

**SPECIAL PUBLIC MEETING MINUTES
TOWNSHIP COUNCIL – TOWNSHIP OF OCEAN**

OCTOBER 26, 2009

OAKHURST, NEW JERSEY

The Special Public Meeting of the Township Council was held in the Township Meeting Room, First Floor, Public Meeting Room, 399 Monmouth Road, Oakhurst, NJ 07755 at 9:00 a.m.

Present: Mayor Larkin
Deputy Mayor Hiers, Councilmember(s) Siciliano

Others: Martin J. Arbus, Esq., Township Attorney
Andrew Brannen, Township Manager
Vincent Buttiglieri, Township Clerk

Absent: Councilmember(s) Garofalo and Schpiga

Mayor Larkin presided and called the meeting to order and asked for the Pledge of Allegiance.

Statement of Compliance with the Open Public Meetings Act:

Mayor Larkin announced that the notice requirements of the Open Public Meetings Act for this meeting have been satisfied; a copy of the Special Meeting Notice was sent to the Asbury Park Press and The Coaster, posted in Town Hall and filed in the Office of the Township Clerk on October 22, 2009.

Fire Exit Procedures:

There are two emergency exits on the wall to my right that will take you to the front of the building and another one to my left that will take you to the rear parking lot.

NOTICE:

All cell telephones must be turned off. If you need to make a call, please make your call outside the meeting room.

Mayor's Statement: Public Portion to Ask Questions with Regards to Resolutions

The purpose of this public portion is solely to ask questions to understand the Resolutions that appear on the agenda. All questions not related to an item on this Agenda should be asked during the Public Comments portion at the conclusion of the meeting.

Public Questions:

No public comments were received.

RESOLUTIONS:

09-174 Rescind Resolution #09-173 due to subsequent clarification of facts concerning AvalonBay Builder's Remedy lawsuit

Councilmember Hiers offered the following resolution and moved its adoption; seconded by Councilmember Siciliano

RESOLUTION RESCINDING RESOLUTION NO. 09-173 DUE TO SUBSEQUENT CLARIFICATION OF FACTS CONCERNING THE AVALONBAY BUILDER'S REMEDY LAW SUIT

WHEREAS, on October 19, 2009, the Township Committee of the Township of Ocean, County of Monmouth, adopted Resolution 09-173, attached hereto for ease of reference; and

WHEREAS, Resolution 09-173 was premised upon certain information, subsequently determined to be incorrect, regarding property upon which AvalonBay Communities, Inc. ("AvalonBay") seeks a builder's remedy pursuant to the Mount Laurel doctrine; and

WHEREAS, by way of background, as early as October, 2008, a representative of AvalonBay initiated negotiations with the Township in an effort to develop not only a roughly six acre site that is owned by BVB II Associates ("BVB"), but also a portion of the adjacent site owned by the Township; and

WHEREAS, in September of 2009, BVB brought a builder's remedy lawsuit on its six acre parcel; and

WHEREAS, in order to insulate itself from additional – and unnecessary -- builder's remedy lawsuits, the Township prepared a Resolution to formally express its commitment to comply with its Mount Laurel obligations, with the intent to adopt same on the evening of October 19, 2009; and

WHEREAS, earlier in the day of October 19, 2009, the Township received a letter from AvalonBay enclosing a copy of its builder's remedy lawsuit, the second such lawsuit filed against the Township; and

WHEREAS, upon initial review of this second lawsuit, the Township thought that AvalonBay was seeking a builder's remedy on the same property that was the subject of its negotiations with the Township late last year and earlier this year: namely, the BVB parcel, as well as a portion of the adjacent site controlled by the Township; and

WHEREAS, indeed, the same attorney that filed the BVB suit filed the AvalonBay suit; and

WHEREAS, in view of the foregoing, the Township initially understood that AvalonBay was the contract purchaser of the property that was the subject of BVB's builder's remedy suit; and

WHEREAS, as such, the Township anticipated that the two lawsuits, although filed separately, would either be prosecuted as one or the BVB suit would be dismissed, since the Court cannot issue two builder's remedies on a single site; and

WHEREAS, the premise upon which Resolution 09-173 was based, however, was incorrect inasmuch as AvalonBay is seeking a builder's remedy on an entirely separate site within the Township; and

WHEREAS, only one builder's remedy suit is necessary to serve as the catalyst for change; and

WHEREAS, in view of the manner in which the facts unfolded, BVB filed the only suit that could reasonably be construed as necessary to cause the Township to comply and therefore is the "catalyst for change" as that term is construed in the Mount Laurel arena; and

WHEREAS, in light of the above, the Township wishes to rescind Resolution 09-173, and adopt a replacement Resolution correcting and clarifying the Township's positions in these matters.

NOW, THEREFORE, BE IT RESOLVED as follows:

1. The Township of Ocean hereby rescinds Resolution 09-173 except as follows:

- (a) The Township does not rescind its concession that it was not in compliance with COAH's current regulations at the point BVB filed its builder's remedy suit.
- (b) The Township does not rescind its declaration that it is committed to comply with its Mount Laurel obligations to the extent that it has not already complied, subject to its right to comply "under protest".
- (c) The Township does not rescind its direction to its professionals to review the current state of Mount Laurel compliance and to take whatever actions may be necessary to achieve a formal judgment of constitutional compliance by the Court or a grant of substantive certification by the Council On Affordable Housing
- (d) The Township does not rescind the direction to its professionals to seek temporary immunity from any Mount Laurel lawsuits, other than BVB, as quickly as possible.

This Resolution shall take effect immediately.

ROLL CALL:

YES: Hiers, Siciliano, Larkin

ABSENT: Garofalo, Schepiga

09-175 Declare the Township of Ocean's intent to comply with its Mount Laurel obligations.

Councilmember Hiers offered the following resolution and moved its adoption; seconded by Councilmember Siciliano

RESOLUTION OF THE TOWNSHIP OF OCEAN, COUNTY OF MONMOUTH, DECLARING ITS INTENT TO COMPLY WITH ITS *MOUNT LAUREL* OBLIGATIONS.

WHEREAS, in *Mount Laurel II*, the New Jersey Supreme Court ruled, subject to various other limitations, that, in order for a plaintiff to be entitled to a builder's remedy, it must "succeed in litigation" (see *Mount Laurel II* at 279-280); and

WHEREAS, in 2002, the Supreme Court underscored that a developer must be a "catalyst for change" in order to qualify as a successful plaintiff (see *Toll Bros. v. Tp. of West Windsor*, 173 N.J. 502, 507 (2002)); and

WHEREAS, Ocean Township is a fundamentally inclusionary community consisting of in excess of 3,000 low and moderate income apartments and other modest housing and has not used its zoning powers to exclude low and moderate income households; and

WHEREAS, notwithstanding its open-door zoning policies, on or about September 3, 2009, BVB II Associates ("BVB") filed a lawsuit against the Township declaring that the Township is exclusionary, demanding that Ocean comply with its Mount Laurel requirements, and seeking a builder's remedy on a roughly 6 acre parcel of land; and

WHEREAS, since only one Mount Laurel lawsuit on one parcel is necessary to cause the Township to comply, BVB's lawsuit is the "catalyst for change" and indeed caused the Township to commit to Mount Laurel compliance; and

WHEREAS, the Township therefore concedes that BVB is the catalyst and that no other lawsuit is necessary; and

WHEREAS, therefore, while AvalonBay Communities, Inc ("Avalon") filed a second builder's remedy lawsuit against the Township on or about October 15, 2009, also seeking a declaration that the Township is exclusionary and demanding that Ocean comply with its

Mount Laurel requirements, this second lawsuit on a second parcel of land, is indeed unnecessary and should not be considered the “catalyst for change”; and

WHEREAS, the Township concedes that, on the date BVB filed suit, the Planning Board had not adopted and the Township had not endorsed a Housing Element and Fair Share Plan that satisfied Ocean’s obligation to provide sufficient low and moderate income housing pursuant to COAH’s *current* substantive regulations; and

WHEREAS, however, the Township contends that its failure to satisfy its obligations did not arise from exclusionary zoning, but instead is a direct result of several fundamental flaws in COAH’s regulations; and

WHEREAS, the Township is aware of several pending appeals to COAH’s regulations, and is aware that a decision by the Appellate Division regarding these appeals will likely occur in the near future; and

WHEREAS, in addition, the Township reserves its right to comply “under protest” and to thereby exercise its independent right to demonstrate that it has not violated the principles upon which the Mount Laurel doctrine is based and that therefore the defect lies not in the land use regulations of the Township, but rather in the regulations COAH has adopted to implement the doctrine; and

WHEREAS, in view of the foregoing, there is no need to further litigate (a) whether defendants complied with the current regulations of COAH at the point BVB filed suit or (b) whether BVB was the “catalyst” for causing the Township to comply with COAH’s current regulations; and

WHEREAS, other than the foregoing two issues, all other issues relating to BVB’s entitlement to a builder’s remedy have not been stipulated to by defendants and are properly before the Court; and

WHEREAS, the Township makes no stipulation as to Avalon other than to stipulate that its lawsuit is unnecessary and is not the cause of the Township’s compliance; and

WHEREAS, despite the aforementioned lawsuits and any associated defenses thereto, the Township of Ocean now wishes to formally declare its intent to comply, to the extent that it has not already complied, with its Mount Laurel obligations in their current form and as may be further amended; and

NOW, THEREFORE, BE IT RESOLVED as follows:

1. The Township of Ocean hereby formally declares its intent to achieve constitutional compliance, to the extent it has not done so already, but reserves its right to comply “under protest”.
2. The Township directs its professionals to review the current state of Mount Laurel compliance and to take whatever actions may be necessary to achieve a formal judgment of constitutional compliance by the Court or a grant of substantive certification by the Council On Affordable Housing.
3. The Township hereby directs its professionals to furnish this Resolution to the Court and to place this Resolution on file in Town Hall so as to put the public and all interested parties on notice of the Township’s formal commitment to comply with its Mount Laurel obligations.
4. The Township hereby directs its professionals to seek immunity from additional Mount Laurel lawsuits based on its stipulation that it was not in compliance with COAH’s current regulations on the date BVB filed suit and that it is committed to comply.
5. The Township reserves all rights to challenge BVB’s entitlement to a builder’s remedy on all grounds other than the issue of whether it served as the “catalyst for change” as required under the first element of the builder’s remedy test.

6. The Township denies that Avalon served as the “catalyst for change” and further reserves all rights to challenge Avalon’s entitlement to a builder’s remedy, including its failure to satisfy any of the three elements of the builder’s remedy test and any of the other limitations to the builder’s remedy created by the Supreme Court in Mount Laurel II or its progeny.

This Resolution shall take effect immediately.

ROLL CALL:

YES: Hiers, Siciliano, Larkin

ABSENT: Garofalo, Schepiga

Council Reports:

There were no reports from Councilmembers.

PUBLIC COMMENTS:

No public comments were received.

On a motion by Councilmember Siciliano and seconded by Councilmember Hiers, it was moved to adjourn the meeting.

Respectfully submitted,

William F. Larkin
Mayor

Vincent Buttiglieri, RMC/CMC
Municipal Clerk