

SUPPLEMENTAL REPORT
OF THE SPECIAL MASTER

REGARDING THE FAIRNESS

OF

A SETTLEMENT AGREEMENT BETWEEN

SADDLE RIVER BOROUGH

AND

FAIR SHARE HOUSING CENTER

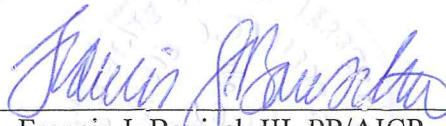
AND COMPLIANCE REVIEW

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

Prepared by:

Francis J. Banisch III, PP/AICP
111 Main Street
Flemington, NJ 08822

The original document was appropriately signed and sealed on March 1, 2021
in accordance with Chapter 41 of Title 13 of the State Board of Professional Planners.


Francis J. Banisch III, PP/AICP
Professional Planner #1686

Introduction

The purpose of this report is to supplement my report to the Court of January 20, 2021 regarding:

1) whether a Settlement Agreement dated February 10, 2020 (“Settlement”) and the Amendment to the Settlement Agreement dated June 8, 2020 (“Amended Settlement”) between the plaintiff Borough of Saddle River ("Borough"), Saddle River Investors, LLC (SRI) and interested party Fair Share Housing Center ("FSHC") is fair and reasonable to low- and moderate-income households, and

2) whether the Borough is eligible for a Judgment of Compliance and Repose.

This report confirms my opinion in my January 20, 2021 Master’s Report that the Settlement is fair to the protected class of low- and moderate-income households as it relates to the provision of affordable housing. It also confirms my opinion that the Borough is eligible for a judgment of compliance and repose and outlines the steps needed to complete the process of securing such judgment.

Prior Recommendations regarding Fairness of Settlement Agreement and Compliance

My January 20 report reviewed the Settlement Agreement to determine whether any element of the Settlement would not be fair to the interests of existing and future low- and moderate-income households in Saddle River's housing region and concluded it was fair and reasonable.

In evaluating the fairness of the Settlement, I was guided by the general principles and standards set forth in *Morris County Fair Housing Council v. Boonton Twp.* 197 N.J. Super. 359, 369-71 (Law Div. 1984), I used the criteria set forth in *East/West Venture v. Borough of Fort Lee*, 286 N.J. Super. 311, 329 (App. Div. 1996), which outlines the fairness issues involved in approving a settlement of *Mount Laurel* litigation. In my earlier report I concluded that the Borough’s HEFSP met this test. In addition, I previously concluded that the Fair Share compliance plan proffered by the Borough was worthy of a judgment of compliance and repose, provided the Borough produced the following:

- *An Accessory Apartment Operating Manual.*
- *The Spending Plan’s remaining balance (\$270,275) must be allocated to eligible programs and activities and cannot be left as a discretionary fund.*
- *An Affirmative Marketing Plan must be provided.*
- *An Affordable Housing Administrative Agent designation resolution must be provided.*
- *Accessory Apartment Operating Manual.*
- *The Borough Council must adopt an Affirmative Marketing Plan Resolution.*
- *The Borough Council must adopt a resolution designating an Administrative Agent.*

I recommended on January 20, 2021 that upon timely compliance with all of the foregoing and approval of the final submission by the Court, Saddle River would be entitled to a final Judgment of Compliance and Repose through July 1, 2025. Subsequent to the delivery of my January 20 report, the fairness and compliance hearing continued on January 21, January 26, January 27,

January 28 and February 10, 2021. During these hearings, testimony was taken from experts that provided reports in the matter. These reports were initially addressed in my January 20, 2021 report. After hearing all testimony, I have summarized my assessment of site suitability of Saddle River's third round plan components in Table 1 below, which indicates that 147 affordable family units will result from the Borough's compliance plan.

Table 1
Suitability Assessment of Third Round Plan Components
Borough of Saddle River, New Jersey

	Total Dwellings	Affordable Units	Approvable	Available	Developable	Suitable
<i>3dr Round RDP Mechanisms:</i>						
E. Allendale Rd Bl 1402 Lots 23, 24 & 25	60 (52 mkt rate, 8 affordable units)	8 units	Rezoned - DEP permits to come at site plan	Title search shows no encumbrance	Water and Sewer available- in BCUA service area	Close to school and commercial center
Algonquin Trail Bl 1603, Lots 1 & 2.01	60 (48 mkt rate, 12 affordable units)	12 units	Rezoned - DEP permits to come at site plan	Title search shows no encumbrance	Water and Sewer available- in BCUA service area	Close to school and commercial center
Choctaw Trail Bl 1601, Lots 10, 10.01 & 11	88 units (100% affordable project)	88 units	Site plan approval granted	Borough Owned	Water and Sewer available- in BCUA service area	Adjoins Route 17 with easy access to commercial services
20 E. Allendale Rd Bl 1605, Lot 1	23 units (100% affordable project)	23 units	Site plan approval granted	Borough Owned	Water and Sewer available- in BCUA service area	Adjoins Route 17 with easy access to commercial services
<i>Unmet Need Mechanisms:</i>						
78 Woodcliff Lake Rd - Bl 1302, Lots 1.02, 1.03 & 1.04 *One unit will be allocated to RDP, the remainder to unmet need.	16 units (100% affordable project)	16 units	Concept plan avoids C-1 stream buffer; DEP permits to come at site plan	Borough Owned	Water and Sewer available- in BCUA service area	Close to Chestnut Ridge Road commercial corridor
		147				

Challenges to COAH Suitability Criteria

The four suitability criteria were identified and demonstrated in the Saddle River HEFSP dated October 26, 2020. The Borough was challenged on its findings regarding the “approvable” and “suitable” criteria.

Regarding the approvable criterion, challengers alleged that the environmental limitations of some of the sites would likely not permit the proposed housing developments and that without DEP permits it was not possible to know whether the proposed development could be accommodated.

It should be noted that it is common practice for municipalities to use available data regarding environmental limitations in formulating compliance plans. Clearly, it is not timely to apply for such permits until the site plan phase, when the proposal is being evaluated for local approval.. Thus, I am satisfied that the Borough relied upon appropriate available data in evaluating sites. If future DEP review reveals different information, an applicant could be required to redesign the plan to accommodate the updated data or lose units.

Additionally, land use compatibility was offered as a reason that the proposed sites cannot meet the “suitable” criterion. Notably, during cross examination Borough planner Joseph Burgis, PP/AICP was asked about the change in his opinion regarding the compatibility of the SRI proposals with surrounding neighborhood character.

Mr. Burgis had initially opined that the higher density development proposed by SRI was not compatible with the nearby 2-acre lot size single-family neighborhoods but he indicated that he later came to realize that if the existing 2-acre lot density controlled affordable housing development in a municipality with almost all of its residential developments being 2-acre or larger single family lots, and 2-acre zoning on most lands in the Borough, there would never be any construction of multiple-family affordable housing.

When questioned by John Schettino about the site suitability of 78 Woodcliff Lake Road in light of the neighborhood character in the area, he indicated that if land use compatibility means “the same as what we have”, towns would not have to accommodate any higher density multifamily housing. Mr. Burgis then opined that the inclusionary and 100% affordable proposals were appropriate elements in meeting the Borough’s constitutional fair share obligation and satisfied this suitability criterion, with which I agree..

Challenge to Legality of Settlement

Planner Creigh Rahenkamp testified on behalf of Zhanna Torres and criticized the Settlement on a number of issues. He contended that the Settlement is illegal on two fronts, including:

- (1) the "disclaimer" language as to the calculation of RDP, and
- (2) paragraph 8(g) of the Settlement, which provides that the final judgment of compliance and repose include a provision that unmet need cannot be used as a basis for a variance or zone change.

His critique of the calculation of RDP did not include a lot-by-lot inventory of the parcels he believed should be included in the calculation. As to his first point, the disclaimer he refers to is an acceptance of the RDP calculation for settlement purposes by the parties. It should be noted that in highly contentious settlements, without some unconventional or out-of-the-box thinking or language, a case will not readily be settled, and settlement is favored by the Courts. As a result, both the municipal third round obligation and the RDP have been the subject of negotiated settlements.

Such “disclaimer” language has been included in numerous settlements accepted by the Court in New Jersey. As to the provision in the Saddle River Settlement that states that unmet need cannot be used as a basis for a variance or a re-zoning, the Court must recognize that a judgment of compliance and repose would be ineffectual if developers could, in essence, be entitled to a "back door" builder's remedy by claiming unmet need entitles them to a variance or a re-zoning.

A few examples of settlements approved by the New Jersey Superior Court, which include such “disclaimers” and/or offer protection against the use of unmet need in support of variances or rezoning include:

- The 2017 Hasbrouck Heights (Bergen County) Settlement Agreement Paragraph 5 contains a disclaimer that both FSHC and the Borough agree that the Borough does not accept the Kinsey methodology or calculations and agree to a 3rd round fair share number of 286 "solely for purposes of settlement of this action." The Court approved this Settlement Agreement.
- The 2018 Tenafly (Bergen County) Settlement Agreement where I am the Court Master. Paragraph 5 contains the same sort of disclaimer included in the Hasbrouck Heights Settlement Agreement and even goes one step further in that the paragraph states: "The parties acceptance of the 3rd Round obligation of 501 is solely for the purposes of achieving a settlement of the litigation and is without prejudice to the parties ability to challenge that 3rd Round number during any proceedings involving subsequent rounds of affordable housing calculations after July 1, 2025." The Court approved this Settlement Agreement.
- The 2018 Montville (Morris County) Settlement Agreement included disclaimers throughout the Vacant Land Adjustment/RDP calculation chart. Specifically, whenever a density exceeded 8 or 9 units per acre, the VLA indicated that the "density applied for purposes of settlement with Fair Share Housing Center". The Court approved this Settlement Agreement.
- The 2018 Westfield (Union County) final judgment of compliance and repose which includes as ordering paragraph 8 the precise language found in paragraph 8(g) of the Saddle River Settlement Agreement providing that unmet need shall not be deemed a legal reason to warrant the grant of any rezoning, variance or other relief."
- The 2019 Lebanon Borough (Hunterdon County) Settlement Agreement where I am the Court Master. Paragraph 3 contains a disclaimer that both "FSHC and the Borough agree

that the Borough's obligations are based on numbers that have been generated by multiple experts as an extrapolation of the Mercer County 'Princeton' Opinion written by the Hon. Mary C. Jacobson, AJSC, which is not otherwise binding on either party except by way of this Settlement Agreement." The Court approved this Settlement Agreement.

Additional Public Comment

Letter dated 2-19-21 from Lynn Hobson, The Julius Hobson Foundation for Racial Injustice

Ms. Hobson objects to what she calls segregation of affordable units in the compliance plan, particularly at the O'Donnell site and argues that the units should be integrated among the market units. She objects to a plan that separates the affordable units.

Segregation is a term with different meanings. In the context of the COAH rules, integration of affordable units is encouraged by N.J.A.C 5:93-5.6 (f), as seen below:

(f) The Council encourages a design of inclusionary developments that integrates the low- and moderate-income units with the market units.

While the regulation encourages integration, it never uses the word "segregation".

In another context, segregation historically refers to the practice of largely white communities preventing the entry of lower income and minority persons through zoning. Nonetheless, a principal objective of the New Jersey's affordable housing laws and regulations is opening access to affordable units in communities where opportunity – educational and otherwise - is available. Thus, the HMFA has provided opportunities for the use of the LIHTC program to construct 100% affordable neighborhoods in many New Jersey communities.

Summary of Findings and Conclusions

I have previously recommended that the Court find the Settlement between Saddle River and the Fair Share Housing Center to be fair and reasonable to the beneficiary class. My opinion in that regard is unchanged. I have also previously recommended that Saddle River is eligible for a Judgment of Compliance and Repose, provided the additional items in my January 20, 2021 report are provided. I continue to make these recommendations, having heard all testimony.

It is noteworthy that my calculation of the RDP was 212 affordable units in my December 20, 2019 report to the Court, when the case was on the litigation track. This RDP would have required 80 affordable family units, half of which must be rentals according to the COAH rules. Judge Jacobson's decision called for a total of 244 affordable units as the Borough's third round obligation, which would require 92 family units, including 46 family rentals.

These numbers are significant because the Borough's compliance plan provides for 147 family units, 127 of which will be family rentals. This compares quite favorably with the family units required by the COAH rules to meet the family unit requirements. In fact, Saddle River is providing 55 more family units than would be required to satisfy the full Jacobson obligation of

244, and where only 46 family rentals would be required to address the full obligation, 127 affordable rental units are being provided. This will triple the number of affordable family rentals required to address the 212-unit RDP by my calculations.

It is also noteworthy the Borough acquired all of the non-inclusionary development sites and that the Choctaw Road and East Allendale Road 100% sites have received site plan approval and funding under the HMFA Low Income Housing Tax Credit program. These are not sites waiting to be rezoned. They have been rezoned and approved for development.

As noted above, the compliance plan also substantially exceeds the minimum requirements for family units, as well as family rentals, which are extremely valuable to the beneficiary class since they do not involve the barriers to entry posed by for-sale units.

In conclusion, I recommend that the Court find the Agreements to be fair to the protected class and that the HEFSP compliance plan satisfies the third round obligation and merits a judgment of compliance and repose.