IN THE MATTER OF THE APPLICATION OF TOWNSHIP OF BERNARDS, A Municipal Corporation of the State of New Jersey, Petitioner.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION SOMERSET COUNTY DOCKET NO. SOM-L-899-15 CIVIL ACTION (Mount Laurel)

I. PARTIES AND COUNSEL

At the Fairness Hearing held by this Court on October 16, 2018 the following parties and their counsel appeared:

John Belardo, Esq. of McElroy Deutsch on behalf of the Township of Bernards and Jonathan E. Drill, Esq. of Stickel Koenig Sullivan & Drill on behalf of the Township of Bernards and their Planning Board. The Township and the Planning Board submitted a Post Fairness Hearing Brief in support of its position.

Adam Gordon, Esq. on behalf of the Fair Share Housing Council ("FSHC"). Mr. Gordon also submitted a Post Fairness Hearing Brief in support of the FSHC's position.

Robert A. Kasuba, Esq. of Bisgaier Hoff on behalf of Intervenor, Bernards Plaza Associates, LLC and Crown Court Associates, LLC.

Craig M. Gianetti, Esq. of Day Pitney, LP on behalf of Interested Party, Mountainview Corp. Center. Mr. Gianetti submitted a letter joining in the position of the Township and the Planning Board.

Lourdes Cornejo-Krohn, a self-represented Interested Party appeared at and participated in the Hearing and she provided a Post Hearing Summation Brief outlining her positions.

Philip B. Caton, PP, FAICP, of Clarke, Caton, Hintz, the Court Appointed Special Master.

Robert Simon, Esq. of Herold Law appeared for various "identified property owners of Hunters Ridge Subdivision" in opposition to the Settlement Agreement. Mr. Simon submitted a Post Fairness Hearing Brief in support of his clients' positions.

II. SHORT SUMMARY OF THE MATTER BEFORE THE COURT

In this opinion, the Court will render is findings in the Fairness and Preliminary Compliance hearing held on October 16, 2018 In the Matter of the Application of the Township of Bernards, Somerset County, Docket No. SOM-L-899-15. The purpose for the hearing was for the Court to determine whether the terms of a Settlement Agreement (hereinafter "Agreement") between the Township of Bernards (hereinafter "Bernards" or "the Township") and Fair Share Housing Center (hereinafter "FSHC") is fair to the interests of low- and moderate-income households. As part of that analysis, the Court will evaluate whether the terms of the Settlement Agreement provide a realistic opportunity for the creation of low and moderate income housing for the Township to meet its fair share of the region's need for affordable housing.

The parties who participated in this matter agree that the only "contested issue" in this Fairness Hearing is whether the Settlement Agreement provides sufficiently realistic housing opportunities to satisfy the Township's Constitutional obligation.

Public notice of the hearing was published in accordance with established Mount Laurel case law. The notice properly summarized the salient points of the Settlement Agreement, directed any interested members of the public to the Township of Bernards municipal building, Office of the Township Clerk, where they could review the Agreement, described the purpose of the Court hearing on October 16, 2018 and invited written comments on the Agreement to be filed on or before October 2, 2018. (See P-1 in Evidence)

At the Hearing the court accepted the following documents which were marked into evidence before the Court:

C1	Special Master Report of Philip B. Caton, PP, FAICP dated October 15, 2018
P1	CERT OF SERVICE AND PUBLICATION OF NOTICE OF FAIRNESS HEARING
P2	RESOLUTION #2018 0390 APPROVING AND AUTHORIZING SETTLEMENT AGREEMENT BETWEEN THE TOWNSHIP AND FAIR SHARE HOUSING CENTER
P3	RES #2018 0196 AUTHORIZING SETTLEMENT AGREEMENT WITH BERNARDS PLAZA ASSOCIATES, LLC AND COURT ASSOCIATES, LLC
P4	RES #2018 0392 AUTHORIZING AND APPROVING A TOWNSHIP AFFORDABLE HOUSING AGREEMENT WITH MOUNTAINVIEW CORPORATE CENTER, LLC
P5	ORDNANCE #2384 AMENDING, REVISING AND SUPPLEMENTING THE CODE OF THE TOWNSHP OF BERNARDS, CHAPTER 21 "REVISED LAND USE ORDINANCES", REGARDING MULTIFAMILY HOUSING IN THE B-5 VILLAGE CENTER ZONE

P6	ORDNANCE #2386 AMENDING, REVISING AND SUPPLEMENTING THE CODE OF THE TOWNSHP OF BERNARDS, CHAPTER 21 "REVISED LAND USE ORDINANCES", TO CREATE A CROWN COURT OVERLAY ZONE
P7	ORDNANCE #2405 AMENDING, REVISING AND SUPPLEMENTING THE CODE OF THE TOWNSHP OF BERNARDS, CHAPTER 21 "REVISED LAND USE ORDINANCES", TO CREATE A NEW MH-1 HOUSING ZONE
P8	BERNARDS TOWNSHIP AMENDED HOUSING PLAN ELEMENT AND FAIR SHARE PLAN ADOPTED ON 9/4/18
P9	BERNARDS TOWNSHIP, DEPARTMENT OF ENGINEERING SERVICES, PLANNING BOARD REFERRAL OF ORIDNANCE #2405 FOR PLANNING REVIEW AND REPORT DATED 9/5/18
P10	AERIAL SITE PLAN EXISTING CONDITIONS OF RESIDENCE AT MOUNTAINVIEW PREPARED BY MINNO WASKO ARCHITECTS AND PLANNERS
P11	AERIAL SITE PLAN APPROVED OFFICE DEVELOPMENT OF RESIDENCE AT MOUNTAINVIEW PREPARED BY MINNO WASKO ARCHITECTS AND PLANNERS
P12	AERIAL SITE PLAN PROPOSED RESIDENTIAL COMMUNITY OF RESIDENCE AT MOUNTAINVIEW PREPARED BY MINNO WASKO ARCHITECTS AND PLANNERS
P13	AERIAL SITEPLAN PROPOSED RESIDENTIAL COMMUNITY OF RESIDENCE AT MOUNTAINVIEW PREPARED BY MINNO WASKO ARCHITECTS AND PLANNERS -REVISED
P14	CONCEPT SITE PLAN OF RESIDENCE AT MOUNTAINVIEW PREPARED BY MINNO WASKO ARCHITECTS AND PLANNERS
P15	CONCEPT SITE PLAN WITH OFFICE BUILDING OVERLAY OF RESIDENCE AT MOUNTAINVIEW PREPARED BY MINNO WASKO ARCHITECTS AND PLANNERS
P16	CONCEPTUAL GRADING PLAN WITH SEWER OVERLAY OF RESIDENCE AT MOUNTAINVIEW PREPARED BY MINNO WASKO ARCHITECTS AND PLANNERS
P17	CROSS SECTION PLAN FOR MOUNTAINVIEW PROJECT PREPARED BY GLADSONE DESIGN, INC.
O-1	LOURDES CORNEJO-KROHN LETTER TO THE COURT DATED 9/25/18
O-2	ROBERT SIMON, ESQ. LETTER TO THE PARTIES DATED 10/2/18
O-3	ROBERT SIMON, ESQ. LETTER TO THE PARTIES DATED 10/3/18
O-4	EXCERPTS FROM THE BERNARDS TWP. 2010 MASTER PLAN
O-5	EXCERPTS FROM THE BERNARDS TWP. ZONING ORDINANCE -VARIANCE TABLES

The Court also received and considered the testimony if Court Appointed Special Master, Philip B. Caton, PP, FAICP and Ronald Kennedy, P.E., a Professional Engineer who testified at

the behest of the Township. The Court also considered the cross-examination by the various parties and argument of counsel and Interested Parties.

The Special Master's Report noted the receipt of two responses to the public notice. Ms. Lourdes Cornejo-Krohn of Emerald Valley Lane and a group of residents from the nearby Hunter's Ridge development, who was represented by Robert Simon, Esq., submitted letters objecting to the proposed inclusionary development on Mountainview Boulevard. The objectors contend that the commercial character of nearby properties and limited access renders the site unsuitable for residential use. The Court has considered and addressed the concerns in the "Objectors" section of this opinion.

III. CONTEXT FOR REVIEW OF THE SETTLEMENT AGREEMENT BETWEEN BERNARDS TOWNSHIP AND THE FSHC

This Court acknowledges that settlement of Mount Laurel litigation – so long as it meets the appropriate standards for judicial approval – is clearly preferable to the adjudication of a dispute.

Among the most prominent advantages to settlement is that it creates a more civil atmosphere for further interactions between the parties. Cooperative working relationships increase the likelihood that the Township, FSHC, developers and residents of Bernards will be able to resolve differences during the coming years without resorting to Court action. Settlements typically facilitate the local compliance process and thereby expedite the delivery or rehabilitation of affordable housing.

The Settlement Agreement will be evaluated according to guidelines established by the Court in two principal cases: Morris County Fair Housing Council v. Boonton Twp. 197 N.J. Super. 359, 369-71 (Law Div. 1984) and East/West Venture v. Borough of Fort Lee 286 N.J. Super. 311 (App. Div. 1996). These cases require agreements in Mount Laurel litigation to be subject to a "Fairness Hearing." The scope of the Fairness Hearing was determined by the Appellate Division in a decision that upheld the hearing process conducted by then–Assignment Judge Peter Ciolino in East/West Venture v. Borough of Fort Lee, a case this Court's Master, Mr. Caton, served as Special Master.

In its 1996 decision, the Appellate Court ruled that a settlement between a builder Plaintiff and municipal Defendant in a Mount Laurel case may be approved by the Trial Court after a hearing which establishes that the settlement "adequately protects the interest of lower-income

persons on whose behalf the affordable units proposed by the settlement are to be built" 286 N.J. Super. 311, 329 (App. Div. 1996). The Appellate Court provided specific factors for Trial Courts to consider in making fairness determinations. These factors, adjusted as necessary for application in a settlement such as this (between a public interest advocate and a municipality) will be detailed in a subsequent section of this report.

Notwithstanding the uncertainty which continues to prevail in the statewide affordable housing realm, the Court's Special Master and the Court have utilized the "Second Round" regulations of the NJ Council on Affordable Housing (hereinafter "COAH") (N.J.A.C. 5:93) to the greatest extent practicable in the course of this review for the Court. This approach encourages uniformity in the interpretation of the Mount Laurel doctrine and is consistent with both legislative and judicial directives. The Fair Housing Act (P.L. 1985, c. 222) states,

> "The interest of all citizens, including low and moderate income families in need of affordable housing, would be best served by a comprehensive planning and implementation response to this constitutional obligation." (N.J.S.A. 52:27D-302(c))

Furthermore, the New Jersey Supreme Court, in its decision in The Hills Development Co. v. Town of Bernards, 103 NJ 1 (1986) (commonly known as Mount Laurel III) upheld the constitutionality of the Fair Housing Act, and stated,

> "Instead of varying and potentially inconsistent definitions of total need, regions, regional need, and fair share that can result from the case-by-case determinations of courts involved in isolated litigation, an overall plan for the entire state is envisioned, with definitions and standards that will have the kind of consistency that can result only when full responsibility and power are given to a single entity [COAH]." (103 N.J. at 25)

In that decision, the Supreme Court also stated that to the extent that Mount Laurel cases remained before the courts,

> "…any such proceedings before a court should conform wherever possible to the decisions, criteria and guidelines of the Council." (103 N.J. at 63)

On March 10, 2015 the N.J. Supreme Court delivered a unanimous decision In re Adoption of N.J.A.C. 5:96 & 5:97 by N.J. Council on Affordable Housing 221 N.J. 1 (2015) (also known as "Mount Laurel IV"). This decision acknowledged COAH's inability or unwillingness to adopt constitutional rules for the so-called "Third Round" of municipal affordable housing compliance.

In the absence of regulatory guidance from COAH or legislative action, the decision instructs the Trial Courts to evaluate the constitutionality of municipal Fair Share Plans.

While the Court invalidated COAH's last two attempts to promulgate Third Round rules, the Second Round rules (N.J.A.C. 5:93) are still largely intact. In fact, these rules have been relied upon by the Trial Courts in numerous compliance and fairness hearings during the "gaps" in COAH's rule-making since the Second Round ended in 1999. Furthermore, in the Mount Laurel IV decision the Supreme Court directed the Trial Courts to continue to rely on the Second Round rules, with certain specific exceptions. The parties to the Agreement have been guided by those instructions. Again, the Court's Special Master and the Court have relied upon COAH's Second Round rules and established Court precedent to evaluate the Agreement before the Court. This will promote the uniformity of approach which is clearly indicated in the Supreme Court's decisions.

This matter comes before the Court by way of Bernards' July 6, 2015 Declaratory Judgment action which sought – among other relief – a judicial determination that the Township's Housing Element and Fair Share Plan, as it may be amended and supplemented, satisfies its fair share of the regional need for low- and moderate-income housing pursuant to the Mount Laurel doctrine. Bernards sought and was granted immunity by the Court from exclusionary zoning lawsuits while it was preparing its compliance plan and negotiating the terms of the Settlement Agreement. The immunity has remained in effect from the inception of the action and through the writing of the opinion.

IV. RELEVANT BACKGROUND REGARDING BERNARDS TOWNSHIP AND "MT. LAUREL"

1. On March 13, 1989 the Township obtained substantive certification from the New Jersey Council on Affordable Housing ("COAH") with respect to its first round/first cycle

affordable housing obligation.[1] (Complaint, para. 2)

2. On June 7, 2000, the Township obtained substantive certification from COAH with respect to its second round or second cycle affordable housing obligation, which identified June 7, 2006 as the expiration date for the second round substantive certification. [2] (Complaint, para. 3)

3. On February 9, 2005, the Township obtained an extension of its Second Round Substantive Certification from COAH. (Complaint, para. 4)

4. In November 22, 2005, the Township Planning Board (the "Board") adopted and the Township endorsed a Third Round Housing Plan Element and Fair Share Plan and, on November 29, 2005, the Township submitted a petition to COAH for third round or third cycle substantive certification. [3] (Complaint, para. 5)

5. Before COAH acted on the Township's 2005 Third Round petition for substantive certification, the Appellate Division overturned COAH's Third Round Rules in In re Adoption of N.J.A.C. 5:94 and 5:95, 390 N.J. Super. 1 (App. Div. 2007). (Complaint, para. 6)

6. On December 16, 2008, the Planning Board adopted, and on December 30, 2008, the Township endorsed, an amended Third Round Housing Plan Element and Fair Share Plan (the "2008 HPE&FSP") and petitioned COAH for third round or third cycle substantive certification

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[1] Pursuant to the Fair Housing Act ("FHA"), specifically, N.J.S.A. 52:27D-314, COAH issues "substantive certification" of a municipality's Housing Plan Element of its Master Plan and related Fair Share Plan if the plans are consistent with the rules and criteria adopted by COAH, and if the plans and municipal land use ordinances make the achievement of the municipality's fair share of its regions need for low and moderate income housing realistically possible. The New Jersey Supreme Court held in So. Burlington County NAACP v. Mount Laurel Tp., 92 N.J. 158, 215, 238-239, 243 (1983) (Mount Laurel II) that every municipality located in a growth area of the State has a State constitutional obligation to provide a realistic opportunity for the construction of its fair share of it region's present and prospective low and moderate income housing need. The Court defined a "realistic opportunity" as "whether there is in fact a likelihood – to the extent economic conditions allow – that lower income housing will actually be constructed." Id. at 222. If COAH grants substantive certification, the municipality is insulated to a substantial extent from exclusionary zoning litigation for a period of what previously was six and is now ten years in accordance with N.J.S.A. 52:27D-313(a). In re Adoption of N.J.A.C. 5:96 & 5:97, 416 N.J. Super. 462, 472 (App. Div. 2010), aff'd, 215 N.J. 529 (2013).

[2] COAH's first round rules extended from 1987 through 1993, its second round rules covered a cumulative period from 1987 through 1999, and COAH readopted the second round or cycle rules in 1999, establishing an expiration date of May, 2004. In re Adoption of N.J.A.C. 5:94 and 5:95, 390 N.J. Super. 1, 11 (App. Div. 2007).

[3] Although COAH should have adopted its third round rules by 1999 when the effective date of the second round rules expired, COAH did not adopt its original third round rules until 2004. In re Adoption of N.J.A.C. 5:96 & 5:97, 416 N.J. Super. at 474.

based on the 2008 HPE&FSP for the second time. [4] (Complaint, para.7)

7. On May 13, 2010, COAH approved the Township's 2010 Third Round petition for substantive certification. Thereafter, the Appellate Division overturned COAH's second iteration of its Third Round Rules in In re Adoption of N.J.A.C. 5:96 and 5:97, 416 N.J. Super. 462 (App. Div. 2010). (Complaint, para. 8)

8. On September 26, 2013, the New Jersey Supreme Court decided In re Adoption of N.J.A.C. 5:96 & 5:97, 215 N.J. 578 (2013), which affirmed the Appellate Division's invalidation of the second iteration of COAH's Third Round Rules on the basis that the "growth share" methodology incorporated into the Third Round Rules were beyond the purview of the rulemaking authority delegated to COAH because it conflicted with the FHA. Id. at 586, 620. (Complaint, para. 9)

9. The Supreme Court "endorsed the remedy imposed by the Appellate Division," Id. at 620, which was that COAH was required to adopt new Third Round Rules within five (5) months, In re N.J.A.C. 5:96 & 5:97, 416 N.J. Super. at 511, so the effect of the Supreme Court's decision was that COAH was required to adopt a third iteration of the Third Round Rules by February 26, 2014 (as the Supreme Court's decision was issued on September 26, 2013). (Complaint, para. 10)

10. COAH failed to adopt the third iteration of the Third Round Rules by February 26, 2014 and, after motions were filed in the Appellate Division and Supreme Court, the Supreme Court issued an Order on March 14, 2014 (the "March 14, 2014 Order") that required COAH to adopt the third iteration of the Third Round Rules on or before October 22, 2014 and transmit those rules to the Office of Administrative Law (the "OAL") to permit publication of the adoption notice in the November 17, 2014 edition of the New Jersey Register. See, 220 N.J. 355, 355-357 (2014). (Complaint, para. 11)

11. The March 14, 2014 Order further provided that in the event that COAH did not adopt the third iteration of the Third Round Rules by November 17, 2014, then the Supreme Court would entertain applications for relief in the form of a motion in aid of litigant's rights, including but not limited to a request to lift the protection provided to municipalities through N.J.S.A.

[4] On June 2, 2008, COAH adopted the second iteration of its third round rules and, thereafter, on October 20, 2008, COAH adopted some amendments to the second iteration of its third round rules. In re Adoption of N.J.A.C. 5:96 & 5:97, 416 N.J. Super. at 477.

52:27D-313. (Complaint, para. 12)

12. On April 30, 2014, COAH completed the preparation of and formally approved the third iteration of the Third Round Rules and thereafter promptly forwarded them to the OAL so that the rules were published in the June 2, 2014 edition of the New Jersey Register. (Complaint, para. 13)

13. COAH met on October 20, 2014 for the purpose of adopting the third iteration of the Third Round Rules but a motion to adopt the rules failed on a 3-3 tie vote of COAH members, so the third iteration of the Third Round Rules, while vetted and recommended for adoption by COAH staff, were not adopted. (Complaint, para. 14)

14. On October 31, 2014, Fair Share Housing Center ("FSHC") filed with the Supreme Court a motion in aid of litigant's rights, seeking the lifting of the protection provided to municipalities through N.J.S.A. 52:27D-313 and an order granting other relief. (Complaint, para. 15)

15. On March 10, 2015, the Supreme Court issued the 2015 decision which decided the motion in aid of litigant's rights and held that COAH's administration process had become futile so that parties concerned about municipal compliance with constitutional affordable housing obligations, as well as municipalities that believe they are currently compliant or are ready and willing to demonstrate such compliance, would heretofore process exclusionary zoning and/or affordable housing matters in the courts. (Complaint, para. 16)

16. As to municipalities that wish to obtain an affirmative declaration of constitutional compliance, the 2015 Decision provided that they can file Declaratory Judgment actions and that notice of such actions must be provided to "interested parties" which "presumptions includes, at a minimum, the entities on the service list" in the motion in aid of litigant's rights matter. 221 N.J. at 23. (Complaint, para. 17)

17. The 2015 Decision also recognized that municipalities that had "approval" status with COAH (these municipalities that filed petitions for substantive certification with COAH along with a Housing Plan Element and Fair Share Plan and where COAH approved such petition) would have five (5) months from either the effective date of the 2015 Decision (June 8, 2015) or from the date in which the municipality filed a Declaratory Judgment action (but no later than July 8, 2015), so that Housing Plan Elements and Fair Share Plans ("HPE&FSP") would have to be submitted to the court by either November 8, 2015 or December 8, 2015. 221 N.J. at 27.

(Complaint, para. 18)

18. The Township has complied with its Third Round Mount Laurel affordable housing obligations and On June 2, 2015, the Board adopted and the Township endorsed on June 9, 2015, an amended 2015 HPE&FSP, which amended the Township's 2010 HPE&FSP that was submitted to COAH for purposes of demonstrating the Township's compliance with its Third Round Mount Laurel affordable housing obligations. (Banisch Cert., para. 20)

19. On July 6, 2015 the Township filed this action seeking (among other relief), a judicial determination that the Township Housing Element and Fair Share Plan satisfies its fair share of the regional need for low and moderate income housing.

V. THE SETTLEMENT AGREEMENT THAT IS BEFORE THE COURT

The Settlement Agreement sets forth the extent of Bernards' Prior and Third Round fair share obligations and describes the compliance plan components through which Bernards addresses those obligations. (See P-2 in Evidence)

The parties to the Agreement have agreed upon the following fair share obligations for the Township for the period from 1987 through July 1, 2025:

- Present Need (Rehabilitation Component): 44 units
- Prior Round (1987 – 1999) Obligation: 508 units
- Third Round (1999 -2025) Obligation: 873 units

The parties acknowledge that there remains much uncertainty as to whether the Appellate Division, Supreme Court, State Legislature, or an agency responsible for implementing the Fair Housing Act will take action that results in the conclusive establishment of Third Round fair share obligations. Consequently, the parties reserve all rights to address how such obligations will be calculated or addressed; however, the Agreement states explicitly that "the Township shall be obligated to adopt a Housing Element and Fair Share Plan that conforms to the terms of this Agreement and to implement all compliance mechanisms included in this Agreement, including by adopting or leaving in place any site specific zoning adopted or relied upon in connection with the Plan adopted pursuant to this Agreement; taking all steps necessary to support the development of any 100% affordable developments referenced herein; and otherwise fulfilling fully the fair share obligation as established herein." (Agreement, section 16).

The Agreement protects Bernards from having to address during the Third Round an obligation greater than what is contained in the Agreement in the event that future law, policy, or judicial action results in a larger Third Round fair share obligation. It also precludes the Township from seeking to amend the Agreement in the event of a subsequent reduction in its obligation. The parties agree that the Township will execute the compliance plan as it is set forth in the Agreement.

Finally, per Section 1 of the Agreement, the parties agree that the Township, through the adoption of a Housing Element and Fair Share Plan (hereafter "the Plan") and through the implementation of the Plan and the Agreement, satisfies its obligation under the Mount Laurel doctrine and Fair Housing Act of 1985, N.J.S.A. 52:27D-301 et seq., for the Prior Round (1987-1999) and Third Round (1999-2025).

VI. TOWNSHIP OF BERNARDS' COMPLIANCE EFFORTS

This report and the upcoming Fairness/Compliance Hearing focus on the Settlement Agreement between FSHC and the Township and the means through which the Township addresses its Prior and Third Round obligations. The Township claims it has addressed its obligation as follows:

1. Present Need: Rehabilitation Component: 44 units

Pursuant to the Agreement, the Township will conduct a housing survey of existing dwelling units to determine whether the municipal housing stock includes the 44 Present Need units identified for the Third Round. [5] After review, the Court will determine if any adjustment to the rehabilitation obligation is warranted. As indicated in the Township's Housing Element and Fair Share Plan, adopted September 4, 2018, the Township will utilize its affordable housing trust fund and Somerset County's HOME Program to assist with rehabilitation.

2. Prior Round Obligation: 508 units

The Township proposes to satisfy its Prior Round obligation with 508 existing units from compliance mechanisms listed in the table below.

[5] The Court's Master recommended that as a condition of approval (Condition 1) the Township should submit its completed survey to the Master and the Court at least 30 days prior to the date of the Final Compliance Hearing.

Prior Round Compliance Mechanisms	Type	Rental	Sales	Bonuses/ RCA	Total Units
Society Hill	Family For-sale	-	100	-	100
The Cedars	Family For-sale	-	106	-	106
Crown Court	Family Rentals	19	-	19	38
Matheny Group Home	Supportive/Special needs	6	-	6	12
Bethel Ridge Group Home	Supportive/Special needs	6	-	6	12
Veterans for Hope I	Supportive/Special needs	47	-	47	94
Veterans for Hope II	Supportive/Special needs	12	-	12	24
Our House 10 Flintlock Ct	Supportive/Special needs	4	-	4	8
Our House 130 Mt. Airy (partial)	Supportive/Special needs	3	-	3	6
Ridge Oak #2	AR-rental	39	-	10	49
Phillipsburg RCA (partial)	Rehabilitation	-	-	50	50
S. Bound Brook RCA	Rehabilitation	-	-	4	4
Substantial Compliance Reduction	-	-	-	5	5
	TOTAL	136	206	166	508

The Township has provided a copy of the resolution from COAH granting Third Round Substantive Certification (adopted May 13, 2010), and the accompanying compliance report (issued April 27, 2010). All Prior Round affordable housing mechanisms, except Our House 130 Mt. Airy, were deemed compliant by COAH.[6]

3. Third Round Need: 873 units

The Township has accepted an 873-unit Third Round obligation and will satisfy its Third Round obligation with units from compliance mechanisms listed in the table below.

[6] During the compliance phase, the Master recommended that the Township should submit a group home license and survey and any other relevant documentation for the Our House 130 Mt. Airy supportive/special needs housing [Condition 2].

Third Round Compliance Mechanisms	Type	Rental	Sales	Bonuses/ RCA	Total Units
Phillipsburg RCA (partial)	Rehabilitation	-	-	187	187
Ridge Oak #3	AR-rental	20	-	-	20
Sunrise Senior Living	AR-rental	4	-	-	4
Society Hill Ext. Controls	Family for-sale	-	99	-	99
The Cedars Ext. Controls	Family for-sale	-	106	-	106
Valley Brook I	Supportive/Special needs	60	-	60	120
Valley Brook II	Supportive/Special needs	48	-	48	96
Our House 130 Mt. Airy (partial)	Supportive/Special needs	3	-	3	6
Our House 11 Lafayette Lane	Supportive/Special needs	4	-	4	8
Our House 17 Vail Terrace	Supportive/Special needs	4	-	4	8
Cerebral Palsy/Monarch 16 Evergreen Place	Supportive/Special needs	4	-	4	8
Dewy Meadow Apts.	Family rental	30	-	30	60
Crown Court Exp. Apts.	Family rental	4	-	4	8
Crown Court Ext. Controls	Family rental	19	-	-	19
Mountainview	Family rental	62	-	62	124
	TOTAL	262	205	406	873

The 2010 COAH Compliance Report included several of the mechanisms Bernards intends to use now for the Third Round, including: Society Hill extension of controls, The Cedars extension of controls, and Ridge Oak III municipally-sponsored 100% affordable housing.

Since the 2010 COAH certification, the Township has adopted ordinances and entered into agreements to allow for the provision of affordable housing in the Third Round as discussed below.

a. Crown Court

The Township adopted Ordinance 2386 (May 15, 2018) establishing the Crown Court Overlay Zone which permits up to 24 additional units, including at least 4 affordable units, at the Crown Court Apartments. The Township has provided a copy of Ordinance 2386 and the

settlement agreement, signed March 29, 2018, between the Township and Crown Court Associates, LLC. (See P-6 and P-3 in Evidence) The settlement agreement stipulates 30-year affordability controls, and an affordable unit distribution consistent with COAH's Second Round rules. The Court's Special Master has recommended that the affordable units be distributed between all buildings proposed in the final design.

b. Dewy Meadow

The Township adopted Ordinance 2384 (May 15, 2018) which permits up to 198 units, including a 15% affordable set-aside (expected to be 30 units), as an overlay use in the B-5 Zone, otherwise known as Dewy Meadow Village. (See P-5 in Evidence) The Dewy Meadow Village affordable units are addressed in the same settlement agreement as the Crown Court affordable units and include the same 30-year affordability controls and distribution guidelines. The Court's Special Master has recommended that the affordable units be distributed between all buildings proposed in the final design.

c. Mountainview Boulevard

The Township adopted Ordinance 2405 (September 11, 2018) establishing the MH-1 Multifamily Housing zone which replaces the E-3 Office zone. (See P-7 and P-4 in Evidence) The MH-1 zone permits up to 280 units inclusive of at least 62 affordable family rental units. The Township has provided a copy of the settlement agreement between the Township and the developer, SJP Properties. The agreement states that the affordable units should be integrated with the market-rate units in one or more buildings. Per the concept site plan submitted by SJP Properties, three multi-family buildings are proposed. The Court's Master recommended that the affordable units be distributed across all three multi-family buildings.

The agreement also states that the affordable units will be subject to two 30-year terms of affordability controls with an option for the Township to cancel the second term. However, the Township has provided a letter from SJP Properties which states their intent to place 60-year affordability controls on the affordable units. Due to the developer's intent to use 60-year affordability controls, the Court's Master opined that the agreement between the Township and SJP Properties is fair.[7]

[7] During the compliance phase, the Township should provide documentation verifying affordability controls, an experienced administrative agent, income and bedroom distributions, and any other relevant

VII. ISSUES RAISED BY THE OBJECTORS AT AND PRIOR TO THE HEARING

The Special Master and the Court received objection letters from two parties, both regarding the proposed inclusionary development on Block 11301, Lot 1 located at the termination of Mountainview Boulevard ("the Mountainview site"). The first letter, dated September 25, 2018, was submitted by Ms. Lourdes Cornejo-Krohn, a nearby resident who appeared at and participated in the Hearing by cross-examining witnesses and offering argument. The second letter, dated October 2, 2018, was submitted by Robert Simon, Esq., who represents a group of residents of the nearby Hunter's Ridge development. Mr. Simon appeared at the Hearing before the Court at which time he cross-examined witnesses and offered argument. Both objections raised a variety of concerns related to the suitability of the site for supporting inclusionary development.

The Court Appointed Master testified at length concerning the suitability issues that were raised by the Objectors.

First, pursuant to N.J.A.C. 5:93-5.3.b, municipalities shall designate sites that are available, suitable, developable and approvable for low- and moderate-income housing. N.J.A.C. 5:93-1.3 defines a suitable site as a site that is adjacent to compatible land uses, has access to appropriate streets and is consistent with the environmental policies delineated in N.J.A.C. 5:93-4.

The objectors claim that the commercial and low-density residential uses surrounding the Mountainview site are incompatible with the higher-density nature of the proposed residential development. However, the Special Master offered credible testimony concerning an evolving real estate marketplace with retail and commercial buildings are becoming stranded assets which may be appropriate for repurposing for residential use. The same applies for approved but unbuilt projects like Mountainview.

The Court's Master credibly opined that there is no inherent land use conflict between the proposed residential project and the adjacent single-family detached homes. While the housing type is different, the concept plan locates townhouses between the neighboring single-family detached homes and the larger multi-family residential buildings creating an appropriate hierarchy of density and mass. From the perspective of use, the inclusionary residential proposal is arguably more compatible with the neighboring houses than the 344,000 square foot office project which

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information for all units not deemed compliant by the 2010 COAH Compliance Report or addressed by the recently adopted ordinances [Condition 3].

was approved under the prior zoning. During his testimony, he provided examples of other such projects in Bernards Township (the A&P Project) as well as projects in Lawrence Township and other municipalities.

The Court was advised that the neighbors were consulted on the landscape buffering which was intended to screen the proposed office buildings from the neighboring homes. Under the agreement between Mountainview and the Township, the Township Land Development Code on Buffers (Section 22-28.2) would apply to the proposed inclusionary development. Evergreen trees and shrubs can be planted to supplement the extensive deciduous woods which will screen the inclusionary development from the neighbors.

The second major suitability objection concerned public access to the site as Mountainview Boulevard is a private road, as well as the impact of traffic resulting from the development. The distinction between a public and a private road is essentially a legal issue. However, it should be acknowledged that private streets are permitted by Township ordinance and Mountainview Boulevard, which is private, provides access to the commercial development adjacent to the proposed inclusionary housing site. Moreover, Ordinance 2405 specifically requires that vehicular access, except for emergency access, be from Mountainview Boulevard which is identified in the ordinance as a private street. Finally, from a practical standpoint, credible evidence was provided via the testimony by Mr. Caton and Ronald Kennedy demonstrated that the proposed inclusionary housing project will generate significantly less traffic than the previously-approved office building for the same site.

Mountainview Boulevard provides exceptionally convenient access from the proposed housing site to Liberty Corner Road, Interstate 78, and the regional interstate highway system. While the Planning Board may seek an updated traffic report from the applicant as part of an eventual site plan application, based on the above and for the purposes of this Court, no traffic study is warranted at this stage for the purpose of a Fairness Hearing.

Third, objectors raised concerns about the ability of Township schools and sewers to accommodate the new housing. The provision of affordable housing is an on-going constitutional obligation and populations are continuously changing. It is the Township's responsibility to adjust its services to meet the needs of its residents.

Finally, it is important to note that the Mountainview site meets the other three criteria which characterize a site which conforms to the COAH standard as realistic to develop. The

Mountainview site is available as it has clear title and is free of encumbrances which preclude development for low- and moderate-income housing; it is approvable, as a site that may be developed for low- and moderate-income housing in a manner consistent with the rules or regulations of all agencies with jurisdiction over the site; and it is a developable site as the site has access to appropriate water and sewer infrastructure, and is consistent with the applicable area-wide water quality management plan (including the wastewater management plan).

With regard to utilities, Mr. Simon pointed out that one or more townhouse buildings, as illustrated on the concept plan for the inclusionary project, may lie in part outside the sewer service area. Whether a detailed engineering plan will show this condition remains to be seen and is beyond the level of detail required for this Hearing. However, if so, the developer – with the Township's expected cooperation – would have a number of remedies to pursue. These include first determining if sewer service is still available to buildings not completely within the service area. If not, the site plan could be redesigned or an application to extend the service area to accommodate the site plan could be submitted to the N.J. Department of Environmental Protection. For those reasons, Special Master Caton opined to the Court that the Mountainview site meets the COAH standards for the construction of affordable housing.

VIII. THE COURT'S FAIRNESS ANALYSIS

A. General Standards

The Settlement Agreement must be subjected to the fairness analysis embodied in the East/West Venture case referenced above. It is worth noting that Mt. Laurel cases 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 goals are achieved, the parties to those litigations cannot settle such cases except with the approval of the Courts and a 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, 369 (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, 326-327 (App. Div. 1996). As set forth in each of these cases, the procedures outlined in Morris County were designed to ensure that the settlement adequately protects the interests of the lower-

income people on whose behalf the suit was brought. To determine that the Settlement Agreement is fair and reasonable to low and moderate income households, this Court must find that it displays sufficient realistic opportunities for the provision of safe, decent affordable housing to satisfy the Township's constitutional housing obligations.

As articulated by the Court in East/West Venture, the Fairness Hearing on the proposed settlement was not intended to be a plenary hearing. Instead, the Fairness Hearing was intended to provide any interested party the opportunity to offer testimony (via direct or cross-examination), evidence and legal argument that the Settlement Agreement is not fair and reasonable to low and moderate income households, and is therefore noncompliant.

Before doing so, it is worth noting, as the Court did in Morris County Fair Housing Council v. Boonton Township 197 N.J. Super, 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." FSHC was heavily involved in all aspects of this case including the Township's fair share allocation and the Township's compliance plan. FSHC is the only public interest advocacy organization in New Jersey devoted exclusively to promoting the production of housing affordable to low- and moderate-income households. Consequently, FSHC's endorsement of the Settlement Agreement is a compelling factor and an indication that it believes the Agreement to be fair and reasonable.

To find that a settlement agreement is fair to low and moderate income households, a court must find that it creates sufficient realistic opportunities for the provision of 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"), 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 lacked sewer services). As set forth in the decision of the Appellate

Division in Livingston Builders, 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 satisfy the negotiated housing obligation.

The Fair Housing Act ("FHA"), specifically, N.J.S.A. 52:27D-314, provides that unless an objection is submitted, COAH (now the Mount Laurel trial courts under Mount Laurel IV, 221 N.J. 1, 6, 23-24, 29 (2015)) "shall" review a petition for substantive certification (now a declaratory judgment action) and "shall" approve it if it finds that (a) the municipality's fair share plan is consistent with the rules adopted by COAH, and (b) the ordinances and affirmative measures in the municipality's housing element and fair share plan make the achievement of the municipality's fair share of low and moderate income housing realistically possible. Under this statutory standard, the municipality has the initial burden of producing evidence but, once it satisfies that initial burden, the burden shifts to any objectors who come forward to challenge the municipal compliance plan.

This is consistent with long standing New Jersey law that the burden of proof initially is a burden of producing evidence to make a prima facie case to obtain the relief the party seeks but, once the party makes its prima facie case, the burden of proof shifts to any party challenging the relief sought. Hughes v. Atlantic City & S.R. Co., 85 N.J.L. 212, 216 (E&A 1914). As explained by the court in Kappish v. Lotsey, 76 N.J. Super. 215, 224-225 (Cty. Ct. 1962), burden of proof applies to the parties in litigation not by their party designation (i.e., plaintiff or defendant) but by "their actual relative position in the litigation as it proceeds." Finally, where a party's case depends on proving a negative – the objectors' case here depends on them proving a negative, that the Mountainview inclusionary development is not suitable – the burden of proofs falls on the party averring the negative once the Township has met its burden of moving forward. Chase Manhattan Bank v. O'Connor, 82 N.J. Super. 382, 387 (Chan. Div. 1964).

The Court notes that for a 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 are similarly set forth in N.J.A.C. 5:93-5.3. These terms are defined as follows:

> "Approval 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 area-wide water quality management plan (including the wastewater management plan) or is included in an amendment to the area-wide 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.

To determine whether terms of the Settlement Agreement are fair to low and moderate income households, the Court is to evaluate the Township's designation of properties as inclusionary sites based on the above criteria and the additional relevant standards outlined in N.J.A.C. 5:93-5.3, 5.4 and 5.6. Under N.J.A.C. 5:93-5.3(b),"[m]unicipalities shall designate sites that are available, suitable, developable and approvable, as defined in N.J.A.C. 5:93-1. In reviewing sites, the Council shall give priority to sites where infrastructure is currently or imminently available." Under N.J.A.C. 5:93-5.3(c), "[f]or each site designated for new construction of low and moderate income units, the municipality shall provide the following minimum documentation:

(1) A general description of each site to be used for inclusionary development, including, but not limited to the following: acreage, current zoning, surrounding land uses, and street access. Maps shall be submitted showing the location of all sites.

(2) A description of any environmental constraints including steep slopes, wetlands and flood plain areas. The municipality shall include calculations of the amount of acreage that is environmentally constrained and any remaining buildable acreage. Documentation shall include the appropriate wetland and flood plain maps required pursuant to N.J.A.C. 5:93-5.1.

(3) Information shall be submitted regarding location, size and capacity of lines and facilities within the service area, as well as the status of the applicable areawide water quality

management plan including the wastewater management plan. Documentation shall include maps showing the location of the sewer and water facilities; and

(4) For each site, the total number of housing units; the gross and net density of the proposed development; the total number of low and moderate income units; and the number of low and moderate income units that will be for sale and for rent.

Under N.J.A.C. 5:93-5.6(a), municipalities that choose to provide zoning for inclusionary development shall select sites that conform to the criteria in N.J.A.C. 5:93-5.3 and shall submit the information required in N.J.A.C. 5:93-5.3.

N.J.A.C. 5.93-5.6(b) provides that:

> "[t]he Council's review of municipal plans to zone for inclusionary development shall include, but not necessarily be limited to: the existing densities surrounding the proposed inclusionary site; the need for a density bonus in order to produce low and moderate income housing; whether the site is approvable, available, developable and suitable pursuant to N.J.AC 5:93-1.3: the site's conformance with the SDRP pursuant to N.J.A.C. 5:93-5.4; the existence of steep slopes, wetlands and floodplain areas on the site; the present ability of a developer to construct low and moderate income housing at a specific density; the length of time an inclusionary site has been zoned at a specific density and set-aside without being developed; and the number of inclusionary sites that have developed within the municipality at specific densities and set-asides.

Under N.J.A.C. 5:93-4.3(a):

> (a) When a community has sufficient land, but insufficient water and/or sewer to support inclusionary development, the Council shall review each possible site for inclusionary development to determine if it is realistic for the site to receive the required water and/or sewer during the period of substantive certification. The Council shall require sufficient information to determine the site's prospects of receiving infrastructure, and the site's prospects of inclusion in an areawide water quality management plan amendment, developed in accordance with the rules of the DEP. If the site had been zoned for inclusionary development, the Council shall consider how long the site had been zoned and if the developer had filed a development application.
>
> (b) If the Council determines that a site may receive water and/or sewer during the period of substantive certification, it shall require the site to be zoned for inclusionary development, or, if the site had already been zoned for inclusionary development, it shall require the continuation of that zoning. If the Council determines that a site may not receive water and/or sewer during the period of substantive certification, the Council shall not require inclusionary zoning, but may require overlay zoning requiring inclusionary development (if water and sewer

become available) and/or the imposition of a development fee consistent with N.J.A.C. 5:93-8.

The parties to this matter cannot agree as to whether the Settlement Agreement provides for a realistic opportunity for the creation of its fair share of housing to meet its constitutional obligations once those standards are applied. Evidence was offered to the Court to make that judgment limited by the applicable standards which have been described in this opinion.

B. Application of the Teachings of East/West Venture

Under the East/West Venture case the Court established criteria for evaluating the fairness of settlements between municipalities and builder plaintiffs in exclusionary zoning cases. By contrast, this Settlement involves a municipality and a public interest organization. Consequently, the East/West Venture fairness criteria must be adapted to serve the particular circumstances of this matter.

Under East/West Venture the first step is to evaluate the number and rationale for the affordable housing units to be provided by the developer(s). However, the fairness of this Settlement Agreement must be viewed from both a Township-wide perspective as well as by evaluating the proposals for development of inclusionary projects.

Evaluation of the Township's fair share obligation must begin with Bernards' fair share allocation under alternative methodologies. FSHC commissioned Dr. David Kinsey to prepare a fair share methodology which would calculate the regional need for the 1999 – 2025 period and allocate that housing need to the constituent municipalities in each housing region. Dr. Kinsey's report of May 2016 allocates Bernards a Third Round Present Need of 44 units, a Prior Round Need of 508 units and a Third Round fair share of 1,172 units, comprised of a Present Need Gap obligation of 718 and a Prospective Need of 454.

A consortium of 288 municipalities retained Econsult Solutions Inc. (hereinafter "Econsult") to prepare a fair share methodology. Bernards was a member of the consortium and designated Econsult as its expert. Econsult produced a series of expert reports and included an allocation mechanism for each municipality. According to Econsult's April 2017 report, Bernards was allocated a Present Need of 33 units, a Prior Round Need of 508 units and a total Third Round Need of 967 units, comprised of a Present Need Gap of 474 units and a Prospective Need of 493 units. Econsult's position is that municipalities should not be responsible for gap period (1999 – 2015) housing need. Nonetheless, in accordance with the Supreme Court's Decision in re Adoption

of N.J.A.C. 5:96, 221 N.J. 1 (2015) ("Mount Laurel V"), Econsult did calculate gap period obligations in April of 2017.

On March 8, 2018, Judge Mary Jacobson ruled on a constitutional fair share obligation and methodology for Mercer County. Econsult released an updated report on March 28, 2018 applying Judge Jacobson's methodology to all municipalities in the state. Using Judge Jacobson's methodology, Bernards was allocated a Present Need of 33 units, a Prior Round of 508 units, and a total Third Round need of 873 units consisting of a 435-unit gap period obligation, and a 438-unit Third Round Prospective Need obligation.

The calculations of all three methodologies are set forth in the table below and compared with the proposed Agreement:

OBLIGATION	FSHC MAY '16	ECONSULT APRIL '17	ECONSULT MARCH '18	SETTLEMENT AGREEMENT
PRESENT NEED	44	33	33	44
PRIOR ROUND	508	508	508	508
TOTAL THIRD ROUND	**1,172**	**967**	**873**	**873**
GAP	*718*[1]	*474*	*435*	*873*
PROSPECTIVE NEED	*454*	*493*	*438*	

[1] The Gap Present Need is from Kinsey's April 2017 report.

In the absence of any consensus on the methodology and in light of the calculations presented by the experts for the respective parties the Special Master convincingly opined that the fair share resolution set forth in the Settlement Agreement to be fair and reasonable to the region's low- and moderate-income households. His opinion was supported by the following:

- While the 44-unit Present Need is higher than the obligation calculated by Econsult, it matches the calculations of both FSHC and the Judge Jacobson methodology;
- The parties have accepted COAH's Prior Round obligation of 508 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"); and
- The settlement at 873 units for Bernards' Third Round Prospective Need is the equivalent of a 26% reduction from Dr. Kinsey's uncapped Third Round obligation of 1,172 units and matches Judge Jacobson's methodology and Econsult's Third Round obligation of 873 units (not including a Present Need Gap allocation). The 26% reduction is on the same

order of magnitude as reductions incorporated in many Third Round settlements approved by the Trial Courts and represents a reasonable enticement to settle for the Township while not unnecessarily lowering the housing need.

- In addition to fulfilling the terms of the Settlement, Bernards has indicated in their adopted Housing Element and Fair Share Plan that the Township will support an additional 24-32 affordable age-restricted units at the Ridge Oak development. The Township plans to amend its zoning ordinance to accommodate the construction of the affordable units upon receipt of detailed plans from the developer. This effort provides further indication of the Township's willingness to provide affordable housing.

Having addressed the fairness of the methodology by which Bernards' fair share obligation was calculated, the *East/West Venture* analysis of the number of rationale for the affordable housing units to be provided by developers should also be examined. Bernards' Fair Share Plan features three inclusionary housing developments, all of which are committed to provide family rental affordable housing along with market-rate housing. Such developments include Dewy Meadow (30 affordable units of 198 total for a 15% set-aside), Crown Court (4 affordable units of 24 total for 17% set-aside plus 19 extensions of expiring affordability controls), and Mountainview Boulevard (62 affordable units of 280 total for 22% set-aside). The number and rationale for the affordable housing units contemplated in these inclusionary developments is equal to or in excess of the 15% set-aside which is consistent with COAH rules and Court precedent.

Second, under the East/West Venture fairness analysis any other contributions being made by the prospective developer must be considered, along with any other components which contribute to the municipality's satisfaction of its Mount Laurel obligation.

C. Features of the Settlement Agreement which Advances the Township's Goals

The Settlement Agreement includes a series of features which advance the goal of meeting the housing needs of low- and moderate-income households:

1. Pursuant to the Settlement Agreement, the Township has prepared and adopted (on September 4, 2018) an updated Housing Element and Fair Share Plan. During the compliance phase, the Township agrees to prepare and adopt an associated Spending Plan, and "an ordinance providing for the amendment of the Township's Affordable Housing Ordinance and Zoning Ordinance" [Condition 4]. With regard to the Spending Plan, the Agreement requires that "any funds deemed 'committed' by the Court" must be expended within four years of the issuance of a final judgment.

2. At least half of all housing units addressing the Third Round Prospective Need shall be affordable to low- and very 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. An exception to the very low-income requirement is customarily made for affordable housing units that were constructed or granted preliminary or final site plan approval prior to July 1, 2008, which encompasses all but 246 of the units Bernards is utilizing to address its Prior Round and Third Round obligations. The Housing Element and Fair Share Plan includes calculations demonstrating compliance with the income distribution requirements.

3. At least 25% of the Township's Third Round Prospective Need shall be met through rental units, at least half of which will be rental units available to families. The Housing Element and Fair Share Plan includes calculations demonstrating compliance with the family rental requirements.

4. At least half of the units addressing the Third Round Prospective Need in total must be available to families. The Housing Element and Fair Share Plan includes calculations demonstrating compliance with the family housing requirement.

5. No more than 25% of the affordable units addressing the Township's Prior Round and Third Round obligation shall be age-restricted. The Housing Element and Fair Share Plan includes calculations demonstrating compliance with the age restriction requirements.

6. Rental bonuses shall be calculated in accordance with COAH's Second Round rules N.J.A.C. 5:93 – 5.15 (d) and shall not exceed the rental obligation. The Housing Element and Fair Share Plan includes calculations demonstrating compliance with the rental obligation.

7. All affordable housing units created pursuant to the Settlement Agreement shall comply with Uniform Housing Affordability Controls (UHAC) rules, with the exception of #2 above in which case those rules have been superseded by an amendment to the Fair Housing Act.

8. All new construction units shall be adaptable in conformance with P.L.2005, c.350/N.J.S.A. 52:27D-311(a) and -311(b) and all other applicable law.

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

10. Within 120 days of the Court's approval of the Settlement Agreement, the Township shall introduce an ordinance or ordinances providing for the amendment of the Township's Affordable Housing Ordinance to implement the terms of the Settlement Agreement and adopt an amended Housing Element and Fair Share Plan and Spending Plan in conformance with the terms of the Agreement. (See P-8 and P-9 in Evidence)

[8] The Housing Element and Fair Share Plan shall include an updated affirmative marketing plan [Condition 5].

11. On the first anniversary of the execution of the Settlement Agreement, which shall be established by the date on which it is executed by a representative of the Township, and every anniversary thereafter through the end of the period of protection from litigation referenced in the Agreement, the Township agreed to provide an annual reporting of trust fund activity to the New Jersey Department of Community Affairs, COAH, or other entity designated by the State of New Jersey, with a copy provided to FSHC and posted on the municipal website using forms developed for the purpose by the New Jersey Department of Community Affairs or COAH. The reporting shall include an accounting of all housing trust fund activity, including the source and amount of funds collected and the amount and purpose for which any funds have been expended.

12. On the first anniversary of the execution of the Settlement Agreement, and every anniversary thereafter through the end of the Agreement, the Township agrees to provide annual reporting of the status of all affordable housing activity within the municipality through posting on the municipal website and with a copy of such posting provided to FSHC.

13. The Township shall submit its midpoint realistic opportunity review on or before July 1, 2020, as required pursuant to N.J.S.A. 52:27D-313. This midpoint review permits any interested party, such as FSHC in this case, to request by motion a Court hearing regarding whether any sites in the Township's compliance plan no longer present a realistic opportunity for affordable housing development and should be replaced. While this review is statutorily sanctioned, in the event the Court finds that an affordable housing compliance mechanism should be replaced, the Court's Special Master has recommended that the Township 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 warranted since the plan which is being amended will have been approved by the Court.

14. Within 30 days of every third anniversary of the Agreement the Township 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.

D. Opinion of the Special Master Considered

In the opinion of the Court's Special Master, all of the requirements or conditions cited above contribute to Bernards' satisfaction of its Mount Laurel obligation. Moreover, the very act of settling this litigation with a public interest non-profit housing advocate advances Mount Laurel compliance.

Although much has been made of the failure of any of the objections to present expert testimony on the issues before the Court, in actuality the only expert planning testimony that was presented was that provided by the Court's Special Master. Special Master Caton offers a wealth of experience in the area of Professional Planning but also with a particular specialty in Mt. Laurel

related matters. The court finds his testimony to be considered, thoughtful, insightful, credible and compelling.

The Court adopts the Master's opinions and recommendations as credible and supported by the great weight of the evidence.

E. THE OBJECTIONS TO THE SUITABILITY OF THE MOUNTAINVIEW SITE ON THE BASIS OF THE SITE NOT HAVING "ACCESS TO AN APPROPRIATE STREET" SHOULD BE REJECTED

The objectors argue that the Mountainview site is not a suitable site because it does not have access to an "appropriate street." The Second Round COAH rules do require that an inclusionary site be "suitable" N.J.A.C. 5:93-5.6(b), and suitable is defined in the Second Round COAH rules as meaning that the site must be "adjacent to compatible land uses" and have "access to appropriate streets." N.J.A.C. 5:93-1.3. Robert Simon, Esq., on behalf of his clients, argues that the site has "no public access as is required by the MLUL," citing N.J.S.A. 40:55D-35. Further, he contends that "no recent professional analysis of traffic considerations and volumes on the local road network in and out of Mountain View Boulevard has been performed."

The Township has addressed the objectors' contentions by various arguments which will be addressed here.

1. BECAUSE PRIVATE STREETS ARE ALLOWED IN THE TOWNSHIP BY ORDINANCE, MOUNTAIN VIEW BOULEVARD HAS BEEN SAFELY USED FOR A NUMBER OF YEARS, AND THE AMOUNT OF TRAFFIC GENERATED FROM THE MOUNTAINVIEW INCLUSIONARY DEVELOPMENT WILL BE SIGNIFICANTLY LESS THAN FROM THE PREVIOUSLY APPROVED OFFICE DEVELOPMENT, THE COURT SHOULD FIND THAT MOUNTAIN VIEW BOULEVARD IS AN APPROPRIATE STREET

Bernards Township zoning ordinance section 21-21.1 requires every development to "have access to a street." See, Pa1, Ordinance section 21-21. [9] The ordinance does not require access to a "public" street. In fact, the ordinance contains provisions governing both public streets (section 21-21.2) and private streets (section 21-21.3) and the ordinance specifically allows private streets

[9] As was agreed at the conclusion of the Fairness Hearing on October 16, 2018, the Township is including with this letter various ordinance provisions not included in Exhibit O-5 and various Master Plan provisions not included in Exhibit O-4, all of which are subject to judicial notice pursuant to N.J.R.E. 201(a).

for zones where specified in an ordinance. The ordinance at issue here, Ordinance #2405, specifically provides in section 21-10.4.2.b.3 that vehicular access, except for emergency access, shall be from Mountain View Boulevard which is acknowledged in the ordinance as a private street. See, Exhibit P-7, page 2. And, while general ordinance section 21-21.2.a requires all lots to have "frontage" on a public street, the Mountainview site does, in fact, have frontage on a public street, as testified to by engineering expert Ronald Kennedy, PE. The fact that access to the site is over Mountain View Boulevard – which is a private street – is not particularly irrelevant and certainly does not render the proposed development to be "unrealistic." In fact, there is no per-se legal impediment to Mountain View Boulevard being found to be an appropriate street by reason of the fact that it is a private street.

Further, factually, the parties acknowledge that Mountain View Boulevard is the means of daily ingress and egress for all of the existing office development in the E-3 zoning district which abuts the Mountainview site. See, Exhibit O-2, page 4. As engineering expert Ronald Kennedy testified, the fact is that this private road has functioned safely for this purpose for a number of years. The objectors presented no witnesses or evidence to support a proposition that this street is unsafe for vehicular access. Moreover, from a planning and traffic engineering perspective, the proposed multi-family inclusionary affordable housing development on the Mountainview site will generate significantly less traffic than the previously approved and still in effect final site plan approval for the office building.

The objectors also point to Mr. Kennedy's testimony that although the Property relies on a private road owned by an unrelated private owner (Mountainview Corp. Association) and that the particulars regarding "control over; maintenance of or costs related to" still need to be worked out, that yet resolved detail, which can be solved by a myriad of methods, does not render the agreement unfair to the affected class. The objectors also criticize the use of the private road because it is (1) a lengthy cul-de-sac (1500 feet in length); (2) it has no side-walks; and (3) it is privately owned. For all of those reasons, the objectors contend that the "road" is inappropriate for its intended use.

Both Special Master Philip B. Caton, PP, FAICP, and engineering expert Ronald Kennedy, PE, testified that the proposed multi-family inclusionary affordable housing development on the Mountainview site will generate significantly less traffic than the previously approved office building. Special Master Caton came to that conclusion by counting the number of parking spaces provided for the previously approved office development and comparing it to the number of

parking spaces proposed for the Mountainview inclusionary development. Engineering expert Kennedy came to that same conclusion by reviewing and relying on a letter from traffic engineering expert Gary Dean, PE dated October 11, 2018, which Kennedy read into the record and which letter estimates the following substantial reductions in vehicle trips:

Use	Morning Peak Hour	Evening Peak Hour	Daily Traffic
Proposed Multi-family	129	157	2076
Approved Office	399	396	3517
DIFFERENCE	-272	-239	-1441

As such, the Court finds that because private streets are allowed in the Township by ordinance, and because Mountain View Boulevard has been safely used for a number of years and the amount of traffic generated from the Mountainview inclusionary development will be significantly less than from the previously approved office development, Mountain View Boulevard is an appropriate street, legally, factually and from a planning and engineering perspective. The proposal to use Mountain View Boulevard does not mean that the proposed development is unrealistic or that the approval of the project would be materially impeded by that feature.

2. DOES N.J.S.A. 40:55D-35 CHANGE THE FACT THAT ACCESS TO A PUBLIC STREET IS NOT REQUIRED FOR A FINDING THAT A SITE IS SUITABLE?

Mr. Simon, on behalf of his clients, argues that the site is not suitable because it has "no public access as is required by the MLUL." Simon cites N.J.S.A. 40:55D-35 for this proposition. The Court finds, however, that the argument fails as a matter of law for the following reasons.

First, N.J.S.A. 40:55D-35 does not require a site to have access to a public street. The statute provides that "[n]o permit for the erection of any building or structure shall be issued unless the lot abuts a street giving access to such proposed building or structure" and that such street "shall have been certified to be suitably improved to the satisfaction of the governing body. . . as adequate in respect to the public health, safety and general welfare of the special circumstance of the particular street." Critically, N.J.S.A. 40:55D-36 provides an appeal mechanism where, if the "enforcement of N.J.S.A. 40:55D-35 would entail practical difficulty or unnecessary hardship, or

where the circumstances of the case do not require the building or structure to be related to [such] a street," the land use board may "vary the application" of the statue and "direct the issuance of a permit subject to conditions that will provide adequate access for firefighting equipment, ambulances and other emergency vehicles necessary for the protection of health and safety . . . ." In any event, N.J.S.A. 40:55D-35 does not require a site to have access to a public street. Further, the statute does not even "come into play" until a site plan or subdivision application or application for construction permit is submitted.

Second, in as much as Mountain View Boulevard has been allowed to be used by the Township as a private road for access for the existing office building development for a number of years, it must be presumed that, prior to issuance of permits to allow the existing office development, the street was approved by the Township as suitably improved for that purpose. Significantly, no evidence or witnesses were offered to show otherwise.

Third, no case holds that N.J.S.A. 40:55D-35 is applicable to anything other than a site plan or subdivision application or application for a construction permit. And, no case holds that a site must have access to a public street for the site to be found to be suitable under COAH's rules. N.J.S.A. 40:55D-35 does not change the fact that access to a public street is not required for a finding that a site is suitable.

As such, the Court finds that the application or consideration of N.J.S.A. 40:55D-35 does not cause this project to be unrealistic so that the Court should consider a rejection of the Settlement Agreement.

3. IS "WALKABILITY" TO GOODS AND SERVICES A REQUIREMENT FOR SITE SUITABILITY?

The objectors suggest that Mountain View Boulevard is an "inappropriate street" since it does not have sidewalks and, even if the developer agreed to install sidewalks, residents would not be able to safely walk to goods and services. See, Exhibit O-1. The objectors pointed to the lack of sidewalks during his Fairness Hearing argument. The objectors' argument fails however because no case law or COAH rules provide that "walkability" to goods and services is a requirement to be considered for site suitability. In fact, Special Master Caton testified to this effect and the objectors presented no witnesses or evidence to the contrary.

Further, as Special Master Caton testified during the Fairness Hearing, most low- and moderate-income households that reside in inclusionary affordable housing developments own a

car. Thus, "walkability" is not necessary to access good and services. Special Master Caton agreed during his cross examination that, from a planning perspective, the necessity to drive is the reason that COAH included the requirement of access to appropriate roads in the definition of a suitable site. The requirement of access to appropriate roads was not for the purpose of ensuring walkable routes to goods and services.

In any event, the lack of "walkability" to goods and services does not serve as a basis for the Court to reject the Settlement Agreement.

F. IS THERE A LEGAL REQUIREMENT THAT A RECENT TRAFFIC ANALYSIS BE PERFORMED ON THE LOCAL ROAD NETWORK IN ORDER FOR THE STREET TO BE DETERMINED TO BE APPROPRIATE ?

The objectors argue that Mountainview Boulevard cannot be determined to be an appropriate street unless a recent traffic analysis is performed on the local road network in and out of Mountain View Boulevard. In that regard, they raise a host of reasons why a traffic study should be performed before the Court considers the agreement. The Court finds that the objectors' position is without legal basis for a number of reasons.

First and foremost, the law in New Jersey is that a municipality has discretion in deciding whether to re-zone a property and in what to consider in making a re-zoning determination "unless a particular performance is imposed as an imperative by the enabling statute." Yousefian v. Municipal Council of Wayne Twp., 152 N.J. Super. 111, 117-118 (Law Div. 1977), aff'd o.b., 160 N.J. Super. 145 (App. Div. 1978), certif. denied, 78 N.J. 341 (1978). There is no statutory or case law that requires a municipality to produce a traffic study prior to the Township re-zoning the Mountainview site for affordable housing.

Likewise, there is no statutory or case law that requires a municipality to produce a traffic study prior to the Township settling with SJP regarding the Mountainview site and/or prior to the court reviewing and approving the fairness of the settlement agreement. In fact, as explained by the Supreme Court in Mount Laurel II, 92 N.J. 158, 198-199 (1983), Mount Laurel compliance is supposed to be about providing the realistic opportunity to create affordable housing; it is not supposed to be about creating paper and studies that are generally sought as part of the details that are involved in the site planning for the project.

Second, there is no factual justification warranting a "recent traffic analysis" to be performed because the proposed inclusionary development will generate significantly less traffic

than the previously approved site plan for the office building. Both Special Master Caton and engineering expert Kennedy testified that the proposed multi-family inclusionary affordable housing development on the Mountainview site will generate significantly less traffic than the previously approved office building. Special Master Caton came to that conclusion by counting the number of parking spaces provided for the previously approved office development and comparing it to the number of parking spaces proposed for the Mountainview inclusionary development. Engineering expert Kennedy came to that conclusion by reviewing and relying on a letter from traffic engineering expert Gary Dean, PE dated October 11, 2018, which Kennedy read into the record and which letter estimates the following substantial reductions in vehicle trips:

Use	Morning Peak Hour	Evening Peak Hour	Daily Traffic
Proposed Multi-family	129	157	2076
Approved Office	399	396	3517
DIFFERENCE	-272	-239	-1441

Certainly the local Planning board will address the usual site planning issues at the time that the development application is considered. That occasion would be the appropriate time and place to require that a traffic report be prepared and analyzed.

Finally, once the Township has moved forward regarding its burden to demonstrate suitability, which the Court finds that it did, the burden is on the objectors to prove that the site is unsuitable. The fact that the Township did not or has not performed a "recent traffic analysis" is not a legal basis to reject the Mountainview settlement agreement and/or to overturn the MH-1 ordinance #2405. Because the objectors' position is that the Mountainview site does not have access to an appropriate street, it would be the objectors' responsibility to obtain a traffic analysis if it believed that such evidence would cause it to meet its own burden, the objectors failed to do so in this case.

G. REGARDING THE OBJECTIONS TO THE SUITABILITY OF THE MOUNTAIN VIEW SITE ON THE BASIS OF THE SITE NOT BEING ADJACENT TO COMPATIBLE USES AND HAVING EXCESSIVE DENSITY SHOULD BE REJECTED

The objectors also aver that the Mountainview site is not suitable on the basis that the site is not "adjacent to compatible uses." While one objector incorrectly cited the Third Round COAH rules for the requirement that a site be adjacent to compatible uses, see, Exhibit O-1, the Second Round COAH rules do require that an inclusionary site be "suitable" N.J.A.C. 5:93-5.6(b), and suitable is defined in the Second Round COAH rules as meaning that the site must be "adjacent to compatible land uses." N.J.A.C. 5:93-1.3. The objectors also made the additional argument that the Mountainview site has "excessive density" which makes it incompatible with his clients' neighboring R-3 zoned (2-acre lot size) single-family neighborhood. See, Exhibit O-2, page 3, point B.

1. IS THERE IS CASE LAW HOLDING AND NO PLANNING EXPERT OPINION TESTIMONY IN THE RECORD TO THE EFFECT THAT A MULTI-FAMILY INCLUSIONARY DEVELOPMENT IS INCOMPATIBLE WITH AN ADJACENT SINGLE-FAMILY LAND USE?

There is no case law holding, and no planning expert testimony in the record to the effect, that multi-family inclusionary development is incompatible with adjacent single-family land use. Indeed, both uses are the same – residential. In fact, Special Master Caton testified that that the uses are not incompatible with each other. The objectors' counsel couched his argument, that "[I]t is plainly evidence that the proposed MH-1 Zone is incompatible with the adjacent E-3 Office Zone" is ably rebutted by Mr. Caton's uncontradicted and credible expert opinion. He further testified that the proposed Mountainview inclusionary development would be an appropriate "transition" use or area between the existing office building development and the existing single-family residential developments. As such, the Court finds that the Mountainview inclusionary development should not be rejected as not being compatible with the adjoining single-family residential neighborhoods.

2. REGARDING WHETHER COAH RULES REQUIRE A COMPARISON OF THE GROSS DENSITY OF AN INCLUSIONARY DEVELOPMENT PROPERTY TO THE GROSS DENSITY OF AN ADJACENT SINGLE-FAMILY LAND USE TO DETERMINE SUITABILITY; NOT A COMPARISON OF NET DENSITY OF THE INCLUSIONARY DEVELOPMENT PROPERTY TO THE GROSS DENSITY OF THE ADJACENT SINGLE-FAMILY LAND USE

N.J.A.C. 5:93-5.6(a) provides that municipalities that "choose to provide zoning for inclusionary development shall select sites that conform to the criteria in N.J.A.C. 5:93-5.3." N.J.A.C. 5:93-5.3(b) provides that municipalities "shall designate sites that are available, suitable, developable and approvable, as defined in N.J.A.C. 5:93-1. "Suitable" as defined in N.J.A.C. 5:93-1.3 includes the requirement that the site "is adjacent to compatible land uses."

N.J.A.C. 5:93-5.6(b) provides that COAH's review (which is now the Mount Laurel trial courts' review) of municipal compliance plans for inclusionary development zoning "shall include . . . the existing densities surrounding the proposed inclusionary site . . . [and] whether the site is approvable, available, developable and suitable pursuant to N.J.A.C. 5:93-1.3." N.J.A.C. 5:93-5.6(b)(2) provides further that in all municipalities that do not seek vacant land adjustments or durational water or sewer adjustments, COAH (now the Mount Laurel trial courts) "shall generally favor a gross density of four (4) units per acre with a 15 percent [affordable housing] set-aside." The rule goes on to provide that if a municipality seeks to impose a higher set-aside, the municipality must increase the density, with the maximum example used being six (6) units per acre if the municipality seeks to impose a 20 percent set-aside. Finally, N.J.A.C. 5:93-5.6(c) provides that COAH (now the Mount Laurel trial courts) "may require higher densities in [certain] circumstances."

The Mountainview site has been zoned with a 22 percent affordable housing set-aside, and SJP (the owner of the Property) has agreed to a gross density of just 3.94 units per acre, which is slightly less than the COAH presumptive minimum density of four (4) units per acre (which is the presumptive density applicable to Bernards Township as the Township is not seeking any adjustments). Under the above cited COAH rules, the density of the Mountainview site is thus presumptively appropriate and presumptively compatible with the adjacent single-family neighborhood gross density of .25 units per acre (2-acre minimum lot size zoning). Furthermore, as noted by Special Master Caton during his testimony, Bernards Township has secured a set-aside

significantly higher than the 15 percent set-aside that COAH's rules had presumptively required for the four (4) unit per acre density.

The objectors' argument is that the net density of the Mountainview site is 16 units per acre is based on eliminating almost half the site for allegedly being "nonfunctional" (which the objectors do not define but the Court assumes to mean that it is encumbered from physical development for one reason or the other) and eliminating additional lands not in the sewer service area, thus resulting in an alleged net lot size of 17.5 acres. See, Exhibit O-2, page 3, point B. As far as the Court can determine, this position and acreage elimination have no basis in COAH's rules or case law. Also, there has been no support offered by way of planning or engineering testimony. The court rejects the position without any basis.

In fact, COAH's rules provide support for including the land that the objectors allege should be eliminated for purposes of calculating density. While applicable to a vacant land adjustment and calculating realistic development potential (RDP) so not controlling in this case, N.J.A.C. 5:93-4.2(e)2.ii is nonetheless instructive. N.J.A.C. 5:93-4.2(e)2.ii provides that municipalities "may exclude as potential sites for low and moderate income housing" wetlands, flood hazard areas and sites with slope in excess of 15%, but the rule does not require a municipality to exclude such sites. The rule goes on to provide that, where a portion of a site is unsuitable "because of flood hazard areas or inland wetlands" and a municipality decides to nonetheless include the site in its compliance plan, low- and moderate-income housing cannot be constructed on that portion of the site. However, the rule further expressly provides that "this rule shall not prohibit construction of low- and moderate-income housing on the remainder of the site." And, significantly, the rule does not exclude from the calculation of the overall size of the affordable housing site any lands that are deemed to be environmentally constrained.

As significantly, neither the above cited rule nor any other COAH rule provides for the exclusion from the calculation of the overall size of an affordable housing site lands that are "nonfunctional" (whatever that means) or lands that are not in a sewer service area. Also, the objectors presented no planning or engineering testimony to the contrary to support their position.

In any event, the Court rejects the objectors' argument as having any effect or ramification that would deter this Court from approving the settlement.

3. REGARDING THE OBJECTOR'S ARGUMENT THAT A MULTI-FAMILY INCLUSIONARY DEVELOPMENT IS INCOMPATIBLE WITH AN ADJACENT OFFICE LAND USE

The objectors have also argued that the Mountainview inclusionary development is incompatible with the adjacent office use. Yet no expert planning testimony was presented to support such a proposition. Only argument of counsel and lay opinion was offered to support their position.

In fact, Special Master Caton testified that the uses are not incompatible with each other. He further testified that the proposed Mountainview inclusionary development would be an appropriate "transition" use or area between the existing office building development and the existing single-family residential developments. As such, the Court finds that the credible evidence indicates that the Mountainview inclusionary development is compatible with the adjoining office use developments.

4. REGARDING THE OBJECTION TO THE INCLUSION OF THE MOUNTAINVIEW SITE ON THE BASIS OF THE PROPERTY'S SHAPE AND ENVIRONMENTAL CONSTRAINTS SHOULD BE REJECTED

Another of the objectors'' criticism to the Mountainview site is that the Property is "highly irregular in shape, with the acreage appendages to the north and east having no functional relationship to the proposed development of 280 dwelling units" and that the site "is burdened by environmental" constraints. See, Exhibit O-2, pages 2 -3, point A. The objectors cite to Mount Laurel II, 92 N.J. 158, 218 (1983) for the proposition that affordable housing projects need to be "located and designed in accordance with sound zoning and planning concepts." Id. at page 3. They also cites other lower court Mount Laurel cases for the proposition that environmental constraints may cause an affordable housing project to represent poor planning and not create the realistic probability of creating affordable housing. Id.

However, COAH's rules recognize that affordable housing projects can realistically be built on property containing environmental constraints. While N.J.A.C. 5:93-4.2(e)2.ii provides that municipalities "may exclude as potential sites for low and moderate income housing" wetlands, flood hazard areas and sites with slope in excess of 15%, the rule does not require a municipality to exclude such sites. The rule does provide that, where a portion of a site is unsuitable "because of flood hazard areas or inland wetlands" and a municipality nonetheless decides to

include the site in its compliance plan, low- and moderate-income housing cannot be constructed on that portion of the site. However, the rule further expressly provides that "this rule shall not prohibit construction of low- and moderate-income housing on the remainder of the site."

As to the fact that the Property is irregularly shaped, there is nothing in COAH's rules or case law that disqualifies Property from being an inclusionary development site due to irregular shape. Where lot shape and size could conceivably come into play is as an "intangible factor" which may have a negative influence upon the development of an affordable housing site. Allan-Deane Corp. v. Bedminster Twp., 205 N.J. Super. 87, 113 (Law Div. 1985). Judge Serpentelli in Allan-Deane found that because a site (so-called Site I – Segerstrom) was comprised of a number of small lots under diverse ownership which would require assemblage, it was not likely that the affordable housing proposed on the site would be built, so he rejected the site. Id. at 124.

The best evidence that the shape of the Mountainview Property and the environmental constraints on the Mountainview Property do not constitute poor planning and will not make the project unrealistic is the fact neither the shape or the environmental constraints will negatively impact the proposed inclusionary development and SJP, the owner of the Property, has agreed to construct the proposed inclusionary development on the Property. And, engineering expert Kennedy testified that the area of disturbance for the proposed Mountainview inclusionary development would be substantially similar to the area of disturbance for the previously approved office development on the Property.

Further, the objectors presented no expert planning or engineering testimony to the contrary.

The Court finds that the credible evidence supports the proposition that neither the property's shape nor environmental constraints will cause this property to be inappropriate or unrealistic for the intended purpose.

5. REGARDING THE OBJECTION TO THE MOUNTAINVIEW SITE ON THE BASIS OF LACK OF PUBIC UTILITIES

The objectors also postulate that the Mountainview site lacked public utilities. See, Exhibit O-2, page 4, point C. The objectors raised an issue during the Fairness Hearing regarding whether some of the market rate townhouses would be prohibited from hooking into the municipal sewer system by reason of the fact that two of the market rate townhouse units shown on the concept

plan attached to the settlement agreement are outside the sewer service area (SSA) line and some of the market rate townhouse units are partially in and partially out of the SSA.

As previously noted, N.J.A.C. 5:93-5.3(b) provides that municipalities "shall designate sites that are available, suitable, developable and approvable, as defined in N.J.A.C. 5:93-1. "Developable" is defined in N.J.A.C. 5:93-1.3 to mean that the site "has access to appropriate water and sewer infrastructure, and is consistent with the applicable areawide water quality management plan (including the wastewater management plan) or is included in an amendment to the areawide water quality management plan submitted to and under review by DEP."

It appears to the Court that the Mountainview site has access to appropriate water and sewer infrastructure, as was testified to by engineering expert Kennedy. Further, as Mr. Kennedy testified, the fact is that the site is in a SSA so it is consistent with the applicable wastewater management plan and is in a water service area so is consistent with the areawide water quality management plan.

As to the issue regarding whether two of the market rate townhouses would be prohibited from hooking into the municipal sewer system by reason of the fact that two units shown on the concept plan attached to the settlement agreement as outside the SSA line, the fact is that the concept plan attached to the settlement agreement is just that, it is a concept plan. SJP can move the two townhouses so that they fall within the SSA.

The objectors' argument that some of the market rate townhouses would be prohibited from hooking into the municipal sewer system by reason of the fact that the units at issue are partially in and partially out of the SSA appears to be at this juncture mere speculation. Engineering expert Kennedy credibly testified, based on his experience with municipal sewer authorities and utilities, that where portions of buildings are within the SSA the buildings have been allowed to hook into a municipal sewer system. Furthermore, the Township stipulated during the Fairness Hearing that, if necessary, the Township would support a SSA line adjustment to bring all of the townhouses entirely within the SSA.

The Court finds that the Mountainview site is "developable" in accordance with COAH's rules. Notably, COAH's rules and case law do not provide otherwise. Also. the objectors presented no expert to testify otherwise or to provide credible evidence to the contrary. Based upon the evidence provided to the Court on the subject of available utilities, the proposed development appears to be realistic and achievable.

H. REGARDING WHETHER THE MH-1 ORDINANCE IS ENTIRELY CONSISTENT WITH THE 2018 HOUSING PLAN ELEMENT AND FAIR SHARE PLAN ELEMENT OF THE MASTER PLAN SO IS NOT INCONSISTENT WITH THE MASTER PLAN AS A WHOLE

The objector's master plan inconsistency argument is based on the re-zoning of the Property from E-3 to MH-1 being contrary to the following sentence in the discussion of "Office/Employment Districts" on page 34 of the Land Use Plan element of the 2010 Master Plan: "Given the location and character of these areas, designed to respond to the interstate highway grid, the established character will remain as previously planned and zoned." See, Exhibit O-2, page 4, point E; Exhibit O-4, page 34.

The Township counters that the objective of this argument fails because it: (a) ignores the fact that the circumstances that currently exist – in 2018 – are very different than the circumstances that existed eight (8) years – in 2010; and (b) ignores the recently adopted 2018 Housing Plan Element and Fair Share Plan element of the Master Plan (the 2018 HPE&FSP), Exhibit P-8, and with which the MH-1 zone is entirely consistent. The 2018 HPE&FSP specifically recommends that the Mountainview site be zoned for the inclusionary development allowed by the MH-1 ordinance #2405. See, Exhibit P-8, page 10 (discussion of Block 11301, Lot 1).

The Township offers that in order to understand and appreciate the circumstances that have changed from 2010 to 2018, one must start with the Housing Plan Element and Fair Share Plan element of the 2010 Master Plan (the 2010 HPE&FSP). (The 2010 HPE&FSP was included in the appendix to the Township's letter brief, starting at page Pa11.) First, the 2010 HPE&FSP is based on COAH's "growth share" regulations (N.J.A.C. 5:97-1 et seq.), see Pa11, page 56 of the 2010 Master Plan, which growth share regulations were subsequently invalidated by our courts. The 2010 HPE&FSP provided that the Township had a Third-Round prospective need fair share number of 368 affordable units. See, Pa11, page 56-57 of the 2010 Master Plan. Thus, certain sites, such as the Mountainview site, which were included in the 2018 HPE&FSP were simply not needed in 2010 to meet the Township's 2010 Third Round affordable housing obligation of 368 affordable units. Such obligation would have run through the end of 2018 and, thus, even if the 2010 rules had been upheld the Township would still have had to identify additional sites at or around this time.

After the "growth share" based regulations were invalidated by the Appellate Division, and the Supreme Court subsequently affirmed the invalidation, In re Adoption of N.J.A.C. 5:96 & 5:97, 215 N.J. 578 (2013), circumstances dramatically changed. Specifically, when the Supreme Court subsequently dissolved the COAH administrative process and directed all affordable housing matters to be heard by the Mount Laurel trial judges, Mount Laurel IV, 221 N.J. 1, 35-36 (2015), the Court directed that the prior round rules (the First and Second Round rules) be used. Id. at 30.

In the recently tried fair share number case, Judge Jacobson issued a 217-page opinion utilizing the prior round rules and established a methodology for calculating fair share statewide. See, I/M/O of the Application of Princeton, Docket No. MER-L-1550-15 (Law Div. 3/8/2018). (Judge Jacobson's opinion has been filed with the court in other Mount Laurel declaratory judgment cases and is not included in the appendix but is available upon request via email.) Special Master Caton has explained that a commonly accepted extrapolation/application of Judge Jacobson's Princeton opinion based on the prior round rules reflects a Third Round prospective (and gap present) need fair share number for the Township of 873 affordable units. [10] The FSHC settlement agreement utilizes 873 as the Township's Third Round prospective (and gap present) need fair share number.

As a result, the Township contends that additional compliance sites were needed for the Township to be able to comply with its newly determined Third Round Mount Laurel constitutional obligation. Hence, the Township Planning Board adopted the 2018 HPE&FSP which specifically identifies additional sites for inclusionary development, one of which is the Mountainview site. See, Exhibit P-8, page 10 of the 2018 HPE&FSP (discussion of Block 11301, Lot 1). Recently adopted ordinance #2405 creating the MH-1 zone is entirely consistent with the 2018 HPE&FSP element of the Township Master Plan.

[10] See, "Statewide and Municipal Obligations under Jacobson Opinion," prepared by Econsult Solutions (March 28, 2018). This Econsult report has been filed with the court in other pending Mount Laurel declaratory judgment actions and is not included in the appendix but is available upon request via email.)

I. REGARDING THE TOWNSHIP'S POSITION THAT THE TOWNSHIP PLANNING BOARD REVIEWED THE MH-1 ORDINANCE AND SPECIFICALLY FOUND THAT IT WAS NOT INCONSISTENT WITH THE TOWNSHIP MASTER PLAN

Furthermore, and critically, the objectors' inconsistency argument ignores the fact that the Township Planning Board reviewed MH-1 ordinance #2405 and specifically found that it was not inconsistent with the Master Plan. Specifically, the Township Committee referred MH-1 ordinance #2405 to the Planning Board for a master plan consistency review and the Planning Board reviewed the ordinance at its meeting held on September 4, 2018 and found at that time that the ordinance was not inconsistent with the Master Plan. See, Exhibit P-9, September 5, 2018 Memo from the Planning Board Secretary to the Township Clerk and Township Attorney.

N.J.S.A. 40:55D-62a requires that all provisions of a zoning ordinance "either be substantially consistent with the land use plan element and the housing plan element of the master plan or designed to effectuate such plan elements." Significantly, the statute does not require that an ordinance be entirely consistent with both of these master plan elements. As the Supreme Court held in Manalapan Realty v. Township Committee of Manalapan, 140 N.J. 366, 384 (1995), some inconsistency is permitted "provided it does not substantially or materially undermine or distort the basic provisions and objectives of the master plan."

The Township contends that MH-1 ordinance #2405 is entirely consistent with the 2018 HPE&FSP element of the Township Master Plan. Further, the Land Use Plan element of the 2010 Master Plan states that it "is designed to implement the purposes of the MLUL . . . ." See, O-4, page 17 of the 2010 Master Plan. One of the primary purposes of the MLUL is to "encourage municipal action to guide the appropriate use or development of all lands in this State in a manner which will promote the public health, safety, morals and general welfare." N.J.S.A. 40:55D-2a. In fact, "General Objective" #1 of the 2010 Master Plan is to "encourage municipal action to guide the appropriate use or development of all lands in this State in a manner which will promote the public health, safety, morals and general welfare." See, Exhibit O-4, page 2 of the 2010 Master Plan.

Certainly it is true that zoning to create affordable housing is without dispute municipal action taken in a manner that will promote public morals and the general welfare. In fact, goal #2 of the "Housing Objectives" of the 2010 Master Plan is to "continue to meet the Township's commitment to providing its fair share of low- and moderate-income housing." See, Exhibit O-4,

page 7 of the 2010 Master Plan. MH-1 ordinance #2405 not only does not substantially or materially undermine or distort the basic provisions and objectives of the 2010 Land Use element of the Master Plan but the ordinance is consistent with those basic objectives.

Finally, where the Planning Board has determined pursuant to N.J.S.A. 40:55D-26a that a proposed zoning ordinance is not inconsistent with the Master Plan (as is the case here), such a determination is entitled to "deference and great weight." Manalapan Realty, 140 N.J. at 383. The objectors have not presented any expert planning testimony to show that the Planning Board determination of no inconsistency is erroneous. As such, the presumption of validity of the Planning Board finding that MH-1 ordinance #2405 is not inconsistent has not been overcome. The objectors have not demonstrated that a colorable inconsistency argument could, based upon the evidence before the Court, cause the development of the proposed project in accordance with the proposed zoning to be unrealistic or unachievable.

J. REGARDING THE OBJECTORS' ARGUMENTS THAT THE MOUNTAINVIEW DEVELOPMENT IS NOT INTEGRATED AND SHOULD BE REJECTED BECAUSE THE SETTLEMENT AGREEMENT AND THE PROPOSED DEVELOPMENT COMPLY WITH THE COAH RULE

Without citation to the COAH rule relating to integration of affordable units with market rate units, the objectors argued in their respective letters that the affordable units in the Mountainview development are not integrated. See, Exhibit O-2, pages 4-5, point F; Exhibit O-1, page 2.

The COAH rule on the issue, N.J.A.C. 5:93-5.6(f), provides that COAH (now the judiciary) "encourages a design of inclusionary developments that integrates the low- and moderate-income units with the market units." Not only does the COAH rule "encourage," not require integration, but the integration which is encouraged is to collocate affordable units with market rate units, not locate affordable units in any specific area of the Township. The objectors misinterpret the concept of integration as used in a Mount Laurel affordable housing context in an attempt to disqualify any inclusionary development on the Mountainview Property which abuts the objectors' single-family residential neighborhood.

Recognizing that the MH-1 ordinance #2405 requires that the affordable units in the Mountainview inclusionary development "shall be integrated with market-rate units in one or more buildings," see, Exhibit P-7, page 2 (ordinance subsection 21-10.4.2.b.4), the objectors argue that

the Mountainview development is not integrated by reason of the market rate townhouses being located at one end of the Property while the market rate and affordable rental unit buildings are located on the other end of the Property.

The objectors did not recognize that the townhouse units will be "for sale" units while the affordable units will be "rental" apartment units, and that the affordable rental units will, in fact, be integrated with market rental units in the same rental apartment building. Thus, the Mountainview development appears to comply with the COAH rule at issue, N.J.A.C. 5:93-5.6(f). The rule does not encourage, let alone require, integration of "for sale" units with "rental" units or the integration of apartment buildings with townhouses. In any event, the Court rejects the objectors' argument that there is a lack of integration of the affordable rental units with the market rate rental units so as to cause the Court to find that the ultimate development proposal is unrealistic.

The objectors also argue that there will be some sort of stigma attached to all persons who end up residing in the Mountainview development due to its location. Putting aside the fact that SJP obviously does not believe that or it would not have proposed this location or agreed to be included in the Township's compliance plan on the terms set forth in the settlement agreement, the objector does not recognize that the goal of integration has been met here and has nothing whatsoever to do with the location of the development.

Finally, Special Master Caton testified that the Mountainview settlement agreement's inclusion of the requirement to integrate the affordable rental units in one or more of the apartment buildings containing market rate rental units complies with COAH's rule. Also, the objectors did not present any expert planning testimony to the contrary.

For those reasons, the Court rejects the arguments advanced by the objectors in this section.

K. REGARDING THE ARGUMENT THAT THE MH-1 ORDINANCE IMPERMISSIBLY ALLOWS FUTURE SUBDIVISION BY RIGHT AND SHOULD BE REJECTED BECAUSE THE PROVISION IN THE ORDINANCE COMPLIES WITH THE MLUL

Without citation to the MLUL or case law, the objectors argue that the MH-1 ordinance impermissibly allows future subdivision by right, meaning subdivision approval without having to comply with any ordinance standards. See, Exhibit O-2, page 5, point G.

N.J.S.A. 40:55D-48b is the MLUL provision governing preliminary subdivision approval and this statutory section provides that the Board "shall, if the proposed subdivision complies with

the ordinance and this act, grant preliminary approval to the subdivision." In the Court's view, MH-1 ordinance #2405 does not impermissibly allow future subdivision without having to comply with any ordinance standards. The MH-1 ordinance provides that the "subdivision of land within the MH-1 zone for the purpose of financing, property management, conveyance or creation of fee simple lots for townhouse units or for the separation of apartment unit buildings from townhouse units shall be permitted by the Board, notwithstanding that after subdivision the individual lots and improvements thereon may not comply with all requirements of this chapter, provided that the pre-subdivision lot remains in compliance with the site plan approved by the Board" (emphasis added). See, Exhibit P-7, page 3 (ordinance subsection 21-10.4.2.b.16).

What this ordinance provision does is specify that the zoning ordinance bulk regulations in effect at the time of site plan approval shall continue to govern the location and separation of building and structures despite the fact that additional lots may be created for the technical purposes stated in the ordinance which, without the provision, would be prohibited due to the location of the new subdivision lot lines. As such, the Court finds that the ordinance provision does not violate the MLUL because it does not impermissibly allow future subdivision without having to comply with any ordinance standards.

L. REGARDING THE ARGUMENTS RELATING TO EXCESSIVE BUILDING HEIGHT, INCOMPATIBLE LAYOUT OF BUILDINGS AND ADVERSE VISUAL IMPACTS SHOULD BE REJECTED

Engineering expert Kennedy credibly testified and showed through a number of exhibits that there will be no adverse impacts on the surrounding residential neighborhoods by the proposed height and layout of the Mountainview inclusionary development. Mr. Kennedy offered the only expert opinion on the subject since the objectors presented no testimony and no exhibits to the contrary. The objectors' counsel's argument contained in his summation brief that the building heights are excessive is unsupported and belied by Mr. Kennedy's opinions on the subject.

Exhibit P-17 – the "Cross Section Plan" – shows site lines from the various single-family residential neighborhoods adjacent to the Property and establishes that the height of the buildings proposed in the Mountainview inclusionary development are less than the heights of the office buildings which were previously approved on the Property. Further, site cross sections "B-B" and "C-C" on Exhibit P-17 show the site lines from the nearest homes located on Van Holten Road

and on Primrose Lane, the streets on which all of Simon's clients live, and show that the view of the Mountainview development will not have any adverse impact.

Exhibit P-13 – an aerial site plan depiction of the Mountainview inclusionary development and the surrounding land uses - shows the distance between the nearest single-family homes and the Mountainview development and reflects a substantial vegetated buffer between the development and those homes and their property lines. Exhibit P-15 – an aerial site plan depiction of the Mountainview inclusionary development with an overlay of the previously approved office development – shows that the improvements related to the Mountainview inclusionary development will be contained within substantially the same area of disturbance as the previously approved office development on the Property.

The arguments relating to excessive building height, incompatible layout of buildings and adverse visual impacts are rejected as a reason to deny the fairness of the settlement agreement because those arguments are belied by the evidence in the record.

M. IS THE CHALLENGE TO THE MH-1 ORDINANCE ON THE BASIS THAT IT DOES NOT CONTAIN A FLOOR AREA RATIO (FAR) LIMITATION REJECTED BECAUSE THERE IS NO LEGAL REQUIREMENT THAT IT CONTAIN A FAR LIMITATION?

The objectors challenge MH-1 ordinance #2405 on the basis that it does not contain a floor area ratio (FAR) limitation. See, Exhibit O-2, page 5, point K.

The Court rejects the objectors' argument that the MH-1 ordinance #2405 is invalid because it does not contain a FAR limitation must be rejected as a matter of law because neither the MLUL nor case law requires the ordinance to contain a FAR limitation.

N. REGARDING WEHTHER THE MLUL OR CASE LAW REQUIRES MH-1 ORDINANCE #2405 TO CONTAIN A FAR LIMITATION

Also, Rumson Estates v. Fair Haven, 177 N.J. 338, 356 (2003) held that municipalities have the authority to adopt FAR regulations applicable to residential zoning. The Court did not hold that FAR regulations were mandatory in residential zones. In fact, N.J.S.A. 40:55D-65b provides that a zoning ordinance "may" regulate FAR. As the Rumson Court explained, pursuant to N.J.S.A. 40:55D-3, the term "shall" indicates a "mandatory requirement" whereas the term "may" indicates a "permissive action." Id. at 352. The Court finds that neither the MLUL nor case law requires that a residential zone ordinance contain a FAR limitation. The Court rejects the

objectors' argument that MH-1 ordinance #2405 is invalid because it does not contain a FAR limitation.

O. REGARDING THE TOWNSHP'S POSITION THAT IF A UNIFORMITY ARGUMENT IS BEING MADE – SUCH AS THAT IF ONE ZONE HAS A FAR LIMITATION (THE E-3 ZONE FOR EXAMPLE), ALL ZONES MUST HAVE FAR LIMITATIONS – THAT ARGUMENT MUST BE REJECTED AS A MATTER OF LAW

The Township contends that if the objectors are is making a uniformity argument – such as that if one zone has a FAR limitation (the E-3 zone for example), all zones must have FAR limitations – that argument must be rejected as a matter of law for the following reasons. N.J.S.A. 40:55D-62a provides in relevant part: "The regulations in the zoning ordinance shall be uniform throughout each district for each class or kind of building or other structure or uses of land." Non-residential zones and residential zones are not alike so regulations in each zone do not have to be alike. Further, nonresidential and residential buildings are separate classes or kinds of buildings so do not have to be treated alike. A zoning ordinance can thus include FAR limitations in non-residential zones while excluding FAR limitations in residential zones. Moreover, the Rumson Court held that uniformity "does not prohibit different classifications within a district so long as they are reasonable." 177 N.J. at 358 (citing Quinton v. Edison Park Dev. Co., 59 N.J. 571, 580 (1971).

Finally, the Appellate Division held in Tannenbaum v. Wall Board of Adj., 407 N.J. Super. 446 (Law Div. 2006), aff'd o.b., 407 N.J. Super. 371 (App. Div. 2006), that a zoning ordinance can distinguish between Mount Laurel development and non-Mount Laurel development, even within one zone district, without violating the MLUL uniformity provision. Thus, the Township - if it wished - could impose a FAR limitation in a residential non-affordable housing zone while not imposing a FAR limitation in the MH-1 zone, a residential affordable housing zone.

As such, for these reasons, the Court rejects the argument that MH-1 ordinance #2405 is invalid because it does not contain a FAR limitation.

P. REGARDING THE CHALLENGE TO THE MOUNTAINVIEW SETTLEMENT AGREEMENT ON THE BASIS THAT IT IMPERMISSIBLY REQUIRES THE PLANNING BOARD TO APPROVE THE PROPOSED DEVELOPMENT SHOULD BE REJECTED BECAUSE IT IS BELIED BY THE PROVISIONS OF THE SETTLEMENT AGREEMENT

The objectors also aver that the Mountainview settlement agreement is invalid on the basis that it impermissibly requires the Planning Board to approve the proposed development. See, Exhibit O-2, page 6, point L.

If the Mountainview settlement agreement actually required the Planning Board to approve the proposed development, that provision would be null and void as against public policy. However, this Court does not read the settlement agreement to not require that the application to be approved. Moreover, even assuming that the settlement agreement contained a provision or provisions that required the application to be approved, the provisions at issue would likely be severed from the agreement and the remainder of the settlement agreement would remain in full force and effect.

Regardless, the Court does not read the Mountainview settlement agreement as requiring that an eventual site plan application be approved. The settlement agreement is clear on this issue. Paragraph 9.8 of the agreement provides:

> Necessity of Required Approvals. The Parties recognize that the site plans required to implement the Inclusionary Development provided in this Agreement, and such other actions as may be required of the Planning Board or the Township under this Agreement, cannot be approved except on the basis of the independent reasonable judgment by the Planning Board and the Township Committee, as appropriate, and in accordance with the procedures established by law. Nothing in this Agreement is intended to constrain that judgment or to authorize any action not taken in accordance with procedures established by law, however, in accordance with procedures established by law, the Planning Board's judgment must not be arbitrary, capricious, or unreasonable in its consideration of the application. Similarly, nothing herein is intended to preclude MCC from appealing any denials of or conditions imposed by the Planning Board in accordance with the Municipal Land Use Law or taking any other action permitted by law. (emphasis added) See, Exhibit P-4, pages 9-10, paragraph 9.8.

As such, the objectors' argument that the Mountainview settlement agreement requires the Planning Board to approve the eventual site plan application must be rejected as it is belied by the language of the settlement agreement.

Q. ASSUMING FOR ARGUMENT'S SAKE ONLY THAT THE MOUNTAINVIEW SETTLEMENT AGREEMENT CONTAINED PROVISION(S) REQUIRING THE PLANNING BOARD TO APPROVE THE EVENTUAL SITE PLAN, THE UNLAWFUL PROVISION(S) OF THE SETTLEMENT AGREEMENT WOULD AND SHOULD BE SEVERED AND THE REMAINDER OF THE SETTLEMENT AGREEMENT WOULD REMAIN IN FULL FORCE AND EFFECT

Finally, assuming for argument's sake only that the Mountainview settlement agreement contained provision(s) requiring the Planning Board to approve the eventual site plan application, the provision(s) would be null and void as against public policy, but the remainder of the settlement agreement would remain in full force and effect. This result is required pursuant to paragraph 9.1 of the settlement agreement which provides:

> Severability. Unless otherwise specified, it is intended that the provisions of this Agreement are to be severable. The validity of any article, section, clause or provisions of this Agreement shall not affect the validity of the remaining articles, sections, clauses or provisions hereof. If any section of this Agreement shall be adjudged by a court to be invalid, illegal, or unenforceable in any respect, such determination shall not affect the remaining sections. See, Exhibit P-4, pages 9-10, paragraph 9.8.

As such, Simon's argument that the Mountainview settlement agreement cannot be approved because it requires the Planning Board to approve the eventual site plan application must be rejected as, even if it contained such provision(s), those unlawful provisions would be severed and the remainder of the settlement agreement would remain in full force and effect.

R. OTHER ISSUES RAISED BY THE PARTIES AND CONSIDERED BY THE COURT

1. Regarding the claim that the Mountainview Site was chosen "in haste" and without proper or sufficient information

At least one objector argued that the Mountainview Site was chosen "in haste" as the map of the Mountainview Site was only presented during the three meetings where the project was discussed. As part of that position, the objector argued that the Township (or the Court) substituted the "Valley Road" site as one that was more suitable.

A Mount Laurel trial court must approve a settlement of Mount Laurel litigation if the settlement is fair and reasonable to, and adequately protects the interests of, lower-income persons, the beneficiaries of the construction of the housing. The time within which the Township takes to

consider and choose a compliance site is irrelevant to the fairness determination that the court must make. The Township is not required to produce any particular maps or studies prior to settling a Mount Laurel case or re-zoning a site for any use, including affordable housing. Finally, in the setting of voluntary compliance, it is the Township's province to choose its compliance sites and, if a particular site is suitable, it is irrelevant if another site is as suitable or more suitable than a chosen site.

As such, the Court rejects those arguments advanced by the objector.

2. Regarding the time that the Township took to consider and choose its compliance sites

The Court finds that the amount of time a municipality takes in considering and choosing its compliance sites is simply irrelevant under statutory and case law as well as COAH rules as to the issue of site suitability and/or the issue of whether a settlement adequately protects the interests of lower-income people.

Regardless, the record in this case shows that the Township had considered the site for an extended period of time. As is reflected in the record of the Mountainview motion to intervene, the facts are that SJP submitted an interested party letter to the Township in May 2016 and filed a motion to intervene in the within declaratory judgment litigation in April, 2017 for the purpose of including the Mountainview site in the Township's compliance plan. While the Township opposed that motion, and the court denied the motion, the Township ultimately decided to include the site.

There is no statutory law, case law or COAH rule which prohibits a municipality from changing its mind and accepting a site that it earlier rejected. In fact, N.J.S.A. 52:27D-310f requires a municipality to consider "lands of developers who have expressed a commitment to provide low- and moderate-income housing." The Mountainview site's selection was the culmination of a long process of decision making. The public was on notice for over a year prior to the Mountainview settlement (at least since the intervention motion was filed) that the Mountainview site was one of several potential sites the Township had been asked to consider by various developers.

As such, the Court rejects the objection as a basis for the Court to disapprove the agreement.

3. IS A MUNICIPALITY REQUIRED TO PRODUCE ANY PARTICULAR MAPS OR STUDIES PRIOR TO SETTLING A CASE AND PRIOR TO RE-ZONING A SITE FOR ANY USE, INCLUDING AFFORDABLE HOUSING?

The law in New Jersey is that a municipality has discretion in deciding whether to re-zone a property and in what to consider in making a re-zoning determination "unless a particular performance is imposed as an imperative by the enabling statute." Yousefian v. Municipal Council of Wayne Twp., 152 N.J. Super. 111, 117-118 (Law Div. 1977), aff'd o.b., 160 N.J. Super. 145 (App. Div. 1978), certif. denied, 78 N.J. 341 (1978). Further, longstanding case law provides that a municipality may rely entirely upon planning objectives first identified during the course of litigation defending the validity of an ordinance and the burden is on the one challenging the ordinance to rule out any set of facts that reasonably supports the ordinance. Manalapan Realty v. Township Committee of Manalapan, 272 N.J. Super. 1, 8-9 (App. Div. 1994), aff'd, 140 N.J. 366 (1995).

There is no statutory or case law that requires a municipality to produce the map that LCK contends should have been produced prior to the Township re-zoning the Mountainview site for affordable housing. Likewise, there is no statutory or case law that requires a municipality to produce the map that the objectors contend should have been produced prior to the Township settling with SJP regarding the Mountainview site and/or prior to the court reviewing and approving the fairness of the settlement agreement. Further, nothing in N.J.A.C. 5:93-5.3 (the Second Round COAH rule defining site selection criteria) requires the mapping and/or studies as requested by the objectors. In fact, as explained by the Supreme Court in Mount Laurel II, 92 N.J. 158, 198-199 (1983), Mount Laurel compliance is supposed to be about providing the realistic opportunity to create affordable housing; it is not supposed to be about creating paper and studies.

For those reasons, the Court finds that the Township is not required to produce any particular maps or studies prior to settling a case or prior to rezoning a site for any use, including affordable housing.

4. ONCE A MUNICIPALLY CHOSEN SITE IS DETERMINED TO BE SUITABLE, IS IT RELEVANT IF ANOTHER SITE IS AS SUITABLE OR EVEN MORE SUITABLE THAT THE CHOSEN SITE?

As to arguments that an alternate site is as suitable or more suitable than a site included in a municipal compliance plan, Judge Serpentelli held and explained in Allan Deane v. Bedminster, 205 N.J. Super. 87, 114 (Law Div. 1985):

> Absent a builder's remedy, a municipality should have the right under Mount Laurel to choose any reasonable combination of realistic sites or realistic mechanisms that will produce the required result – the likelihood [of creating affordable housing]. . . . In many cases, neither the court nor the parties will be able to determine with any certainty which sites or mechanisms may be more or less likely. Even in those cases where it would be possible, a graduation of likeliness should not be an element of the evaluation. Rather, the court should focus upon the compliance package that the Township presents by examining each of its parts and its overall effect to determine whether the package is realistic. This standard of compliance should make it possible to achieve all the purposes of the underlying Mount Laurel doctrine while at the same time preserve the legitimate planning control which the Court sought to protect for our municipalities. . . . Finally, to those who may be excluded in the process, the test is not unfair. There is no inherent right to Mount Laurel zoning absent a builder's remedy. The Mount Laurel principals exist for the benefit of the lower income households of our State, not for those seeking rezoning. . . . A builder or property owner not so entitled [to a builder's remedy] should not be heard to upset an otherwise acceptable municipal plan simply because it does not include a site upon which lower income housing is also likely. That demands more of our towns that the Mount Laurel principles dictate. It also represents an unwarranted intrusion into the well-established prerogatives of our municipalities.

In fact, the Appellate Division in Livingston Builders, 309 N.J. Super. 370, held that it was improper for a Mount Laurel trial court to "veto" a part of Livingston's proposed settlement on the basis that one of the subject sites at issue could have provided more housing units than planned for if the owner of the site had wanted to build them. The Appellate Division held that neither the court nor the municipality can compel the construction of particular affordable housing. Id. at 380. The purpose of a fairness hearing is to ensure that the relevant evidence shows that a proposed settlement protects the necessary interests and meets the criteria established by COAH and relevant Mount Laurel case law. If so, a court should not reject it. Id. at 380-382.

While N.J.S.A. 52:27D-310f requires a municipality to consider "lands of developers who have expressed a commitment to provide low- and moderate-income housing," the statute does not require that the most suitable or most appropriate sites be selected; just that any sites selected be suitable and appropriate. Under Mount Laurel case law, having filed a voluntary declaratory judgment action, it is the Township's province to choose its compliance sites and, even if the Valley Road site is as suitable or more suitable than the Mountainview site, that is irrelevant and not a basis for this Court to reject the Mountainview site as part of the Township's Compliance Plan. Nor is it a valid a basis to reject the settlement.

S. SHOULD THE COURT FIND THAT MOUNTAINVIEW'S PAYMENT TO THE TOWNSHIP CONTINGENT ON SITE PLAN APPROVAL INAPPROPRIATE?

The Settlement Agreement at paragraph 22 provides "The Township agrees to pay FSHC's attorneys fees and costs in the amount of $15,000 within ten (10) days of the Court's approval of this Agreement pursuant to a duly-noticed fairness hearing. Mountainview has agreed to reimburse the Township for $10,000 of this fee." Id. (under the Mountainview Agreement, the $10,000 was to be placed in an escrow account upon adoption of the ordinance, to be released upon the approval of a site plan for the Mountainview development.)

The objectors argue that this agreement by Mountainview to reimburse the Township for 66.67% of attorney's fees and costs as set forth in the Mountainview agreement should be determined to be contrary to public policy and is violative of law. See Nunziato v. Planning Bd. of Edgewater, 225 N.J. Super. 124 (App. Div. 1988).

This Court has already determined in other matters in this Vicinage that a settlement agreement may include an appropriate and reasonable attorney's fee to be paid to FSHC for the invaluable and vital service that they have provided to the protected class is appropriate, fair and reasonable. The Court does not find that it is improper for the parties (FSHC and the Township) to negotiate a term which assigns some of that responsibility to a developer, such as Mountainview, who has been engaged in the mediation process, the effect of which was the incurrence of fees and expenses by the FSHC.

Also, the objectors' reliance upon Nunziato v. Planning Bd. of Edgewater, supra. is misplaced. The payment to FHSC is not a condition that requires the Planning Board's grant of site plan approval. The condition in question is contained in this separate settlement agreement

(executed pursuant to authority provided in a municipal ordinance) that was independent from the approval of a development application. The Township agreed to pay the fee to FSHC, regardless of any future approvals and thus, the term is not an improper exaction. The payment by the Township to FSHC is simply not a "blatant quid pro quo" that is payable for any future approval by Mountainview. See Nunziato, supra.

The Court does not find that the payment term is a reason to disapprove the proposed Settlement Agreement.

IX. CONCLUSION

The Court has evaluated the Settlement Agreement by and between the Township of Bernards and the Fair Share Housing Center based on the authority, procedures and standards set forth in Morris County Fair Housing Council v. Boonton Twp. 197 N.J. Super. 359, 369-71 (Law Div. 1984) and East/West Venture v. Bor. of Fort Lee, 286 N.J. Super. 311 (App. Div. 1996). For the reasons set forth in the Court's opinion, the Court finds that the subject is Settlement Agreement fair and reasonable to the interests of the protected class. The Court's approval of the Settlement Agreement is conditioned upon the Township's perfection of the settlement to be considered for final compliance approval hearing. At that time the Court will determine whether to grant "repose" to the Township .

The Settlement Agreement cites most of the actions which the parties must take to qualify for final Court approval. The most important documents will be the Township's responsibility; the Housing Element and Fair Share Plan will include a Spending Plan for any affordable housing trust funds.

The Court will set a time limit of 120 days (consistent with Section 15 of the Agreement) within which the Township will complete the actions/documents necessary for final judicial approval. The Compliance Hearing can then be scheduled and noticed to the public. At that time the Township will be required to demonstrate compliance with the terms of this Agreement and the conditions recommended by the Court's Master as noted in this opinion.

The Township's Attorney, John Belardo, will submit an Order to the Court for consideration that is reflective of the Court's opinion as a "Five Day Order."