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MEMORANDUM

To: West Windsor Township Council  
From: Gerald J. Muller  
Re: Settlement of Atlantic Realty Litigation  
Date: November 16, 2020

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Attached is a Stipulation of Settlement and Consent Order ("SCO") settling two lawsuits in which Atlantic Realty is on the other side. The first is the remaining counts in the suit originally brought by the Howard Hughes Corporation with respect to its site. Some time ago, West Windsor was successful in having dismissed the three counts where there were no factual issues and therefore a motion to dismiss was permissible. Counts that were fact-sensitive remain. Atlantic has been substituted as the plaintiff for HHC. The second suit is the appeal of the declaratory judgment action for which a Judgment of Compliance and Repose was entered in July, 2019. The appeal has been stayed pending efforts by the parties to settle the case.

Once the SCO is entered by Judge Jacobson, the declaratory judgment appeal will be dismissed and the remaining counts of the HHC suit will be dismissed without prejudice.

At that point, the Township will have 90 days to adopt ordinances for the HHC Site and H&B Site, a site that, along with the HHC Site, is part of the DJ appeal, primarily permitting warehousing uses but also some retail. The ordinances are part of the SCO, attached to the Agreement itself as Exhibits E and F Subexhibit A. They are summarized in the two David Novak memos that are included in this package, as is the Conceptual Plan that sets forth how Atlantic intends to develop the Site. The settlement does not provide for any residential zoning. The dismissal without prejudice becomes a dismissal with prejudice when the Planning Board adopts a resolution recommending the rezoning of the HHC Site and the ordinance rezoning it is adopted. I recommend that the Township not wait the 90 days for ordinance adoption, but introduce the ordinances for the two sites when it approves the settlement, since Council would be approving the ordinances at that point anyway, since they are the central part of the settlement and they represent the kind of zoning that Administration would like on those two sites and which the staff recommends.

With the dismissal with prejudice, Atlantic Realty and its successors are precluded from (1) applying to the Planning Board for a recommendation or authorization for residential use on the HHC Site; (2) petitioning Township Council for residential rezoning; and (3) filing a lawsuit or otherwise seeking governmental or judicial relief that would authorize residential zoning.

If the HHC Site ordinance is not adopted within the time set forth above, Atlantic can apply for an order reactivating the HHC suit. Any successful reactivation, however, will not affect the finality or non-appealability of the July 2, 2019 Judgment of Compliance and Repose in the DJ action or the dismissal of the appeal of it. Alternatively, Atlantic may opt for such non-conforming zoning as is adopted for portions of the HHC Site that Atlantic may designate and litigate with respect to the remainder of the site. Such litigation could include seeking residential zoning, consisting of multi-family, inclusionary zoning, and 100 percent affordable housing. But such a suit will have no effect on the finality of the Judgment of Compliance and Repose and the final dismissal of the HHC suit. In addition, if the warehouse zoning is not approved, Atlantic may contest the adequacy of the Township's compliance with its Judgment of Compliance and Repose to the extent of challenging the reasonability of speed and progress in implementing the Fair Share Plan and whether in light of that any Fair Share Plan sites are not realistic.

All of this could be avoided by simply adopting the zoning ordinances that have been negotiated between Atlantic and staff and that are attached to the SCO as Exhibits \_\_ and \_\_ and described in Dave's two memoranda.

If a conforming site plan is rejected, Atlantic can seek judicial review or file a separate action seeking (1) residential use on portions of the site subject to the adverse site plan decision; (2) substitution of HHC site areas for sites in the Fair Share Plan; and (3) inclusionary zoning for satisfaction of Round 4 obligations. Again, this can be avoided by approval of the site plan with such conditions as the Board may impose. As usual, we would want to be reasonable about that. Non-approval of the site plan would not have any effect on the finality of the Judgment of Compliance and Repose or dismissal of the DJ appeal.

The SCO expressly provides that there will not be a PILOT.

cc: Hon. Hemant Marathe (via electronic transmission)  
Ms. Gay Huber (via electronic transmission)  
Ms. Marlena Schmid (via electronic transmission)  
Mr. John Mauder (via electronic transmission)  
Mr. Joseph Burgis (via electronic transmission)  
Mr. David Novak (via electronic transmission)  
Francis A. Guzik, P.E. (via electronic transmission)  
Mr. Samuel J. Surtees (via electronic transmission)