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OF THE COMMITTEE ON OPINIONS

	:	SUPERIOR COURT OF NEW JERSEY
	:	FILED
IN THE MATTER OF THE APPLICATION OF THE TOWNSHIP OF CHATHAM, a Municipal Corporation of the State of New Jersey,	:	October 30, 2020
	:	MICHAEL GAUS, J.S.C.
	:	LAW DIVISION
	:	MORRIS COUNTY
	:	DOCKET NO.: MRS-L-1659-15
Petitioner	:	CIVIL ACTION
	:	**SUPPLEMENTAL OPINION OF THE COURT**

Amended Fairness and Preliminary Compliance Hearing: September 17, 2020 and September 24, 2020

Decided: September 24, 2020

Supplemental Statement of Reasons: October 30, 2020

Albert E. Cruz, Esq. of DiFrancesco Bateman Kunzman, Davis, Lehrer & Flaum, P.C., attorneys for petitioner, Township of Chatham

Brian M. Slaugh, PP, AICP, Special Master

Bassam F. Gergi, Esq., for Fair Share Housing Center, Intervenor

Peter M. Flannery, Esq., Bisgaier Hoff, LLC, for Sterling Properties, LLC and Sun Homes, LLC, Intervenors

MICHAEL C. GAUS, J.S.C.

AMENDED FAIRNESS AND PRELMINARY COMPLIANCE

HEARING EXHIBIT LIST.

Plaintiff's Exhibits

A. Jurisdictional

P-1. Affidavit of Service of Notice of Amended Fairness and Preliminary Compliance Hearing.

B. 2020 Housing Element and Fair Share Plan

P-2. 2020 Township of Chatham Housing Element and Fair Share Plan.

P-2a. Township of Chatham Planning Board Resolution adopting 2020 Housing Element and Fair Share Plan.

P-2b. Resolution 2020-177 endorsing 2020 Housing Element and Fair Share Plan.

C. Settlement

P-3. December 13, 2018 Settlement Agreement between the Township of Chatham and the Fair Share Housing Center, Inc.

P-4. January 10, 2019 Letter Amendment to December 13, 2018 Settlement Agreement correcting block and lot designation.

P-5. Order on Fairness and Preliminary Compliance Hearing filed on February 22, 2019 finding that the December 13, 2018 Settlement Agreement and January 10, 2019

Letter Amendment that the Settlement Agreement had "apparent merit" and "that the Settlement Agreement between the Township and FSHC is fair and adequately protects the interests of low and moderate income persons within the Township's housing region". Findings No. 2 and 3.

P-6. March 12, 2020 Amended Settlement Agreement (Superseded by July 23, 2020 Amended Settlement Agreement).

P-7. July 23, 2020 Amended Settlement Agreement.

D. Arbor Green at Chatham and 24 Family Rental Units

P-8. Redevelopment Agreement between Township of Chatham and Southern Boulevard Urban Renewal, LLC.

P-9. Developer's Agreement between the Township of Chatham and Southern Boulevard Urban Renewal, LLC (without Exhibits).

P-10. Financial Agreement between the Township of Chatham and Southern Boulevard Urban Renewal, LLC.

E. Group Homes and 12 Bedrooms

P-11. Judgment of Foreclosure for Block 62, Lot 71 commonly known as 482 River Road vesting title in Township of Chatham.

P-12. Bond Ordinance 2020-10 Authorizing Funding and Acquisition of Block 62, Lot 70 commonly known as 490 River Road, with notice of adoption on June 25, 2020.

P-13. Agreement for Purchase of Real Property between Township of Chatham and Peter Parlapiano for 490 River Road.

P-14. Agreement to Convey Group Home Lot on Hillside Avenue between Township of Chatham and Sterling/Sun at Chatham, LLC (without Exhibits).

P-14a. Resolution 2020-203 authorizing the Mayor and Clerk to execute an Agreement for Conveyance of a Group Home Lot on Hillside Avenue.

P-15. Resolution 2020-178 authorizing Mayor and Clerk to sign Affordable Housing Agreement with Nouvelle Housing Solutions, Inc., and designating Nouvelle as the developer of the group homes on River Road and Hillside Avenue.

P-16. Affordable Housing Agreement between Township of Chatham and Nouvelle Housing Solutions, Inc. (without Exhibits).

F. 522 Southern Boulevard and 62 Family Rental Units

P-17. Planning Board Resolution Recommending that 522 Southern Boulevard be Designated an Area in Need of Condemnation Redevelopment.

P-18. Township Resolution 2020-189 Accepting and Approving that Recommendation.

P-19. Bond Ordinance 2020-14 Authorizing Funding and Acquisition by Purchase or Condemnation of 522 Southern Boulevard (Public hearing scheduled for September 10, 2020).

P-19a. Ordinance 2020-14 adopted on September 10, 2020.

P-20. Ordinance 2020-15 Authorizing Purchase or Condemnation of 522 Southern Boulevard (Public hearing scheduled for September 10, 2020).

P-20a. Ordinance 2020-15 adopted September 10, 2020.

P-20b. **Letter to property owner offering appraised value for 522 Southern Boulevard, dated September 14, 2020 (without appraisal attached).**

P-21. Ordinance 2020-16 Adopting Redevelopment Plan for 522 Southern Boulevard, with Redevelopment Plan attached (Public hearing scheduled for September 24, 2020).

G. Overlay Zone

P-22. Ordinance 2019-19 Adopting an Affordable Housing Overlay Zone for Fairmount Commons.

H. Administrative Mechanism to Administer Income Qualification of Applicants, Administer Units, Pro-Forma, Funding Sources and Construction Schedule for Group Home

P-23. Narrative of operation of group homes; Schedule 10-B to be submitted in support of New Jersey Housing and Mortgage Finance Agency (one for each group home) for financing and Construction Schedule.

I. Agreement with Affordable Housing Administrative Agent

P-24. Agreement between Township of Chatham and Piazza & Associates, Inc. to serve as the Affordable Housing Administrative Agent.

J. Stable Funding Sources

P-25. Ordinance 2019-22 Authorizing Collection of Development Fees.

P-26. Resolution 2020-47 Intent to Bond Spending Plan Shortfall.

Court Exhibit

C-1. Report of the Special Master Brian P. Slaugh, PP, ACIP, dated September 11, 2020

I. PRELIMINARY

The Court has considered the application of the Township of Chatham (Chatham or Township), located in Morris County, New Jersey, for a determination that its Amended Settlement Agreement, entered into with the Fair Share Housing Center (FSHC) and dated July 23, 2020 (Agreement), is an agreement that is fair and initially demonstrates the likely production of sufficient realistic affording housing opportunities within the municipality to satisfy Chatham's Constitutional obligation to provide its fair share of low and moderate income housing to those populations in the region (affordable housing obligations). The matter was tried before the Court on September 17, 2020 and September 24, 2020 via an "Amended Fairness and Preliminary Compliance Hearing." At the conclusion of hearing the court rendered a brief oral bench decision and indicated it would follow up with a supplemental written decision.[1]

II. PROCEDURAL POSTURE

In July 2015, Chatham filed a complaint by way of a declaratory judgment action seeking a final judgment of compliance and repose regarding its affordable housing obligations. FSHC participated throughout this process. Sterling Homes, LLC and Sun Homes, LLC (collectively Sun Sterling) were granted intervenor status by order dated June 30, 2017.

[1] The court also reserves the right to provide an amplification of its decision in the event of an appeal in accordance with R. 2:5-1(b).

An order granting temporary, continuing immunity from any builder's remedy actions or other challenges to Chatham's compliance with its affordable housing obligations was entered shortly after the complaint was filed.[2] Chatham and FSHC reached an initial settlement agreement dated December 13, 2018 (original Agreement) and an amended agreement (first amended Agreement) dated January 10, 2019, which were approved via court order by Judge Nergaard (now retired) on February 22, 2019 after a fairness and preliminary compliance hearing (the initial fairness order).[3] A final compliance hearing was to be scheduled for the summer 2019. The initial fairness order approved the original Agreement and first amended Agreement (collectively, the initial Agreement) which provide, inter alia, for the Township to provide a project that would include a 74 unit 100% affordable family rental development (development or development site) at a site within the Township to be determined by June 2019.

As Chatham began drafting its housing element and fair share plan together with ordinances to implement various terms of the initial Agreement, public opposition began to mount regarding potential sites for the development. Delays ensued and the final compliance hearing was postponed. Philip Caton, AICP had previously been appointed as the court's special master. After Mr. Caton's retirement in 2019, Brian M. Slaugh, PP, AICP, a principal in the same professional planning firm, was appointed to continue as the court's special master by order dated July 24, 2019. Mr. Slaugh conducted numerous mediations leading to a final agreement. There was an additional amendment to the Agreement in March 2020 but the site projected for the affordable housing was found to have developability concerns leading to the final amendment of the Agreement on July 23, 2020 which now designates a specific site for the development. The

[2] There were two prior judges who handled the case before this Court took over the matter in March 2019.
[3] Judge Nergaard had previously entered an order on May 4, 2018 regarding preliminary fairness in connection with an existing site known as Vernon Grove which approved the extension of affordability controls for 30 years from September 24, 2016.

development site was designated as 522 Southern Boulevard, a privately owned parcel in the Township that was improved with a Charlie Brown's restaurant. Currently, the restaurant is not operating. In the Agreement the Township committed to acquiring the property, if necessary, by way of condemnation.

Upon being advised the Agreement has been fully executed and approved the court issued an order on July 28, 2020 scheduling the amended fairness and preliminary compliance hearing for September 17, 2020 and September 24, 2020. Proper and timely notices of the hearing were served and published, including information regarding the need for the hearing to take place in a virtual remote setting due to the continuing COVID-19 public health emergency in the State of New Jersey (hearing notice). The hearing notice provided interested parties would be allowed to present any position on the Agreement at the hearing, but also provided that written objections (including expert reports) needed to be in writing, filed with the court and served on counsel of record by September 3, 2020. Although not intervenors, Kronos Holdings, LLC (Kronos) and the Silverman Group, LLC (Silverman) filed written objections to the Agreement.

Kronos is the current owner of the development site. Its objections were filed through counsel, Thomas H. Prol, Esq. of Sills Cummis & Gross, P.C. Kronos filed a notice of motion to intervene on September 3, 2020 and requested that its motion papers double as its objection to the Agreement. Its motion was not returnable until September 25, 2020 – the first available return date based on the filing date of the motion. Kronos' request to adjourn the hearing dates so its intervention motion could be heard in advance of the hearing was denied. Through Mr. Prol, Kronos appeared at the hearing, participated as a member of the public, cross examined witnesses and presented its position to the court.

Silverman is the purported contract purchaser of the development site (together with a second parcel) from Kronos. Through its counsel, Derek W. Orth, Esq. of Inglesino Webster Wyciskala & Taylor, LLC, Silverman filed a non-specific objection to the Agreement on September 3, 2020. Its filing suggested it would present affirmative testimony at the hearing. However, other than indicating it objected to the Agreement there were no substantive reasons set forth in the written objection. Silverman did not seek to present any affirmative evidence or testimony at the hearing. Instead, through Mr. Orth, Silverman appeared at the hearing, participated as a member of the public, cross examined witnesses and presented its position to the court.

Approximately 35-40 individual members of the public appeared via Zoom at the hearing. Several asked questions of the witnesses. When the hearing was opened to all members of the public to make statements, in addition to Mr. Prol and Mr. Orth, three additional members of the public elected to make statements for the record.

At the conclusion of the hearing the court rendered a brief oral bench ruling finding the Agreement meets the necessary fairness criteria and indicated it would provide a supplemental written statement of reasons when it issued its order. Counsel for the Township was directed to submit an Order On Amended Fairness and Preliminary Compliance. That Order was submitted on October 5, 2020 and will be entered simultaneously with this opinion. This opinion resolves all issues regarding both fairness and preliminary compliance in this matter.

III. STANDARD OF REVIEW

1. Creation and implementation of the Mount Laurel doctrine

Forty-five years ago, our Supreme Court recognized that New Jersey faced a desperate need for housing that would provide decent living conditions and would be economically suitable for low and moderate income families. Southern Burlington County NAACP v. Mount Laurel, 67 N.J. 151, 158 (1975) (Mount Laurel I). The remedy devised sprung from a determination by our New Jersey Supreme Court that there exists a Constitutional obligation for every municipality in the State to provide a realistic opportunity for the development of its "fair share" of the region's present and prospective low and moderate income housing needs through implementation of appropriate land use regulations. Id. at 192 (the Mount Laurel doctrine). However, municipalities were instructed that they "need not guarantee that the required amount of affordable housing will be built, but must only adopt land use ordinances that create the realistic opportunity to meet the regional need and their own rehabilitation share." In re Adoption of N.J.A.C. 5:94 & 5:95 By New Jersey Council On Affordable Housing, 390 N.J. Super. 1, 54 (App. Div. 2007). Thus, when a trial court finds that a municipality has failed to meet its Mount Laurel obligation, it shall order the municipality "to revise its zoning ordinance within a set time period to comply with the constitutional mandate; if the municipality fails adequately to revise its ordinance within that time, the court shall implement the remedies for noncompliance . . . ." S. Burlington County NAACP v. Mt. Laurel, 92 N.J. 158, 278 (1983) (Mount Laurel II).

The New Jersey Fair Housing Act was then implemented in 1985. N.J.S.A. 52:27D-301-329. Found within the Fair Housing Act was the creation of the Council on Affordable Housing (COAH). N.J.S.A. 52:27D-305. COAH was to hold "primary jurisdiction for the administration of housing obligations . . ." N.J.S.A. 52:27D-304(a). In 2015, the New Jersey Supreme Court found that COAH had essentially stopped functioning and was failing to carry out its mandate. Therefore, the control and oversight of such municipal affordable housing obligations was returned

to the courts. In re Adoption of N.J.A.C. 5:96 & 5.97, 221 N.J. 1 (2015) (Mount Laurel IV). In adjudicating Mount Laurel declaratory judgment actions such as this trial courts were directed to "employ flexibility" in assessing a municipality's compliance plan. Mount Laurel IV, 221 N.J. at 33. Thereafter, Chatham filed this declaratory judgment actions within the timeframe set forth in Mount Laurel IV.

2. General standards

As to the Fairness hearing, Chatham asserts the Agreement displays the production of sufficient realistic housing opportunities to satisfy its affordable housing obligations. Mount Laurel cases, whether brought by builders or by municipalities, arise in the nature of representative actions at which the rights and interests of low and moderate income households throughout the region are determined, and the future opportunity of low and moderate income households to assert those rights are foreclosed. In order to assure that those laudable goals are achieved, the parties cannot settle such cases except with the approval of the courts and an ultimate determination, upon notice to low and moderate income households and those who might act to vindicate the interests of such households, that the settlement is fair and reasonable to low and moderate income households in the region. Morris County Fair Housing Council v. Boonton Township, 197 N.J. Super. 359, 368 (Law Div. 1984), aff'd mem on opinion below, 209 N.J. Super. 108 (App. Div. 1986) (Morris County Fair Housing Council); East/West Venture v. Borough of Fort Lee, 286 N.J. Super. 311, 326-27 (App. Div. 1986).

In this case, Chatham has noticed the hearing as both a "amended fairness" hearing and "preliminary compliance" hearing because of the amended Agreement.[4] This hearing provides the opportunity for any party to offer evidence that the Agreement is unfair and unreasonable to low

[4] The court found on the record the notices were appropriate and timely.

and moderate income households, and is therefore noncompliant. To make a final determination that the settlement is in fact fair and reasonable to low and moderate income households, this court must make a finding, as a matter of fact, that the Agreement displays sufficient realistic opportunities for the provision of safe, decent affordable housing to satisfy Chatham's constitutional affordable housing obligations. The creation of realistic opportunities for safe, decent affordable housing is the core of the Mount Laurel doctrine:

> Satisfaction of the Mount Laurel obligation shall be determined solely on an objective basis: if the municipality has in fact provided a realistic opportunity for the construction of its fair share of low and moderate income housing, it has met the Mount Laurel obligation to satisfy the constitutional requirement; if it has not then it has failed to satisfy it. Mount Laurel II, 92 N.J. at 221.

A municipality must satisfy its entire housing obligation—satisfaction of only some portion of that obligation does not suffice[5]:

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

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

To find that a settlement agreement is fair to low and moderate income households, a court must find, among other things, that based upon these constitutional standards, it in fact creates

[5] For this reason no final judgment of compliance and repose could be rendered when Judge Nergaard approved the agreement limited to the Vernon Grove 30 year extension of affordability controls or her subsequent order approving the first iteration of Chatham's settlement with FSHC as it did not identify how or where the Township would implement the 100% affordable development it agreed to advance .

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

As set forth in the appellate division's decision of Livingston Builders Inc. v. Livingston, a court's review of a settlement agreement for the purpose of determining if it is fair to low and moderate income households is guided by COAH's criteria regarding whether the agreement creates sufficient realistic housing opportunities to satisfy the allocated housing obligation:

> By adoption of the Fair Housing Act, N.J.S.A. 52:27D-301 to-329, the Legislature, with the Supreme Court's approval, has designated the Council on Affordable Housing, acting pursuant to the Act, to establish the criteria for defining what a municipality must do to

> comply with its constitutional obligation to "provide through its land use regulations a realistic opportunity for a fair share of its region's present and prospective needs for housing for low and moderate income families." N.J.S.A. 52:27D-302a; see Hills Dev. Co. v. Township of Bernards, 103 N.J. 1, 25,31-32, 510 A 2d 621 (1986). **COAH has established those criteria, see N.J.A.C. 5.93-1.1 to -15.1 and the courts should ordinarily defer to them.** Hills Dev. Co., 103 N.J. at 63, 510 A.2d 621; East/West Venture, supra, 286 N.J. Super. at 334 n. 6, 669 A.2d 260. If the relevant evidence presented at a fairness hearing held on proper notice to all interested parties show that a proposed settlement satisfies those criteria, the settlement is entitled to the court's preliminary approval. [Id.] (emphasis added).

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

"Flexibility" remains the polestar of the authority that the Supreme Court provided to trial judges in adjudicating Mount Laurel declaratory judgment actions stemming from Mount Laurel IV. 221 N.J. at 33. The trial's court role is to flexibly exercise discretion to ensure, to its satisfaction, that each municipality has provided a realistic opportunity for the construction of its fair share of low and moderate income housing and has met its obligation to satisfy its constitutional Mount Laurel affordable housing obligations. Id. ("We emphasize that the courts should employ flexibility in assessing a town's compliance…).

> The courts that will hear such declaratory judgment applications or constitutional compliance challenges will judge them on the merits of the records developed in individual actions before the courts.
>
> […]
>
> [M]any aspects to the two earlier versions of Third Round Rules were found valid by the appellate courts. In upholding those rules the appellate courts highlighted COAH's discretion in the rule-making process. **Judges may confidently utilize similar discretion when assessing a town's plan, if persuaded that the techniques proposed by a town will promote for that municipality and region the constitutional goal of creating the realistic opportunity for producing its fair share of the present and prospective need for low and moderate income housing.**

[…]

> We emphasize that the courts should employ flexibility in assessing a town's compliance and should exercise caution to avoid sanctioning any expressly disapproved practices from COAH's invalidated Third Round Rules. Beyond those general admonitions, the courts should endeavor to secure, whenever possible prompt voluntary compliance from municipalities in view of the lengthy delay in achieving satisfaction of towns' Third Round obligations.
>
> Mt. Laurel IV, 221 N.J. at 29-30 (emphasis added).

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

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

The Court shall give considerable deference to the Agreement in this matter between Chatham and FSHC as it is designed to afford a realistic opportunity for the provision of affordable housing. At the same time, the court notes that an objection posed by a developer like Silverman or a property owner like Kronos, although ostensibly submitted as representative of low and moderate income households, are for the purpose of attempting to gain leverage and/or persuade the municipality to take some other course of action. Kronos suggests its property is not right for development as proposed in the Agreement, suggests it has a better alternative but offers none. Kronos seeks to raise issues that are more properly raised in other expected litigation. Its objections suggest it will seek prerogative writ relief regarding an "in need of redevelopment" designation and will further contest any condemnation action initiated by the Township.

Silverman urges a second parcel it will acquire will provide an opportunity to spread out affordable units; however, no specifics are provided. The court concludes Kronos and Silverman have a primary interest at this time in retaining the benefit of whatever contractual rights they developed and not in advancing public interests on behalf of low and moderate income families. Although the second parcel was never clearly identified, one member of the public suggested it must be one of the most environmentally sensitive parcels in the municipality.

Morris County Fair Housing Council, involved circumstances similar to the present matter. Significantly, as stated therein by Judge Skillman, in the case of developers engaged in Mount Laurel claims, standing is to be granted "not to pursue their own interests, but rather as representatives of lower income persons" affected by exclusionary zoning. Id. at 366. Here, as memorialized in the Agreement adopted by Fair Share Housing Center on behalf of low and moderate income individuals seeking housing in Chatham, those interests have received "actual and efficient protection" as required in this proceeding. Id. at 365 (citation omitted). That fact should weigh heavily in the court's decision.

Specifically, Judge Skillman stated: "[t]he risks of improvidently approving a settlement and issuing a judgment of compliance are most acute in Mount Laurel litigation brought by developers." Id. at 367 (emphasis added). Judge Skillman added that, rather than descend into a "morass of facts, statistics, projections, theories and opinions," Id. at 371-372, the settlement of a Mount Laurel controversy should turn solely on a determination that the settlement protects the interests of the persons on whose behalf the action was brought. Id. at 369-371. Where, as in this case, a public interest group such as FSHC has competently represented the interest of low income persons, the dangers of improvident settlement are substantially reduced. Id. at 368. Even then, the court is mindful that a public organization may incorrectly evaluate the strengths and

weaknesses of its claims or be overly anxious to settle a case for internal organizational reasons. Morris County Fair Housing Council, 197 N.J. Super. at 367-368. Yet, in this case, FSHC has itself advocated that the terms and conditions of this Agreement do not require any deference or preference to be exhibited by the Court. Instead, it has merely urged the court to accept the Agreement. Of particular note here, Chatham had great difficulty and created substantial delays in determining the development site as required by the original Agreement due – at least in part - to pressure from the community regarding two other proposed sites—but, with continued perseverance from FSHC and the Special Master, Chatham remained committed to a settlement that left intact the original approach to finding an appropriate site for a 100% family rental development. In light of these events, and for these reasons, the court will scrutinize the elements of the Agreement.

5. Regarding Particular Applicable Regulations

As part of the standards for the review of plans to zone for affordable housing developments (N.J.A.C. 5:93-5-6), COAH regulations require a determination for a proposed project 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 also detailed in N.J.A.C. 5:93-5-3. These terms are defined as follows:

> "'Approvable site' means a site that may be developed for low and moderate income housing in a manner consistent with the rules or regulations of all agencies with jurisdiction over the site. A site may be approvable although not currently zoned for low and moderate housing."
>
> "'Available site' means a site with clear title, free of encumbrances which preclude development for low and moderate income housing."
>
> "'Developable site' means a site that has access to appropriate water and sewer infrastructure, and is consistent with the applicable

> areawide water quality management plan (including the wastewater management plan) or is included in an amendment to the areawide water quality management plan submitted to and under review the Department of Environmental Protection (DEP)."
>
> "'Suitable site' means a site that is adjacent to compatible land uses, has access to appropriate streets and is consistent with the environmental policies delineated in N.J.A.C. 5:93-4."

In order to evaluate the Township's designation of properties proposed for affordable housing, an analysis according to the above criteria, and the additional standards outlined in N.J.A.C. 5:93-5.3, 5.4 and 5.6, should be provided by a municipality in its Housing Element and Fair Share Plan (HEFSP). A similar approach is needed for the 100% affordable family rental development site. This analysis is a condition to be addressed in conjunction with the final compliance hearing.

In this case, the court was presented some initial evidence concerning satisfaction of the COAH criteria as set forth in N.J.A.C. 5:93-1, et seq. but the parties also noted that these requirements will be further addressed during the compliance phase. The Township's expert witness and the Special Master both credibly testified there exists sufficient information to reach the preliminary conclusion on compliance. The HEFSP (P-2) provides information on earlier identified sites and the site finally selected. The Agreement (P-6) includes a site suitability analysis at exhibit A for the development site.

IV. SUBSTANCE OF THE SETTLEMENT AGREEMENT PRESENTLY IN ISSUE

The substance of the Agreement addresses Chatham's (1) Present Need (Rehabilitation Component) obligation; (2) Prior Round obligation (1987-1999); and (3) estimated Third Round Prospective Need Obligation (1999-2025), which includes (a) Present Need for the period 1999-2015 and (b) Prospective Need for 2015-2015 (collectively Third Round Obligation). In

accordance with the New Jersey Supreme Court decision on the "gap" period, the entire Third Round period covering 1999-2025 is included. In re Declaratory Judgment Actions Filed By Various Municipalities, 227 N.J. 508 (2017) (Mount Laurel V). The Agreement also includes proposals on how to address the affordable housing obligations recognized and established therein.[6]

As referenced in the Special Master's report and testified to by both Mr. Slaugh and Mr. Banisch, the starting point for determining the Rehabilitation Component and Third Round affordable housing obligations identified in both the initial settlement agreement and the amended Agreement is the report "New Jersey Fair Share Housing Obligations for 1999-2025 (Third Round) Under Mount Laurel IV—dated May 2016 and April 2017" and prepared by Dr. David N. Kinsey, PhD, FAICP, PP for and in collaboration with FSHC (Kinsey Report). The Kinsey Report included a statewide methodology in establishing municipal affordable housing obligations. The settlement reflects that Chatham did not accept the basis of Dr. Kinsey's methodology, but agreed to these terms in the interest of settling the case. Through the negotiation process the settlement embodied a reduction in Dr. Kinsey's calculated obligation for Chatham's Third Round by way of a vacant land analysis (VLA) resulting in a realistic development potential (RDP) of 200 units rather than the full 387 units generated by the Kinsey Report. (P-3, para. 3, 7 & Ex. B). The Prior Round obligation was consistent with N.J.A.C. 5:93. (P-3, pg.2).

1. Present Need (Rehabilitation Share)

[6] As referenced above the original agreement dated December 13, 2018 already received an order recognizing that agreement met the required standards for fairness and preliminary compliance as embodied in Judge Nergaard's Order entered February 22, 2019. The court incorporates herein by reference her order and oral statement of reasons (P-5) (initial Fairness Order). However, at the request of the Township and FSHC that order did not make any findings regarding the 74 unit 100% affordable family rental development as the site for the development had not yet been designated. (P-5, para. 1).

The Settlement Agreement indicates that the Chatham's original rehabilitation obligation is 63 units, but based on a structural conditions survey of the community's housing stock in accordance with N.J.A.C. 5:93-2.2 (b) "an on-the-ground investigation of the actual physical condition of the Township's housing stock . . . concluded that only six units in the Township meet COAH's criteria for physical deficiency. As a result, the Township's rehabilitation obligation is reduced from 63 to six units." (C-1, pg. 6). The original Special Master Philip Caton agreed with this assessment. (P-3, pg. 2 para.5). This provision remained unchanged between the original agreement and the amended Agreement. This present need will be addressed by the Township in accordance with applicable law. This was approved in Judge Nergaard's initial Fairness Order. (P-5). Compliance with be separately evaluated at the final compliance hearing.

2. <u>Prior Round Obligation (1987-1999)</u>

The Agreement indicates that Chatham's Prior Round Obligation is eighty-three (83) affordable units pursuant to N.J.A.C. 5:93, and further provides that the Township meets the Prior Round Obligation through the following mechanisms: (a) 75 unit credits for family for sale units at Vernon Grove and (b) six group home credits (plus 6 bonus credits) for an existing group home at Block 67, Lot 3. Combined credits total eighty-seven (87) units. These were approved in Judge Nergaard's initial Fairness Order (P-5). Exhibit A to the initial Agreement contained the necessary deed restriction for Vernon Grove and documentation evidencing the creditworthiness of the group home units must be presented at the final compliance hearing.

3. <u>Third Round Obligation (1999-2025)</u>

The Agreement reflects that Chatham's Third Round Obligation, inclusive of the Gap Period Present Need, is 387 units as calculated by the Kinsey Report and adjusted through

the Agreement. The Third Round Obligation of 387 units has been reduced to a RDP of 200 through a VLA.

The use of a VLA is recognized in the Fair Housing Act, which acknowledged an adjustment to present and prospective fair share can be made based upon the amount of available vacant and developable land. N.J.S.A. 52:27D-307(c)(2). COAH regulations were implemented as part of the Second Round Rules, and recognized: "some towns may not have enough currently developable land to meet their fair share requirements, although they may have vacant land that is capable of future development for that purpose." In re Fair Lawn Borough, Bergen Cty., Motion of Landmark at Radburn, 406 N.J. Super. 433, 441 (App. Div. 2009). Therefore, "[a] municipality may receive a [VLA], conditioned on adopting zoning geared at allowing the eventual development of affordable housing on those properties. Id. at 442 (citing N.J.A.C.5:93-4.1 to 4.2).

The RDP of 200 units in the amended Agreement remains consistent with the 200 RDP agreed to in the initial agreement. The basis for the VLA was set forth in exhibit B to the initial agreement and did not change in the amended Agreement. There was also no change in the units being developed through the first three categories of RDP units. The only change in the RDP units was an allocation of up to 15 of the originally designated 74 municipal units to group home units and the designation of 522 Southern Boulevard as the site for the remaining municipal committed units. The Agreement indicates Chatham will satisfy the Third Round Obligation in the following manner:

- Eight (8) units relating to a Regional Contribution Agreement (RCA) with City of Newark approved by the Council on Affordable Housing on November 6, 1996. (P-3 pg. 2).

- Seventy-two (72) units at the Vernon Grove site receiving an extension of expiring controls on affordable family, for-sale units. (P-3 pg. 2-3 & P-7 pg. 2). The extension of these controls was approved by court order dated May 4, 2018 which was attached as Exhibit D to the initial Agreement. (P-3).

- Twenty-four (24) family rental units created through inclusionary zoning of Block 66, Lot 1, a 30.74 acre parcel with provision of off-site units phased with the market-rate units on a portion of Block 48.16, Lot 117.27 (Skate Park site). (P-3 pg. 3 & 4 & P-7 pg. 2-3). These units were approved as part of Judge Nergaard's initial Fairness Order.

- No fewer than fifty-nine (59) units (plus 26 bonus credits) of affordable family rental units through the development of the 100% affordable development on 522 Southern Boulevard (Block 128, Lot 2). (P-7 pg. 3).

- Up to fifteen (15) group home bedrooms on a site or sites to be identified and acquired with each bedroom being permitted to count as one one-bedroom unit. Two sites are identified for eight (8) of these units with four (4) being allocated to Block 62, Lots 70 & 71 and four (4) being allocated to Block

> 67, Lots 17 & 17.01). Any additional sites must be identified before the final compliance hearing.[7] (P-7, pg. 4-5).

The Agreement supports the VLA and reduced RDP. All vacant lands in the Town, both privately owned and publicly owned, were identified and calculated as totaling approximately 355 acres. (P-3, Ex. B). Environmental constraints were considered for both sites going through a site suitability analysis (SSA) and additional vacant parcels. (Id.). After constrained land was eliminated there remained approximately 148 acres of developable land. (Id.). The result demonstrated six sites that could potentially be developed yielding 154 units. (Id.). These included suggested densities of between 6 and 12 units per acre. (Id.). The remaining sites outside of the SSA yielded approximately 61 areas of developable area with a suggested yield of 6 units per acre totaling 366.492 units; with a 20% set aside would generate 46 additional affordable units. (Id.). The combination of 154 units under the SSA and the 46 additional units represented a combined total of 200 units of RDP. The Agreement, as amended on July 23, 2020, incorporated the VLA from the initial agreement and maintained the same RDP of 200 units. (P-7, pg. 1).

The total projected unit yield from the projects identified above represents 228 units (including allowable bonus credits) – or 28 units more than the RDP of 200 units. This has remained consistent in all versions of the Agreement. (P-3, pg. 4 & P-7, pg. 5). Unmet need for the Third Round remains at 155 units; calculated as a Third Round Obligation of 387 units, less 228 credits as referenced above and a 4-unit surplus from the Prior Round (387-228-4=155). (P-3, pg. 4).

[7] The combined total number of affordable family rental units to be provided on 522 Southern Boulevard and group home units shall be no fewer than 74 units. For example, if 62 family rental units are provided on 522 Southern Boulevard, at least 12 group home units must be provided (62 + 12 = 74). (P-7, pg. 5).

Unmet need compliance is proposed through a series of ordinance changes providing for a 20% affordable housing unit set aside for projects consisting of six (6) or more new residential units and overlay zoning changes for Block 128 Lot 9[8], a 3.2-acre parcel currently used as an office building to permit 12 units to an acre with a 20% set-aside if for sale and 15% set-aside if for rental. (P-3, pg. 5-6). These ordinances are to be implemented during the compliance phase and approved no later than the final compliance hearing. The ordinance for Block 128, Lot 9 has already been adopted. (P-22). The Special Master also notes the additional overlay zoning ordinance was adopted as Ordinance 2019-15 but does require some revisions before final compliance.

The Special Master found, based upon his analysis and review of the VLA prepared by Mr. Banisch, that the RDP of 200 out of a 387-unit Third Round Obligation, as supported by FSHC, was justified.

V. OBJECTIONS TO THE AMENDED SETTLEMENT AGREEMENT

The court is unclear whether there were objections to the original agreement when it received preliminary approval from Judge Nergaard on May 4, 2018. e-Courts filings do not reflect any objections having been filed, nor does the May 2, 2018 order indicate that any objections were made when the court approved the extensions of affordability controls at Vernon Grove.[9]

[8] There was a clerical error in the initial Agreement, originally referencing the parcel as Block 138, Lot 1 which was corrected to reflect Block 128 Lot 9 in a letter amendment dated January 10, 2019. (P4).

[9] Since the original agreement was subsequently amended into the Agreement that is now the subject of this hearing, the terms and conditions of the original Agreement are not relevant to the court's determination of this matter except for those provisions to have survived and been incorporated into the current Agreement. This Agreement must stand on its own and be evaluated de novo.

Objections to the amended Agreement have been received from the following persons/entities: Kronos and Silverman filed written objections. Silverman did not specify the basis for its objections in its written submission. Kronos relied on its assertions set forth in its pending motion to intervene. Three additional members of the public expressed general and conclusory concerns that focused on broader concerns involving the environment, a lack of nearby services and impact on a bordering residential neighborhood.

Kronos and Silverman, through counsel, did not raise any objection to any parts of the settlement terms other than how the Kronos property at 522 Southern Boulevard was classified. Mr. Banisch prepared a site suitability study in July 2020 that was made a part of the Agreement. It reflects the parcel is not complicated by environmental constraints. It is close to shopping, local services and parks. There are sidewalks for access to nearby retail and service providers. Adequate sewer and water capacity is available and already services the property which housed a Charlie Brown's restaurant that closed with the onset of the public health emergency in March 2020. It has frontage and access on a county road. An initial concept plan prepared by the Township engineer reflects the ability to construct the proposed 62 unit 100% affordable project per Mr. Banisch's report. The site is located in a Planning Area 1 per the State Development and Redevelopment Plan. In furtherance of these recommendations the Township has already adopted a series of resolutions and ordinances to acquire this site and redevelop it. (P-17 to P-21).

In its oral presentation through counsel Silverman indicated it has a contract to purchase this and another site from Kronos that may allow for a better development of affordable housing units. Exactly how or why that might be better was not made clear. Also, counsel did not argue that any legal standard would support a position that a municipality must await a determination on what would be the very best affordable housing plan.

The objections by Kronos focus on what it claims to be the Kafkaesque manner by which the Township has sought to designate its property for the 100% affordable site coupled with what it perceives to be a threat against its vibrant business interests. Kronos represented in its written objection that the Townships actions in pursuing its property were violative of statutory and common law. A tort claims notice had already been filed and through counsel Kronos represented it would pursue any available legal actions to protect its interests.[10]

Neither Kronos nor Silverman offer any legal authority to support a position that the municipality is not within its rights to seek condemnation determined to be necessary or useful for the construction of low or moderate income housing. In fact, both acknowledge the New Jersey Fair Housing Act specifically allows a property to be acquire for this purpose through the exercise of eminent domain. See N.J.S.A. 52:27D-325.

VI. SUMMARY OF TESTIMONY AND EVIDENCE OFFERED TO THE COURT

The Town presented the testimony of its expert Professional Planner, Francis Banisch, AICP, PP. Mr. Banisch was duly qualified as an expert witness in the area of professional planning, and more particularly in the area of planning involving "Mount Laurel issues." He has been involved in the field of professional planning since 1975, during which he has prepared dozens of affordable housing plans. Moreover, he has been appointed by other courts as a special master in approximately 50 Mount Laurel cases throughout the State of New Jersey.

Mr. Bansich provided a thorough and detailed summary of the Township's Fair Share Plan, which was referred to and encompassed within the Agreement entered into between the Township and FSHC. His testimony referred to various exhibits, including the Agreement, which he

[10] The court is aware that after the hearing on September 24, 2020 Kronos has filed at least one legal action against the Township involving, inter alia, the actions taken in connection with the Redevelopment process of the Kronos site. MRS-L-2024-20.

authenticated. These were all accepted into evidence by the court. Mr. Bansich reviewed each of the component projects which constitute the Township's proposal to be included in its HEFSP in order to meet its constitutional obligation. He indicated that he evaluated each of the projects based upon required criteria (i.e. N.J.A.C. 5:93-5.3).

Mr. Banisch indicated that he found the overall plan, as embodied in the Settlement Agreement, to be fair and reasonable to the protected class of low and moderate income households as those terms have been used under existing case law and rules and regulations. He was made available for cross-examination by all parties and members of the public.

The court also received the sworn testimony of Brian M. Slaugh, PP, AICP, the court-appointed Special Master in this case. Given Mr. Slaugh's extensive experience in municipal planning, development and affordable housing issues, he was accepted as an expert witness by the Court with the consent of all parties. He prepared and submitted his report dated September 11, 2020, testified regarding his findings, recommendations and professional opinions and was made available for cross-examination by all parties and members of the public. His report was entered in evidence as C-1 without objection.

All exhibits introduced and marked into evidence on behalf of the Township included P-1 through P-26. A table of those exhibits and the Special Master's report is set forth at the beginning of this Opinion.

Mr. Slaugh summarized his reports, which along with his testimony, provided a thorough review of the Agreement, the applicable law, the particular circumstances in the Township of Chatham, his opinions and recommendations concerning the approval of the Agreement by the court, and certain recommended conditions to be considered by the court. The court has and will address the specific provisions of Mr. Slaugh's testimony and reports throughout this opinion.

Mr. Slaugh testified as to the general site suitability of the 522 Southern Boulevard with specific details to follow at the final compliance hearing. Generally, he found there were no disqualifying environmental constraints that would have any negative material impact at the site; the density yield of 18.2 units per acre was not excessive and adequate public water and sewer is available. Moreover, he emphasized that Silverman had not raised any specific objections in its written submission and Kronso had not identified any site suitability issues in its written objection. Mr. Slaugh testified there were only "minor adjustments to the prior approval" being presented primarily involving how the 74 unit 100% would be implemented with the 522 Southern Boulevard now being the designated site which would accommodate 62 units and 12 group home units would be constructed on the River Road site. The River Road site had at one point been contemplated as the site for 100% affordable project. (P-6, pg. 3). However, both Mr. Banisch and Mr. Slaugh agreed the 522 Southern Boulevard was far superior to the River Road site for the primary 100% affordable project as the River Road site would have challenges relating to the proposed density resulting from environmental constraints and River Road was not a centrally located as 522 Southern Boulevard. With sidewalks all around and retail and services nearby 522 Southern Boulevard was therefore far more accommodating to those occupying affordable housing units.

VIII. COURT'S FINDING ON FAIRNESS

A. General Statement

The Court has reviewed and considered the amended Agreement (P-7) reached between Chatham and FSHC dated July 23, 2020 in an effort to determine whether or not there was any element of the settlement that would be unfair to the interests of existing and future low and moderate income households in Chatham's housing region.

The Court has evaluated the Agreement in terms of the criteria set forth in East/West Venture v. Borough of Fort Lee, 286 N.J. Super 311, 329 (App. Div. 1996) (East/West Venture), which outlines the issues involved with approving a settlement of Mount Laurel litigation. While this case differs in that the Township is the plaintiff and FSHC is an intervenor—and through the settlement, a defendant in the proceedings—East/West Venture provides a good framework for evaluating any settlement arising out of Mount Laurel litigation.

As a result of its analysis, the Court concurs with the opinion of its Special Master, Brian M. Slaugh, that the settlement provides for the development of a substantial amount of affordable housing and satisfies the criteria set forth by the appellate division in East/West Venture.

B. Summary of Key Terms of the Settlement Agreement

1. Development and Implementation of the Affordable Units

(a). Present/Rehabilitation Share

The original agreement (P-3) provided for a Present/Rehabilitation Share totaling sixty-three 63 units but based on a structural housing conditions survey on the actual on-the-ground physical condition of the Township's housing stock the obligation was reduced from sixty-three (63) units to six (6) units. (P-5, Ex. A, pg. 6). Except for not establishing a rental rehabilitation program the municipality is addressing these requirements in accordance with applicable law. This requirement did not change in the amended Agreement and is part of the original fairness approval entered by Judge Nergaard. (P-5).

The Township will be required to demonstrate compliance at the final hearing.

(b). Prior Round Obligation

The original agreement also provided for a Prior Round obligation per N.J.A.C. 5:93 of eighty-three (83) units. (P-3, pg. 3). This is addressed with the 75 affordable family for sale units

developed at the Vernon Grove development, plus a six (6) unit group home development at Block 67, Lot 3 (plus 6 bonus credits). (Id.). This represent total credits of 87; 83 of which satisfy the Prior Round obligation with the remaining 4 credits being carried to the Third Round obligation. The 30 year deed restrictions for Vernon Grove were set forth in Exhibit A to P-3. At the final compliance hearing the Township must provide documentation evidencing the creditworthiness of the group home units. These requirements did not change from the original agreement and were part of the original fairness approval entered by Judge Nergaard. (P-5).

(c). Third Round Prospective Need

The Agreement further indicates the Township and FSHC agree the Third Round Prospective Need is 387 affordable units, per the Kinsey Report as then adjusted through the Agreement. (P-3, pg. 3). Mr. Bansich conducted a vacant land analysis (VLA) and the VLA results in the Township having a realistic development potential (RDP) to provide 200 affordable units/credits towards its third Round Prospective Need (not including unmet need) for which the Township has implemented or will implement the necessary mechanisms to allow for the development of those units. Both the original agreement (P-3) and the amended Agreement (P-7) provide for the development of 228 units (inclusive of bonuses) despite the RDP of 200 units. In addition, the Township also had the 4 unit bonus from the Prior Round. Thus, the Township's Third Round unmet need is 155 units (387-228-4=155). (P-3 pg. 4). This did not change in the amended Agreement. The unmet need is being addressed by a combination of factors including: a mandatory 20% set aside ordinance for projects with a density of 6 units to the acre or more, a development fee ordinance and overlay zoning permitted the redevelopment of an office building site. (Id. at pg. 4-5; P-4; P-22; C-1, pg. 18-21). Final proofs will be required at the final compliance hearing.

2. Additional Obligations, Terms, Conditions and Components

(a). The Town will post annual status reports of all affordable housing activity within the municipality through the municipal website, with an additional copy sent to FSHC. The Township will use forms previously prepared by COAH or any other forms endorsed by the Special Master and FSHC. (P-3, para. 19, pg. 8).

(b). The Town further agreed to require that 13% of all affordable units, except for those approved, vested or constructed, or granted preliminary or final site plan approval prior to July 1, 2008, shall be very low income units, with half of the very low income units being available to families. (Id., para. 11, pg. 5).

(c). In regard to meeting Third Round Prospective Need, the Township agreed Third Round bonuses will be applied in accordance with N.J.A.C. 5:93-5.15(d). At least 50% of the units in this round, including unmet need, will be affordable to very-low-income and low-income households with the remainder affordable to moderate-income households. Also, 25% will be met through rental units, including at least half in rental units available to families. At least one-half of the Third Round Prospective Need units must be available to families. The Town agreed to comply with the age-restricted cap of 25% and to not request a waiver of this requirement. (Id., para. 12, pg. 6).

(d). The Town agreed to add to the list of community and regional organizations in its affirmative marketing plan receiving notice of all available affordable housing units: the FSHC, the New Jersey State Conference of the NAACP, the Latino Action Network, the Morris County Chapter of the NAACP, Newark NAACP, East Orange NAACP, Housing Partnership for Morris County, Community Access Unlimited, Inc., Northwest New Jersey Community Action Program, Inc. (NORWESCAP), Homeless Solutions of

Morristown, and the Supportive Housing Association. These organizations will also be noticed during implementation of the affirmative marketing plan as part of the Town's regional affirmative marketing strategies. The Township also agreed to require any other entities, including developers or person or companies retained to do affirmative marketing, to comply with this requirement.

(e). The Town further agreed to comply with the requirements of the Uniform Housing Affordability Controls (UHAC), N.J.A.C. 5:80-26.1 et seq. regarding bedroom distribution, with an exception that in lieu of 10% of affordable units in rental projects being required to be at 35% of median income, 13% of affordable units in such projects shall be required to be at 30% of median income. Compliance via ordinance adoption shall be required. Income limits will be updated annually as set forth in the Agreement. (Id., para. 14, pg. 6-7).

(f). As an essential term of the settlement, the Town shall adopt a HEFSP in conformance with the terms of the Agreement and present it to the court for approval as part of final compliance. (Id., para. 16, pg. 7). Its proofs at this hearing already included the amended HEFPS incorporating the terms of the Agreement in its final form together with the Planning Board adoption Resolution and the Township Committee's endorsement Resolution. (P-2, P-2a & P-2b).

(g). The parties to the Agreement concurred that if there is a decision from a court of competent jurisdiction in Morris County, a determination by an administrative agency responsible for implementing the Fair Housing Act, or an action by the New Jersey Legislature that would result in a calculation of the Township obligation's for the period of 1999-2025 lower by more than 20% than the total prospective Third Round need obligation established in the Agreement, and if that calculation is memorialized in an unappealable final judgment, the Town may then seek to amend the judgment in this matter to reduce its fair share obligation accordingly.

Notwithstanding the reduction, the Township shall be obligated to adopt a Plan that conforms to the terms of the Agreement and to implement all compliance mechanisms included in the Agreement. These mechanisms shall include, but are not limited to, adopting or leaving in place site specific zoning adopted or relied upon in connection with the Plan; maintaining all mechanisms to address unmet need; and fulfilling the fair share obligation as established in the Agreement. Any reduction below the obligation established in the Agreement would not provide a basis for an application to amend the Agreement, or for relief pursuant to R.4:50-1. If there is any successful reduction of that obligation resulting in credits, the Town may carry over those extra credits to future rounds in conformance with then applicable law. (P-3, para. 17, pg. 7-8).

(h). The Agreement required the Town to prepare a Spending Plan during the compliance period subject to the approval of the court and FSHC. The Town reserved the right to seek approval from the court that the expenditure of funds under the Spending Plan constitutes a "commitment" for expenditure pursuant to N.J.S.A. 52:27D-329.2 and -329.3. The funds deemed "committed" shall have the four-year time period for expenditure designated by statute and case law, with the period beginning to run with the entry of a final judgment approving the settlement. (Id., para. 18, pg. 8).

(i). On the first anniversary of the execution of the Agreement and every anniversary thereafter through the end of the period of protection from litigation referenced in the Agreement, the Town shall provide annual reporting of trust fund activity to the NJ Department of Community Affairs, Council on Affordable Housing, or Local Government Services or other entity designated by the State of New Jersey, with a copy provided to FSHC and posted on the municipal website.. The reporting shall include an accounting of all trust fund activity, including the source and amount of funds collected and the amount and purpose for which any funds have been expended. (Id.).

(j). The Town agreed to contribute a total of $56,000 toward legal fees and costs incurred by FSHC as result of these proceedings; $15,000 thereof have been reimbursed to the Township by Southern Boulevard Urban Renewal, LLC. (P-7, para. 6, pg. 9).

(k). For the midpoint realistic opportunity review due on July 1, 2020, as required by pursuant to N.J.S.A. 52-27D-313, the Township will post on its municipal website, with a copy provided to FSHC, a status report as to its implementation of the Plan and an analysis of whether any unbuilt sites or unfulfilled mechanisms continue to present a realistic opportunity and whether any mechanism to meet unmet need should be revised or supplemented. (P-3, para. 20a, pg. 8-9).

(l). For the review of very low income housing requirements required by N.J.S.A. 52:27D-329.1, within 30 days of the third anniversary of the Agreement, an every third year thereafter, the Township will post on its municipal website, with a copy provided to FSHC, a status report as to its satisfaction of its very low income requirements, including the family very low income requirements referenced in the Agreement.

C. Evaluation of the Settlement Agreement

In East/West Venture, the appellate division established the standard that must be used in evaluating the fairness of a settlement in a Mount Laurel lawsuit;—that standard is whether or not "the settlement adequately protects the interests of the lower-income persons on whose behalf the affordable units proposed by the settlement are to be built". East/West Venture, 286 N.J. Super. at 328. The determination of whether or not the East/West Venture standard is met requires a five-factor analysis that "involves a consideration of [1] the number of affordable housing units being constructed, [2] the methodology by which the number of affordable units has been derived, [3] any other contributions being made by the developer to the municipality in lieu of affordable units,

[4] other components of the agreement which contribute to the municipality's satisfaction of its constitutional obligation, and [5] any other factors which may be relevant to the 'fairness' issue." East/West Venture, 286 N.J. Super. at 328. Thus, the court will consider each factor, as applied to the present matter, as follows.

1. The number of affordable housing units being constructed.

The terms of the amended Agreement provide that the Township's new construction affordable housing obligation for the Third Round (including the Gap Period) is 387 units subject to the durational adjustments. After those adjustments the realistic development potential was calculated as 200 units with 178 units actually constructed or to be constructed plus 50 bonus credits for a total of 228 unit credits. Adding in the 4 additional carryover credits the unmet need is 155 units. Many of the units are already built, but that is not a disqualifying consideration when evaluating this factor. See Livingston Builders, Inc. v. Township of Livingston, 309 N.J. Super. 370, 375 (App. Div. 1998). There is an 8 unit regional contribution agreement (RCA) credit with the City of Newark. (P-9, para. 7, pg. 2; P-7, para. 1, pg.2). RCA supporting documentation is required at the final compliance hearing. In addition, there is credit for 72 units at Vernon Grove based on the extension of affordability controls for an additional 30 years starting on September 24, 2016 as already approved by Judge Nergarrd on May 4, 2018. (P-3, para. 7.2, pg.2; P-7, para. 1.2, pg.2; P-5; C-1, pg. 11).

There remains considerable uncertainty throughout New Jersey concerning the accepted methodology that might ultimately be used to establish affordable housing obligations and the number of units to be constructed. Determining the underlying methodology can represent a significant, time-consuming and costly trial issue in those cases that do achieve a settlement. Some approaches were developed before Mount Laurel V was decided and some were revised

thereafter[11]. A consortium of New Jersey municipalities retained Econsult Solutions, Inc. (Econsult) to develop a methodology and calculate the required number of units for each member of the consortium. This court's Regional Special Master, Richard Reading, prepared a report projecting obligations throughout the State that often fell below the FSHC allocation and generally supported a reduction in the FSHC number. In addition, on March 8, 2018 the Honorable Mary C. Jacobson, the Mercer County Assignment Judge, issued a comprehensive opinion concerning the fair share methodology to implement the Mount Laurel affordable housing doctrine for the Third Round. Thereafter, both Econsult and Mr. Reading issued additional reports updating their calculations utilizing the methodology adopted by Judge Jacobson in her opinion.[12] Here, while not accepting the basis of the methodology in the Kinsey Report, the Township agreed—for settlement purposes only —to use that approach as a starting point in the interest of settling the case. The figure was then adjusted through the Agreement and the VLA performed by Mr. Banisch.

The 63-unit Present Need/Rehabilitation Share was an initial assessment of actual need but based on a structural conditions survey of the community's housing stock in accordance with N.J.A.C. 5:93-2.2 (b) "an on-the-ground investigation of the actual physical condition of the Township's housing stock . . . concluded that only six units in the Township meet COAH's criteria for physical deficiency. As a result, the Township's rehabilitation obligation [was] reduced from

[11] Inclusion of the Gap Period as part of the Third Round Prospective Need analysis was ordered and approved by the New Jersey Supreme Court in Mount Laurel V.

[12] In the Matter of the Application of the Municipality of Princeton, et. al, Superior Court of New Jersey, Law Division, Mercer County; Docket Numbers: MER-L-1550-15 & MER-L-1561-15, Opinion on Fair Share Methodology to Implement the Mount Laurel Affordable Housing Doctrine for the Third Round, M. Jacobson, A.J.S.C. (issued March 8, 2018). The court references this opinion not for any binding precedent, but rather because the parties and experts refer extensively to it and recognize the methodology established therein has and is being utilized throughout the State as an element significantly impacting the settlement discussions and negotiations leading to proposed settlements in these Mount Laurel IV declaratory judgment actions. See R. 1:36-3(c).

63 to six units." (C-1, pg. 6 & 9). The original Special Master Philip Caton agreed with this assessment. (P-3, pg. 2 para.5).

The eighty-three (83) unit Prior Round obligation is in accord with Mount Laurel IV and was approved by Judge Nergarrd in her fairness and preliminary compliance order dated February 22, 2019. (Slaugh Testimony and C-1 pg. 8-9; P-5). Furthermore, Mr. Slaugh affirmed that the 387 units of Third Round Prospective Need and adjusted 200 unit RDP are generally consistent with application of the methodology outlined in Judge Jacobsen's opinion. (Slaugh testimony).

Given the above considerations, and the fact this court's approval of a settlement is not an adjudication of the fair share obligation derived therein, the Court finds that the number of affordable housing units addressed in the Agreement is reasonable.

2. The methodology by which the number of affordable units has been derived.

The methodology utilized in the Kinsey report to calculate the Third Round new construction obligation was designed to follow the Prior Round methodology used by COAH in 1994 to determine cumulative 1987-1999 fair share obligations as closely as possible, as had been directed by the Supreme Court in Mount Laurel IV. As noted above, there is no statewide agreed-to methodology, and the FSHC methodology has been utilized in settlements throughout the state, including in this vicinage (both before and after the Mount Laurel docket was assigned to this court). Deriving the number of affordable units by starting with the Kinsey report calculations and then applying durational adjustments coupled with consideration of the methodology arising from the Judge Jacobson decision represents a reasonable approach in determining the number of affordable units for the Third Round – particularly considering the efficacy of settlements instead of trial.

3. Any other contributions being made by the Plaintiff.

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

- agreement to adopt a compliant HEFSP and all implementing ordinances (in fact these have already been adopted and implemented);
- agreement that 13% of affordable units, except units constructed or granted preliminary or final site plan approval prior to July 1, 2008, shall be reserved for very-low-income households with 50% of those units being available to families;
- agreement that 50% of units addressing the Third Round Prospective Need, including unmet need, shall be affordable to very-low-income and low-income households with the remainder affordable to moderate-income households.
- agreement that at least 25% of the Third Round Prospective Need shall be rental units;
- agreement that at least 50% of rental units shall be available to families;
- agreement that at least 25% of all Third Round Prospective Need units be made available to families;
- agreement that any rental bonuses shall be calculated in accordance with COAH's Second Round rules found at N.J.A.C. 5:9305.15(d);
- agreement to an age-restricted cap of 25% of affordable units with no ability to apply for a waiver;
- agreement to expand the affirmative marketing plan;

- agreement to comply with the requirements of UHAC, subject only to limited exceptions where those rules have been superseded by an amendment to the Fair Housing Act;
- agreement to approve and implement a spending plan;
- agreement that the Agreement may be enforced by the Town or FSHC through a motion to enforce litigant's rights or separate action filed in the Superior Court, Morris County, with the prevailing party being entitled to an award of reasonable attorney's fees;
- agreement that FSHC is recognized as having party status through intervention without the need of motion practice; and
- agreement to contribute $56,000 to FSHC for attorney's fees and costs.

4. <u>Other components of the Agreement that contribute to the municipality's satisfaction of its constitutional obligation.</u>

The Township agreed to take the steps necessary to amend and implement its HEFSP in accordance with the terms of the Agreement and the zoning contemplated in the Agreement, including zoning for inclusionary development, the 100% affordable development and the Group Home development. In addition, the Township will be implementing various measures to advance satisfaction of the unmet needs component. In that context a durational adjustment was proposed with the Township agreeing to pursue vigorously the redevelopment for the Overlay Zone for Block 128 Lot 9 – a commercial property described by the Special Master as a site where tenancies are "trailing off" thereby enhancing the likelihood of future development in accordance with the affordable housing zoning allowance implemented through the overlay zoning. Unmet need is also being addressed by the mandatory set aside ordinance and the development fee ordinance.

Due to the passage of time between the original agreement and the amended Agreement there was also a reduction in timelines to complete important tasks from the original agreement to the amended Agreement including the need for the Township to provide prior to the final compliance hearing "that it has purchased or obtained through use of eminent domain 522 Southern Boulevard for a 100% affordable development and that the site meets the criteria of N.J.A.C. 5:93-5.3(b), including that adequate sewer and water service and capacity is available." (P-7, para 3, pg. 6). Failure to comply with these and other requirements will result in the loss of current and ongoing immunity to "builder's remedy" litigation against the Township and the loss of designating a site for a 100% affordable project with the Special Master (or another person appointed by the court) taking over the process including having the court – rather than the Township – approve the entire process including approval of required zoning changes and site plan approvals. (Id., para. 3, pg. 7). This reduction of time and remedies for noncompliance preclude the Township from gaining any advantage associated with the extended delay between the original Fairness Order entered on February 22, 2019 and a final judgment of compliance and repose if approved at the upcoming hearing scheduled for December 14, 2020.

Another key aspect of the Agreement is the recognition of the dedicated work the Township has already put in to achieve its affordable housing obligations by virtue of the reduction of units needed to meet the Rehabilitation Share and the Prior Round obligation being fully satisfied. Further, eighty of the two hundred RDP units are already completed through the RCA and extension of affordability controls at Vernon Grove. Also, there are four bonus credits for completed units already credited against unmet need and an additional credit of 28 units will be applied against unmet need through the excess RDP being developed.

The commitments and obligations of the Township described above all contribute to the Township's satisfaction of its Mount Laurel obligations. Moreover, the very act of settling this litigation rather than going through the protracted process of an extended trial advances and serves to promote Mount Laurel compliance. This settlement saves time and money and moves the Town forward that much faster toward achieving satisfaction of Mount Laurel compliance.[13]

5. Any other factors that may be relevant to the "fairness" of the settlement.

As discussed in more detail in the previous section of Key Terms of the Settlement, the Agreement provides for a continuing monitoring program throughout its duration, including annual and triennial reporting requirements. The monitoring and reporting requirements will ensure that the interest of lower income households will be advanced through the court's approval of the Agreement and the HEFSP. The process of obtaining the court's approval regarding the Agreement, the scrutiny that document has received as a result of FSHC's intervention, and the conditions contained in the Special Master's Reports requiring adoption of a HEFSP and certain ordinance amendments will all allow the Township to move forward in satisfaction of its constitutional obligation.

Lastly, the court's approval of the Agreement is subject to final compliance which is scheduled to come quickly on the heels of this approval as a result of the delays that did ensue between Judge Nergarrd's fairness order in February 2019 and this fairness hearing in September 2020 – more than one year later than originally contemplated in that original approval. Accordingly, a final compliance review has been scheduled for less than 90 days from the commencement of this hearing with significant consequences flowing to the Township should it be unable to meet that deadline.

[13] The court takes judicial notice that the trial before Judge Jacobson consumed more than 40 trial days covering a 6-month time period.

D. Consideration of Objections filed by Kronos and Silverman

1. Positions of Kronos and Silverman Summarized.

Through counsel, and without calling any witnesses or experts, Kronos and Silverman object to the settlement. Their arguments tend to overlap. However, neither can seriously suggest they are acting on behalf of or attempting to truly advance the interests of low and moderate income households – the target group on behalf of whose interests the Mount Laurel doctrine focuses.

Mr. Prol argues "my client" will suffer from a disability of the process having moved so quickly. Mr. Orth suggests there might be a better plan if the two sites (one of which remains unknown) Silverman is under contract to purchase from Kronos were utilized for inclusionary development rather than creating a 100% affordable project at 522 Southern Boulevard plus the other 100% group home projects.

Both counsel seem to suggest there is a "stigma" that attaches to a 100% affordable project that enhances its potential demise. They both object to the potential use of the eminent domain process as one possible option for the acquisition of 522 Southern Boulevard and lengthy litigation delays they profess will follow. They abhor the potential use of eminent domain – although neither argued against the reality that it is expressly permitted by the Fair Housing Act as one method to achieve a municipality's obligation to meet its constitutional affordable housing obligation.

They both urge the court "pause" and "delay" this determination so there can be more discussion and negotiation.

2. Positions of the Township and FSHC Summarized.

The Township and FSHC emphasize there are many ways to settle an affordable housing case. They argue a key element in this settlement is the significant number of two and three bedroom family units being put forth, as well as the group home component. Moreover, they proffer –

correctly – that 100% affordable developments are a well recognized tool in achieving satisfaction with affordable housing needs. They are not uncommon and clearly allowed; and here the settlement provides for the expeditious construction of the 100% affordable development and the group homes.

The "stigma" suggested by Silverman and Kronos is an outdated and abhorrent class discrimination – one of the very real concerns the Mount Laurel doctrine is intended to eradicate over forty-five years ago. FSHC projects any "stigma" comes from a lack of acceptance by those opposing affordable housing concepts; and the best way to disarm such a concern will be for the local population to embrace their new neighbors and take active steps to integrate them into their community. Thus, the centralized location of the 100% affordable development with easy access to local services enhances the success of this design. Moreover, the Township offers that it will not be an inexperienced developer of such a development; instead it will be contracting with a reputable and experienced outside developer that will bring the site to success. The anticipated tax credits (or additional financial assistance from the Township as required by the Agreement if the tax credits are not acquired), the rental nature of the units (as compared to the for sale status of the Vernon Grove units), the family-type units being developed, the contract with a highly qualified developer to own, operate, maintain and manage the site and the extensive affordability controls lasting for 30-45 years all support the projected success of the 100% affordable development.

3. The Court's Analysis of the Issues Raised by Kronos and Silverman.

It is important to bear in mind that this "hearing on the proposed settlement is not a plenary trial and the court's approval of the settlement is not an adjudication of the merits of the case." Morris County Fair Housing Council, 197 N.J. Super. at 370 (citations omitted). "Rather, it is the

court's responsibility to determine, based upon the relative strengths and weaknesses of the parties' position, whether the settlement is 'fair and reasonable,' that is, whether it adequately protects the interest of the person on whose behalf the action was brought." Id. (citations omitted). This determination "rests within the sound discretion of the court." Id. (citations omitted). However, in carrying out this responsibility the court is not meant to second guess the Township's decision-making process. A court is required to accord municipalities a great deal of flexibility in designing fair-share plans. A court is not to substitute its judgment concerning the reasonableness of the compliance ordinance for that of a well-reasoned and soundly conceived municipal plan. Toll Bros., Inc. v. Township of West Windsor, 334 N.J. Super. 77, 98 (App. Div. 2000) (citing Allan-Deane Corp. v. Bedminster Township, 205 N.J. Super. 87, 132 (Law Div. 1985) and J.W. Field Co., Inc. v. Franklin Township, 204 N.J. Super. 445, 468 (Law Div. 1985)).

Also, it is important to point out the fact that FSHC supports this settlement. Entities such as FSHC were viewed by the court in Morris County Fair Housing Council as representative groups that would be adequately protective of the class on whose behalf it speaks. Those interests receive "actual and efficient protection" when the public interest group participates and endorses settlement. Id., 197 N.J. Super. 359. In fashioning the judicial oversight approach after the collapse of COAH our Supreme Court mandated that all such actions be on notice to FSHC and other interested parties. Mount Laurel IV, 221 N.J. at 23. Therefore, a trial court will be "assisted [in its decision-making process by having all] applications [] on notice to FSHC and other interested parties." Id. at 29.

The same cannot be said for Kronos and Silverman. Silverman has only surfaced as a potential participant after it apparently acquired a contract to buy certain lands from Kronos. While it may be an experienced affordable housing developer it offers no details about what it would

propose. The second parcel it suggests is not even clear; and according to at least one member of the public may be significantly impacted with environmental constraints. Kronos talks about the "disability" it will suffer. These positions do not espouse any suggestion that qualified low and moderate income households are forefront in their considerations. Any additional delay or pause in the proceedings will only continue to interfere with the long-awaited plan to achieve Third Round consistency and compliance. This litigation is already more than five years old and qualifying households are entitled to see a municipality's plan move forward more expeditiously.

Pursuant to the terms of the Agreement, the Town was required to undertake various actions toward achieving the goals presented in the Agreement. These actions are well underway as evidenced by the initial changes and implementation of the HEFSP (P-2, P-2a & P-2b); agreements regarding the 24 family rental units at Arbor Green (P-8, P-9 & P-10); agreements and ordinance development for the group homes on the River Road sites (P-11, P-12, P-13 & P-14, P-14a, P-15 & P-16); and implementing ordinances and other actions regarding the 100% 62 unit family rental development at 522 Southern Boulevard (P-17, P-18, P-19, P-19a, P-20, P-20a, P-20b & P-21). Additionally, steps have been taken to advance the Township's ability to advance additional affordable housing opportunities relating to unmet need (P-22, P-25). A spending plan and other operational considerations are also moving forward (P-23, P-24 and P-26). This action will allow for the reasonable likelihood of developing the affordable units as contemplated in the Agreement.

As mentioned above, neither Kronos or Silverman offered any expert testimony to support claims that the proposed settlement Agreement does not represent a fair and reasonable opportunity for low and moderate income households and families to achieve necessary housing within Chatham Township as part of a regional approach. It is appropriate to disregard an objection to a

municipality's HEFSP where the objector's position is based on conclusory, self-serving objections without any legally competent evidentiary support by way of expert proofs. See In re Montvale Petition for Substantive Certification, 386 N.J. Super. 119, 130-33 (App. Div. 2006). Kronos and Silverman argue only for themselves—the nature of their joint position demonstrates that they do not speak from the perspective of the class of persons whose protection is intended by this very kind of litigation. That position is advanced by FSHC, who fully endorses the Agreement.

There is no reason for any bias or "stigma" to attach to any affordable housing unit – except for the embedded prejudice that may still exist in some segments of our society. There are no flashing lights and signs reading "this house is occupied by a poor person!" Affordable and market units are and should be indistinguishable. Depending on family size, households qualifying for affordable housing may – in this day and age – have incomes that range from around $25,000 to well in excess of $100,000. A building that is well managed, maintained and operated with all affordable units should not carry any different appearance than the apartment building next door and will not impact the single-family homes just down the street. Services and other nearby amenities will only enhance the success of these developments.

The positions of Kronos and Silverman that something is inherently wrong with approaching satisfaction of an affordable housing plan that includes the potential use of the power of eminent domain is without any support in this record. As referenced earlier the New Jersey Fair Housing Act has specifically included this tool as one approach legally available to achieve the salutary purposes of the Mount Laurel doctrine. N.J.S.A. 52:27D-311 et. seq.; N.J.S.A. 52:27D-325Chatham also has the ability to pursue a condemnation pursuant to the Local Lands and Buildings Law, which specifically authorizes municipalities to acquire private property by " . . . condemnation . . ." N.J.S.A. 40a:12-5(A)(1). Although eminent domain is an option, Chatham

has clearly acknowledged it is not the default option. As required by law Chatham has committed to strictly follow all required processes before resorting to the exercise of its eminent domain powers. Should Kronos feel aggrieved in that process it has remedies depending on what has taken place outside of the Mount Laurel process. Prerogative writs challenges, pursuant to R. 4:69, and other challenges if a condemnation action is filed remain available to Kronos.[14]

The foregoing analysis leads the Court to find and conclude the Township has provided a creative and proactive approach to its affordable housing obligation to accommodate for the needs of low and moderate income households. The Plan is realistic and comprehensive. There is an appropriate mix of unit types throughout the Township: rental and for-sale, family, age-restricted, and income based. A significant portion of the Township is already developed, thus creating a demonstrable limitation of developable land justifying the VLA.

When the court considers the totality of these factors, it is clear the proposed settlement as embodied in the Agreement is reasonable. In addition, the deed restriction to be imposed in connection with Vernon Grove and the 100% affordable development at 522 Southern Boulevard represent an appropriate public purpose in accordance with the aim of the New Jersey Fair Housing Act. There has been no credible evidence provided to the Court to indicate that the projects that have been included within the Township's Plan are not feasible or achievable. More information will be provided when the plan reaches its final compliance hearing stage. Nothing was challenged

[14] As noted in footnote 10 Kronos has already instituted one such prerogative writ action. That action has now been assigned to this court. The court is aware in a recently filed Amended Complaint to the prerogative writ action Kronos has now included a constitutional challenge to the New Jersey Fair Housing Act. The court would note that long ago, the constitutionality of the New Jersey Fair Housing Act was upheld by our New Jersey Supreme Court. Hills Dev. Co. v. Bernards, 103 N.J. 1, 25 (1986) (Mount Laurel III) ("We hold the [New Jersey Fair Housing] Act is constitutional . . ."). However, any ultimate determination on the merits of the claim advanced by Kronos must abide the outcome of that proceeding.

therein apart from the unsubstantiated claim by Silverman and Kronos that a better undefined plan might be found if more delays were imposed. The Special Master disagrees; the Court disagrees.

The Court also understands that, as with any proposed fair share plan, issues or conditions may arise that cause the projects associated with these proposed developments to undergo changes. The Agreement anticipates those events in several ways that protect the interest of the parties and the protected class ultimately at the center of this litigation: low and moderate income families.

The Township has committed to this process and its necessary components. There is an expectation and a reason to believe that it will continue to comply. Should it fail to comply as such, the Agreement contains procedures and consequences to overcome any non-compliance. In this case those consequences are significant as the Township runs the very real risk of losing control over the affordable housing process while still being responsible for substantial future costs and expenses. This is reasonable in light of significant delays encountered between the time the Township committed to designate a property for a 100% affordable development and the time when the right property was ultimately determined and advanced.

IX. CONCLUSION AS TO FAIRNESS

In conclusion, the Court is being asked to determine whether the interests of low and moderate income households will be served by the approval of the Agreement entered into with FSHC. In the Court's opinion, and for the reasons set forth herein, the interests of low and moderate income households will be advanced by this Court's approval of the Agreement. The Agreement provides a realistic opportunity at this stage for the development by the Township of its "fair share" of the region's present and prospective low and moderate income housing needs through implementation of appropriate land use regulations and actions. The Court therefore approves the Agreement subject to the conditions and milestones contained within the report of

Special Master Brian P. Slaugh. (C-1). A final compliance hearing will be held on December 14, 2020. The Township's immunity from builder's remedy lawsuits will continue until further order of the court.

_____/s Michael C. Gaus_____

Honorable Michael C. Gaus, J.S.C.