

FILED**JAN 17 2019****CHRISTINE A. FARRINGTON,
J.S.C.**

Prepared by the Court

In the Matter of the Application of the
Borough of East Rutherford ,
Plaintiff/Petitioner

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: BERGEN COUNTY

DOCKET NO.: BER-L-5925-15

Civil Action

**ORDER
GRANTING PRELIMINARY
JUDGMENT OF COMPLIANCE AND
REPOSE WITH CONDITIONS**

This matter came before the court on January 17, 2019 for a hearing to determine the fairness of settlement agreement ("Fairness Hearing") between the Borough of East Rutherford, interested party Fair Share Housing Center (FSHC), herein deemed a party. East Rutherford did not seek substantive certification from the Council on Affordable Housing (COAH) or a Judgment of Repose from Superior Court during the first (1987-1993) or second (1993-1999) rounds. In 2003, the Borough was subject to a builder's remedy suit by Tomu Development Co. In connection with the builder's remedy suit, an Order Imposing Scarce Resource Restraints was entered on May 13, 2005. The builder's remedy was awarded by order of the Honorable Jonathan Harris, J.S.C. on November 10, 2005. In response to a finding that East Rutherford did not meet the Court's mandate to fulfill its constitutional obligation to provide a realistic opportunity for low and moderate income housing, Judge Harris on May 19, 2006 assigned a Mount Laurel Implementation Monitor to oversee preparation of a housing element and fair share plan for submission to COAH for substantive certification and to review and approve land use matters in the

Borough. The court named Robert T. Regan, Esq. to the role, in which he continues to this date.

The Borough prepared and filed with COAH a third round housing element and fair share plan. The Borough did not receive substantive certification prior to the third round rules being overturned.

The Borough filed a Complaint for Declaratory Judgment on June 25, 2015.

The scope of the fairness hearing includes a preliminary determination of the sufficiency of the Borough's Third Round Housing Element and Fair Share Plan. The court's function at a Fairness Hearing is to determine whether the settlements between the Borough and FSHC are fair to the protected class in the context of meeting the Borough's constitutional requirement to provide affordable housing. According to New Jersey's Constitution, municipalities must provide opportunities for the development of affordable housing for low and moderate income households, and that is the perspective from which the court must determine fairness, i.e. from the perspective of people with low and moderate income, and their opportunity to have affordable housing.

Present for the hearing were Elizabeth K. McManus, AICP, PP, LEED AP, Kyle & McManus Associates, court appointed Special Master; the Borough's attorney, Gerald R. Salerno, Esq., Aronsohn, Weiner, Salerno & Kaufman, P.C.; Richard Allen, Esq., Borough Co-Counsel; Robert T. Regan, Esq., Mount Laurel Implementation Monitor; Borough Planner, Richard Preiss, PP, AICP; Mayor James L. Casella; Council Member Philip Sorbera, and Joshua D. Bauers, on behalf of Fair Share Housing Commission (FSHC). No objectors appeared.

Marked for identification and ultimately into evidence were the following:

P-1 Corrected Affidavit of Service

P-2 Affidavit of Publication

P-3 Settlement Agreement between the Borough and Fair Share Housing Center,
dated November 20, 2018

P-4 Report of Elizabeth K. McManus, AICP, PP, LEED, AP, Special Master

The Borough by and through its attorney, called Special Master Elizabeth K. McManus. Elizabeth K. McManus testified and recommended the court approve the settlement. Ms. McManus is a principal of Kyle & McManus, a Planning and Design Consulting firm. Ms. McManus has a Bachelor of Arts in Environmental Policy and Masters in City and Regional Planning from Rutgers University. Ms. McManus has been a planner since 2006.

The court notes that the proper procedure for a fairness hearing has been followed in this matter to make sure that the interests of low and moderate income households have been safeguarded. See Morris Cty. Fair Hous. Council v. Booton Twp., 197 N.J. Super. 359, 371 (Law Div. 1984). Adequate public notice of the hearing was mailed to appropriate persons and published in the Record and the Herald on December 14, 2018.

A municipality's affordable housing obligation is comprised of three components: 1) present need (rehabilitation); 2) prior round (1987-1999); and 3) estimated third round prospective need which runs from July 1, 1999 to June 30, 2025, which includes the Gap Present Need for the period 1999-2015 and Prospective Need for 2015-2015 in accordance with the New Jersey Supreme Court decision of January 18, 2017 on the "gap" period. The parties to the Settlement Agreement have agreed and the Special

Master has testified that the fair share obligations for the Borough for the period from 1987 through July 1, 2015 are:

Rehabilitation Share:	6 Units
Prior Round (1987-1990) Obligation:	90 Units
Third Round (1999-2025) Obligation:	656 Units

The Special Master's report and testimony notes that the parties to the Settlement Agreements have agreed the Borough's Present Need of 6 affordable units, as calculated in the report titled "New Jersey Low and Moderate Income Housing Obligations for 1999-2025 Calculated Using the NJ COAH Prior Round (1987-1999) Methodology, May 2016", prepared by David N. Kinsey, PhD, PP, FAICP (Kinsey Report). The settlement provides that the Borough will work with Bergen County or hire a separate entity to implement an indigenous need rehabilitation program to address this component of its obligation, including the rental component of the rehabilitation obligation. The rehabilitation share was determined by a Structural Conditions Survey completed by the Borough as permitted by N.J.A.C. 5:93-5.2(a). The Borough had a Prior Round Obligation of 90 affordable units and a Gap Present Need and Prospective Need Obligation (2015-2025) of 656 affordable units. For purposes of the Agreement, the Gap Present Need and the Prospective Need are considered the "Round 3 regional need" or "Third Round Prospective Need", as recognized by the Supreme Court and calculated in the Kinsey Report. The 656 unit Third Round Prospective Need obligation reflects a 40% reduction from the 1,093-unit Prospective Need identified in the 2016 Kinsey Report and from the application of the 20% cap to the municipality's existing housing stock, which dictates the Borough's Third Round obligation may not exceed 820 units. The court notes that except for purposes of

settlement, the Borough does not accept the basis of the methodology, applications of caps or calculations in the Kinsey report, but for purposes of the agreement agrees to the terms in the agreement.

The Borough prepared a vacant land analysis which resulted in a combined Prior Round and Third Round Prospective Need Realistic Development Potential (RDP) of 187 affordable units, resulting in an unmet need for the Prior Round and Third Round Prospective Need of 469 affordable units. The Borough will satisfy its realistic development potential of 187 units from family rental units at nine locations and 47 bonus credits.

The Settlement Agreement identifies the mechanisms to address the Borough's combined RDP. The Special Master testified that additional information is necessary to confirm these mechanisms will satisfy the UHAC, FHA and COAH Rules. These include, the Tomu Builder's remedy (60 family rentals), The Monarch, a completed project of 32 units of affordable housing of which 7 units are credited to the prior round obligation and 25 to the third-round prospective need, and 23 bonus credits. The Borough's Unmet Need of 469 units will be addressed through a Borough-wide mandatory set-aside ordinance and overlay zoning yielding 132 potential affordable units.

The Borough will provide realistic opportunity for the development of additional affordable housing in conjunction with the Housing Authority of Bergen County for the construction of 2 family rentals funded with a payment in lieu option from the 132 Union Avenue project.

Thirteen percent (13%) of the total units, excepting those constructed or granted preliminary or final site plan approval prior to July 1, 2008 shall be very low income

units, with half of those being available to families. The Borough agrees to comply with an age-restricted cap of 25% of all units developed or planned to meet its cumulative prior round and third round fair share obligation.

The Borough will participate in the Bergen County Home Improvement Program, which is limited to owner-occupied units, and will implement a supplemental municipal rehabilitation program for renter-occupied units. The municipal program is necessary for the Borough to be compliant with N.J.A.C. 5:93-5.2(f), which states rental units may not be excluded from the rehabilitation program. Operating manuals for both the County and municipal programs must be submitted as part of the crediting documentation to ensure the programs meet the requirements of N.J.A.C. 5:93-5.2.

The Borough has committed to adopting a resolution of intent to bond as part of the upcoming third round housing element and fair share plan, if determined by the Special Master that the Spending Plan does not provide a reasonable assurance of funds for the municipal rehabilitation program. This review will be conducted once the housing element and fair share plan, including the spending plan, is submitted.

The Borough satisfies the prior round obligation with two family rental inclusionary projects – Tomu Development Co. and the Monarch, as well as associated bonus credits. The Borough should assign the 23 bonus credits to the specific sites as part of the third round housing element and fair share plan.

Tomu Development Co. is the site that was the subject of the 2006 Builder's Remedy and includes Block 107.03, Lots 2, 5 and 7. The development will include 420 units, of which 360 shall be market rate units and 60 shall be affordable units, resulting in a 14.3% affordable housing set-aside. Associated nonresidential uses are also permitted.

The Monarch is a constructed family rental inclusionary housing project on Block 108.04, Lot 5.01. The project includes 316 total units, of which 10% or 32 units are affordable units. Both the Tomu Development Co. and the Monarch sites are within the jurisdiction of the NJSEA.

Satisfaction of the 90 Unit Prior Round Obligation

	<i>Program Type</i>	<i>Housing Type</i>	<i>Status</i>	<i>Credits</i>
Tomu Development Co.	Inclusionary	Family Rental	Unbuilt	60
The Monarch Phase I (7 of 32)	Inclusionary	Family Rental	Built	7
Bonus Credits	n/a	Family Rental	n/a	23
			TOTAL	90

The Borough is eligible for a vacant land adjustment, pursuant to N.J.A.C. 5:93-4.2. Municipalities, such as East Rutherford, that do not have adequate capacity of developable land to fulfil the entirety of the affordable housing obligation are eligible for an adjustment of the obligation that reflects a realistic development potential (hereinafter "RDP") and the unmet need. The RDP represents the portion of the new construction affordable housing obligation that can realistically be addressed with inclusionary development on lots identified as being developable in the vacant land adjustment. The unmet need is calculated as the difference between the total obligation and the RDP.

As detailed in Appendix B to the Settlement Agreement, the Borough's calculated RDP is 187 units, as such the unmet need is 469 units (656-187). The vacant land adjustment was completed in accordance with N.J.A.C. 5:93-4.2. More specifically, the Borough evaluated vacant (property class 1) lands, public lands (property class 15c) and additional properties which were under-developed or otherwise may offer an opportunity

for inclusionary affordable housing. Environmental constraints, such as but not limited to wetlands, and municipally owned recreation lands were excluded from generating the RDP. The Borough utilized densities ranging from 12 to 30 du/ac and a 20% affordable housing set-aside to calculate the RDP.

The Borough satisfies the third round 187 unit RDP entirely with family rental projects and associated bonus credits. The Borough shall assign the 47 bonus credits to the specific sites as part of the third round housing element and fair share plan.

<i>Satisfaction of the 187 Unit Third Round RDP</i>			
	<i>Program Type</i>	<i>Housing Type</i>	<i>Credits</i>
The Monarch Phase I (25 of 32)	Inclusionary	Family Rental	25
132 Union Avenue	Inclusionary	Family Rental	3
Garden House	Inclusionary	Family Rental	2
Bergen County Housing Authority	100% Affordable	Family Rental	2
228 Park Avenue	Inclusionary	Family Rental	9
384 Paterson Avenue	Inclusionary	Family Rental	1
Van Winkle Avenue	Inclusionary	Family Rental	6
Group at Route 3, LLC	Inclusionary	Family Rental	75
Eastbound Inc.	Inclusionary	Family Rental	23
Bonus Credits	Inclusionary	Family Rental	47
		Total	193

In addition to meeting the RDP, the Borough has also committed to meet the unmet need. The Borough will utilize overlay zoning and a mandatory set-aside ordinance to do so.

The overlay zoning set forth in the Settlement Agreement are partially composed of lands in existing inclusionary housing overlay zones. The affordable housing set-aside is 20% in all locations. The following table provides a summary of the overlay zoning addressed in the Settlement Agreement.

<i>Overlay Zoning to Address the Unmet Need</i>				
<i>Location</i>	<i>Existing Overlay</i>	<i>Area</i>	<i>Density</i>	<i>Potential Affordable Units</i>
Block 6, Lot 1: Madison St.	No	6.22	20	25
Block 8, Lot 1: 2 Carlton Ave.	Yes	5.66	20	23
Block 8, Lot 2: Morton St.	Yes	.29	20	1
Block 8, Lot 6: Herrick and Morton St.	Yes	.45	20	2
Block 8, Lot 7: Herrick and Morton St.	Yes	.50	20	2
Block 8, Lot 8: Herrick and Morton St.	Yes	.12	20	1
Block 8, Lot 10: Madison & Morton St.	No	3.6	20	14
Block 18, Lot 14: 731 Morton St.	Yes	.92	20	4
Block 26, Lot 1: 10 Oak Street	Yes	4.78	27.5	26
Block 26, Lot 2: 20 Oak Street	Yes	2.66	27.5	15
Block 29, Lot 5: 401 Central Ave.	Yes	4.79	20	19
Total				132

The mandatory set-aside ordinance requires an affordable housing set-aside for all new multifamily residential developments of five (5) units or more. The set-aside for rental developments shall be 15% and the set aside for for-sale developments shall be 20%. The provisions of the ordinance shall not apply to residential expansions, additions, renovations, replacement, or any other type of residential development that does not result in a net increase in the number of dwellings of five or more. The Agreement requires the form of the Ordinance to be finalized prior to final judgment being issued in this matter through collaboration between FSHC, the Special Master, and representatives of the Borough.

The court is not here to act as the legislature or municipal planner and substitute its plan for where affordable housing units should be built for that of the municipality. See Morris Cty. Fair Hous. Council, *supra*, at 370. “[A] trial judge may approve a settlement [regarding a municipality’s Mount Laurel obligation]” after a ‘fairness’ hearing

to the extent the judge is satisfied that the settlement adequately protects the interests of lower-income persons on whose behalf the affordable units proposed by the settlement are to be built.” E.W. Venture v. Borough of Fort Lee, 286 N.J. Super, 336 (App. Div. 1996) at 328. The court must also consider whether the proposed settlement will result in the expedited construction of a significant number of low income housing units, Morris Cty. Fair Hous. Council, supra at 327. “A municipality may provide its fair share of affordable units by ‘means of any technique or combination of techniques’ which satisfy its Mount Laurel obligation.” E.W. Venture supra, (quoting N.J.S.A. 52:27D-311). If the agreement is found to be fair, and the Borough fulfills its compliance obligations, then the court will order a final judgment of repose.

The court holds, based upon the report and testimony of the Special Master, the endorsement of the Settlement Agreement by Joshua Bauers, Esq. on behalf of FSHC which the court deems to have party status in this matter, and the exhibits marked into evidence, that the settlement agreement, between the Borough and Fair Share Housing Center, which is incorporated herein, is fair to the protected class of low and moderate income persons and will grant a preliminary Judgment of Compliance and Repose subject to the conditions which follow and shall be addressed within 120 days of the date of this Order, except for the information necessary to confirm the mechanisms set forth herein satisfy the crediting requirements of the Settlement Agreement, UHAC, FHA and COAH Rules, which shall be submitted within 60 days of the date of this order.

The endorsements of the Settlement Agreement by the Special Master, FSHC and the court appointed special implementation monitor speak for themselves. In coming to

the conclusion that the Settlement Agreement is fair, the court has considered the criteria set forth in East/West Venture v. Borough of Fort Lee, *supra*. With regard to the criteria:

(1) *Consideration of the number of affordable units being constructed.* While the structure of the obligation identified in the Settlement Agreement is different than the findings of this Supreme Court decision (i.e. no redefined present need and a prospective need specific to 1999 – 2025), the Borough's obligation reflects that which was calculated for the 1999-through-2025 time period by FSHC in its 2016 Report (1,093 units, reduced to 820 pursuant to the 20% cap, and further reduced in mediation to 656).

All the experts accepted the 90-unit Prior Round obligation previously assigned by COAH.

(2) *The methodology by which the number of affordable units is provided.* The adjustment for insufficient vacant developable land was undertaken in compliance with COAH's Prior Round Rules, at N.J.A.C. 5:93-4.1 and 4.2. 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. Currently, there is no statewide agreed to methodology, and the FSHC methodology has been utilized in over 200 settlements throughout the State. In the absence of any consensus on the methodology and in light of the considerable spread in the calculations presented by the experts for the respective parties, the court finds the fair share resolution set forth in the Settlement Agreement to be fair and reasonable to the region's low and moderate income households. This opinion is supported by the following:

- The Borough and FSHC have agreed to the 6-unit rehabilitation share based on the structural conditions survey;
 - The parties have both accepted COAH's Prior Round obligation of 90 units; this is in accordance with Mount Laurel IV "...prior unfulfilled housing obligations should be the starting point for a determination of a municipality's fair share responsibility;" In Re Adoption of N.J.A.C. 5:96, 221 N.J. 1, 30 (2015) ("Mount Laurel IV");
 - The Settlement at 656 units for East Rutherford's Third Round Prospective Need is a 40% reduction from Dr. Kinsey's 1,093-unit "uncapped" Third Round Prospective Need calculation presented in his July 2016 report. It is also 472 units greater than the 184-units calculated by Econsult and 113 units less than that calculated using the methodology set forth in Judge Jacobson's March 2018 decision.
 - As stated above, while the structure of the obligation identified in the Settlement Agreement is different than the findings of this recent Supreme Court decision (i.e. no redefined present need and a prospective need specific to 1999 – 2025), the Borough's obligation reflects that which was calculated for the 1999-through-2015 time period by FSHC.
 - As testified by the Special Master, the specific fair share number in this case is of lesser import than the municipal compliance plan's prospects for successfully delivering affordable housing. The Settlement Agreement commits East Rutherford to implement new zoning that creates an opportunity for the development of very-low, low-, and moderate-income housing in an area of the Borough suited for redevelopment.
- (3) *Other Contributions by the Borough:* As stated above, the Borough has agreed with FSHC that as part of the compliance methods that will address the rehabilitation share,

prior round, and third round obligations, including the creation of new inclusionary zoning. Under the East/West Venture fairness analysis any other contributions being made by the developer (read “municipality” for this case) must be considered, along with any other components which contribute to the municipality’s satisfaction of its Mount Laurel obligation.

(4) Other components of the Settlement Agreement which contribute to the satisfaction of the constitutional obligation. (a) At least half of all housing units addressing the Third

Round Prospective Need shall be affordable to low-income households, with 13% of the affordable housing units being reserved for very-low income households. The remainder of the affordable units shall be affordable to moderate-income households.

(b) At least 25% of the Borough’s Third Round Prospective Need shall be met through rental units, at least half of which will be rental units available to families.

(c) At least half of the units addressing the Third Round Prospective Need in total must be available to families. (d) No more than 25% of the affordable units addressing the

Borough’s Prior Round and Third Round obligation shall be age-restricted.

(5) Other factors relevant to the fairness of the Settlement Agreement. The Agreement provides for a continuing monitoring program throughout its ten-year duration, including annual and triennial reporting requirements, as well as an additional review on July 1, 2022. This program will ensure that the interests of lower income households in the future will be advanced through the Court’s approval. The process of obtaining the Court’s approval of the Settlement Agreements, the scrutiny these documents have received as a result of the intervention by FSHC and Tomu, and the conditions contained in the Special Master’s report.

Lastly, the Court's approval of the settlement is subject to a final compliance hearing at which time the court will determine whether the Borough has fulfilled the following conditions, recommended by the Special Master:

1. The Borough Planning Board shall adopt and the Mayor and Council shall endorse a The Housing Element of the Master Plan and a Fair Share Plan which incorporates a Spending Plan and Affirmative Marketing Plan, , consistent with the terms of this Agreement.

2. The Borough has committed to adopting a resolution of intent to bond as part of the upcoming third round housing element and fair share plan, if determined by the Special Master that the Spending Plan does not provide a reasonable assurance of funds for the municipal rehabilitation program. This review will be conducted once the housing element and fair share plan, including the spending plan, is submitted.

3. The Borough shall adopt amendments to the Affordable Housing Ordinance and Zoning Ordinance to implement the terms of the Settlement Agreement.

4. The Borough will participate in the Bergen County Home Improvement Program, which is limited to owner-occupied units, and will implement a supplemental municipal rehabilitation program for renter-occupied units. The municipal program is necessary for the Borough to be compliant with N.J.A.C. 5:93-5.2(f), which states rental units may not be excluded from the rehabilitation program. Operating manuals for both the County and municipal programs must be submitted as part of the crediting documentation to ensure the programs meet the requirements of N.J.A.C. 5:93-5.2.

5. The Borough shall submit its midpoint realistic opportunity review on or before July 2, 2020, as required pursuant to N.J.S.A. 52:27D-313. This midpoint review

permits any interested party, such as FSHC, to request by motion a Court hearing regarding whether any sites in the Borough's compliance plan no longer present a realistic opportunity for affordable housing development and should be replaced. While this review is statutorily sanctioned and certainly reasonable, in the event the Court finds that an affordable housing site or other compliance mechanism should be replaced, the Borough shall be given the opportunity to supplement its Fair Share Plan to correct any deficiency while being protected by immunity from builder remedy litigation. This municipal opportunity to remedy a defect is certainly warranted since the plan which is being amended was approved by the Court.

6. Within 30 days of every third anniversary of the Agreement the Borough will publish on its website and submit to FSHC a status report regarding its satisfaction of the very-low income requirement pursuant to N.J.S.A. 52:27D – 329.1.

7. The Borough should provide additional information as to the Bergen County rehabilitation program for rehabilitated units, or hire a separate entity to implement a rehabilitation program, and shall provide the administrative procedures for the Borough rehabilitation program.

8. The Borough shall update its affirmative marketing plan to include FSHC and other named organizations in its list of community and regional organizations, and both the Borough and any other developers or administrative agencies conducting affirmative marketing shall provide notice to those organizations of any available units.

9. The Borough shall appoint, if it has not already done so, 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.

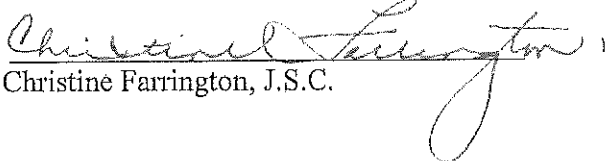
10. The Borough shall supply information necessary to confirm the crediting requirements of the Settlement Agreement within 60 days of the date of this order. The monitoring and reporting requirements shall be continuing conditions of the Court's approval.

The Borough and FSHC will complete the actions/documents necessary for final judicial approval, including the adoption of the Housing Element and Fair Share Plan and its required components within 120 days and the adoption of the Multifamily Inclusionary II ordinance to the Governing Body. If the Borough fulfills the conditions of the settlement agreement, including the list of documents which need to be prepared and adopted by the Borough within 120 days of the court's order as set forth in the Settlement Agreement and the Special Master's report, the court will determine whether there has been compliance and make the appropriate determinations either by court order or a compliance hearing. See E.W. Venture v. Borough of Fort Lee, supra, at 328. At the time of the compliance hearing or entry of the compliance order, the court will determine if any of the enactments of the plan, ordinances and resolutions are ultra vires. Id. At 329.

Robert T. Regan, Esq., the court appointed Mount Laurel Implementation Monitor, is relieved of his duties as of the date of the entry of the Final Judgment of Compliance and Repose.

The court extends immunity to May 17, 2019 nunc pro tunc to January 15, 2019.

January 17, 2019


Christine Farrington, J.S.C.

X Unopposed