PREPARED BY THE COURT

D.R. HORTON, INC. Plaintiff, vs. TOWNSHIP OF SPRINGFIELD, Defendant.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION – BURLINGTON COUNTY DOCKET NO. BUR-L-684-22 OPINION

Procedural History and Statement of Facts

This matter originates with the filing of two separate complaints in lieu of prerogative writs by two separate plaintiffs. The first was filed by plaintiff, 1245 Old York Rd. LLC, under L-2041-21 on September 27th, 2021. The second was filed by plaintiff, DR Horton, on April 18th, 2022, under L-684-22. The Court consolidated both Builder's Remedy (Mount Laurel affordable housing) lawsuits in June, 2022. Ultimately, the Township of Springfield settled with 1245 Old York Rd. by purchasing the property and entering into a stipulation of dismissal on April 11, 2023.

Historically, Springfield Township, the defendant in this matter, applied for and received first and second round substantive certification from the Council on Affordable Housing for a plan to construct low and moderate income housing. Substantive certification of Springfield's third round plan was received by COAH on June 10th, 2009, but third round regulations were subsequently invalidated. After the New Jersey Supreme Court decided Mount Laurel IV in 2015, Springfield Township chose not to file for a declaratory judgment action following the expiration of its 2009 certification, and therefore had no immunity against DR Horton's Builders

Remedy lawsuit. Additionally, upon being sued, the Township contended for the first time that they had no constitutional obligation to provide affordable housing.

While both plaintiffs were still involved in the litigation, the Court heard and decided the threshold question of Springfield's constitutional obligation to provide their fair share of the regional affordable housing demanded by the NJ Constitution. After briefs were submitted and oral argument was conducted, the Court on October 21st, 2022 determined that Springfield did have such an obligation, and rendered an oral opinion with reasons. As previously stated, plaintiff Old York Road's matter was then dismissed by way of settlement.

DR Horton, Inc., is a national residential developer, building residential communities since 1978. DR Horton is the contract purchaser of approximately 286 acres of property located along Arney's Mount, Birmingham Road, known as block 1201, lots 27.01, and block 1202, lot 3 on the official Springfield Township tax maps. The north side of the property consists of 126 acres along the northern side of Arney's Mount, Birmingham Road near its intersection with Arney's Mount Rd., County Route 668. The south side of the property consists of approximately 160 acres situated along the southern side of Arney's Mount, Birmingham Road near its intersection with N. Pemberton Road, County Route 630.

On March 18th, 2022, DR Horton submitted plans to the Township proposing to develop the property with a planned, mixed residential community of 622 units, having reduced from their original plan to build 1,540 units, consisting of a combination of fee simple active adult single family homes and traditional single-family homes on the north side, together with multi-family rental apartments on the south side. Under this proposal, the north side would consist of 419 dwellings, 300 active adult single family dwellings, and 119 traditional single-family dwellings. The south side would consist of 203 dwellings, consisting of 107 townhomes, and a

96-unit multifamily apartment which would be restricted to low and moderate income households. The proposed 94 low- and moderate-income rental dwellings would constitute a 15% set aside, for low and moderate income, affordable housing. However, almost directly prior to trial in this matter of the Builder's Remedy, DR Horton modified their proposal to instead develop the property as a mixed residential community consisting of 389 units; 115 detached single-family units and 138 townhomes, as well as 80 townhouses and 56 "stacked" affordable units on the south side of the property. The proposed low- and moderate-income housing would consist of 56 units, or a 14.4% set aside. This alteration having occurred by submission dated December 18, 2023, and subsequent to Springfield having already submitted their expert reports. The Court then permitted Springfield an additional 3 weeks to provide supplemental expert reports which could respond to the revised proposal, and the Court granted the special master an additional 5 days to provide his report for the same reason.

Springfield Township is a rural municipality in Burlington County. In 2020, it had a population of 3,245 people. As of 2018, approximately 13,163 acres in Springfield were assessed as farmland and approximately 1,016 acres were purchased and preserved for open space and appear on the township's recreation and open space inventory. Thus, approximately 75% of the municipality is either farmland assessed or preserved open space. Less than 3% of the township's land is devoted to industrial or commercial use. There is no public water or sewer. There are no public transportation facilities in Springfield Township. The number of employed persons in the resident labor force in the Township declined in 2007, 2019 and 2020.

Springfield's master plan, initially adopted in 1967, and reexamined in 1993, 1996, 2005, 2010, and 2021 set forth an overarching goal to "preserve its rural character, enhance the current and future viability of agriculture, protect its fragile ecosystem, and manage development

prudently." Farmland preservation and the retention of agriculture as a viable industry were and are the primary forces behind Springfield's land use vision.

Burlington County's most recent comprehensive farmland preservation plan identifies the entirety of Springfield Township as an agricultural development area, and a long-term target for County farm easement acquisition efforts leading to 5,827 acres of preserved farmland. Similarly, the State Development and Redevelopment Plan ("SDRP") adopted March 1st, 2001, by the New Jersey State Planning Commission identifies no growth areas in Springfield Township, (a term that has fallen out of favor) and designates the entire town as rural within Planning Area 4 ("PA-4").

Following multiple unsuccessful settlement sessions regarding the DR Horton development proposal in Springfield Twp., on May 16th, 2023, the court issued a Case Management Order directing that the parties file briefs relating to the Builder's Remedy issue, with a hearing to be held October 19th, 2023. On that date the Court again rendered an oral Decision, determining the need for an evidentiary trial on the issue of site suitability, which began on January 24th, 2024, and which continued on January 26th and January 29th until completion. The following Decision is a result of that trial.

I. The DR Horton Proposal At Trial Was Improperly Timed At Best and Could Have Been Procedurally Barred At Worst

(A). DR Horton never amended their pleadings to conform with their new Proposed Builder's Remedy of 389 units as is required by R.4.5-2, R. 4.9-1, and R. 4.9-2.

On December 18, 2023, six hundred and nineteen days into this Builder's Remedy litigation, just weeks before trial, and on the discovery end date, DR Horton submitted a new

design for the site, via expert reports, reducing the proposed unit count from 622 to 389. In correspondence dated December 22, Counsel for DR Horton justified this change by referencing this Court's statement from the October 19 hearing, that it was not likely to permit the 622-unit proposal based on its outsized magnitude, a position the Court had stated from day one. Yet, DR Horton submitted the new design without amending its complaint, without prior notice to Defendants, and without leave of Court.

The Court's admonition in its Opinions does not relieve DR Horton of its obligations under the Court rules to amend its complaint, or to get this Court's permission to do so. R. 4.9-1. To date, DR Horton has never sought leave to conform its pleadings to the evidence presented at trial, despite opportunity and obligation to do so. R. 4:9-2; New Mea Const. Corp. v. Harper, 203 N.J. Super 486, 492 (App. Div. 1985) (affirming the denial of the motion made and noting that the movant had foregone numerous prior opportunities to amend or seek to amend his pleading). DR Horton similarly failed to fairly apprise Defendants of its intent to drastically revise its proposal, subverting R. 4:5-2, which requires adequate notice to one's adversary. Finally, they never provided any explanation for why they waited until the discovery end date to reduce their proposal, when they were acutely aware of the challenges of a larger development from the inception of this case.

DR Horton's untimely conduct was unfairly prejudicial to Defendants. Defendants diligently submitted interrogatories shortly after the October 19 hearing to determine whether DR Horton planned to revise their proposal, but did not receive a response until after the discovery end date and the submission of its expert reports, rendering those reports partially nonresponsive, and also in need of revision.

(B). DR Horton's failure to respond to Defendant Township's interrogatories by the discovery end date violated the Court's October 19, 2023 discovery order. R. 4.23-2.

On October 25, Springfield Township submitted interrogatories to DR Horton, to determine if Plaintiff intended to vary its proposal. DR Horton did not respond to the interrogatories by the discovery end date, of December 18, but did in fact drastically reduce the housing number in their proposal. Then, after Springfield requested additional time to prepare responsive expert reports, based on the new proposal, DR Horton objected, stating that "Plaintiff does not believe that Defendants need to supplement or submit new reports." DR Horton also stated it had not exceeded the sixty-day period allowed to answer interrogatories, having answered Springfield's interrogatory on December 22.

This rationale misses the point. Defendants' inquiry was clearly made for one purpose, to prepare responsive expert reports. Providing a response to Defendant's interrogatories after the discovery end date, and after Defendants incurred the expense of their reports, is a superficial attempt at compliance with the rules and this Court's Order. DR Horton's chosen strategy required this Court to allow additional time for Defendants to obtain further, responsive expert reports, at taxpayer expense. Because of this behavior, the Court could have struck part of Plaintiff's pleadings, but did not, opting for liberality, and moving the trial forward. R. 4:23-2(b).

In sum, if plaintiff did not openly violate the Rules of Court, they at least conducted themselves in a way that is contrary to the spirit of open discovery, transparency, and timelines, which is the hallmark of a fair trial system in New Jersey, by waiting until the very last minute, during the holiday season, to reveal their new proposal.

II. The Court Will Reach Its Decision Without Reliance On Net Opinion

"The admission or exclusion of expert testimony is committed to the sound discretion of the trial court." Townsend v. Pierre, 221 N.J. 36, 53 (2015) *quoting* State v. Berry, 140 N.J. 20, 293 (1995). "When a trial court determines the admissibility of expert testimony, N.J.R.E. 702 and N.J.R.E. 703 frame its analysis. N.J.R.E. 702 imposes three core requirements for the admission of expert testimony:

> (1) the intended testimony must concern a subject matter that is beyond the ken of the average juror; (2) the field testified to must be at a state of the art such that an expert's testimony could be sufficiently reliable; and (3) the witness must have sufficient expertise to offer the intended testimony.

Ibid. (internal citation omitted).

N.J.R.E. 703 addresses the foundation for expert testimony. It requires that expert opinion be grounded in "facts or data derived from (1) the expert's personal observations, or (2) evidence admitted at the trial, or (3) data relied upon by the expert which is not necessarily admissible in evidence but which is the type of data normally relied upon by experts." Ibid., *quoting* State v. Townsend, 186 N.J. 473, 494 (2006).

The net opinion rule is a "corollary of [N.J.R.E. 703] . . . which forbids the admission into evidence of an expert's conclusions that are not supported by factual evidence or other data." Id., at 53. The rule requires that an expert 'give the whys and wherefore' that supports the opinion, rather than a mere conclusion." Ibid.

Courts reject expert testimony that is merely the *ipse dixit* of the expert. See., e.g., Pomerantz Paper Corp., v. New Comm. Corp., 207 N.J. 344, 373 (2011) ("[I]f an expert cannot offer objective support for his or her opinions, but testifies only to a view about a standard that is 'personal,' it fails because it is a mere net opinion."). Ibid.

On February 27, 2024, twenty-nine (29) days after the conclusion of trial, the parties submitted summaries of their trial arguments. In Plaintiff's summary, but <u>not</u> at trial, Plaintiff objected to the recommendations made in the Special Master's report, and also to the report and testimony of Township witness, Mr. Zellner. Plaintiff argues that both the conclusions offered in the Special Master's report, along with specific testimony offered by Mr. Zellner, constitute a net opinion which should not be considered by the court. <u>Psb</u>., p. 26-30.

At the outset, Plaintiff's objection is untimely, raised in a summation of trial arguments for the first time, again without regard to Defendant's ability to respond. <u>See</u> <u>Pressler & Verniero</u>, Current N.J. COURT RULES, (GANN), Comment R. 1:7-2[1]. "The absence of an objection suggests that trial counsel perceived no error or prejudice, and, in any event, prevented the trial judge from remedying any possible confusion in a timely manner." <u>Ibid</u>., *citing* <u>Bradford v. Kupper Associates</u>, 283 N.J. Super. 556, 573-74 (App. Div. 1995), *certif. den.* 144 N.J. 586 (1996). In fact, Plaintiff accepted, without objection, the expertise, testimony, and reports of both Mr. Maczuga and Mr. Zellner at trial.

Where, as here, no objection is advanced at trial, the standard by which the statements are to be tested is that of plain error on appeal. <u>Id</u>., at 493. Under that standard, the issue is whether the comments had the "clear capacity for producing an unjust result." <u>Ibid</u>., *citing* <u>State v. Melvin</u>, 65 N.J. 1, 18 (1974); <u>R</u>. 2:10-2. While this Court does not presume to act as an Appellate Court in any way, it also hastens to note that the purpose of written summations after trial was to allow the parties to present organized arguments to the Court; it was not an opportunity to rectify inaction or substitute action which is specifically reserved for trial, where an adversary has the opportunity to respond.

First, Plaintiff challenges the Court's Special Master's report, specifically, Mr. Maczuga's ultimate conclusion, that DR Horton's proposal "does not represent sound planning and would have **environmental impacts** that would alter the character of the area." Exhibit C-1, p. 4. (emphasis added). The factual findings of a Special Master are reviewed by the same standard applicable to trial judges, that is, the court will defer to the findings of fact supported by credible evidence in the record. Pressler & Verniero, Current N.J. COURT RULES, (GANN), Comment R. 2:10-2[6.8] *citing* Little v. Kia Motors America, 242 N.J. 557, 593 (2020).

Plaintiff contends Mr. Maczuga's conclusion is "unsubstantiated" because it does not "reconcile his [ultimate conclusion ...] with the current AR-10 zoning or municipal master plan and .... [i]nstead [] [relies] on the Property's non-binding, unaffected depiction [in](sic.) the 2022 Burlington County Farmland Preservation Plan to support his planning opinion." Plaintiff's Summary Brief (Psb), p. 27. Plaintiff also argues Mr. Maczuga's report lacks support because he did not include his own "Site Suitability" or "Environmental Impacts" analyses. Psb, p. 27 *citing* N.J.A.C. 5:93-5.3; N.J.A.C. 5:93-4.

Plaintiff also takes issue with Mr. Maczuga's definition of "environmental impact". Ibid. At trial, Mr. Maczuga explained that environmental impact "describes the changing character of the Property area 'from like rural farm area to kind of a suburban setting.'" Ibid. Plaintiff states Mr. Maczuga's definition should have, but "does not refer to any specific criteria like wetlands, landscape, [] endangered species", referencing N.J.A.C. 5:93-4. Id., at p. 28. Plaintiff argues that Mr. Maczuga's ultimate conclusion is a net opinion which cannot be considered by this Court. Id., p. 27-28 *quoting* 3T:149, 150:1-5.

Despite this assertion, the Court notes the COAH regulations provide no competing definition for 'environmental impacts' in N.J.A.C. 5:93-1.3 and discerns no standard which