

Fair Share Housing Center

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Fair Share Housing Center, Inc.,

Plaintiff,

v.

**Red Real Estate Associates, LLC,
and The Township of Teaneck, and
The Zoning Board of Adjustment
of the Township of Teaneck,**

Defendants.

Superior Court of New Jersey
Law Division, Bergen County

Docket No. BER-L-____-21

Civil Action

Verified Complaint

Plaintiff Fair Share Housing Center, Inc. ("FSHC"), by way of this Verified Complaint, against Defendants Red Real Estate Associates, LLC ("Red Real Estate" or "RREA"); the Township of Teaneck; and the Zoning Board of Adjustment of the Township of Teaneck, alleges and says:

Introductory Statement

1. This case concerns actions taken by the developer Red Real Estate Associates, LLC; the Township of Teaneck; and the Zoning Board of Adjustment of the Township of Teaneck that threaten to deny low- and moderate-income New Jerseyans their constitutional right to two (2) affordable units that the developer has thus far failed to complete and provide.

2. In May 2016, Red Real Estate obtained site plan

approval from the Teaneck Zoning Board of Adjustment to construct a 19-unit inclusionary development on Block 1001, Lot 6.01, otherwise known as 764 New Bridge Road, Teaneck, New Jersey, with two (2) affordable units that had to be provided.

3. Rather than comply with the affordable housing requirements of the Township's code that were in place when the developer applied for site plan approval and the applicable rules from the Council on Affordable Housing ("COAH") that require affordable and market-rate units in inclusionary developments to be completed in accordance with the phasing schedule in N.J.A.C. 5:93-5.6(d) and N.J.A.C. 5:97-6.4(d), Red Real Estate has now completed what it alleges are 19 market-rate units and, through litigation, recently obtained temporary certificates of occupancy for the 19 units without completing and providing a single affordable unit either on-site or off-site.

4. Red Real Estate's failure to abide by the phasing requirements of the Township's code and COAH's applicable rules followed by the issuance of the temporary certificates of occupancy to the 19 units that may be sold or rented at market-rate threatens the provision of the two (2) affordable housing units that are part of the Township of Teaneck's Court-approved Housing Element and Fair Share Plan; the Township's Court-approved settlement with Fair Share Housing Center; and are part of how the Township is meeting its constitutional obligation to provide its fair share of the

regional need for affordable housing under Mount Laurel.

5. As the New Jersey Supreme Court explained in Mount Laurel II, "[m]andatory set-asides can be rendered ineffective if a developer builds all its conventional units first and then reneges on the obligation to build the lower income units. To avoid this problem, municipalities and courts should require that a developer phase-in the lower income units as the development progresses." S. Burlington Cnty. NAACP v. Mount Laurel, 92 N.J. 158, 270 (1983).

6. Courts since then have continued to require that affordable and market-rate units be constructed "in tandem" in order "to prevent developers from selling [or renting] only market rate units, harvesting a profit, then abandoning the project." Urban League v. Mahwah, 207 N.J. Super. 169, 214-15 (Law Div. 1984).

7. Because Red Real Estate has not complied with the Township's code nor COAH's rules and has obtained temporary certificates of occupancy for 19 units without completing and deed restricting a single affordable unit, Fair Share Housing Center submits this Complaint in support of its Order to Show Cause to enjoin and restrain the developer Red Real Estate, and any affiliated entities, from renting, selling, or transferring for value more than (5) of the nineteen (19) market-units until at least one of the (1) affordable housing units has been completed, deed restricted in accordance with the Uniform Housing

Affordability Controls, and provided to low- and moderate-income New Jerseyans.

8. Then, after the first affordable unit is provided, Red Real Estate, and any affiliated entities, should be enjoined and restrained from renting, selling, or transferring for value more than fourteen (14) of the nineteen (19) units until the second affordable housing unit has been completed, deed restricted in accordance with the Uniform Housing Affordability Controls, and provided to low- and moderate-income New Jerseyans.

9. The Township of Teaneck should be ordered not to issue final certificates of occupancy for the number of market-rate units identified at 764 New Bridge Road until the requisite number of affordable units are completed, deed restricted in accordance with the Uniform Housing Affordability Controls, and provided to low- and moderate-income New Jerseyans.

10. This remedy ensures that the affordable units are provided in accordance with the phasing schedule that applies to this inclusionary development.

11. This immediate relief is essential in order to ensure that the realistic opportunity for the two (2) affordable units is not lost, perhaps permanently.

The Parties

12. Plaintiff Fair Share Housing Center is a non-profit organization based in the State of New Jersey. FSHC was founded in

1975, and FSHC is dedicated to defending the housing rights and interests of low- and moderate-income New Jerseyans, including those who live and work, and seek to live and work, in the Township of Teaneck.

13. Defendant Red Real Estate Associates, LLC, is a developer and New Jersey limited liability company in the business of real estate acquisition and development.

14. Defendant Township of Teaneck is a municipal entity of the State of New Jersey, a body corporate and body politic, located in Bergen County, created pursuant to and required to act consistent with and in furtherance of the Constitution and laws of the State and the United States of America.

15. Defendant Zoning Board of Adjustment of the Township of Teaneck is a municipal entity of the State, created by the Township pursuant to, and required to act consistent with and in furtherance of its own ordinances, the Municipal Land Use Law, N.J.S.A. 40:55-1, et seq. (the "MLUL") and the Constitution and laws of the State and the United States as a municipal "planning and zoning board" as defined in the MLUL.

Jurisdiction and Venue

16. The Superior Court of New Jersey has jurisdiction over the Defendants because this Complaint alleges causes of action arising under New Jersey State law and subject matter jurisdiction is appropriate pursuant to Rules 4:2-1, 4:2-2, and 4:3-2(a).

17. Venue for this action properly lies in the Superior Court, Bergen County, because the matters that are the subject of this Complaint and the events that gave rise to Plaintiff's claims occurred in the State of New Jersey, County of Bergen, Township of Teaneck.

18. At all relevant times, the Defendants acted under color of New Jersey State law.

Factual Background

19. Red Real Estate is the developer of property commonly known as 764 New Bridge Road, Teaneck, New Jersey, and is shown on the Tax Map of the Township of Teaneck as Block 1001, Lot 6.01.

20. In November 2015, Red Real Estate submitted a site plan application to develop an inclusionary housing development at 764 New Bridge Road.

21. In May 2016, Red Real Estate was granted preliminary and final site plan approval from the Teaneck Zoning Board of Adjustment to construct a 19-unit inclusionary development that was required to produce at least two (2) affordable units.

22. The ten percent (10%) affordable housing set-aside is below the twenty percent (20%) affordable housing set-asides common across the State. See, e.g., Mount Laurel II, 92 N.J. at 279 n.37 ("20 percent appears to us to be a reasonable minimum."); see also N.J.A.C. 5:93-5.6(b)(1) ("When a municipality is receiving

an adjustment pursuant to N.J.A.C. 5:93-4.2, the municipality shall be required to zone inclusionary sites . . . with a 20 percent set-aside.”).

23. The approval was memorialized in a July 7, 2016 Resolution of Approval from the Board. (Cert. of B. Gergi Exh. A.¹)

24. The July 7, 2016 Resolution of Approval states that the applicant testified during the hearings “that the Applicant would comply with the Township’s Affordable Housing Requirements.” (Cert. of B. Gergi Exh. A.)

25. The July 7, 2016 Resolution of Approval states “that the Property is required to generate 2 affordable housing units and . . . [c]ould be satisfied with 2 . . . units included on the Property” or “providing 2 units elsewhere in the Township.” (Cert. of B. Gergi Exh. A.)

26. The Board “reject[ed] the idea of a contribution in lieu of the inclusion or construction of affordable units.” (Cert. of B. Gergi Exh. A.)

27. The Board required “[t]he Applicant . . . to provide 2 affordable housing units either within the development . . . [o]r in the alternative, the Applicant may provide 2 units elsewhere in the Township. A contribution to a fund will not be considered an option or permitted.” (Cert. of B. Gergi Exh. A.)

28. The Board required “[c]ompliance with all the codes

¹ “Cert. of B. Gergi” refers to the Certification of Bassam F. Gergi, Esq., in Support of FSHC’s Verified Complaint and Order to Show Cause.

of the Township . . . as well as compliance with all ordinances and regulations of the Township of Teaneck and any and all other requirements of governmental authorities having jurisdiction over same.” (Cert. of B. Gergi Exh. A.)

29. At the time of Red Real Estate’s submission of its site plan application in November 2015, Teaneck’s code required:

- (2) Affordable housing units, excluding such units to be funded by a payment pursuant to Subsection (f) below, shall be built in accordance with the following schedule:

Percentage of Market-rate Units Units Completed	Minimum Percentage of Low- and Moderate- Income Completed
25	0
25 + 1 unit	10
50	50
75	75
90	100

[(Cert. of B. Gergi Exh. B.)]

30. At the time of Red Real Estate’s submission of its site plan application in November 2015, COAH’s Second Round rules required:

- (d) Municipalities zoning for inclusionary development shall require low and moderate income housing units to be built in accordance with the following schedule:

Minimum Percentage of Low and Moderate Income Units Completed	Percentage of Market Housing Units Completed
0	25
10	25 + 1 unit
50	50
75	75
100	<u>90</u>
	100

[N.J.A.C. 5:93-5.6(d).]

31. At the time of Red Real Estate’s submission of its site plan application in November 2015, COAH’s Third Round rules required:

- (d) Inclusionary zoning ordinances shall require affordable housing units to be built in accordance with the following schedule:

Percentage of Market-rate Units <u>Completed</u>	Minimum Percentage of Low- and Moderate-Income Units <u>Completed</u>
25	0
25 + 1 unit	10
50	50
75	75
90	100

[N.J.A.C. 5:97-6.4(d).]

32. On November 5, 2019, Red Real Estate and the Township of Teaneck entered into a developer’s agreement that states that the two (2) affordable units were to be provided on-site. (Cert. of B. Gergi Exh. C.)

33. The developer’s agreement also states that “[t]he Developer shall be required to comply with all legal requirements necessary to render the . . . affordable housing units as affordable . . . pursuant to the regulations established by the Council on Affordable Housing.” (Cert. of B. Gergi Exh. C.)

34. Following the New Jersey Supreme Court’s Mount Laurel IV decision in March 2015, see In re N.J.A.C. 5:96 & 5:97, 221 N.J. 1 (2015), the Township of Teaneck filed a declaratory judgment complaint in July 2015.

35. The Township sought an order from the Court

approving its Housing Element and Fair Share Plan (HEFSP) and granting it immunity from builder's remedy suits.

36. The Township's declaratory judgment action is titled In the Matter of the Application of the Township of Teaneck, Docket No. BER-L-6338-15.

37. In December 2017, Teaneck and FSHC entered into a settlement agreement that establishes the Township's fair share obligations and its mechanisms for satisfying those obligations. (Cert. of B. Gergi Exh. D.)

38. The settlement sets forth that the Township is receiving a vacant land adjustment due to limited available land to immediately generate all of the affordable housing needed to satisfy its fair share obligations in full. (Cert. of B. Gergi Exh. D.)

39. The settlement sets forth that 764 New Bridge Road would create at least two (2) affordable non-age-restricted units for low- and moderate-income New Jerseyans. (Cert. of B. Gergi Exh. D.)

40. On May 31, 2018, the Hon. Menelaos W. Toskos, J.S.C., entered an order, following a duly-noticed fairness hearing, which found the settlement agreement "fair and reasonable to low and moderate income persons and will . . . provide affordable housing in accordance with all regulatory and statutory requirements." (Cert. of B. Gergi Exh. E.)

41. Teaneck's February 6, 2019 Housing Element and Fair Share Plan states that the Township would be generating "[t]wo (2) family affordable apartments at 764 New Bridge Road." (Cert. of B. Gergi Exh. F.)

42. On May 18, 2021, Red Real Estate filed a verified complaint and order to show cause with the Superior of New Jersey, Docket No. BER-L-3265-21. (Cert. of B. Gergi Exh. G.)

43. The complaint named the Township of Teaneck and its construction official as defendants. (Cert. of B. Gergi Exh. G.)

44. The complaint alleged that Red Real Estate had completed construction of the 19 units at 764 New Bridge Road and that the Township was withholding temporary certificates of occupancy. (Cert. of B. Gergi Exh. G.)

45. The complaint alleged that Red Real Estate intended all 19 units at 764 New Bridge Road to be market-rate units. (Cert. of B. Gergi Exh. G.)

46. The complaint alleged that Red Real Estate had purchased a property, on April 23, 2021, less than a month before the complaint and order to show cause, at 1371 Teaneck Road (Block 5710, Lot 34) where it intended to construct the two (2) affordable units. (Cert. of B. Gergi Exh. G.)

47. The complaint did not allege that construction had started on either of the two (2) affordable units allegedly intended to be built at 1371 Teaneck Road. (Cert. of B. Gergi Exh.

G.)

48. The complaint did not explain how Red Real Estate intended to comply with the phasing schedule for inclusionary developments that was in the Township's code and COAH's rules. (Cert. of B. Gergi Exh. G.)

49. Red Real Estate did not join Fair Share Housing Center in the action. (Cert. of B. Gergi Exh. G.)

50. Neither Red Real Estate nor the Township of Teaneck notified Fair Share Housing Center of the action prior to the return date of the Order to Show Cause.

51. On June 11, 2021, the Hon. Christine A. Farrington, J.S.C. (ret'd t/a), entered an Order granting Red Real Estate's Order to Show Cause. (Cert. of B. Gergi Exh. H.)

52. Judge Farrington ordered Teaneck and its Construction Code Official to issue temporary certificates of occupancy for the 19 units at 764 New Bridge Road. (Cert. of B. Gergi Exh. H.)

53. Judge Farrington wrote that Red Real Estate "may satisfy its affordable housing obligation . . . by way of construction and completion of two (2) . . . [affordable] units at 1371 Teaneck Road." (Cert. of B. Gergi Exh. H.)

54. In the rider attached to the Order, Judge Farrington wrote that she was "troubled by the delay of [Red Real Estate] in bringing its arguments to the court." (Cert. of B. Gergi Exh. H.)

55. Judge Farrington did not address the phasing requirements for inclusionary developments that was in the Township's code at the time Read Real Estate applied for site plan approval. (Cert. of B. Gergi Exh. H.)

56. Judge Farrington did not address the phasing requirements for inclusionary developments that was in COAH's rules at the time Read Real Estate applied for site plan approval. (Cert. of B. Gergi Exh. H.)

57. After Judge Farrington's June 11, 2021 Order, counsel for the Township of Teaneck contacted counsel for Fair Share Housing Center.

58. Counsel for Teaneck informed FSHC of the action and what had transpired.

59. FSHC noted for counsel for Teaneck that the applicable rules from COAH established that temporary certificates of occupancy should not have been issued for all 19 market-rate units when no affordable units had been completed.

60. Counsel for FSHC attempted to contact counsel for Red Real Estate.

61. No reply was received from counsel for Red Real Estate.

62. Instead, on June 24, 2021, counsel for Red Real Estate filed a motion to enforce litigant's rights, which sought an order, on short notice, requiring the issuance of the temporary

certificates of occupancy.

63. On June 25, 2021, counsel for FSHC sent a letter to the court noting that "FSHC is gravely concerned that if RREA receives its TCOs for all its market-rate units before it has provided any of the required affordable housing units, the affordable homes will never be built." (Cert. of B. Gergi Exh. I.)

64. Counsel for FSHC's letter noted that "FSHC is an indispensable party to this matter and should have been joined at the outset." (Cert. of B. Gergi Exh. I.)

65. Counsel for FSHC's letter further noted that he "sent correspondence to counsel for RREA on Monday afternoon alerting them that FSHC has an interest in this matter and sought answers to basic questions. [FSHC] has not received a response. Instead, regrettably, RREA has sought to compound its circumvention of FSHC's right to participate in this matter by filing . . . to immediately get the TCOs before FSHC has the chance to bring its views to the court's attention." (Cert. of B. Gergi Exh. I.)

66. On June 28, 2021, Judge Farrington granted Red Real Estate's motion to enforce, on short notice, and ordered the Township's construction official to immediately issue temporary certificates of occupancy for the 19 market-rate units at 764 New Bridge Road. (Cert. of B. Gergi Exh. J.)

67. FSHC now files this Verified Complaint and Order to Show Cause.

FIRST COUNT

(Enjoining Red Real Estate from Renting, Selling, Transferring for Value, or Receiving Final COs, for Certain Market-Rate Units at 764 New Bridge Road Until the Required Number of Affordable Units Are Provided)

68. Plaintiff repeats and incorporates each of the foregoing paragraphs of this Complaint for purposes of this count as if set forth at length herein.

69. Plaintiff seeks temporary and permanent injunctive relief.

70. When Red Real Estate submitted its site plan application in November 2015 to construct an inclusionary development of 19 units, with 2 affordable units, Teaneck's code required that the affordable units be completed in accordance with the phasing schedule therein.

71. The July 7, 2016 Resolution of Approval states that the applicant testified during the hearings "that the Applicant would comply with the Township's Affordable Housing Requirements."

72. The phasing schedule in Teaneck's code set forth that before more than 25% of the market-rate units are completed, at least 10% of the affordable units must be completed.

73. Before more than 50% of the market-rate units are completed, at least 50% of the affordable units must be completed.

74. Before more than 75% of the market-rate units are completed, at least 75% of the affordable units must be completed.

75. Before more than 90% of the market-rate units are

completed, all of the affordable units must be completed.

76. In November 2015, the same phasing schedule for inclusionary developments existed in COAH's Second and Third Round rules. See N.J.A.C. 5:93-5.6(d); N.J.A.C. 5:97-6.4(d).

77. Here, that means before more than five (5) of the nineteen (19) units may be completed at 764 New Bridge Road, at least one (1) affordable unit must be completed.

78. Further, before more than fourteen (14) units may be completed at 764 New Bridge Road, both affordable units must be completed.

79. "A newly constructed unit is considered complete when the certificate of occupancy is issued." N.J.A.C. 5:93-5.6(e).

80. Issuing temporary certificates of occupancy to all 19 alleged market-rate units at 764 New Bridge Road before the 2 affordable units are completed and provided to low- and moderate-income New Jerseyans violates the requirements of Teaneck's code, the resolution of approval, and COAH's applicable rules.

81. It also violates case law that makes clear that affordable and market-rate units must be phased together in order "to prevent developers from selling [or renting] only market rate units, harvesting a profit, then abandoning the project." Urban League v. Mahwah, 207 N.J. Super. 169, 214-15 (Law Div. 1984); see also S. Burlington Cnty. NAACP v. Mount Laurel, 92 N.J. 158, 270

(1983) ("Mandatory set-asides can be rendered ineffective if a developer builds all its conventional units first and then reneges on the obligation to build the lower income units. To avoid this problem, municipalities and courts should require that a developer phase-in the lower income units as the development progresses.").

WHEREFORE, FSHC demands judgment against all Defendants as follows:

(a) Issuing a preliminary and permanent injunction enjoining and restraining Red Real Estate and their agents, servants, employees, affiliates, and those acting in concert with them from renting, selling, or transferring for value more than (5) of the nineteen (19) units at 764 New Bridge Road until at least one (1) affordable housing unit has been completed, deed restricted in accordance with the Uniform Housing Affordability Controls, and provided to low- and moderate-income New Jerseyans. Then, after the first affordable unit is provided, enjoining and restraining Red Real Estate, and any affiliated entities, from renting, selling, or transferring for value more than fourteen (14) of the nineteen (19) units at 764 New Bridge Road until the second affordable housing unit has been completed, deed restricted in accordance with the Uniform Housing Affordability Controls, and provided to low- and moderate-income New Jerseyans.

(b) Ordering Red Real Estate and their agents, servants, employees, affiliates, and those acting in concert with them to

identify to FSHC and the Township of Teaneck the specific units that shall not be rented, sold, or transferred for value until the affordable units are completed, deed restricted in accordance with the Uniform Housing Affordability Controls, and provided to low- and moderate-income New Jerseyans.

(c) Ordering the Township of Teaneck not to issue final certificates of occupancy for units identified at 764 New Bridge Road until the requisite number of affordable units are completed, deed restricted in accordance with the Uniform Housing Affordability Controls, and provided to low- and moderate-income New Jerseyans.

(d) Declaring that the issuance of temporary certificates of occupancy for all nineteen (19) units at 764 New Bridge Road before any affordable units were completed and provided to low- and moderate-income New Jerseyans was inconsistent with the phasing requirements in Teaneck's code and COAH's applicable rules that governed when Red Real Estate applied for site plan approval.

(e) Awarding such other procedural, substantive or equitable relief as the Court deems necessary and proper, including costs of suit and attorney's fees.

FAIR SHARE HOUSING CENTER
Attorneys for Plaintiff

Dated: July 6, 2021


Bassam F. Gergi, Esq.

DESIGNATION OF TRIAL COUNSEL

Pursuant to Rule 4:25-4, Bassam F. Gergi, Esq., is hereby designated as trial counsel on behalf of Plaintiff Fair Share Housing Center.

Dated: July 6, 2021



Bassam F. Gergi, Esq.

Rule 4:5-1 CERTIFICATION

Pursuant to Rule 4:5-1, I hereby certify that, to the best of my knowledge, information and belief, the subject matter of the within controversy does not form the basis of any other action presently pending in any court or arbitration proceeding, other than Docket No. BER-L-3265-21, which involved the Order to Show Cause filed by Red Real Estate against the Township of Teaneck and Teaneck's Construction Official.

Also, to the best of my knowledge, information and belief, no other action or arbitration proceeding is contemplated at this time, and I know of no other party who should be joined in this action.

Dated: July 6, 2021



Bassam F. Gergi, Esq.

VERIFICATION

I, Bassam F. Gergi, Esq., am a member of the New Jersey bar and a staff attorney at Fair Share Housing Center. All of the facts stated in the Verified Complaint to which this Verification is attached are true based upon my personal knowledge and the information provided to me, and as to those facts that are alleged on information and belief, I believe those facts to be true.

I certify that the foregoing statements made by me are true. I am aware that if any of the forgoing statement made by me are willfully false, I am subject to punishment.

Dated: July 6, 2021



Bassam F. Gergi, Esq.