

**SUPERIOR COURT OF NEW JERSEY**  
**BERGEN VICINAGE**  
Bergen County Justice Center, Room 335  
Hackensack, New Jersey 07601

Hon. Gregg A. Padovano, J.S.C.

(201) 527-2670  
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**TO:** Richard P. DeAngelis, Jr., Esq. 973-984-5529  
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**DATE:** May 21, 2018

**NUMBER OF PAGES INCLUDING COVER SHEET:** 9

**RE:** In Re Petition of the Borough of Emerson  
Docket No.: BER-L-6300-15

**SENT BY:** Lynn-Marie Gargagliano, Secretary to Judge Gregg Padovano

**MESSAGE:**

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Prepared by the court

IN RE PETITION OF THE BOROUGH  
OF EMERSON, BERGEN COUNTY,  
NEW JERSEY,

Petitioner.

SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION:BERGEN COUNTY

DOCKET NO.: BER-L-6300-15

CIVIL ACTION  
*Mount Laurel Action*

ORDER

**FILED**  
MAY 21 2018  
GREGG A. PADOVANO, J.R.C.

**THIS MATTER** is brought to the court by the law firm of DeCotiis, FitzPatrick, Cole & Giblin, LLP (by John A. Stone, Esq), counsel for Petitioner Borough of Emerson (the "Borough"), on notice to the law firm of McKirdy Riskin Olson Della Pelle (by Richard P. DeAngelis, Esq.) counsel for 214 Kinderkamack, LLC ("214") owner of real property located at Block 419 Lots 2, 3 and 4 on the official tax map of the Borough of Emerson ("214's Property") and Delores Della Volpe, Trustee, ("Della Volpe") owner of real property identified as Block 419 Lot 6.01 on the official tax map of the Borough of Emerson ("Della Volpe's Property"), which properties the Borough seeks to obtain by eminent domain pursuant to the Borough's plan to meet its affordable housing obligations and its Settlement Agreement with Fair Share Housing Center ("FSHC"), in accordance with the Fair Housing Act N.J.S.A. 52:27D-301, et seq.; seeking, among other things, an Order 1) deeming 214 and Della Volpe to have intervened in this matter including (but not limited to) the "Fairness Hearing" conducted pursuant to East/West Venture v. Borough of Fort Lee, 286 N.J. Super. 311 (App. Div. 1986) and Morris County Fair Housing Council v. Boonton Tp., 197 N.J. Super. 359 (Law Div. 1984), aff'd o.b., 209 N.J. Super 108 (App. Div. 1986); 2) deeming that 214 and Della Volpe are on notice of the Fairness Hearing and may participate in the Fairness Hearing including (without limitation) introducing fact witnesses, documents and expert testimony, and cross-examining witnesses at the Fairness Hearing; 3) deeming that 214 and Della Volpe are bound by, and may not subsequently challenge, the court's findings at the Fairness Hearing, including (without limitation) this court's determination regarding (a) the Borough's authority to take certain properties as permitted by the Fair Housing Act 52:27D-301 et seq. ("FHA"); (b) whether the 214 Property and the Della Volpe Property are "necessary or useful for the construction or rehabilitation of low and moderate income housing or conversion to low or moderate income housing" pursuant to the FHA, N.J.S.A. 52:27D-325, and Cramer Hill Residents Ass'n, Inc. v Primas, 395 N.J. Super. 1 (App. Div. 2007); (c) whether the FHA permits the acquisition of properties that are part of a "for profit" development to be constructed and provide low and moderate family rental Units (the "Project"); (d) whether the FHA permits the Borough's acquisition of properties for the Project, even though the Project is an "inclusionary" project and not a 100% affordable development; (e) any other objections by 214 or Della Volpe to the Borough's use or acquisition of the 214 Property and the Della Volpe Property, concerning the

fairness of the proposed settlement between the Borough and Fair Share Housing Center, or with respect to the Borough's authority and ability to acquire property for the Project; and 4) deeming that 214 and Della Volpe have 45 days from the Borough's adoption of any implementing ordinances which may be adopted in furtherance of the Borough's Affordable Housing obligations and the Borough's settlement agreement with FSHC pursuant to the Fair Housing Act, N.J.S.A. 52:27D-301 et seq. to challenge any such ordinance; and the court having reviewed all papers submitted and heard oral argument of counsel for the Borough, FSHC, 214 and Della Volpe, and for the reasons set forth in the attached rider and for good cause having been shown;

**IT IS ON THIS 21<sup>st</sup> DAY OF MAY 2018**

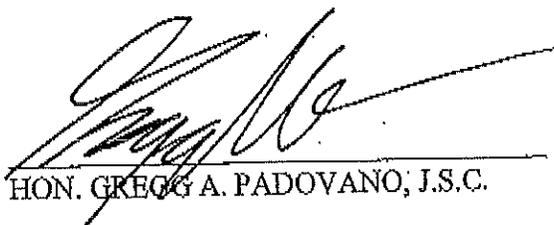
**ORDERED THAT** the Borough's motion seeking to hold that 214 and Della Volpe are deemed to have intervened in this matter is **DENIED**; and it is further

**ORDERED THAT** the Borough's motion seeking to deem that 214 and Della Volpe are on notice of the Fairness Hearing including (without limitation) the ability to introduce fact witnesses, documents and expert testimony at the Fairness Hearing is **GRANTED**; and it is further

**ORDERED THAT** the Borough's motion to deem that 214 and Della Volpe be bound by the court's findings at the Fairness Hearing is **GRANTED** to the extent that all non-parties and members of the public are so bound; and it is further

**ORDERED THAT** the Borough's motion seeking to deem that 214 and Della Volpe have 45 days from the Borough's adoption of any implementing ordinances, adopted in furtherance of the Borough's affordable housing obligations and the Borough's Settlement Agreement with Fair Share Housing Center pursuant to the Fair Housing Act N.J.S.A. 52:27D-301, et seq. and the Local Redevelopment and Housing Law, N.J.S.A. 40A:12A-1 et seq. to challenge the adoption of those ordinances is **DENIED, without prejudice**; and it is further

**ORDERED THAT** the court shall provide a copy of this Order to all counsel of record on this date via eCourts and to counsel for 214 and Della Volpe by facsimile and/or email.



HON. GREGG A. PADOVANO, J.S.C.

**IN RE PETITION OF  
THE BOROUGH OF EMERSON, BERGEN COUNTY,  
NEW JERSEY**

**Docket No. BER-L-6300-15**

**RIDER TO ORDER DATED MAY 21, 2018<sup>1</sup>**

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Before the court is a motion filed on behalf of the Borough of Emerson (the "Borough") seeking an Order to provide the following: 1) deem that 214 Kinderkamack, LLC ("214") and Dolores Della Volpe, Trustee ("Della Volpe") to have intervened in the subject matter; 2) deem that 214 and Della Volpe be declared to be on notice and be eligible to participate in a scheduled fairness hearing in the subject matter; 3) deeming that 214 and Della Volpe are bound by, and may not subsequently challenge, the court's findings at the Fairness Hearing, including (without limitation) the court's determination regarding: (a) the Borough's authority to take certain properties as permitted by the Fair Housing Act 52:27D-301 *et seq.* ("FHA"); (b) whether the 214 Property and the Della Volpe Property are "necessary or useful for the construction or rehabilitation of low and moderate income housing or conversion to low or moderate income housing" pursuant to the FHA, N.J.S.A. 52:27D-325, and Cramer Hill Residents Ass'n, Inc. v Primas, 395 N.J. Super. 1 (App. Div. 2007); (c) whether the FHA permits the acquisition of properties that are part of a "for profit" development to be constructed and provide very low, low and moderate family rental Units (the "Project"); (d) whether the FHA permits the Borough's acquisition of properties for the Project, even though the Project is an "inclusionary" project and not a 100% affordable development; (e) any other objections by 214 or Della Volpe to the Borough's use or acquisition of the 214 Property and the Della Volpe Property, concerning the

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<sup>1</sup> Not for publication without the approval of the committee on opinions (See R. 1:36-1).

fairness of the proposed settlement between the Borough and Fair Share Housing Center, or with respect to the Borough's authority and ability to acquire property for the Project; and 4) deem that 214 and Della Volpe have 45 days from the Borough's adoption of any implementing ordinances which may be adopted in furtherance of the Borough's Affordable Housing obligations and the Borough's settlement agreement with Fair Share Housing Center ("FSHC") pursuant to the Fair Housing Act, N.J.S.A. 52:27D-301 et seq. to challenge any such ordinance. Opposition was filed on behalf of 214 and Della Volpe. FSHC filed reply papers in connection with the Borough's motion. The court heard oral argument and considered all papers submitted.

This motion arises under ongoing litigation concerning the Borough of Emerson's attempt to resolve and establish a fair share plan to provide for a low-and moderate-income housing obligation. The Borough and FSHC have purportedly reached a settlement agreement upon which the Borough will present a plan for the court's review during an upcoming scheduled "fairness hearing." The Borough now in the motion before the court seeks to, in essence, require that 214 and Della Volpe formally participate in the fairness hearing or be barred from arguing or otherwise addressing issues which be raised during the fairness hearing.

214 and Della Volpe are owners of parcels identified as Block 419, Lots 2, 3, 4 and 6.01 on the Tax Map of the Borough of Emerson. These particular lots are under consideration by the Borough as part of a redevelopment plan and have also been considered and included as part of the Borough's settlement agreement with FSHC. The Borough argues that 214 and Della Volpe should, for purposes of judicial economy, be required to address any objections concerning property owned which may be part of the Borough's plan for redevelopment and development of affordable housing so that the Borough and the court is not required to address similar issues during a subsequent action.

214 and Della Volpe have not sought to intervene in the subject action. 214 and Della Volpe argue in opposition to the Borough's motion that

the [c]ourt may render a final decision in this matter without [214 and Della Volpe] in the case and, importantly, without consideration of the issue of whether the Borough has the authority to acquire their properties by eminent domain.  
[214 and Della Volpe Brief at 1.]

214 and Della Volpe each challenged the Borough's redevelopment plan and designation of their properties as areas in need of redevelopment in the consolidated matters pending under Docket Numbers BER-L-1660-17 and BER-L-1855-17. Since that separate action is also pending before this court, 214 and Della Volpe argue that they are not indispensable parties as to issues regarding potential eminent domain and/or designation of their properties as areas in need of redevelopment of their parcels for affordable housing and that they should not be joined pursuant to R. 4:28-1. 214 and Della Volpe also argue that the Borough is attempting to address anticipated condemnation proceedings which have not yet commenced under the guise of satisfying its affordable housing obligation.

The Borough, relying upon the holdings in East / West Venture v. Borough of Fort Lee, 286 N.J. Super. 311 (App. Div. 1996), Gordon v. Rozenwald, 380 N.J. Super. 55 (App. Div. 2005) and Granata v. Broderick, 446 N.J. Super. 449 (App. Div. 2016) argues that regardless of whether 214 and Della Volpe are formal parties to the subject action, the court can and should address all issues with regard to 214's and Della Volpe's objection to consideration of their property as areas in need of redevelopment and/or the potential condemnation of their properties as it relates to the Borough's attempt to satisfy its constitutional obligation to provide affordable housing. The Borough asserts that 214's and Della Volpe's joint position must be addressed as part of the scheduled fairness hearing in this action.

FSHC, in its supporting papers, concedes that the relief sought by the Borough should be granted even though it may not actually be necessary to formally deem 214 and Della Volpe as parties. FSHC argues that

fairness hearings, which are publicly noticed, bind not only all parties that appear at the hearing, but also all parties that could have appeared at that hearing but chose not to do so. "[I]f a judgment of compliance entered at the conclusion of Mount Laurel litigation were binding only upon the party who had filed the action, such a judgment would afford a municipality very limited repose. Yet the [Supreme] Court said that upon issuance of a judgment of compliance a municipality would be 'free of litigious interference with the normal planning process.' This degree of insulation from Mount Laurel claims can be realized only if a judgment of compliance is binding upon non-parties." Morris Co. Fair Housing Council v. Boonton Tp., 197 N.J. Super. 359, 364 (Law Div. 1984) (citing Southern Burlington Co. NAACP v. Tp. of Mt. Laurel, 92 N.J. 158, 292 (1983)).  
[FSHC Letter Brief at 2.]

The purpose of the fairness hearing is to determine whether a proposed settlement provides a realistic opportunity for development of affordable housing for low-and moderate-income households as required by the New Jersey Constitution and whether any provisions of the settlement agreement and proposal are ultra vires or otherwise invalid. Any party, or non-party for that matter, may challenge an action taken to implement a housing plan approved under a fairness hearing. See Morris Cty. Fair Hous. Council v. Boonton Twp., 197 N.J. Super. 359 (Law Div. 1984); Alexander's Dept. Stores of New Jersey, Inc. v. Borough of Paramus, 234 N.J. Super. 157 (App. Div. 1990) aff'd 125 N.J. 100 (1990); See also, Saratoga v. West Paterson, 346 N.J. Super. 569 (App. Div. 2002). However, the court finds that this challenge must actually occur as part of the fairness hearing. The court recognizes that, as part of its consideration during a fairness hearing, it must determine if the proposed plan of the Borough affords a realistic opportunity to provide for development of low and moderate income housing. See In re Petition for Substantive Certification, Tp. of Southhampton, Cty. of Burlington, 338 N.J. Super. 103 (App. Div. 2001); Morris Co. Fair Housing, supra. The court is not aware, however, of any statutory or case law

which dictates that this court is required to add 214 and/or Della Volpe as direct parties / intervenors under the facts presented.

While the court disagrees with the Borough's position that 214 and Della Volpe must be formally designated as intervenors, the court acknowledges that any ruling made as part of the scheduled fairness hearing will be binding upon any and all non-parties. To permit any party or non-party to continue to challenge the findings at a fairness hearing would improperly expose a municipality to the exact type of future challenge and litigation which is to be avoided during the applicable period of repose. It cannot be denied that 214 and Della Volpe, through their counsel, have actually appeared in this matter. For example, papers have been submitted in opposition to this motion, 214 and Della Volpe's counsel has appeared during case conferences and has been formally and informally provided notice of the fairness hearing and its adjournments. 214 and Della Volpe, like any other interested party certainly have a right to appear and be heard during a fairness hearing. While the court finds that it is not necessary to confirm notice and a right of appearance by formal Order, the court finds that such notice has been provided to 214 and Della Volpe to date and that both parties are free to appear and participate in the scheduled fairness hearing, as any other noticed party, interested party or member of the public may also appear. 214 and Della Volpe are in no way limited or restricted from participation in a fairness hearing in this action. The court makes no findings at this time as to whether 214 and Della Volpe may be collaterally estopped from raising certain issues which may be addressed during an upcoming fairness hearing. See East/West, supra, 286 N.J. Super. at 333. Each situation would have to be addressed as it arises. The court does find, however, that 214 and Della Volpe will be bound by the court's determination with regard to the fairness hearing just as will any other party and/or non-party in this action. See In Re Adoption of N.J.A.C. 5:96 and 5:97, 221 N.J. 1 (2015) and Morris Co. Fair Housing, supra.

The court notes that all parties in this matter have attempted to address a potential condemnation and/or an issue regarding designation of property as an area in need of redevelopment when such issues are not yet before this court as part of this action. The issue regarding the Borough's designation of 214's and Della Volpe's parcels in accordance with the Local Housing and Redevelopment Law, N.J.S.A. 40A:12A-1, is pending in a separate action in lieu of prerogative writs which has not yet been adjudicated. Furthermore, the issue of whether condemnation can or should be undertaken as part of this proceeding, (the affordable housing action), is also not yet before the court as the fairness hearing has not yet been addressed. The court makes no determination regarding condemnation and accordingly at this time.

The final remedy sought by the Borough under this motion is to mandate that 214 and Della Volpe be limited to take action 45 days from the time the Borough adopts any implementing ordinances in furtherance of the Borough's Affordable Housing obligations and the Borough's Settlement Agreement with FSHC pursuant to the Fair Housing Act. The court finds that there is no basis to direct or otherwise limit 214 and Della Volpe in this regard. There are several variables which the Borough desires that this court set aside by making such a determination at this time. First, the court is not aware of any action or implementation of subject ordinances that could properly be considered. The Borough's request is not yet ripe as to this issue. Furthermore, the limitation of "45 days from the time the Borough adopts any implementing ordinances" is vague at best. The court could not possibly rule at this time as to whether there were proper notice, proper action, etc. of a yet to be scheduled future event or action of the Borough.

For the above referenced findings, the Borough's motion is denied in part and granted in part.