This is in response to an article written by Flemington-area attorney Lee Roth. It was published on his web site and on social media in May, 2018. Mr. Roth's article is presented in its entirety below (in black text), with borough responses inserted immediately following the various allegations (in blue text).

A Really Bad Agreement For The Flemington Taxpayers

The Mayor, and other elected leadership of the government of the Borough of Flemington, have entered into an agreement on behalf of the Flemington taxpayers and voters with a limited liability company, Flemington Center Urban Renewal, LLC. In the introduction to the 50+ page agreement, they recite that by resolution adopted June 14, 2010, the Borough designated the Union Hotel property at 70-76 Main St. in Flemington as an area in need of redevelopment. This is the Union Hotel agreement.

At the request of a failed second redeveloper, the Mayor (who has been part of selecting three successive redevelopers) and other leadership of the government of the Borough of Flemington, expanded the area to include the properties at 78 Main Street, 80 Main Street, 82 Main Street, 90-100 Main Street, 104 Main Street, 110 Main Street, 7 Spring Street, 19 Spring Street, 3 Chorister Place, and 6 Chorister Place, which they now call the 2014 redevelopment area.

I submit that the second redevelopers requested this expansion to stall for time when they could not entice investors to their proposed project. They could not show investors experience they did not have. We now know they failed. They filed for bankruptcy on behalf of their limited liability company and walked away. They had no personal liability and they had provided no proof of financial or development ability to the Borough.

The current agreement points out that by resolution adopted April 2017, the Mayor was authorized to sign the current agreement. It is not an agreement between the Borough and Mr. Cust, as is often said, it is an agreement between the Borough and a limited liability company of which Mr. is a member or principal.

The Current Agreement Itself

On page 10, the redeveloper is given the option to develop the project “in whole or in part”. Any part not developed by the redeveloper can be handed off, by the redeveloper and only the redeveloper, to a person or affiliate of the redeveloper, subject to review by the Borough, according to the agreement.

Response: Any transfer would need to be approved by the borough. This is standard contract language and is not a problem with the redeveloper agreement (the RDA).

On page 12, the redeveloper, Flemington Center Urban Renewal, LLC., represents that it is qualified, based on the two pages of criteria set out in the agreement, and the Borough says it relies on that representation. There is no indication of any verification or confirmation of any meaningful criteria.

Response: Each party represents that it brings or will bring certain resources to the project. For example, we represent that we will have water capacity even though we need to complete another well to provide it. By signing the agreement, Mr. Cust accepts that we will provide the water, because we say that we will. There is a certain amount of trust that must exist between two parties to any agreement. Developers routinely carry out individual projects through limited liability corporations (LLCs). No matter how much money the developer may have in his personal portfolio, only the project’s LLC will be doing the redevelopment. In this case Mr. Cust has 100% ownership of the Flemington Center Urban Renewal LLC, but, technically, the LLC and not Mr. Cust himself will be the legal entity doing the redevelopment. Based on Mr. Cust’s developments that are all over Hunterdon and Somerset counties, we accept his representation that he can do this one as well. He has continued to demonstrate that ability and his commitment to develop this project through his actions and considerable continued investment of time, money, and energy. It is admittedly a judgment call. In our judgment, Mr. Cust has demonstrated through his other efforts as well as his commitment to this project, that he is qualified.

On page 17, the redeveloper is responsible for up to $2 million in costs to increase the amount of available water required for the project. Does this redeveloper, this limited liability company, have $2 million? The agreement provides that the project will utilize the current reserve capacity (how much is that?) and will require the construction of additional wells and infrastructure

(how many and at what cost?). There is no indication or schedule of detail as to what is required for the proposed project, and the rest of the community, and no cost study is provided.

Response: The RDA is not the place for water capacity calculations. The RDA provides that Mr. Cust will pay $2M toward more capacity, because normally a developer does not do that. The $2M contribution is over-and-above what other developers in Flemington have paid for water. Based on the cost of other wells, we believe that the $2M should be more than sufficient to cover the portion of additional water capacity that will be used by this project. This should be viewed as a contribution rather than suggesting that it may not cover 100% of the cost of a well or that Mr. Cust may not have the $2M.

On page 19, the redeveloper is required to make a "good faith" effort to preserve and salvage for reincorporation in the project where, **in the redeveloper's opinion**, it is cost-effective and feasible to do so and to match architectural elements or other historically relevant objects or elements. The agreement provides that the redeveloper is to cooperate with the Borough to document the buildings and historic artifacts prior to demolition, destruction or removal. What is the measure of "cost-effective and feasible"? How far can demolition be taken?

Response: After the RDA was signed on December 22, 2017, the borough received a final approval of the project from the NJ State Historic Preservation Office (SHPO) in March, 2018. This agreement, which is available along with many other project documents on the borough's web site, provides detailed descriptions of the various preservation efforts that are required. It answers the questions posed above.

Page 19 and 20 require an escrow deposit of $15,000 for the payment of costs incurred by the Borough in relation to the project. Has that been paid and is there a provision for accounting and renewal of the deposit? The agreement is a year old. An accounting is in order now if not before now. Is the amount sufficient? How does the amount compare with the total escrow required for, for example, the Cut Glass project?

Response: This is a question, not a problem with the RDA. Mr. Cust not only funded the initial $15,000, but he has replenished it as needed and has paid over $77,000 in professional service fees through this escrow account through May, 2018.

Page 20 also requires that the Borough, on request, issue redevelopment bonds in an amount not to exceed $1 million. The bonds are to be secured by the project and a financial agreement. I do not find a provision for a personal guarantee by the people behind the redeveloper, or for a bond or letter of credit, to provide for the payment of these bonds. The redeveloper represents it has the needed financial capacity to acquire the redevelopment area **if the Borough issues the bonds**. Has a financial statement of the new limited liability company been verified or certified to confirm the represented financial capacity?

Response: New Jersey redevelopment statutes that govern payment-in-lieu-of-taxes (PILOT) agreements specify that payments to the municipality follow either (a) a fixed, graduated repayment schedule, or (b) a mutually agreed alternate payment schedule if the project includes some financing by redevelopment area bonds. The up-to-$1M bond (above) gives us the option to determine our own payment schedule. The bond, by law, would be issued by the borough, but it would be paid by and backed by the project and the PILOT payments, not by the borough (i.e., taxpayers). As for a personal guaranty, first, there is sufficient security through the project revenue to assure satisfaction of the bond. Second, a personal guaranty is not a standard provision routinely found in redevelopment bond deals. Third, the borough will have significant remedies for a default in payment of the bond, including the right to pursue an *in rem* tax foreclosure, and possible others in the PILOT agreement. Finally, keep in mind this is a $1M bond which does not materially affect the developer's ability to fund an $80M project.

Page 22 provides that if the redeveloper is unable to acquire title or control of the redevelopment area within the time period set forth in the project schedule, the Borough may make demand for completion of the purchase or site control (when is that deadline? A year has passed — has it been met?) In the event the Borough does not grant an extension of time, or assist the redeveloper with **property acquisition through condemnation**, then either party may terminate the agreement. Has the Borough demanded completion of the purchase? I read in a local publication that the redevelopment committee, or two of its members, had facilitated an agreement between the Hotel property owner and the redeveloper. Does the Borough have a copy of that signed agreement and is such agreement now a matter of public record?

Response: These are questions, not problems with the RDA. As of this writing (June, 2018), Mr. Cust owns 82 Main St. The RDA provides that the borough will sell him our properties. The Flemington Furs properties are

under contract. That leaves the properties owned by Steve Romanowski, which are the hotel and the "Potting Shed" and its parking lot. The borough is working with the buyer and seller to try and facilitate the sale without having to go through eminent domain. Mr. Romanowski is being offered far more by the developer than he would be entitled to in an eminent domain proceeding. We remain hopeful, in any event, that eminent domain will not be necessary.

On page 24, the redeveloper represents that it is experienced and qualified to undertake the work provided for under the agreement and it is in good financial standing. It represents its undertaking is for the sole purpose of redevelopment and not for speculation in land holding.

Response: This is a statement, not a problem with the RDA.

The redeveloper further represents on page 25 that it will use commercially reasonable efforts to complete each phase of the project on or before the timeframes set forth in the project schedule. What is a "commercially reasonable effort"? I see no definition or standard built into the agreement. Is there a plain clear timeframe that all can understand?

Response: This is standard contract language. It is worded as such because no one can anticipate and list every possible eventuality, and the reasonableness of any delay would have to be evaluated based upon the particular circumstance causing such delay.

On page 26, the Borough represents that it has sufficient sewer capacity and easements to support phase one and two of the project as to water and sewer. What will it cost the taxpayers if it does not? There is no indication or measure or schedule of that need or capacity. The Borough further represents that the redevelopment plan has been adopted in compliance with all applicable laws. Has it? I understand that there are pending law suits that challenge this Borough representation. What if the plan has not been properly adopted?

Response: Our agreement with the RTMUA (the sewer utility) includes more than enough reserve capacity to accommodate this project, and we have a letter from them to that effect. It is well known that there is a lawsuit challenging the designation of the Flemington Furs properties as being in the area-in-need-of-redevelopment. This is not a problem with the RDA; it is a legal challenge that will be resolved by the courts if we cannot work it out otherwise, as we are currently trying to do.

Page 30 provides that in the event of a default by the redeveloper, and the failure to timely cure any event of default, the Borough can terminate the agreement and de-designate the redeveloper. The second and failed redeveloper was given a time within which it was to acquire the real estate that is the redevelopment area. Has the now and third redeveloper been given a time within which it must acquire the property? Has that time requirement been met?

Response: This is a question, not a problem with the RDA. Timelines are referenced in Section 5.1 and in Exhibit B (Project Schedule) to the RDA. Property acquisition status is covered above in a previous response.

The Most Critical Provision

Page 31 contains a most critical paragraph entitled “Limitation of Liability,” which says, “The Parties agree that if an Event of Default occurs, the Parties shall look solely to the Parties hereto and/or their respective property interest in the Project for the recovery of any judgment or damages, and [they] agree that no member, manager, officer, principal, employee, representative or other person affiliated with such party shall be personally liable for any such judgment or damages. In no event shall either Party be responsible for any consequential or punitive damages.”

Of course this paragraph means that the Borough is not relying on the character or deep pockets of any individual, but only relies on the newly formed limited liability company that has no experience to execute, finance, and carry out this project. Such a provision raises the issue of the extent to which the leadership of the Borough of Flemington has investigated the ability of the party to this agreement to carry out the terms of this agreement. Deep pockets on the part of any member, manager, officer, principal, employee, representative or other person affiliated with the redeveloper has no meaning under the agreement.

Response: This is a routine provision in a development agreement. In essence, the borough is approving development rights for a redeveloper, who in turn is committing to develop a significantly important project to carry out the public purpose of remediating a blighted area that is dragging down the downtown area and, ultimately, if no action is taken, the entire community. Mr. Cust is taking a substantial personal risk and has already made and continues to make substantial personal financial investment into this project.

How can he be expected to further expose himself, or his representatives and employees, to additional direct personal liability? The statement that the borough is at risk because it is relying only upon a limited liability company with no experience is either disingenuous or misguided. The fact that Mr. Cust has, like any other developer would, set up a single -purpose entity for this project does not diminish the reality (and requirement under the RDA) that he continues to control whatever entity is set up to carry out this project. The comments also ignore that the potential liability is limited to the extent of property interest in the project. Thus, the borough can look to the interest and value in the redevelopment area properties in any remedy. It should finally be noted that this is a protection for the Borough's officials and employees as well as those of the redeveloper. If, for example, the Borough defaults under the RDA and that default renders the redeveloper unable to complete the project and the investment into the redevelopment area it lost, without this provision, redeveloper might make a claim against the individual officials whose votes or decision led to this default for consequential damages and loss of anticipated returns.

On page 36, we find an indemnity provision. The redeveloper and the Borough agree to indemnify and hold each other harmless from any and all demands or suits. The Borough has the ability to collect taxes from its property owners and can thus make good on it being able to indemnify the redeveloper. We the tax payers will pay the bill. What is provided from the redeveloper to show the ability of this limited liability company to indemnify the Borough against any claims? I find nothing in the agreement.

Response: Redeveloper is contractually obligated to indemnify the borough officials. The next page of the RDA provides that this indemnity obligation runs with the land to any assignor and, as noted above in discussing the liability limitations, the borough can look to the redevelopment property to enforce this indemnity obligation. The redeveloper's failure to indemnify would result in its loss of the right to do the project and possible loss of the redevelopment property and its entire substantial investment therein.

Does the Redeveloper Own the Liquor License? No.

Page 38 addresses the requirement of a liquor license for use with the hotel and restaurant part of the project. It notes that the redeveloper has secured a liquor license. The question raised here, but not in the agreement, is — Is the license in the name of the redeveloper or is it in the name of one of the principles of the redeveloper? This paragraph of the agreement also provides

that these provisions relating to the liquor license will not survive the termination of this agreement. This leaves open the question of whether the license should be transferred to the party to this agreement now, making it among the assets of the redeveloper that can be looked to in the event claims are presented? It should. The Borough should immediately demand that the transfer take place now. In effect the people behind the redeveloper who have been given, under this agreement, a free opinion on the total redevelopment area, should pay the license into the project in consideration for their option so that the license stays on Main Street and as part of the redevelopment area.

Response: This provision of the RDA merely requires that the project include an establishment licensed to serve alcohol. It notes that Redeveloper has "secured another liquor license." It does not say that Redeveloper must hold title to the liquor license in its name but only that it must hold it for use in the project *if* it cannot obtain another license for the project. The only relevant question is control of the license. In response to inquiries concerning this, the borough has confirmed that the current liquor license is held by Stagecoach Liquors LLC, which is 100% owned by Mr. Cust. As for demanding that it be transferred now so that the borough can seek to claim it if the project does not proceed, it is submitted that no developer would agree to put a license that it purchased for $1.2M as collateral for a project, particularly a project of this scope and risk and under attack at every turn by the Friends' group.

On pages 42 and following, the Borough consents in advance to the sale or lease of the residential units and the commercial space in the project. It also allows the merger of the redeveloper with another business. This looks very much like a provision to allow the owners of the redeveloper to "flip" their project. That means the members of the limited liability can seel the project at a profit. There seems to be a conflict between the allowance of merger and sale and the prohibition against speculative development. The agreement goes further to benefit the current people behind the redeveloper in that it provides that on a conveyance of the rights and obligations to a qualified entity, the redeveloper is relieved of all of its obligations under this agreement.

Response: The transfer provisions specifically require that Redeveloper maintain a controlling interest. Redeveloper is owned 100% by Mr. Cust so, effectively, Mr. Cust is required to control any successor entity. Any proposed assignment that would relieve Mr. Cust of his controlling interest is required to be approved by the borough and if so approved, that successor entity would

take on all obligations under the RDA and, therefore, of course the Redeveloper would be relieved of the obligations under the RDA now assumed by a subsequent developer approved by the borough.

Conclusion

A terrible agreement from the view of the Flemington taxpayers and residents and local businesses. It seems clear that the Mayor and other leaders who accepted this agreement did not have any advice from experienced people, or if they did, they ignored the advice when they entered into this agreement. **The agreement needs to be renegotiated and changed immediately.**

Response: The unusual nature of this article, apparently publishing an attorney-client communication and attorney work product just before a primary election, must be noted. While this is presented as a legal opinion, it is based on a one hour review with no insight or perspective and contains unsupported speculation that was prepared for a client. The author nevertheless makes the bold statement that this RDA must be "renegotiated and changed immediately." Based upon the comments, it appears those changes should include (1) Redeveloper's agreement to pay above and beyond what is required of any other developer toward water infrastructure should be unlimited rather than just $2 million, (2) redeveloper should post a bond or escrow for $1 million to secure the bond, or Mr. Cust should be personally liable for the bond, (3) all officials, representatives and employees of Redeveloper and the borough should be personally liable for unlimited damages in the event of a default, (4) redeveloper should be required to post a bond or escrow for an unknowable amount of money to prove that it will honor its obligation to indemnify the borough, (5) redeveloper should be required to post the liquor license that Mr. Cust purchased for $1.2M as collateral that he loses if the project fails for any reason, (6) redeveloper should be precluded from taking on partners/investors to finance and develop the project and should continue to be liable under the RDA even if the borough approves an assignment of the RDA. Presumably, with these changes this would no longer be a "terrible agreement from the view of the Flemington taxpayers…" While these changes might be better for the borough, they have no basis in reality as no rational developer would entertain such onerous provisions. Had the author been asked by a developer to evaluate the RDA, instead of by a client looking for ways to criticize the RDA, he might conclude it was a "terrible agreement from the view of the"

developer. He would also no doubt conclude that the developer “did not have any advice from experienced people …”

Any negotiated agreement such as this one involves some risk and some give-and-take by both parties. Redevelopment is a public-private partnership and does not succeed if the parties approach it as negotiation to best the other party and take maximum advantage of the other, as perhaps is appropriate in the author’s practice areas. This agreement is the result of much negotiation, and the borough believes it is a fair agreement.