SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2756-21

IN THE MATTER OF THE APPLICATION OF THE TOWNSHIP OF READINGTON, COUNTY OF HUNTERDON.

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Submitted September 20, 2023 – Decided November 8, 2023

Before Judges Vernoia, Gummer, and Walcott-Henderson.

On appeal from the Superior Court of New Jersey, Law Division, Hunterdon County, Docket No. L-0301-15.

Berger & Bornstein, LLC, attorneys for appellant United States Land Resources, LP (Lawrence S. Berger, on the briefs).

Surenian, Edwards & Nolan LLC, attorneys for respondent The Township of Readington (Michael J. Edwards, of counsel and on the brief; William E. Olson, on the brief).

Bisgaier Hoff, LLC, attorneys for respondent K-Land No. 71, LLC (Richard J. Hoff, Jr., and Danielle N. Kinback, on the brief).

Joshua D. Bauers, Senior Staff Attorney, attorney for respondent Fair Share Housing Center (Ashley J. Lee, Staff Attorney, of counsel and on the brief).

PER CURIAM

Municipalities have constitutional obligations to provide for their fair share of the regional need for affordable housing. See In re Adoption of N.J.A.C. 5:96 & 5:97 (Mount Laurel IV), 221 N.J. 1 (2015); the Fair Housing Act (FHA), N.J.S.A. 52:27D-301 to -329.4. On March 28, 2022, the trial court approved as amended the Housing Element and Fair Share Plan (HEFSP) of the Township of Readington (the Township) and granted the Township a final judgment of compliance and repose. The decision to grant that relief was based in part on affordable-housing units to be built in proposed developments pursuant to settlement agreements the Township had entered in 2018 and the court had approved after duly-noticed fairness hearings in 2019.

Intervenor United States Land Resources, LP (USLR), appeals from the final judgment, contending the settlement agreements did not provide a realistic opportunity for the production of a sufficient number of affordable-housing

units and, thus, the court erred in approving the Township's HEFSP and granting a final judgment of compliance and repose.[1] We disagree and affirm.

I.

In 1975, our Supreme Court held that developing municipalities are under a constitutional obligation to provide a realistic opportunity for the creation of affordable housing. S. Burlington Cnty. N.A.A.C.P. v. Mount Laurel Twp., 67 N.J. 151, 174 (1975). The Court clarified and reaffirmed that constitutional requirement in South Burlington County N.A.A.C.P. v. Mount Laurel Township (Mount Laurel II), 92 N.J. 158 (1983).

In 1985, following Mount Laurel II, the Legislature codified the constitutional obligation of municipalities "to use their zoning power in a manner that creates a 'realistic opportunity for the construction of [their] fair share' of the region's low- and moderate-income housing" by "enacting the [FHA] and creating [the Council on Affordable Housing (COAH)] to facilitate and monitor municipal compliance with the constitutional mandate." In re Declaratory Judgment Actions, 227 N.J. 508, 514 (2017). "In COAH, the

[1] In its notice of appeal, USLR indicated it was appealing from the final judgment and two orders approving different settlement agreements. In its briefs, however, the only remedy USLR seek is the reversal and vacation of the final judgment.

Legislature vested responsibility for determining and assigning municipal affordable housing obligations, which would be accomplished through promulgation of procedural and substantive rules for successive housing cycles." Ibid. COAH adopted rules to govern its first and second cycles, "but when the Second Round rules expired in 1999, COAH had not proposed new regulations . . . to govern the third housing cycle (Third Round)." Ibid.

"Because COAH had failed to . . . take specific administrative steps culminating in the adoption of Third Round rules, [the Court in Mount Laurel IV] declared COAH defunct and . . . 'provide[d] a substitute for [COAH's] substantive certification process,'" whereby "municipalities that had already obtained, or were in the process of obtaining, substantive certification from COAH could file declaratory judgment actions to confirm that their plans comported with their Mount Laurel obligations." Id. at 515 (quoting Mount Laurel IV, 221 N.J. at 24). A municipality seeking "an affirmative declaration of constitutional compliance . . . [must] do so on notice and opportunity to be heard to [the Fair Share Housing Center (FSHC)] and interested parties." Mount Laurel IV, 221 N.J. at 23.[2] "To guide the . . . judges who would be evaluating

[2] The FSHC is "a non-profit organization that advocates for affordable housing." In re Borough of Englewood Cliffs, 473 N.J. Super. 189, 196-97 (App. Div. 2022).

compliance with Mount Laurel obligations, [the Court] instructed the courts to follow certain guidelines 'gleaned from the past.'" In re Declaratory Judgment Actions, 227 N.J. at 515 (quoting Mount Laurel IV, 221 N.J. at 29-30). The Court "authorized judges to evaluate municipal compliance using discretion similar to that afforded to COAH in the rulemaking process." Id. at 516.

Consistent with Mount Laurel IV, the Township filed a declaratory judgment action on July 2, 2015, seeking approval of the Township's HEFSP and entry of a judgment of compliance and repose. Three years later, the Township reached agreements with intervenors SAR I, LLC (SAR)[3] and Readington Commons II (RCII) regarding the construction of inclusionary developments[4] with rental residential units, twenty-five percent of which would be set aside for very low, low, and moderate-income housing.

In a July 11, 2018 settlement agreement, the Township and SAR agreed on a plan for the development of 192 residential units, including forty-eight

[3] According to respondent K-Land No. 71, LLC, it now owns the property SAR then owned and agreed would be developed in its 2018 agreement with the Township.

[4] The FHA defines "[i]nclusionary development" as "a residential housing development in which a substantial percentage of the housing units are provided for a reasonable income range of low and moderate income households." N.J.S.A. 52:27D-304(f).

affordable-housing units, on property owned by SAR located in Readington at Block 36, Lots 5, 5.02, and 5.04. The purpose of the agreement was to "settle the SAR [i]ntervention," "to create a realistic opportunity for the construction of the [i]nclusionary [d]evelopment" proposed for the SAR site, and "to generate affordable housing credits for the Township to apply to any Round [Three] obligation assigned to it." The SAR agreement included concept site plans and a proposed zoning ordinance, which created an inclusionary housing zone at the SAR site and was ultimately adopted by the Township. The ordinance required the development at the SAR site to "include affordable housing as a component," with at least twenty-five percent of the units being affordable to low- and moderate-income households and forty-eight of the units being "affordable family rental apartment dwellings." The agreement also provided for the submission of "a phasing plan" as part of the preliminary plan "[f]or developments to be constructed over a period of years."

The Township and SAR amended the agreement on August 8, 2018, to "ensure that the [i]nclusionary [d]evelopment generates affordable housing credits to be applied to the Township's Round [Three] affordable housing obligations." Specifically, the Township and SAR agreed that "the affordability controls . . . shall be governed by Uniform Housing Affordability Controls,

N.J.A.C. 5:80-26.1 [to -26.26] ('UHAC')." That amendment did not change the number of affordable-housing units to be constructed.

On May 30, 2019, the court conducted a duly-noticed fairness hearing regarding the SAR agreement. See E./W. Venture v. Borough of Fort Lee, 286 N.J. Super. 311, 328 (App. Div. 1996) (finding "a trial judge may approve a settlement of Mount Laurel litigation after a 'fairness' hearing to the extent the judge is satisfied that the settlement adequately protects the interests of lower-income persons on whose behalf the affordable units proposed by the settlement are to be built"). During the hearing, the court heard testimony from the Township's former planner, Kendra Lelie, who testified the SAR site was "developable for the proposed inclusionary development" of 192 units, of which forty-eight would be affordable units.

Francis Banisch III, who was the court's special master overseeing the Township's Mount Laurel compliance, also testified. Banisch represented that, since the Court's Mount Laurel IV decision, he has seen more projects move into the twenty-five-percent set-aside range because of the increase in competition among developers to be included in municipalities' fair-share plans. Banisch believed the twenty-five-percent set aside would not be offered if it was not possible and that "in a robust housing market like Readington where units like

this will be in high demand," the twenty-five-percent set aside would "not be an impediment to the development of this project." Instead of being an impediment, Banisch found the twenty-five-percent set-aside as "clearly . . . advancing the [Township's] attempt to [achieve] constitutional compliance." Applying the five-factor fairness analysis of East/West Venture, 286 N.J. Super. at 328, Banisch concluded the SAR agreement was fair and recommended the court approve it.[5]

Finding credible Lelie's and Banisch's testimony and having conducted its own East/West Venture analysis, the court approved the SAR agreement in an eight-page opinion dated June 4, 2019, and a July 8, 2019 order. The court acknowledged certain "interested parties" had "questioned various aspects of the feasibility of the development that is contemplated in the [a]greement,"

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[5] The East/West Venture test

> involves a consideration of the number of affordable housing units being constructed, the methodology by which the number of affordable units has been derived, any other contribution being made by the developer to the municipality in lieu of affordable units, other components of the agreement which contribute to the municipality's satisfaction of its constitutional obligation, and any other factors which may be relevant to the "fairness" issue.
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> [Ibid.]

including "whether the Township 'negotiated too good of a deal' in that the requirement to provide [twenty-five percent] affordable housing is in excess of the norm and may make the project not feasible and therefore not realistic." The court rejected that concern, explaining:

> The [c]ourt is satisfied, however, that the project as proposed in the [a]greement is feasible and developable. Mr. Banisch testified that although his expertise is in the "zoning and planning["] areas as opposed to "economics of the projects," in his experience he has seen 25% projects that have been approved.
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> In the [c]ourt's experience in nearly fifty[-]nine "Mt. Laurel" cases in Vicinage 13, the [c]ourt has also seen several twenty five (25%) percent projects that have been approved in several municipalities. Further, the fact that a developer is under contract to purchase the SAR property in order to develop it in accordance with the [a]greement also bolsters the conclusion that the project is feasible and developable.

The court held the Township had "created a realistic opportunity for affordable housing."

On July 11, 2018, the Township entered into a similar settlement agreement with RCII for the development of the RCII site located in Readington at Block 4, Lots 51 and 52. Like the SAR agreement, the purpose of the RCII agreement was, in part, to "create a realistic opportunity for the construction of the [i]nclusionary [d]evelopment" spelled out in the agreement, which included

184 rental residential units, forty-six of which would be affordable-housing units. The RCII agreement included a concept site plan as well as a proposed zoning ordinance, which rezoned the RCII property to include an "Office-Multi-Family Affordable Housing district" that provided seventy additional dwelling units and required a twenty-five-percent affordable-housing set-aside, which would result in the construction of eighteen additional affordable-housing units. The Township subsequently adopted the ordinance, thereby permitting on the RCII site an inclusionary development consisting of up to 254 units, including sixty-four affordable-housing units. On August 8, 2018, the Township and RCII amended their settlement agreement in the same way the Township and SAR had amended their agreement. The amendment did not reduce the number of affordable-housing units to be constructed.

On June 28, 2019, the court conducted a duly-noticed fairness hearing regarding the RCII agreement. Lelie testified the RCII site was suitable for the proposed development and that 254 units could be constructed on the RCII site, sixty-four of which would be affordable-housing units. Lelie also testified the site contained a transit stop and the site already had partial access to sewer service. When asked if she had done "any study as to whether a twenty-five-percent set-aside would have any impact on the . . . buildability of the project,"

Lelie responded: "I am not the expert that does that particular analysis. The assumption is that the developers coming forward to provide a twenty-five-percent set-aside, . . . they've done that analysis."

Banisch testified the RCII agreement met the East/West Venture test and was fair and reasonable, and he recommended the court approve it. When asked if a twenty-five-percent affordable-housing set-aside would make a development less likely to be built, Banisch testified: "[M]ost of my expectation that [a] twenty-five-percent set-aside would not preclude development of the project or . . . discourage its development is the extent to which I've seen a set-aside of that magnitude approved in various jurisdictions around the state." Banisch also agreed with Lelie, stating:

> I think Ms. Lelie made an excellent point when she said people in the position of making these agreements are also in the position of carefully examining the parameters that would allow them to go forward. There's an awful lot of money spent even just getting to the point where there's an agreement, let alone an approval and then ultimately a development.
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> So, yeah, I think that there is a private side evaluation of this that's key to the willingness to agree and, as I say, I've seen that willingness around the state so . . . I would not . . . call this an exception to the rule.

At the end of the hearing, the court held the agreement was fair and approved it. The court found the agreement would allow for the construction of

up to 254 rental residential units, of which sixty-four would be affordable-housing units, and was "feasible" and "achievable." The court entered an order approving the RCII settlement agreement on July 8, 2019.

On July 17, 2019, the Township executed a settlement agreement with FSHC. In the agreement, FSHC and the Township identified various Third Round obligation "[c]ompliance [m]echanisms," including the SAR site, the RCII site, and another site they identified as "Three Bridges," located at Block 81, Lots 1, 2, and 3. Lots 2 and 3 were described as the Three Bridges "Inclusionary Overlay."

The agreement specified that the SAR and RCII sites had a twenty-five-percent set-aside for affordable housing, thereby providing for the construction of forty-eight and sixty-four affordable-housing units respectively. According to the agreement, Lots 2 and 3 of the Three Bridges site would be rezoned "to permit multi-family housing" with a twenty-five-percent affordable-housing set-aside, providing for forty affordable-housing units, and Lot 1 of Three Bridges would be designated as a "100% affordable development of at least 80 affordable family rental units." The agreement provided that prior to the compliance hearing, the Township would demonstrate the "ability to sewer" the development at Lot 1 of Three Bridges, and, if the Township failed to meet

certain deadlines for that development, the Township would forfeit its right to claim bonus credits on the project, which would then be treated as part of the Township's deferred obligation. The Township and FSHC also agreed the Township would take certain actions if the 100% affordable development on Lot 1 of Three Bridges experienced a specified delay in construction or in gaining sewer access, including "increasing the density on an inclusionary site identified in this [a]greement" and "rezoning a site that is most likely to receive water and sewer utilities within the municipality for inclusionary development."

On October 3, 2019, the court held a duly-noticed fairness hearing on the FSHC agreement. Michael Sullivan, who was the Township's planner, testified about the Township's fair-share obligations, including its Third Round obligation of 1,045 units, and what the Township had done and planned to do to meet those obligations. Sullivan stated the Township's Third Round obligation would be split into two categories: projects that would move forward immediately and projects that would be deferred until they could secure access to sewer. A total of 783 units were not deferred, including the SAR and RCII sites. Sullivan also testified the Three Bridges Inclusionary Overlay was included in the FSHC agreement as a deferred project due to its pending access to sewer.

Banisch testified the FSHC agreement was fair and reasonable pursuant to the East/West Venture test. Regarding the Township's 1,045 unit Third Round obligation, Banisch testified "[t]he Township ha[d] demonstrated a commitment to implement inclusionary and overlay zoning and other mechanisms that will address the Third Round obligation." Banisch acknowledged "several hundred units need[ed] to be deferred because of the lack of sewer service" but testified the Township would "support application to [New Jersey Department of Environmental Protection (DEP)] amending the sewer service area to the extent needed for SAR, [RCII], and [a third site]." Banisch also testified that "prioritizing sewer [was] done as part of the agreement" and a commitment was in place to develop sewer access for the Three Bridges site. Banisch opined that "the compliance plan as outlined to date conforms with the requirements of Mount Laurel IV."

On October 7, 2019, the court issued an opinion finding the FSHC settlement agreement was fair and that the Township had "created a realistic opportunity for satisfaction of the Township's affordable housing obligation for the period 1987 through 2025 . . . ." In its opinion, the court noted the Township had represented it would support applications to DEP to amend the sewer service area by SAR and RCII and "prioritize capacity for affordable housing

developments in the Three Bridges Sewer Service Area." The court addressed the issue of whether the twenty-five-percent set-aside for affordable housing "would either make any affected project 'overly burdensome' from a profit and loss perspective, and, as such, whether that requirement would ultimately discourage or deter the actual development of affordable housing." Referencing its analysis of that issue in its SAR opinion, the court found its "opinion on the matter has not changed. Both Mr. Sullivan and Mr. Banisch opined that the [a]greement with FSHC and the component elements of the Township's [p]lan are fair, reasonable and achievable. The [c]ourt [found] those expert opinions to be compelling on the subject."

The court approved the FSHC agreement subject to certain conditions, including that before entry of a final judgment of compliance and repose, the Township's HEFSP would be reviewed by Banisch "for compliance with the terms of the executed settlement agreement, the [FHA,] and the UHAC regulations . . . ." On October 15, 2019, the court issued an order memorializing its opinion.

The court conducted another hearing on August 27, 2020. The court considered, among other exhibits, Banisch's compliance report, in which Banisch recommended the court grant the Township a conditional judgment of

compliance and repose; and a sewer-capacity report prepared by Township engineer Robert Clerico regarding the Three Bridges site, in which Clerico concluded sufficient capacity was available to service the site provided certain specific measures were taken and noted "[t]he Township intends to take all steps necessary" to "cure" issues preventing access of sewer to the Three Bridges site. During the hearing, the court heard testimony from Sullivan and Banisch regarding the status of the Township's compliance efforts.

During the compliance hearing, USLR's counsel argued the court lacked sufficient information regarding two issues and, consequently, could not make a determination on the Township's application. First, counsel questioned the information presented regarding sewer capacity. Second, he argued the court lacked sufficient information from which to conclude a twenty-five-percent set-aside for affordable housing would not undermine the realistic opportunity to construct that affordable housing. USLR had not filed a written objection on those grounds prior to the hearing. In response, Banisch testified: "[M]y answer then like it is now is that when competent developers are willing to enter into these kinds of . . . zoning agreements . . . , that to me provides some assurance that this is not an unrealistic opportunity, so I don't think I have to say more about that."

On September 21, 2020, the court entered an order granting the Township a conditional order of judgment of compliance and repose. The trial court ordered the Township to "satisfy all outstanding conditions of the Special Master's Report, dated August 26, 2020, as modified on the record during the [c]ompliance [h]earing" and to submit compliance documentation to FSHC.

By letter dated March 14, 2022, the Township submitted to the court a proposed final order of judgment of compliance and repose, stating it had been reviewed and approved by FSHC and the special master. Finding the Township had "satisfied all the conditions identified or referenced in the [s]pecial [m]aster's [r]eport" and all conditions of the conditional order, the court entered the final judgment of compliance and repose on March 28, 2022. In determining how the Township would satisfy its Third Round obligation, the court considered the units expected from the twenty-five-percent affordable-housing set-asides contained in the SAR and RCII settlement agreements and the units from the Three Bridges site. The court directed the Township to "continue its efforts to sewer" the 100% affordable development on Lot 1 of the Three Bridges site and to "take all steps to formally secure a reservation of sewer capacity sufficient to construct this project."

On appeal, USLR argues the court did not have adequate evidence to conclude the proposed developments on the SAR and RCII sites and Lot 1 of the Three Bridges site have a realistic opportunity of construction. Regarding the SAR and RCII sites, USLR contends the twenty-five-percent affordable-housing set-asides decrease the developments' profitability and the decreased profitability will deter developers from agreeing to construct the developments, thereby reducing the likelihood of their actual construction. Regarding the Three Bridges 100% affordable-housing development, USLR contends the site lacks access to sewer, which undermines any realistic opportunity the project will be constructed.

II.

"A final determination made by a trial court conducting a non-jury case is 'subject to a limited and well-established scope of review.'" In re Twp. of Bordentown, 471 N.J. Super. 196, 216-17 (App. Div. 2022) (quoting Seidman v. Clifton Sav. Bank, S.L.A., 205 N.J. 150, 169 (2011)). "[W]e give deference to the trial court that heard the witnesses, sifted the competing evidence, and made reasoned conclusions." Id. at 217 (quoting Griepenburg v. Twp. of Ocean, 220 N.J. 239, 254 (2015)). Although we review de novo a trial court's legal conclusions, "[w]e will 'not disturb the factual findings and legal conclusions of

the trial judge unless' convinced that those findings and conclusions were 'so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice.'" Ibid. (quoting Rova Farms Resort v. Invs. Ins. Co. of Am., 65 N.J. 474, 484 (1974)).

"Trial courts have broad discretion when reviewing a municipality's Mount Laurel fair share plan for constitutional compliance." Id. at 217-18 (citing Mount Laurel IV, 221 N.J. at 30). Accordingly, we review a trial court's order approving a municipality's HEFSP for an abuse of discretion. Id. at 217 n.8 (rejecting argument that a trial court's approval of a municipality's HEFSP is subject to de novo review). We also review a trial court's order approving a proposed settlement agreement under an abuse-of-discretion standard. Id. at 217. In reviewing a proposed settlement agreement, "[t]he trial court's role is to approve or reject the proposed settlement in its entirety as written and the court may not revise or amend particular provisions." Ibid.

A municipality has satisfied its Mount Laurel obligation if it has "provided a realistic opportunity for the construction of its fair share of low and moderate income housing." Mount Laurel II, 92 N.J. at 221. "Determining if an opportunity is 'realistic' requires application of a practical and objective standard; the court must decide 'whether there is in fact a likelihood—to the

extent economic conditions allow—that the lower income housing will actually be constructed.'" Bordentown, 471 N.J. Super. at 219 (quoting Mount Laurel II, 92 N.J. at 221-22). Municipalities are not required to meet the entire affordable-housing need "within the third round period of substantive certification . . . [and] need not guarantee that the required amount of affordable housing will be built, but must only adopt land use ordinances that create a realistic opportunity to meet the regional need and their own rehabilitation share." In re Adoption of N.J.A.C. 5:94 & 5:95, 390 N.J. Super. 1, 54 (App. Div. 2007); see also Bordentown, 471 N.J. Super. at 219-20.

"Trial courts adjudicating Mount Laurel declaratory judgment actions 'should employ flexibility in assessing a' municipality's compliance plan." Bordentown, 471 N.J. Super. at 220 (quoting Mount Laurel IV, 221 N.J. at 33); see also In re Declaratory Judgment Actions, 227 N.J. at 525 (Court confirms it "gave the trial courts considerable flexibility . . . in evaluating municipal plans for compliance"). "The [FHA] and the Municipal Land Use Law authorize municipalities to use various means to provide for their 'fair share of low[-] and moderate[-]income housing.'" Bordentown, 471 N.J. Super. at 220 (quoting N.J.S.A. 52:27D-311(a)); see also N.J.S.A. 40:55D-8.7(a).

Applying those standards, we conclude the record contains sufficient credible evidence to support the trial court's approval of the Township's HEFSP. In approving the SAR, RCII, and FSHC settlements, the court found the Township had created a realistic opportunity for the development of affordable-housing units at the SAR, RCII, and Three Bridges sites, among others. The court heard extensive testimony from Special Master Banisch, who scrutinized the settlement agreements and the HEFSP, was satisfied with their feasibility, and supported the court's approval of them. The court also heard testimony from the Township's planners and reviewed Banisch's reports and the Township engineer's report about sewer capacity at the Three Bridges site. USLR attacks the credibility of those experts. The court, however, found their opinions to be credible and even "compelling." Considering the deference we give to a trial court's assessment of a witness's credibility, we have no basis to reject the court's findings. See C.R. v. M.T., 248 N.J. 428, 440 (2021) ("Appellate courts owe deference to the trial court's credibility determinations.").

USLR asserts the court erred by including in its final judgment the units from the Three Bridges 100% affordable-housing development, relying on a letter sent by the Township's counsel after the court's entry of the final judgment. Rather than supporting USLR's assertion that the Township failed to establish

its ability to provide sewer capacity to the site, the letter shows the Township's commitment to fulfilling its obligation to take the necessary steps to provide that sewer capacity – a commitment already demonstrated by the Township in the FSHC settlement agreement, which contains contingencies if the Township fails to meet certain benchmarks; confirmed in its engineer's report; and considered by the court in rendering the final judgment.

For these reasons, we find no merit in USLR's arguments. The court's findings are sufficiently supported by the record and consonant with applicable legal principles. The court considered and addressed directly the issues USLR raised on appeal, and USLR has failed to identify any issue the trial court did not address in approving the settlement agreements and the Township's HEFSP. Discerning no basis to disturb the court's final judgment, we affirm.

Affirmed.