Fair Share Housing Center
510 Park Boulevard
Cherry Hill, New Jersey 08002
P: 856-665-5444
F: 856-663-8182
Attorneys for Fair Share Housing Center
By: Bassam F. Gergi, Esq. (302842019)
bassamgergi@fairsharehousing.org

Fair Share Housing Center, Inc., **Plaintiff,** **v.** **The City of Jersey City and The Municipal Council of the City of Jersey City,** **Defendants.**	SUPERIOR COURT OF NEW JERSEY Law Division, Hudson County Docket No. HUD-L-4499-20 **CIVIL ACTION**

FAIR SHARE HOUSING CENTER'S BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Of Counsel and on the Brief:
Bassam F. Gergi, Esq. (302842019)
bassamgergi@fairsharehousing.org

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Preliminary Statement

Fair Share Housing Center (FSHC) submits this motion for summary judgment under Rule 4:46-2 because the documented facts in this matter make it unmistakably clear that City of Jersey City Ordinance No. 20-089 is and should be declared void.

Jersey City has historically been one of the most ethnically, racially, and socio-economically diverse cities in the country. Its prime location, neighboring Ellis Island and a stone's throw to Manhattan, has made it a natural starting spot for those many waves of daring dreamers who have traveled to the United States in search of opportunity.

In recent years, Jersey City has witnessed fierce growth and redevelopment. While glistening office and condo towers seemingly mark the City's progress, many of Jersey City's working families struggle to make ends meet due to rapidly escalating rents and home prices that have far outpaced growth in incomes -- especially in the wake of the COVID-19 pandemic.

The influx of new luxury developments that cater almost exclusively to high-earning professionals has squeezed the many families who have lived and worked in Jersey City for generations, and without a substantial increase in the affordable housing stock, these families are likely to continue to be pushed and shut out of the City they call home.

In October 2020, Jersey City's Municipal Council ignored widespread public opposition and violated the Municipal Land Use

Law (MLUL) and substantial precedent when it rushed to adopt Ordinance No. 20-089.

Under the guise of encouraging the production of affordable housing to address the City's mounting housing affordability crisis, the ordinance enacts an unlawful scheme that sanctions blatant quid pro quos and grants absolute discretion to the City's officials to engage in freewheeling negotiations to trade away much-needed affordable housing, including for a limitless range of ill-defined "community benefits" that constitute illegal exactions prohibited by statute, case law, and public policy.

The City enacted this unlawful scheme while flouting the statutorily-mandated procedure for adopting development and zoning ordinances, which requires referral to the City's Planning Board for consistency review with the master plan prior to adoption.

Jersey City is not above the law. It must abide by the procedural and substantive requirements enacted by the New Jersey Legislature -- just like every other municipality in the State.

Because Ordinance No. 20-089 was adopted in violation of the MLUL's statutorily-mandated procedure, and because it substantively violates the law and public policy, and exceeds Jersey City's legislative authority, it must be invalidated.

Jersey City's working families in need of affordable housing deserve far better from the City's leadership.

Statement of Material Facts

Pursuant to Rule 4:46-2(a), FSHC's Statement of Material Facts (hereinafter referred to as "SOMF") has been excluded from the within brief and separately bound for convenience. The SOMF is incorporated and adopted herein by reference as if set forth at length.

Procedural History

On October 7, 2020, Ordinance No. 20-089 was introduced by the Jersey City Municipal Council at a regularly scheduled meeting. (SOMF ¶ 15.)

The ordinance is titled "An Ordinance Creating Chapter 187 (Inclusionary Zoning) of the Municipal Code Requiring the Inclusion of Affordable Housing Units in All Development Projects With Residential Which Have Received Use Variances or Increased Density or Height." (SOMF ¶ 17.)

The ordinance was not referred to the Jersey City Planning Board for consistency review with the master plan, as mandated by the MLUL. (SOMF ¶¶ 18-25.)

Instead, on October 21, 2020, after four-plus hours of public opposition (including from the Jersey City NAACP, Morris Canal Community Development Corporation, Solidarity Jersey City, the Hudson County Progressive Alliance, and other civil rights and community groups), the Municipal Council voted, 7-2, to adopt the ordinance. (SOMF ¶¶ 28-34.)

On December 7, 2020, FSHC timely filed a 93-paragraph complaint with the Hudson County Superior Court that alleges, inter alia, that the City of Jersey City violated the MLUL, substantial precedent, and the New Jersey Civil Rights Act when the City Council adopted Ordinance No. 20-089. (SOMF ¶¶ 62-64.)

On February 19, 2021, after FSHC consented to a 30-day extension, the City filed a non-compliant answer. (SOMF ¶ 65.)

In its answer, the City denied 92 of the 93 paragraphs in the complaint, including basic facts that are supported by the City's own documents attached as exhibits to the complaint -- such as that the ordinance was introduced and adopted. (SOMF ¶ 66.)

On March 12, 2021, counsel for FSHC sent a letter to the City's counsel, pursuant to Rule 1:4-8, assiduously detailing the many ways in which the City's answer is non-compliant. FSHC asked that the City withdraw and file a compliant answer within twenty-eight (28) days. (SOMF ¶ 67.) As of June 25, 2021, more than three (3) months later, the City has not replied. (SOMF ¶ 68.)

On March 23, 2021, New Jersey Appleseed Public Interest Law Center moved for leave to appear as amicus curiae. (SOMF ¶ 69.) On April 16, 2021, the Hon. Joseph A. Turula, P.J.Cv., granted Appleseed's motion. (SOMF ¶ 70.)

FSHC now moves, pursuant to Rule 4:46-2, for summary judgment, and FSHC separately moves, pursuant to Rule 1:4-8, for sanctions and to strike Jersey City's non-compliant answer.

Legal Argument

A. Standard for Summary Judgment Under Rule 4:46-2.

Rule 4:46-2 sets forth that summary judgment should be granted, "forthwith," when "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law."[1] R. 4:46-2(c).

"An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact." Ibid.

Further, "summary judgment . . . may be rendered on any issue in the action" even if "there is a genuine factual dispute as to any other issue." Ibid.

The New Jersey Supreme Court has directed that "summary judgment should be awarded if the record demonstrates 'that there is no genuine issue as to any material fact challenged and that the

[1] Summary judgment is appropriate in this matter because it involves a substantive challenge to the ordinance as well as whether or not statutorily-mandated procedure for its adoption was followed by the City's Municipal Council. See Willoughby v. Planning Bd. of Tp. of Deptford, 306 N.J. Super. 266, 275 (App. Div. 1997) ("[W]here a prerogative writ action challenges governmental action which is not based on an administrative record developed in a quasi-judicial hearing . . . the usual procedures for the disposition of civil actions, including summary judgment practice, may be employed."); see also R. 4:69-2.

moving party is entitled to a judgment or order as a matter of law.'" Jones v. Morey's Pier, Inc., 230 N.J. 142, 153 (2017) (quoting Rule 4:46-2(c)); see also Steinberg v. Sahara Sam's Oasis, LLC, 226 N.J. 344, 366 (2016) ("[W]hen no genuine issue of material fact is at issue and the moving party is entitled to a judgment as a matter of law, summary judgment must be granted." (emphasis added)).

Indeed, "a court should deny a summary judgment motion only where the party opposing the motion has come forward with evidence that creates a 'genuine issue as to any material fact challenged.'" Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 529 (1995) (citation omitted). "Bare conclusory assertions, without factual support in the record, will not defeat a meritorious application for summary judgment. The opponent must do more than simply show there is some 'metaphysical doubt' as to the material facts." Horizon Blue Cross Blue Shield of N.J. v. State, 425 N.J. Super. 1, 32 (App. Div. 2012) (citations omitted).

This is because summary judgment "is designed to provide a prompt, businesslike and inexpensive method of disposing of any cause which . . . the motion clearly shows not to present any genuine issue of material fact requiring disposition at a trial." Ledley v. William Penn Life Ins. Co., 138 N.J. 627, 641 (1995) (quoting Judson v. Peoples Bank & Tr. Co., 17 N.J. 67, 74 (1954)).

B. FSHC's Motion for Summary Judgment Should Be Granted and Ordinance No. 20-089 Should be Declared Void as a Matter of Law.

FSHC submits that, for the procedural and substantive reasons that follow, Ordinance No. 20-089 is void ab initio as a matter of law.

The documented facts in this matter prove that Jersey City's Municipal Council chose to violate the MLUL and substantial precedent when it adopted Ordinance No. 20-089 without following the statutorily-mandated procedure of referring it to the Planning Board for consistency review prior to adoption and when it used the ordinance as the vehicle to enact an unlawful scheme that would allow the City's elected officials absolute discretion to trade away affordable housing as part of blatant quid pro quo agreements with favored developers in clear violation of the law. This defeats the permitted purpose of adopting a mandatory set-aside ordinance in the first place, which is to help encourage the production of affordable homes for low- and moderate-income New Jerseyans.

As a result, Ordinance No. 20-089 is and should be declared invalid.

1. Ordinance No. 20-089 Is Void Because Jersey City's Municipal Council Violated the Statutorily-Mandated Procedure in the MLUL That Requires Referral to the Planning Board for Consistency Review Prior to Adoption.

The MLUL mandates that all development regulations and zoning ordinances be referred by municipal governing bodies to their

planning boards for consistency review with the municipal master plan and a recommendation prior to adoption. Because Jersey City's Municipal Council chose not to comply with this statutorily-mandated procedure and did not refer Ordinance No. 20-089 to its Planning Board, the ordinance is void as a matter of law.

In Riggs v. Long Beach, 109 N.J. 601, 610 (1988), the New Jersey Supreme Court explained that "[m]unicipalities do not possess the inherent power to zone, and they possess that power . . . only insofar as it is delegated to them by the Legislature." The Court further explained that a court should "declare an ordinance invalid if in enacting the ordinance the municipality has not complied with the requirements of the statute," including "statutory and municipal procedural requirements." Id. at 611-12; see also Shipyard Assocs., LP v. City of Hoboken, 242 N.J. 23, 41 (2020) ("[A] municipality's zoning power must 'be exercised in strict conformity with the delegating enactment -- the MLUL.'" (citations omitted)); East/West Venture v. Borough of Fort Lee, 286 N.J. Super. 311, 324 (App. Div. 1996) ("A municipality has no power to circumvent these statutory and municipal procedural safeguards . . . .").

Here, the Municipal Land Use Law expressly requires:

> Prior to the adoption of a development regulation, revision, or amendment thereto, the planning board shall make and transmit to the governing body, within 35 days after referral, a report including identification of any provisions in the proposed development regulation, revision or amendment which are

> inconsistent with the master plan and recommendations concerning these inconsistencies and any other matters as the board deems appropriate. The governing body, when considering the adoption of a development regulation, revision or amendment thereto, shall review the report of the planning board and may disapprove or change any recommendation by a vote of a majority of its full authorized membership and shall record in its minutes the reasons for not following such recommendation.
>
> [N.J.S.A. 40:55D-26 (emphases added).]

The MLUL further requires:

> Prior to the hearing on adoption of a zoning ordinance, or any amendments thereto, the governing body shall refer any such proposed ordinance or amendment thereto to the planning board pursuant to subsection 17a. of this act.
>
> [N.J.S.A. 40:55D-64 (emphases added).]

Despite the unambiguous requirements of the MLUL, Jersey City's Municipal Council failed to refer Ordinance No. 20-089 to its Planning Board. Instead, it chose to rush to adopt the ordinance, a mere fourteen (14) days after introduction, over widespread public opposition without following the required procedure. This failure renders the ordinance void as a matter of law.

The evidentiary record cannot be clearer that the ordinance was not referred to the Planning Board.

On October 7, 2020, the Municipal Council introduced Ordinance No. 20-089. (SOMF ¶ 15.)

At the meeting introducing the ordinance, no resolution was on the agenda referring the ordinance to the Planning Board prior to adoption. (SOMF ¶ 15.)

There was one Planning Board meeting between introduction and adoption of Ordinance No. 20-089, which occurred on October 13, 2020, and the ordinance was not listed on the Board's agenda. (SOMF ¶¶ 19-20.)

On October 21, 2020, the Municipal Council adopted Ordinance No. 20-089, by a 7-2 vote, after more than four hours of public criticism and opposition from dozens of speakers and groups across the City, including the Jersey City NAACP, Morris Canal Community Development Corporation, Solidarity Jersey City, the Hudson County Progressive Alliance, and many others. (SOMF ¶¶ 26-40.)

At the meeting adopting the ordinance, the City's First Assistant Corporation Counsel, J. Nicholas Strasser, Esq., confirmed that the ordinance had not been referred to the Planning Board.

Toward the end of the meeting, Councilman Rolando R. Lavarro, Jr., stated:

> I want to bring up the issue of referral to the Planning Board . . . . If I can take a minute just to address that question to the Corporation Counsel and to Tanya the Planning Director . . . . It was brought to my attention that the zoning changes and amendments should be referred to the Planning Board according to the Municipal Land Use Law. I sent an email out right before the start of the meeting . . . . I vaguely recall the Director of Planning . . .

> saying that we weren't going to have to refer it to the Planning Board . . . . Could the Law Department elaborate on that . . . and why we are not referring to the Planning Board?
>
> [(SOMF ¶ 22.)]

Mr. Strasser replied:

> You quoted the Director of Planning accurately. . . . [I]t would not need to go before the Planning Board.
>
> [(SOMF ¶ 23.)]

When Councilman Lavarro noted that a different inclusionary zoning ordinance proposed earlier had been referred to the Planning Board, Mr. Strasser stated:

> [Ordinance No. 20-089] did not go before the Planning Board.
>
> [(SOMF ¶ 24.)]

On December 7, 2020, Councilman Lavarro forwarded to counsel for Fair Share Housing Center, Bassam F. Gergi, Esq., an email from Annisia Cialone, Director of Jersey City's Department of Housing, Economic Development, and Commerce, in which Ms. Cialone wrote that Ordinance No. 20-089 "was not" referred to the Planning Board prior to adoption. (SOMF ¶ 25.)

Accordingly, it is evident that Ordinance No. 20-089 was not referred to the Planning Board by the City's Municipal Council prior to adoption. The record includes confirmation of this fact from both Jersey City's counsel as well as the City's Director of Housing.

Any attempt by Jersey City to somehow claim that Ordinance No. 20-089 is not a development regulation required, pursuant to the MLUL, to be referred to the Planning Board for consistency review prior to adoption is belied by the plain terms of the ordinance, its purpose and function, as well as substantial precedent.

Jersey City titled Ordinance No. 20-089 an "Inclusionary Zoning" ordinance, (emphasis added), and it stated that it is being adopted to "requir[e] the inclusion of affordable housing units in all development projects with residential which have received use variances or increased density or height." (SOMF ¶ 14.)

Next, the ordinance's preamble opens by repeatedly referring to the MLUL itself as the basis for the ordinance's adoption:

> **WHEREAS**, a purpose of the Municipal Land Use Law . . . is to encourage municipal action to guide the appropriate use or development of all lands in this state in a manner which will promote the public health, safety, morals, and general welfare; and
>
> **WHEREAS**, a purpose of the Municipal Land Use Law . . . is to promote the establishment of appropriate population densities and concentrations that will contribute to the well-being of persons, neighborhoods, communities and regions and preservation of the environment; and . . . .
>
> [(SOMF ¶ 42.)]

The ordinance then states that its purpose "is to create mixed income housing through new construction to assist the City in promoting the creation of Inclusionary Developments and Affordable

Housing as the City grows and attracts new market-rate residential development." (SOMF ¶ 43.)

Functionally, the ordinance sets forth certain regulations that developers may have to comply with in certain development projects, including providing affordable housing on-site, off-site, payments in lieu of affordable housing, or some sort of "community contribution" in lieu of affordable housing. (SOMF ¶¶ 41-62.)

In view of the above, Ordinance No. 20-089 is exactly the type of development ordinance that the MLUL requires be referred for consistency review by a planning board prior to adoption.

In the New Jersey Supreme Court's recent decision in Shipyard Assocs., the Court determined that in evaluating the nature of a particular ordinance, trial courts are obligated to "consider not only how the municipality characterizes the ordinance, but also how the ordinance functions in practice." 242 N.J. at 41. There, the Court held that an ordinance is subject to the MLUL where "its provisions set specific standards, methods, and uses governing construction -- should it occur at all." Id. at 42.

More recently, in February 2021, in a case arising out of Ocean County, the Hon. Marlene Lynch Ford, A.J.S.C., invalidated a soil/fill ordinance adopted by the Township of Jackson that had not been referred to that municipality's planning board in compliance with the MLUL.[2] (Cert. of B. Gergi Exh. T.) The Township had

[2] Pursuant to Rule 1:36-3, the full unpublished opinion is attached as Exhibit T to the certification of Bassam F. Gergi, Esq., in support of the motion for

argued that the ordinance was "not a development ordinance, but rather an ordinance adopted . . . under general police powers." (Cert. of B. Gergi Exh. T.) In rejecting that argument, Judge Ford wrote:

> While the Township has argued that it reposed responsibility with the zoning officer, the court is obligated to consider the functionality of the ordinance and clearly this ordinance was intended to function within the parameters of the land use and development interests of the Township.
>
> . . . .
>
> . . . The court finds Ordinance is unmistakably a development regulation, and Defendants' failure to comply with N.J.S.A. 40:55D-26a with a referral for review by the Planning Board renders the Ordinance void. While many ordinances may touch upon the use of land, as argued by the Township, in this case the function and operation of the ordinance reposes almost completely with the land development function. The Township may not avoid compliance with the MLUL by cloaking it in language of the exercise of the police power and the promotion of the health, safety, and welfare of the public.
>
> [(Cert. of B. Gergi Exh. T.)]

Here, too, the ordinance in dispute operates entirely, or almost entirely, within the land development function, and any attempt by Jersey City to somehow argue that it is not subject to the procedural mandates of the MLUL must be firmly rejected.

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summary judgment. The undersigned is unaware of any contrary unpublished opinions.

Again, Ordinance No. 20-089 is plainly titled an "Inclusionary Zoning" ordinance, and it states that it is designed to regulate residential development in projects that "have received use variances or increased density or height." (SOMF ¶ 17.)

The preamble of the ordinance repeatedly references that it is being adopted subject to the goals in the MLUL, and its body states that its purpose "is to create mixed income housing through new construction to assist the City in promoting the creation of Inclusionary Developments and Affordable Housing as the City grows and attracts new market-rate residential development." (SOMF ¶¶ 42-43.)

Functionally, the ordinance then regulates how developers that are seeking certain land use approvals may comply, including by providing affordable housing on-site, off-site, payments in lieu of affordable housing, or some sort of "community contribution" in lieu of affordable housing. (SOMF ¶¶ 41-62.)

Under these factual circumstances, there can be no question that Ordinance No. 20-089 is a development ordinance and the Municipal Council should have complied with the MLUL's procedural requirements.

By its plain language, title, purpose, and functionality, the ordinance intends to govern the use of land and the construction of certain residential developments within Jersey City.[3] See Shipyard

[3] Attached to FSHC's complaint as exhibits are the inclusionary zoning ordinances adopted by the City of Asbury Park and the Township of Parsippany, both of which evidenced the fact that they had been referred to each

Assocs., 242 N.J. at 42 (holding that an ordinance is subject to the MLUL where "its provisions set specific standards, methods, and uses governing construction -- should it occur at all").

In view of the above, the failure to comply with the statutorily-mandated process in the MLUL and the Council's failure to refer Ordinance No. 20-089 to its Planning Board for consistency review prior to adoption renders the ordinance invalid. The ordinance is unmistakably a development regulation, and the City was obligated to comply with the law -- which it chose not to do.

2. Ordinance No. 20-089 Is Void Because It Creates an Unlawful Scheme That Would Allow Jersey City's Officials Absolute Discretion to Trade Away Much-Needed Affordable Housing as Part of Blatant Quid Pro Quo Agreements With Favored Developers in Clear Violation of the Law.

When the Jersey City Council adopted Ordinance No. 20-089, the administration claimed that it was designed to maximize affordable housing for those low- and moderate-income families in need.

In reality, Ordinance No. 20-089 has set up an unlawful scheme that enables Jersey City's municipal officials, under the guise of supporting affordable housing, to negotiate on a case-by-case basis to trade away affordable housing, including for illegal exactions from private developers that they would otherwise be forbidden from demanding and/or accepting. This scheme undermines the very reason why mandatory set-aside/inclusionary zoning ordinances have been held to be permissible, which is to increase the number of

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municipality's planning board for consistency review and recommendation prior to adoption. (Cert. of B. Gergi Exh. L.)

affordable homes for working families. Such ordinances are not supposed to be used as means of leverage for municipalities to demand and/or accept contributions from developers that bear no rational relation to the purpose of providing affordable homes.

Indeed, in the words of one Jersey City resident who spoke at the October 21, 2020 Council meeting in opposition to Ordinance No. 20-089, "[t]his is a pay to play disaster waiting to happen." (SOMF ¶ 31.)

i. Ordinance No. 20-089 Is Ultra Vires Because No Statutory Authority Permits Jersey City to Adopt a Mandatory Set-Aside Ordinance That Enables Municipal Officials to Trade Away Affordable Housing in Exchange for So-Called "Community Benefits."

Ordinance No. 20-089 is ultra vires because no statutory authority permits Jersey City to adopt a mandatory set-ordinance that enables municipal officials to trade away affordable housing in exchange for a limitless range of so-called "community benefits" that do not serve the purpose of increasing the City's affordable housing stock.

Although it is well established that municipalities may require developers to set aside a percentage of new residential development as affordable housing via mandatory set-aside/inclusionary zoning ordinances, municipal officials are not permitted to negotiate, case by case, with private developers to trade away the affordable housing required in exchange for an endless and ill-defined range of off-tract improvements.

To the contrary, mandatory set-aside ordinances have been found permissible "because they are specifically designed and applied to aid in the creation of affordable residential housing." Holmdel Builders Ass'n v. Holmdel, 121 N.J. 550, 569 (1990). An ordinance that allows municipal officials to trade away that housing for "benefits" that do not contribute to the provision of affordable housing has no basis in any statutory authority delegated to the municipality.

Further, the MLUL and case law are pellucidly clear that the off-tract improvements that can be imposed on a developer are limited to those improvements the need for which arose as a direct consequence of the particular development under review. This is the case even when a developer enthusiastically agrees to provide the improvements in question. The New Jersey Supreme Court has repeatedly emphasized that this limit on municipal authority is imperative to avoid sanctioning blatant quid pro quo agreements where developers effectively buy land use approvals in exchange for "so-called voluntary contributions."

A municipality does not possess the inherent authority to regulate the use of land. That power is vested by the State's Constitution in the legislative branch and, in turn, the New Jersey Legislature has delegated specific powers to subordinate levels of government, including municipalities. See Riggs, 109 N.J. at 610 ("Municipalities do not possess the inherent power to zone, and

they possess that power, which is an exercise of the police power, only insofar as it is delegated to them by the Legislature.").

That delegation of land use authority to municipalities is strictly limited, however, and there must be statutory authorization for a municipality's exercise of its land use powers in order for the municipality's actions to be valid. See Nuckel v. Borough of Little Ferry Planning Bd., 208 N.J. 95, 101 (2011) ("Because the planning and zoning power stems from legislative allowance, it must be exercised in strict conformity with the delegating enactment . . . ."); accord Dunbar Homes, Inc. v. Zoning Bd. of Adjustment of the Tp. of Franklin, 448 N.J. Super. 583, 597 (App. Div. 2017).

The MLUL "set[s] forth, in detail, the procedural and substantive standards . . . intended to guide municipalities in the exercise of the delegated zoning power over the use and development of land." Toll Bros., Inc. v. Bd. of Chosen Freeholders of Burlington, 194 N.J. 223, 229 (2008).

Moreover, the procedural and substantive standards set forth in the MLUL apply with equal force in the redevelopment context.[4] See Britwood Urban Renewal, LLC v. City of Asbury Park, 376 N.J. Super. 552, 567 (App. Div. 2005) ("This provision of the LRHL makes

[4] The Local Redevelopment and Housing Law (LRHL) contains no provision that authorizes a municipality to contract to receive payments or contributions from a redeveloper that have no nexus to the area in need of rehabilitation or the project for redevelopment of the area. To the contrary, the applicable provisions of the LRHL indicate that there is not such authority. See N.J.S.A. 40A:12A-1, et seq.

plain that the MLUL is not superseded by the LRHL but that the MLUL independently governs review and approval of site plan applications.").

It is settled law that municipalities may adopt mandatory set-aside/inclusionary zoning ordinances that require developers to set aside a specific percentage of new residential units as affordable to low- and moderate-income households. See S. Burlington Cty. NAACP v. Mount Laurel, 92 N.J. 158, 271 (1983) (Mount Laurel II) ("[I]nclusionary devices such as density bonuses and mandatory set-asides keyed to the construction of lower income housing, are constitutional and within the zoning power of a municipality."); see also Holmdel Builders Ass'n, 121 N.J. at 582 ("[M]andatory set-asides [are] legitimate as long as developers [a]re assured an adequate return on their investments . . . ." (quotations omitted)); Fair Share Hous. Ctr., Inc. v. Zoning Bd. of City of Hoboken, 441 N.J. Super. 483, 513 (App. Div. 2015), certif. denied 224 N.J. 246 (2016) ("We reverse the trial court's decision invalidating the Hoboken Affordable Housing Ordinance for the reasons expressed here.").

The case law holds that these types of ordinances are permissible "because they are specifically designed and applied to aid in the creation of affordable residential housing." Holmdel Builders Ass'n, 121 N.J. at 569; see also Mount Laurel II, 92 N.J. at 266 ("[A] mandatory set-aside, is basically a requirement that

developers include a minimum amount of lower income housing in their projects.").

While the 2008 amendments to the New Jersey Fair Housing Act (FHA) also permit municipalities to accept, in certain limited circumstances, payments in lieu of affordable housing, these payments must "be imposed and collected . . . pursuant to the rules of the" Council on Affordable Housing and "expend[ed] . . . within four years of the date of collection."[5] N.J.S.A. 52:27D-329.3. Further, as the Supreme Court has explained, such payments are permissible because the monies collected must be used "for creating more affordable-housing units." See Holmdel Builders Ass'n, 121 N.J. at 565.

Nevertheless, nowhere has the New Jersey Legislature authorized municipalities to adopt a mandatory set-aside/inclusionary zoning ordinance that would trade away the affordable housing required for so-called "community benefits" that do not aid in the creation of affordable housing but, rather, lead to a reduction in the number of affordable homes.

[5] It is worth highlighting that Ordinance No. 20-089's payments in lieu provisions do not even comply with the requirements of New Jersey's Fair Housing Act. The City's ordinance would allow developers to make payments in lieu as low as $25,000 per unit in "Tier 1" for not providing an actual affordable unit. The highest payment amount per affordable unit that would be required is $100,000 in "Tier 5." (SOMF ¶ 55.) This is an incredibly low amount, will not produce affordable housing, and is inconsistent with the applicable rules. The Third Round Rules adopted by the Council on Affordable Housing in 2008 set forth that, in Region 1, which is Jersey City's housing region, the State's determination was that the appropriate payment in lieu amount required to actually construct an affordable unit was $180,267 -- almost twice the maximum that Jersey City requires. See N.J.A.C. 5:97-6.4(c).

Moreover, even outside the context of mandatory set-aside/inclusionary zoning ordinances, an ordinance that demands and/or accepts "community benefits" from developers in exchange for land use approvals is not statutorily authorized.

The MLUL's plain language establishes that a municipality, by ordinance, may only require a developer "to pay the pro-rata share of the cost of providing only reasonable and necessary street improvements and water, sewerage and drainage facilities, and easements therefor, located off-tract but necessitated or required by construction or improvements within such subdivision or development." N.J.S.A. 40:55D-42.

New Jersey's courts have strictly interpreted this limit on municipal authority, repeatedly rejecting attempts by municipalities to impose greater contributions on developers for off-site improvements, even when the developers are enthusiastic partners.

In Swanson v. Planning Bd., 149 N.J. 59, 61 (1997), Justice Stein explained that "the legislative history and case law" interpreting the MLUL demonstrates that "the plain meaning and obvious legislative intent was to limit municipal authority to require developers to contribute to the cost of off-site improvements to only those improvements the need for which arose as a direct consequence of the particular . . . development under review." Id. at 64-65 (citing N.J.S.A. 40:55D-42).

In Toll Bros., the Supreme Court endorsed Justice Stein's opinion, holding that the only off-tract improvements that can be imposed on a developer are those "necessitated by the development." 194 N.J. at 229. The Court emphasized that "a developer cannot be compelled to shoulder more than its pro-rata share of the cost of such improvements . . . even if the developer is a willing participant." Id. at 229-30.

The Court wrote that "[f]undamental" to the MLUL "is a required rationally based link: a municipality may only demand contributions for off-tract improvements 'that [are] necessitated by the development itself, or [are] a direct consequence of the development.'" 194 N.J. at 244 (quoting Holmdel Builders Ass'n, 121 N.J. at 571). It wrote further that

> it is beyond dispute that under the MLUL, a planning body may not condition site plan approval on a developer paying for improvements that are unconnected to its development, or if connected, paying an amount that is disproportionate to the benefits conferred on the developer.
>
> [Id. at 245.]

The Court went on to explain that givebacks/community benefits pose a serious threat to the integrity of the land use process, writing:

> Authorizing off-tract improvements beyond a developer's pro-rata share through the guise of "volunteerism" is problematic from many perspectives. At heart, it fails to provide an adequate safeguard against municipal duress to procure otherwise unlawful exactions because the

> line between true volunteerism and compulsion is a fragile one. . . .
>
> Indeed, it is hard to explain why a private developer would offer more than its fair share contribution without a quid pro quo. In addition to the problem of compulsion, so-called voluntary contributions are not much different than a pay-to-play system, where developers are rewarded for their "philanthropic" gifts. Allowing such a scheme not only impacts the developers willing to pay, but threatens the livelihood of those unable or unwilling to submit to the illicit exaction toll. . . .
>
> Most importantly, even if materially disproportional contractual exactions could be categorized as purely voluntary, they would be unenforceable insofar as they plainly violate the nexus and proportionality requirements in the MLUL that serve as the Legislature's check on a municipality's limited planning power. The exercise of that power must conform with the MLUL even if embodied in a contract; a developer and a municipality cannot do by contract what the statute prohibits.
>
> [Id. at 245.]

A year later, in N.J. Shore Builders Ass'n v. Twp. of Jackson, 199 N.J. 449, 452 (2009), the New Jersey Supreme Court relied on its Toll Bros. opinion to hold that the Township of Jackson did not have the statutory authority to promulgate a municipal ordinance that required developers to satisfy an open space requirement as a condition of development approval.

The Court underscored that "the statutory authority that permits a municipality to require contributions for off-tract improvements is itself limited" and "municipalities must exercise their powers relating to zoning and land use in a manner that will

strictly conform with that statute's provisions." Id. at 452-53 (citing N.J.S.A. 40:55D-42).

An uninterrupted line of case law has similarly confirmed that municipalities cannot accept nor impose off-tract improvements beyond those that arise directly as a consequence of a particular development, even when those improvements are needed and offered by a developer. See N.J. Builders Asso. v. Bernards Twp., 108 N.J. 223, 238 (1987) ("[T]he Legislature has not delegated to municipalities the far-reaching power to depart from traditionally authorized methods of financing public facilities so as to allocate the cost of substantial public projects among new developments . . . ."); West Park Ave., Inc. v. Ocean, 48 N.J. 122, 127-28 (1966) (holding that a municipality could not impose a requirement on a developer to contribute $300 per new home to off-set capital improvements to the school system because an illegal exaction could not be made legal "through the guise of 'voluntary' contributions with spurious 'agreements' to make them stick"); Hackensack Riverkeeper, Inc. v. N.J. Dep't of Envtl. Prot., 443 N.J. Super. 293, 313 (App. Div. 2015) ("[C]ontributions . . . absent a specific legislative grant of authority[are] ultra vires."); Tp. of Marlboro v. Planning Bd. of Tp. of Holmdel, 279 N.J. Super. 638, 643 (App. Div. 1995) ("[C]ontributions for recreational facilities and for firefighting facilities, even those necessary for proper servicing of the development itself, are beyond the authorization of the statute, and hence a development application may not be

conditioned on the developer's undertaking to provide them."); Battaglia v. Wayne Twp. Planning Bd., 98 N.J. Super. 194 (App. Div. 1967) ("[T]he conditions that may be imposed . . . must be limited to those permitted by the authorizing statute.").

Most recently, in a March 2019 decision issued by the Hon. Anthony V. D'Elia, J.S.C., from this very vicinage, Judge D'Elia held that the City of Hoboken had no statutory authority to obtain community benefits from a developer in a redevelopment area and "that to permit such givebacks would create an unacceptable possibility for abuse and fraud in negotiations between an applicant . . . and the City."[6] (Cert. of B. Gergi Exh. U.)

Judge D'Elia explained that the MLUL, namely N.J.S.A. 40:55D-42, places "specific conditions and limitations . . . upon a municipality for it to require off-tract costs and expenses to be paid by a developer as conditions for approval," even in the redevelopment context, and there is "no statutory authorization . . . for the givebacks in question." (Cert. of B. Gergi Exh. U.)

Judge D'Elia concluded that Hoboken could not lawfully exact "community contributions" and "[a]ny agreements which purport to be 'voluntary' by a developer for such contributions . . . are, by definition[,] 'involuntary' contributions and cannot be permitted." (Cert. of B. Gergi Exh. U.)

[6] Pursuant to Rule 1:36-3, the full unpublished opinion is attached as Exhibit U to the certification of Bassam F. Gergi, Esq., in support of the motion for summary judgment. The undersigned is unaware of any contrary unpublished opinions.

When applied to Ordinance No. 20-089, the above case law leads to the ineluctable conclusion that Jersey City did not have the statutory authority to adopt a mandatory set-aside ordinance that allows a small group of handpicked local officials,[7] which are required to only "consult with the Councilperson for the ward in which the project is to be built," to trade away required affordable housing for "community benefits." (SOMF ¶ 54.)

As previously stated, the ordinance in no way tries to limit the off-tract improvements/community benefits that may be demanded by the officials to those "necessitated by the development itself, or [are] a direct consequence of the development." Toll Bros., 194 N.J. at 244 (quoting Holmdel Builders Ass'n, 121 N.J. at 571); see also N.J.S.A. 40:55D-42 (A municipality may only require a developer "to pay the pro-rata share of the cost of providing only reasonable and necessary street improvements and water, sewerage and drainage facilities, and easements therefor, located off-tract but necessitated or required by construction or improvements within such subdivision or development.").

Instead, Ordinance No. 20-089 permits Jersey City to impose or accept an endless range of illegal exactions instead of requiring much-needed affordable housing.

[7] The ordinance defines "approving authority," the group of officials who can unilaterally trade away affordable housing, as "the Director of Housing, Economic Development and Commerce . . . ; the Director of Affordable Housing; and the Director of Community Development." In the case of a project in a Redevelopment Area, the ordinance states that "the director of the Jersey City Redevelopment Agency . . . shall also be a member." (SOMF ¶ 44.)

The ordinance specifically states that "[e]ligible community benefits may consist of, but are not limited to, . . . construction of a public facility, such as, but not limited to, public schools, public recreational facilities, government offices, fire stations, police stations, public parking garages, public transportation systems or facilities, roads and water infrastructure, etc." (SOMF ¶ 60 (emphases added).)

It is thus evident that Jersey City has exceeded its statutory authority in adopting a mandatory set-aside ordinance that allows it to accept so-called "community benefits" in lieu of affordable housing. Irrespective of whether the benefits are "demanded by the municipality and acceded to by the developer or offered by the developer and accepted by the municipality," they are impermissible because they defeat the purpose of mandatory set-aside ordinances, which are to provide homes for those in need, and will "be fairly regarded as an interdicted sale of a municipal approval, subversive of law, anathematic to public policy, and remedial only by vitiation of the approval." Tp. of Marlboro, 279 N.J. Super. at 643.

Permitting municipal officials to negotiate for such "benefits," especially where there are absolutely no standards to govern those negotiations, threatens the integrity of the land use process because, "[a]t heart, it fails to provide an adequate safeguard against municipal duress" and bears all of the hallmarks of "a quid pro quo . . . where developers are rewarded for their

'philanthropic' gifts" and "threatens the livelihood of those unable or unwilling to submit to the illicit exaction toll." Toll Bros., 194 N.J. at 245.

Accordingly, because there is absolutely no statutory authority that permitted Jersey City to adopt a mandatory set-aside ordinance that would allow municipal officials to trade away affordable housing for an endless range of illegal exactions that do not serve the purpose of creating more affordable housing, Ordinance No. 20-089 is invalid as a matter of law.

ii. Ordinance No. 20-089 Violates Public Policy and Substantial Precedent.

Ordinance No. 20-089 violates public policy as well as substantial precedent, threatens the integrity of the land use process, and will foster an environment where development approvals may be sold to the highest bidder and disfavored developers could be forced "submit to the illicit exaction toll."

Courts have repeatedly forbidden schemes that would enable municipal officials to engage in freewheeling bidding for contributions from developers as a condition of a land use approval and where, as here, development conditions are arbitrarily applied to developers based on their "favored" status.

In a seminal case, Nunziato v. Planning Bd. of Borough of Edgewater, 225 N.J. Super. 124 (App. Div. 1988), the Appellate Division overturned the Edgewater Planning Board's approval of a high-rise condominium apartment building where the developer agreed

to contribute $500 to the town's affordable housing trust fund for each market-rate unit to be built. Id. at 129.

In voiding the approval, the Appellate Division noted that where there are no "legislated standards the possibilities for abuse . . . between an applicant and a regulatory body, no matter how worthy the cause, are unlimited." Id. at 133-34. It then noted that

> [c]ases can be visualized in which neighboring land owners file competing applications for site plan approval of shopping center developments and where the applicant promising the larger contribution is granted approval and the other is not. . . .
>
> We conclude that the kind of free-wheeling bidding under review is grossly inimical to the goals of sound land use regulation. The intolerable spectacle of a planning board haggling with an applicant over money too strongly suggests that variances are up for sale. This cannot be countenanced. Proceedings in which this has occurred are irremediably tainted and must be set aside.
>
> [Id. at 134.]

Similarly, in Swanson, Justice Stein warned:

> The possibility that municipal decisions concerning zoning of undeveloped property or conditions of subdivision approval could be subject to influence by a payment from a developer substantially in excess of any amount that lawfully could have been imposed is fundamentally incompatible with the principles underlying the MLUL. . . . The power of municipalities to zone is delegated by the Legislature and its exercise must conform to the boundaries of that delegation. . . . Extraneous considerations, such as a developer's voluntary contribution to defray the cost of a municipal obligation, should not be permitted to influence

> or affect municipal zoning decisions. Similarly, in circumscribing a municipality's power to impose the cost of off-site improvements on developers, we have expressed our concern about disproportionate impositions and emphasized the need for planning boards, in imposing such charges, to act in accordance with prescribed standards . . . .
>
> Our case law has been extremely sensitive to the threat presented by unlawful exactions imposed by a municipality on developers, whether the developers are reluctant or enthusiastic participants in the transaction. . . .
>
> . . . .
>
> . . . [I]n reviewing municipal planning and zoning decisions concerning development applications that contemplate payments by the developer for a prescribed local purpose relevant to the application, courts must be vigilant to insure that such payments do not constitute unlawful exactions that have the capacity to subvert the meritorious review process contemplated by the MLUL. Similarly, municipal officials must be scrupulously careful to avoid the imposition of conditions to approvals of development applications that, even though acceptable to the applicants, could not be imposed without their consent. In such circumstances the developer's acquiescence to the conditions imposed by the municipality may, in reality, constitute an improper incentive that impermissibly taints the municipality's action on the development application, and thereby undermines the principle of objective and impartial review of development applications that the MLUL is intended to assure.
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> [149 N.J. at 66-68.]

Judge D'Elia, in a matter arising from Hoboken, likewise held that permitting elected officials to negotiate for community givebacks violates public policy and poses a serious threat to the integrity of the land use process. He wrote:

> The concerns for significant risk of abuse, favoritism or bad faith on the part of a municipality are much greater when . . . [they] engage in "freewheeling bidding" for contributions or givebacks . . . .
>
> . . . .
>
> . . . [O]ne can easily envision a Mayor and Council approving . . . plans in light of which applicant is offering the greatest giveback or contribution to the municipality, or to selected non-profit organizations or schools; such as occurred here. Thus, as there is no statutory authority or standards regulating these givebacks . . . actions in adopting the ordinance . . . are void as a matter of public policy.
>
> . . . .
>
> . . . The risk of bad faith, favoritism and the unlimited range of discretion, which would be afforded to municipalities in exacting off-tract contributions . . . is too great.
>
> [(Cert. of B. Gergi Exh. U.)]

Here, the public policy danger posed by Ordinance No. 20-089 that it may be arbitrarily applied to different developers based on their "favored" status is exacerbated not simply by the fact that there are no legislated standards to govern what "community benefits" can be accepted, when, and why, but by the fact that the City Council has retained the authority to waive the ordinance for certain developers, at any time, for any reason.

In Section 187-8, the ordinance states that the requirements of the ordinance "may be waived by the City Council" for any developer, and it does not have any standards or criteria that

would guide or govern when or why the ordinance could be waived. (SOMF ¶¶ 49-51.)

One could easily envision scenarios where the City's officials waive the affordable housing requirements for certain favored developers, or requires a minimal "community benefit," while imposing greater requirements on those developers that are disfavored or that, for whatever reason, have not managed to curry the same local political support.

These scenarios threaten the integrity of the land use process, fuel the perception of local government as up for sale, and are what the courts of this State have tried to vigorously defend against for decades.

Finally, such unlawful and arbitrary provisions run counter to the deep need and rationale behind affordable housing ordinances.

New Jersey's courts have consistently recognized that "[t]he public policy of this State has long been that persons with low and moderate incomes are entitled to affordable housing. . . . 'There cannot be the slightest doubt that shelter, along with food, are the most basic human needs.'" Homes of Hope, Inc. v. Eastampton Tp. Land Use Planning Bd., 409 N.J. Super. 330, 337 (App. Div. 2009) (quoting S. Burlington Cty. NAACP v. Mount Laurel, 67 N.J. 151, 178 (1975) (Mount Laurel I)).

The Supreme Court has recognized that the provision of "safe, decent and attractive housing that [working families] can afford serves the community's interest in achieving an integrated, just

and free society and promotes the general welfare of all citizens." De Simone v. Greater Englewood Hous. Corp., 56 N.J. 428, 441 (1970).

The New Jersey Legislature itself affirmed this commitment when it enacted the Fair Housing Act, which established that it is in the State's interest "to maximize the number of low and moderate units by creating new affordable housing." N.J.S.A. 52:27D-302.

Accordingly, the Court has determined that "[a]ffordable housing is a goal that is no longer merely implicit in the notion of the general welfare. It has been expressly recognized as a governmental end and codified under the FHA." Holmdel Builders Ass'n, 121 N.J. at 567.

It is thus exceedingly disappointing that Jersey City's Municipal Council, under the guise of supporting affordable housing, chose to rush to adopt an unlawful scheme that sanctions blatant quid pro quos and grants absolute discretion to the City's officials to engage in freewheeling negotiations to trade away much-needed affordable housing.

Conclusion

For the foregoing reasons, FSHC respectfully urges the court to invalidate Ordinance No. 20-089 and declare it void as a matter of law.

Dated: June 25, 2021

Respectfully submitted,
FAIR SHARE HOUSING CENTER

Bassam Gergi
Bassam F. Gergi, Esq.