

Cover Letter for Affordable Housing Legal Analysis

Dear Fellow Residents of Berkeley Heights:

At various Council meetings over the past year, we have been providing reports concerning the status of Affordable Housing litigation facing Berkeley Heights and virtually every other municipality throughout the State.

By way of background, more than 40 years ago the N.J. Supreme Court determined that the right to affordable housing is mandated by the State Constitution and that each and every municipality is obligated to provide its share of housing units to meet the need in their respective regions. In the intervening 40 years, a great deal of litigation ensued with multiple trips to the Supreme and lower State Courts to establish a framework and methodology for each Town to determine and satisfy its affordable housing obligation. The Fair Housing Act (“FHA”) was enacted by the N.J. State Legislature and an agency called the Council on Affordable Housing (“COAH”) was formed to adopt regulations governing the process. In March of 2015, all of this changed.

COAH had enacted two rounds of regulations prior to 1994, and many towns, including Berkeley Heights had adopted Housing Plans in compliance with those regulations. Compliance under the first two rounds of regulations included the ability to enter into agreements in which a municipality could purchase credits by sending a certain sum of money to a receiving municipality as well as the construction of units within each municipality. However, the third round of regulations, which were supposed to be promulgated in 1999, did not get adopted until 2004, at which point they were challenged by various builders’ and public interest groups and were subsequently invalidated by the Courts. After several additional attempts to adopt the third round rules, further court challenges and additional decisions invalidating the rules, COAH finally “gave up” in 2014 when it failed to adopt a final proposed set of third round regulations.

In March 2015, in the absence of COAH or other legislative action, the Supreme Court decided that the State Courts would take over for COAH and implement the affordable housing program on a town by town basis. The Supreme Court required each town that was previously before COAH, like Berkeley Heights, to file a Declaratory Judgment action to get a new Affordable Housing Plan approved.

The failure to develop a reasonable Affordable Housing Plan in compliance with the law has severe consequences including the ability of developers to bring Builder’s Remedy lawsuits to force municipalities to comply. Such lawsuits often result in Courts granting high density developments in exchange for those developers agreeing to construct the municipalities’ affordable housing units as part of their projects. We believe that Berkeley Heights is well situated having complied with its affordable housing obligations at every step in this process.

Pursuant to the March 2015 Supreme Court decision, we have applied for and been granted temporary “immunity” from lawsuits as we continue to develop our Housing Plan. However, what happens going forward is unclear. Courts throughout the State are being asked to make decisions as to the number of affordable units that are required in each municipality. A housing advocate public interest group has retained an expert that has come up with astronomically high affordable housing numbers for each municipality including 858 units in Berkeley Heights alone. The Township’s expert (Econsult) has determined that in their opinion, our obligation would be 218 units. We have retained the top legal, planning and consulting experts on affordable housing matters to assist us in applying the law and coming up with a reasonable Affordable Housing Plan that meets our obligations and comports with law that is going to be developed by Courts across the State. In the meantime, we are currently in Court ordered mediation with several developers proposing housing projects including those having interests in Property

located on 100 Locust Avenue, the site of the former “Kings” supermarket and the owner of the former movie theatre. Additionally, the Hamilton Avenue property, the Hotel site (near Delicious Heights restaurant), and Connell have also been identified as inclusionary residential development projects which are being discussed outside of the mediation process.

For those interested in learning more, we have attached a summary prepared by our attorneys which goes into greater detail concerning the history of the affordable housing litigation and Berkeley Heights’ Affordable Housing Plans. Thank you for taking the time to read this letter and summary, and we look forward to seeing you at future Council meetings and at events throughout Town. We remain excited about the future of Berkeley Heights and look forward to continued reasonable growth and prosperity for our Township.