FAIR SHARE HOUSING CENTER

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Via eCourts
Honorable Christine A. Farrington, J.S.C.
Superior Court of New Jersey
Bergen County Courthouse
10 Main Street, 4th Floor
Hackensack, NJ 07601

Re: In the Matter of the Application of the Borough of Englewood Cliffs,
Docket No. BER-L-6119-15

Dear Judge Farrington:

Fair Share Housing Center (FSHC), an intervenor and interested party in this matter, files this brief in preparation for the Mount Laurel IV trial in the above-captioned matter, which is scheduled to start on October 11, 2019.

I. Introduction

The Borough of Englewood Cliffs' (the "Borough" or "Englewood Cliffs") efforts over the past forty-plus years evidence a determined pattern of thwarting Mount Laurel at every turn. The Borough may in fact hold the ignominious distinction of having been, to date, the municipality most determined to be non-compliant and most successful at thwarting Mount Laurel.

Indeed, since Mount Laurel I was decided in 1975, the Borough has not provided for the construction of a single unit of affordable housing -- not a single one. It has also taken no meaningful steps to comply with Mount Laurel. This shameful track record of non-

compliance is, in part, what led the court to terminate the Borough's immunity from builder's remedy litigation on August 27, 2019. As the court then-wrote, "[t]he court's earlier reliance on the commitment of municipal elected officials to carry out their constitutional duties . . . was apparently misplaced" and resulted in "a long delay and the denial of equal treatment to the poor."

At trial, FSHC will rebut Englewood Cliffs' claim that it has complied with the Mount Laurel doctrine for the Prior Round and Third Round. FSHC submits that the Borough cannot meet its burden of demonstrating compliance with Mount Laurel because it has (a) failed to calculate its realistic development potential (RDP) in accordance with applicable law, (b) proposed insufficient credits to address its properly calculated RDP of 342 units, and (c) proposed insufficient mechanisms to address its unmet need.

FSHC will prove that the December 10, 2018 Housing Element and Fair Share Plan (the "2018 Plan" or "HEFSP") submitted to the court by the Borough does not comply with Mount Laurel. To do so, FSHC will rely on testimony from an expert report prepared by David N. Kinsey, Ph.D., FAICP, PP, which outlines the many ways in which the 2018 Plan violates applicable law. The report also offers substantive recommendations as to how to bring the 2018 Plan into compliance.

The Kinsey report shows that the Borough's 2018 Plan repeatedly deviates from the COAH regulations on calculating RDP, in contravention of Supreme Court directives. It shows further that the

Borough has, instead, relied on its own fabricated interpretation of well-settled law to deny the constitutional rights of the protected class. As the court will be shown, the areas where the 2018 Plan deviates from the Prior Round regulations always -- and invariably -- result in the Borough providing far fewer affordable housing units than required by a properly calculated RDP.

The Special Master Mary Beth Lonergan frequently concurs with FSHC's arguments and Dr. Kinsey's opinions regarding the 2018 Plan's clear and illegal deviations from applicable law. That said, on a few issues, Ms. Lonergan has erred in accepting arguments that are inconsistent with the applicable law.

For example, Ms. Lonergan accepts the Borough's contention that the Prentice Hall/LG site should be omitted from generating any RDP. This omission is incorrect and improper. It ignores the fact that the Council on Affordable Housing (COAH) previously determined that the site was essential to the Borough's Mount Laurel compliance. It also ignores the fact that the Borough had adequate notice that the site was needed for Mount Laurel compliance and the fundamental unfairness that would be imposed on lower-income households from the loss of desperately-needed housing. The Borough should not be allowed to benefit from its own non-compliant conduct, which is what would result if it is allowed to provide no affordable units for this site that it consciously chose to squander. At a minimum, the Prentice Hall site should increase the municipality's RDP and that RDP should

be met through compliance mechanisms that are not fully or at all addressed through zoning on the Prentice Hall site.

With regard to the Lighthouse LLC site, Ms. Lonergan also accepts the Borough's contention that this site, which was vacant when the Borough filed its declaratory judgment action and remained vacant for more than a year thereafter, should not generate RDP. Again, this is incorrect and improper because the site was vacant and available during the Third Round, was vacant and available when the municipality filed its declaratory judgment action, and was vacant and available when the municipality requested a vacant land adjustment.

FSHC strongly disagrees with Ms. Lonergan's determinations on the above issues and submits that the approach recommended by Dr. Kinsey is correct on the law, appropriate under the present facts, and should be used by the court.

In summary, FSHC will demonstrate at trial that the 2018 Plan does not meet the Borough's burden of demonstrating constitutional compliance and instead is intended to minimize the Borough's affordable housing obligation and deny the rights of the protected class while enabling the Borough to exclude the 800 Sylvan site, the Borough's best chance at providing a substantial amount of affordable housing, from consideration.

II. Legal Argument

A. The Borough should be required to demonstrate how it has complied with the Mount Laurel doctrine. The Borough has the burden of showing that it has complied. The failure of the municipality to carry its burden provides the trial court with substantial powers.

The procedures the court intends to use at trial have been addressed in an order entered today by the Honorable Christine A. Farrington, J.S.C. This section of legal argument is included here for the sake of a comprehensive presentation of important legal issues and is fully consistent with the order entered today.

At trial, the Borough must present its fair share plan and attempt to carry its burden of demonstrating, despite the overwhelming weight of evidence suggesting otherwise, that it is entitled to a declaration that it has met its Mount Laurel obligations in accordance with the Fair Housing Act (FHA) of 1985, N.J.S.A. 52:27D-301 to -329.9, and applicable regulations. The burden is clearly on the municipality at this stage:

> Equal treatment requires at the very least that government be as fair to the poor as it is to the rich in the provision of housing opportunities. That is the basic justification for Mount Laurel. When that clear obligation is breached, and instructions given for its satisfaction, it is the municipality, and not the plaintiffs, that must prove every element of compliance. It is not fair to require a poor man to prove you were wrong the second time you slam the door in his face.
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> [Southern Burlington County NAACP v. Mount Laurel, 92 N.J. 158, 306 (1983)(Mount Laurel II) (emphasis added).]

The court must apply an objective standard and may not consider defenses of "good faith":

> [P]roof of a municipality's bona fide attempt to provide a realistic opportunity to construct its fair share of lower income housing shall no longer suffice. Satisfaction of the Mount Laurel obligation shall be determined solely on an objective basis: if the municipality has in fact provided a realistic opportunity for the construction of its fair share of low and moderate income housing, it has met the Mount Laurel obligation to satisfy the constitutional requirement; if it has not, then it has failed to satisfy it. Further, whether the opportunity is "realistic" will depend on whether there is in fact a likelihood -- to the extent economic conditions allow -- that the lower income housing will actually be constructed.
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> [Id. at 220-22 (footnotes omitted).]

Regarding the order of proofs, the municipality at this stage should present its affirmative case. Then, FSHC and 800 Sylvan, in the order of appearance in the proceeding, should be able to present witnesses that respond to the testimony introduced by the municipality.

It is anticipated that the most important issues at this stage will be whether the municipality has prepared a plan that satisfies a properly calculated RDP and prepared an adequate response to unmet need. Following the presentation of evidence by all parties, Ms. Lonergan should testify in her role as the Special Master. Following her testimony, the court should decide whether the municipality has carried its burden of demonstrating compliance with Mount Laurel.

In the event, as anticipated, the court finds that the municipality's fair share plan is non-compliant, the court should proceed to the remedial stage of the matter in which it should "consider the range of remedies available to cure the violation." In re N.J.A.C. 5:96 & 5:97, 221 N.J. 1, 20 (2015) (Mount Laurel IV); see also Mount Laurel II, 92 N.J. at 285 (noting that, after a municipality has prepared a fair share plan and submitted it for court review, if the municipality does not carry its burden and demonstrate satisfaction of its Mount Laurel obligations, "the trial court may issue such orders as are appropriate").

At this stage, in view of the municipality's loss of immunity and the pending builder's remedy, the proceeding should focus on what is an appropriate builder's remedy and what other steps, in addition to the builder's remedy, must be taken by the municipality to meet its Mount Laurel obligations. The court may not need additional testimony regarding the majority of the issues that must be addressed during the remedial stage because many of those issues will have been addressed comprehensively during the first phase.

Subject to whatever directives the court issues to avoid the presentation of repetitive and duplicative proofs, the order of proofs during this phase should be as follows: (1) 800 Sylvan should present limited supplemental evidence regarding the appropriateness of its proposed builder's remedy; (2) FSHC should present limited supplemental evidence regarding the municipality's entire fair share

plan; and (3) the municipality should present limited supplemental evidence in response. Following testimony from Ms. Lonergan, the court should enter a detailed order setting forth what the municipality must do to comply with its fair share obligations.

Prior to the entry of an order following the trial, the court should hear argument regarding what steps must be taken to secure compliance with its order. From the Borough's recent conduct, it appears very likely that the court will need to supersede the council and planning board in order to secure compliance with its orders. See Urban League of Essex Cty. V. Tp. Of Mahwah, 207 N.J. Super. 169, 236-43 (Law Div. 1984); Tomu Dev. Co. v. Borough of Carlstadt, 2008 WL 4057912 (App. Div. 2008); Cranford Dev. Assocs., LLC v. Twp. of Cranford, 445 N.J. Super. 220, 232–33 (App. Div. 2016) (appointing master to oversee site plan approval and stating "[t]he court's authority to appoint Special Masters in Mount Laurel cases is well established. Given the Township's record of obstructing affordable housing projects, and the Planning Board's past hostility to a much more limited affordable housing plan, the court's decision to appoint the hearing examiner was justified in this case." (citing Mount Laurel II, 92 N.J. at 282–85)).

The court should consider appointing a person who, in collaboration with Ms. Lonergan, will perform tasks, including drafting ordinances and reviewing proposed site plans, that the

municipality is unlikely to perform on its own in a manner that complies with the law.

B. The Borough's calculation of its realistic development potential does not comply with the Prior Round regulations. The court should adopt the calculations of FSHC's expert, David Kinsey.

As part of its 2018 Plan submission, the Borough of Englewood Cliffs requested a vacant land adjustment pursuant to N.J.A.C. 5:93-4.2. The Borough contends that its RDP is 77 units. Through expert testimony, FSHC will demonstrate that the Borough's RDP should be 342 units.[1]

1. N.J.A.C. 5:93-4.2 and relevant judicial and COAH decisions require consideration of all appropriate sites.

The FHA directs COAH to "[a]dopt criteria and guidelines" that address "[m]unicipal adjustment of the present and prospective fair share based upon available vacant and developable land" and provide that such adjustments shall be made whenever "[v]acant and developable land is not available in the municipality." N.J.S.A. 52:27D-307(c).

COAH acted in accordance with that legislative authorization in adopting N.J.A.C. 5:93-4.2. COAH indicated that, "[w]ith the concept of RDP, the Council is recognizing that some sites are more realistic and/or appropriate than others for the location of inclusionary development. For example, some sites may lack infrastructure or be

[1] FSHC reserves the right for its planner to adjust the RDP calculation based on information learned through discovery (which is still ongoing) and information learned at trial.

surrounded by incompatible land uses. However, these sites and others have the potential to develop or redevelop over time and, as such development takes place, the Council has determined that such sites shall contribute toward the housing obligation." N.J.A.C. 5:93-4.1(c).

Under the Second Round rules, a municipality's RDP is calculated by determining how many acres are appropriate for residential development and multiplying that by an appropriate density. N.J.A.C. 5:93-4.2(f). COAH defined the term "adjustment" as "a modification and/or deferral of the municipal low and moderate income housing obligation, pursuant to N.J.S.A. 52:27D-307(c)(2) and N.J.A.C. 5:93-4." N.J.A.C. 5:93-1.3.

A municipality that seeks a vacant land adjustment is not required to use all of the sites that generate RDP. The rules state that "[t]he municipality need not incorporate into its housing element and fair share plan all sites used to calculate the RDP if the municipality can devise an acceptable means of addressing its RDP." N.J.A.C. 5:93-4.2(g).

The rules and relevant case law are also clear about whether sites that experience redevelopment should be included in a municipality's RDP. The COAH rules provide direct guidance that properties "have the potential to develop or redevelop over time and, as such development takes place, the Council has determined that such

sites shall contribute toward the housing obligation." N.J.A.C. 5:93-4.1(c).

Three important principles of law have evolved regarding RDP that are relevant to this matter. First, sites with redevelopment potential generate RDP. See, e.g., Fair Share Housing Center v. Cherry Hill, 173 N.J. 393, 416 (2002). In Cherry Hill, the Supreme Court required the municipality to include a 225-acre parcel in its RDP calculations even though it was not vacant and may not be rezoned for inclusionary purposes. Ibid.

Second, there are circumstances when a site may generate RDP even though it may not be currently available to meet RDP. In Cherry Hill, for instance, the Court required a site to generate RDP because all appropriate sites were required to be included in the RDP, even if the site may not ultimately be rezoned to require a set-aside of affordable housing because the existing zoning already permitted higher density residential uses. Id. at 416; see also id. at 404 ("The GSP property is a 225–acre property that was zoned B–4 in 1982 and consistently has been zoned as such. A B–4 zoning allows for a mix of non-residential and residential uses at high intensities and densities."). The Court's decision in Cherry Hill is consistent with COAH's practice of evaluating RDP based on an available site's capacity, even when the site is no longer available and a developer can develop the site generating RDP without fully meeting the RDP obligations attributed to it.

Similarly, in a 2001 decision involving the Borough of Wanaque, COAH assigned RDP to a site that already had development approvals. Exh. A. A developer obtained approvals permitting 23.7 units per acre on a site on which the RDP had been calculated at six units per acre. Based on the municipality's site plan approval at a higher density, COAH increased the municipality's RDP from 98 units to 275 units. Id. at 2-3. COAH's decision recognized explicitly that the site may develop fully in accordance with the development approvals and not satisfy the obligation. Id. at 4.

Third, in municipalities that requested a vacant land adjustment, sites that are appropriate for an inclusionary use, but that were approved for another purpose during the Third Round, may generate RDP. In a January 2017 decision, the New Jersey Supreme Court held that Mount Laurel obligations accrued during the "gap period" from 1999-2015. In re Declaratory Judgment Actions Filed By Various Municipalities, 227 N.J. 508 (2017). The Court held "that there could be no hiatus in the constitutional obligation" and agreed with lower courts "that the need that arose during the gap period was a responsibility of the municipalities." Id. at 521–22. The Court ruled as follows:

> There is no fair reading of this Court's prior decisions that supports disregarding the constitutional obligation to address pent-up affordable housing need for low- and moderate-income households that formed during the years in which COAH was unable to promulgate valid Third Round rules. The opportunity for immunity provided by this Court's substitute for

> substantive certification was premised on the value of the efforts of towns that received substantive certification from COAH during that interval or that otherwise could show steps taken to address affordable housing needs. Mount Laurel IV, supra, 221 N.J. at 21, 24–29. That necessarily meant addressing the need of low- and moderate-income households that came into existence since 1999, and that still exists today.
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> [Id. at 521 (emphasis added).]

See also id. at 512-13 ("For the last sixteen years, while the Council on Affordable Housing (COAH) failed to promulgate viable rules creating a realistic opportunity for the construction of low- and moderate-income housing in municipalities, the Mount Laurel constitutional affordable housing obligation1 did not go away. Municipal responsibility for a fair share of the affordable housing need of low- and moderate-income households formed during that period was not suspended.").

Consistent with the Court's holding in the "gap period" decision, and with the decisions involving Cherry Hill and Wanaque, during the Third Round declaratory judgment proceedings, courts, litigants, and special masters, including Ms. Lonergan, have considered both currently available sites and sites that were available but that were squandered by the municipality in evaluating municipalities' requests for a vacant land adjustment. This approach to implementing N.J.A.C. 5:93-4.2 was addressed in a report prepared by Ms. Lonergan's firm regarding Delran Township:

> The Township's June 2016 Draft Housing Element and Fair Share Plan included the Township's initial vacant land analysis, which alleged that the Township's RDP was 44 units. My office reviewed that analysis for consistency and compliance with N.J.A.C. 5:93-4.2, and advised the Township to calculate additional RDP from farmland, underutilized sites, and other sites permitted by the Second Round rules. I also recommended that the Township calculate RDP from the Timber Ridge and Stellwag Farm sites, and also provide a separate RDP calculation accounting for sites that had been approved for non-inclusionary residential development since 1999. The latter recommendation was based on the premise that the Third Round obligation represents the affordable housing need that has been generated since 1999; therefore, the RDP should include land that was available to address the obligation at the beginning of the Third Round period, as well as what is available now.
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> [Exh. B at 8 (emphasis added).]

2. The Borough improperly excludes sites from generating RDP. Ms. Lonergan has erred in endorsing the municipality's exclusionary practices.

In view of the above relevant sources of law, FSHC will urge the court to find that Englewood Cliffs' inventory of sites used to calculate the RDP is incomplete in the following ways.

a. Prentice Hall site

The most egregious part of the Borough's RDP calculation is its failure to include the 27.03-acre Prentice Hall site, Block 207, Lot 6, in its RDP inventory.

The Prentice Hall parcel was previously evaluated by COAH for inclusion in the Borough's affordable housing plan. In 1997, COAH viewed the site as so important to the Borough's Mount Laurel

compliance that it conditioned the Borough's substantive certification on the Borough adopting overlay zoning on this site. Thus, in 1997, the Borough was on notice that this site would be essential to its compliance with the Mount Laurel doctrine. The Borough, as part of its forty-plus-year record of exclusion, did not adopt that overlay zoning and was therefore thrown out of the COAH substantive certification process, a step COAH took very infrequently. The site is now in the process of being developed with a 400,000 square foot headquarters for LG. The site has provided zero affordable housing units.

The Special Master takes the position that this site should not be included in the Borough's RDP calculations because, in her opinion, the various property owners of the site never considered any other use besides an office use. Ms. Lonergan takes this position notwithstanding the fact that it is impossible to know whether the property owners considered other uses. It is, however, knowable and in fact demonstrated that the Borough chose to do whatever was necessary to never permit residential housing to be constructed on this site. Ms. Lonergan recognizes that had overlay zoning been put into place the site would have been required to provide affordable housing once it redeveloped, regardless of the property owner's desires. On page fifty-one of her report, the Special Master makes clear that the unmet need rule requires, "where the prior use on the site is changed, the site shall produce low and moderate income

housing." It is undisputed that the prior use on the Prentice Hall site has changed. The property was leveled to the ground and a brand-new building was constructed. The Special Master, in her deposition, explained that, in taking this exclusionary position, she was motivated by a concern that, if Englewood Cliffs were required to incorporate the Prentice Hall site into the Borough's RDP, the Borough could not address that RDP by zoning this site (because the site is now being utilized for non-residential development). Yet as was noted above, there is no requirement that all sites that generate RDP be used to meet it, and there is no requirement that all sites that generate RDP even be available to meet it. There additionally has been no demonstration that the RDP attributable to the site could not be met through alternative compliance mechanisms or by using unutilized portions of the site. To the extent that incorporating the Prentice Hall site into the RDP results in Englewood Cliffs having to do more than might be required of municipalities that did not openly flout the law, this is a problem of Englewood Cliffs' own making and which it could have avoided. The Borough was on notice that the site was essential to address its Mount Laurel obligations but it nonetheless chose to allow the site to be used in a way that produced no affordable housing whatsoever.

Englewood Cliffs' conduct is especially unforgiveable because, according to the documentary evidence it produced during discovery,

the municipality openly conspired to avoid having to use the Prentice Hall site and to game the COAH substantive certification process.

At trial, FSHC will introduce documentary evidence that reveals a conspiracy to avoid providing affordable housing on the site and to reenter the COAH process only after the site was acquired for a non-residential use. The documents will show that, in the Spring 1999 edition of the Englewood Cliffs newsletter, the Borough's attorney, E. Carter Corriston, wrote to residents that the "Borough refused to re-zone the [Prentice Hall] property for residential use" and had been denied COAH certification and, on appeal, "the Appellate Division . . . ruled that under New Jersey law they had to affirm COAH's decision."

The Borough attorney then wrote that, "[a]s a practical matter, the Borough will suffer no ill affects since the Prentice Hall property was the only property designated by COAH for an overlay zone and the issue is now moot since . . . the property is no longer available for possible residential development thanks to Citicorp and the Mayor and Council."

Five years later, in an August 2004 letter to the Mayor, the same attorney explained that Englewood Cliffs had rejected "the former Prentice Hall property" because it "would have left the door open to low income housing developments on that piece and was substantially changing our numbers." He suggested that, in light of the new development on the Prentice Hall site, the Borough could now resubmit

its petition to COAH without fear, and he attached a letter from one of the Borough's retained planners, who wrote "that the conditions within the Borough have substantially changed with the sale and use of the Prentice Hall property. I concur with your analysis that this change in conditions would possibly create a different outcome from COAH." As the Borough's attorney plainly told the Borough's Mayor, the different outcome sought was to not "le[ave] the door open to low income housing."

The Borough attorney's words recall the passage from Mount Laurel II where the Supreme Court wrote that "[w]hen th[e municipality's] clear obligation [to comply with Mount Laurel] is breached, and instructions given for its satisfaction, it is the municipality, and not the plaintiffs, that must prove every element of compliance. It is not fair to require a poor man to prove you were wrong the second time you slam the door in his face." Mount Laurel II, 92 N.J. at 306.

In short, the Borough behaved in manifest bad faith despite the fact that governmental officials have an obligation to perform their duties with integrity. See F.M.C. Stores Co. v. Borough of Morris Plains, 100 N.J. 418, 426-27 (1985) ("[G]overnmental officials . . . must 'turn square corners.' . . . [Their] primary obligation is to comport [themselves] with compunction and integrity . . . ." (citation omitted)).

N.J.A.C. 5:93-4.2 provides a municipality with discretion regarding which sites and compliance mechanisms it uses to address RDP, but the municipality cannot eliminate sites that are appropriate for housing. See Cherry Hill, 173 N.J. at 416. The Borough has the discretion to not use all or most of the Prentice Hall site to meet RDP, but it does not have the discretion to completely eliminate that site from its RDP calculation.

As part of the trial, we anticipate demonstrating that Ms. Lonergan's reasons for excluding the Prentice Hall site from the RDP are inconsistent with sound public policy and not rationally based in N.J.A.C. 5:93-4.2. Ms. Lonergan's opinion fails to account for Cherry Hill, COAH's decision involving Wanaque, and the municipality's determined efforts to game the system in order to exclude the protected class.

Ms. Lonergan's position, if accepted by the court, would reward the most exclusionary municipalities that discouraged all residential development and promoted only nonresidential development. If Ms. Lonergan on the stand does not modify her recommendation to account for the facts and law addressed in this brief and which will be addressed further at trial, the court should reject her recommendation and direct that the 27.03 developable acres from the Prentice Hall site be included in the Borough's RDP.

If the court does require the inclusion of the Prentice Hall site, as FSHC urges, it must also decide the density at which the

site must be included. Michael Mistretta, PP, AICP, the Borough's planner, testified in his deposition that an appropriate density for the site considerably far exceeds the 6 units per acre COAH required in 1997. Ms. Lonergan also agreed that a higher density would be appropriate. Dr. Kinsey recommended that the RDP could be as high as 30 units per acre. At a density of 6 units per acre, the RDP attributable to the site is 33. At Dr. Kinsey's recommended density of 30 units per acre, the RDP is 162. FSHC respectfully urges the court to assign a density of 30 units per acre to the Prentice Hall site for RDP purposes.

b. The Lighthouse site

The Borough removed at least one substantial parcel from its vacant land inventory because it received a development approval subsequent to the Borough's filing of its declaratory judgment action. In November 2015, the property owner of a vacant property at Block 1202, Lot 2, located at 922 Sylvan Avenue and known as the Lighthouse LCC site, submitted a development application for office development. This application was approved in 2016, and the office building was developed in 2018. Thus, for at least the first year of the pendency of this declaratory judgment action, the site remained vacant.

The Borough claims that it "cannot stop a landowner or developer from securing the right to develop their land" and, thus, this site should be excluded from the vacant land inventory. That is not entirely accurate because the municipality could have zoned or

overlay-zoned the parcel long ago; its hands are hardly clean. Even if the municipality were blameless, the site should generate RDP because the Prior Round regulations provide six different land areas that "municipalities may seek to eliminate from the vacant land inventory." N.J.A.C. 5:93-4.2(c). None of these exclusions permits a municipality to remove a site from consideration simply because it has a land use approval on the site.

Ms. Lonergan appears to endorse the exclusion of the site, perhaps in an end-oriented effort to keep the RDP low, by pointing out that COAH previously reviewed the site for inclusion in the Borough's Prior Round RDP and determined that the site was undevelopable. Ms. Lonergan also opines that, with respect to the timing of the November 2015 application, "it could be reasonably assumed that the owner started preparing a fully engineered site plan application much earlier in 2015 or even 2014, thus before the Borough filed its July 2015 DJ action." Ms. Lonergan's positon gives the benefit of the doubt where it is not due and fails to account for the reason the site was previously excluded from the RDP.

COAH did review this site for inclusion in the Borough's RDP and determined that the site should not be included (in 1997) because information provided by the Borough at that time showed extensive wetlands that prohibited the site from being available for development. COAH's findings, however, were simply wrong, as evidenced by the ultimate development of the site. Thus, a vacant,

developable site was available when the Borough filed its declaratory judgment action in July 2015. The Borough permitted the site to develop without any affordable housing despite the fact it knew it had substantial unmet fair share obligations.

The Special Master's unsubstantiated speculation about when the landowner may or may not have begun preparing its development application is puzzling and irrelevant. The relevant question on this site is whether it was vacant and developable when the Borough filed its declaratory judgment action: it was. Ms. Lonergan also completely ignores the fact that while the Borough filed its declaratory judgment in July 2015, it would likely have been working on its plan for many months prior to July -- and at least as early as March 2015, when the Supreme Court authorized towns to file declaratory judgment actions. Moreover, the municipality knew as far back as 1997 that it had an obligation to provide affordable housing wherever possible given that it lacked sufficient land to meet its obligations.

The Borough's other arguments are also not compelling. Although a municipality cannot stop a developer from securing the right to develop their property, the municipality does indeed have power to determine what is constructed on the site: this power is called zoning. Interestingly, the municipality has no problem using its zoning power to attempt to prohibit 800 Sylvan from developing its property as it sees fit. As early as March 2015 (8 months before the

development application came in), the Borough could and should have been looking at the Lighthouse site to help address its affordable housing obligations. Indeed, it was well established prior to this that the Borough had provided zero affordable housing units toward its fair share and knew that it would not have sufficient vacant land to address those obligations.

For the foregoing reasons, the court should include the 3 net developable acres of the Lighthouse site in the Borough's vacant land inventory. These 3 acres should be factored into the RDP at 30 du/a (the same recommended for the 800 Sylvan site), which would produce an RDP of 18.

3. The court should require the municipality to meet its substantial RDP of 342 units.

As noted above, FSHC urges the court to exercise its substantial powers to bring Englewood Cliffs into compliance with the Mount Laurel doctrine for the first time. The municipality has intentionally undercalculated how many affordable homes it can provide. FSHC will demonstrate at trial that the municipality, through reasonable compliance mechanisms that comply fully with applicable law, can meet or exceed an RDP of 342 units.

C. The Borough should do more to address its substantial unmet need.

At trial, FSHC, based on its expert's report and information and opinions obtained during discovery, will argue for a more expansive response to the Borough's unmet need.

A municipality that has a vacant land adjustment "must identify potential sites for development, and a method to generate additional affordable units should those sites become available." In re Petition of Borough of Montvale, 386 N.J. Super. 119, 122 (App. Div. 2006). In In re Fair Lawn Borough, 406 N.J. Super. 433, 441-442 (App. Div. 2009), the Appellate Division wrote:

> COAH's regulations recognize that some towns may not have enough currently developable land to meet their fair share requirements, although they may have vacant land that is capable of future development for that purpose. A municipality may receive a "vacant land" adjustment, conditioned on adopting zoning geared at allowing the eventual development of affordable housing on those properties. N.J.A.C. 5:93-4.1, -4.2.
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> [(citations omitted).]

Unmet need is not "'a permanent adjustment to municipal affordable housing obligations.'" In re Adoption of N.J.A.C. 5:94 & 5:95, 390 N.J. Super. 1, 87-88 (App. Div.), certif. denied, 192 N.J. 71 (2007) (quoting 36 N.J.R. 5770 (December 20, 2004)).

The Appellate Division has found that COAH's approach to unmet need met the requirements of the Mount Laurel doctrine because it must be satisfied through, for instance, overlay zoning. Ibid. See also 40 N.J.R. 5965(a), 6005 (October 20, 2008) (COAH's regulations are intended to "require meaningful plans for unmet need"); In re Fair Lawn, 406 N.J. Super. at 445 (noting in case in which COAH required overlay zoning that COAH "carefully scrutinized" a municipality's "plan to be sure the vacant land adjustment did not

become a hollow promise"); N.J.A.C. 5:93-5.6(b)(1)("When a municipality is receiving an adjustment pursuant to N.J.A.C. 5:93-4.2 [vacant land adjustment] the municipality shall be required to zone inclusionary sites . . . with a 20 percent set-aside.").

Here, the Borough's unmet need plan is lacking in the following three ways:

First, irrespective of how the court calculates the Borough's RDP -- that is, irrespective of whether it adopts the calculation of the Borough, the Special Master, FSHC's expert David Kinsey, or some other calculation -- the unmet need will be in the hundreds of units. The Borough's unmet need plan, even if every site were to redevelop (a very unlikely occurrence) and produce affordable housing, would only address 95 units. The Borough should be directed to plan for additional redevelopment opportunities and to require the overlay zones to provide a minimum 20 percent set-aside in accordance with long-standing COAH rules and case law. See N.J.A.C. 5:93-4.2(b)1 ("When a municipality is receiving an adjustment pursuant to N.J.A.C.5:93-4.2, the municipality shall be required to zone inclusionary sites at a minimum gross density of six (6) units per acre with a 20 percent set-aside.").

Second, the Borough's unmet need plan is very unlikely to provide the 95 units it purports to provide in the 2018 plan. The Borough relies on three different overlay zones on E. Palisades Avenue, Hudson Terrace, and lots in the B-3 Rehabilitation Area to provide

residential units between 15 and 20 dwelling units per acre. The Borough's calculation of 95 units assumes that every lot in each of the three zones redevelops, an extremely unlikely scenario as tremendous amounts of lot assemblage will likely be necessary to realize the kind of results the Borough takes for granted here. These zones will likely produce much more modest results.

Third, the Borough does not include any of the larger, underutilized lots that are essential to addressing its unmet need. FSHC's expert points to two such lots that could produce several hundred affordable housing units if redeveloped into multi-family residential. The Borough considers and rejects these lots, including the property owned by intervenor 800 Sylvan Avenue LLC for largely pretextual reasons. The Borough provides no explanation for the exclusion of the property located at 1000 Sylvan Avenue, the site of the existing LG Headquarters. Just as COAH foresaw the redevelopment of the Prentice Hall site in 1997, the future use at 1000 Sylvan Avenue appears to be ripe for redevelopment, considering LG's new headquarters elsewhere in the Borough.

During trial, FSHC will demonstrate that Englewood Cliffs' approach to addressing its unmet need should be altered and supplemented to account for the applicable law and opportunities that have not been included but that both Mr. Mistretta and Ms. Lonergan agree should be included in the municipality's fair share plan.

In this brief, FSHC has focused on the most important legal issues that the court must address at trial. FSHC reserves the right to make supplemental legal arguments at trial based on the evidence presented to the court.

Thank you for your attention to this matter.

Respectfully,

Kevin D. Walsh, Esq.
Counsel for Defendant-Intervenor
Fair Share Housing Center

c: Mary Beth Lonergan, P.P., AICP, Special Master
Jeffrey Surenian, Esq.
Thomas Trautner, Esq.
Albert Wuntsch, Esq.
Antimo Del Vecchio, Esq.
Thomas Carroll, Esq.

RESOLUTION DENYING SUBSTANTIVE CERTIFICATION WITH CONDITIONS - 187-99

WHEREAS, Wanaque Borough , Passaic County, did not seek first round (1987-1993) substantive certification from the Council on Affordable Housing (COAH); and

WHEREAS, Wanaque Borough petitioned COAH on December 16, 1996 for substantive certification of a housing element and fair share plan addressing the borough's second round (1987-1999) cumulative precredited need in accordance with N.J.S.A. 52:27D-313 and N.J.A.C. 5:93-1 et seq.; and

WHEREAS, COAH established a second round precredited need for Wanaque Borough of 369 units, of which 37 are rehabilitation units and 332 new construction units; and

WHEREAS, the petition for substantive certification included a request for a vacant land adjustment pursuant to N.J.A.C. 5:93-4.2 that would reduce the borough's new construction obligation to a realistic development potential (RDP) of 22 units; and

WHEREAS, no objections were received by COAH during the 45-day objection period; and

WHEREAS, COAH staff reviewed Wanaque Borough's housing element and fair share plan; and

WHEREAS, after two visits to review the vacant sites in Wanaque Borough, COAH staff released a COAH Report Requesting Additional Information on February 5, 1998; and

WHEREAS, on February 25, 1998, a portion of Wanaque Borough was granted Center Designation by the State Planning Commission; and

WHEREAS, COAH received the last of the documentation requested on August 11, 1998; and

WHEREAS, on the site visits, COAH staff noted a 400-acre industrially zoned area of the borough called "Powder Hollow" which, except for a composting facility, was vacant but was not included by Wanaque in its original inventory ; and

WHEREAS, approximately 350 acres of Powder Hollow is outside of the borough's designated center and sewer service area and is in Planning Area (PA) 5 of the Resource Planning and Management Map of the New Jersey State Development and Redevelopment Plan (SDRP) and is environmentally sensitive and/or affected by industrial contaminants; and

1

Exhibit A

WHEREAS, the undeveloped area of Powder Hollow not affected by contaminants or not environmentally sensitive is a site of 50± developable acres; and

WHEREAS, COAH staff determined that this portion of the site was appropriate for the development of affordable housing and required Wanaque Borough to include it in the determination of the borough's RDP; and

WHEREAS, COAH staff determined that the site was suitable for residential development and that the residential density of six units per acre with a 20 percent setaside, which would yield 60 affordable units, appeared appropriate based on surrounding residential densities; and

WHEREAS, in a COAH report dated September 29, 1998, COAH determined that Wanaque Borough was entitled to a vacant land adjustment and had an RDP of 98 new construction units; and

WHEREAS, the COAH report required Wanaque Borough to amend its plan to address the 98-unit RDP, repetition for substantive certification and provide additional information and documentation; and

WHEREAS, Wanaque Borough repetitioned COAH on September 13, 1999 for substantive certification of an amended housing element and fair share plan addressing the borough's adjusted fair share obligation of 135 units (RDP of 98 units and 37 rehabilitation); and

WHEREAS, the 50 acre portion of the Powder Hollow site is included in Wanaque's amended plan and is located with the borough's inclusionary sites in the designated center; and

WHEREAS, Wanaque Borough published notice of its petition in the *Suburban Trends*, which is a newspaper of general circulation within the county, on October 6, 1999 pursuant to N.J.S.A. 52:27D 313 and N.J.A.C. 5:91-3.3; and

WHEREAS, the repetition for substantive certification initiated a 45-day objection period pursuant to N.J.A.C. 5:91-4.1(a); and

WHEREAS, no objections were received by COAH during the 45-day objection period; and

WHEREAS, it was discovered that the property owners of sites selected for inclusionary development were not notified by mail of Wanaque Borough's petition pursuant to N.J.A.C. 5:91-3.6(b); and

WHEREAS, on June 19, 2000, COAH notified by mail the property owners of the selected inclusionary sites in Wanaque Borough's amended plan and initiated an extended objection period for those property owners; and

WHEREAS, no objections were received by COAH during the additional 45-day objection period; and

WHEREAS, Wanaque Borough's fair share plan included a 37-unit rehabilitation program, a 24-unit regional contribution agreement (RCA) and inclusionary zoning on four sites at six units per acre with a 20 percent setaside that would yield 74 affordable units; and

WHEREAS, on January 3, 2001 COAH approved a 24-unit RCA between Wanaque Borough and Hoboken City, Hudson County; and

WHEREAS, a developer approached Wanaque Borough with a plan to develop the Powder Hollow site with 1,185 age-restricted housing units; and

WHEREAS, with approximately 50 developable acres, the net density for the proposed development is 23.7 units per developable acre; and

WHEREAS, Wanaque Borough changed the zoning on Powder Hollow from industrial to residential on March 13, 2000, permitting development of active adult housing (AAH) at five units per gross acre with an affordable housing component of 60 units; and

WHEREAS, COAH staff was not informed of the zoning change until contacting the Office of State Planning (OSP) prior to a September 12, 2000 Plan Implementation Committee (PIC) meeting that was reviewing this zoning change; and

WHEREAS, pursuant to N.J.A.C. 5:93-4.2(f), COAH's rules require an affordable housing setaside of 20 percent in a vacant land adjustment; and

WHEREAS, at a 20 percent setaside, the yield of affordable housing on the 1,185-unit Powder Hollow site would be 237 units; and

WHEREAS, on December 21, 2000 the Wanaque Borough Planning Board granted preliminary approval for the development of 1,185 residential units on the 50-acre Powder Hollow site, requiring the developer to provide at least 60 units of affordable housing, representing a 5.1 percent affordable housing setaside; and

WHEREAS, in a COAH Compliance Report dated January 8, 2001, COAH staff recalculated Wanaque Borough's RDP to 275 units, reflecting the affordable housing yield that could be achieved through a 20 percent setaside on the Powder Hollow site; and

WHEREAS, the January 8, 2001 COAH Compliance Report (Exhibit A) requested additional information and recommended that COAH conditionally deny Wanaque Borough's repetition for substantive certification, and

WHEREAS, there was a 14-day period to submit comments to the COAH Compliance Report pursuant to N.J.A.C. 5:91-5.2(a); and

WHEREAS, in Wanaque Borough's January 26, 2001 comments (Exhibit B) to the COAH Compliance Report, the borough disputed COAH staff's calculation of a 275-unit RDP; and

WHEREAS, Wanaque Borough offered to address an adjusted RDP of 152 units by doubling the densities on three inclusionary sites (Sites 36, 39 and 53/54) from six to 12 units per acre and increasing the number of affordable units assigned to the Powder Hollow site from 60 to 100, representing an 8.4 percent affordable housing setaside; and

WHEREAS, Wanaque Borough justifies the increased densities on the three inclusionary sites as being realistic because it is expected that the development of the Powder Hollow site will spur development on the three inclusionary sites; and

WHEREAS, Wanaque Borough's comment noted that the developer of the Powder Hollow site would provide only the 60 units required by the preliminary site plan approval and Wanaque Borough would address the balance of the 100 units (40 units) through some other means; and

WHEREAS, Wanaque Borough asserts that once COAH had established an RDP of 98 units, COAH's rules permit the borough to address this obligation in any way that meets COAH's rules without COAH increasing the RDP; and

WHEREAS, Wanaque Borough requests that COAH refrain from conditionally denying the borough's repetition for substantive certification until COAH staff receives and reviews Wanaque Borough's proposed plan to address the revised 152-unit RDP; and

WHEREAS, COAH released a Response to Comments dated March 6, 2001 (Exhibit C) recommending that COAH accept the 275-unit RDP recommended in the COAH Compliance Report and require Wanaque Borough to rezone the three inclusionary sites at 12 units per acre with a 20 percent setaside and to rezone the Powder Hollow site with a 20 percent setaside; and

WHEREAS, it was acknowledged that such recommended rezoning of the Powder Hollow site would not affect the approvals already in place, but in the event that the developer of the Powder Hollow site requests substantial changes to the approved site plan or the approvals expire, Wanaque Borough would capture a full 20 percent of the development for affordable housing or 223 units, whichever is less; and

WHEREAS, COAH staff also recommended that if the approved project is developed with less than 223 affordable units by the developer, Wanaque Borough should be required to address any shortfall in meeting its second round obligation in the third round; and

WHEREAS, COAH permitted an additional 14-day period to submit comments in response to COAH's Response to Comments of March 6, 2001; and

WHEREAS, in Wanaque Borough's March 20, 2001 response (Exhibit D), the borough reiterated its request from the January 26, 2001 response; and

WHEREAS, Skylands CLEAN, Inc. and Wanaque Borough REACH jointly submitted a response, dated March 21, 2001 (Exhibit E), expressing concern regarding the Powder Hollow site and Wanaque Borough's proposal to increase the density on the inclusionary sites; and

WHEREAS, Skylands CLEAN, Inc. and Wanaque Borough REACH provided no study, expert report or documentation to support their claims regarding the impact on land and infrastructure; and

WHEREAS, the type of residential development permitted by the increased density (12 units per acre) will be the same as would have been permitted at the lower density (six units per acre); and

WHEREAS, COAH responded to Wanaque Borough's March 20, 2001 response and the March 21, 2001 comment from Skylands CLEAN, Inc. and Wanaque Borough REACH in a COAH response dated April 2, 2001 (Exhibit F); and

WHEREAS, the COAH response of April 2, 2001 considered all the documentation and comments submitted and recommends that COAH deny Wanaque Borough substantive certification with conditions.

NOW THEREFORE BE IT RESOLVED that, having considered all of the documentation and comments submitted, COAH determines the RDP for Wanaque Borough shall be 275 units with an unmet need of 57 units; and

BE IT FURTHER RESOLVED that COAH finds that the housing element submitted by Wanaque Borough does not comport to the standards set forth at N.J.S.A. 52:27D-314 and is not consistent with the rules and criteria adopted by COAH pursuant to N.J.A.C. 5:93-1 et seq.; and

BE IT FURTHER RESOLVED that COAH hereby DENIES Wanaque Borough SUBSTANTIVE CERTIFICATION with the following conditions to be met within 60 days:

1. Wanaque Borough shall amend its fair share plan to create a realistic opportunity for addressing its RDP of 275 units of affordable housing.
2. Wanaque Borough shall revise the zoning on the Powder Hollow site to capture a 20 percent setaside or 223 units (275 – 52 = 223), whichever is less. If the approved Powder Hollow site project is developed with less than 223

affordable units, Wanaque Borough shall address any shortfall in meeting its second round obligation in the third round.

3. Wanaque Borough shall rezone the three inclusionary sites (Sites 36, 39 and 53/54) at 12 units per acre with a 20 percent setaside.
4. Wanaque Borough shall amend its proposed fair share ordinance and development fee ordinance so that at least one half of Wanaque Borough's fair share obligation shall be built within Wanaque Borough and eliminate the provision for all developers to use a payment in lieu for zoned units.
5. Wanaque Borough shall identify the sites to be zoned in its proposed fair share ordinance, including the redevelopment overlay zone, and include the density and setaside requirements for each site in its ordinance.
6. Wanaque Borough shall complete and submit the development fee monitoring forms.
7. Wanaque Borough shall contract with an experienced administrative entity for the administration of newly constructed affordable units.
8. Wanaque Borough shall increase the density in its proposed overlay zoning ordinance for unmet need to 10 units per acre; and

BE IT FURTHER RESOLVED that if Wanaque Borough addresses the conditions listed above in satisfaction of COAH's rules and criteria within 60 days, COAH shall grant Wanaque Borough substantive certification.

I hereby certify that this Resolution
was adopted by the Council on
Affordable Housing at its public meeting
on April 4, 2001.

Renee R. Reiss, Secretary
Council on Affordable Housing

Clarke Caton Hintz
Architecture
Planning
Landscape Architecture

Hon. Paula T. Dow, P.J.Ch.
Superior Court of New Jersey
Burlington County Olde Courthouse
120 High Street, First Floor
Mount Holly, NJ 08060

August 25, 2017

Re: IMO Application of the Township of Delran Docket No. BUR-L-1620-15
FSHC v. Twp. Of Delran, et. al. Docket No. BUR-L-138-17
FSHC v. Twp. Of Delran, et. al. Docket No. BUR-L-142-17

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Dear Judge Dow:

This report has been prepared pursuant to Your Honor's Case Management Order of July 5, 2017, which, in part, directs me to provide an outline of the current status of Delran Township's affordable housing compliance in relation to the following matters:

- The Application of the Township of Delran, County of Burlington, Docket No. BUR-L-1620-15
- Fair Share Housing Center v. The Township of Delran; The Planning Board of the Township of Delran; and Delran Land Investment, LLC., Docket No. BUR-L-138-17
- Fair Share Housing Center v. The Township of Delran; The Planning Board of Delran; A.M.Y. Farms, Inc., and Edward and Nancy Klumpp d.b.a. Timber Ridge at Delran, LLC., Docket No. BUR-L-142-17.

Philip Caton, FAICP
John Hatch, FAIA
George Hibbs, AIA
Brian Slaugh, AICP
Michael Sullivan, AICP

Emeriti
John Clarke, FAIA
Carl Hintz, AICP, ASLA

This report reviews the compliance of Delran Township's (hereinafter "Township or "Delran") Third Round affordable housing compliance plan as described in its Draft 2016 Housing Element and Fair Share Plan ("2016 Draft Plan" or "Draft Plan") prepared by Jennifer Beahm, PP, AICP and James Clarkin, PP, AICP, and its August 15, 2017 Summary of Plan prepared by Mr. Clarkin, with the substantive rules of the Council on Affordable Housing (hereinafter "COAH") (*N.J.A.C.* 5:93, or the "Second Round rules"). It also reviews the compliance of the Township's July 2017 revised Vacant Land Inventory and Analysis Report ("VLA Report"), and summarizes the two concurrent litigations, listed above, in which Fair Share Housing Center ("FSHC") alleges that Delran Township and the developers of two properties known as Timber Ridge and Stellwag Farm violated *Mount Laurel* by failing to require inclusionary set-asides in approved market-rate developments.

Exhibit B

Your Honor granted intervenor status to the two developers identified below. This report will also describe the intervenors' sites and summarize the status of their intervention and negotiations, if any, with the Township.

- Atlantic Delta Corporation at Montgomery, Inc. ("ADC") filed a motion to intervene on July 31, 2017, which was granted by Order entered on August 4, 2017. The ADC site had been included in the Township's 2016 Draft Plan to address the RDP, but was removed from the Township's compliance plan in the 2017 Plan Summary.
- Defendant/Intervenor Chester Avenue Developers, LLC. ("CAD") filed a notice of motion to revoke the temporary immunity of Delran and to amend its answer with the Court this week. Notwithstanding that motion, the Plan Summary which Delran has submitted to the Court includes, for the first time, the CAD property as part of its fair share plan. I have asked the Township and CAD to discuss this new development and to explore whether settlement can be reached between the parties.

BACKGROUND

Delran filed a Complaint for Declaratory Judgment on July 6, 2015 seeking a declaration of its compliance with the *Mount Laurel* doctrine in accordance with the NJ Supreme Court's March 10, 2015 decision In re *N.J.A.C.* 5:96 and 5:97, 221 N.J. 1, (2015; a.k.a. "*Mount Laurel IV*"). The Township has not previously been granted third round substantive certification or judgment of compliance.

In January of 2017, FSHC filed complaints with the Court against Delran Township and the developers / owners of the Timber Ridge and Stallwag Farms properties due to the failure of the Township to require the proposed developments to provide an inclusionary affordable housing set-aside. FSHC also alleges that the Township improperly excluded these sites from generating a realistic development potential ("RDP") in the vacant land analysis in the Draft 2016 Plan. The cumulative effect of these actions, FSHC argues, is to deprive low- and moderate-income households of an opportunity for affordable housing in a municipality that has asserted it has limited developable land.

Timeline

The events leading up to the current litigation date back over a decade. The Township, in 2005, reduced the permitted residential density in the A-1 Agricultural Zone District, where both litigation sites are located, to half-a-unit per acre. Subsequently

the owners of the Timber Ridge tract – A.M.Y. Farms, Inc. and the Klumpp family – sued the Township. In 2009, the owners of Timber Ridge entered into a settlement agreement with the Township that permitted Timber Ridge to be developed with a 108-unit age-restricted housing subdivision, along with a dedication of acreage to the Township for recreation / open space. The agreement relieved Timber Ridge of any obligation to provide on-site affordable units or make a payment in-lieu of affordable units.

In 2014, the Township designated the Stellwag Farm site, located a half-mile northwest of the Timber Ridge site on Hartford Road, as an area in need of redevelopment. In May of 2016, the Township adopted a redevelopment plan for Stellwag Farm permitting 82 age-restricted market rate units with no on-site affordable housing set-aside.

One month later, in June of 2016, the Township prepared its Draft Housing Element and Fair Share Plan and vacant land analysis, which asserted that the Township had insufficient land to address a third round fair share obligation of more than 44 units. The Plan addressed its 44-unit realistic development potential ("RDP") with a 78-unit 100% affordable housing site that was to be funded with a payment[1] established in a future redevelopment agreement for the Stellwag Farm Redevelopment Site. However, as FSHC notes in its filings, the Township did not include Stellwag Farm and Timber Ridge in its vacant land analysis despite both sites being vacant at the time the Draft Plan was prepared.

On July 12, 2016, the Township approved a 108-unit age-restricted market-rate subdivision on Timber Ridge. Six months later, on January 17, 2017, the Township entered into a redevelopment agreement with Delran Land Investment, LLC. ("DLI") to develop Stellwag Farm in accordance with the Redevelopment Plan. The Township's Planning Board granted development approval on June 1, 2017 for Stellwag Farm in accordance with the Redevelopment Plan and redevelopment agreement.

FSHC filed the complaints concerning Timber Ridge and Stellwag Farm on January 12 and 13, 2017, respectively, alleging that the actions of the Township and the Planning Board, violated *Mount Laurel* by "dissipating scarce land resources" that could have otherwise provided affordable units. The FSHC filings request that the

[1] The payment in-lieu amount would later be established in the January 17, 2017 redevelopment agreement between the Township and Delran Land Investment, Inc. as being equal to 1.5% of the equalized value of the houses to be developed at Stellwag Farm. This is not, technically, a payment in-lieu since it is equivalent to a developer fee.

Court invalidate agreements and approvals for the litigation sites and require that the two sites be included in the Township's housing element and fair share plan with a 20% set-aside for low- and moderate-income households. FSHC also requested that the Court require all future residential development in the Township provide affordable housing through an inclusionary set-aside.

Fair Share Obligation

The Township's fair share obligation has not yet been determined by the Court. FSHC's methodology expert, Dr. David Kinsey, PhD, PP, FAICP, and the Township's expert, Econsult Solutions Inc. ("ESI") have produced a series of reports, the most recent of which were published in April of this year, calculating municipal fair share obligations statewide. The table below shows the fair share obligations calculated by the respective experts in their April 2017 reports.

OBLIGATION	FSHC APRIL 2017*	ESI APRIL 2017
PRESENT NEED (2015)	52	24
PRIOR ROUND (1987-1999)	208	208
THIRD ROUND (1999-2025)	704	8
GAP NEED (1999-2015)	*316*	*8*
PROSPECTIVE NEED (2015-2025)	*388*	*0*

* FSHC's April 2017 report only included calculations of municipalities' gap present need. The 52-unit Present Need and 388-unit Prospective Need are taken from FSHC's May 2016 report.

On July 28, 2017, the Township submitted a revised Vacant Land Inventory and Analysis Report that describes three "alternative" RDP scenarios (see the Vacant Land Adjustment section of this report). The Township's alternative RDPs range from 285 units (which is the RDP the Township has incorporated into its Plan Summary) to 471

units. These RDP's are roughly midway between Econsult's 8-unit and FSHC's 704-unit Third Round obligation calculations.

LITIGATION SITES - STATUS AND SUITABILITY

The Delran Township Planning Board has approved development applications for the Timber Ridge subdivision and Stellwag Farm redevelopment, presumably having found the sites to be suitable for market-rate age-restricted single-family detached and age-restricted townhouse development. FSHC is requesting that the Court invalidate the approvals and agreements for the litigation sites and require both these sites and future housing developments to address the Township's *Mount Laurel* obligation. The suitability of sites proposed for affordable housing must be evaluated according to specific criteria established in COAH's Second Round rules.

COAH's rules at *N.J.A.C.* 5:93-5.3 "New Construction; Site Criteria and General Requirements" requires that sites selected for new construction meet the criteria found in the "Definitions" section at *N.J.A.C.* 5:93-1.3 for suitability, developability, availability, approvability.

- *N.J.A.C.* 5:93-1.3 defines "Suitable Site" as "a site that is adjacent to compatible land uses, has access to appropriate streets and is consistent with the environmental policies delineated in *N.J.A.C.* 5:93-4 ["Municipal Adjustments"]".
- *N.J.A.C.* 5:93-1.3 defines "Developable Site" as "a site that has access to appropriate water and sewer infrastructure, and is consistent with the applicable areawide water quality management plan (including the wastewater management plan) or is included in an amendment to the areawide water quality management plan submitted to and under review by DEP."
- *N.J.A.C.* 5:93-1.3 defines "Available Site" as "a site with clear title, free of encumbrances which preclude development for low and moderate income housing."
- *N.J.A.C.* 5:93-1.3 defines "Approvable Site" as "a site that may be developed for low- and moderate-income housing in a manner consistent with the rules or regulations of all agencies with jurisdiction over the site. A site may be approvable although not currently zoned for low and moderate income housing."

With the possible exception of the availability of the ADC site, as described below, all four sites which have filed or intervened in this matter meet the COAH suitability criteria cited above.

Stellwag Farms

The property known as Stellwag Farms, located at Block 116, Lot 23, was designated an area in need of redevelopment by resolution on July 10, 2014. The property, at that time, contained an existing farm, nursery and associated structures, and a single-family house, on 29.01 acres in the Township's A-1 Agricultural District. In May of 2016, the Township adopted a Redevelopment Plan permitting the development of 82 age-restricted housing units at the site.

The Township entered into a redevelopment agreement with Delran Land Investment, LLC. ("DLI") on January 17, 2017, to develop an 82-unit age-restricted development consistent with the redevelopment plan. As noted by FSHC, the agreement did not include an affordable housing set aside. The agreement does specify that the redeveloper must provide a 1.5% affordable housing development fee on the fair market value of the development, as would have been required by the Township's development fee ordinance. The 2017 Plan Summary provides for an inclusionary set-aside of 15 age-restricted affordable units at this site in place of funding an off-site affordable development. From my knowledge of the settlement discussions, I believe the 15 units listed for the Stellwag site are intended to be non-age-restricted, rather than age-restricted as described in the Plan Summary.

The parties have agreed on most of the substantive elements of a settlement of the Stellwag litigation. I expect that the terms can be finalized within a couple of weeks.

Timber Ridge

Timber Ridge is a 76.174-acre tract of land comprised of two parcels owned by A.M.Y. Farms, Inc. ("A.M.Y. Farms") and Edward W. and Nancy M. Klumpp ("the Klumpps") at Block 116, Lots 8 and 10.01 (forming the "Timber Ridge site"). The Klumpp parcel (Lot 10.01) is vacant, and the A.M.Y. Farms parcel (Lot 8) is improved as a golf course. In 2005, the Township adopted an ordinance reducing the density in the A-1 zone to permit up to 0.5 units per acre, or one unit per 2 acres. A.M.Y. Farms and the Klumpps subsequently sued the Township. Also in 2005, Pulte Homes of NJ, LP ("Pulte") became the contract purchaser of both parcels forming the Timber Ridge site.

In 2009, the Township and the Timber Ridge site owners entered into a settlement agreement that required a contribution of 42.5 acres of the site to the Township for recreational fields. Additionally, the A-1 zoning district requirements were amended to permit "Age-Restricted Residential Cluster Development II", allowing for age-restricted cluster development at an average density of two (2) units per acre. The

settlement agreement permitted development of 108 age-restricted units on the Timber Ridge site.

Section 3.6 of the settlement agreement between the Timber Ridge owners and the Township explicitly states that "The Developer need not restrict any of the units in the [Timber Ridge] Project for affordable housing and need not make any contribution to the Township in lieu of providing such affordable units. The Township will satisfy at another site any affordable housing obligation which may arise as a result of the Project."

I have mediated discussions among the parties to the Timber Ridge site, but thus far without success.

INTERVENORS

There are two developer intervenors in this matter: Atlantic Delta Corporation at Montgomery, Inc. ("ADC") and Chester Avenue Developers, LLC. ("CAD").

Atlantic Delta Corporation at Montgomery, Inc.

On July 31, 2017, Atlantic Delta Corporation at Montgomery, Inc. ("ADC") filed a motion to intervene, which was granted by Order of Your Honor entered on August 4, 2017. ADC is the contract purchaser of a roughly 15-acre property at Block 65, Lot 18.01, which the Township had proposed in its Draft 2016 Third Round Plan as the location for the 78-unit Stellwag Farm funded off-site 100% affordable housing development. The site is not part of the Township's 2017 Plan Summary. ADC proposes an inclusionary multi-family residential development with 36 affordable housing units. ADC does not specify if these units would be rental or for-sale; however, if the proposed development is for-sale with a 20% set-aside the total unit count would presumably be 180 units with a 12 du/ac density (36 affordable units ÷ 20% set aside = 180 total units ÷ 15 ac = 12 du/ac). Alternatively, if it is rental with a 15% set-aside there would be a total of 240 units with a 16 du/ac density (36 affordable units ÷ 15% set aside = 240 total units ÷ 15 ac= 16 du/ac). The site is included in the Township's 2017 revised vacant land analysis and inventory, although it is listed in the inventory as Block 65, Lot 18 (instead of Lot 18.01) and identifies Home Depot USA as the current owner.

Of the four litigation and intervenor sites identified in this report (Stellwag Farm, Timber Ridge, ADC, and Chester Avenue / Holy Cross Academy, below), the ADC site is the only site that may not satisfy all four suitability criteria. I understand that a deed restriction on the property may prohibit residential development on the ADC site, which would render the site unavailable for affordable housing. ADC should address this issue.

Chester Avenue Developers, LLC.

Chester Avenue Developers, LLC., contract purchasers of the Holy Cross Academy site on Chester Avenue, filed a Motion to Intervene in this matter on January 4, 2017 and was granted intervenor status on February 6, 2017. In April of 2017, CAD proposed to construct a 387-unit development (with 58 affordable units) on a roughly 25-acre portion of the Holy Cross Academy site. On August 22, 2017, citing the lack of productive dialogue with the Township, CAD filed a Motion to Revoke the Temporary Immunity of the Township of Delran. Although the 25% set-aside set forth in the Plan Summary is likely to be an obstacle, given that the Township has included the CAD project in its 2017 Plan Summary, it is possible the parties may settle, in which case this Motion may be withdrawn.

VACANT LAND ADJUSTMENT

The Township's June 2016 Draft Housing Element and Fair Share Plan included the Township's initial vacant land analysis, which alleged that the Township's RDP was 44 units. My office reviewed that analysis for consistency and compliance with *N.J.A.C.* 5:93-4.2, and advised the Township to calculate additional RDP from farmland, underutilized sites, and other sites permitted by the Second Round rules. I also recommended that the Township calculate RDP from the Timber Ridge and Stellwag Farm sites, and also provide a separate RDP calculation accounting for sites that had been approved for non-inclusionary residential development since 1999. The latter recommendation was based on the premise that the Third Round obligation represents the affordable housing need that has been generated since 1999; therefore, the RDP should include land that was available to address the obligation at the beginning of the Third Round period, as well as what is available now. The Township did not subscribe to this approach but consented to perform the calculation at my request (see Alternative II) below.

On July 28, 2017, the Township submitted a revised vacant land adjustment following my recommendations. The updated analysis provided three alternative RDP Scenarios; The Township utilized the first scenario for its Plan Summary.

1. Alternative I – 285 Units: The Township calculated an RDP from 26 developable parcels, including the Stellwag Farm and Timber Ridge sites, in a manner generally consistent with the vacant land analysis methodology in *N.J.A.C.* 5:93-4.2. A 6 dwelling unit per acre (du/ac) density was applied to 19 parcels including the Timber Ridge and Stellwag Farm sites. The Township points out that the 6 du/ac density applied to the Stellwag Farm and Timber Ridge sites is approximately twice the actual net densities approved for those sites and is

consistent with the 6 du/ac density applied at the inclusionary Summer Hill development across Hartford Road from the litigation sites. The Township applied an 11 du/ac density to seven (7) parcels located near the Hunter's Glen Apartments, which, according to Mr. Clarkin, is consistent with the density of the existing apartment complex.

2. Alternative II – 471 Units: In this analysis, the Township adds to the 285-unit RDP calculated in Alternative I 186 units generated from three sites – Walton Farm (Block 117, Lot 5), Waters Edge, and Harper Boulevard – that had been approved for single-family detached residential development since 1999. Waters Edge and Harper Boulevard have been built, and Walton Farm is under construction. The Alternative II analysis utilizes a net density of 6 du/ac to generate 186 units in addition to the 285-unit RDP generated in Alternative I, for a gross RDP of 471 units (285 Alt. I + 186 Alt. II = 471).

3. Alternative III – 327 Units: This analysis generates a 42-unit RDP from the three developed sites examined in Alternative II based on a 20% set aside from the approved unit count, resulting in a total of 327 units (42 Alt. III + 285 Alt. I = 327). Because the densities of each of the developments is less than 6 du/ac, this approach would not be consistent the Second Round methodology or the purpose of the vacant land adjustment.

I am still reviewing the 2017 VLA Report, but I note that the Chester Avenue site, which is occupied by the Holy Cross Academy school, is not included in the RDP. *N.J.A.C.* 5:93-4.2(d) allows COAH (in this case, the Court) to "determine that other sites, that are devoted to a specific use which involves relatively low-density development, would create an opportunity for affordable housing if inclusionary zoning was in place." A substantial portion of the Diocesan property is undeveloped or underdeveloped, and would appear to fall into the category of lands this section of COAH's rules intends to include. The Plan Summary ascribes 400 units to development of the Chester Avenue site; if included in the Vacant Land Analysis, this would increase the Township's RDP by 80 units to 365 units (400 units x 20% = 80 units + 285-unit Alternative I RDP = 365-unit RDP).

I have reviewed the Township's 2016 Draft Plan and 2017 Plan Summary for preliminary compliance with the rules and guidelines set forth in COAH's Second Round rules, the Fair Housing Act, and the UHAC. The Township submitted its Draft Plan in June of 2016, and submitted its preliminary Plan Summary in August 2017, addressing the new minimum 285-unit RDP calculated in the Township's 2017 VLA Report. The Plan Summary offers limited detail, but introduces new mechanisms for which the Township will need to provide documentation in its full Plan. The Fair Housing Act at *N.J.S.A.* 52:27D-310 and COAH's rules prescribe the components of the municipal Housing Element of the Master Plan.

Rehabilitation Credits/Program: 52 units (2016 Plan) or 24 units (2017 Plan Summary).

In its 2016 Draft Plan, the Township indicated it would address a 52-unit Present Need/Rehabilitation obligation as prescribed by David Kinsey, PhD, PP, FAICP in his May 2016 report, *New Jersey Fair Share Housing Obligations for the 1999 to 2025 (Third Round) Under Mount Laurel IV,* by participating in Burlington County's Housing Rehabilitation Program. The Township will also establish a municipal rehabilitation program open to both homeowner and renter households, to be administered by an experienced administrative agent.

The 2017 Plan Summary addresses a 24-unit Rehabilitation obligation based on Econsult's calculations. The Summary does not indicate that its rehabilitation compliance plan has changed since 2016; so, I presume that the Township still intends to use the County and municipal rehabilitation programs proposed in its 2016 Draft Plan.

The 2016 Spending Plan, which will be further discussed below, dedicated $470,000.14 toward the rehabilitation of 52 units. This averages out to $9,038 per unit, whereas COAH rules call for the Township to set aside an average of at least $10,000 per unit for hard costs of rehabilitation and $2,000 per unit for administration of the rehabilitation. The funding amount to be set aside for the Township's rental rehabilitation program will depend on the Indigenous Present Need determined by the Court.

The Township is required by *N.J.A.C.* 5:93-5.2 to provide a rehabilitation program manual and documentation of any contracts executed with an administrative agent responsible for the municipal rehabilitation program.

Prior Round Obligation: 208 units

The Township intends to address its 208-unit Prior Round obligation with 232 affordable units, of which 39 are group home bedrooms, 43 are RCA credits to the City of Burlington, and the remaining 150 units are affordable owner-occupied units at the Summerhill and Garden Club/Glenbrook developments (75 units each). In addition to the 232 affordable units, the Township claims to be eligible for 34 rental bonuses generated from its group homes, yielding a total of 266 units and credits.

The Second Round rules prohibit group homes from generating rental bonuses if their affordability control period is less than 30 years (*N.J.A.C.* 5:93-5.8(d)). The Township is claiming rental bonuses from all of the group homes contained in its plan, but it has not demonstrated that these units have affordability controls for 30 or more years.

Third Round Need: TBD

The Township's June 2016 plan addressed its claimed 44-unit RDP with 58 surplus credits from the Prior Round and 78 units from a proposed 100% affordable family rental project at Block 65, Lot 18.01, to be funded by payments made from the Stellwag Redevelopment. The August 2017 Plan Summary plans for the 285-unit RDP calculated in the July 2017 VLA Report, with the 58 surplus units from the Prior Round, 15 family affordable units from the Stellwag Redevelopment Area (note that the Plan Summary text incorrectly identifies the units as age-restricted), 100 affordable units from the Chester Avenue Inclusionary Development, 30 units from the Abrasive Alloys 100% affordable site, 10 units from a market-to-affordable program, and 72 rental bonuses.

Not surprisingly, since the Township's RDP has increased from 44 to 285 (and possibly higher) the Township has introduced a number of new compliance mechanisms in its 2017 Plan Summary. These will need to be examined to determine whether they present the requisite realistic opportunity for affordable housing development. The 25% set-aside applied to the Chester Avenue site certainly warrants an explanation, as does the 100% affordable housing proposed for the Abrasive Alloys property. Nonetheless, at face value the 2017 Plan Summary represents progress.

In order to address unmet need, the Township's 2016 Plan included a Township-wide inclusionary set-aside requirement imposed on residential developments of five (5) or more units (which will include a payment in-lieu option), and an inclusionary housing

overlay zone ordinance targeting several vacant lots that were excluded from the 2016 RDP.

The Township-wide inclusionary set-aside requirement would give developers the option of making a payment in-lieu of $25,000 per unit instead of constructing affordable housing on site. Perhaps the Township intends to use these revenues for its market-to-affordable program; more information is needed.

The 2017 Plan Summary does not identify specific unmet need mechanisms, but does confirm that the Township still intends to use "inclusionary zoning mechanisms such as affordable housing overlay zones" and "an inclusionary zoning ordinance to require set-asides for low- and moderate-income housing on specific residential developments." The proposed overlay zoning ordinance permits inclusionary development on vacant sites scattered around the Township. The shape of many of the sites are not conducive to accommodate townhouse or multi-family development. Furthermore, some of the sites are located in industrial districts where townhouse or multi-family development would be difficult to buffer from adjacent land uses. Again, more information is needed.

Rental Bonuses

The RDP identified in the Township's 2017 revised vacant land analysis, 285 units, would allow the Township to claim 72 rental bonuses (0.25 x 285 = 71.25, round up to 72). In the highest RDP scenario, 471 units, the Township would be eligible for up to 118 rental bonuses (0.25 x 471 = 117.75, round up to 118).

TRUST FUND AND SPENDING PLAN

The Spending Plan submitted with the 2016 Draft Plan begins with a starting balance of $500,028.87 as of the end of 2014, and projects a total of $555,545.67 in development fees and interest to be collected between 2015 and 2025. The development fees are estimated to be collected at a rate of $50,000 per year; however, the Spending Plan does not include pending or collected development fees or payments in-lieu of development from Timber Ridge, Stellwag Farm, Walton Farm sites, or other sites approved since 2014.

The Township proposes to dedicate $470,000 to rehabilitate 52 units through its municipal rehabilitation program. This appears to be more than necessary since the Township plans to participate in Burlington County's rehabilitation program.

The balance of the Township's actual and projected affordable housing trust fund revenues will be dedicated to administrative costs and affordability assistance programs. The spending plan indicates that 20% of the approximately $400,000 in affordability assistance funds will be used to address foreclosure or abandonment of affordable units. I understand that there are a number of affordable units in the Township that are vacant and that owners of those units are having difficulty filling them. The Spending Plan does not specify where the remaining 80% of affordability assistance will be spent. Also, some of the new compliance techniques included in the 2017 Plan Summary, such as the 100% affordable development, may require financial subsidies from the Township.

CONCLUSION

This report has been prepared in accordance with Your Honor's Order dated July 5, 2017. It provides an outline of Delran Township's Draft 2016 Housing Element and Fair Share Plan, 2017 Plan Summary, and 2017 revised VLA Report, and summarizes concurrent litigation regarding four sites in the Township.

Based on this analysis, the Township is making progress in its approach to calculating the RDP, although that obligation may still climb higher, as described above. Similarly, the Township's Plan Summary indicates an ability to provide significantly more affordable units than previously offered; yet, Delran's compliance plan may have to generate even more units to match its higher RDP and to address unmet need.

I would be pleased to respond to any questions or comments which Your Honor or counsel may have.

Sincerely,

Philip B. Caton, PP, FAICP

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