Attorney ID: 016211980
Our File No.: C22172(AEC)

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Attorneys for Township of Chatham

IN THE MATTER OF THE TOWNSHIP OF CHATHAM FOR A JUDGMENT OF COMPLIANCE OF ITS THIRD ROUND HOUSING ELEMENT AND FAIR SHARE PLAN	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: MORRIS COUNTY DOCKET NO.: MRS-L-1659-15 (MOUNT LAUREL) *Civil Action* **CERTIFICATION OF ALBERT E. CRUZ, ESQ., IN SUPPORT OF THE TOWNSHIP OF CHATHAM'S NOTICE OF MOTION FOR APPROVAL OF DEVELOPMENT FEE ORDINANCE AND RELATED SPENDING PLAN, EXTENSION OF TIME FOR COMPLIANCE AND TEMPORARY IMMUNITY, AND ADJUSTMENT OF CONSTRUCTION START DATE (Returnable: February 14, 2020 at 1:30 P.M.)**

I, Albert E. Cruz, Esq., being of full age, hereby certify as follows:

1. I am an attorney at law of the State of New Jersey and a member of DiFrancesco, Bateman, Kunzman, Davis, Lehrer & Flaum, P.C., attorneys for the Township of Chatham.

2. I make this Certification in support of the Township's Notice of Motion for approval of the Township's Development Fee

Ordinance and related Spending Plan, Extension of Time for Compliance and Temporary Immunity from Builder's Remedy Lawsuits, and adjustment of the construction start date of the 100% municipally sponsored affordable housing development described in the December 13, 2018 Settlement Agreement between the Township and the Fair Share Housing Center, Inc.

3. As the Township Attorney, I make this Certification upon my personal knowledge.

A. Township as a Participating Municipality.

4. On March 5, 1997, the Council on Affordable Housing granted the Township Second Round Substantive Certification for the cumulative period of 1987 to 1999.

5. On December 31, 2008, the Township filed a Third Round Petition with COAH, which COAH deemed complete on May 18, 2009.

6. On March 10, 2015, the New Jersey Supreme Court decided In re Adoption of N.J.A.C. 5:96&5:97 by the Council on Affordable Housing, 221 N.J. 1 (2015).

7. On July 6, 2015, the Township filed this declaratory judgment action.

8. On May 4, 2018, a Partial Judgment on Partial Fairness Hearing approving a Settlement Agreement between the Township and the Vernon Grove Condominium Association, Inc. was entered by Judge Maryann L. Nergaard, J.S.C., extending the

affordability controls on seventy-two (72) units at the Vernon Grove Condominium, Inc.

9. On February 22, 2019, an Order on Fairness and Preliminary Compliance Hearing approving the FSHC Settlement Agreement was entered by Judge Nergaard.

10. The Township was a participating municipality before COAH in 2015 and has actively participated in the judicial process seeking a Judgment of Repose and Compliance.

B. No Pending Builder's Remedy Lawsuits.

11. There are no builder's remedy lawsuits pending against the Township.

12. Other than Sterling/Sun at Chatham, LLC, no other party sought to intervene in the Township's affordable housing declaratory judgment action.

13. On December 16, 2019, Sterling/Sun received preliminary and final site plan approval for an inclusionary development consisting of fifty-three (53) market units at the Dixiedale Farm and the twenty-four (24) affordable off-site units at Arbor Green at Chatham.

C. Agreement with Vernon Grove Condominium, Inc. to Extend Affordability Controls.

14. Prior to the Township and FSHC entering into the FSHC Settlement Agreement, the affordability controls for seventy-two

(72) condominium units at the Vernon Grove Condominium expired on September 24, 2016.

15. The Township then proceeded to negotiate with the Vernon Grove Condominium, Inc. to extend the affordability controls and on May 25, 2017 authorized a Settlement Agreement with Vernon Grove to extend those controls for thirty (30) years. An Amendment to the Master Deed extending the affordability controls was recorded with the Morris County Clerk on May 1, 2018.

16. Attached as Exhibit A is a copy of the Amendment to Master Deed.

17. As stated above, on May 4, 2018, Judge Nergaard entered a Partial Judgment and Partial Fairness Hearing approving the Settlement Agreement between the Township and Vernon Grove. This occurred well before the FSHC Settlement Agreement on December 13, 2018.

18. After the Partial Judgment, the Township proceeded to make payments to Vernon Grove in the absence of a settlement with FSHC and in the absence of FSHC agreeing that the Township would receive credit for the extension of affordability controls at Vernon Grove.

19. The Vernon Grove Settlement Agreement required that the Township make a one (1) time payment of $60,000.00 for parking

lot improvements, and annual payments of $29,000.00 for thirty (30) years for capital improvements and maintenance at Vernon Grove.

20. Accordingly, the Township was at risk of having to make the payments to Vernon Grove but not receive credit for the extension of affordability controls until a settlement was reached with FSHC.

D. Approval of Development Fee Ordinance and Spending Plan.

21. On December 19, 2019, the Township Committee adopted Ordinance 2019-22 titled "An Ordinance of the Township of Chatham, County of Morris, State of New Jersey, Amending Chapter XXIX, titled 'Affordable Housing' of the Revised General Ordinances to Add a New Subsection 29-2, titled 'Development Fees'."

22. A true copy of the Development Fee Ordinance is attached as Exhibit B.

23. On the January 30, 2020 Township Committee Agenda, the Township Clerk anticipates that a Resolution authorizing a Spending Plan, a Resolution authorizing a Dedication by Rider for the Affordable Trust Fund and a Resolution expressing an intent to bond will be considered by the Township Committee.

24. A true copy of the draft Spending Plan is attached as Exhibit C.

25. As stated above, the Township is a participating municipality which contractually committed to and made payments to Vernon Grove to preserve the affordability controls on seventy-two (72) units, and the Township made those payments from the general revenue and operating budget and not an Affordable Housing Trust Fund.

26. Through this motion, the Township seeks approval of the Development Fee Ordinance and Spending Plan to begin to collect development fees.

27. While I realize that the Development Fee Ordinance and Spending Plan are reviewed at the time of the Compliance Hearing, the Township requests that the Ordinance and Plan be reviewed and approved at this time because the Township moved forward to extend the affordability controls at Vernon Grove and made the associated payments.

D. In the Matter of the Application of the Borough of Englewood Cliffs.

28. A true copy of the August 27, 2019 Order and Letter Opinion in In the Matter of the Application of the Borough of Englewood Cliffs, Docket No. BER-L-6119-15, are attached as Exhibit D.

29. I hereby certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements are willfully false, I am subject to punishment.

Albert E. Cruz

Dated: January 9, 2020

Exhibit A

Morris County Recording Cover Sheet

Honrable Ann F. Grossi, Esq.
Morris County Clerk

MORRIS COUNTY, NJ
Ann F. Grossi
AMND-OR BOOK 23336 PG 727
RECORDED 05/01/2018 10:45:52
FILE NUMBER 2018023696
RCPT # 1348458; RECD BY: SKEEFE eRecord
RECORDING FEES 80.00
INDEX FEE

Official Use Only - Realty Transfer Fee	*Official Use Only - Barcode*
Date of Document: 2017-09-19	Type of Document: AMENDMENT TO MASTER DEED
First Party Name: Vernon Grove Condominium Association, Inc.	Second Party Name: Vernon Grove Condominium Association, Inc.
Additional Parties:	

THE FOLLOWING SECTION IS REQUIRED FOR DEEDS ONLY	
Block:	Lot:
Municipality:	
Consideration:	
Mailing Address of Grantee:	

THE FOLLOWING SECTION IS FOR ORIGINAL MORTGAGE BOOK & PAGE INFORMATION FOR AN ASSIGNMENT, RELEASE, OR SATISFACTION OF A MORTGAGE OR AN AGREEMENT RESPECTING A MORTGAGE	
Original Book: 2889,	Original Page: 681,

MORRIS COUNTY RECORDING COVER SHEET
Please do not detach this page from the original document as it contains important recording information and is part of the permanent record.

WARNING: Information contained on the Recording Cover Sheet must exactly match the information within the attached document or the document will be rejected and returned.

AMENDMENT TO THE MASTER DEED EXTENDING AFFORDABILITY CONTROLS
THIRTY YEARS FROM SEPTEMBER 24, 2016

Dated: 9/19/17

Prepared By:

Daniel Barros

Daniel Barros, Esq.

Record and return to:
Cutolo Barros LLC
151 Highway 33 East, Suite 204
Manalapan, New Jersey 07726

AMENDMENT TO THE MASTER DEED EXTENDING AFFORDABILITY CONTROLS THIRTY YEARS FROM SEPTEMBER 24, 2016

WHEREAS, the Association was established and exists as a non-profit corporation and by virtue of a certain Master Deed, recorded on September 24, 1986, in the Office of the Clerk of Morris County in Deed Book 2889, Page 681, *et seq.*, as may be amended (the "Master Deed"); and

WHEREAS, Article 30, Section B of the Master Deed provides, in part, that, "[t]his Master Deed may be amended at any time after the date hereof by a vote of at least two-thirds (2/3) of all Unit Owners at any meeting of the Association duly held in accordance with the provisions of the By-Laws of the Association, provided, however, that any such amendment shall have been approved in writing by each bank, mortgage banker or other institutional holder of a first mortgage on any Unit, which approval shall not be unreasonably withheld, and provided that any such amendment shall not impair the property rights of any Unit Owner or be contrary to the requirements of the Condominium Act, N.J.S.A. 46:8b-1 et. seq., as amended and as the same may from time to time be amended. No amendment shall be effective until recorded in the Office of the Clerk of Morris County, New Jersey..."; and

WHEREAS, Article 14 of the Master Deed provides, in pertinent part, "[e]ach Owner or occupant of a Unit shall comply with, and shall assume ownership or occupancy subject to, law, rules and regulations of governmental authorities having jurisdiction over the Condominium, the provisions of this Master Deed, the Articles of Incorporation, the By-Laws and Rules and Regulations of the Condominium Association and the Community Association and any other documents, amendments or supplements to the foregoing as described in Article 2 hereof."; and

WHEREAS, Article 14 of the Master Deed provides "[u]pon acceptance of a Deed to a Unit, each Unit Owner shall automatically become a member of the Condominium Association and the Community Association and shall be a member for so long as he shall hold legal title to his Unit, subject to all provisions of this Master Deed, the Condominium Act, the Articles of Incorporation, the By-Laws and the Rules and Regulations which may now or hereafter be established for or by such Condominium and Community Association."; and

WHEREAS, Article 17 Section 1 of the Master Deed provides that "[e]ach Condominium Unit Owner, by virtue of his being the owner of a Unit in the Condominium, and each owner of other real property within the Community, by virtue of such ownership, will automatically become a member of the Community Association and does hereby covenant and agree to be bound by all of the provisions contained in the Condominium Documents including, but not limited to, the By-Laws of the Community Association, as such documents presently exist or as they may be amended in the future."; and

WHEREAS, Article 17 Section 3 of the Master Deed provides that "[e]ach Condominium Unit Owner, by virtue of his being the Owner of a Unit in the Condominium, does hereby covenant and agree to be bound by all of the restrictions, rules and regulations established by the Glenwood Housing Corporation, including, without limitation, those provisions contained in the Glenwood Housing Corporation's Procedures for Selection and Resale, as such document presently exists or as it may be amended from time to time. The provisions of such Procedures for Selection and Resale, which is included as a part hereof as Exhibit "I", include without limitation eligibility

criteria for the selection of purchasers of Units, restrictions on pricing and rental of Units and resale restrictions and requirements. Such restrictions shall run for a period of thirty (30) years following the recording of this Master Deed."; and

WHEREAS, Article 17 Section 5 of the Master Deed provides that "[t]he rights, restriction, licenses, privileges, benefits and burdens established by and under this Article of the Master Deed shall be perpetual, except that the restrictions on resale and leasing contained in Glenwood Housing Corporation's Procedures for Selection and Resale shall expire on the thirty - first anniversary of the recording of this Master Deed, and shall run with the land. They shall continue for as long as any portion of the Condominium Property remains subject to the provisions of the Condominium Act. All of the provisions thereof shall be binding upon and shall inure to the benefit of the owner of all or of any part thereof or interest therein, and his heirs, executors, administrators, successors and assigns, but the same are not intended to create nor shall they be construed as creating any rigjhts in or for the benefit of the general public.";

WHEREAS, Article 24 of the Master Deed provides that "[e]ach Owner or occupant of a Unit shall comply with, and shall assume ownership or occupancy subject to laws, rules and regulations of governmental authorities having jurisdiction over the Condominium, the provisions of this Master Deed, the Articles of Incorporation, By-Laws and Rules and Regulations of the Condominium Association and any other documents, amendments or supplements to the foregoing as described in Article 2M hereof, the Articles of Incorporation, By-Laws and Rules and Regulations of the Community Association and to the Glenwood Housing Corporation's Procedures for Selection and Resale."; and

WHEREAS, the Board of Trustees of the Association and the Membership decided to amend the Master Deed as set forth below; and

WHEREAS, a proposed amendment to the Master Deed was placed before the Membership of the Association for approval; and

WHEREAS, the necessary quorum of Members was present, either in person or by proxy, to conduct the meeting; and

WHEREAS, at least two thirds (2/3) of all Members attending a special meeting on September 19, 2017, either in person or by proxy, did indeed vote in favor of amending the Master Deed and By-Laws; and

WHEREAS, the Board of Trustees has determined that it is in the best interest of the Association to have such Amendment recorded in the Morris County Clerk's Office, the Amendment is now hereby submitted for recording in the Morris County Clerk's Office.

NOW, THEREFORE, BE IT RESOLVED THAT:

1. The Members of the Association voted to amend and did so amend Article 17.3 of the Master Deed to read as follows, with the amended language being set forth in bold:

> Each Condominium Unit Owner, by virtue of his being the Owner of a Unit in the Condominium, does hereby covenant and agree to

be bound by all of the restrictions, rules and regulations established by the Glenwood Housing Corporation, including, without limitation, those provisions contained in the Glenwood Housing Corporation's Procedures for Selection and Resale, as such document presently exists or as it may be amended from time to time. The provisions of such Procedures for Selection and Resale, which is included as a part hereof as Exhibit "I", include without limitation eligibility criteria for the selection of purchasers of Units, restrictions on pricing and rental of Units and resale restrictions and requirements. **Such restrictions shall run for a period of thirty (30) years from September 24, 2016 and the affordability control restrictions are extended on each individual Unit in Vernon Grove Condominium for thirty (30) years from September 24, 2016.**

2. All other terms and conditions of the Master Deed and By-Laws remain in full force and effect.

3. Should any provision hereof be determined to be invalid, the remaining provisions hereof shall remain in full force and effect.

4. Any provision contained within any previously adopted resolution or amendment of the Association that conflicts with any provisions set forth herein shall be deemed void and the provision contained herein shall govern.

IN WITNESS WHEREOF, Vernon Grove Condominium Association, Inc. has caused this instrument to be executed by its duly authorized representative this 19 day of SEPTEMBER, 2017.

Witness/Attestator
[complete below]

Signature: Jennifer Kerwin

Name: JENNIFER KERWIN

Title: Secretary

Date: [m] 9 / [d] 19 / [y] 2017

Vernon Grove Condominium Association, Inc.
[complete below]

Signature: Andrea Vezzosi-Cereza

Name: ANDREA VEZZOSI-CEREZA

Title: President

Date: [m] 9 / [d] 19 / [y] 2017

CORPORATE ACKNOWLEDGMENT

STATE OF NEW JERSEY)
): SS.
COUNTY OF Morris)

I CERTIFY that on the 19 day of September 2017, [print] Jennifer Kerwin personally appeared before me and this person acknowledged under oath, to my satisfaction, that:

(a) this person is the Secretary of Vernon Grove Condominium Association, Inc, a non-profit corporation of the State of New Jersey, named in this document;

(b) this person signed this document as attesting witness for the proper corporation officer who is [print] Andrea Verzosi-Cerza, the President of the corporation;

(c) this person knows the proper corporate seal of the corporation and the proper corporate seal was affixed; and

(d) this document was signed and delivered by the corporation as its voluntary act and deed by virtue of authority from its Board of Trustees.

Signature: Jennifer Kerwin

Name: Jennifer Kerwin

Title: Secretary

[notarize]
Signed and sworn before me on
September 19th, 2017.

Heidy E. Jimenez
NOTARY PUBLIC OF NEW JERSEY

My Commission Expires: _____

HEIDY E. JIMENEZ
Notary Public - State of New Jersey
My Commission Expires May 24, 2021

Exhibit B

ORDINANCE 2019-22

AN ORDINANCE OF THE TOWNSHIP OF CHATHAM, COUNTY OF MORRIS, STATE OF NEW JERSEY, AMENDING CHAPTER XXIX, TITLED "AFFORDABLE HOUSING" OF THE REVISED GENERAL ORDINANCES TO ADD A NEW SUBSECTION 29-2, TITLED "DEVELOPMENT FEES"

BE IT ORDAINED by the Township Committee of the Township of Chatham, in the County of Morris, State of New Jersey, as follows:

Section 1. Subsection 29-2 titled "Development Fees" of Revised General Ordinances of the Township of Chatham, is hereby added as follows:

29-2 Development Fees.

§29-2.1 Purpose

A. In Holmdel Builder's Association v. Holmdel Township, 121 N.J. 550 (1990), the New Jersey Supreme Court determined that mandatory development fees are authorized by the Fair Housing Act of 1985 ("Act"), N.J.S.A. 52:27D-301 et seq., and the State Constitution, subject to the Council on Affordable Housing's ("COAH's") adoption of rules.

B. Pursuant to P.L.2008, c.46 section 8 (N.J.S.A. 52:27D-329.2) and the Statewide Non-residential Development Fee Act (N.J.S.A. 40:55D-8.1 through 8.7), COAH is authorized to adopt and promulgate regulations necessary for the establishment, implementation, review, monitoring and enforcement of municipal affordable housing trust funds and corresponding spending plans. Municipalities that are under the jurisdiction of the Council or court of competent jurisdiction and have a COAH-approved spending plan may retain fees collected from nonresidential development.

C. In Re Adoption of N.J.A.C. 5:96 and 5:97 by COAH, 221 N.J. 1 (2015) ("Mount Laurel IV"), the Supreme Court remanded COAH's duties to the Superior Court. As a result, affordable housing development fee collections and expenditures from municipal affordable housing trust funds to implement municipal Third Round Fair Share Plans through July 7, 2025 are under the Court's jurisdiction and are subject to approval by the Court.

D. This article establishes standards for the collection, maintenance, and expenditure of development fees pursuant to COAH's regulations and in accordance P.L. 2008, c.46, §§ 8 and 32-38. Fees collected pursuant to this article shall be used for the sole purpose of providing low- and moderate-income housing. This article shall be interpreted within the framework of COAH's rules on development fees, codified at N.J.A.C. 5:93-8.

§ 29-2.2 Definitions.

As used in this Subsection, the following terms shall have the meanings indicated:

AFFORDABLE HOUSING DEVELOPMENT

A development included in the Housing Element and Fair Share Plan, and includes, but is not limited to, an inclusionary development, a municipal construction project or a one-hundred-percent affordable development.

COAH or THE COUNCIL

The New Jersey Council on Affordable Housing established under the Act which has primary jurisdiction for the administration of housing obligations in accordance with sound regional planning consideration in the state.

DEVELOPER

The legal or beneficial owner or owners of a lot or of any land proposed to be included in a proposed development, including the holder of an option or contract to purchase, or other person having an enforceable proprietary interest in such land.

DEVELOPMENT FEE

Money paid by a developer for the improvement of property as permitted in N.J.A.C 5:93-8.3

EQUALIZED ASSESSED VALUE

The assessed value of a property divided by the current average ratio of assessed-to-true value for the municipality in which the property is situated, as determined in accordance with sections 1, 5, and 6 of P.L.1973, c.123 (N.J.S.A. 54:1-35a through N.J.S.A. 54:1-35c).

SUBSTANTIAL IMPROVEMENT

Any reconstruction, addition, or other improvement of a structure, the cost of which exceeds fifty (50%) percent of the equalized assessed value of the structure before the start of construction of the improvement.

SUBSTANTIVE CERTIFICATION

A determination by COAH approving a municipality's housing element and fair-share plan in accordance with the provision of the Fair Housing Act (N.J.S.A. 52:27D-301 et seq.) and the rules and criteria as set forth herein.

§ 29-2.3 Development fees.

A. Residential development fees.

(1) Imposed fees.

(a) Within the Township of Chatham, residential developers, except for developers of the types of development specifically exempted below, shall pay a fee of 1.5% of the equalized assessed value for residential development, provided no increased density is permitted.

(b) When an increase in residential density pursuant to N.J.S.A. 40:55D-70d(5) (known as a "d" variance) has been permitted, developers may be required to pay a development fee of 4% of the equalized assessed value for each additional unit that may be realized. However, if the zoning on a site has changed during the two-year period preceding the filing of such a variance application, the base density for the purposes of calculating the bonus development fee shall be the highest density permitted by right during the two-year period preceding the filing of the variance application. Example: If an approval allows four units to be constructed on a site that was zoned for two units, the fees could equal 1.5% of the equalized assessed value on the first two units; and the specified higher percentage up to 4% of the equalized assessed value for the two additional units, provided zoning on the site has not changed during the two-year period preceding the filing of such a variance application.

(2) Eligible exactions, ineligible exactions and exemptions for residential development:

(a) Affordable housing developments and developments where the developer has made a payment in lieu of on-site construction of affordable units shall be exempt from development fees.

(b) Developments that have received preliminary or final site plan approval prior to the adoption of a municipal development fee ordinance shall be exempt from development fees, unless the developer seeks a substantial change in the approval.

Where a site plan approval does not apply, a zoning and/or building permit shall be synonymous with preliminary or final site plan approval for this purpose. The fee percentage shall be vested on the date that the building permit is issued.

(c) Except as provided in Subsection 29-2.3A(2)(d) below, development fees shall be imposed and collected on new residential construction or when an existing residential structure undergoes a substantial improvement as defined in Section 29-2.2 above, is demolished and replaced, or is expanded where the size of the change, replacement, or expansion is greater than 2,500 square feet. The development fee shall be calculated on the increase in the equalized assessed value of the new or improved structure.

(d) Developers of residential structures demolished and replaced as a result of fire, or natural disaster, or other catastrophic events shall be exempt from paying a development fee.

B. Nonresidential development fees.

(1) Imposed fees.

(a) Within all zoning districts, nonresidential developers, except for developers of the types of development specifically exempted, shall pay a fee equal to 2.5% of the equalized assessed value of the land and improvements, for all new nonresidential construction on an unimproved lot or lots.

(b) Nonresidential developers, except for developers of the types of development specifically exempted, shall also pay a fee equal to 2.5% of the increase in equalized assessed value resulting from any additions to existing structures to be used for nonresidential purposes.

(c) Development fees shall be imposed and collected when an existing structure is demolished and replaced. The development fee of 2.5% shall be calculated on the difference between the equalized assessed value of the preexisting land and improvement and the equalized assessed value of the newly improved structure, i.e., land and improvement, at the time a final certificate of occupancy is issued. If the calculation required under this section results in a negative number, the nonresidential development fee shall be zero.

(2) Eligible exactions, ineligible exactions and exemptions for nonresidential development.

(a) The nonresidential portion of a mixed-use inclusionary or market-rate development shall be subject to the development fee of 2.5% unless otherwise exempted below.

(b) The fee of 2.5% shall not apply to an increase in equalized assessed value resulting from alterations, change in use within existing footprint, reconstruction, renovations and repairs.

(c) Nonresidential developments shall be exempt from the payment of nonresidential development fees in accordance with the exemptions required pursuant to P.L.2008, c.46, as specified in the Form N-RDF "State of New Jersey Non-Residential Development Certification/Exemption." Any exemption claimed by a developer shall be substantiated by that developer.

(d) A developer of a nonresidential development exempted from the nonresidential development fee pursuant to P.L.2008, c.46, shall be subject to it at such time the basis for the exemption no longer applies, and shall make the payment of the nonresidential development fee, in that event, within three years after that event or after the issuance of the final certificate of occupancy of the nonresidential development, whichever is later.

(e) If a property which was exempted from the collection of a nonresidential development fee thereafter ceases to be exempt from property taxation, the owner of the property shall remit the fees required pursuant to this section within 45 days of the termination of the property tax exemption. Unpaid nonresidential development fees under these circumstances may be enforceable by the Township as a lien against the real property of the owner.

§ 29-2.4 Exempt development types.

The following development types are exempt from development fees:

A. Nonprofit and public education buildings.
B. Houses of worship.
C. Public amenities (recreational, community, or senior centers).
D. Parking lots and structures.
E. Nonprofit hospital relocation or improvement.
F. State, county and local government buildings.
G. Transit hubs, transit villages, and light-rail hubs.
H. Commercial farm buildings and Use Group U structures.
I. Developments with a general development plan approval, or executed developer's or redeveloper's agreement, prior to July 17, 2008, with a fee or affordable housing requirement the equivalent of at least 1% of equalized assessed value.

§ 29-2.5 Collection procedures.

A. Upon the granting of a preliminary, final or other applicable approval, for a development, the applicable approving authority (Planning or Zoning Board) shall direct its staff to notify the construction official responsible for the issuance of a building permit.

B. For nonresidential developments only, the developer shall also be provided with a copy of Form N-RDF "State of New Jersey Non-Residential Development Certification/Exemption" to be completed as per the instructions provided. The Developer of a nonresidential development shall complete Form N-RDF as per the instructions provided. The construction official shall verify the information submitted by the nonresidential developer as per the instructions provided in the Form N-RDF. The Township Tax Assessor shall verify exemptions and prepare estimated and final assessments as per the instructions provided in Form N-RDF.

C. The construction official responsible for the issuance of a building permit shall notify the Township Tax Assessor that he has prepared to be issued the first building permit for a development, at which time an amount of 50% of the total fee is due at the issuance of the first building permit. The remaining amount owed will be paid at the issuance of a final certificate of occupancy.

D. Within 30 days of receipt of that notice, the Township Tax Assessor, based on the plans filed, shall provide an estimate of the equalized assessed value of the development and the fee is calculated as cited above.

E. The construction official responsible for the issuance of a final certificate of occupancy notifies the Township Tax Assessor of any and all requests for the scheduling of a final inspection on property.

F. Within 10 business days of a request for the scheduling of a final inspection, the Township Tax Assessor shall confirm or modify the previously estimated equalized assessed value of the improvements of the development; calculate the development fee; and thereafter notify the developer of the remaining amount of the fee due.

G. Should the Township fail to determine or notify the developer of the amount of the development fee within 10 business days of the request for final inspection, the developer may estimate the amount due and pay that estimated amount consistent with the dispute process set forth in subsection b. of section 37 of P.L.2008, c.46 (N.J.S.A. 40:55D-8.6).

H. Fifty percent of the development fee shall be collected at the time of issuance of the building permit. The remaining portion shall be collected at the issuance of the certificate of occupancy. The developer shall be responsible for paying the difference between the fee calculated at building permit and that determined at issuance of certificate of occupancy.

I. Appeal of development fees.

(1) A developer may challenge residential development fees imposed by filing a challenge with the County Board of Taxation. Pending a review and determination by the Board, collected fees shall be placed in an interest-bearing escrow account by the Township. Appeals from a determination of the Board may be made to the Tax Court in accordance with the provisions of the State Tax Uniform Procedure Law, N.J.S.A. 54:48-1 et seq., within 90 days after the date of such determination. Interest earned on amounts escrowed shall be credited to the prevailing party.

(2) A developer may challenge nonresidential development fees imposed by filing a challenge with the Director of the Division of Taxation. Pending a review and determination by the Director, which shall be made within 45 days of receipt of the challenge, collected fees shall be placed in an interest-bearing escrow account by the Township. Appeals from a determination of the Director may be made to the Tax Court in accordance with the provisions of the State Tax Uniform Procedure Law, N.J.S.A. 54:48-1 et seq., within 90 days after the date of such determination. Interest earned on amounts escrowed shall be credited to the prevailing party.

§ 29-2.6 Affordable Housing Trust Fund.

A. There is hereby created a separate, interest-bearing housing trust fund to be maintained by the Chief Financial Officer for the purpose of depositing development fees collected from residential and nonresidential developers and proceeds from the sale of units with extinguished controls.

B. The following additional funds shall be deposited in the Affordable Housing Trust Fund and shall at all times be identifiable by source and amount:

(1) Payments in lieu of on-site construction of affordable units;
(2) Developer-contributed funds to make 10% of the adaptable entrances in a townhouse or other multistory attached development accessible;
(3) Rental income from municipally operated units;
(4) Repayments from affordable housing program loans;
(5) Recapture funds;
(6) Proceeds from the sale of affordable units; and
(7) Any other funds collected in connection with the Township's affordable housing program.

C. The Township previously provided COAH with written authorization, in the form of a three-party escrow agreement between the Township, a bank, COAH, to permit COAH to direct the disbursement of the funds as provided for in N.J.A.C. 5:93-8. The Superior Court shall now have jurisdiction to direct the disbursement of the Township's trust funds.

D. All interest accrued in the housing trust fund shall only be used on eligible affordable housing activities approved by COAH or a court of competent jurisdiction.

§ 29-2.7 Use of funds.

A. The Township shall not spend development fees until COAH or a court of competent jurisdiction has approved a plan for spending such fees. Thereafter, the expenditure of all funds shall conform to the spending plan approved by COAH or a court of competent jurisdiction. Funds deposited in the housing trust fund may be used for any activity approved by COAH or a court of competent jurisdiction to address the Township's fair share obligation and may be set up as a grant or revolving loan program. Such activities

include, but are not limited to, preservation or purchase of housing for the purpose of maintaining or implementing affordability controls, rehabilitation, new construction of affordable housing units and related costs, accessory apartment, market to affordable, or regional housing partnership programs, conversion of existing nonresidential buildings to create new affordable units, green building strategies designed to be cost saving and in accordance with accepted national or state standards, purchase of land for affordable housing, improvement of land to be used for affordable housing, extensions or improvements of roads and infrastructure to affordable housing sites, financial assistance designed to increase affordability, administration necessary for implementation of the Housing Element and Fair Share Plan, or any other activity as permitted pursuant to N.J.A.C. 5:93-8 and specified in the approved spending plan.

B. Funds shall not be expended to reimburse the Township for past housing activities.

C. At least 30% of all development fees collected and interest earned shall be used to provide affordability assistance to low- and moderate-income households in affordable units included in the municipal Fair Share Plan. One-third of the affordability assistance portion of development fees collected shall be used to provide affordability assistance to those households earning 30% or less of median income by region.

(1) Affordability assistance programs may include down-payment assistance, security deposit assistance, low-interest loans, rental assistance, assistance with homeowners' association or condominium fees and special assessments, and assistance with emergency repairs.

(2) Affordability assistance to households earning 30% or less of median income may include buying down the cost of low- or moderate-income units in the municipal Fair Share Plan to make them affordable to households earning 30% or less of median income.

(3) Payments in lieu of constructing affordable units on site and funds from the sale of units with extinguished controls shall be exempt from the affordability assistance requirement.

D. The Township may contract with a private or public entity to administer any part of its Housing Element and Fair Share Plan, including the requirement for affordability assistance, in accordance with N.JA.C. 5:93-8.16(d).

E. No more than 20% of all revenues collected from development fees, may be expended on administration, including, but not limited to, salaries and benefits for municipal employees or consultant fees necessary to develop or implement a new construction program, a Housing Element and Fair Share Plan, and/or an affirmative marketing program. In the case of a rehabilitation program, no more than 20% of the revenues collected from development fees shall be expended for such administrative expenses. Administrative funds may be used for income qualification of households, monitoring the turnover of sale and rental units, and compliance with COAH's monitoring requirements as set forth in the Court-approved Settlement Agreement with FSHC, dated December 13, 2018. Legal or other fees related to litigation opposing affordable housing sites or objecting to the Council's regulations and/or action are not eligible uses of the affordable housing trust fund.

§ 29-1.8 Monitoring.

On or about December 13 of each year through 2025, the Township shall provide annual reporting of trust fund activity to the DCA, COAH, or NJLGS, or other entity designated by the State of New Jersey, with a copy provided to Fair Share Housing Center and posted on the municipal website. This reporting shall include an accounting of all housing trust fund activity, including the collection of development fees from residential and nonresidential developers, payments in lieu of constructing affordable units on site, funds from the sale of units with extinguished controls, barrier-free escrow funds, rental income, repayments from affordable housing program loans, and any other funds collected in connection with the Township's housing program, as well as to the expenditure of revenues and implementation of the plan approved by

COAH or a court of competent jurisdiction. All monitoring reports shall be completed on forms designed by COAH or other entity designated by the State of New Jersey.

§ 29-1.9 Ongoing collection of fees.

The ability for the Township to impose, collect and expend development fees shall expire with its Court-issued Judgment of Compliance and Repose unless the Township has (1) filed an adopted Housing Element and Fair Share Plan with COAH, a court of competent jurisdiction or other entity designated by the State of New Jersey; (2) has petitioned for substantive certification or filed a declaratory judgment action; (3) and has received COAH's or a court of competent jurisdiction's approval of its Development Fee Ordinance. If the Township fails to renew its ability to impose and collect development fees prior to the expiration of its Judgment of Compliance and Repose, it may be subject to forfeiture of any or all funds remaining within its municipal trust fund. Any funds so forfeited shall be deposited into the "New Jersey Affordable Housing Trust Fund" established pursuant to section 20 of P.L.1985, c.222 (N.J.S.A. 52:27D-320). The Township shall not impose a residential development fee on a development that receives preliminary or final site plan approval after the expiration of its judgment of compliance; nor shall the Township retroactively impose a development fee on such a development. The Township shall not expend development fees after the expiration of its judgment of compliance.

REPEALER

All Ordinances or parts of Ordinances inconsistent herewith are repealed as to such inconsistencies.

SEVERABILITY

If any section, subsection, sentence, clause, phrase or portion of this Ordinance is for any reason held invalid or unconstitutional by any court of competent jurisdiction, such portion shall be deemed a separate, distinct and independent provision, and such holding shall not affect the validity of the remaining portions thereof.

EFFECTIVE DATE

This Ordinance shall not become effective until approved by the Superior Court of New Jersey.

Introduced: November 14, 2019

Adopted: December 19, 2019

Attest:

Gregory J. LaConte, Clerk

TOWNSHIP OF CHATHAM, COUNTY OF MORRIS, STATE OF NEW JERSEY

BY: _____

Tayfun Selen, Mayor

I, Gregory J. LaConte, Township Clerk of the Township of Chatham in the County of Morris, New Jersey, hereby certify the foregoing to be a true complete copy of an ordinance adopted by the Township Committee of the Township of Chatham at a regular meeting held on December 19, 2019.

Date Issued: 12/20/2019

Township Clerk

Exhibit C

Spending Plan

Township of Chatham
Morris County, New Jersey

DRAFT
Not for Adoption Prior to Review

January 2020

Prepared by
Chatham Township
in consultation with Banisch Associates, Inc.
111 Main Street, Flemington, NJ 08822

INTRODUCTION

Chatham Township has prepared a draft Housing Element and Fair Share Plan (unadopted) that addresses its regional fair share of the affordable housing need in accordance with the Municipal Land Use Law (N.J.S.A. 40:55D-1 et seq.), the Fair Housing Act (N.J.S.A. 52:27D-320) and the regulations of the Council on Affordable Housing (COAH). A development fee ordinance creating a dedicated revenue source for affordable housing has not yet been approved by the Court of jurisdiction but was adopted by the municipality.

Chatham Township has not collected or expended development fees nor established an affordable housing trust fund to date.

The Township adopted the development fee ordinance (No. 2019-22) on December 19, 2019. Once the associated Developer's Fee Affordable Housing Trust Fund is established, then the development fees and payments in lieu will comply with §28-1 et seq. of the Township's Revised General Ordinances. All payments in lieu of constructing affordable units on site, funds from the sale of units with extinguished controls, and interest generated by the fees are to be deposited in a separate interest-bearing dedicated trust fund in *TD Bank* and reserved for the purposes of affordable housing. These funds shall be spent in accordance with N.J.A.C. 5:93:8.1 as described in the sections that follow.

1. REVENUES FOR CERTIFICATION PERIOD

To calculate a projection of revenue anticipated during the period of third round substantive certification, Chatham Township considered the following:

(a) Development fees:
1. Residential and nonresidential projects which will have development fees imposed upon them at the time of preliminary or final development approvals;
2. All projects currently before the planning and zoning boards for development approvals that may apply for building permits and certificates of occupancy; and
3. Future development that is likely to occur based on historical rates of development.

(b) Payment in lieu (PIL):
There are no actual and/or committed payments in lieu (PIL) of construction from developers.

(c) Other funding sources:
Not Applicable

(d) Projected interest:
Interest on the projected revenue in the municipal affordable housing trust fund at the current average interest rate of 1.4%.

SOURCE OF FUNDS	PROJECTED HOUSING TRUST FUND REVENUES – 1-1-2020 THROUGH 7-1-2025						
	2020	**2021**	**2022**	**2023**	**2024**	**7/2025**	**Total**
(a) Development fees:							
1. Approved Development							
2. Development Pending Approval							
3. Projected Development(1)	$525,000	$525,000	$525,000	$525,000	$525,000	$262,500	$2,887,500
(b) Payments in Lieu of Construction							
(c) Other Funds (Specify source(s))							
(d) Interest	$5,000	$5,000	$5,000	$5,000	$5,000	$2,500	$27,500
Total	$530,000	$530,000	$530,000	$530,000	$530,000	$265,000	$2,915,000

(1) Chatham Township projects an average of $35M in annual added assessments, between January 2020 and July 2025. Given the nature of added assessments in the Township, net development fees are be based upon 1.5% of average annual added residential assessments ($35,000,000 x 1.5% = $525,000). All interest earned on the account shall accrue to the account to be used only for the purposes of affordable housing.

2. ADMINISTRATIVE MECHANISM TO COLLECT AND DISTRIBUTE FUNDS

The following procedural sequence for the collection and distribution of development fee revenues shall be followed by Chatham Township

(a) Collection of development fee revenues:

Collection of development fee revenues shall be consistent with Chatham Township's development fee ordinance for both residential and non-residential developments in accordance with COAH's rules and P.L.2008, c.46, sections 8 (C. 52:27D-329.2) and 32-38 (C. 40:55D-8.1 through 8.7).

(b) Distribution of development fee revenues:

1. Rehabilitation Program
2. 100% Affordable Housing Project
3. Extension of controls at Vernon Grove, and
4. Affordability assistance

3. DESCRIPTION OF ANTICIPATED USE OF AFFORDABLE HOUSING FUNDS

(a) **Rehabilitation and new construction programs and projects (N.J.A.C. 5:97-8.7)**

Chatham Township will dedicate a portion of the proceeds of the development fee revenue to rehabilitation and new construction programs (see detailed descriptions in Fair Share Plan), as follows:

Rehabilitation program total: $120,000

New construction project(s): $1,075,250
1. 100% Affordable 74-unit development

New Construction total: $1,075,250

(b) **Extension of controls** - This includes a payment to the Vernon Grove Condominium Association of $60,000.00 as a capital contribution for parking lot repaving.
Expiration of controls total cost: $60,000

(c) **Affordability Assistance (N.J.A.C. 5:97-8.8)**

Chatham Township is required to spend a projected minimum affordability assistance of $874,500. However, the Township will dedicate a total of $1,076,750 from the affordable housing trust fund to render units more affordable, of which $291,500 will be dedicated to render units more affordable to households earning 30% or less if median income by region. Included in this expenditure is a dedicated annual payment of $29,000 to Vernon Grove Association. This payment will continue for 30 years, however for

purposes of this spending plan, $261,000 has been allocated which covers 9 years of payments, from 2017 and through 2025.

Projected minimum affordability assistance requirement:

Actual development fees through 6/1/2019		$0.00
Actual interest earned through 6/1/2019	+	$0.00
Development fees projected 2020-2025	+	$2,887,500
Interest projected 2020-2025	+	$27,500
Less housing activity expenditures through 6/1/2019	-	$0.00
Total	=	**$2,915,000**
30 percent requirement	x 0.30 =	**$874,500**
Less Affordability assistance expenditures to date	-	$0.00
PROJECTED MINIMUM Affordability Assistance Requirement 6/1/2019 through 12/31/2025	=	**$874,500**
PROJECTED MINIMUM Very Low-Income Affordability Assistance Requirement 1/1/2017 through 12/31/2025	÷ 3 =	**$291,500**

(d) **Administrative Expenses (N.J.A.C. 5:97-8.9)**

Chatham Township projects that $583,000 will be available from the affordable housing trust fund to be used for administrative purposes (20% X 2,915,000). Projected administrative expenditures, subject to the 20 percent cap, are as follows:

Staff administrative services and professional services (attorney, planner, engineer and administrative agent) including but not limited to:

Preparation of Housing Element and Fair Share Plan
Coordination of Court and/or COAH activities
Any other eligible expenses as may become necessary or appropriate

4. EXPENDITURE SCHEDULE

Chatham Township's affordable housing trust fund revenues for the creation and/or rehabilitation of housing units. Where applicable, the creation/rehabilitation funding schedule below parallels the implementation schedule set forth in the draft Housing Element and Fair Share Plan and is summarized as follows.

Program* *[Individually list programs and projects e.g. Rehab, Accessory Apartments, for-sale and rental municipally sponsored, etc].*	**# of Units**	**Funds to be Expended and/or Dedicated**	**PROJECTED EXPENDITURE SCHEDULE 2020-2025 (THOUSANDS)**						
		2020- 2025	**2020**	**2021**	**2022**	**2023**	**2024**	**2025**	**Total**
(3a) Rehabilitation	6	$120,000	22,000	22,000	22,000	22,000	22,000	10,000	$120,000
(3a) 100 % Affordable	74	$1,075,250	358,416	358,416	358,416	0	0	0	$1,075,250
(3b) Extension of Controls (Vernon Grove capital contribution of $60,000)	72	$60,000	$60,000	0	0	0	0	0	$60,000
(3c) Affordability Assistance (includes Vernon Grove annual payments of $29,000)		$1,076,750	179,458.33	179,458.33	179,458.33	179,458.33	179,458.33	179,458.33	$1,076,750
(3d) Administration		$583,000	97,166.66	97,166.66	97,166.66	97,166.66	97,166.66	97,166.66	$583,000
Total	152	$2,915,000	717,040.99	657,040.99	657,040.99	298,624.99	298,624.99	286,624.99	$2,915,000

*Refers to categories in Section No. 3

5. EXCESS OR SHORTFALL OF FUNDS

Pursuant to the draft Housing Element and Fair Share Plan, the governing body of Chatham Township will adopt a resolution agreeing to fund any shortfall of funds required for implementing housing programs within this spending document.

In the event of excess funds, any remaining funds above the amount necessary to satisfy the municipal affordable housing obligations may be used for housing rehabilitation or other affordable housing programs.

6. BARRIER FREE ESCROW

Collection and distribution of barrier free funds shall be consistent with Chatham Township's Affordable Housing Ordinance in accordance with N.J.A.C. 5:97-8.5.

SUMMARY

Chatham Township intends to spend affordable housing trust fund revenues pursuant to N.J.A.C. 5:93-8 and consistent with the housing programs outlined in the proposed 2020 Housing Element and Fair Share Plan, as outlined below:

SPENDING PLAN SUMMARY		
Balance as of July 17, 2008		$0
PROJECTED REVENUE 2020-2025		$2,915,000
Development fees	+	$2,887,500
Payments in lieu of construction	+	$0
Other funds	+	$0
Interest	+	$27,500
TOTAL REVENUE	=	$2,915,000
EXPENDITURES		
Funds used for Rehabilitation	-	$120,000
Funds used for New Construction		
1. 100% Affordable	-	$1,075,250
3.Extension of Control (Vernon Grove Condominium Association capital contribution)	-	$60,000
Affordability Assistance (includes annual payments of $29,000 to Vernon Grove Condominium Association)	-	$1,076,750
Administration	-	$583,000
Excess Funds for Additional Housing Activity	=	$0
TOTAL PROJECTED EXPENDITURES	=	$2,915,000
REMAINING BALANCE	=	$0.00

Chatham Township had a trust fund balance of $ 0 as of January 2020 and anticipates collecting $2,915,000 in revenues before the expiration of substantive certification. The municipality will dedicate $1,255,250 towards rehabilitation, extension of controls, and a 100% affordable housing project. In addition, $1,076,750 will be used to render units more affordable, and up to $583,000 will be available for administrative costs.

Exhibit D

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Attorneys for Defendant-Intervenor
800 Sylvan Avenue, LLC

FILED
AUG 27 2019
CHRISTINE A. FARRINGTON, J.S.C.

IN THE MATTER OF THE APPLICATION OF THE BOROUGH OF ENGLEWOOD CLIFFS, a Municipal Corporation of the State of New Jersey

SUPERIOR COURT OF NEW JERSEY
BERGEN COUNTY - LAW DIVISION

DOCKET NO. BER-L-6119-15

Mt. Laurel
CIVIL ACTION

ORDER DENYING THE BOROUGH'S MOTION FOR AN EXTENSION OF IMMUNITY AND GRANTING 800 SYLVAN AVENUE'S CROSS-MOTION TO TERMINATE IMMUNITY FROM EXCLUSIONARY ZONING LITIGATION

THIS MATTER having come before the Court on application of the Borough of Englewood Cliffs, though its counsel, Jeffrey R. Surenian and Associates, LLC (Jeffrey R. Surenian, Esq., appearing) ; Chiesa, Shahinian & Giantommasi, PC (Thomas J. Trautner, Esq., appearing); and Law Offices of Albert H. Wunsch, III (Albert H. Wunsch, III, Esq., appearing) for an extension of the Borough of Englewood Cliffs' immunity from builder's remedy suits and the application of 800 Sylvan Avenue, LLC though its counsel, Hill Wallack, LLP (Thomas F.

Carroll, III, Esq., appearing) and Beattie Padovano, LLC (Antimo A. Del Vecchio, Esq., appearing) for the termination of the Borough of Englewood Cliffs' immunity from exclusionary zoning litigation, and Fair Share Housing Center (Kevin D. Walsh, Esq., appearing), the Court having considered the papers filed in support of the motion to extend immunity filed by the Borough of Englewood Cliffs and the papers filed in opposition to the motion seeking an extension of immunity and in support of the cross-motion seeking revocation of immunity by Defendant-Intervenor 800 Sylvan Avenue, LLC and the Fair Share Housing Center, and for good cause shown:

IT IS on this 27th day of August 2019,

ORDERED as follows:

1. The Court finds that the Borough of Englewood Cliffs has acted in bad faith.
2. The Court finds that the Borough of Englewood Cliffs has made a concerted effort to avoid compliance with its obligation to create a realistic opportunity for the creation of its fair share of the regional need for low and moderate cost housing.
3. The Borough of Englewood Cliffs' immunity from exclusionary zoning litigation is denied and immunity is terminated.
4. Defendant-Intervenor 800 Sylvan Avenue, LLC's cross-motion to terminate the Borough of Englewood Cliffs' immunity from exclusionary zoning litigation as to 800 Sylvan is hereby granted.
5. Defendant-Intervenor 800 Sylvan Avenue, LLC is hereby authorized to file an amended answer and counterclaim setting forth a claim for site-specific relief.
6. Copies of this Order shall be served via ECourts and via direct service upon the Court-appointed Master

Christine Farrington

Hon. Christine A. Farrington, J.S.C., rctd, t/a

Opposed [✓]
Unopposed [ ]

* For reasons set forth in the attached Rider

FILED
AUG 27 2019
CHRISTINE A. FARRINGTON, J.S.C.

SUPERIOR COURT OF NEW JERSEY
BERGEN VICINAGE

CHAMBERS OF

CHRISTINE FARRINGTON

SUPERIOR COURT JUDGE, RET'D, t/a

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August 27, 2019

RIDER TO ORDERS DATED AUGUST 27, 2019

RE: In the Matter of the Application of the Borough of Englewood Cliffs
BER-L-6119-15

Jeffry R. Surenian & Associates
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Special Master Mary Beth Lonergan, PP, AICP
Clarke Caton Hintz
100 Barrack Street
Trenton, NJ 08608

This matter comes before the court upon the motion of the Borough to extend immunity pending a trial to determine the Borough's Fair Share Housing obligation. Both Fair Share Housing Center and Intervenor 800 Sylvan Avenue, LLC (800 Sylvan) oppose. 800 Sylvan cross moves for revocation of immunity. For the reasons which follow the court has determined that the Borough has acted in bad faith and determined to be constitutionally non-compliant and immunity from builders remedy actions is revoked.

The Borough of Englewood Cliffs took no action to comply with either of our Supreme Court's decisions of 1975 and 1983 in So. Burlington Cty. N.A.A.C.P. v. Twp of Mount Laurel (67 N.J. 151 and 92 N.J. 158). The Borough did not participate in the Council on Affordable Housing's (COAH) First Round.

As set forth in Special Master Lonergan's report, the Borough petitioned COAH for substantive certification based upon its Second Round Plan. In the Second Round plan, the Borough requested a Vacant Land Adjustment (VLA) which would reduce its then 219 unit pre-credited need to a 4-unit RDP with a 215-unit unmet need. COAH conditioned its 1997 denial of substantive certification upon the Borough's

adoption of an overlay zone to permit inclusionary development of a former Prentice-Hall headquarters, now the site of LG headquarters under construction. The Borough failed to adopt the overlay zoning and COAH denied certification in 1997, making the Borough vulnerable to possible builders remedy complaints. It is noteworthy that when the LG redevelopment was approved, it included no provision for affordable housing.

The Borough prepared an initial Third Round Housing Element and Fair Share Plan in January 2006. On account of Judge Skillman's 2010 decision overturning COAH's Third Round rules, the Borough's petition for substantive certification was not addressed by COAH. The Borough never implemented the mechanisms identified in its HEFSP adopted by the Englewood Cliffs Planning Board January 7, 2009.

In 2013, our Supreme Court upheld Judge Skillman and directed COAH to prepare and adopt necessary rule revisions. When COAH failed to do so, FSHC filed a motion in aid of litigant's rights to compel the production of constitutional affordable housing regulations. In March 2015, the Supreme Court transferred responsibility of review and approving to designated

Mount Laurel trial judges by way of declaratory judgments with temporary immunity from third party lawsuits during the municipality's development of compliant HEFSPs.

The Borough filed this declaratory judgment action on June 26, 2015. Special Master Lonergan issued a report in January 2016. The Borough pressed its claim for a vacant land adjustment which was disputed by FSHC. The Special Master proposed reviewing the VLA analysis and proposed zoning changes. The report also recommended mediation.

In January 2017 our Supreme Court issued its decision In Re Declaratory Judgment Actions Filed by Various Municipalities, County of Ocean, Pursuant to the Supreme Court's Decision in In Re Adoption of N.J.A.C. 5:96, 221 N.J. 1 (2015), the so-called "Gap" decision which found that the period between the end of the Second Round in 1999 and 2015 generates an affordable housing obligation.

The Borough was ordered to prepare an updated housing plan and updated VLA by December 2017.

On November 17, 2017, 800 Sylvan advised the Borough of their interest in offering a 20+ acre portion of their 28 acre property for inclusionary development. The offer consisted of

600 homes of which 15% (rental set-aside) or 20% (sale set-aside) would be affordable. The Honorable Menelaos Toskos (retired) entered an order granting 800 Sylvan's motion to intervene January 10, 2018. Judge Toskos subsequently entered an April 13, 2018 order dismissing 800 Sylvan's builder's remedy law suit. 800 Sylvan appealed and the Appellate Division issued an order on September 17, 2018 permitting 800 Sylvan's builder's remedy lawsuit to proceed as of right. On June 7, 2019 the Appellate Court stayed the proceedings before it until August 1, 2019 pending settlement discussions.

In March 2018, the court established a schedule for the parties to set forth their positions on a confidential basis and attempt settlement. The Borough was unable to reach agreement with FSHC. On October 1, 2018, the court entered an order ending mediation and scheduling trial for January 22, 2019.

On October 22, 2018, this court entered an order approving expenditure of the Borough's trust funds for the purchase of 476 Hudson Terrace for the purpose of construction of a 100% affordable housing project.

The Borough sought a bifurcated trial and to limit the first phase to quantification of the RDP and the second to the

sufficiency of the Borough's plan. This court denied those motions. Thereafter, this court denied the Borough's request to bifurcate trial for a determination of its RDP, followed by a compliance hearing. This court also advised the parties that the trial would utilize the same methodology as determined by the Honorable Mary C. Jacobsen, A.J.S.C., In the Matter of the Application of the Municipality of Princeton, decided March 29th, 2018. In its decision, the court stated:

> The failure of the Borough to provide a single unit of Affordable Housing between 1985 and 2018 resonates with this court. The Borough's dilemma is one of its own making and the result of a willful refusal to comply with its Constitutional obligations. . . This court continues to believe under circumstances where a municipality is desirous of meeting its Constitutional obligation, there might be a benefit to the municipal officials who are tasked with the obligation of implementing the Ordinances and housing plan, often unpopular with constituents, to ascertain the realistic development potential first, making it easier for those officials to explain to those constituents what the realities are. In the court's mind this might motivate the municipality to reach a settlement with Fair Share Housing to enable them to plan and build units in locations they deem best. The court believed the proximity of the trial following Judge Jacobson's decision might motivate the Borough of Englewood Cliffs to move forward in a constructive manner to meet its Constitutional obligation to provide affordable housing. The court has not seen anything which indicates this to be the case. Notwithstanding the extraordinary efforts of the Special Master in a mediation attempt spanning months and essentially accommodating the Borough in terms of a confidentiality agreement no progress has been made. That lack of progress cannot be blamed on the Intervener and/or

Fair Share Housing alone. The court is persuaded by the arguments of the Intervener and Fair Share Housing that the ultimate decision can no longer be delayed.

The court ordered the Borough to submit its Housing Element and Fair Share Plan and all expert reports by December 7, 2018. The court also denied FSHC's motion to strip the Borough of immunity at that time. This court also issued two orders on December 5,

2018, requiring the Borough to address its unmet need and denying FSHC's motion to require specific inclusionary overlay zoning as premature, noting the court found no bad faith as to that issue and the proximity of the then trial date of January 22, 2019.

On January 9, 2019 this court denied the Borough's motion for reconsideration of the issues of bifurcation, discovery and the trial date and denied 800 Sylvan's motion to terminate immunity. The trial date was adjourned to March 5, 2019 to permit the Special Master additional time to complete her report. The Borough's governing body adopted its Housing Element and Fair Share Plan on January 24, 2019. That plan acknowledges the Borough's obligation to be 584 units, but calculates its realistic development potential as 77 units. The calculation is

based in part on exclusion of certain properties based on steep slope, despite the fact the Borough has no steep slope ordinance. It is further based upon a density of 6 units per acre which the Special Master concluded was based solely on the character of the surrounding area as its threshold for determining density, and did not provided any context in its decision-making for the need for housing. The Master concluded that the densities assigned to some sites should be increased. The Plan further addresses only 95 of the 507 units of unmet need based upon the Borough's calculation of its RDP. The Plan excludes 800 Sylvan's property, despite the fact that the 800 Sylvan appears to be the only remaining location in the Borough available for significant affordable housing development. 800 Sylvan has committed to provide 120 units of affordable housing. This court has fact based concerns that the 800 Sylvan site will go the way of the Prentice Hall/LG site if a builder's remedy suit does not go forward.

According to the Borough's attorney, the Borough, recognizing a potential exposure to an estimated 12.7 million dollar cost[i], re-entered negotiations with 800 Sylvan and on April 25, 2019 the Borough's Mount Laurel subcommittee consisting

of three members of the Borough Council, FSHC, and 800 Sylvan entered into a non-binding Memorandum of Understanding.

On July 10, 2019, an informational town hall meeting was held. The governing body did not approve the non-binding Memorandum of Understanding nor did it adopt the ordinance regarding same. Instead, the Borough passed Resolution 19-57 on July 29, 2019 which states in part:

> . . .WHEREAS as a result of finding itself *forced* to prepare a plan before it knew with a measure of reliability the RDP it needed to plan for. . .
> WHEREAS the Borough remains committed to complying and has emphasized that commitment at every turn even though, like so many public officials in other municipalities, the Borough's public officials have questioned the wisdom of the Mount Laurel doctrine. . .
> WHEREAS as a result of the foregoing, the Governing Body wishes to express its commitment to providing affordable housing in a manner of its choosing and that the best way for the Borough to satisfy its obligations would not be to rezone the Sylvan site for residential housing. (emphasis provided)

Trial is currently scheduled for October 11, 2019. The court permitted the filing of the instant motion to terminate immunity and ordered release of the Special Master's report.

In addition to the procedural aspects of the case set forth herein, the court has been made aware that two council members

have reportedly had recall petitions commenced against them allegedly related to their support of the Memorandum of Understanding; and that the Mayor has been consistently opposed to resolution of the litigation.

It is clear from the rulings of our Supreme Court, the legislative enactments and the case law that voluntary compliance is preferred, and should be encouraged and that a builder's remedy action should be considered a remedy of last resort. This voluntary compliance, however, was not meant to refer to compliance with a judgment following trial, rather it derived from a desire to promote voluntary compliance *and early settlement*. It has to do with the desire to simplify litigation in this area and encourage voluntary compliance with the constitutional obligation. Here, despite the evidence to the contrary, the Borough as evidenced in its July Resolution, continues to insist it does not know what the range of its constitutional obligation is, and further provides no concrete plan for funding or building affordable units within that range.

The Borough argues that until the court adjudicates the Borough's realistic development potential, it is not clear to whether and to what extent the Borough must adjust its affordable

housing plan to satisfy the RDP the court finds satisfactory. The Borough advanced this same argument in November 2018. At that time, making arguments relative to the applicability of the 20-percent cap, Kevin Walsh, Esq., on behalf of FSHC noted that in that this court had indicated it would follow the methodology determined by Judge Jacobsen. Based upon that methodology, FSHC noted that the two components of the Borough's Third Round obligation total 599 units (Prior round obligation 219 units, Gap Period 234 units and prospective obligation of 418 units, capped at 365 (234+365)). The court rejects the Borough's argument here for the same reasons set forth in its opinion in the earlier motion.

As set forth in Judge Wolfson's opinion In the Matter of the Application of the Twp. Of South Brunswick, 448 N.J. Super 441 (Law Div. 2016):

> In enacting the FHA, the Legislature "clearly signaled," and the Supreme Court recognized, that an administrative remedy that resulted in "voluntary municipal compliance" with its affordable housing obligation, was "preferred" to litigation culminating in a "compelled rezoning." Mount Laurel IV, supra. Because of COAH's inability to function, the Supreme Court dissolved the FHA's "exhaustion-of-administrative-remedies requirement" leaving the courts to "resume" their role as "the forum of first instance," in adjudicating a municipality's constitutional compliance. The Supreme Court

> undoubtedly envisioned that "certified" and "participating" towns would likely subject themselves, as South Brunswick did in this case, to judicial review via the filing of a declaratory judgment action, taking advantage of the temporary immunity from the threat of multiple builder remedy lawsuits. The Court also recognized, however, that some municipalities might not embrace, in full, their affordable housing obligation, but instead might pursue a path of resistance, resulting in a loss of immunity. Judge Serpentelli's admonition in J.W. Field Co., Inc., bears repeating here: "[i]f a municipality chooses not to voluntarily comply, it brings upon itself the potential that multiple builders will force it to comply. The choice is the municipality's." (internal citations omitted)

It is clear to this court that the Borough of Englewood Cliffs has chosen to pursue a path of resistance. In In re N.A.C.C., 221 N.J. 1 (2015) our Supreme Court held:

> We emphasize that the courts should employ flexibility in assessing a town's compliance and should exercise caution to avoid sanctioning any expressly disapproved practices from COAH's invalidated Third Round Rules. Beyond those general admonitions, the courts should endeavor to secure, whenever possible, prompt voluntary compliance from municipalities in view of the lengthy delay in achieving satisfaction of towns' Third Round obligations. If that goal cannot be accomplished, with good faith effort and reasonable speed, and the town is determined to be constitutionally noncompliant, then the court may authorize exclusionary zoning actions seeking a builder's remedy to proceed against the towns either that had substantive certification granted from COAH under earlier iterations of Third Round Rules or that had held "participating" status

before COAH until this action by our Court lifted the FHA's exhaustion of administrative remedies requirement.

This court has been diligent and flexible in its effort to secure voluntary compliance. The court's earlier reliance on the commitment of municipal elected officials to carry out their constitutional duties to provide opportunity for the construction of affordable housing was apparently misplaced. The result has been a long delay and the denial of equal treatment to the poor contrary to the holding in Mount Laurel II, 92 N.J. 158, 306 (1983), "Equal treatment requires at the very least that government be as fair to the poor as it is to the rich in the provision of housing opportunities. That is the basic justification for Mount Laurel."

Further in Mount Laurel II, the Supreme Court held, "Experience since Madison, however, has demonstrated to us that builder's remedies must be made more readily available to achieve compliance with Mount Laurel." A builder's remedy may result in site specific relief when the builder meets a three prong test: (1) the builder succeeds in Mount Laurel litigation, (2) the builder proposes a project with substantial amount of affordable

housing and (3) the builder's site is suitable. The court finds that the first prong would be satisfied if 800 Sylvan was permitted to file a builder's remedy suit as demonstrated by the Special Master's report and recommendations which includes the recommendation that this court to give the Borough an additional ninety (90) days to amend its deficient HEFSP. The amendments would include items which the Borough has failed to provide or provided incorrectly or incompletely. These include but are not limited to:

(1) Affordable Housing Ordinance and Affirmative Marketing Plan

(2) A Housing Element which includes a complete compilation of the Borough's housing inventory, assessment of housing size and occupancy, data on the number of bedrooms, accurate discussion of housing stock, and correlation of data regarding rental units and average rents to affordability.

(3) A projection of the Borough's housing stock including probably construction of low and moderate income housing for the next ten years.

(4) An analysis of existing and probably future employment characteristics[ii].

These deficiencies, together with the Borough's failure to produce a single unit of affordable housing in the forty- plus years since the original Mount Laurel decision convinces this court that further delay will be justice denied.

The second prong is met by 800 Sylvan's proposal to build 120 units of affordable housing.

The third, site suitability, is not contested by the Borough's experts from a reading of its HEFSP.

Regarding the Special Master's recommendation that the court receive her report as a pre-mediation report pursuant to N.J.A.C. 5:91-6.2 and recommending a 90-day process (which would exceed the trial date) during which the Master would work with the Borough to ascertain immediately if the Borough's proposed means to address what is likely an increased Court-approved RDP, a meeting to review the VLA analysis and the proposed zoning changes for unmet need and to explore additional development opportunities for unmet need, the court finds the time for such a process is long past. Such a process should have been pursued by the Borough following the Special Master's first report in 2016

or at any time prior to now. In its Resolution 19-157, the governing body states,

> WHEREAS, the plan was for the professionals to negotiate agreements consistent with a non-binding negotiation with Sylvan and FSHC; to introduce an ordinance to rezone the Sylvan site and thereafter, to take into account the public's input before voting on whether to adopt the Sylvan ordinance at second reading and to sign a settlement agreement with Sylvan; and . . .
>
> WHEREAS, the public made its sentiments clear at the July 10, 2019 town hall meeting: (1) It was committed to comply voluntarily - even if the plan was even more expensive than its January 2019 affordable housing plan; and (2) it did not want to comply by rezoning the Sylvan site for high density residential zoning. . .
>
> WHEREAS as a result of the foregoing, the Governing Body wishes to express its commitment to providing affordable housing in a manner of its choosing and the best way for the Borough to satisfy its obligations would not be to rezone the Sylvan site for residential housing. . .

In essence, the Governing Body wants this court to believe that it negotiated in good faith for months with FSHC and 800 Sylvan, but the time, money and effort of the parties, the intervener and the Special Master in reaching the terms of the Memorandum of Understanding were all for naught in the face of public opposition. The court finds this to be an abuse of the process. The Governing Body says it "wishes to express its commitment to providing affordable housing in a manner of its

choosing," but the manner of its choosing has been to stall, procrastinate and evade its obligations. The result of allowing the Borough to provide affordable housing "in a manner of its choosing" has produced not a single unit of affordable housing. As a result, the Borough has lost the ability to determine the elements of its affordable housing plan which will be designed by third parties, the Special Master and the court.

The motion for an extension of the Borough of Englewood Cliffs' immunity from builders remedy suits is denied. The motion of 800 Sylvan Avenue, LLC through its counsel for the revocation of the Borough of Englewood Cliffs' immunity and FSHC opposition to the Borough's application is granted for the reasons set forth herein.

CHRISTINE FARRINGTON, J.S.C., ret'd, t/a

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[i] This statement is also reflected in Resolution 19-157, July 30, 2019, p. 4
[ii] Special Master's report, August 14, 2019, pp. 52-53