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Michael J. Blee P.J. Ch.

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The Honorable Michael J. Blee, P.J.Ch.

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MEMORANDUM OF DECISION

TO James, N. Lawlor, Esquire
James G. O'Donohue, Esquire
Olga Pomar, Esquire
Robert Beckelman, Esquire
Vladimir Palma, Esquire
Salvatore Perillo, Esquire
Clyde L. Otis, Esquire
Keith Bonchi, Esquire
Michael D. Mezzacca, Esquire
Robert Fagella, Esquire
Adam Greenberg, Esquire
Noel Eisenstat, Esquire
Honorable Robert A. Fall, J.S.C., Ret.

RE Manufacturers and Traders Trust Company as Indenture Trustee vs. Marina Bay Towers Urban Renewal II, L.P., et als

DOCKET NO. CPM-F-049229-14
CPM-L-365-14

REMAND FROM APPELLATE DIVISION.
Decision decided October 22, 2019 under docket A-5879-17T2

The Court having considered oral argument on December 6, 2019 and May 14, 2020, the written submissions of Manufacturers and Traders Trust Company of November 19, 2019; the written submissions of the "tenant defendants" of December 2, 2019; the written submission of Essex County Improvement Authority of December 2, 2019; the written submission of the City of North Wildwood of December 3, 2019; the written submission of PAC Capital of December 4, 2019; the reply submission of Manufacturers and Traders Trust

Company of December 5, 2019; the reply submission of North Wildwood of December 5, 2019; the submission for N.J.H.M.F.A of December 5, 2019; and the Court having considered an unredacted version of the updated and amended Final Restructuring Plan of March 17, 2020; the April 24, 2020 Report with Findings and Recommendations of Special Master Noel Eisenstat in response to the submission of Manufacturers & Traders Trust Company as Indentured Trustee (the "Trustee"); PAC Capital, LLC (PAC Capital) updated restructuring plan of March 17, 2020; and the Court having considered Beach Creek Marina, Inc's response to the Special Masters Report with findings and recommendations dated and submitted April 24, 2020 submitted on April 30, 2020; Marina Bay Towers Urban Renewal II, L.P. (MBT "II") response of April 30, 2020; South Jersey Legal Services ("Tenants") report regarding the Special Masters Report and the most recent proposal for rehabilitating and restructuring MBT of April 30, 2020; Manufacturers and Traders Trust Company, as Indentured Trustee ("Trustee") for the ECIC bonds issued and sold to PAC Capital, LLC ("PAC") "Trustee, Sponsor"; response to the Special Master Report of May 1, 2020; the City of North Wildwood correspondence of May 1, 2020 in which they did not object to the Special Masters Report or comment upon the report; PAC Capital, LLC ("PAC") response to the Special Masters Report of May 1, 2020; Marina Bay Towers Urban Renewal II, L.P. request for oral argument of May 7, 2020; Manufacturers and Traders Trust Company, as Indentured Trustee for the ECIC bonds issued and sold to PAC Capital, LLC ("PAC") letter brief of May 21, 2020 in accordance with the Court's Third Amended Case Management Order and by way of supplement to the May 1, 2020 letter brief filed by the Trustee; correspondence of May 7, 2020 from Fair Share Housing Center regarding participation in other matters which included builders remedies claims settled as the result of mediation with Retired Judge Robert Fall; the Resolution of the City of North Wildwood

authorizing the Mayor and the City Clerk to execute a settlement agreement in connection with various litigation matters concerning Marina Bay Towers and related litigation with ownership interests in and around the Marina Bay Tower's project and other property within Block 152 adopted on March 17, 2020; Settlement Agreement and Release Agreement of April 6, 2020 by and among Marina Bay Towers Urban Renewal II L.P. (Marina Bay II), PAC Capital, LLC ("PAC"), Beach Creek Marina, Inc. and all of these submissions with attachments thereto;

SUBMISSIONS BY PLAINTIFF AND DEFENDANTS:

- **MR. LAWLOR, ATTORNEY FOR PLAINTIFF, MANUFACTURERS, SUBMISSION OF NOVEMBER 19, 2019**
- **MS. POMAR, ATTORNEY FOR DEFENDANT TENANTS, SUBMISSION OF DECEMBER 2, 2019**
- **MR. OTIS, ATTORNEY FOR ESSEX COUNTY IMPROVEMENT AUTHORITY, SUBMISSION OF DECEMBER 2, 2019**
- **MR. BECKELMAN, ATTORNEY FOR THE CITY OF NORTH WILDWOOD, SUBMISSION OF DECEMBER 3, 2019 (BRIEF AND CERTIFICATION)**
- **MR. PERILLO, ATTORNEY FOR PAC CAPITAL, SUBMISSION OF DECEMBER 4, 2019**
- **JUDGE SANDSON'S ORDER OF MAY 22, 2018 AND EXHIBITS**
- **APPELLATE DIVISION DECISION**
- **ORDER OF NOVEMBER 6, 2019 SCHEDULING DEADLINE ETC.**
- **ORDER OF DECEMBER 20, 2019 WITH RSPECTO FINAL RESTRUCTURING PLAN AND FURTHER SUBMISSIONS**
- **ORDER OF MARCH 31, 2020 SECOND AMENDED CASE MANAGEMENT ORDER WITH RESPECT TO FINAL RESTRUCTURING PLAN AND FURTHER SUBMISSIONS**

- **ORDER OF MAY 202, 2020 THIRD AMENDED CASE MANAGEMENT ORDER WITH RESPECT TO FINAL RESTRUCTURING PLAN AND FURTHER SUBMISSIONS**

- **MR. LAWLOR, ATTORNEY FOR MANUFACTURERS TRADERS TRUST COMPANY MARCH 17, 2020 UPDATED AND A FINAL RESTRUCTURING PLAN AND EXHIBITS A THROUGH N.**

- **SPECIAL MASTER NOEL EISENSTAT REPORT OF APRIL 24, 2020, IN RESPONSE TO THE SUBMISSION OF MANUFACTURERS & TRADERS TRUST COMPANY AS INDENTURED TRUSTEE (THE "TRUSTEE");**

- **PAC CAPITAL, LLC (PAC CAPITAL) UPDATED RESTRUCTURING PLAN OF MARCH 17, 2020**;

- **BEACH CREEK MARINA, INC'S RESPONSE TO THE SPECIAL MASTERS REPORT WITH FINDINGS AND RECOMMENDATIONS DATED AND SUBMITTED APRIL 24, 2020 SUBMITTED ON APRIL 30, 2020;**

- **MARINA BAY TOWERS URBAN RENEWAL II, L.P. (MBT "II") RESPONSE OF APRIL 30, 2020;**

- **SOUTH JERSEY LEGAL SERVICES ("TENANTS") REPORT REGARDING THE SPECIAL MASTERS REPORT AND THE MOST RECENT PROPOSAL FOR REHABILITATING AND RESTRUCTURING MBT OF APRIL 30, 2020;**

- **MANUFACTURERS AND TRADERS TRUST COMPANY, AS INDENTURED TRUSTEE ("TRUSTEE") FOR THE ECIC BONDS ISSUED AND SOLD TO PAC CAPITAL, LLC ("PAC") "TRUSTEE, SPONSOR"; RESPONSE TO THE SPECIAL MASTER REPORT OF MAY 1, 2020;**

- **THE CITY OF NORTH WILDWOOD CORRESPONDENCE OF MAY 1, 2020 IN WHICH THEY DID NOT OBJECT TO THE SPECIAL MASTERS REPORT OR COMMENT UPON THE REPORT;**

- **PAC CAPITAL, LLC ("PAC") RESPONSE TO THE SPECIAL MASTERS REPORT OF MAY 1, 2020;**

- **MARINA BAY TOWERS URBAN RENEWAL II, L.P. REQUEST FOR ORAL ARGUMENT OF MAY 7, 2020;**

- **MANUFACTURERS AND TRADERS TRUST COMPANY, AS INDENTURED TRUSTEE FOR THE ECIC BONDS ISSUED AND SOLD TO PAC CAPITAL, LLC ("PAC") LETTER BRIEF OF MAY 21, 2020;IN ACCORDANCE WITH THE COURT'S THIRD AMENDED CASE MANAGEMENT ORDER AND BY WAY**

OF SUPPLEMENT TO THE MAY 1, 2020 LETTER BRIEF FILED BY THE TRUSTEE;

- **FAIR SHARE HOUSING CENTER LETTER REGARDING PARTICIPATION IN OTHER MATTERS WHICH INCLUDED BUILDERS REMEDIES CLAIMS SETTLED AS A RESULT OF MEDIATION WITH RETIRED JUDGE ROBERT FALL;**

- **RESOLUTION OF THE CITY OF NORTH WILDWOOD AUTHORIZING THE MAYOR AND THE CITY CLERK TO EXECUTE A SETTLEMENT AGREEMENT IN CONNECTION WITH VARIOUS LITIGATION MATTERS CONCERNING MARINA BAY TOWERS AND RELATED LITIGATION WITH OWNERSHIP INTERESTS IN AND AROUND THE MARINA BAY TOWER'S PROJECT AND OTHER PROPERTY WITHIN BLOCK 152 ADOPTED ON MARCH 17, 2020;**

- **SETTLEMENT AGREEMENT AND RELEASE AGREEMENT OF APRIL 6, 2020 BY AND AMONG MARINA BAY TOWERS URBAN RENEWAL II L.P. (MARINA BAY II), PAC CAPITAL, LLC ("PAC"), BEACH CREEK MARINA, INC.**

Statement of Material Facts

On October 22, 2019, the Appellate Division in an eighty-nine (89) page Opinion affirmed in part the Trial Court's decision of May 22, 2018 and Reversed and Remanded in part to the Trial Court with specific instructions contained within pages 87 and 89 of the Opinion (A-5879-17T2). On November 6, 2019, this Court conducted a telephone management conference with counsel for all parties and the Special Master. The Court entered a scheduling deadline for the submission of a revised restructuring plan and further submissions in support and in opposition thereto and for entry of Final Judgment of Foreclosure. The Order provided timeframes upon which the Plaintiff was to present an updated Restructuring Plan. The Court also established timeframes for opposition to the restructuring plan. The Court recognized that the updated Restructuring Plan would take considerably more time for presentation because of the role and duties of the Special Master.

Within the November 6, 2019 Order, the Court addressed certain specific issues remanded by operation of the Appellate Order: (1) "whether the obligations under the ECI loan can be satisfied if the project remains a "qualified residential rental project" pursuant to 26 U.S.C. §142 (b)(1); (2) whether MBTIII is "qualified housing sponsor" under N.J.S.A. -107(j) and (3) whether the proposed deed restriction conforms to the restructuring plan."

Oral argument was conducted on December 6, 2019. In a subsequent Order of December 20, 2019, the Court set forth additional timeframes for submissions regarding the Final Restructuring Plan. The Court also conducted a telephonic management conference on December 23, 2019.

Manufacturers Traders Trust Company on March 17, 2020 submitted an updated and a Final Restructuring Plan with Exhibits A through N.

During the course of this matter, while on remand, the parties voluntarily participated in mediation with Retired Judge Robert Fall. The parties engaged in approximately seven to eight separate mediation sessions which culminated in a "Global Settlement Agreement" involving various litigated matters concerning Marina Bay Towers and related litigation with ownership interests in and around the Marina Bay Towers project and other property within Block 152 on the City of North Wildwood tax map. That litigation has been described as the tax lien foreclosure matter, the financial agreement matter, the financial agreement appeal, PAC claims appeal, mortgage foreclosure matter and Anglesea matter. The "Global Settlement" reached involved the following cases:

(1) Marina Bay Towers Urban Renewal, II, L.P.,
vs. City of North Wildwood
Superior Court of New Jersey, Law Division
Civil Part Cape May County
Below Docket No: CPM-L-759-08
Appellate Division Docket No: A-4089-16TF

(2) Royal Tax Lien Services, LLC.,
vs. Marina Bay Towers Urban Renewal II, L.P., et als

and

PAC Capital, LLC. And
The City of North Wildwood
Superior Court of New Jersey, Chancery Division
Cape May County
Below Docket No: CPM-F-56520-09
Below Docket No: CPM-F-10203-11
Appellate Division Docket No: A-771-17T2;

(3) Angelsea Properties, LLC
vs. City of North Wildwood, et als
Superior Court of New Jersey, Law Division
Civil Part Cape May County
Docket No: CPM-L-359-15

HAVING CAREFULLY REVIEWED THE MOVING PAPERS, AND RESPONSES FILED, AND HAVING CONSIDERED ORAL ARGUMENT I HAVE RULED ON THE ABOVE CAPTIONED MOTION(S) AS FOLLOWS:

LEGAL ANALYSIS

I. WHETHER THE PLAN WILL ENSURE THAT THE ECIA BOND OBLIGATIONS ARE PAID IF IT IS A QUALIFIED RESIDENTIAL RENTAL PROJECT AND IF IT STILL MEETS THE LATTER DEFINITION.

On Page 72 of the Appellate Division Decision, the Appellate Panel noted that the Trial Court did not address "whether the interest and principal on the ECIA loan could be earned under the restrictions imposed by §142(d). The Appellate Panel cites requirements of §116 of the County Improvement Authority Law, which permits the removal or modification of restrictions. A court cannot permit a restructuring plan that imposes continued or new

restrictions, if: "the Court shall find that the interest and principal on these obligations secured by the lien which is the subject of foreclosure cannot be earned under the limitations imposed by the provisions of this Act." N.J.S.A. 40:37A-116. Absent such a plan, the property may be sold free of limitations imposed by this Act or subject to such limitations as the Court may deem advisable to protect the public interest".

The Appellate Court was concerned that the dwindling number of 50% AMI tenants threatened the projects existence as a "qualified residential rental project" under IRC §142. " It appears that there may be an insufficient number of tenants that will meet the requirement standards by 2020 or 2021." Appellate Op. at 73.

The Appellate Division had reservations that if the project was no longer meeting the definition of "qualified residential rental project" under IRC 142(d)(1), any proposed financing in the original Capital Restructuring Plan would not be viable. Alternatively, even if it remained a 142 project in a modified plan, §116's requirements would still not be met. It is based upon this framework, that the Appellate Division remanded to the Trial Court for findings that "(a) the ECIA loan could be satisfied if the project remains a qualified residential project and (b) that it would still be a qualified residential project."

The City of North Wildwood objected to the updated plan in its entirety at the time of the original oral argument following the remand on December 6, 2019, based upon a written submission of December 3, 2019. However, after the matter was amicably resolved following mediation, the City indicated that it had no comments or objections to a Special Masters Report which was filed on April 27, 2020. Further, the City of North Wildwood indicated that as a result of the mediation sessions which led to the settlement entered into by the City, the City agreed as a condition of settling the other pending lawsuits that the "Phase

II Development Rights were fully approved". The City does not mention a general objection as to whether or not the project remains a qualified residential rental project and whether bonds can be repaid under the plan. Similarly, the tenant defendants raised general objections to the entire plan and other concerns but did not specifically set forth a position with respect to this issue.

The Essex County Improvement Authority objected to the qualifications of MBTIII as a qualified housing sponsor based upon County Improvement Authority Law. Specifically, the ECIA contends that it has not tacitly approved MBTIII as a qualified housing sponsor or formally approved of same. The ECIA argued that the current ownership needs to introduce a partner with independent experience as an affordable housing developer. The ECIA argues that no documentation was submitted demonstrating that MBTIII was a separate independent entity qualified to construct, rehabilitate, operate, manage or maintain Marina Bay Towers. The ECIA argues that the Appellate Division made a distinction between a non-profit corporation qualified as an urban renewal entity under the long term tax exemption law (N.J.S.A. 40A:21 at 20-1 et. seq., and a qualified housing sponsor under CIAL.

The ECIA admits that both MBTII and MBTIII were properly organized as non-profit corporations and are considered urban renewal entities. However, they argue that there was no specific finding that they are a qualified housing sponsor under CIAL. The ECIA, following oral argument on December 6, 2019, did not participate in the mediation process and has essentially withdrawn from this proceeding.

For the following reasons, the Court rejects the arguments of the ECIA and finds that Marina Bay Towers Urban Renewal III is a qualified housing sponsor pursuant to N.J.S.A. 40A-107(j).

This Court finds that MBTIII's status as a qualified housing sponsor was disclosed during the discovery phase of the litigation and placed on the record during the trial. See 7/28/17 Tr. at 21:11-22:9, 38:14-23. Moreover, the State's public records confirm that MBTIII is a qualified housing sponsor. The Court finds that MBTII is a qualified housing sponsor because it is an established urban renewal entity. The Division of Community Affairs approved PX72 which is a certificate of limited partnership of MBTII. This entity had to qualify under the Urban Renewal Long Term Tax Exemption Law Urban Renewal Statute in order to operate lawfully. The Courts finds that MBTII and MBTIII both have the same general partner, First Community Development Corporation. FCDC is a New Jersey non-profit corporation organized under the New Jersey Profit Corporation Act. N.J.S.A. 15A:3-4 has, for one its purposes, the provision of affordable housing. Thus, if MBTII is qualified, this Court finds MBTIII is also qualified.

The Court finds that on May 18, 2015, the DCA's Bureau of Homeowner Projection approved MBTIII's certificate of limited partnership. On the same date, the DCA's Division of Codes and Standards certified that MBTIII was formed as a "urban renewal entity pursuant to the long term tax exemption law, N.J.S.A. 40:20-1 et. seq." The Certificate of Limited Partnership states, in relevant part as follows:

> "MBTIII has been organized to serve a public purpose, its operation shall be directed toward (1) the redevelopment of redevelopment area, the facilitation of its relocation of residents displaced or to be displaced by redevelopment, or the conduct of low and moderate income housing project; (2) the acquisition, management and operation of a project, redevelopment relocation housing project, or low and

> moderate income housing project under the LTTL; and (3) the partnership shall be subject to regulation by the municipality in which its project is situated, and to a limitation or prohibition as appropriate on profits or dividends for so long as it remains the owner of a project subject to the LTTL."

The Court finds that §107(j) of the CIAL defines a "qualified housing sponsor" as an "urban renewal corporation or association…or any renewal non-profit association or corporation…which has for one of its purpose, the construction, rehabilitation or operation of housing projects. While the statutory predicates defining an urban renewal entity in §107(j) have been repealed, they have been replaced with a single definition of urban renewal entity contained in the LTTL.

Under the LTTL, an urban renewal entity is a non-profit entity which enters into a financial agreement with a municipality to undertake a project pursuant to a redevelopment plan for either the redevelopment of all or any part of their redevelopment area or a project necessary, useful, or convenient for the relocation of residents displaced or to be displaced by the redevelopment of all or any part of one or more redevelopment areas, or a low or moderate income housing project. N.J.S.A. 40A:20-3g. Accordingly, the LTTL definition of urban renewal entity satisfies §107(j)'s requirements for determining if an entity is a qualified housing sponsor.

Finally, the restructuring Order requires the financial agreement with the City to be assigned to the successor owner of the project which is MBTIII. For the following reasons: (1) the DCA has certified MBTIII as an urban renewal entity, (2) MBTIII has for its purpose, the necessary elements of §107, and (3) MBTIII will be party to the financial agreement. This Court finds that MBTIII satisfies the definition of qualified housing sponsor pursuant to §107(j) of the CIAL.

II. WHETHER THE PROJECT WILL REMAIN A QUALIFIED RESIDENTIAL PROJECT AND THE BONDS CAN BE REPAID UNDER THE PLAN.

The only restrictions that can remain on the project after the Appellate Division affirmed the restructuring order are those imposed by the CIAL 26 U.S.C. Section 142(d). The restrictions were abrogated by the Honorable Mark Sandson, P.J.Ch. in the Trial Opinion. Appellate L.P. at 9-10, 37-42. However, the Appellate Opinion noted the Trial Court did not address "whether the interest and principal on the "ECIA Loan" could be earned under the restrictions imposed by §143(d). Id. at 72. IRC 142(d) is the applicable post foreclosure law governing the ECIC loan being assumed by the successor borrower/owner, MBTIII. The entity was derived from the proceeds of federally tax exempt bonds issued pursuant to the CIAL. To the extent PAC wishes to have the ECIA bonds remain federally tax exempt pursuant to IRC 142(d), the issue is whether the ECIA loan could be repaid in accordance with its terms if the protect continues to be subject to IRC 142 Rent and Income Restrictions as part of a proposed updated and revised restructuring plan. Pursuant to §116 of the CIAL, this Court could not permit a restructuring that imposes continued, modified or new restrictions, if it were to "find that the interest and principal on the obligations secured by the lien which is the subject of foreclosure cannot be earned under the limitations imposed by the provisions of the Act. N.J.S.A. 40:37A-116.

The Appellate Division questioned whether the dwindling number of 50% AMI tenants threatened the projects existence as a "qualified residential rental project" under IRC 142(d)(1), as it appeared that there would be an insufficient number of tenants that met the required standards by 2020 or 2021. Appellate Op. at 73. The Appellate Division was

concerned that as the project was no longer a "qualified residential rental project", any proposed financing would not be viable and that, even if it remained an IRC 142 project in a modified plan, §116's requirements could not have been established.

This Court finds that the project will still remain a "qualified residential rental project". A "qualified residential rental project" means any project for residential rental property if, at all times during the qualified project period, such project meets the requirements under IRC 142(d)(1)(A) or (B) ("set-asides"). A project meets the "set aside" of IRC 142(d)(1)(A) if twenty (20%) percent or more of the residential units in a project are occupied by individuals whose income is 50% or less of the area median gross income. It meets the set aside of IRC 142(d)(1)(B) if 40% or more of the residential units in a project are occupied by individuals whose income is 60% or less of the AMGI.

The issue elects either a 20/50 or 40/60 set aside at the time of the issuance with respect to such project. Once available for occupancy, each unit in a residential rental project must be rented or available for rental on a continuous basis during the qualified project period. 26 C.F.R. Section 1.103-8(b)(5). The 20/50 set aside was elected. Thus, for the project to maintain its status as a qualified residential rental project, at least 20% of the units must continue to be restricted to individuals whose income does not exceed 50% AMI or AMGI. This Court finds that the final restructuring plan sets forth that 33 units or 20% of the total number of rental units shall remain subject to the 20/50 set aside during the term of the qualified project period. (Approximately 15 years from the date in which the foreclosure becomes final). The Court finds that the deed restriction, to be recorded pursuant to plan confirms same. Thus, this Court finds the project will remain a qualified residential rental project for the period of time expressly mandated by IRC 142(d).

With respect to whether the project will continue to be able to satisfy the ECIA bond obligations if it remains qualified under the Federal Program, this Court finds based upon the submissions that these obligations are reasonably sustainable and financially feasible to provide for 105 affordable rental units at 50% AMI households (33 units) and 80% AMI households (82 units), along with a mix of approximately 59 market rate rental units contingent upon the Phase II project becoming vested. Based upon the financial information submitted, this Court finds the project can continue to be operated in compliance with the Federal Tax Exempt Bond Program 20/50 set aside during the renewed fifteen (15) year "qualified project". (As such term is defined in IRC 142(d)(2)(A) while repaying the principal and interest on their outstanding ECIA bond mortgage indebtedness.)

III. THE DEED RESTRICTION.

Within its decision, the Appellate Court expressed concerns that the new deed restriction conflicted with the occupancy and rent restrictions in the restructuring plan. On remand, this Court is charged with resolving this issue. The tenant-defendants object to the proposed deed restriction. Specifically, the tenant defendants contend that the deed restriction is ambiguous because it does not have a clearly defined beginning and end date. Defendant tenants argue that the deed restriction states that it shall run for the "qualified project period" or "restricted term as defined in the statute governing tax exempt bonds beginning on the first day on which 50% of the residential units in the project are occupied and ending on the latest of "(1) the date which is 15 years after the date in which 50% of the

residential units of the project are occupied; or (2) the first day on which no tax exempt private activity bond issue with respect to the project is outstanding". Defendants would prefer a more specific deadline as set forth in the trustees brief in which they indicate the period starts in February 2020 but does not incorporate the specific deadline. Defendants raise concerns that the start date is subject to multiple interpretations. MBT has been occupied since 2001 and the deed restriction does not specifically state that it is referring to re-occupancy after renovations or some other start date relating to an entry of judgment in the case. The tenants also argue the deed restriction could potentially be terminated through foreclosure.

Defendant North Wildwood argued at the time of original oral argument on December 6, 2019 and within their written submissions that the deed restrictions should be revised to specifically define the number and affordability mix of units to be restricted, the commencement date, the termination date, and to further add protections to the current tenants. Specifically, the defendant North Wildwood argues the following:

(1) The deed restriction should specifically state that the restricted period commences on February 1, 2020;

(2) The restricted period should be for the full term of an additional fifteen (15) years through 2035;

(3) The restriction should not be terminated through foreclosure other than by any new first mortgage financing, as may be authorized under the UHAC;

(4) The restriction should specify the total number of restricted units ultimately approved by the Court, and the specific income limits and configuration;

(5) The restriction should include the age restriction requirement;

(6) The restriction should provide that the current tenants be entitled to remain in the building for life at 50% AIG and

> should not be subject to termination of their leases or their restriction in any future foreclosure.

As indicated, following the negotiated settlement, the City of North Wildwood did not pose any objection to the entire plan.

The deed restriction submitted with the final restructuring plan now makes explicit that the "restricted term" of the affordability controls is what IRC 143(d) requires. The Court finds the controls remain for the "qualified project", which is, a period of time beginning on the first day on which 10% of the residential units in the project are occupied and ending on the last of :

> [T]he period beginning on the 1st day on which 10[%] of the residential units are occupied and ending on the latest of – (i) the date which is 15 years after the date on which 50[%] of the residential units in the project are occupied, (ii) the 1st day on which no tax-exempt private activity bond issued with respect to the project is outstanding, or (iii) the date on which any assistance provided with respect to the project under section 8 of the United States Housing Act of 1937 terminates".

This Court finds that this language is contained within the final restructuring plan and is in conformity with IRC 142(d)(2)(A).

Finally, the Court finds the restricted term will be triggered by the final foreclosure judgment and will continue to apply to the 20/50 set aside units for fifteen (15 years starting from the Sheriff's Sale. The remaining seventy-two (72) units at 80% AMI will also be subject to the restricted term but only if the settlement with the City's requirements for the proposed new Phase II development are met. Further, the Court finds the deed restriction also provide the current tenants in good standing are guaranteed and will

still remain at 50% AMI. This Court finds that the restrictions are enforceable by the City. Accordingly, this Court finds the deed restriction plans are conforming documents.

IV. SETTLEMENT AGREEMENT.

Special Master, Noel Eisenstat, in his April 24, 2020 Report generally recommends the plan with the exception of two significant changes. The first change involves a recommendation that the sponsors lender be compelled to waive a critical financing contingency and that the sponsor "guarantee" that 105 affordable units will be provided. The second change revises the proposed end date of the eight (8) year rent freeze for current tenants. All parties with the exception of the tenants requested the Court decline to adopt the first recommendation as it would jeopardize the core term of the plan's financing.

As indicated previously, the parties engaged in numerous mediation sessions which resulted in a global settlement with the assistance of Retired Judge Fall. This settlement between the trustee, PAC Capital, Beach Creek and the City of North Wildwood has resolved fourteen (14) years of litigation. Unfortunately, the parties did not invite the Special Master to participate in these discussions. However, he was provided with all relevant documentation. The Court is faced with somewhat of a perplexing situation. This is a matter in which all parties with the exception of the tenants entered into a Global Settlement which includes the instant matter and the other matters set forth previously in this Memorandum of Decision. However, as a result of the remand, the Special Master was still charged with his responsibilities on remand such as making recommendations of the Final

Plan submitted. Also, the Trial Court must make specific findings that included approval of the Final Restructuring Plan.

Settlement agreements fall within the scope of contract law. An agreement to settle a lawsuit is a "contract which, like all contracts, may be freely entered into and which the court, absent demonstration of fraud or other compelling circumstances, should honor and enforce as it does other contracts." Pascarella v. Bruck, 190 N.J. Super. 118, 125 (App. Div. 1983). A court should interfere with a settlement agreement voluntarily entered into by the parties only where the "inadequacy of consideration is grossly shocking to [the] conscience of [the] court." Id.

The Appellate Division in Pascarella v. Bruck, 190 N.J. Super. 118 (App. Div. 1983) provided a liberal standard in enforcing settlement agreements:

> An agreement to settle a lawsuit is a contract which, like all contracts, may be freely entered into, and which a court, absent a demonstration of 'fraud or other compelling circumstances' shall honor and enforce as it does other contracts. Honeywell v. Bubb, 130 N.J. Super. 130, 136 (App. Div. 1974). Indeed, 'settlement of litigation ranks high in our public policy.' Jannarone v. W.T. Co., 65 N.J. Super. 472, 476 (App. Div.), certif. denied, 35 N.J. 61 (1961). Moreover, courts will not ordinarily inquire into the adequacy or inadequacy of the consideration underlying a compromise settlement fairly and deliberately made. DeCaro v. DeCaro, [13 N.J. 36, 43 (1953)].

Id. at 124-25. See also Jennings v. Reed, 381 N.J. Super. 221, 227 (App. Div. 2005) (encouraging courts to "strain [themselves] to give effect to the terms of a settlement wherever possible" for the purpose of enforcing settlement agreements), quoting Dep't of Pub. Advocate v. N.J. Bd. of Pub. Utils., 206 N.J. Super. 523, 528 (App. Div. 1985), certif. denied, 137 N.J. 165 (1994).

In New Jersey, settlement agreements are favored, as the agreements allow the parties to reach an amicable solution of the matter by themselves. See Brundage v. Estate of Carambio, 195 N.J. 575, 601 (2008). In Pascarella v. Bruck, 190 N.J. Super. 118 (App. Div. 1983) the court concluded that an agreement to settle a lawsuit is a "contract which, like all contracts, may be freely entered into and which the court, absent demonstration of fraud or other compelling circumstances, should honor and enforce as it does other contracts." Pascarella, 190 N.J. Super at 125. Further, the court noted, "[i]t is only where inadequacy of consideration is grossly shocking to [the] conscience of [the] court that [the] court will interfere with [a] settlement agreement voluntarily executed by parties." Id. Moreover, in Brundage, the Supreme Court found that our courts 'strain to give effect to the terms of a settlement wherever possible. Brundage, 195 N.J. 575, 601.

This Court is mindful of the tremendous amount of work all parties performed in reaching this Global Settlement. However, the tenants were not part of the negotiated settlement and the court cannot simply consider this matter resolved without considering the objections of the tenants. Further, although the Court is going to place significant weight on the importance of the settlement agreement, it feels compelled to make independent findings regarding the recommendations of the Special Master.

V. SPECIAL MASTER RECOMMENDATIONS

Special Master, Noel Eisenstat, presented his findings and recommendations on April 24, 2020. Since Judge Sandson appointed Mr. Eisenstat as the Special Master, this Court finds that he has been very diligent and fair throughout this process. Mr. Eisenstat was in constant contact with the parties and clearly grasped the complex issues involved in this matter. As is set forth above, the Court placed significant weight upon the strong public policy encouraging parties to

reach amicable resolutions. However, since the Special Master was not part of the extensive mediation with Retired Judge Fall that led to the settlement of significant cases that have been pending for 14 years, the Court feels an obligation to make independent findings regarding the Special Master's recommendations.

(1) **Background:**

The Sponsor submitted the plan pursuant to Judge Sandson's Memorandum and Order of May 22, 2018 as modified by the Appellate Division in its October 22, 2019 Opinion. The May 22, 2018 Order approved a plan prepared at the end of 2015, preserving 91 units of senior, affordable housing, all at moderate-income 80% AMI, with the remaining units being at market rate. The Memorandum recognized that the age of the original plan had changing conditions which required updating. The Memorandum emphasizes three critical considerations for an updated Section 116 Plan to be approved; (1) providing the existing tenants with code compliant, refurbished units in a fully rehabilitated building as soon as possible; (2) evaluating ways to provide affordable units while maximizing the number of low-income units; (3) repaying PAC on account of its ECIA bonds and costs, as required by the CAL.

The Memorandum specifically states that if the plan could not achieve all of the foregoing, PAC had the right to foreclose and remove all restrictions. The Order provided that a Special Master be appointed to consider other changes, while ensuring that the plan meets those requirements.

The Court has reviewed the updated plan which provides for up to 105 dwelling units restricted for senior, low and moderate income tenants, 33 of the rental units restricted to 50% AMI and up to 72 units restricted to 80% AMI in the project. The updated plan provides the current plan tenants are to receive renovated units and may remain living in those units as long as

they are in good standing on their leases at 50% AMI rents. With respect to financing, the Court finds that PAC is willing to meaningfully restructure its debt, extending the term and reducing the interest rate and believes that based on sources and uses, assumptions in operating pro forma provided with the plan, the projected operating expenses and PAC's modified debt can be serviced by the project rents.

In the plan, the sponsor is borrowing funds from Beach Creek, which is agreeing in turn to pledge its unencumbered land to a third-party lender. Beach Creek, a ground lessor, is willing to risk the pledge of its land but is not willing to be a long term lender. Under the plan, Beach Creek will only provide funds if it can be reasonably assured that its debt will be retired in the short term.

In order for the short-term borrowing, the plan provides that a fully approved Phase II project would result in assuring that the short term debt would be paid. The Court finds that the proposed plan assists the City of North Wildwood in reaching its Mount Laurel obligations. An approval of the Phase II project, the Court finds, will make the financing of 105 affordable units achievable without any new governmental subsidies.

The Court finds that since MBTII did not obtain any of the Superstorm Sandy Relief money administered by the State, no one other than PAC Capital presented a plan to Judge Sandson. The funding of the plan is dependent upon Phase II being fully approved. The Court believes that Phase II is critical to financing the repairs and if the Court does not permit the Phase II contingency, it would undermine the settlement as set forth above and place the rehabilitation of the entire building into jeopardy. This Court finds that Phase II is an essential business element of the settlement and it provides more reasonable certainty that the new multi-

million dollar financing will be paid while allowing all 105 restricted units to be operated for a long term without undue financial risk.

(2) **Special Masters recommendation of a guaranteed 105 unit plan is rejected by the Court**:

The Court finds the recommendation for a guaranteeing commitment to all 105 units without a Phase II contingency is unrealistic and rejected by the Court for the following reasons. First, the Court finds that the Special Master's recommendation that there is a projected cash flow which is strong enough to support a guaranteed 105 affordable unit is unrealistic. The Court finds that this recommendation would be accurate if Beach Creek was not repaid. Beach Creek is owed a significant sum and short term debt using the project's rents would not be achievable. This Court finds the key requirement for Beach Creek's loan could not be met if it accepted the Special Master's recommendation.

Secondly, the Special Master recommends that as an alternative to Phase II contingency, that MBTII could sell the market rate units in the event the approvals are not granted. The Court finds the plan demonstrates that PAC and Beach Creek are relying on the vesting rights of the Phase II project. Lastly, PAC and Beach Creek will have considerable expenses to go through the approval process which has not yet occurred.

The Special Masters concerns about timeliness appear to be adequately addressed through the Settlement Agreement. In the Settlement Agreement, the sponsor shortened the time for Phase I approvals to be obtained while Phase II project approvals are projected to take roughly the same period of time set forth in Judge Sandson's May 22, 2018 Order for the original plan.

(3) **The Court accepts the Sponsor's revised rent increase phase-in:**

The present plan moves all current tenants at the project expense to fully renovated units at the project, which will be a rehabilitated, fiscally stablized, mixed-use building. The 33 rentals to seniors that meet HUD's 50% AMI guidelines, will be protected. PAC and MBTII froze rents at 2012 levels. However, there was an understanding that upon approval of a Section 116 Plan, rents for such tenants would be normalized to 50% AMI levels.

The sponsor proposed increasing all tenant rents by uniform annual increase of 7% commencing June 2021, the Special Master requests a modification to a start date reflecting when tenants are moved in to their final units.

Within its May 1, 2020 submission, the sponsor agreed to a modification which is as follows:

> All current tenant rates will be subject to a uniform annual increase of 7% a year commencing the earlier of (1) the date in which such tenant moves in to his or her final unit, and (2) September 2021, more than fifteen (15) months from the present date.

This Court accepts the modification proposed by the sponsor for the following reasons. First, all current tenants will receive equal treatment and no particular tenant group will receive unique concessions. Second, providing dates will create certainty in allowing the sponsor to increase to the federally permitted level. Finally, the deadlines should provide an incentive to the sponsor to complete renovations and move tenants into their final units as quickly as possible.

The Court finds the recommendations of Special Master to be reasonable and well-intentioned. However, in order to achieve the original goals set forth in Judge Sandson's Memorandum, this Court finds that the Phase II contingency is a critical factor. The Phase II

contingency will honor the fully negotiated settlement and also create a more feasible opportunity to achieve the original goals of the Trial Court.

This Court finds that a plan without the Phase II project approvals fully vested is not fiscally possible. Further, a plan with uncertainty as to rents would place a difficult burden upon the Sponsor to refinance. This Court does not wish to have any further delays for the tenants or risk to the parties involved. Accordingly, the Court respectfully rejects the recommendations of the Special Master.

VI. TENANTS

The Tenant defendants raise numerous objections to the plan based upon their December 2, 2019 submission and April 30, 2020 submission. The Tenants generally support many of the Special Master's recommendations and defer to certain findings of the Special Master but raise specific concerns that were not addressed in the Special Master report. The objections are as follows. The final plan offers protections to tenants in "good standing" only. Tenants argue that all tenants should be deemed in "good" standing and subject to eviction only for any lease violations. The tenants approve of the provision of the transition stabilization plan set forth in Exhibit M which enables all current tenants to remain at MBT during renovations and to offer them temporary units as needed. Tenants argue the units should be inspected and obtain a certificate of occupancy. Tenants admit that the plan states that the owner will pay for reasonable moving and packing costs but does not provide specifics. They argue that temporary storage fees or utility transfer deposits should be included as part of the relocation expenses.

With respect to replacement units, tenants argue that none of the low-income tenants should be required to accept an efficiency as a replacement unit. Tenants also object to a proposed segregation of all the 50% AMI units to the two bottom floors physically separated from the other residents. With respect to rent increases, tenants argue that raising rents to the maximum allowable amount for 50% AMI would render the units unaffordable to many current residents and could result in extensive displacement. Tenants request a 5% increase as opposed to the 7% increase. Tenants request that the Special Master's requirements regarding financing certifications by appropriate professionals be incorporated in the Court's Final Order. The Tenant's support the Special Master's recommendation that all 105 units be restricted as affordable housing without allowing for any contingencies in the form of governmental approvals. The tenants request that the Court provide for greater protection of the existing tenants rights and the restrictions on the affordable units. Finally, the Tenants request that the Court provide for enforcement of the restrictions by tenants to require the City to create a compliance protocol to ensure that the restrictions are not violated.

With respect to the objections of the tenants, for the reasons set forth previously, the Court finds the sponsor's modified proposal for a uniform annual increase of 7% per year commencing the earlier of the date in which such tenant moves into his or her final unit and (ii) September 20, 2021 to be reasonable. Under this formula, it will take five (5) more years for the rents to increase to the federally permitted level. There is certainty for all parties by having a specific date and the proposal creates an incentive for the sponsor to complete renovations and move tenants to the final units.

For the following reasons, the Court denies the remaining objections to the plan posed by the tenants. Throughout this matter, the parties have raised concerns about "standing". The

Court rejects the proposal that all tenants be considered in good standing. Throughout this proceeding, the parties have raised concerns of standing for the tenants in this case. There are indications that some of the tenants no longer reside in the building and some have failed to pay their rent. Under the circumstances, the Court finds that the tenant should be in good standing in order to obtain the reasonable protections set forth in the final plan.

With respect to the request for the adequate relocation plan, the Court will not mandate that costs of temporary storage fees or utility transfers of the deposits to be specified within the transition stabilization plan. Nor will it mandate that certificate of occupancies be issued. The transition stabilization plan states that the owner will pay for reasonable moving and packing costs and temporary storage fees and transfers may be necessary depending upon the circumstances as the transition plan is imposed. There must be an application of equitable principals and reasonableness throughout the transition and stabilization plan. The Court does not feel compelled to enter specific language on each issue raised by the tenants. The tenants have every right to make the appropriate application to the Court if problems arise during the transition stabilization plan. The City of North Wildwood will be responsible to oversee the issuance of certificates of occupancies.

This Court specifically rejects the request that the tenants be able to be relocated on the top floors. Presently, the AMI units are planned to be placed on the two bottom floors. Clearly, the placement of the 50% AMI units is done for financial reasons in order to maximize the ability to collect rent or sale prices for market rate units. This Court does not find this to be an unreasonable request considering the alternative on the entire project in the event that this plan fails. The tenants will still be able to enjoy the amenities in the same manner as the market rate

units and the Court does not find the plan to be discriminatory or create unequal treatment among affordable units and market rate units.

With respect to reasonable rent increases, the Court will rely upon its findings with respect to the Special Masters Report set forth above. Similarly, the tenants make a general objection regarding financing. The Court hereby relies upon its previous findings rejecting the Special Masters recommendations for an alternative financing plan. For many of the same reasons, the tenants' argument for the preservation of the additional 72 units contingent on Phase II is rejected by the Court. The Court provided an analysis in its findings rejecting the recommendations of the Special Master and incorporates same herein.

With respect to continued oversight, the Court finds that the proposed Judgment provides continued oversight consistent with the May 22, 2018 Order.

Conclusion

For the reasons set forth above, the Court will enter an Order approving the Final Restructuring Plan pursuant to N.J.S.A. 4:37A-116 and approving the Sponsor's Final Amended Restructuring Plan dated March 12, 2020. An entry of Final Judgment will proceed in a timely manner.

In sum, the Final Restructuring Plan is reasonable and satisfies the needs of all parties. The elements of the Plan include a full rehabilitation of the project. 105 residential rental units are restricted for seniors. 33 units at 50% AMI, 72 units at 80% AMI. This constitutes a 14 unit increase in the total number of restricted age units from 91 and a newly proposed low-income rental set aside of 33 units from 80% AMI units that were approved by Judge Sandson in May of 2018. The plan allows all existing tenants in good standing to enjoy an updated unit. The Sponsor will obtain the benefit of the additional 59 or 60 market rate units with no income or age

restriction without an objection by the City of North Wildwood. The transfer of ownership to MBTIII, a "qualified housing sponsor", is in compliance with the applicable County Improvement Authorities (CIAL) and long term tax exemption laws, (LPTL). The entire project is without any additional governmental monetary assistance. Funding will be advanced to MBTIII by a new leasehold, unsecured loan from the land owner and ground lessor, Beach Creek. The Phase II project on the same block as the result of revised zoning and other governmental actions will create a means for Beach Creek to obtain commercial third party financing to make the necessary loan to MBTIII and be repaid in the short term.

With respect to financing, the acquisition cost to MBTIII will be reduced from the costs expected in the original plan, there will be an assumption of the existing principal amount and reduced accrued interest of the ECIA bond debt. The financing will be on more favorable terms, including a reduced interest rate. There will be an extension of the amortization of the ECIA bond principal as a continuing first lien debt by MBTIII. The extension should enhance the likelihood of the loan being satisfied which is consistent with the remand by the Appellate Division that the project, if restructured, be sustainable and feasible as an IRC 142D as a "qualified residential rental project" for the entire "qualified project". There will be a restructuring of the existing ground lease and condominium master deed in order to accommodate the goals of the new plan.

With respect to overall planning and zoning, the City of North Wildwood has agreed via the settlement set forth above to enact required land use approvals and other ordinances required for both Phase I and Phase II. The current tenants have not seen a rent increase in ten (10) years and are paying below 50% AMI. As the result of the plan, they will sustain small yearly

percentage increases until reaching the applicable 50% AMI rental rates. To increase economic viability, the market rate units will not be age restricted.

In his Memorandum of Decision of May 22, 2018, the Honorable Mark H. Sandson, P.J.Ch., noted that both the City of North Wildwood, through its governing body, New Jersey Department of Community Affairs, through its various officials began a campaign to drive the developer out. He found the actions of North Wildwood in this matter were inexplicable and contributed to the fact that the building was in disrepair and two-thirds empty. This Court is encouraged by the good faith negotiations involving the City of North Wildwood which led to a comprehensive global settlement which shall bring closure to this litigation and create a sense of hope for the remaining tenants. Although this Court rejected the final recommendations of the Special Master, the Special Master should be commended for his efforts. His efforts contributed in creating compromise between the parties. It is clear from the global settlement that all sides make concessions which were fair and reasonable. Neither the remaining senior tenants nor MBTII can continue to endure more litigation. Continued litigation would simply create more cost inflation and deterioration of the building and needless delay.

Additionally, pursuant to Judge Sandson's Order of May 22, 2018 appointing Mr. Eisenstat as Special Master, the Court directs that the Special Master provide a final bill with an itemized list of work performed in connection with his request for compensation. The Court recognizes that the City of North Wildwood and the NJDCA have to some extent withdrawn from this litigation. Nevertheless, the Court will not deviate from Judge Sandson's original Order for payment of the Special Master. The bill shall be divided evenly between the following parties: City of North Wildwood; the NJDCA and the developer; the City of North Wildwood, the NJDCA and the developer will equally split the fees and costs associated with the Special

Master. The Court requests that the final bill be submitted within thirty (30) days. All parties shall have fourteen (14) days to file an objection to those fees. If there is no objection, the Court will make independent findings on the record and enter a final award for counsel fees.

Michael J. Blee P.J.Ch. Date of Decision: June 10, 2020

An Order is hereby signed in conformity with this Memorandum of Decision. The Sponsor must submit a proposed Final Judgment within seven (7) days.