

SUPERIOR COURT OF NEW JERSEY

SOMERSET COUNTY
VICINAGE 13

Chambers of
THOMAS C. MILLER
Presiding Judge - Civil



Somerset County Superior Court
P.O. Box 3000
Somerville, NJ 08876-1262
(908) 203-6092

March 23, 2018

Jonathan Drill, Esq.
STICKEL KOENIG SULLIVAN & DRILL, LLC
Sent Via Facsimile Only 973-239-0369

**RE: IN RE: TOWNSHIP OF CLINTON
DOCKET NO. HNT-L-315-15**

Dear Mr. Drill:

Enclosed herewith is the Court's decision concerning the Fairness Hearing held before this Court on March 19 and 20, 2018.

I would request that you provide a copy of the Court's opinion to all counsel of record and pursuant to the terms of the Court's opinion, submit an appropriate Order to the Court under the appropriate Five Day Rule.

Thank you.

Very truly yours,

THOMAS C. MILLER, P.J.Cv.

TCM/jml
Enclosure

I. PRELIMINARY

The Court considered the application of Clinton Township for a determination that the Settlement Agreement that the Township has entered into with the Fair Share Housing Council (FSHC) dated February 5, 2018¹ is an Agreement that displays the production of sufficient realistic housing opportunities to satisfy Clinton Township's Constitutional obligation to provide its fair share of low and moderate income housing. The matter was "tried" before the Court on March 19 and 20, 2018 as a "Contested Fairness Hearing."

II. PARTIES AND COUNSEL

The Township of Clinton was represented by Jonathan Drill, Esq. and Kathryn J. Razin, Esq. of Stickel, Koenig, Sullivan & Drill, LLC.

The Intervenor Objector, Clinton 94, LLC, objects to the approval of the Clinton Township's Fair Share Plan by and through its counsel, Jeffrey Kantowitz, Esq. of the Firm of Abe Rappaport.

The Fair Share Housing Council was represented by Kevin D. Walsh, Esq.

Guliet D. Hirsh, Esq. of the Archer Law Firm appeared on behalf of Headley Farm Estate. Ms. Hirsh participated in the Hearing by providing a statement in support of the Township's proposed plan.

Patrick J. Mullaney, Esq. appeared on behalf of Kerwin-Savage Partnership, a party whose property was considered in the Township's Fair Share Plan, even though they were not an intervening party in this matter.

III. STANDARD OF REVIEW

1. General Standards

In this Fairness Hearing, Clinton Township asserts that the Revised Settlement Agreement displays the production of sufficient realistic housing opportunities to satisfy its housing obligation. Mount Laurel cases, whether brought by builders or by municipalities, are in the nature of representative actions at which the rights and interests of low and moderate income households throughout the region are determined and the future opportunity of low and moderate income households to assert those rights are foreclosed. In order to assure that those laudable goals are achieved, the parties cannot settle such cases except with the approval of the courts and a

¹ And signed by the Mayor of the Township of February 7, 2018.

determination, upon notice to low and moderate income households and those who might act to vindicate the interests of such households, that the settlement is fair and reasonable to low and moderate income households in the region. Morris County Fair Housing Council v. Boonton Township, 197 N.J. Super. 359, 368 (Law Div. 1984), *aff'd mem. on opinion below*, 209 N.J. Super. 108 (App. Div. 1986); East/West Venture v. Borough of Fort Lee, 286 N.J. Super. 311, 326-27 (App. Div. 1996).

In this case, Clinton Township has noticed the hearing scheduled for March 19, 2018 as a “fairness” hearing. This hearing is the opportunity for any party to offer evidence that the Revised Settlement Agreement is not fair and reasonable to low and moderate income households, and is therefore noncompliant. To determine that the settlement is fair and reasonable to low and moderate income households, this Court must find as a matter of fact that the Revised Settlement Agreement displays sufficient realistic opportunities for the provision of safe, decent affordable housing to satisfy the Township’s constitutional housing obligations. The creation of realistic opportunities for safe, decent affordable housing is the core of the Mount Laurel mandate:

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. [Southern Burlington NAACP v. Mount Laurel Township, 92 N.J. 158, 221 (1983)(“Mount Laurel II”).]

A municipality must satisfy its entire housing obligation – satisfaction of only some portion of that obligation does not suffice:

The municipal obligation to provide a realistic opportunity for low and moderate income housing is not satisfied by a good faith attempt. The housing opportunity provided must, in fact, be the substantial equivalent of the fair share. [*Id.* at 216].

Finally, the opportunity created must be determined by the Court to be “realistic,” not merely theoretical or hypothetical. *Id.* at 260. Whether the opportunity provided by a municipality is “realistic” is generally measured by whether the municipality has established that the requisite number of low and moderate income housing units will actually be provided, or that they have been provided. *Id.* at 222.

To find that a settlement agreement is fair to low and moderate income households, a court must, among other things, find that, based upon these constitutional standards, it in fact creates sufficient realistic opportunities for the provision safe, decent housing affordable to low and

moderate income households to satisfy the negotiated housing obligation. Livingston Builders, Inc. v. Livingston, 309 N.J. Super. 370, 380 (App. Div. 1998).

In this respect, the role of a court in reviewing a proposed settlement agreement is analogous to that of the Council on Affordable Housing ("COAH") under the Fair Housing Act. In re Adoption of N.J.A.C. 5:96, 221 N.J. 1, 29 (2015) ("Mount Laurel IV"). Under the applicable statutory standard, COAH could lawfully grant a municipal petition to certify its Housing Element and Fair Share Plan only if it made an affirmative finding that "the combination of the elimination of unnecessary housing cost-generating features from the municipal land use ordinances and regulations, and the affirmative measures in the housing element and implementation plan make the achievement of the municipality's fair share of low and moderate income housing realistically possible." N.J.S.A. 52:27D-314(b). A failure by COAH to make such affirmative findings required the reviewing court to reverse the decision by COAH granting a municipal petition. In re Petition for Substantive Certification, Twp. of Southampton, 338 N.J. Super. 103 (App. Div. 2001); In re Denville, 247 N.J. Super. 186, 200 (App. Div. 1991); In re Township of Warren, 132 N.J. 1 (1993) (no finding that the site designated for construction of public housing is "suitable"); Elon Associates, L.L.C. v. Howell, 370 N.J. Super. 475, 480 (App. Div. 2004) (site zoned for inclusionary development lacks sewer service).

As set forth in the decision of the Appellate Division in Livingston Builders, Inc. v. Twp. of Livingston, *supra*, a court reviewing a settlement agreement for the purpose of determining whether it is fair to low and moderate income households is guided by COAH's criteria in determining whether the agreement creates sufficient realistic housing opportunities to satisfied the negotiated housing obligation:

By adoption of the Fair Housing Act, N.J.S.A. 52:27D-301 to -329, the Legislature, with the Supreme Court's approval, has designated the Council on Affordable Housing, acting pursuant to the Act, to establish the criteria for defining what a municipality must do to comply with its constitutional obligation to "provide through its land use regulations a realistic opportunity for a fair share of its region's present and prospective needs for housing for low and moderate income families." N.J.S.A. 52:27D-302a; see Hills Dev. Co. v. Township of Bernards, 103 N.J. 1, 25, 31-32, 510 A.2d 621 (1986). COAH has established those criteria, see N.J.A.C. 5.93-1.1 to -15.1, and the courts should ordinarily defer to them. Hills Dev. Co., supra, 103 N.J. at 63, 510 A.2d 621; East/West Venture, supra, 286 N.J. Super. at 334 n. 6, 669 A.2d 260. If the relevant evidence presented at a fairness hearing held on proper notice to all interested parties shows that a proposed settlement

satisfies those criteria, the settlement is entitled to the court's preliminary approval.
[Id.]

2. The Supreme Court authorized Mount Laurel Judges to exercise considerable flexibility in determining whether a proposed settlement meets a Municipality's Mount Laurel obligations

"Flexibility" remains the polestar of the authority that the Supreme Court provided to trial judges in adjudicating Mt. Laurel declaratory judgment actions stemming from Mt. Laurel IV. In re Adoption of N.J.A.C. 5:96 & 5:97 ex rel. New Jersey Council on Affordable Hous., 221 N.J. 1, 33 (2015) ("Mt. Laurel IV"). The trial court's role is to flexibly exercise discretion to ensure, to its satisfaction, that each municipality has provided a realistic opportunity for the construction of its fair share of low and moderate income housing and has met its obligation to satisfy its constitutional Mount Laurel affordable housing requirements. ("We emphasize that the courts should employ flexibility in assessing a town's compliance. . . .") In re Adoption of N.J.A.C. 5:96 & 5:97 ex rel. New Jersey Council on Affordable Hous., 221 N.J. 1, 33 (2015) ("Mt. Laurel IV").

The courts that will hear such declaratory judgment applications or constitutional compliance challenges will judge them on the merits of the records developed in individual actions before the courts.

[...]

[M]any aspects to the two earlier versions of Third Round Rules were found valid by the appellate courts. In upholding those rules the appellate courts highlighted COAH's discretion in the rule-making process. Judges may confidently utilize similar discretion when assessing a town's plan, if persuaded that the techniques proposed by a town will promote for that municipality and region the constitutional goal of creating the realistic opportunity for producing its fair share of the present and prospective need for low- and moderate-income housing.

[...]

We emphasize that the courts should employ flexibility in assessing a town's compliance and should exercise caution to avoid sanctioning any expressly disapproved practices from COAH's invalidated Third Round Rules. Beyond those general admonitions, the courts should endeavor to secure, whenever possible, prompt voluntary compliance from municipalities in view of the lengthy delay in achieving satisfaction of towns' Third Round obligations.

[Mt. Laurel IV, 221 N.J. at 29-30 (emphasis added)]

As a result of Mt. Laurel IV, the Court has considerable flexibility in assessing a municipality's Mt. Laurel compliance and also in determining whether to grant waivers regarding proofs or credits that would have been considered and granted by COAH. The Court should be especially flexible when FSHC endorses certain compliance techniques, and in light of the Supreme Court's repeated exhortations to resolve these cases by way of settlement.

3. **Considerable deference should be given to a settlement endorsed by a public interest group such as the Fair Share Housing Center and objections by Developers seeking a benefit only themselves should be viewed skeptically**

The Courts should also give considerable deference to the Settlement Agreement in this matter because it is between the Township and FSHC and is designed to afford a realistic opportunity for the provision of affordable housing. At the same time, the Court notes that an objection posed by a developer like Clinton 94, although ostensibly as representatives of low and moderate income households, is for the purposes of attempting to persuade and/or leverage the municipality to rezone for their proposed development.

Morris Co. Fair Housing Council v. Boonton Tp., 197 N.J. Super. 359 (Law Div. 1984) involved circumstances similar to the present matter. Significantly, as stated by Judge Skillman, in the case of developers engaged in Mt. Laurel claims, standing was to be granted "not to pursue their own interests, but rather as representatives of lower income persons" affected by exclusionary zoning. Id. at 366. Here, as memorialized in the Settlement adopted by Fair Share Housing Center on behalf of low and moderate income individuals seeking housing in Bridgewater, those interests have received "actual and efficient protection" as required in this proceeding. Id. at 365 (citation omitted). That fact should weigh heavily in the Court's decision.

Specifically, Judge Skillman stated: "[t]he risks of improvidently approving a settlement and issuing a judgment of compliance are most acute in Mount Laurel litigation brought by developers." Id. at 367 (emphasis added). Judge Skillman added that, rather than descend into a "morass of facts, statistics, projections, theories and opinions," Id. at 371-72, the settlement of a Mt. Laurel controversy should turn solely on a determination that the settlement protects the interests of the persons on whose behalf the action was brought. Id. at 369-371. Where, as in this case, a public interest group such as the Fair Share Housing Center has competently represented the interests of low income persons, the dangers of improvident settlement are substantially reduced. Id. at 368. Even then, the Court is mindful that even a public organization may incorrectly

evaluate the strengths and weaknesses of its claim or be overly anxious to settle a case for internal organizational reasons. Morris County Fair Housing Council v. Boonton Township, 197 N.J. Super. 359, 367-368 (Law Div. 1984), *aff'd mem. on opinion below*, 209 N.J. Super. 108 (App. Div. 1986). In fact, in this case, FSHC has itself advocated that the terms and conditions of this agreement does not even require any deference or preference by the Court. In any event, for these reasons, the Court will scrutinize the elements of the settlement.

4. Regarding Particular Applicable Regulations

For any proposed inclusionary project, as part of the standards for the review of plans to zone for inclusionary development (N.J.A.C. 5:93-5.6), the COAH regulations require a determination as to whether a site is approvable, available, developable and suitable pursuant to N.J.A.C. 5:93-1.3, Definitions. The site criteria and general requirements for new low and moderate income projects also are detailed in N.J.A.C. 5:93-5.3. These terms are defined as follows:

" 'Approvable site' means 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."

" 'Available site' means a site with clear title, free of encumbrances which preclude development for low and moderate income housing."

" 'Developable site' means 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 the Department of Environmental Protection (DEP)."

" 'Suitable site' means 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."

In order to evaluate the Township's designation of properties as inclusionary sites, an analysis according to the above criteria, and the additional standards outlined in N.J.A.C. 5:93-5.3, 5.4 and 5.6, should be provided by the Township in the Township's Housing Element and Fair Share Plan (HPE/FSP). This analysis is a condition to be addressed prior to the final compliance hearing.

N.J.A.C. 5:93-5.5 also requires that the Township provide a construction or implementation schedule, or timetable, or each step in the development process, including the preparation of a site plan, granting of municipal approvals, application for State and Federal permits, selection of a contractor and construction. The schedule shall provide that construction shall commence within two years of Court approval of the settlement. The municipality shall indicate the entity responsible for undertaking and monitoring the construction and overall development activity.

In this case, the parties presented evidence concerning the COAH criteria as set forth in N.J.A.C. 5:93-1, et seq. but it also noted that the Settlement Agreement indicates that the Township will address these obligations during the compliance phase.

IV. SUBSTANCE OF THE SETTLEMENT AGREEMENT THAT IS IN ISSUE IN THIS CASE

The substance of the Settlement Agreement addresses the Township's Present Need (Rehabilitation) obligation; Prior Round obligation (1987-1999); estimated Third Round Prospective Need Obligation (1999-2025), which includes Present Need for the period 1999-2015 and Prospective Need for 2015-2015 in accordance with the N.J. Supreme Court decision of January 18, 2017 on the "gap" period; and, proposals to address the obligations.

1. Present Need (Rehabilitation Share)

The Settlement Agreement indicates that the Township's rehabilitation obligation is 10 units, based on a structural conditions survey of the community's housing stock in accordance with N.J.A.C. 5:93-5.2. The structural conditions survey should be provided during the compliance phase. The Agreement further provides that the Township shall demonstrate at the compliance hearing how its rehabilitation obligation will be satisfied.

2. Prior Round Obligation (1987-1999)

The Settlement Agreement indicates that Clinton's Prior Round Obligation is 335 affordable units pursuant to N.J.A.C. 5:93, and provides that the Township meets the Prior Round Obligation through the following mechanisms:

- 5 units for an existing group home, the documentation (facility license and deed restriction) for which will be provided during the compliance phase
- 13 units for credits without controls, approved by the Council on Affordable Housing (COAH) as part of the Township's Second Round certification
- 108 units for a Regional Contribution Agreement with the City of New Brunswick

- 4 existing rental units at Village Green
- 35 existing rental units at The Mews, with 3 rental bonus credits
- 4 units and 4 rental bonus credits for an approved group home (CRC Longview)
- 1 family rental unit at the Fox/Seals redevelopment site
- 66 family rental units with 66 rental bonus credits for the Beaver Brook Homestead, an approved project with New Jersey Housing and Mortgage Finance Agency (NJHMFA) 9% funding
- 26 family rental units from the 84 unit project at the Marookian site, a municipally sponsored 100% affordable project

The above mechanisms provide for a total of 262 affordable units and 73 rental bonus credits.

3. Third Round Prospective Need Obligation (1999-2025) and Durational Adjustment

The Settlement Agreement indicate that the Township's Third Round Prospective Need Obligation, inclusive of the Gap Period Present Need, is 337 affordable units, as calculated by David N. Kinsey, PhD, PP, FAICP, in a report titled "New Jersey Low and Moderate Income Housing Obligations for 1999-2015 Calculated Using the NJ COAH Prior Round (1987-1999) Methodology", dated May 2016 (Kinsey Report), and "per Kinsey Report, as adjusted through this Agreement to account for the municipality's decision to conform to the Highlands Regional Master Plan". The Agreement indicates that the Township will satisfy this obligation in the following manner:

- 58 family rental units with 58 rental bonus credits from the Marookian site (139 acres)
- 89 family units from the LeCompte site, a 100% affordable project subject to a durational adjustment for water and sewer capacity (8.9 units per acre across street from Marookian)
- 104 family rental units from the Headley Farm Estate, an inclusionary project with a 26% set-aside subject to a durational adjustment for water and sewer capacity (155 acre)
- 28 family rental units from the Alton Place project, an inclusionary project with a 20% set-aside subject to a durational adjustment for water and sewer capacity

Headley Farm Estate and Alton Place are inclusionary projects.

The Beaver Brook Homestead, Marookian and LeCompte developments are municipally sponsored projects. Both the Beaver Brook Homestead and Marookian projects have been previously approved by the Court² as part of the Township's compliance plan. In accordance with

² The matter was opened to the Court by Motion of the Township with notice to all interested parties. The Court has previously issued orders approving those components of the Township's Fair Share Plan.

N.J.A.C. 5:93-5.5, the Township recognizes that it must provide evidence that the municipality has adequate and stable funding for any non-inclusionary affordable housing developments. The municipality is required to provide a pro forma of total development costs and sources of funds and documentation of the funding available to the municipality and/or project sponsor, and any applications still pending. In the case where an application for outside funding is still pending, the municipality has agreed to provide a stable alternative source, such as municipal bonding, in the event that the funding request is not approved. The funding requirement is typically satisfied through the adoption of a resolution of intent to bond by the municipality.

The Agreement also acknowledges that the Marookian and LeCompte developments may not receive funding for the total number of units proposed in the Agreement and may not receive funding enabling construction to begin within two years of Court approval of the Agreement. The agreement anticipates that the Marookian and LeCompte sites will apply for Low Income Housing Tax Credits. In the event the funding applications are submitted for a number of units less than the number of units provided in the Agreement, the Township has agreed that it will make up the difference by funding the difference, increasing the density on an inclusionary site identified in the Agreement, rezoning a site that is most likely to receive water and sewer utilities at a density of 10 units per acre or more, or using some combination of the three approaches. In addition, if the Marookian site is not under construction within two years of the Court approval of the Agreement, the Township has indicated in the agreement that it will make up the difference using some combination of the three approaches noted previously.

Relative to the LeCompte site, the Township agreed to take all reasonable efforts to obtain water and sewer access as soon as possible.³ In the event the LeCompte development is not under construction within 48 months of the Court's approval of the Agreement, the Township has agreed to be obligated to take all necessary steps to provide and demonstrate the provision of a realistic opportunity for the units identified at the LeCompte site, including funding the development using municipal funds, increasing the density of an inclusionary site identified in the Agreement, rezoning a site for inclusionary development that is most likely to receive water and sewer utilities at a density of 10 or more units per acre, or using a combination of the three approaches. If the LeCompte site either does not have access to water or sewer utilities or is not under construction

³ Since the agreement was signed "sewer capacity" has been obtained by the Township by virtue of a separately signed agreement.

within 4 years of the Court's approval of the Agreement, and the Township has not provided a sufficient number of affordable units through other means, the Township has also agreed to comply with N.J.A.C. 5:93-4.3(c)3 and 4 concerning inclusion in a Fair Share Plan a site where the DEP has approved a proposal to provide water and/or sewer.

The parties have agreed that the Marookian and LeCompte developments present opportunities for shared amenities, including for persons with disabilities. The Township also agreed to fund or obtain funding for a large public playground that will accommodate disabled children, sited on either the Marookian property or the adjacent Kaufelt property. The playground will exceed requirements imposed by the Americans with Disabilities Act and include unitary surfacing, with a path from the Marookian and LeCompte sites to allow pedestrian access. The Township also agreed to require developers of the Marookian and LeCompte sites to provide a minimum of 20% of all units as barrier free wheelchair accessible units. The Township further agreed to propose and apply to the NJDOT for a signaled crosswalk across Route 31 to provide a pedestrian connection between the two developments and to fund and construct the crosswalk within one year of the crosswalk's approval by the NJDOT.

The Agreement supports a durational adjustment authorized by N.J.A.C. 5:93-4.3 due to insufficient water and sewer capacity. The Agreement indicates that the Township has secured 38,925 gallons of sewage capacity from the Town of Clinton Sewerage Authority (CTSA), sufficient to accommodate the Beaver Brook Homestead, Fox/Seals and Marookian developments, and these sites are the Township's first priority. The Agreement notes that private entities/individuals have rights to the remaining available capacity, but that there presently is not enough sewer capacity to accommodate the LeCompte, Headley Farms and 108 Alton Place developments. The Township has agreed to make all reasonable efforts to obtain sewer capacity for the LeCompte project, and prioritizes the Headley site over the Alton Place site as it will generate the most affordable housing units. With regard to water capacity, the Township will request a water reservation for the Marookian site prior to the fairness hearing. The Agreement further notes that there is presently not enough water to supply the development of the Headley Farm, Alton Place and LeCompte sites, although water infrastructure is adjacent to the sites, and that any remaining capacity will be allocated to the LeCompte project first and then the Headley project.

The Township has also agreed to comply with the Prior Round durational adjustment rule at N.J.A.C. 5:93-4.3 relative to the 221 affordable units for which the durational adjustment is

sought. The Township has agreed that it shall reserve and set aside new water and/or sewer capacity, when it becomes available, for low and moderate income housing on a priority basis. The Township has agreed that it will rezone the Headley Farms Estate, Alton Place and LeCompte as needed to satisfy the terms of the Agreement.

V. OBJECTIONS TO THE INITIAL SETTLEMENT AGREEMENT

Objections to the initial Settlement Agreement⁴ have been received from the following persons/entities:

- Jolene Weiss
- Elizabeth Lugo
- Nicholas A. Corcodilis
- Patrick J. Mullaney, Esq., on behalf of the Kerwin Savage Partnership
- Laurie Gneiding and Michael Brady
- Christopher Stadulis
- Jeffrey Kantowitz, Esq., on behalf of Clinton 94 LLC

Jolene Weiss expressed concerns about the traffic from the Headley Farm Estate project, as it might affect East Main Street, Petticoat Lane and Route 22, and a devaluation of property. She requested an opportunity to voice her concerns at the fairness hearing. Elizabeth Lugo questioned whether the Open Public Meeting Act was complied with; traffic impacts; pedestrian traffic from the Headley Farm property; the prior approval and extensions for CRC (Headley Farm); and, Township population decreases and alternative solutions to provide affordable housing. Nicholas A. Corcodilis submitted a Letter Brief and Certification which raises issues concerning the Open Public Meetings Act and his Open Public Records Act request; and, conflicts of interest for Jonathan E. Drill, Esq., of Stickel, Koenig, Sullivan & Drill; Trishka Waterbury Cecil of Mason, Griffin & Pierson; and, Michael A. Bolan, PP, AICP.

Patrick J. Mullaney, Esq., representing the Kerwin Savage Partnership, submitted a summary of testimony that raises issues concerning Township fees; sewage capacity in the Town of Clinton treatment plant; and, the design, density and set-aside for the affordable housing project proposed for its site. Laurie Gneiding and Michael Bradley submitted a Letter Brief and

⁴ This Agreement was subsequently amended in the Agreement that is now the subject of this Hearing. As a result, the terms and conditions of the prior Agreement are not relevant to the Court's determination of this matter.

Certification that questions the developability of the Headley Farms project based on environmental issues. Christopher Stadulis raised issues concerning the need for affordable housing in Clinton Township, rent control, and water and sewer access. Jeffrey Kantowitz, Esq., representing Clinton 94, an intervener, submitted an objection and Letter Brief, a summary of testimony for David Meiskin, a member of Clinton 94; deeds; and, a letter to the Clinton Township Sewer Authority. Mr. Kantowitz raised issues concerning the realistic likelihood that the affordable housing sites identified in the Settlement Agreement can be developed.

All of these matters have been received and considered by the Court.

VI. OBJECTIONS TO THE AMENDED SETTLEMENT AGREEMENT

Objections to the amended Settlement Agreement⁵ have been received from the following persons/entities:

- Diane Eriksson
- Jeffrey Kantowitz, Esq., on behalf of Clinton 94 LLC

Diane Eriksson questioned the need for additional housing in the Township and the location of the Marookian and LeCompte projects; points out advantages of the Windy Acres site; outlines problems with Valley Crest Farm; and, notes the Township's success in preserving open space and farmland and protecting water supply. Jeffrey Kantowitz, Esq., representing Clinton 94, an intervener, submitted an objection concerning the LeCompte site; and, a supplemental report and summary of testimony for David Meiskin, a member of Clinton 94, including maps from the Highlands Council comparing the LeCompte and Clinton 94 sites.

VII. SUMMARY OF WRITTEN OBJECTIONS FROM DIANE ERIKSSON DATED MARCH 1, 2018

Ms. Eriksson was not an intervenor in the matter and to the Court's knowledge did not appear or particulate in the Fairness Hearing.

Ms. Eriksson raises various objections or concerns, which include:

- 1) There is no need for "so many" units or apartments in Clinton Township
- 2) That the properties that are identified in the plan would cause traffic congestion or issues.

⁵ Which is the Agreement that is at issue in this Fairness Hearing.

- 3) That the residents will be in a "remote and barren" area as those sites are not located in the vicinity of amenities that are necessary to accommodate this type of housing.
- 4) There is no "mass transit" located in the vicinity.
- 5) Clinton Township "lacks the facilities" to accommodate additional school children.
- 6) The LeCompte site has various issues, including several violations of local ordinances and state laws.
- 7) The Court should allow the Rolling Hills Nursing Home beds to be considered to "reduce the Township's numbers."
- 8) The Township's ability to service the proposed projects for drinking water and sewer is questionable.
- 9) The Township's commitment to preserving open space through farmland preservation, outright purchase of open space and other preservation methods should be considered. Also, the objector indicates that the creation of affordable housing in this manner undermines that effort.

VIII. SUMMARY OF WRITTE OBJECTIONS OF CLINTON 94

Clinton 94, through its counsel, Jeffrey Kantowitz, Esq., was the only party that actually appeared at the Fairness Hearing in order to object to the settlement. Prior to the Hearing, Clinton 94 submitted written objections which were received and reviewed by the Court.⁶ During the hearing, Clinton 94's counsel cross-examined witnesses and presented its own witness, its principal, David S. Meiskin.

Clinton 94 contends that the LeCompte Site, which the Amended Settlement Agreement has substituted in place of the Windy Acres Site, has significant environmental constraints, despite the statement in the Settlement Agreement to the contrary. Clinton 94 offered to provide factual and expert testimony from David S. Meiskin who proffered that he would opine that it is subject to severe environmental limitations.

In contrast, in its written submission Clinton 94 pointed to its own site which it has proposed for inclusion into the Affordable Housing Plan and notes that it has no such constraints.

Clinton 94's position is based upon several propositions. First, it notes that the burden of proof is on the Township to demonstrate a likelihood that each of the mechanisms that it has

⁶ The Court acknowledges that many of the arguments and contentions that were provided in the written submission of Clinton 94 were not raised in their testimonial presentation. Although the Court has provided this summary for completeness of the record, the Court will consider only that "evidence" that was offered by Clinton 94 at the trial.

selected in its Plan will produce Affordable Housing and that its Plan "as a whole, will likely come to fruition." In that regard, Clinton 94 submits that regardless of the examination that PSHC has performed in evaluating the mechanisms enumerated and described in the Settlement Agreement, this Court must satisfy, itself, based on proofs and evidence presented by the settling parties, especially the Township of Clinton, that: (1) each of the mechanisms presented provides a realistic opportunity for the development of the affordable housing units ascribed to it in the Settlement Agreement; and (2) the entire compliance plan, taken altogether, satisfies the Township of Clinton's fair share housing obligation. See Allan Deane v. Bedminster, 205 N.J. Super. 87, 113 (Law Div. 1985).

As Judge Serpentelli explained in Allan Deane, supra:

Our [Supreme] Court has clearly expressed the obligation. A municipality must provide a realistic opportunity for the construction of its fair share. **"Realistic" is defined by the Court in terms of "likelihood"**. ([92 N.J.] at 221-222)... What proofs will support the conclusion that the municipal action has achieved the required likelihood? To answer this ultimate question the court will perform the following inquiry:

1. Verify that the ordinances are free from all excessive restrictions and exactions or other cost generating devices that are not necessary to protect health and safety.

Our Court has established this as a minimum step towards compliance. ([92 N.J.] at 258-259)

2. Examine the sites selected or other mechanisms used by the town to achieve compliance.

In this examination, the court will assess whether those sites or mechanisms provide a realistic opportunity (i.e. likelihood) for the actual construction of lower income units within the compliance period. This assessment may include evaluation of site suitability, use of affirmative measures to encourage lower cost housing, alternative compliance mechanisms, project feasibility, and any intangible factors which may have a very real influence upon the development of lower income housing. [205 N.J. Super. at 113; emphasis added].

Discussing in further detail the examination of sites selected and mechanisms chosen, Judge Serpentelli observed:

...the evaluation process involves an examination of the sites selected or other mechanisms used by the township to achieve compliance. The assessment may include, among other things, site suitability, affirmative measures, alternative compliance mechanisms, project feasibility and other less tangible factors.

A review of site suitability relates to the physical appropriateness of the parcel. Such factors as environmental suitability, availability of infrastructure, proximity to goods and services, regional accessibility and compatibility with neighboring land uses may impact upon whether the court finds a parcel suitable for *Mount Laurel* development.

A review of affirmative measures relates to the matters discussed in *Mount Laurel II* at 260-274, including subsidies, inclusionary zoning devices, incentive zoning, mandatory set-asides and the resale controls necessary to ensure that the lower income unit will remain affordable over the long term.

A review of alternative compliance mechanisms relates to any approaches that a municipality may propose as means of avoiding the construction of four market units for each lower income unit which results from use of a 20% mandatory set-aside. Examples might include commercial incentive zoning which produces lower income housing or projects fully funded by the municipality. The court will be called upon to gauge whether the alternative mechanisms will be likely to lead to *Mount Laurel* housing.

A review of project feasibility relates to whether the rezoning and other affirmative measures will provide a builder with a sufficient profit to make the project a likelihood. ([92 N.J.] at 279, n. 37) If the project is not economically feasible, a builder will not undertake construction and *Mount Laurel* housing will not materialize. In reviewing project feasibility, the court will address any density bonus granted to the builder in light of the required set-aside to determine if it provides sufficient funds to internally subsidize the lower income units. If the bonus is too low or the set-aside too high, lower income housing will not result. In that regard the court should also address fee waivers, tax abatements and other municipal actions designed to provide the developer with the assurance of a reasonable profit. [205 N.J. Super. at 115-16; emphasis added]

Moreover, Judge Serpentelli was keenly aware that the availability of infrastructure was a crucial factor in evaluating the merits of a site. "Of course, if the proofs demonstrate that one site has very little likelihood of having the appropriate infrastructure provided to it and that another site is comparatively assured of having such facilities, those proofs cannot be overlooked." 205 N.J. Super. at 130; emphasis added].

Finally, Judge Serpentelli explained that the Court must evaluate both intangible factors and the compliance plan as a whole, in order to determine whether it presents a likelihood actually constructing the affordable housing described.

While a municipality should be given as broad a rein as possible in designing its response, the court will not assume that merely because each site selected is itself realistic the combination of those sites into a compliance package automatically

produces an acceptable ordinance. Thus, for example, the court will have to address itself to possible social segregation within each project and within the town as a whole. (*cf.* 268, *n.* 32) Not only must each site be realistic, the total package must represent reasonable planning. [205 N.J. Super. at 116-17; emphasis added].

In its pretrial written submission, Clinton 94 provided the Certification of David S. Meiskin concerning his views concerning the various sites selected by the Township.⁷ He noted with regards to each that:

CRC Longview – Group Homes: The site received preliminary approval about nine (9) years ago. Clinton bears the burden of proof to show that this remains a realistic site, likely to be developed and produce even one unit with the four allocated bedrooms.

Beaver Brook Homestead: notwithstanding Clinton's "sanguine" description of activities, he opines that the subject property is encumbered by various easements including a 50 foot wide stream easement and easements pertaining to historic preservation of an existing structure.

Given the Settlement's statement that a development application is pending in January before the township Planning Board, he suggested that the Court should request further information regarding that proceeding before reaching any conclusion about whether this is a realistic site.⁸

Further, in the face of a will serve letter sought by Clinton 94 LLC for land it seeks to develop for an inclusionary project, Mr. Meiskin offers that the Township must demonstrate that there is sewer capacity for this project.

As for any prior determination made by this court respecting any property that was approved by the Court and whether it presents a realistic opportunity, Clinton 94 submits that the Court should retain the right and prerogative to re-visit its determination. See Lombardi v. Masso, 207 N.J. 517, 25 A.3d 1080 (2011)(trial court has discretion to revisit and vacate prior interlocutory summary judgment order).

⁷ Again, the Court has summarized the written submission of Clinton 94 for the purpose of completeness of the record. Much of the information provided in its submission was not offered or confirmed in the testimony which was offered at the trial in this matter. The Court is only permitted to consider matters that were offered at trial through sworn testimony that was subject to cross-examination or in the exhibits that were marked into evidence during the trial.

⁸ The project was approved by the Planning Board during the trial at the Board's meeting of March 19, 2018.

Marookian: Clinton 94 LLC incorporates by reference its arguments expressed in its opposition to the Township's motion for an order approving Marookian as an affordable housing project.

The Township's reply brief (filed on January 29, 2018) in connection with its motion seeking approval of the Marookian project, argues that somehow Clinton 94 LLC's arguments in opposition to the motion exceed the limits of its intervention. Clinton 94 asserts that the Township's position is "misguided."

Further, in any event, Mr. Meiskin offered that the Township bears the burden of proving that the 6 acres it maintained for development outside of the restriction against development because of open space funding are, in fact, the very same six acres that are proposed to be developed, i.e., the acreage at the southeast corner of the property near access to Route 31.

In addition, the objector complains that the absence of even an RFP and a developer committed to the project leaves unanswered whether such a development is even financial feasible given its absolute reliance on the competitive 9% tax credits from the State.

Headley Farm Estate: The Township proposes a 400 unit inclusionary development with an 104 unit affordable housing component. All traffic is proposed to be routed onto the narrow and winding East Main Street, Mr. Meiskin observed that the right of way appears insufficient for widening and that there appears to be no secondary access.

Further, there is no evidence via a letter of intention from the land owner, CRC Communities, that it agrees and intends to move forward with such a use and a dense development, and to commit to the early, significant investment necessary to advance such a project. Sewer and water would have to be brought from about a mile and a half away, including having to pass under Interstate Route 78 to reach the site. Thus, there is no demonstration or evidence that this project is feasible.

Clinton 94 submits that as with Windy Acres⁹, so, too, with this project, the FAQ states that "the CRC project cannot go forward unless and until adequate water AND sewerage capacities have been acquired by CRC."

In the objector's view, this site, too, fails the "realistic likelihood" test.

⁹ Which was a project included in the first iteration of the settlement agreement but not in the agreement that was the subject of this Fairness Hearing.

Alton Place: Similar to the Headley Farm Estate project, and as reflected in the FAQ, the Township proposes an inclusionary development of about 138 units with a 20% set aside for 28 affordable housing units. He notes that here, too, the Township seeks a durational adjustment.

Yet, the FAQ notes that one entity holds an option to purchase from the current owner, and it notes: "It is entirely speculative as to what entity would develop the property if and when it proceeds as adequate water AND sewerage capacities have not yet been acquired by Kerwin and Savage [the option holders]."

Thus, Clinton 94's submissions theorize that given the costs and uncertainties associated with the development and the admitted absence of water and sewer, there is no evidence via a letter of intention from the owner or option holder that either intends to develop the property in the manner, use, and density proposed by the township given the significant development challenges.

For those reasons, the objector therefore submits that this site, too, fails the "realistic likelihood" test.

As for its own cite, Clinton 94 indicates that it has expressed its interests during mediation sessions with the Township. It indicates that it remains committed to assisting the Township to address the Township's affordable housing obligations through an inclusionary project. To that end, and as Mr. Meiskin will testify, it has sent a request for service letter to the Clinton Township Sewer Authority advising that

"Clinton 94 LLC has entered into an agreement for the transfer of sewer capacity with CCD [Country Club Drive Associates] for the acquisition of 39,075 gallons per day sewer capacity and to convey to deer Meadows a right of first refusal for 9,637 gallons per day sewer capacity."

Clinton 94 LLC has requested that the matter be placed on the Sewer Authority's agenda at its next meeting so it may obtain the Authority's consent for transfer of the allocation and the right of first refusal.

IX. SUMMARY OF THE TESTIMONY AND EVIDENCE OFFERED TO THE COURT

1) Testimony of Joseph Burgis, AICP, PP

The Township presented the testimony of its expert Professional Planner, Joseph Burgis, AICP, PP. Mr. Burgis was duly qualified as an expert witness in the area of professional planning and more particularly in the area of planning issues involving "Mt. Laurel issues."

Mr. Burgis provided a thorough and detailed summary of the Township's Fair Share Plan, which was referred to and encompassed within the Settlement Agreement entered into between the Township and the FSHC.

Through Mr. Burgis, the following exhibits were referred to, authenticated, and eventually accepted into evidence by the Court:

- P-1 Initial Settlement Agreement dated December 12, 2017
- P-2 Proof of Service dated January 24, 2018 for the Fairness Hearing that was scheduled for the initial Settlement Agreement¹⁰
- P-3 Amended Settlement Agreement dated February 5, 2018
- P-4 COAH Substantive Certification for the Township of Clinton dated January 3, 2001
- P-5 Proof of Service for this Fairness Hearing dated March 12, 2018.

Mr. Burgis reviewed each of the component projects which constitute the Township's proposal to be included in its Fairness Plan in order to meet its constitutional obligation. (See Projects listed in Point IV of this opinion) He indicated that he evaluated each of the projects based upon the criteria included within N.J.A.C. 5:93-5.3.

He indicated that he expected each of the projects would be evaluated before the anticipated "compliance hearing" to be scheduled by this Court (assuming that the Court found the agreement to be fair) for (1) availability and source of funds for the project; (2) availability of amenities necessary to service the development; (3) the proposed sponsor for the development; (4) the time table for the project; and (5) that there is a responsible agency put in place to monitor the project.

Mr. Burgis indicated and found that the plan was fair and reasonable to the protected class of low and moderate income households as those terms have been used under existing case law and rules and regulations.

Through cross-examination, counsel for Clinton 94 pointed out that 221 of the 337 units (65%) that are to be produced to satisfy the durational adjustment so that they will not be produced in the near term. Mr. Burgis acknowledged the point, but indicated that the agreement provided for assurances for the projects to eventually proceed, and if they didn't proceed, the Township had the ability to reverse course and proceed in a different direction in order to accomplish its goals.

Opposition counsel also probed the issue of whether "Tax Credit Approval" and the financing that thus becomes available for the proposed projects (LeCompte and Markoosian) will

¹⁰ That Hearing was subsequently adjourned.

pose a significant impediment to the feasibility of either or both projects. Mr. Burgis testified that he believed that the "settlement agreement adequately accommodates" for the potential vagaries of that situation. The durational adjustment component of the settlement allows for the projects to seek funding over the next two rounds of tax credit funding, but allows the FSHC and, if necessary, the Court to monitor the component parts of the Fair Share Plan to make sure that the Plan remains viable and achievable.

With regards to sewer and water availability, when pressed on cross-examination, Mr. Burgis indicated that the Township has pledged its support to support the acquisition of sewer and water availability. Mr. Burgis offered his opinion that the plan adequately addresses the issue and that he believes that all of the projects can realistically obtain the necessary water and sewer availability to make them viable and realistic.

Mr. Burgis' presentation was cogent and credible. The Court accepted his opinions (which are in substantial accord with the Court's Special Master) that the Settlement Agreement was fair and reasonable to the Protected Class of Low and Moderate Income Households.

2) Testimony of David Meiskin

David Meiskin, the Principal of Clinton 94, offered testimony as a fact and expert witness. After extensive voir dire, Mr. Meiskin, an experienced developer¹¹, was accepted by the Court as an expert in the field of "Development and Analyzing Projects for their Developability."¹²

Voir dire questions exposed Mr. Meiskin's inadequacies to testify as an expert in the fields of planning, engineering, and environmental engineering. Although the Court recognizes some overlap between the areas of Mr. Meiskin's recognized expertise and the areas that the Court declined to accept him as an expert, the Court instructed the parties that the determination of whether Mr. Meiskin would be permitted to offer expert opinions regarding certain questions, issues or matters would be handled on a question-by-question basis.

Mr. Meiskin testified that he received the "material" documents that were before the Court in this hearing as well as other information, including "Highlands Mapping" and the NJDEP website.

¹¹ Mr. Meiskin indicated extensive experience as a residential developer of affordable housing.

¹² Which is one of the criteria that N.J.A.C. 4:93-1, et seq. requires the Court to evaluate when considering the inclusion of development projects in the Fair Share Plan.

While Mr. Meiskin did not offer adverse opinions or criticisms regarding several of the projects¹³ that were in the Fair Share Plan, he did indicate the following:

(1) Marookian Project

Mr. Meiskin indicated that he had serious concerns that the Marookian Project was economically feasible due to the (a) available sewer line was remote and required a costly pump station to provide access to the project; (b) deed restrictions affected the use of the supposedly developable portions of the property; and (c) environmental constraints limited the developability of the portion of the site that was tabbed for development.

(2) CRC Headley Farms¹⁴

Mr. Meiskin indicated that the project is not economically feasible since (a) the existing sewer line is about 1.5 miles from the site; (2) the Highlands restrictions (as shown on the Highlands Mapping) casts doubt on whether the project is suitable for on-site waste water management facilities; and (c) significant road improvements are required.

(3) The LeCompte Site

Mr. Meiskin indicated that the Highlands Mapping indicated that the existence of various environmental issues. In that regard, Mr. Meiskin offered seven exhibits which he prepared. The exhibits were marked O-1 through O-7 and were eventually admitted into evidence by the Court.¹⁵

Plaintiff's counsel and FSHC effectively cross-examined Mr. Meiskin on issues involving the accuracy of the data that he relied upon to prepare the exhibits. Additionally, the Court was not swayed by the thoroughness of Mr. Meiskin's analysis. In fact, the Court simply does not put much credence into his testimony.

¹³ Alton Place, CRC Longview.

¹⁴ The Court also subsequently accepted P-8 and P-9 into evidence. P-8 was a Feasibility Study for water supply to the Headley Estate property prepared by Dwyer Geosciences, Inc. dated February 7, 2018. P-9 is a Feasibility Study for the permitting, designing, constructing and operating an on-site wastewater management structure on the Headley Estate site. Both reports were considered.

¹⁵ Plaintiff's counsel effectively cross-examined Mr. Meiskin concerning the accuracy of his exhibits which all contained "hand drawn" depictions of the proposed LeCompte Development (not drawn to scale) which were superimposed on the Highlands Mapping. Given that the Court admitted the documents into evidence despite their questionable value, the Court also accepted the Plaintiff's rebuttal documents, P-6 through P-9, which provided other information about the proposed development, which the Court has previously referenced in this opinion.

3) **Testimony of Special Master, Michael Bolan, AICP, PP**

The Court also received the sworn testimony of Michael Bolan, AICP, PP, the Court-appointed Special Master in this case. Given Mr. Bolan's extensive experience in municipal planning, development and affordable housing issues, he was accepted as an expert witness by the Court (with the consent of all parties).

Mr. Bolan summarized his report to the Court which was marked as C-1 into evidence. Mr. Bolan's report and testimony provides a thorough review of the agreement, the applicable law, the particular circumstances in Clinton Township, his opinions and recommendations concerning the approval of the agreement by the Court, and certain recommended conditions to be considered by the Court.

The Court has and will address the specific provisions of Mr. Bolan's testimony in the Court's opinion.

4) **Statement of Guliet D. Hirsh, Esq.**

Guliet D. Hirsh, Esq. addressed the Court on behalf of her client, Headley Farm Estate. Although Ms. Hirsh's statement was not in the form of sworn testimony, she indicated "on the record" that her clients support the plan and their apparent willingness to strive to develop their property in accordance with the parameters of the Fair Share Plan to be prepared by the Township. The statement was offered, also, in part, to dispel criticisms of the plan, as it related to her client's property, that were contained in the written submissions of Clinton 94.

X. COURT'S FINDING

A) General Statement

The Court has reviewed and considered the Settlement Agreement reached between Clinton and FSHC dated February 5, 2018 in an effort to determine whether or not there was any element of the settlement that would not be fair to the interests of existing and future low and moderate income households in Clinton's housing region. The Court has evaluated the Settlement Agreements in terms of the criteria set forth in East/West Venture v. Borough of Fort Lee, 286 N.J. Super 311, 329 (App. Div. 1996), which outlines the issues involved in approving a settlement of *Mount Laurel* litigation. While this case differs in that the Township is the plaintiff and FSHC is an interested party and, through the settlement, a defendant in the proceedings, the East/West Venture case provides a good framework for evaluating any settlement arising out of *Mount Laurel* litigation.

As a result of the Court's analysis, the Court concurs with the opinion of its Special Master, Michael Bolan, that the settlement provides for a substantial amount of affordable housing and satisfies the criteria set forth by the Appellate Court in East/West Venture.

B) Summary of Key Terms of the Settlement Agreement

The Settlement Agreement provides that the Township has met the Prior Round Obligation of 335 affordable units. It also provides that the Township shall demonstrate at the compliance hearing how its rehabilitation obligation will be satisfied, including submission of a structural conditions survey to identify substandard housing. The Settlement Agreement further indicates that the Township and FSHC agree that the Third Round Prospective Need is 337 affordable units, per the Kinsey Report as adjusted through the Agreement, and that the Township has implemented or will implement mechanisms to provide 337 affordable units/credits towards its Third Round Prospective Need.

The Township has agreed to request that the Court continue the appointment of the Special Master in this matter for the purpose of assisting the municipality and advising the Court regarding the municipality's efforts to obtain approvals from State and local agencies required by this Agreement. The parties agreed to recommend to the Court that the master be directed to issue reports semi-annually to the Court, and the Township further agreed to respond to reasonable inquiries from the Special Master and FSHC regarding its efforts to obtain approvals required by the Agreement.

The Township agreed to require that 13% of all affordable units approved, vested or constructed after July 17, 2008 be very low income units, and that half of these units shall be available to families. The Settlement Agreement identified 50 units in five projects that will address this requirement.

The parties agreed that Third Round bonuses will be applied in accordance with N.J.A.C. 5:93 (i.e. one bonus credit per family rental unit up to the 25 percent maximum). The Township further agreed to not use bonuses to reduce the actual number of units for which a realistic opportunity must be provided, even though subject to a durational adjustment, below 279 units. At least 50 percent of the units addressing the Third Round Prospective Need shall be affordable to very-low-income and low-income households with the remainder affordable to moderate-income households. At least 25 percent of the Third Round Prospective Need shall be met through rental units, including at least 50 percent in rental units available to families, and at least 50 percent

of the units addressing the Third Round Prospective Need in total shall be available to families. The Township agreed to comply with an age-restricted cap of 25 percent and to not request a waiver of this requirement.

The Township agreed to add to the list of community and regional organizations in its affirmative marketing plan receiving notice of all available affordable housing units the FSHC, the New Jersey State Conference of the NAACP, the Latino Action Network, NORWESCAP, the Supportive Housing Association, and the Central Jersey Housing Resource Center. The Township also agreed to require any other entities, including developers or persons or companies retained to do affirmative marketing, to comply with this requirement.

The Township agreed to comply with the requirements of the Uniform Housing Affordability Controls including, but not limited to, the marketing, bedroom distribution and affordability controls (UHAC, N.J.A.C. 5:80-26.1 et seq.) for the affordable housing units referenced in the Agreement, with the exception to UHAC that 13 percent of affordable rental units in all projects shall be required to be at 30 percent of median income. The Township agreed to update annually the income limits for the establishment of sales prices and rents of affordable housing units according to the formula in Paragraph 15 of the Agreement, which is the formula approved by Judge Wolfson in his December 16, 2016 decision. All new construction units shall be adaptable in conformance with P.L. 2005, c. 350 and all other applicable law.

As an essential term of the settlement, within 90 to 120 days of the Court's approval of the Settlement Agreement, the Township shall adopt a Housing Element and Fair Share Plan and Spending Plan in conformance with the terms of the Agreement. Additionally, within 90 to 120 days of the Court's approval of the Township's compliance plan after a Compliance Hearing, the Township shall introduce and adopt an ordinance or ordinances providing for the amendment of the Township's Affordable Housing Ordinance and Zoning Ordinance to implement the terms of the Agreement and the zoning contemplated in the Agreement.

The parties to the Settlement Agreement agreed that if there is a decision from a court of competent jurisdiction in Hunterdon County, or a determination by an administrative agency responsible for implementing the Fair Housing Act, or an action by the N.J. Legislature, which would result in a calculation of an obligation for the Township for the period 1999-2025 that would be lower by more than 10 percent that the total Third Round Prospective Need obligation established in the Agreement, and if that calculation is memorialized in an unappealable final

judgment, that the Township may seek to amend the judgment in this matter to reduce its fair share obligation accordingly. Notwithstanding the reduction, the Township shall be obligated to adopt a HEFSP that conforms to the terms of the Agreement and to implement all compliance mechanisms included in the Agreement. In the event alternatives are required in accordance with the terms of the Agreement it provided that in no circumstance may the municipality provide less than 279 units of affordable housing, not including bonuses.

The Agreement required the Township has to prepare a Spending Plan within the 90 day period referenced above. The Township reserved the right to seek approval from the Court that the expenditure of funds under the Spending Plan constitute a "commitment" for expenditure pursuant to N.J.S.A 52:27D-329.2 and 329.3. The funds deemed "committed" shall have the four-year time period for expenditure designated by statute, and the period begins to run with the entry of a final judgment approving the settlement.

On the first anniversary of the execution of the Agreement and every anniversary thereafter through the end of the period of protection from litigation referenced in the Agreement, the Township shall provide annual reporting of trust fund activity to the NJ Department of Community Affairs, Council on Affordable Housing, or Local Government Services, or other entity designated by the State of New Jersey, with a copy provided to FSHC and posted on the municipal website, using forms previously developed for this purpose by COAH or Local Government Services. The reporting shall include an accounting of all trust fund activity, including the source and amount of funds collected and the amount and purpose for which any funds have been expended. Also on the first anniversary of the Agreement and every anniversary thereafter, the Township shall provide annual reporting of the status of all affordable housing activity through posting on the Township website, with a copy to the FSHC, using forms previously developed for this purpose by COAH or any other forms as approved by the Court.

The Township agreed to comply with two monitoring provisions of the Fair Housing Act regarding action to be taken by the Township during the ten-year period of protection provided in this agreement. For the midpoint realistic opportunity review due on July 1, 2020, the Township will post on its municipal website, with a copy provided to FSHC, a status report as to its implementation of the Plan and an analysis of whether any unbuilt sites or unfulfilled mechanisms continue to present a realistic opportunity. Such posting shall invite any interested party to submit comments to the municipality, with a copy to FSHC, regarding whether any sites no longer present

a realistic opportunity and should be replaced. Any interested party may by motion request a hearing before the Court regarding these issues. For the review of very low income housing requirements, within 30 days of the third anniversary of this agreement, and every third year thereafter, the Township will post on its municipal website, with a copy provided to FSHC, a status report as to its satisfaction of its very low income requirement, including family low income requirements, with the opportunity for any interested party to submit comments to the municipality and FSHC on the issue of whether the municipality has complied with its very low income housing obligation under the terms of the Agreement.

The Township also agreed to make a \$30,000 donation to FSHC to be used for the advancement of affordable housing.

C) Evaluation of the Settlement Agreement

The Appellate Court established, in the East/West Venture case, the standard that must be used in evaluating the fairness of a settlement in a *Mount Laurel* lawsuit. That standard is whether or not "the settlement adequately protects the interests of the lower-income persons on whose behalf the affordable units proposed by the settlement are to be built". The determination of whether or not the standard is met is based upon a five-part analysis, as follows:

1. Consideration of the number of affordable units being constructed.

The terms of the settlement agreements provide that the Township's New Construction affordable housing obligation is 337 units and the Township is eligible for 337 total units of credit. There is considerable uncertainty concerning the methodology that might ultimately be used to establish affordable housing obligations. For example, the report prepared by Econsult Solutions, Inc. (Econsult) for the municipal consortium, dated April 12, 2017, calculates the 1999-2025 obligation for the Township as 80 affordable units. This Court's Regional Special Master, Richard Reading, has projected obligations in other vicinages that fall below the FSHC allocations and generally support a reduction in the FSHC number. In addition, on March 8, 2018, the Honorable Mary C. Jacobson, the Mercer County Assignment Judge issued an opinion concerning the fair share methodology to implement the Mt. Laurel affordable housing doctrine for the Third Round. Given the above, and that this Court's approval of a settlement is not an adjudication of the fair share obligation, the number of affordable housing units addressed in the settlement is reasonable.

2. The methodology by which the number of affordable units provided is Derived

The methodology utilized in the Kinsey Report to calculate third round new construction obligations was designed to follow the Prior Round methodology used by COAH in 1994 to determine cumulative 1987-1999 fair share obligations as closely as possible, as directed by the Supreme Court in Mt. Laurel IV. As noted above, there is no statewide agreed to methodology, and the FSHC methodology has been utilized in over 170 settlements throughout the State. Of those, approximately 45 of the settlements involve municipalities in Vicinage XIII.

3. Other contributions by the Plaintiff.

This prong of the East/West Venture test originally applied to a plaintiff/developer. In this case the plaintiff/Township has agreed to the following, which are described in more detail above in the section discussing Key Terms of the Settlement Agreement:

- agreement to adopt a compliant Housing Element and Fair Share Plan and all implementing ordinances;
- agreement that 13% of affordable units shall be for very low income households;
- agreement that at least 25% of the Third Round Prospective Need shall be rental units;
- agreement that at least 50% of rental units shall be available to families;
- agreement that at least 50% of all affordable units addressing the Third Round Prospective Need shall be available to families;
- agreement to an age-restricted cap of 25% of affordable units;
- agreement that at least 50% of units shall be available to very low income and low income households;
- agreement to continue the appointment of a Special Master to oversee compliance
- agreement to expand the affirmative marketing plan;
- agreement to comply with the requirements of UHAC;
- agreement to approve and implement a spending plan: and,
- agreement to make a \$30,000 donation to FSHC to be used for the advancement of affordable housing.

4. Other components of the Agreement that contribute to the satisfaction of the constitutional obligation.

The Township agreed to take the steps necessary to amend and implement its Housing Element and Fair Share Plan in accordance with the terms of the Settlement Agreement and the zoning contemplated in the Agreement, including zoning for inclusionary development. In the context of the durational adjustment, the Township agreed to pursue rigorously the provision of water and sewer utilities for inclusionary and municipally sponsored projects. The Township further agreed to address the standards for municipally sponsored projects contained in N.J.A.C. 5:93-5.5, and to follow a specified timeline should any of these projects not come to fruition. The Township committed to execute a developer's agreement to implement a project identified in a redevelopment plan and redeveloper's agreement.

5. Consideration of Clinton 94's Objection

a) Clinton 94's position summarized

Clinton 94's position raises several issues, including the flexibility of the projects that have been proposed as part of the Township's Fair Plan. Clinton 94 argued that (1) the plan calls for an inordinately high number (and percentage) of units that will be the subject of a deviational adjustment; (2) that the plan is perhaps overly ambitious; (3) that the number of "conditions" that were recommended by the Special Master portends that the plan may not be achievable; (4) the frequency of monitoring that was suggested by Special Master Bolan (every 180 days) should be performed more often, say every 90 days; (5) that there would be no harm done by including other properties in the plan (such as the property offered for inclusion in the plan by Clinton 94), even if its inclusion would provide a surplus number of units to be provided over and above the number of units that would be required under the Settlement Agreement.

b) Court's Analysis of the Issue Raised by Clinton 94

As part of the Court's ruling, the Court has reviewed, analyzed and considered the objections made by Clinton 94. First, with regards to Clinton 94's argument that the Court consider and include projects that have additional low and moderate income units (such as its property) that are above the agreed upon settlement numbers, the Court finds that such a requirement is unnecessary and unwarranted under the circumstances. Once it has been determined that a reasonable number of affordable units have been included the Township's Plan, it is within the Township's reasonable discretion as to whether it would or should include additional units or

additional properties at this time. Said another way, the Court will not include a requirement that the Township "overzone" to meet its fair share obligation.

The Court was not swayed by Clinton 94's contentions that the various component parts of the Township's proposed plan were unrealistic and unachievable. Mr. Meiskin's testimony on the subject (1) lacked the necessary expertise to opine on key facts and issues that supports his propositions; (2) Mr. Meiskin's testimony was oft times spotty, not buttressed by credible documentation and lacked coherence; and (3) Mr. Meiskin's testimony appeared to the Court to be a thinly veiled effort to support his own proposal and thus his testimony was tainted with bias.

The Court finds that the Clinton Township Plan provides an imaginative, proactive, comprehensive and realistic plan to accommodate for the needs of low and moderate income households. A significant portion of the Township is located within the Highlands Area. During recent years, the Township has experienced very limited growth. There is a demonstrable limitation of sewer availability. Those conditions have caused Clinton Township to be unable to even satisfy its prior round's needs.

When the Court considers the totality of these factors, it is clear that the settlement that has been proposed is reasonable. There is no real credible evidence that was provided to the Court to indicate that the Projects that have been included within the Township's Plan are not feasible or achievable.

The Court understands that, as with any proposed fair share plan, issues or conditions arise that may cause the projects for these proposed developments to change. The Settlement Agreement certainly anticipates those events in several ways that protect the interests of the parties and the Protected Class.

The Municipality has committed to take aggressive steps to aid the prospective developers of the approved projects to secure the water and sewer capacity and acres that will be required to service the projects. It has also committed to provide funding for a couple of the projects should the tax credit financing not be available.

Also, the Court's Master will continue to be involved to monitor the settlement and keep the projects "on track" or, if modifications are necessary, to advise the Court so that intervention may be activated if substantial compliance is not achieved. These additional "insurance policies" provide the Court with comfort that the Settlement Agreement is fair and reasonable to the affected

"class" of low and moderate income households and that there is a substantial likelihood that the plan is an achievable one.

6. Other factors that may be relevant to the fairness of the settlement.

As discussed in more detail in the previous section of Key Terms of the Settlement Agreement, the Agreement provides for a continuing monitoring program throughout its ten-year duration, including annual and triennial reporting requirements. The monitoring and reporting requirements will ensure that the interests of lower income households will be advanced through the Court's approval. The Township agreed to the appointment of a Special Master for the purpose of assisting the municipality and advising the Court regarding the municipality's efforts to obtain approvals from State and local agencies required by this Agreement. The process of obtaining the Court's approval of the Settlement Agreement, the scrutiny that document has received as a result of the intervention by FSHC, and the conditions contained in this report requiring the Township to adopt a HEFSP and certain ordinance amendments will allow the Township to move forward in the satisfaction of its constitutional obligation. Lastly, the Court's approval of the settlement is subject to a final compliance hearing which will be anticipated to be scheduled in approximately 120 to 150 days from the date of this opinion.

CONCLUSION

In conclusion, the Court is being asked to determine whether the interests of low and moderate income households will be served by the approval of the Settlement Agreement with FSHC. In the Court's opinion, the interests of low and moderate income households will be advanced by the Court's approval of the Settlement Agreement. The Court therefore approves the Settlement Agreement subject to the conditions and milestones contained within the report of Special Master Bolan as follows:

1. Within approximately 90 days of the Court's approval of the Agreement after a fairness hearing, the Township Planning Board shall adopt and the Mayor and Council shall endorse a HEFSP with any revisions required by or resulting from the Settlement Agreement and these Conditions. For proposed inclusionary development sites, the HEFSP specifically must include an analysis of the sites to demonstrate that they are approvable, available, developable and suitable in accordance with COAH Rules. The Fair Share Plan shall include any Zoning Ordinance amendments and agreements necessary to effectuate the terms of the Settlement Agreement.

2. Within approximately 90 days of the Court's approval of the Township's compliance plan after a Compliance Hearing, the Township shall introduce and adopt an ordinance or ordinances providing for the amendment of the Township's Affordable Housing Ordinance and Zoning Ordinance to implement the terms of the Settlement Agreement and the zoning contemplated in the Settlement Agreement. The Affordable Housing Ordinance shall incorporate all of the provisions of the Settlement Agreement, applicable provisions of UHAC and COAH rules, and any other provisions that result from the adopted HEFSP.

3. Within approximately 90 days of the Court's Order approving the Settlement Agreement, the Township shall demonstrate compliance with the requirements of N.J.A.C. 5:93-5.5 for non-inclusionary developments. These requirements include evidence that the Township has adequate and stable funding; a pro forma of total development costs and sources of funds and documentation of the funding available to the municipality and/or project sponsor, and any applications still pending; and, a construction or implementation schedule, or timetable, for each step of the development in the development process, with the schedule providing for construction to begin within two years of the Court's Order approving the Settlement Agreements.

The schedule shall provide for construction of the Marookian project and the LeCompte project consistent with the terms of Paragraph 10 in the Agreement. The Township shall indicate the entity responsible for undertaking and monitoring the construction and overall development activity. The Township shall address how it satisfies the requirements of this paragraph through a filing with the Court at least 60 days prior to the compliance hearing in this matter.

4. Within approximately 90 days of the Court's Order approving the Settlement Agreement, the Township shall endorse a Spending Plan in conformance with the terms of the Agreement.

5. At least 60 days prior to the compliance hearing, the Township shall provide a structural conditions survey to identify substandard housing in accordance with N.J.A.C. 5:93-5.2. The Township shall demonstrate at the compliance hearing how its rehabilitation obligation will be satisfied.

6. Within approximately 90 days of the Court's Order approving the Settlement Agreement, the Township shall provide documentation for the existing group home at Block 4.03, Lot 40, including the deed restriction, Supportive and Special Needs Housing Survey, and a copy of the facility license, if applicable.

7. Within approximately 90 days of the Court's Order approving the Settlement Agreement, the Township shall provide the deed restrictions for the Mews project.

8. Within approximately 90 days of the Court's Order approving the Settlement Agreement, the Township shall provide evidence of the approvals for the CRC Longview group home and the Fox/Seals redevelopment area.
9. Within approximately 90 days of the Court's Order approving the Settlement Agreement, the Township shall provide a letter from the developer of the Headley Farm Estate agreeing to the density and set-aside for the proposed development and supporting the terms of the Agreement.
10. Within approximately 90 days of the Court's Order approving the Settlement Agreement, the Township shall adopt a Resolution appointing a specific municipal employee as Municipal Housing Liaison responsible for administering the affordable housing program, including affordability controls, the Affirmative Marketing Plan, and monitoring and reporting, if it has not already done so.
11. Within approximately 90 days of the Court's Order approving the Settlement Agreement, the Township shall adopt a Resolution appointing the Township's Administrative Agent to administer affordable units in accordance with the Uniform Housing Affordability Controls (UHAC, N.J.A.C. 5:80-26.1 et seq.), if it has not already done so.
12. Within approximately 90 days of the Court's Order approving the Settlement Agreement, the Township shall adopt a Resolution adopting the Township's Affirmative Marketing Plan, as modified by the terms of the Settlement Agreement.
13. The monitoring and reporting requirements identified in Paragraphs 20, 21 and 22 of the Settlement Agreement shall be continuing conditions of the Court's approval.