to the other three projects. He did not evaluate the effect the set-asides would have on the financial feasibility of any of the projects.

In a rebuttal report, Kinsey calculated that Hoboken had a present need for 241 affordable housing units. This obligation could be satisfied through rehabilitation of existing units or constructing new units. As to the developments in question, he concluded that Advance had received significant compensating benefits including a 167% increase in permitted housing units. 1415 Park received a use variance as well as an eighteen percent increase in the number of housing units. 900 Monroe received a use variance, and an increase in the height of the proposed building to three times of what was permitted, resulting in a thirty-eight percent increase in the number of permitted housing units. Artisan received a use variance, an increase in the height of the building to six stories where four were permitted, resulting in a thirty-eight percent increase in the number of permitted housing units.

Creigh Rahenkamp, a professional planner and expert for Artisan, stated in his deposition that he was not provided with information to evaluate the

economic feasibility of the developments with the ten percent set-aside. He stated that he found no improper motivation on the part of the City in adopting the AHO.

C. FAIR SHARE HOUSING I

In Fair Share Housing I, the court stated that while each of the developers in the case "received significant relief from the City's zoning laws in the form of variances," it was "compelled to address the issues raised by Fair Share in order to dispel any doubt concerning the enforceability of the City's affordable housing ordinance." 441 N.J. Super. at 486-87. The court held that the trial court erred in concluding that the FHA required that the City submit the AHO to COAH for approval. Id. at 487. It also found that the trial court erred in invalidating the provision for voluntary payments by developers in lieu of compliance with the ordinance's affordable housing requirements. Id. at 488. The court found the AHO to be enforceable and remanded "for the trial court to adjudicate the remaining legal issues raised by the parties." Id. at 487.

D. TRIAL COURT'S DECISION ON REMAND

In its decision, the trial court initially held that the law of the case doctrine applied to the question of the facial validity of the AHO. However, it held that the doctrine did not apply to the questions of whether respondents received a

compensatory benefit, equitable estoppel, and selective enforcement. The court rejected respondents' arguments regarding compensatory benefits and taking without compensation. It noted that each respondent's plans were granted subject to compliance with all relevant ordinances, including the FHA, and that they were granted variances, "and significant variances at that." It further cited the Appellate Division's statement that all of respondents' plans were accepted on the condition that they obtain all other required approvals, including the City's and the State's affordable housing regulations. In so holding, the court rejected the City's and Fair Share's claim that the exhaustion of administrative remedies doctrine barred respondents from raising the lack of compensatory benefits argument.

However, the trial court agreed with respondents' estoppel argument, citing statements made throughout the years by City officials:

> The statements proffered by the developers are statements made by City officials in their official capacities. This includes statements made to the Hudson Reporter by the Zoning Board's former Attorney, language directly from the 1995 Reexamination Report, statements made by Brandy Forbes, the Director of Community Development, former Councilman Joseph Della Fave, and a letter from Mayor Dawn Zimmer to the City Council advocating that the Ordinance be replaced as it was never enforced. Given the multitude of officials that made statements regarding the invalidity of the

> Ordinance, it is the view of this [c]ourt that it was reasonable for the developers to believe that the Ordinance would not be enforced against them.

The court further found that application of estoppel would not inhibit an essential government function because the "continual non-enforcement" of the ordinance for over two decades is "cause to believe that it is not an essential government function."

In addition, the trial court found that the ordinance was improperly selectively enforced against respondents under federal law:

> Third Circuit precedent allows individuals to file a selective enforcement case under a class[-]of[-]one theory by showing that a State actor treated him differently from similarly situated individuals without a rational basis for the different treatment. . . . Between the enactment of the Ordinance and today the only developers against whom enforcement was sought are the developers in these cases.

The court concluded:

> The argument is similar, in theory, to the estoppel claim. The idea being that the non-enforcement of the Ordinance makes it unfair to enforce against the developers, and that the developers could not have anticipated that they would be expected to comply with provisions that have never been enforced. The Ordinance at issue here was, indeed, selectively enforced making the Ordinance invalid as applied.

Thus, the court granted respondents' motions for summary judgment "as the Court has found that the ordinance, while facially valid as per the Appellate Division decision, is invalid as applied due to the selective enforcement thereof."

Finally, the trial court found that both 1415 Park and 9th Monroe had standing because they still were at risk of suffering financial loss if the AHO was imposed. It also rejected the City's argument that the statute of limitations applied to respondents because they "did not believe that they would actually be compelled . . . to comply with it, and therefore it is reasonable that the developers had no way of knowing a challenge [was] necessary."

E. FAIR SHARE HOUSING II

As noted above, this court reversed the trial court's decision and remanded the matter for further proceedings. The Supreme Court later directed us to consider respondents' substantive arguments.

III.

With regard to our consideration of respondents' four substantive arguments, our standard of review is well settled. Our review of a ruling on

summary judgment is de novo, applying the same legal standard as the trial court, namely, the standard set forth in Rule 4:46-2(c). Conley v. Guerrero, 228 N.J. 339, 346 (2017). Thus, we consider, as the trial court did, whether "the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Town of Kearny v. Brandt, 214 N.J. 76, 91 (2013) (quoting Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995)).

If, as here, there is no genuine issue of material fact, we must then "decide whether the trial court correctly interpreted the law." Dickson v. Cmty. Bus Lines, 458 N.J. Super. 522, 530 (App. Div. 2019) (citing Prudential Prop. & Cas. Co. v. Boylan, 307 N.J. Super. 162, 167 (App. Div. 1998)). "We accord no deference to the trial judge's conclusions of law and review these issues de novo." Ibid.

IV.

Respondents contend the trial court correctly determined that the City was estopped from enforcing the AHO against them. We disagree.

There is no dispute that the AHO's ten percent set-aside was not enforced against any development application from the time it was enacted in 1988 until

these applications in 2011 and 2012. Nor is there any dispute that no affordable housing units resulted from the AHO, or that no affordable housing corporation and no affordable housing trust fund were established, as called for by the AHO. The question is whether the City's failure to enforce the ten percent set-aside requirement in the AHO prevented it from requiring the set-asides in these developments. That presents a legal question inasmuch as there are no genuine disputes of material fact as to the City's lack of enforcement.

To establish equitable estoppel, parties must prove that an opposing party engaged in conduct, either intentionally or under circumstances that induced reliance, and that they acted or changed their position to their detriment. Knorr v. Smeal, 178 N.J. 169, 178 (2003). Equitable estoppel is invoked in the interests of justice and common fairness. Ibid.

However, equitable estoppel is rarely invoked against a public entity, and then only in the most compelling circumstances, "particularly when estoppel would 'interfere with essential governmental functions.'" O'Malley v. Dep't of Energy, 109 N.J. 309, 316 (1987) (quoting Vogt v. Borough of Belmar, 14 N.J. 195, 205 (1954)). "Consideration of whether equitable estoppel should be applied against a [public entity] is a fact-sensitive inquiry." In re Johnson, 215 N.J. 366, 386 (2013). In evaluating this question,

> the ultimate objective [is] fairness to both the public and the individual property owner and that it [is] necessary to strike a proper balance between the interests of the plaintiff and the right and duty of the municipality to promote the public welfare of the community through proper planning and zoning.
>
> [Gruber v. Mayor & Twp. Comm. of Raritan Twp., 39 N.J. 1, 15 (1962).]

Respondents claim that "the City's course of conduct over twenty years reasonably created an objective impression that the AHO would not be enforced against only" their projects because "the AHO had undisputedly never been enforced during that time period," including the initial approvals in these cases. Specifically, they point to the statements by City officials that the AHO was unnecessary, not enforceable, and no longer valid. That appears to be in large part due to the Planning Board's statement in the 1995 master plan report that the AHO had been invalidated as a result of the Appellate Division's decision in Holmdel Builders, 232 N.J. Super. at 182.

However, that conclusion was incorrect, as the Supreme Court reversed the Appellate Division's ruling and held that the imposition of affordable housing fees on developers as a condition for developmental approval was not improper. Holmdel Builders, 121 N.J. at 550. In so doing, the Court noted that

"development fees are the functional equivalent of mandatory set-asides . . . ." Id. at 573.

Only justified and reasonable reliance warrants the application of equitable estoppel against a public entity. Palatine I v. Plan. Bd. of Montville, 133 N.J. 546, 563 (1993). The Supreme Court has held that "[o]rdinances are not repealed by inaction. And it is difficult to conceive of a general estoppel to enforce a regulatory measure merely because of a general failure to compel compliance." Kennedy v. City of Newark, 29 N.J. 178, 191 (1959) (internal citation omitted). Rather, an ordinance remains in effect until specifically repealed or superseded by another enactment. Inganmort v. Borough of Fort Lee, 72 N.J. 412, 417 (1977). Moreover, statements by public officials do not bind a municipality. Glen Rock Realty Co. v. Bd. of Adjustment. of Glen Rock, 80 N.J. Super. 79, 89 (App. Div. 1963). Therefore, respondents did not have a justified and reasonable basis to rely on the lack of enforcement of the ordinance and on the statements by City officials regarding the ordinance's validity.

Further, respondents failed to show how they were harmed by the delay in enforcing the ordinance. The harm would be having to provide affordable housing units. However, that would not require them to reconfigure their developments, which have been constructed. They would only need to lower

the rent on ten percent of their units. The question then would be whether they received compensation for providing such housing in the form of greater densities or reduced costs. We address that issue below.

The trial court relied on Bonaventure International Inc. v. Borough of Spring Lake, 350 N.J. Super. 420, 425 (App. Div. 2002), which involved an ongoing dispute between the owner of a nonconforming use, a restaurant, and nearby homeowners. The Appellate Division held that the Borough was estopped from issuing a cease and desist order to the restaurant. Ibid. It noted that there was no reason for the restaurant owner to believe that a use variance was required because the Borough took no action while the restaurant expanded over the years. Id. at 437. During those years, the owner obtained a license and a building permit to renovate the kitchen. Ibid. In addition, the Borough's Zoning Board was presented with several applications over a seven-year period, none of which questioned the restaurant's status as a permitted nonconforming use. Ibid. However, the court further held that the owner would have to apply for a use variance to conduct on- and off-premises catering. Id. at 438.

Continuation of the prior nonconforming use in Bonaventure has little application to the question of the enforceability of the AHO here. In any event, while the restaurant was faced with closure if required to obtain a use variance

for its existing operations, respondents would only have had to provide affordable housing units, for which they had already received compensatory benefits, if the AHO were enforced. Therefore, no harm was established here as it was in Bonaventure.

The cases relied on by respondents are also distinguishable. Middletown Township PBA v. Township of Middletown, 162 N.J. 361, 367-373 (2000), involved a municipality that was held to be estopped from denying retirement health benefits to an employee where it had previously approved and begun paying benefits, and these benefits were set forth in the applicable collective bargaining agreement. No such direct representations were made here regarding the applicability of the set-aside.

Nor does Vogt, also relied on by respondents, support estoppel in this case. There, the plaintiff suffered injury in the performance of his public volunteer fire duty, but was denied workers' compensation coverage because he was not eighteen as required by the municipal ordinance. 14 N.J. at 197-98, 204. However, because the municipality had the established practice of recognizing "junior" fire fighters as active fire fighters, the Court held that the municipality was estopped from not granting the plaintiff workers' compensation. Id. at 204. It noted that the plaintiff had suffered an injury "in

the performance of the public fire duty which he assumed in good faith with its acquiescence under established practice." Id. at 207. No such public safety employment is involved here.

In Scardigli v. Borough of Haddonfield Zoning Board of Adjustment, 300 N.J. Super. 314, 317-18 (App. Div. 1997), a property owner was told by the Planning Board attorney that the lots he owned could be sold as a single lot. The Appellate Division held that while the attorney did not have the statutory authority to offer that interpretation, the municipality was estopped from setting aside the subsequent conveyance based on that advice because the statutory two-year limit had passed. Id. at 319. Here, no such direct advice was given and there is no statutory bar preventing enforcement of the AHO.

Moreover, estoppel is not warranted because, contrary to the trial court's conclusion, the provision of affordable housing is obviously an essential government function. The provision of affordable housing has been described as essential in promoting the general welfare in all local land use regulations. Homes of Hope, Inc. v. Eastampton Twp. Plan. Bd., 409 N.J. Super. 330, 338 (App. Div. 2009). "The public policy of this State has long been that persons with low and moderate incomes are entitled to affordable housing[,]" Id. at 337, and that the supply of affordable housing should be increased. Bi-County Dev.

of Clinton, Inc. v. Borough of High Bridge, 174 N.J. 301, 326 (2002). That public policy has been described as "strong." Franklin Tower One v. N.M., 157 N.J. 602, 608 (1999). In addition, a municipality has a constitutional obligation to provide realistic housing opportunities for people of low and moderate income. Mount Laurel II, 92 N.J. at 208-22. Viewed in this light, it is clear that the AHO's set-aside requirement was an essential governmental function.

Respondents fail to cite support for their assertions that the passage of time, a failure to enforce, and the number of affordable housing units in the municipality render an affordable housing ordinance unessential for purposes of estopping a public entity's enforcement of that ordinance. Therefore, we reject these contentions and conclude the City was not estopped from enforcing the AHO.

Finally on this point, the 1415 Park respondents argue that the Zoning Board was without the authority to require the set-asides because the AHO only referred to the Planning Board. However, the MLUL provides that a zoning board "shall have the power to grant, to the same extent and subject to the same restrictions as the planning board, subdivision or site plan approval . . . whenever the proposed development requires approval" of a use variance. N.J.S.A. 40:55D-76(b). Thus, if an application before a zoning board involves, as here,

an application for site plan approval normally reserved to the planning board in conjunction with one for a use variance, both applications may be heard by the zoning board. Michelotti Realty Co. v. Saddle Brook Twp. Zoning Bd., 191 N.J. Super. 568, 571-72 (App. Div. 1983). Therefore, the Zoning Board had the power to require the ten percent set-asides.

V.

Respondents next argue that the trial court properly ruled that the City's decision to apply the AHO to them constituted impermissible selective enforcement. Again, we disagree.

In New Jersey, two elements must be established to succeed on a claim of unconstitutional selective enforcement of an ordinance: a discriminatory effect and a motivating discriminatory purpose. United Prop. Owners Ass'n of Belmar v. Borough of Belmar, 343 N.J. Super. 1, 25 (App. Div. 2001). The conscious exercise of some selectivity in enforcement is not a constitutional violation unless the decision to prosecute is based on an unjustifiable standard such as race, religion, or other arbitrary classification. Twp. of Pennsauken v. Schad, 160 N.J. 156, 183 (1999). The party asserting selective enforcement has a heavy burden of proof. Twp. of Saddle Brook v. A.B. Fam. Ctr., 307 N.J. Super. 16, 23-24 (App. Div. 1998).

Here, respondents failed to offer any motivating discriminatory purpose, or any evidence of one, on the part of the City in applying the AHO to their developments. Therefore, respondents failed to carry their heavy burden of proving selective enforcement under New Jersey law.

The trial court found that the federal "class-of-one" doctrine was applicable, and as a result, respondents were impermissibly subjected to selective enforcement. In Village of Willowbrook v. Olech, 528 U.S. 562, 564 (2000), the Supreme Court recognized the class-of-one doctrine as an aspect of equal protection. The theory permits a plaintiff to bring an equal protection claim alleging that it was intentionally treated differently from others similarly situated and there was no rational basis for the difference in treatment. Ibid. Persons are similarly situated when they are alike in all relevant aspects. Radiation Data, Inc. v. N.J. Dep't of Env't Prot., 456 N.J. Super. 550, 562 (App. Div. 2018). "New Jersey courts likewise have recognized such a class-of-one theory, where it is supported by the facts." Ibid.

However, the present case does not involve one entity or individual. Rather, four developers are involved.[4] Thus, by definition, the class-of-one

[4] The City claims that another developer was also subject to the AHO in 2009. However, the resolution approving that development did not state that the set-aside in question was the result of the application of the AHO.

doctrine is not applicable. Respondents offer no case law applying the doctrine to more than one individual or entity. Moreover, the trial court read Willowbrook too broadly. Justice Breyer, in his concurrence in that case, noted:

> This case . . . does not directly raise the question whether the simple and common instance of a faulty zoning decision would violate the Equal Protection Clause. That is because the Court of Appeals found that in this case respondent had alleged an extra factor . . . that the Court of Appeals called "vindictive action," "illegitimate animus," or "ill will."
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> [528 U.S. at 565-66 (Breyer, J., concurring).]

Respondents do not claim that the City applied the AHO to their applications as a matter of vindictiveness or animus, or out of ill will. Thus, applying the animus requirement cited by Justice Breyer, this is a further basis for the non-applicability of the class-of-one doctrine. Accordingly, we hold that the trial court erred as a matter of law in holding that application of the AHO to the developments constituted selective enforcement.

VI.

Turning to the first of the two issues respondents raised in their cross-appeals, respondents assert that because there was no need for additional affordable housing units in Hoboken at the time the City considered their applications, the City had no authority to enact a ten percent affordable housing

set-aside requirement. This assertion lacks merit. Assuming for purposes of this opinion that respondents' documentation demonstrates there is no factual dispute that there is no affordable housing need in the City, nothing in the FHA limits a municipality's right to require set-aside units over and above its current need. Instead, the Mount Laurel doctrine establishes a floor, rather than a ceiling, for what municipalities may do to encourage the addition of affordable housing for low and moderate income individuals.

In this regard, the Supreme Court has stated that "[w]hile municipalities must plan and provide for regional housing needs, no municipality need assume responsibility for more than its fair share of these needs." Mount Laurel I, 67 N.J. at 212 (emphasis added). The Court also recognized the need for affordable housing as "universal and constant," noting that "proper provision for adequate housing" is "an absolute essential in promotion of the general welfare required in all local land use regulation." Id. at 179. Stated plainly, although municipalities cannot be required to provide more than their fair share of affordable housing, it certainly does not follow that they may not take steps to exceed that fair share.

The FHA created COAH to assign and determine municipal housing obligations based on present, or rehabilitative, as well as prospective, fair share

housing need. In re Declaratory Judgment Actions, 446 N.J. Super. 259, 270 (App. Div. 2016), aff'd as mod., 227 N.J. 508 (2017). COAH adopted two rounds of rules whereby it calculated the need for affordable housing in each of the state's regions, and then allocated to each municipality its fair share of the present and prospective regional need. Id. at 272. Because of COAH's inability to adopt third round rules that would pass constitutional muster, the Supreme Court determined that affordable housing cases would be henceforth resolved by the judiciary. In re N.J.A.C. 5:96 & 5:97, 221 N.J. 1, 5 (2015).

In Homes of Hope, 409 N.J. Super. at 339, we squarely held that the fact that a municipality had met its fair share affordable housing obligation did not mean that affordable housing could no longer constitute an inherently beneficial use for purposes of obtaining a use variance. The court added:

> A COAH certification does not mean that a municipality has reached a limit for affordable housing. Neither the FHA, nor Mount Laurel I or II, explicitly or implicitly supports the Board's argument that once a municipality's Mount Laurel obligation has been fulfilled, a need for low or moderate income housing no longer exists. It is beyond question that even if a municipality meets its Mount Laurel obligation, substandard housing will continue to exist. Providing affordable housing to meet that need . . . continues to foster the general welfare . . . .
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> [Id. at 340 (footnote omitted).]

See also Deland v. Berkeley Twp., 361 N.J. Super. 1, 16 (App. Div. 2003) (the fact that the municipality may have zoned for more than its fair share of affordable housing was not grounds for terminating a prior consent judgment settling a Mount Laurel action).

Therefore, requiring affordable housing over and above Hoboken's fair share obligation was well within City's authority under the FHA. Respondents' reliance upon Mount Laurel II in support of their contentions is misplaced. They argue that Mount Laurel II limits the constitutionality of mandatory set-asides to circumstances "where the Mount Laurel obligation cannot be satisfied by the removal of restrictive barriers." However, in Mount Laurel II, the Court rejected the idea that inclusionary zoning differed in any meaningful way from other forms of zoning, including "[d]etached single family residential zones, high-rise multi-family zones of any kind, factory zones, 'clean' research and development zones, . . . [and] regional shopping mall zones," and concluded that mandatory set-asides constitute a valid exercise of zoning powers. Id. at 273.

The Court explained that it "would find it difficult to conclude that our Constitution both requires and prohibits" the use of mandatory set-asides, observing "it would take a clear contrary constitutional provision to lead us to conclude that that which is necessary to achieve the constitutional mandate is

prohibited by the same Constitution." Ibid.; see also Holmdel Builders Ass'n, 121 N.J. at 563. While the Court in Holmdel stated that mandatory set-asides may not be so excessive as to render an inclusionary development unprofitable, 121 N.J. at 581, it has never held that municipalities are limited in the manner respondents suggest.

Respondents' reliance upon Tanenbaum v. Township of Wall Board of Adjustment, 407 N.J. Super. 446 (Law Div. 2006) is also unavailing. In that case, as in Mount Laurel II, the court recognized that municipalities may not be compelled to provide affordable housing in excess of their constitutional obligation. Id. at 457-58. However, the court did not find that municipalities were prohibited from doing so. Instead, the court observed that municipalities that have met their fair share obligation may undertake zoning of their choosing, consistent with the MLUL, "so long as those measures bear a reasonable relationship to a legitimate government objective." Id. at 457 (quoting Mount Olive Complex v. Twp. of Mount Olive, 340 N.J. Super. 511, 538 (App. Div. 2001)).

In addition, the Tanenbaum court concluded that the developer in that case was not exempt from the Township's zoning requirements because there had been "clear, unequivocal" notice of the land use requirements. Id. at 459. That

is also the case here. As discussed in the next section, respondents received substantial zoning relief from the City's zoning ordinances that more than justifies the requirement to produce affordable housing under the AHO.

Finally, the 1415 Park respondents argue that the ten percent set-aside was beyond the City's authorized zoning power under the MLUL. However, their reliance on N.J.S.A. 40:55D-42 for this proposition is misplaced. That statute involves general contributions for off-site improvements resulting from a development, not affordable housing.

Based upon the foregoing, we hold that the City had the authority to require the ten percent set-asides even though it had met its fair share affordable housing obligation.

VII.

Finally, respondents contended in their cross-appeals that the trial court erred by failing to conclude that the required ten percent set-aside constituted an unconstitutional taking because the City had already satisfied its affordable housing need and because the City did not provide them with an adequate compensatory benefit in return for requiring the set-aside. These contentions lack merit.

The takings clause of the Fifth Amendment provides that the government may not take private property for public use without just compensation. U.S. Const. amend. V. There must be an essential nexus between a legitimate state interest and the exacted condition in order to pass constitutional muster under the takings clause of the Fifth Amendment. Nollan v. Ca. Coastal Comm'n, 483 U.S. 825, 837 (1987). If such a nexus is established, the impact of the exaction on the proposed development must be examined. Dolan v. City of Tigard, 512 U.S. 374, 386 (1994). An exaction may constitute a taking if not reasonably necessary to effectuate a substantial governmental purpose. Id. at 388.

Mandatory set-asides for the development of affordable housing do not constitute a taking. Mount Laurel II, 92 N.J. at 267 n.30 (1983). However, whenever affordable housing units are proposed to be provided through an inclusionary development, "a municipality shall provide, through its zoning powers, incentives to the developer, which shall include increased densities and reduced costs." N.J.S.A. 52:27D-311(h). The Appellate Division has noted that a twenty percent set-aside requirement has been considered the norm in the administration of the Mount Laurel doctrine. In re N.J.A.C. 5:96 & 5:97, 416 N.J. Super. 462, 491 (App. Div. 2010).

As noted above, there can be no reasonable dispute that providing for affordable housing is a legitimate state interest. Nonetheless, respondents contend that because the City does not have an unmet affordable housing need, the ten percent set-aside was not reasonably necessary to effectuate that interest. However, as discussed in Section VI of this opinion, even where a municipality has met its fair share of affordable housing, it still may require the provision of additional affordable housing. Homes of Hope, 409 N.J. Super. at 340. Thus, requiring affordable housing over and above the City's fair share does not constitute a taking because it is part of an effort to effectuate a substantial governmental purpose.

Moreover, respondents received just compensation for the affordable housing they are required to provide under the AHO. The use variances and increased densities permitted Advance to construct 140 units where the ordinance only permitted fifty-four units, N.J. Casket was permitted to develop fifty-nine dwelling units where none were permitted in the zone, 9th Monroe was permitted to develop 135 units where no residential units were permitted in the zone, and 1415 Park was permitted to develop the site at 141 units per acre. Artisan conceded in its statement of material facts that it and the other developers received "very substantial density bonuses."

Advance argues that because the AHO contained no specific reference to compensatory benefits, the benefits respondents received in the form of the use variances and increased densities granted by the Zoning Board do not constitute an acceptable compensatory benefit. Artisan cites to nothing in the land use law that supports this proposition. Because this is an as applied, and not a facial, challenge to the AHO, the actual compensatory benefits provided by the Zoning Board satisfy the constitutional requirement. As the court stated in Fair Share Housing I, "[e]ach of the four developers . . . received significant relief from the City's zoning laws in the form of variances . . . conditioned upon the developers' compliance with the City's affordable housing ordinance." 441 N.J. Super. at 486.

A municipality's zoning power includes the right of its Zoning Board to grant variances and increased densities. N.J.S.A. 40:55D-70. Therefore, the resolutions granting respondents' site plan applications adhered to N.J.S.A. 52:27D-311(h), even though the AHO did not explicitly provide for these incentives. That statute did not restrict the provision of these incentives to ordinances only. Therefore, the failure of the AHO to contain such a provision is not fatal to the Zoning Board's set-aside requirement in these site plan approvals.

Artisan and Advance attack the trial court's findings by conflating the requirements for a Zoning Board's resolution for granting a variance under the MLUL with a trial court's assessment of whether the variance satisfied the requirement that a developer receive compensation for the mandatory set-asides under the FHA. Furthermore, respondents offer no support for their argument that there was an insufficient compensatory benefit because there was no evidence that the Zoning Board intended the variances to, in fact, constitute such benefit for the required set-aside. Nothing in the MLUL or the FHA requires that such an intention be set forth, or that the Board actually have such an intention, in order for the benefit to sufficiently compensate a developer for the required set-aside.

In short, an objective reading of the resolutions establishes that compensatory benefits were provided. See Gandolfi v. Town of Hammonton, 367 N.J. Super. 527, 546 (App. Div. 2004) (noting that a planning board's resolution, read objectively, did not evince the board's predisposition to grant subdivision approval without variances). Thus, Artisan's claim that there should have been a "site-specific analysis" in order to determine the Board's rationale is misplaced.

Advance also argues that the variance relief it was granted did not constitute a sufficient compensatory benefit to assure the economic viability of the development, and that it was the City's obligation to determine that it was. However, Advance offers no evidence to support its claim. Brody criticized Kinsey's determination that the projects were economically viable with the set-asides based on the variances and densities granted, but offered no facts to support this claim and specifically stated that he did not undertake such an evaluation. No other evidence on the question was offered by respondents. Thus, there are no material facts in dispute that would preclude summary judgment in favor of the City and Fair Share on this issue.

Therefore, we hold that the ten percent affordable housing set-asides did not constitute a taking of respondents' property without just compensation.

VIII.

In sum, we hold that the trial court erred by finding that the City was estopped from enforcing the AHO and that it selectively enforced the AHO against respondents. We also conclude that the City could apply the AHO even

if it had no need for additional affordable housing units and that the City's actions did not constitute an unconstitutional taking without just compensation.

Reversed.