

B A N I S C H

A S S O C I A T E S, I N C.

Planning and Design

**SECOND SUPPLEMENTAL REPORT
OF THE SPECIAL MASTER**

**REGARDING THE FAIRNESS OF
A SETTLEMENT AGREEMENT BETWEEN**

**SADDLE RIVER BOROUGH
AND
FAIR SHARE HOUSING CENTER**

AND COMPLIANCE REVIEW

**IN THE MATTER OF THE APPLICATION
OF THE BOROUGH OF SADDLE RIVER
DOCKET No. BER-L-6120-15**

Prepared by:

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The original document was appropriately signed and sealed on December 21, 2021 in accordance with Chapter 41 of Title 13 of the State Board of Professional Planners.

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Date

Introduction

The purpose of this report is to present my review and recommendations as the Court-appointed Special Master regarding 1) whether the settlement agreement dated February 10, 2020 entered into by Saddle River ("Borough"), Fair Share Housing Center ("FSHC") and Saddle River Investors ("SRI") as amended by the November 8, 2021 Second Amendment to the Affordable Housing Settlement Agreement ("Settlement") among the plaintiff Borough of Saddle River, FSHC, Zhanna Torres ("Torres") and the Borough of Woodcliff Lake ("Woodcliff Lake") is fair and reasonable to low- and moderate-income households, and 2) whether the Borough is eligible for a Judgement of Compliance and Repose.

Notice of the continuation of the fairness and compliance hearing scheduled for December 28, 2021, which was provided in accordance with the Court's instructions, included a description of the Settlement Agreement and indicated on the Borough of Saddle River website that the February 10, 2020 Settlement Agreement, June 9, 2020 Amendment, and November 8, 2021 Second Amendment to the Settlement Agreement were available for inspection and photocopying at the Municipal Offices.

This report addresses the fairness of the Amended Settlement to the protected class of low- and moderate-income households as it relates to the provision of affordable housing. It also provides an assessment of the Borough's eligibility for a judgment of compliance and repose and the steps needed to complete the process of securing such judgment.

Fairness of Amended Settlement Agreement

The November 8, 2021 Second Amendment to the Settlement Agreement has been reviewed to determine whether any element of the Settlement would not be fair to the interests of existing and future low and moderate income households in Saddle River's housing region. This Second Amendment eliminates 78 Woodcliff Lake Road as a compliance site, and replaces it with a parcel at 25 East Allendale Road, which will become part of a 111 unit 100% affordable development proposed on the so-called "Choctaw Trail" site.

In evaluating the fairness of the Settlement, my earlier evaluation and the current review have been guided by the general principles and standards set forth in Morris County Fair Housing Council v. Boonton Twp., 197 N.J. Super. 359, 369-71 (Law Div. 1984), and I have used 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 fairness issues involved in approving a settlement of *Mount Laurel* litigation.

According to the Settlement, the Borough will address a fair share obligation consisting of

- present need (rehabilitation share) - 6 units*
- prior round obligation (1987-1999) - 162 units
- prospective need obligation (1999-2025) - 244 units

*The present need obligation need was derived from a structural survey prepared by the Borough as provided in the Settlement.

How the Settlement Addresses the Present Need

The Borough provided a structural survey in accordance with COAH rules (NJAC 5:97-6.2(a) and determined the final present need to be a 6-unit obligation. Since the Borough has determined that a 6-unit rehabilitation obligation exists, a rehabilitation program consistent with NJAC 5:97-6.2 must be developed or the Borough must partner with an appropriate agency.

How the Settlement Addresses the Prior Round Obligation

The Settlement acknowledges that the Borough can receive credit for 162 units, including 156 actual units and 6 rental bonus credits. These are identified in Table 1 below:

Table 1: Prior Round Compliance Mechanisms

Prior Round Obligation Compliance Mechanisms	Block/Lot	Units	Bonus Credits	Total Credits	Status
Villa Marie Claire – Senior/Alternative Living Arrangement		18	0	18	Completed
Saddle River Properties Family and Senior Rental	Block 1302, Lots 1, 3 & 4	76	6	82	Completed
City of Passaic - RCA		18	0	18	Completed
Borough of Ridgefield - RCA		22	0	22	Completed
Borough of Ogdensburg – RCA		22	0	22	Completed
Total		156	6	162	

How the Settlement Addresses the Third Round RDP

The Settlement acknowledges that Saddle River is entitled to a vacant land adjustment. The Borough has demonstrated a Realistic Development Potential (RDP) of 132 units, to be addressed as follows:

Table 2: Third Round RDP Compliance Mechanisms

Compliance Mechanisms	Block/Lot	Units	Bonus Credits	Credits to Third Round
SRI Allendale Road	Block 1402, Lots 23, 24 & 25	8	0	8
SRI 14 Algonquin Trail	Block 1603, Lots 1 & 2; Block 1602, Lot 1	12	0	12
Choctaw Trail and 25 E. Allendale	Block 1601, Lot 9, 10, 10.01 & 11	80 of 111)	32	112
Total		99	32	132

How the 2nd Amendment to the Settlement Addresses Choctaw Trail (Block 1601, Lot 9, 10, 10.01, 11)

The project will consist of an 111-unit 100% affordable family rental housing development. The Borough has acquired all four (4) lots with the last lot (Lot 9), which is the subject of the Second Amendment, having been acquired by the Borough on December 20, 2021. The development will meet income and bedroom mix requirements including 14 very-low - income, 42 lot-income, and 55 moderate income units with the appropriate bedroom distribution across income levels. The Borough will rezone the site within three months of the execution of the settlement agreement and provide a revised timetable with Michaels Organization demonstrating construction will commence not later than September 30, 2023. The Borough has provided information showing that the Michaels Organization was awarded 9% tax credit funding from NJHMFA. Resolution 200-20 was adopted 12/21/20 and demonstrates the Borough’s intent to bond for any shortfall.

Addressing the Third Round Unmet Need

After subtracting the RDP from the third-round obligation, the Settlement acknowledges that the Borough has an unmet need of 112 units, to be addressed, in part, through the following mechanisms:

Table 3: Third Round Unmet Need Compliance Mechanisms

Prior Round Obligation Compliance Mechanisms	Block/Lot	Units	Bonus Credit	Credits Toward Obligation
Choctaw Trail (31 out of 111 units)	Block 1601, Lots 10, 10.01 & 11	31		31
Mandatory Overlay Ordinance	Block 1302, Lots 1.02, 1.03 & 1.04			
Accessory Apartment Program		10		10
Borough-wide Mandatory Set-aside Ordinance				
Total		41		41

Compliance Discussion regarding Accessory Apartments

The Borough adopted Ordinance 19-963-C on February 25, 2019 entitled, “Allowance for Accessory Apartment units in the R-1 Zone Districts”, and this ordinance satisfied the requirement that an accessory apartment ordinance be adopted.

Compliance Regarding Mandatory Set-aside Ordinance

The Borough adopted Ordinance 21-1007 on January 18, 2021 entitled, “Affordable Housing Mandatory Set-Aside” on February 25, 2019, which satisfied this requirement. Ordinance No. 21-1007 to repeal and replace the then existing Mandatory Set-Aside Ordinance No. 19-964-C. Ordinance 21-1007 satisfied the requirement that a mandatory Borough wide set aside ordinance be adopted.

FAIRNESS EVALUATION OF THE SETTLEMENT AGREEMENT

I have previously found the predecessor agreements to the Second Amendment to be fair to the protected class of low and moderate income households, according to the five-part fairness analysis in a *Mount Laurel* lawsuit outlined in East/West Venture v. Borough of Fort Lee, 286 N.J. Super. 311, 328-329 (App. Div. 1996). That analysis is below.

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

The Settlement Agreement acknowledges that the Borough has a 244-unit third round fair share obligation. The Settlement Agreement confirms the Borough's commitment to implement inclusionary zoning, overlay zoning and the construction of a 111-unit 100% affordable housing development. There is no change in the number of units provided under the Borough's compliance plan, but the geographic location of some units has changed. The substitution of 25 E. Allendale Road for 78 Woodcliff Lake Road adds a parcel to the HMFA-approved 100% affordable development that will become part of the larger development, with its amenities and funding. Compared with the more remote and environmentally constrained 78 Woodcliff Lake Road site, which was affected by wetlands and had a limited development area, 25 E. Allendale is a major improvement because it adds to and improves the 100% affordable "Choctaw" neighborhood, making it more robust, while also eliminating disputes over water and sewer access.

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

The settlement offered by FSHC, which forms the basis for this Settlement, is derived from a methodology based on the opinion written by the Hon. Mary C. Jacobson A.J.S.C. and that FSHC asserts follows the prior round methodology as directed by the Court.

3. **Other contributions by the developer.** This prong of the East/West Venture test is not strictly applicable to a settlement that does not involve a builder/plaintiff. However, the terms of the Settlement provide that:

- a) at least half of all affordable housing units addressing the Third Round Prospective Need will be available to family households;
- b) the Borough will require at least 13 percent of all of the new affordable housing units in its Plan to be affordable to very low-income households earning 30 percent or less of median income and that at least half of these units will be available to families;
- c) at least 25 percent of the Third Round Prospective Need obligation will be met with rental units, of which at least 50 percent shall be available to families;
- d) no more than 25 percent of affordable units are to be age-restricted;
- e) rental bonuses shall be as set forth at N.J.A.C. 5:93 and shall not exceed the rental obligation (at least 25 percent of the Borough's new construction fair share obligation);

f) at least 50 percent of all affordable units in each inclusionary site will be affordable to low-income and very low-income households with the remainder affordable to moderate income households;

g) the Borough will comply with affirmative marketing and affordability regulations set forth at N.J.A.C. 5:80-26.1, *et seq.* (UHAC) except that in lieu of the requirement at N.J.A.C. 5:80-26.3(d) for 10 percent of all low- and moderate-income rental units to be affordable to households earning 35 percent or less of median income, the requirement shall be that 13% of all low and moderate income rental units shall be affordable to households earning 30 percent or less of median income;

h) the Borough will expand the list of community and regional organizations that will receive notice of the availability of affordable housing units (in the Affirmative Marketing Plan) the following additional organizations: Fair Share Housing Center, the New Jersey Conference of the NAACP, the Latino Action Network, Bergen County NAACP, Bergen County Urban League, Bergen County Housing Coalition, and the Supportive Housing Association;

i) within 90 days of the Court's approval of the settlement agreement, the Borough will adopt the Housing Element and Fair Share Plan and all required implementing ordinances to ensure that all of the foregoing occurs. (See Attachment A)

4. **Other components of the Agreement that contribute to the satisfaction of the constitutional obligation.** The process of obtaining the Court's approval of the Borough's Third Round Housing Element and Fair Share Plan, the scrutiny that document has received from FSHC, and the conditions contained in the Settlement and this report requiring the Borough to adopt certain master plan and ordinance amendments will allow the Borough to move forward in the satisfaction of its constitutional obligation.

5. **Other factors that may be relevant to the fairness of the settlement.** This Settlement is designed to ensure that the interests of lower income households will be advanced through the Court's approval. The Agreement provides for a continuing monitoring program throughout its duration and a spending plan amendment will require a review of its provisions by the Court.

The Agreement requires that "any funds deemed 'committed' by the Court" must be expended within four years of the issuance of a final judgment on the Settlement Agreement and requires annual reporting on the collection and expenditure of trust funds as well as annual reporting on the status of various components of the Fair Share Plan to address its housing obligation.

It also provides for a three-year status report regarding the satisfaction of the very low-income requirements established by the Fair Housing Act and the Settlement Agreement

and requires annual updates of regional income limits that are used to income qualify households, establish initial affordable sales prices and rents and index permitted increases in sales prices and rents.

Another factor relevant to the fairness inquiry involves whether any sites proposed for inclusionary or 100% affordable housing are acceptable in terms of the COAH rules regarding "approvable," "available," "developable" and "suitable" sites. A series of objections claim some of the compliance sites are not appropriate for affordable housing. Since the Borough and the other concerned parties will have an opportunity to present arguments and evidence in this regard at the fairness hearing, I will reserve judgment on these issues pending testimony at the hearing.

The substitutiouon of 25 E. Allendale Road for 78 Woodcliff Lake Road provides a more developable site as part of a coordinated and well funded 100% development, rather than an isolated site with disputes over water and sewer access. As a result the Second Amendment offers a better opportunity to deliver the affordable units than if 78 Woodcliff Lake Road were included.

Compliance Review

Attachment A to my July 27, 2020 Master's Report identified items needed in order for the Court to find that Saddle River Borough has created a realistic opportunity for satisfaction of the Borough's affordable housing obligation for the period from 1987 through 2025, pursuant to the Mount Laurel decisions, the Fair Housing Act, applicable COAH regulations, and the Supreme Court's decision in Re N.J.A.C. 5:96 and N.J.A.C. 5:97, 221 N.J. (2015). Those items have been addressed as follows:

1. The compliance proposals contained in Tables 1, 2 and 3 and narrative of this report and the applicable terms of the executed Settlement with FSHC shall be referenced in the Housing Element and Fair Share Plan, which, following review by the Special Master, shall be adopted and submitted to the Court for approval as part of the final Judgment of Compliance and Repose.

Compliance Discussion regarding the Housing Element and Fair Share Plan

The Borough Planning Board adopted a Housing Element and Fair Share Plan on October 26, 2020 (Resolution #20-26). The Housing Element and Fair Share Plan addresses the terms of the settlement agreement, with the exception of several items outlined in #2 below. Creditworthiness documentation has been provided. An amendment tto the HEFSP will be required to eliminate 78 Woodcliff Lake Road and include 25 E. Allendale Road.

2. Prior to the entry of an Order granting a final Judgment of Compliance and Repose, the Fair Share Plan shall be reviewed by the Special Master for compliance with the terms of the executed Settlement Agreement, the Fair Housing Act and the UHAC regulations before being adopted and submitted to the Court. The Fair Share Plan document should

include any proposed Ordinances and Resolutions needed to implement the Plan, including zoning amendments, an Affordable Housing Ordinance, a Development Fee Ordinance, an Affirmative Marketing Plan, a Rehabilitation Program description and Manual (not applicable to the Borough), a Spending Plan, resolutions appointing an Administrative Agent and a Municipal Affordable Housing Liaison, a resolution adopting the Housing Element and Fair Share Plan (Planning Board) and a resolution endorsing the Housing Element and Fair Share Plan (Governing Body).

Review of the Housing Element and Fair Share Plan and compliance terms

The following documents have been supplied to address this requirement:

- Planning Board Resolution #20-26 adopting the Housing Element and Fair Share Plan dated 10/26/2020
- Ordinance 20-992 TIHD-1, Block 1402, Lots 23, 24, and 25 (O'Donnell Site), and Block 1602, Lot 1 (Algonquin site), adopted 6/4/2020
- Ordinance 20-993 TIHD-2, Block 1603, Lots 1 and 2.01 (Algonquin Trail site), adopted 6/4/2020
- Ordinance 20-1000 AH-3, Block 1601, Lot 10, 10.01, and 11 (Choctaw Trail) and Block 1605, Lot 1 (Allendale Road), adopted 9/10/2020
- AH-4 Zone Ordinance 21-1006, adopted 1/18/2021
- AHO-5 Overlay Zone Ordinance 21-1005, adopted 1/18/2021
- Ordinance 19-964, Mandatory Set Aside ordinance adopted 2/25/2019; Ordinance 21-1007 to repeal and replace Ordinance 19-964 was introduced by Borough Council on 1/18/2021
- Ordinance 19-963, Establishing the Accessory Apartment program, adopted 2/25/2019
- Ordinance 19-965, Affordable Housing Regulations, adopted 2/25/2019; Ordinance 21-1008 amending Ordinance 19-965 was introduced by Borough Council on 1/18/2021
- Ordinance 19-966 Development Fee ordinance, adopted 2/25/2019; Ordinance 21-1009 amending Ordinance 19-996 was introduced by Borough Council on 1/18/2021
- Resolution 200-20, intent to bond in the event of shortfall, adopted 12/21/2020
- Governing Body Resolution 47-21 endorsing the Housing Element and Fair Share Plan adopted on 1/18/2021
- Municipal Housing Liaison Resolution 06-21 reappointing MHL was adopted 1/2/2021
- Resolution 68-21 adopted the Spending Plan on 3/15/2021
- Resolution 69-21 approving resolution with draft affirmative marketing plan adopted February 16, 2021.

Items needed for Compliance:

- *Accessory Apartment Operating Manual*

- *A resolution designating an Affordable Housing Administrative Agent*
3. The Spending Plan shall be prepared, submitted to the Special Master for review and comment, adopted by the Planning Board as part of the Plan and by the Borough Committee as a separate action and submitted to the Court for approval before the Borough will be permitted to expend any funds from its Affordable Housing Trust Fund.

Compliance Discussion regarding the Spending Plan

The Spending Plan adopted 3/15/21 by Resolution 68-21 satisfies the requirement to adopt a spending plan.

4. All proposed inclusionary and 100 percent affordable housing development zoning amendments shall be prepared, reviewed by the Special Master, and adopted and submitted to the Court prior to the entry of an Order granting a final Judgment of Compliance and Repose.

The Borough has adopted the following ordinances:

- Ordinance 20-992 TIHD-1, Block 1402, Lots 23, 24, and 25 (O'Donnell Site), and Block 1602, Lot 1 (Algonquin site), adopted 6/4/2020.
- Ordinance 20-993 TIHD-2, Block 1603, Lots 1 and 2.01 (Algonquin Trail site), adopted 6/4/2020.
- Ordinance 20-1000 AH-3, Block 1601, Lot 10, 10.01, and 11 (Choctaw Trail) and Block 1605, Lot 1 (Allendale Road), adopted 9/10/2020.
- Ordinance 21-1007, Mandatory Set Aside ordinance adopted 1/18/2021.
- Ordinance 19-963, Establishing the Accessory Apartment program, adopted 2/25/2019.
- Ordinance 21-1006 for the AH-4 Zone, Block 1703, Lot 15 (78 Woodcliff Lake Road), adopted 1/18/2021. Will require adoption based on outcome of the Fairness Hearing determination.
- AHO-5 Overlay Zone Ordinance 21-1005 for Block 1302, Lots 1.02, 1.03, and 1.04, adopted 1/18/2021.

5. Accessory Apartment Program

Compliance Discussion regarding the Accessory Apartment Program

Ordinance 19-963 adopted 2/25/2019 established the Accessory Apartment program.

The following item is required for compliance:

- *Accessory Apartment Operating Manual*

6. The Borough shall prepare and adopt an Affordable Housing Ordinance that reflects all provisions of the Settlement Agreement, as well as applicable UHAC and COAH

Rules and an Affirmative Marketing Plan Resolution consistent with the terms of the Settlement Agreement.

Compliance Discussion

- Ordinance 21-1008 adopted 2/16/2021 contains the Borough's Affordable Housing Regulations, and satisfies the requirement to adopt affordable housing regulations consistent with the Settlement Agreement as well as applicable COAH rules.

The Borough Council adopted an Affirmative Marketing Plan by Resolution 60-21 adopted 2/16/21, and this satisfies the requirement to adopt an affirmative marketing plan consistent with the Settlement Agreement.

7. If it has not done so already, the Borough will need to create the position of Municipal Housing Liaison by Ordinance and fill that position by Resolution of the Governing Body and the Borough will also need to designate an administrative agent.

Compliance Discussion

The Borough has not provided information regarding the designation of an Administrative Agent.

Resolution 06-21 adopted 1/2/2021 appoints an administrative agent.

Conclusion and Conditions for Fairness Determination

This report has been prepared in anticipation of the upcoming Fairness and Final Compliance Hearing before the Honorable Gregg A. Padovano, J.S.C. in the matter of the Application of the Borough of Saddle River for a Determination of *Mount Laurel* Compliance (Docket No. BER-L-6120-15). The Court is being asked to determine whether the interests of low- and moderate-income households will be served by the approval of the second amendment to the Saddle River Settlement Agreement with FSHC.

Based upon the analysis undertaken herein, I find the Settlement Agreement, as amended by the Second Amendment to the Settlement to be fair to low and moderate income households and recommend its approval by the Court.

I note that the FSHC, an affordable housing advocate and party to the Settlement Agreement, has concluded that the compliance plan contained in the Settlement Agreement is fair and reasonable to the interests of low and moderate-income households. This is significant, in light of the holding in *Morris County Fair Housing Council v. Boonton Twp.*, 197 N.J. Super, 359 (Law Div. 1984), *aff'd o.b.* 209 N.J. Super, 108 (App. Div. 1986), wherein the Court concluded that "...it may be assumed that generally a public interest organization will only approve a settlement which it conceives to be in the best interest of the people it represents."

Additionally, for the reasons provided herein, I find that Saddle River's allocation of units and credits for its prior round and third round obligation is designed to implement the March 10, 2015 decision of the N.J. Supreme Court In Re N.J.A.C. 5:96 and 5:97, insofar as can be determined at this time.

Items still needed for a Judgment of Compliance include:

- ***An Accessory Apartment Operating Manual***
- ***A resolution designating an Affordable Housing Administrative Agent.***

I recommend that the Borough be afforded 90 days to submit the remaining materials. Upon its timely compliance with all of the foregoing and approval of the final submission by the Court, Saddle River will be entitled to a final Judgment of Compliance and Repose through July 1, 2025.