

Prepared by the court

IN THE MATTER OF THE APPLICATION
OF THE BOROUGH OF SADDLE RIVER,
a municipal corporation of the State of
New Jersey,

Petitioner.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: BERGEN COUNTY

DOCKET NO.: BER-L-6120-15

Civil Action

ORDER

FILED
APR 28 2023
GREGG A. PADOVANO, J.S.C.

THIS MATTER having been opened to the court by Stickel, Koenig, Sullivan & Drill LLC, on behalf plaintiff / petitioner Borough of Saddle River (the "Borough") by declaratory judgment complaint filed on July 2, 2015 wherein the Borough sought determination of compliance pursuant to procedures set forth in In re Adoption of N.J.A.C. 5:96 & 5:97, 221 N.J. 1 (2015) ("Mount Laurel IV"); and the court having granted the Borough immunity from Mount Laurel lawsuits from the time of the filing of the Borough's Declaratory Judgment action ("DJ Action"); and Francis J. Banisch III, P.P., A.I.C.P. having been appointed as the Special Mount Laurel Court Master (the "Special Master"); and Saddle River Investors, LLC ("SRI") having intervened in the Borough's DJ Action pursuant to a court order dated February 20, 2018; and Fair Share Housing Center ("FSHC") having intervened in the Borough's DJ Action pursuant to a court order dated October 25, 2019; and the Borough, FSHC, and SRI having entered into a settlement agreement (the "Initial Settlement Agreement") on February 10, 2020 to settle the DJ action; and the Borough and FSHC having agreed upon a first amendment to the Settlement Agreement ("First Amended Settlement Agreement") which was entered into on June 9, 2020; and the Borough and FSHC having agreed upon a second amended settlement agreement on or about November 8, 2021 ("Second Amended Settlement Agreement"); and the court having scheduled and conducted a combined "Fairness" and "Compliance" hearing which was properly noticed as identified in the certification of service and publication filed with the court; and the court having heard testimony from multiple witnesses, argument of counsel, and having accepted various documents into evidence during the combined Fairness and Compliance hearing, as identified on the record; and the court having afforded counsel for all parties the opportunity to submit supplemental written arguments and/or proposed findings of fact, all of which has been considered by the court; and for the reasons set forth in the attached rider and for other good cause shown

IT IS ON THIS 28th DAY OF APRIL 2023

ORDERED that pursuant to the Second Amended Settlement Agreement (which the court finds to be fair, reasonable, and adequately protects the interests of low and moderate income households) the Borough's Present Need / Rehabilitation Obligation is 6 units; Prior Round Obligation (1987-1999) is 162 units; Third Round Obligation (inclusive of Gap and Prospective Need Obligation (1999-2025)) is 244 units; and it is further

ORDERED that pursuant to the Initial Settlement Agreement and Second Amended Settlement Agreement, the Borough has insufficient vacant land to provide for its Third Round Obligation and is entitled to a Vacant Land Adjustment (“VLA”) pursuant to N.J.A.C. 5:93-4.2. In accordance with the VLA, the Borough’s Realistic Development Potential (“RDP”) is 132 units and the Borough’s unmet need is 112 units (244-132 = 112); and it is further

ORDERED that the Borough is granted a Judgment of Compliance and Repose as to its Present Need / Rehabilitation Obligation, its Prior Round Obligation (1987-1999), its Third Round Obligation (the last comprised of both the gap (1999-2015) and the prospective (2015-2025 need), its RDP of 123 units, and its unmet need of 112 units, as well as its compliance with satisfying its RDP and addressing its unmet need, pursuant to the judicially amended Settlement Agreement entered into between the Borough, FSHC, and SRI on February 10, 2020, as amended on June 9, 2020 and as further amended on November 8, 2021, the Fair Share Housing Act (N.J.S.A. 52:27D-301, et seq.), the Uniform Housing Affordability Controls (N.J.A.C. 5:8—26.1, et seq.), applicable Council on Affordable Housing substantive rules, and Mount Laurel case law, including the New Jersey Supreme Court’s Mount Laurel IV decision, conditioned upon the completion of the items identified in page 10 of the Special Master’s Report dated December 21, 2021 requiring “an accessory apartment operating manual” and “resolution designating an Affordable Housing Administrative Agent,” to the extent not already provided; and it is further

ORDERED that the Borough’s Judgment of Compliance and Repose shall remain in effect for ten (10) years beginning on July 2, 2015 and ending on July 2, 2025, and during this ten (10) year period the Borough shall have repose from all Mount Laurel lawsuits, including, but not limited to Builder’s Remedy lawsuits; and it is further

ORDERED that, to the extent necessary, the Second Amended Settlement Agreement is judicially amended to require full integration of affordable units with market rate units for the “O’Donnell Property” as identified as Block 1402, Lots 23, 24 & 25 on the current Tax Map of the Borough of Saddle River. Furthermore, Ordinance 20-992 of the Borough of Saddle River, which governs the development of the O’Donnell Property, is also judicially amended to require full integration of affordable units with market rate units; and it is further

ORDERED that a copy of this order shall be served upon all counsel of record by eCourts. The Borough shall serve a copy of this order to all parties and persons entitled to notice not otherwise served electronically by eCourts.



 GREGG A. PADOVANO, J.S.C.

**IN THE MATTER OF THE APPLICATION OF
THE BOROUGH OF SADDLE RIVER,
a municipal corporation of the State of New Jersey**

Docket No. BER-L-6120-15

RIDER TO ORDER DATED APRIL 28, 2023¹

This matter has an extensive history since having been opened to the court on behalf of plaintiff / petitioner Borough of Saddle River (the “Borough”) by complaint filed on July 2, 2015 seeking declaratory judgment pursuant to procedures set forth in In re Adoption of N.J.A.C. 5:96 & 5:97, 221 N.J. 1 (2015) (“Mount Laurel IV”). The court has granted the Borough immunity from Mount Laurel lawsuits from the time of the filing of the complaint. The court having also appointed Francis J. Banisch III, P.P., A.I.C.P. as Special Mount Laurel Court Master (“Banisch” or the “Special Master”) during the proceedings. Saddle River Investors, LLC (“SRI”), an owner of certain property (referred to as the “O’Donnell Property” located at Block 1402, Lots 23, 24 & 25 and the “Algonquin Property” located at Block 1603, Lots 1 & 2 and Block 1602, Lot 1) proposed to be developed within the Borough, was permitted to intervene in this action by prior order of the court dated February 20, 2018. Fair Share Housing Center (“FSHC”) also was permitted to intervene in this matter by order of the court dated October 25, 2019. The Special Master having conducted several mediation sessions with the parties and the parties having entered into an initial settlement agreement dated February 10, 2020 (the “Initial Settlement Agreement”) whereby the parties agreed that the Borough’s Third Round Mount Laurel affordable housing

¹ Not for publication without the approval of the committee on opinions (See R. 1:36-1).

obligations consists of the following: Present Need (Rehabilitation) Obligation – 6 units; Prior Round (1987-1999) Obligation – 162 units; Prospective and Gap Need (1999-2025) – 244 units. The Initial Settlement Agreement (in accordance with a vacant land adjustment pursuant to N.J.A.C. 5:93-4.2) provided that the Borough’s realistic development potential (“RDP”) was determined to be 132 units. The Borough proposed to rely upon the following parcels to satisfy the RDP:

Parcel Identificaiton	Block/Lot	Units	Bonus Credits	Credits to Third Round
SRI “O’Donnell Property” Inclusionary Development	Block 1402, Lots 23, 24 & 25	8	0	8
SRI “Algonquin” Inclusionary Development	Block 1603, Lots 1 & 2; Block 1602, Lot 1	12	0	12
Choctaw Trail – 88-unit 100% Affordable Rental Development (56 of the 88 units for Third Round RDP)	Block 1601, Lots 10, 10.01 & 11	56	33	89
20 E. Allendale – 23-Bed 100% Affordable Special Needs Housing	Block 1605, Lot 1	23	0	23
Total		99	32	132

On June 9, 2020, the Initial Settlement Agreement was amended without altering the Borough’s Third Round obligation (the “First Amended Settlement Agreement”). The First Amended Settlement Agreement did not alter any of the provisions of the Initial Settlement Agreement pertaining to the SRI’s O’Donnell Property or Algonquin Property. The Borough, FSHC and objectors Ms. Zhanna Torres and the Borough of Woodcliff Lake entered into a second amended settlement agreement on November 8, 2021 (the “Second Amended Settlement Agreement”) which, among other things, reallocated certain units from a particular parcel by increasing the size and density of one of the Borough’s 100% affordable housing developments and by adding a new, adjacent parcel at 25 E. Allendale Road. The Second Amended Settlement

Agreement did not otherwise alter the Initial Settlement Agreement as applied to SRI’s O’Donnell Property or Algonquin Property.

Under the Second Amended Settlement Agreement, the Borough’s Third Round obligations remained unchanged as follows: Present Need (Rehabilitation) Obligation – 6 units; Prior Round (1987-1999) Obligation – 162 units; Prospective and Gap Need (1999-2025) – 244 units. The Borough’s RDP as remained unchanged from the Initial Settlement Agreement at 132 units. The Second Amendment to the Settlement Agreement changed the Borough’s Third Round RDP compliance mechanisms as well as the Borough’s Third Round Unmet Need compliance mechanisms. The Borough proposed to satisfy its 132 RDP as follows:

Compliance Mechanisms	Block/Lot	Units	Bonus Credits	Credits to Third Round
SRI “O’Donnell” Inclusionary Development	Block 1402, Lots 23, 24 & 25	8	0	8
SRI “Algonquin” Inclusionary Development	Block 1603, Lots 1 & 2; Block 1602, Lot 1	12	0	12
Choctaw Trail and 25 E. Allendale - 111-unit 100% Affordable Rental Development (80 of 111 units for Third Round RDP)	Block 1601, Lot 9, 10, 10.01 & 11	80 of 111)	32	112
Total		100	32	132

The Borough proposed to address its 112-unit unmet need (244 – 132 = 112) as follows:

Prior Round Obligation Compliance Mechanisms	Block/Lot	Units	Bonus Credits	Credits Toward Obligation
Choctaw Trail and 25 E. Allendale - 111-unit 100% Affordable Rental Development (31 of 111 units for Third Round Unmet Need)	Block 1601, Lots 9, 10, 10.01 & 11	31	0	31
20 E. Allendale – 16-Bed 100% Affordable Special Needs Housing	Block 1605, Lot 1	16	0	16
Mandatory Overlay Ordinance	Block 1302, Lots 1.02, 1.03 & 1.04			
Accessory Apartment Program		10	0	10
Borough-wide Mandatory Set-aside Ordinance				
Total		57	0	57

Upon proper public notice, the court conducted / scheduled 19 public hearings which were continued where the court considered testimony, comments of members of the public and argument of counsel including, but not limited to, hearings held on July 30, 2020, November 4, 2020, January 21, 2021, January 26, 2021, January 27, 2021, January 28, 2021 and February 10, 2021. The court completed hearings, as a combined “Fairness and Compliance Hearing” on December 28, 2021 (the “Fairness / Compliance Hearing”) in order to review and determine whether the Second Amended Settlement Agreement is fair and reasonable to, and adequately protects the interests of, low and moderate income households in the region and whether the Borough has complied with and implemented its Mount Laurel obligations as established by the Second Amended Settlement Agreement. Upon the closing of the public hearing, the court

afforded the parties an opportunity to provide written closing statements, arguments and proposed findings of fact after the Fairness / Compliance Hearing. The court reviewed all papers filed.

In undertaking its initial review of the Second Amended Settlement Agreement, the court looks to determine whether the settlement proposal is fair and reasonable to, and adequately protects the interests of, low- and moderate-income households in the region in accordance the holding and analysis prescribed by the Appellate Division in East / West Venture v. Borough of Fort Lee, 286 N.J. Super. 311, 328 (App. Div. 1996). The East / West Venture analysis requires the court to consider: 1) the number of affordable housing units that will be constructed; 2) the methodology by which the number of affordable housing units has been derived; 3) any other contribution being made by the developer to the municipality in lieu of affordable units; 4) other components of the settlement 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. Id. An analysis of the "fairness" issue includes consideration of the issue of site suitability for each of the proposed compliance sites. The Appellate Division explained that:

questions of sound planning and the "fairness" of providing affordable housing are overlapping concepts. There is no doubt that any fair share proposal raises substantive zoning and planning concerns for the municipality. Imposition of the constitutionally-mandated obligation to provide affordable housing "does not require bad planning" (citing Mount Laurel II, 92 N.J. 158, 238 (1983)). The specific location of "decent housing for lower income groups" continues "to depend on sound municipal land use planning considerations in this State" (citing Mount Laurel II, 92 N.J. at 211). Moreover, the Fair Housing Act directs COAH to carry out its statutory duties "in accordance with sound regional planning" (citing N.J.S.A. 52:27D-304a). COAH regulations provide that sites for low- and moderate-income units should be "suitable," (citing N.J.A.C. 5:92-9.1(a)); that is, "a site adjacent to compatible land uses." N.J.A.C. 5:92-1.3.
[Id. at 329-330.]

Additionally, the court must also consider whether the affordable housing sites are “available, suitable, developable and approvable,” as defined in COAH’s rules. See In re Township of Denville, 247 N.J. Super. 186, 200 (App. Div. 1991). A court is guided by COAH’s criteria in determining whether the Mount Laurel settlement agreement is fair to low- and moderate-income households and creates sufficient realistic affordable housing opportunities to satisfy the negotiated affordable housing obligation. Livingston Builders, Inc. v. Livingston, 309 N.J. Super. 370, 380 (App. Div. 1998). The requirement that all affordable housing sites be “available, suitable, developable and approvable” was established in N.J.A.C. 5:92-9.1(a) (COAH’s First Round rule) and carried over in N.J.A.C. 5:93-5.3(b) (COAH’s Second Round rule). N.J.A.C. 5:92-1.3 (the First Round Rule) and 5:93-1.3 (the Second Round rule) provides the definitions for “available, suitable, developable, and approvable.”

With regard to the fairness determination, the court here has reviewed the record, exhibits and argument of counsel. The court concurs with the recommendations set forth in the reports prepared and filed by the Special Master. Specifically, the Special Master submitted the following four reports: (a) fairness report dated July 27, 2020 (the “July 27, 2020 Report”); (b) fairness and compliance report dated January 20, 2021 (the “January 20, 2021 Report”); (c) fairness and compliance report dated March 1, 2021 (the “March 1, 2021 Report”); and (d) fairness and compliance report dated December 21, 2021 (the “December 21, 2021 Report”). The Special Master’s reports were submitted into evidence exhibits listed in the appendix to the within findings and conclusions.² The court also considers the methodology by which the Borough’s Third Round Mount Laurel obligations have been derived.

² The attached appendix represents exhibits submitted on behalf of plaintiff / petitioner only.

Both the Initial Settlement Agreement and the Second Amended Settlement Agreement provide that the Borough's Third Round affordable housing obligations are as follows: (a) Present Need (also known as the Rehabilitation Obligation) is 6-units, and this obligation was derived from a structural conditions survey performed and prepared by the Borough in accordance with COAH's Third Round rules; (b) Prior Round Obligation (1987-1999) of 162-units, and this obligation is taken directly from COAH's Second Round rules; and (c) Prospective Need and Gap Period Need Third Round Obligation of 244-units, and this obligation was calculated using the fair share methodology developed and established by Judge Mary C. Jacobson, A.J.S.C. in an unpublished 217 paged opinion concerning fair share methodology, I/M/O Princeton, Docket No. MER-L-1550-15 (issued March 8, 2018).³ The court here notes that Judge Jacobson's reasoning in the Princeton opinion has been adopted by many courts, planners and Mount Laurel Special Masters.

The court here notes that the 6 unit Present Need Obligation, 244 unit Third Round Prospective Need and Gap Period need calculation of 244 units, and 162 unit Prior Round Obligation calculations were not objected to by any party under the Second Amended Settlement Agreement. The Borough has provided the following information regarding its Prior Round Compliance:

³ The court recognizes that R. 1:36-3 provides no unpublished opinion shall be cited by a court, there is an exception, namely, where "required by res judicata, collateral estoppel, the single controversy doctrine or any other similar principle of law." In this case, there is a principle of law that requires the unpublished Princeton opinion to be cited, namely, the requirement in East / West Venture, 286 N.J. Super. at 328, that a trial court reviewing a settlement of Mount Laurel litigation must consider the methodology by which the number of affordable housing units has been derived. In fact, Mount Laurel IV holds that "computations of housing need and municipal obligations [must be] based on [Prior Round] methodologies," 221 N.J. at 30, and the unpublished Princeton opinion is based on the Prior Round methodologies. Because the methodology utilized in the amended settlement here derives from the unpublished Princeton opinion, the opinion should be cited. Finally, the Court notes that, while it is in no way bound by a Law Division opinion (let alone an unpublished Law Division opinion), R. 1:36-3 does not preclude the Court from adopting an unpublished opinion's analysis as persuasive. Nat'l Union Fire Ins. Co. v. Jeffers, 381 N.J. Super. 13, 18-19 (App. Div. 2005).

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

Based upon a review of the record, the court recognizes that the Borough has satisfied all required regional contribution agreement (“RCA”) payments to the City of Passaic (to fund 18 affordable units), the Borough of Ridgefield (to fund affordable 22 units), and the Borough of Ogdensburg (to fund 22 affordable units). The court finds from the COAH rules governing RCA’s which the Borough submitted, namely, N.J.A.C. 5:97-7.10 (COAH’s Third Round rule governing enforcement of RCA’s, which rule was not invalidated by the Appellate Division or the Supreme Court). The court also recognizes that the Saddle River Family and Senior Rental development identified above on property known as Block 1302, Lots 1, 3 and 4 , 76 units of affordable housing has previously been constructed, which provides 82 credits as that development produced 6 bonus credits under COAH’s Second Round rules based on the testimony of both the Borough’s planning expert and the Special Master. The court finds that, with regard to the Villa Marie Claire development identified above, the Borough is entitled to Prior Round credit for 18 affordable housing units since this development was a Prior Round project and the units in a prior round project which does not require restrictions of affordable housing beyond the time period provided for in COAH’s rules. Further, the court finds on the basis of the final court order entered on January 11, 2000 by the court in Tice Associates v. Borough of Saddle River, Docket No. BER-L-2731-97

that “Villa Marie Claire entitles the Borough to 18 credits against its [Second Round] fair share obligation.”⁴

As to the 244-unit Third Round prospective need and gap period need obligation, the parties relied upon the methodology established by Judge Jacobson in, I/M/O Princeton, supra. Again, the court here recognizes that it is not bound by the unpublished Princeton opinion, the court finds that the reasoning provided for in the decision is persuasive and adopts the analysis of the opinion as its own. The court also notes that there has been no reasonable objection presented here which could establish a basis for rejection of the methodology established by Judge Jacobson in Princeton, supra. The court accepts the 244 Third Round Prospective Need and Gap Period need provided for in the Second Amended Settlement Agreement.

As to the Borough’s RDP and Unmet Need calculation, the court looks to the testimony and exhibits presented on behalf of the Borough. Specifically, the RDP analysis completed by the Borough’s planning expert, Joseph H. Burgis, P.P., A.I.C.P. (the “Burgis” or the “Borough’s Planner”), which was previously identified in the Borough’s 2019 Housing Plan Element and Fair Share Plan (the “2019 HPEFSP”) as 33 units. The record reveals that FSHC’s planning expert’s analysis contained in his December 10, 2019 critique of the 2019 HPEFSP concluded that the Borough’s RDP was 221 units. The record also reveals that the Special Master analyzed the vacant land adjustment and RDP issues in a December 20, 2019 report prepared in anticipation of

⁴ As the Appellate Division recognized in Livingston Builders, Inc. v. Township of Livingston, 309 N.J. Super. 370, 374 (App. Div. 1998), the entry of a judgment approving a settlement of Mount Laurel litigation has “an extraordinary res judicata effect,” and not only on the actual parties to the lawsuit but such a judgment will also “vitally affect the rights of parties who are not themselves before the court,” such as the objectors who are before this Court but were not before the Tice court. Moreover, the Court notes that FSHC and the Special Master support Villa Marie Claire entitling the Borough to 18 credits against its Prior Round obligation and none of the objectors currently before this Court oppose or object to it.

the trial on these issues titled “Report of the Special Master Regarding the Housing Element and Fair Share Plan of the Borough of Saddle River” (the “2019 RDP and Unmet Need Report”). The special master in the 2019 RDP and Unmet Need Report primarily agreed with FSHC’s expert’s analysis, but he calculated the Borough’s RDP to be 212 units, lower than the 221 calculated by FSHC’s expert, but significantly higher than the 33 units set forth in the 2019 HPEFSP.

The Initial Settlement Agreement established the Borough’s RDP at 132 units, and this number was unchanged by the Second Amended Settlement Agreement. The court finds that the 132 unit RDP number is a reasonable RDP number for settlement purposes because it was and is apparent to the court that, if the case was tried and the court ruled that the Borough’s RDP was anywhere near the 212 units recommended by the Special Master, the Borough would have litigated its RDP on appeal rather than voluntarily settling this case. As the Supreme Court held in Mount Laurel II, 92 N.J. 158, 199 (1983), “the [Mount Laurel] obligation is to provide a realistic opportunity for housing, not litigation.” The Mount Laurel II Court stressed, one of the purposes of the Mount Laurel II opinion was “to encourage voluntary compliance with the constitutional obligation.” Id. at 214. More recently, the Supreme Court in Mount Laurel IV, 121 N.J. 1, 33 (2015), held that the Mount Laurel trial courts “should endeavor to secure, whenever possible, prompt voluntary compliance from municipalities in view of the lengthy delay in achieving satisfaction of . . . Third Round obligations.” The Court finds that the settled upon RDP number of 132 units is reasonable and fair to low- and moderate-income households as it will result in the construction of affordable housing sooner than much later and instead of litigation.

The court next considers the number of affordable housing units that will be constructed under the settlement. While the settlement 132 unit RDP is less than the 221 unit RDP initially advocated by FSHC or even the 212 unit RDP once suggested by the Special Master, it is highly significant to note that the proposed settlement results in more affordable family units being

constructed in contrast to the number of family units that would have been constructed under either of the RDP's suggested by FSHC or the Special Master. The proposed 132 unit RDP also results in more family units than would have been constructed than if the Borough did not receive a vacant land adjustment and, instead, had to comply with the entire 244 unit obligation as calculated from Judge Jacobson's Princeton opinion. Specifically, the 132 unit settlement RDP will result in the construction of 131 affordable family units (111 from the Choctaw Property, 8 from the O'Donnell Property, and 12 from the Algonquin Property). In contrast, the 212 unit RDP suggested by the Special Master would require 106 affordable family units, the 221 unit RDP advocated by FSHC would require 111 affordable family units, and a 244 unit affordable housing obligation taken from Judge Jacobson's Princeton opinion would require 122 affordable family units. The court concludes that the Second Amended Settlement Agreement provides that the Borough, through two municipally sponsored 100% affordable housing developments, will not merely satisfy its 132 unit RDP but will also result in construction of 47 units of its 112 unit unmet need.

The court further concludes finds that the Second Amended Settlement Agreement will result in construction of a substantial number of affordable units. The agreement will produce more family rental units than if the matter was not settled for the following reasons: 1) the applicable COAH regulations require that 25% of the Borough's 132 unit RDP must be rentals (33 affordable rental units), and half of the 33 affordable rental units (17 affordable rental units) must be family rental units; 2) the Second Amended Settlement Agreement provides that the Borough will satisfy its 132 RDP obligation through 20, purported "for-sale", affordable units from the two SRI inclusionary development sites. Eighty affordable family rental units with 32 rental bonus credits will result from the Borough sponsored 100% affordable housing developments slated for the

Choctaw Property.⁵ Thus, these 80 to-be-constructed affordable family rental units are nearly five times the number of affordable family units than would have resulted from simply complying with the minimum 17-unit family rental requirement called for in the regulations; and 3) the Special Master identified in his March 1, 2020 Report that the 212 unit RDP calculation contained in his 2019 Litigated RDP and Unmet Need Report would have required 80 affordable family units. Accordingly, it appears that while the Borough has a settled upon 132 unit RDP, the Borough's proposed plan will result in 80 affordable family rental units. It is clear that if the Borough and FSHC had not agreed to a vacant land adjustment and the 132 unit RDP, the Borough would have been obligated to zone for its full fair share number of 244 units which would have required 92 affordable family units, including 31 affordable family rental units, substantially less than the 80 affordable family rental units resulting from the Borough's now proposed plan.

The Borough's compliance plan proposed under the Second Settlement Agreement provides for 127 affordable rental units (111 rental units from the municipally sponsored 100% affordable family housing development slated for the Choctaw Property and 16 affordable rental units from the municipally sponsored 100% affordable special needs housing development slated for 20 E. Allendale Road location), and 111 of the 127 total affordable rental units will be family rental units. This plan is comparable to the number of family units required under the prior COAH rules. In fact, the Borough is providing 49 more family units than would be required to satisfy the

⁵ The Second Amendment to the Settlement Agreement provides for 132 credits against the Borough's 132 RDP through the following mechanisms: (a) 8 affordable units from SRI's inclusionary O'Donnell site; (b) 12 affordable units from SRI's inclusionary Algonquin site; (c) 80 affordable family rental units (of a total of 111 affordable family rental units) from the Borough's municipally sponsored 100% affordable housing family rental development slated for the Choctaw site; and (d) 32 bonus credits from the family rental units. This totals 132 affordable housing credits (8+12+80+32=132). The Court also notes that the Borough has acquired all of the lots which will be developed with municipally sponsored 100% affordable housing projects and, further, all such lots have been re-zoned to permit the 100% affordable housing projects.

full 244 fair share obligation had the parties not utilized a vacant land adjustment. The plan provided reveals that 111 affordable family rental units will be provided where only 31 affordable family rental units would be required had the Borough been required to zone for its full fair share of 244 units.

With regard to the proposed Unmet Need calculation, the Second Amended Settlement Agreement provides for the actual construction of 47 affordable units through two of the Borough's municipally sponsored 100% affordable housing developments, which represents 42% of the Borough's 112-unit unmet.⁶ The court notes that while COAH's Second Round and Third Round rules require all municipalities to satisfy their RDP, the rules do not require municipalities to "satisfy" their unmet need – the rules only require municipalities to "address" the unmet need through the use of certain mechanisms specified in the rules. See N.J.A.C. 5:93-4.2(f) (COAH's Second Round rule); N.J.A.C. 5:97-5.3(b) (COAH's Third Round rule). Significantly, none of the mechanisms specified in the rules require zoning exclusively for affordable housing (overlay zoning which offers an option for affordable housing is one of the mechanisms). Additionally, no rule requires a municipally sponsored affordable housing development, let alone a 100% affordable municipally sponsored development, which will result in the guarantee of construction of affordable units. N.J.S.A. 52:27D-311d provides: "Nothing in . . . C.52:27D-301 et al. [the FHA] shall require a municipality to raise or expend municipal revenues in order to provide low- and moderate-income housing." As set forth above, the court finds the fact that the amended settlement will produce the actual construction of 42% of the Borough's unmet need quite

⁶ The court notes that 31 units of the 111 units that will be constructed on the Borough's sponsored 100% affordable housing Choctaw Property will be credited towards addressing the Borough's unmet need of 112 units, and all 16 units that will be constructed on the other Borough sponsored 100% affordable housing special needs development on the 20 E. Allendale site will be credited towards addressing the Borough's unmet need of 112 units.

compelling and leads the court to find that the amended settlement agreement will result in construction of a substantial number of affordable units.

The court also considers other contributions by developers. As noted in the Special Master's July 27, 2020 Report, January 20, 2021 Report, and December 21, 2021 Report, the court does not necessarily apply these contributions under the analysis provided for in East / West Venture, supra, however, SRI is a developer and is one of the parties that entered into the Initial Settlement Agreement, and the Borough sponsored 100% affordable housing projects will be developed by 100% affordable housing developers. There are no financial contributions being made by SRI or any of the 100% affordable housing developers here. All of the developers will be constructing housing. The Borough will be making contributions to the 100% affordable housing developers in terms of providing those developers with the sites the Borough has acquired for the construction of 100% affordable housing projects. Accordingly, the court accepts the "other contributions by the developer" factor of the East / West Venture analysis together with the "other components of the agreement that contribute to the satisfaction of the constitutional obligation" factor. The court finds that the following terms of the Second Amended Settlement Agreement, which are not only binding on the Borough but are also binding on the developers of all affordable housing in the Borough, will contribute to the satisfaction of the Borough's Third Round Mount Laurel constitutional obligations:

- a) at least half of all affordable housing units addressing the Third Round Prospective Need and Gap Period need obligation will be available to family households;
- b) the Borough will require at least 13 percent of all of the new affordable housing units constructed to be affordable to very low-income households earning 30 percent or less of median income and that at least half of these units will be available to families;

- c) at least 25 percent of the Third Round prospective need and gap period need obligation will be rental units, of which at least 50 percent will be available to families;
- d) no more than 25 percent of affordable units will be age-restricted;
- d) rental bonuses shall be as set forth at N.J.A.C. 5:93 and shall not exceed the rental obligation (at least 25 percent of the Borough's new construction fair share obligation);
- e) at least 50 percent of all affordable units in each inclusionary site will be affordable to low-income and very low-income households with the remainder affordable to moderate income households;
- f) the Borough will comply with affirmative marketing and affordability regulations set forth at N.J.A.C. 5:80-26.1, et seq. (UHAC) except that in lieu of the requirement at N.J.A.C. 5:80-26.3(d) for 10 percent of all low- and moderate-income rental units to be affordable to households earning 35 percent or less of median income, the requirement shall be that 13% of all low- and moderate-income rental units shall be affordable to households' earning 30 percent or less of median income;
- g) the Borough will expand the list of community and regional organizations that will receive notice of the availability of affordable housing units (in the Affirmative Marketing Plan) to the following additional organizations: Fair Share Housing Center, the New Jersey Conference of the NAACP, the Latino Action Network, Bergen County NAACP, Bergen County Urban League, Bergen County Housing Coalition, and the Supportive Housing Association; and
- h) within 90 days of the court's approval of the settlement agreement, the Borough will adopt the Housing Element and Fair Share Plan and all required implementing ordinances to ensure that all of the foregoing occurs.

The court also considers other factors that are relevant to the fairness of the Second Amended Settlement Agreement, including site suitability, for each of the proposed compliance sites. In this regard, the Court agrees with the opinions rendered through the testimony of the Borough's Planner and the testimony and reports submitted by the Special Master. The court finds that both of these experts were credible and their opinion testimony persuasive. The court further finds that the sites in the compliance plan are available, likely approvable, developable, and suitable based on the testimony and reports of the experts. The court adopts the Borough's findings in this regard.

The O'Donnell Property

With regard to the O'Donnell Property, the court accepts the Special Master's testimony that the O'Donnell Property is free of encumbrances which would otherwise preclude development of the contemplated inclusionary housing development on the property based on a title search having been done by SRI, even though the special master did not review the title search. The court notes and finds in this regard that no party, including objector SR Residents, submitted a title search or restrictive covenants into evidence showing that there were any encumbrances which would preclude development of the O'Donnell Property for the contemplated inclusionary housing development. In addition, the developer has expressed an interest in developing affordable housing for this property. As to the issue of approvability, the Borough has rezoned the O'Donnell Property to allow for development of multifamily housing and to implement the terms of the Initial Settlement Agreement as to this property. While the court, at this time, recognizes that SRI, or its affiliate, has been denied approval for this site based upon a determination of the Borough Planning Board, it is still anticipated that the site will ultimately receive all necessary approvals based upon a complete and appropriate application before the Planning Board. As to developability, the court acknowledges that the record indicates a modest percentage of the O'Donnell Property is impacted

by environmentally sensitive features, it appears that the remainder of the site is developable and provides adequate space for reasonable development. There is also more than sufficient sewer capacity available from the Northwest Bergen Utilities Authority, as confirmed by the sewer capacity agreement entered into between the utilities authority and the Borough. There is also sufficient water capacity to service the site. Accordingly, the court finds that the O'Donnell Property is suitable and the property's suitability stems from its location immediately east of the Wandell School in the Borough's business district, its location along a county road (East Allendale Road) and its access to New Jersey State Highway Route 17 to the east and to the Garden State Parkway to the west along Chestnut Ridge Road. The property is also near Borough recreation facilities.

The Algonquin Property

With regard to the Algonquin Property, the court accepts the special master's testimony that the Algonquin site is free of encumbrances based on a title search having been undertaken by SRI. The court finds in this regard that no party, including objector SR Residents, submitted a title search or restrictive covenants into evidence showing that there were any encumbrances which would preclude development of the Algonquin Property for the contemplated inclusionary housing development. In addition, the developer has expressed an interest in developing affordable housing on the subject property. As to the issue of approvability, the Borough has rezoned the Algonquin Property in order to allow for development of multifamily housing and to implement the terms of the Initial Settlement Agreement.

As to developability, the record reveals that a small portion of the Algonquin Property is affected by environmentally sensitive features, however, the remainder of the site appears to provide adequate space for the proposed development. There is sufficient sewer capacity available from the Northwest Bergen Utilities Authority, as confirmed by the sewer capacity agreement

entered into between the utilities authority and the Borough. In addition, there is also sufficient water capacity to service the site. The Algonquin site is also suitable and its suitability stems from its location on a county road, one of the main corridors in the Borough, which provides access to New Jersey Highway Route 17, the Garden State Parkway and other major roadways in the region.

100% Affordable Choctaw Property (including 25 E. Allendale Road):

The Choctaw Property consists of 4 lots (three fronting on Choctaw Trail and one fronting along the E. Allendale Road located at 25 E. Allendale Road) which were added to the Borough's compliance plan under the Second Amended Settlement Agreement. The record reveals that this property is free of encumbrances. The Borough has rezoned the property for the proposed 100% affordable housing development and has selected an affordable housing developer, The Michaels Organization ("Michaels"). Michaels has obtained preliminary and final site plan approval from the Borough Planning Board to allow it to construct the subject development. Michaels has also applied for and obtained 9% tax credit financing from the New Jersey Housing and Mortgage Finance Agency and, further, has secured the other additional financing necessary to construct the development. As to the issue of developability of this property, the record reveals that approximately 20% of the site is impacted by wetlands. Nonetheless, a reasonable design for the 100% affordable housing development has been achieved which has been reviewed and accepted by FSHC. The record reveals that the site has sufficient sewer capacity as set forth in the sewer capacity agreement between the utility authority and the Borough. The site also has sufficient water capacity. As to suitability, the Choctaw Property is located immediately adjacent to New Jersey State Highway Route 17 and East Allendale Road with immediate access to the regional road network. The Choctaw site is also somewhat close to the business district of adjacent municipality, Allendale, to the east, as well as to the business district of the Borough to the west.

Municipally Sponsored 100% Affordable Housing 20 East Allendale Road Property:

With regard to the parcel at 20 East Allendale Road, the record reveals that the site is free of encumbrances. The Borough owns the subject property and has already held discussions with one entity which expressed an interest in developing the property for special needs housing, as permitted by the terms of the Second Amended Settlement Agreement. The Borough has rezoned this property in an effort to implement the terms of the Second Amended Settlement Agreement and, as of the date of the hearing, it was anticipated that the site would receive all necessary final approvals for development. The record has not presented any evidence of environmental constraints which would impact the proposed development. The site is also located within the Northwest Bergen County Utility Authority sewer service area and has sewer capacity and sufficient water capacity. The evidence presented also reveals that the site is suitable for the proposed development as it is located along East Allendale Road, a county roadway close to New Jersey State Highway Route 17. The parcel is also located near the downtown districts of the Borough and the neighboring municipality of Allendale.

SR Residents Objects To The Two SRI Sites

The court recognizes that interested party SR Residents raised several objections to development of and inclusion of the two SRI sites (the "O'Donnell Property and the Algonquin Property) throughout the hearing process. SR Residents argue, in part, that the SRI sites are not "developable" because "neither has appropriate access to water and sewer infrastructure," making the two sites not developable in accordance with the definition of "developable site" in N.J.A.C. 5:93-1.3.⁷ SR also asserts that the SRI sites are not "suitable" for development as proposed since

⁷ Objector SR Residents NJ, a New Jersey not-for-profit corporation comprised of and supported by a significant number of Saddle River residents filed various objections, arguments of counsel and exhibits, including exhibits designated as SRR-1 through SRR-14, during the public hearings in this matter. The court has considered all information, argument and exhibits filed.

the proposed multi-family developments on both sites are not consistent with adjacent single family uses and are therefore not suitable pursuant to the definition of “suitable site” under N.J.A.C. 5:93-1.3. SR further argues that the proposed development of the SRI properties is also inconsistent with the environmental policies delineated under N.J.A.C. 5:92-4.2(e)(2).

During the hearings, SR Residents identified two sites which it deems to be more suitable for the 20 affordable units that would be generated by the two SRI developments (8 affordable units from the 60 units slated for the O’Donnell Property and 12 affordable units from the 60 units slated for the Algonquin Property). The court rejects SR Residents’ alternative site argument. While an interested party may object to the inclusion of a site in a compliance plan based upon claims of suitability, developability or other grounds, it does not have the right to require the inclusion of another site in the municipality’s compliance plan. The court in Allan-Deane v Bedminster, 205 N.J. Super. 87, 113-114 (Law Div. 1985) held that

[t]he court should not look to any sites not selected or mechanisms not employed even if they might arguably be as realistic or more realistic unless an excluded site has earned a builder’s remedy. Absent a builder’s remedy, a municipality should have the right under Mount Laurel to choose any reasonable combination of realistic sites or realistic mechanisms that will produce the required result – the likelihood of creating affordable housing.
[Emphasis in original.]

The court here determines that since no builder’s remedy has been sought and none is being ordered, the Borough has the right to choose the site(s) which will likely result in development of affordable units. The trial judge in Allan-Deane held, “the court should focus upon the compliance package that the [municipality] presents by examining each of its parts and its overall effect to determine whether the package is realistic.” Id. The court has reviewed the Borough’s amended settlement plan and rejects SR Resident’s attempt to require the Borough to include an alternate site.

Again, the court recognizes that the purpose of the fairness and compliance hearing here is not to assess whether there are other sites that may be better or more suitable than the sites proposed in the settlement. Applicable Mount Laurel case law (Allan Deane, supra, East / West Venture, supra, and Livingston Builders, supra,⁸) requires that if the court determines that the Borough's compliance plan provides for the realistic opportunity for development of affordable housing, the court should approve it and, conversely, if this court determines that the Borough's compliance plan is not realistic, then the court should reject it. Under the applicable Mount Laurel case law, the court should not direct the municipality to add, delete or substitute sites which will provide for realistic development. In a voluntary compliance through settlement setting, as presented here, site selection is left to the province of the Borough.⁹ The court also notes that SR Residents has not provided any evidence that the owners of the proposed alternate sites were at all interested in developing the property for affordable housing. Accordingly, even if the court was to consider the alternative sites, it would have to reject them as being unrealistic due to the lack of any interest expressed by the owners of the lots to develop their lots for affordable housing.

The court also rejects SR Residents' argument that the two SRI sites should be denied because they are "not financially feasible" to be developed for affordable housing. As set forth above, the issue that the court must determine in fairness and compliance hearings regarding

⁸ The Appellate Division in Livingston Builders, 309 N.J. Super. at 381, held that it was improper for the trial court to "veto" a part of Livingston's proposed settlement compliance plan on the basis that one of the compliance sites could have provided more housing units than proposed. The court held that the purpose of a fairness hearing is to ensure that a proposed settlement protects the interests of low- and moderate-income people and meets the criteria established in COAH's rules and, if it does, the settlement "is entitled to the court's . . . approval." Id. at 380.

⁹ In fact, the record reveals that this court stated throughout the hearings on several occasions that the purpose of the hearing was not to compare other sites that may be suitable or even more suitable than the sites selected by the Borough and that alternative sites would not be considered even if they would be better than the sites selected by the Borough.

compliance sites is whether the proposed sites are likely to produce sufficiently realistic housing opportunities to satisfy the municipality's constitutional obligation to provide its fair share of its region's need for affordable housing. The inquiry for the court is whether a site presents a realistic opportunity to be developed for the affordable housing proposed; the inquiry for the court is not whether the site presents a realistic opportunity for a particular developer. As held by the Appellate Division in Rosenshein Associates v. Borough of Palisades Park, 304 N.J. Super. 438, 443-444 (App. Div. 1997),

[t]he inquiry by a trial court in a Mount Laurel case requires examination and evaluation of the subject property, its suitability for development, . . . environmental concerns, . . . and, ultimately, whether the municipality has complied with its constitutional obligations under Mount Laurel II. . . . Nowhere in a Mount Laurel proceeding is there the necessity to make an inquiry into the financial wherewithal of the applicant. To allow such an inquiry, . . . would shift the focus to collateral matters and away from the critical issues involved. . . . The ultimate ability of the developer to bring the project to fruition is a concern left to another day. . . . [I]f a particular developer is unable to perform, the developer may assign its rights to a credit-worthy developer who can perform....

The court here recognizes that the term "developable site" is defined under N.J.A.C. 5:93-1.3 as "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)" It is undisputed that both of the SRI sites are located within water and sewer service areas. The disputed issue is whether the SRI sites have "access to appropriate" water and sewer infrastructure. SR Residents argues that the lack of water and sewer lines in the streets which abut the frontage of the two properties results in a determination that they do not have "access to appropriate" water and sewer infrastructure. SRI further argues that because the developer will have to install long runs of water and sewer lines in the streets which will be disruptive to the

surrounding community, the sites do not have “appropriate” access to water and sewer infrastructure. The court finds no merit in SR Residents argument on this issue.

Based upon the facts presented and the current status of infrastructure, the court finds that simple reliance upon the fact that there are no water and sewer lines in the streets abutting any of the Borough’s proposed affordable housing sites would, as a practical matter, have the effect of deeming every site as “undevelopable” and, as a result, the Borough would be unable to comply with any of its Mount Laurel obligation at this time. The court finds that the two SRI sites, being located in water and sewer service areas, have access to appropriate water and sewer lines as identified in the credible evidence and testimony presented. The record reveals that existing water and sewer lines can, and are proposed to be, extended to the subject properties. The court also notes In re Petition of Howell Township COAH staff concluded that, because of the uncertainty concerning the availability of sewer service to a particular affordable housing site in Howell’s compliance plan, “the site does not provide a realistic opportunity for affordable housing within six years.” 371 N.J. Super. 167, 173 (App. Div. 2004). The court here concludes that the determination of whether a site has “access to appropriate water and sewer infrastructure” requires a finding that the site at issue is likely to have a physical connection to water and sewer infrastructure before the end of the affordable housing cycle or round at issue, which in this case is 2025. The court finds, based upon the credible testimony / evidence produced, that the water and sewer line extensions required for the two SRI properties (and also for the two municipally sponsored 100% affordable housing parcels) are likely to be physically installed before the end of the Third Round in 2025. Accordingly, the court finds that the SRI sites, as proposed, have “appropriate access to water and sewer infrastructure” and are developable as defined under N.J.A.C. 5:93-1.3.

SR Residents' argument that the SRI sites are not "suitable" due to existing environmental restrictions is without merit. The court finds that SR Residents' planning expert Paul Ricci's testimony concerning this issue was not persuasive. The record reveals that Mr. Ricci criticized SRI's conceptual plans for not including wetlands and wetland buffers and then admitted that the plans prepared for his municipal affordable housing clients did not include wetlands or wetland buffers. Mr. Ricci also testified that the required number of affordable housing units to be generated through development of the two SRI properties would not be constructed because the environmental constraints on each of the lots would result in a loss of units. On cross-examination, he conceded that the terms of the Second Amended Settlement Agreement obligated SRI to construct the required number of affordable units on each site (8 affordable units on the O'Donnell Property and 12 affordable units on the Algonquin Property) even if it was unable to build all of the associated market rate units.

The court also rejects the objector's argument that the two SRI properties are not suitable because their multi-family densities are inconsistent with the adjacent single-family large lot densities. As set forth above, a "suitable site" is defined as "a site that is adjacent to compatible land uses," Mr. Ricci testified during the hearing that the approximately 6 unit per acre density of each of the two SRI properties are inconsistent with the adjacent approximately 2 acre single-family large lot surrounding neighborhoods. The court rejects this opinion because, if multi-family housing sites which are proposed to be approximately 6 units per acre are found to be inconsistent with neighboring single-family homes on 2 acre lots, the Borough can simply forbid any affordable housing from being constructed during the Third Round and beyond, simply by not amending its 2 acre single family zoning throughout the municipality. The New Jersey Supreme Court explained in Mount Laurel II, 92 N.J. 158, 240, fn. 15 (1983) that

[t]he application of the Mount Laurel doctrine to fully developed municipalities will undoubtedly pose difficult problems. We note only that sound land use planning and Mount Laurel should remain compatible both at the state and municipal level, and that, in particular, where fully developed municipalities are involved, great care may be required to assure that the benefit of Mount Laurel is not offset by damage to legitimate zoning and planning objectives. The Mount Laurel doctrine should ordinarily be able to be accommodated, for example, without placing lower income housing projects in the middle of long-settled middle or upper income sections of a town. A satisfactory resolution of the occasionally conflicting interests may at times require creativity and cooperation. [Emphasis added.]

The court here concludes that the only possible resolution of the conflicting interests of providing multi-family housing to produce affordable housing in the Borough (which is over 95% zoned for minimum 2 acre sized single-family lots) is to conclude that multi-family development fronting along county roads in this particular case, with densities ranging between 5.85-units (the proposed density of the O'Donnell Property) to 8.33 units per acre (the proposed density of the Algonquin Property) are, in fact, compatible with the adjacent 2 acre lots containing single-family dwellings at issue. The court notes the testimony of the Borough's Planner revealing that COAH rules have effectively established a presumptive minimum density of 6 units per acre and, in municipalities that seek vacant land adjustments (such as the Borough) up to 8 units an acre as the presumptive density, regardless of the character of the area surrounding an affordable housing cite.

N.J.A.C. 5:93-4.2(f) provides that COAH "shall consider . . . the need to provide housing for low- and moderate-income households in establishing densities and set-asides for each site." Moreover, N.J.A.C. 5:93-5.6(c) provides that COAH "may require higher densities in circumstances including, but not limited to: . . . (2) when [COAH] determines that higher densities are required to provide an opportunity for inclusionary development in a specific municipality, based on the particular circumstances of that municipality." The court here finds that the existing circumstances present in the Borough and, most particularly, the need to provide affordable

housing in the Borough for low- and moderate-income households support densities between 5.85-units and 8.33-units per acre, as proposed.

During the hearing, SR Residents referred to a density analysis contained in an early version of the HPEFSP which had been replaced with a subsequent HPEFSP. Furthermore, the subsequent analysis was explained by the Borough Planner, Mr. Burgis, as follows:

As we were going through all of the information, and particularly Mount Laurel II, where it talks about desire not to impact higher income neighborhoods which is in footnote 15 of the Mount Laurel II decision, the re-reading of that section made me also understand that that section also does say that sometimes it is necessary to have the satisfactory resolution because, without a satisfactory resolution that results in some affordable housing where developed municipalities that are otherwise fully developed and cannot accommodate affordable housing, the end result would be that such municipalities would remain exclusionary and therefore, would not be able to accommodate its constitutional obligation. So consequently, as this process evolved, I began to realize if we continue to maintain that position, as spelled out on page 59 [of the 2019 HPEFAP], on behalf of the Borough, it doesn't address their - - the issue of their constitutional obligation. And that is why we changed our opinion. . . . [T]he underlying issue is to make sure that municipalities do, in fact, have this constitutional obligation as spelled out in Mount Laurel II, irrespective of whether or not they have to, in the words of Mount Laurel II, at times required creativity and cooperation, I believe is the words that are used. And cooperation involves some necessity to reflect on densities in lower density communities.

The Court finds Mr. Burgis's explanation of the density issue to be credible.

The court also rejects SR Residents' argument that the two SRI properties are not suitable because, as multi-family developments, they "threaten the integrity of the Borough's historic districts." SR Residents' planning expert, Mr. Ricci, as well as SR Residents' historic architecture expert, Mr. Barton Ross, both testified that N.J.A.C. 5:93-4.2(e)(3)(i) (a Second Round rule) provides that "historic and architecturally important sites shall be excluded if such sites were listed on the State Register of Historic Places in accordance with N.J.A.C. 7:4 prior to the submission of

the petition for substantive certification [which under Mount Laurel IV would be the filing of the declaratory judgment action].” The court finds that the record reveals the O’Donnell Property is not located within a historic district and, while a significant percentage of the Algonquin Property is located within the Saddle River Center Historic District (which itself is listed on the State Register of Historic Places), the location of the parcel within that historic district does not, in and of itself, make the site “unsuitable.”

The court notes that N.J.A.C. 5:97-3.13(b)(5), which is a COAH Third Round rule which was not invalidated by the Appellate Division or the Supreme Court, applies here rather than the Second Round rule cited by SR Residents experts in their testimony.¹⁰ N.J.A.C. 5:97-3.13(b)(5) provides that

[h]istoric and architecturally important sites and districts listed on the State or National Register of Historic Places shall be reviewed by the New Jersey State Historic Preservation Office [SHPO] for a recommendation pertaining to the appropriateness and size of buffer areas that will protect the integrity of the site. The review and written recommendation by [SHPO] shall be included in the Housing Element and Fair Share Plan that is the subject of any petition before the Council. Within historic districts, a municipality may regulate low- and moderate-income housing to the same extent it regulates all other development.

Historic and architecturally important sites are not excluded from RDP and are not deemed to be unsuitable for affordable housing. The Third Round rule merely requires that any such site be submitted to SHPO for review and recommendation regarding the appropriateness and size of buffer areas that will protect the integrity of such a site.

¹⁰Mount Laurel IV, 221 N.J. 1, 30 (2015) holds that Mount Laurel trial courts may “confidently utilize” earlier versions of the Third Round rules that were not invalidated by the Appellate Division.

The court finds that the objectors' argument and the testimony of Mr. Ricci regarding the historic nature of the subject sites and the COAH rule at issue is without merit. Mr. Ricci conceded during cross-examination that the Third Round rule applies and does not prevent lots located in historic districts from inclusion in the calculation of RDP nor does such inclusion automatically deem a site as unsuitable. Mr. Ricci also conceded on cross-examination that, while there were historic structures located on the Algonquin Property at the time a portion of the site was added to the historic district, the historic structures were later demolished and replaced by an existing mansion. In fact, the record reveals that there are no longer any "historic" or "architecturally important" structures on the Algonquin Property. SR Residents' historic architectural expert, Mr. Ross, also conceded on cross-examination that the proposed development could be designed to actually be compatible with the historic district. Further, he conceded on cross-examination that the O'Donnell Property was previously considered for inclusion in the Saddle River Center Historic District but the Borough rejected the site.

For all of the foregoing reasons, the court rejects all of SR Residents' objections as to fairness of the Second Amended Settlement Agreement.

Findings and Conclusions as to Lynn Hobson's Objections

At the time of the public hearing, Ms. Lynn Hobson appeared and raised an objection to the fairness of the settlement and the Borough's compliance with its Third Round Mount Laurel obligations on the basis that the affordable units proposed for the O'Donnell Parcel, at the time, were not proposed to be integrated with the market rate units. The court notes that N.J.A.C. 5:97-6.4(f) requires that "inclusionary zoning ordinances shall require, to the extent feasible, that developers fully integrate the low- and moderate-income units with the market units."¹¹ The

¹¹ The court further notes that there is a Second Round rule that "encourages" integration of affordable housing units with market rate units, N.J.A.C. 5:93-5.6(f), but that the Third Round rule

record is devoid of any evidence indicating that integration of the units is not possible. Although the court previously entered an order dated April 3, 2020 (the "April 3, 2020 Order") which approved a version of the ordinance rezoning the O'Donnell Property which did not require any integration of affordable units with market rate units, the record reflects that the Borough put SRI on notice that there was an issue regarding the failure to fully integrate the affordable units with the market rate units by including reference to same in the preamble to the ordinance. See Preamble to Ordinance 20-992. The Borough concedes that paragraph 9.b of the Initial Settlement Agreement (which is unchanged in this regard by the Second Amended Settlement Agreement) that the ordinances governing the O'Donnell Property and Algonquin Property would be subject to a non-appealable decision of the trial court in the event the parties could not agree on any ordinance terms. As such, the Borough has deferred to the court on this issue.

The court's determination in this regard is that the failure of Ordinance 20-990 to include a provision requiring full integration of the affordable units with the market rate units slated for the O'Donnell Property is contrary to the Mount Laurel doctrine as established in N.J.A.C. 5:97-6.4(f) because SRI has not offered any evidence to the court to show, let alone prove, that it is not feasible for SRI to fully integrate the affordable units with the market rate units proposed at this site. Accordingly, the court concludes that Ordinance 20-992 shall be judicially amended to add a requirement that "all low- and moderate-income units shall be fully integrated with the market units in the inclusionary development." It has been a long-standing principal of Mount Laurel case law that a court reviewing compliance must "address itself to possible social segregation within each [affordable housing] project. . . ." Allan-Deane, 205 N.J. Super. at 117. The court also

applies here. The court again acknowledges, as set forth above, Mount Laurel IV, 221 N.J. 1, 30 (2015) holds that Mount Laurel trial courts may "confidently utilize" earlier versions of the Third Round rules that were not invalidated by the Appellate Division. The court determines that the later-in-time Third Round rule represents COAH's latest position on the issue so should be applied.

notes that since the April 3, 2020 Order is, in effect, an interlocutory order it may be revisited at any time prior to the entry of a final judgment. Lombardi v. Masso, 207 N.J. 517, 534 (2011). The court finds that it is appropriate to revisit this issue which apparently was inadvertently overlooked at the time the April 3, 2020 order was issued.

Conclusion as to Fairness Determination

For all of the foregoing reasons set forth above and in the record presented and for the reasons articulated in the detailed, credible and persuasive testimony of the Borough's Planner / expert, Joseph H. Burgis, P.P., A.I.C.P. and Special Master Francis Banisch, P.P., A.I.C.P., as to site suitability of each of the parcels identified within the Borough's compliance plan, the court finds that the Second Amended Settlement Agreement is fair and reasonable to, and adequately protects the interests of, low and moderate income households in the region provided a condition is imposed providing for the court to judicially amend the ordinance to add a requirement that "all low- and moderate-income units shall be fully integrated with the market units in the inclusionary development." See East/West Venture, 286 N.J. Super. at 328.

The Compliance Determination

The court next addresses whether the Borough has complied with its Mount Laurel obligations as established by the Second Amended Settlement Agreement by implementing the terms of the Second Amended Settlement Agreement. As set forth above, the parties contesting compliance issues (with one exception as will be discussed below) withdrew their compliance objections when they withdrew their objections to the fairness of the settlement agreement after it was amended a second time prior to the completion of the combined fairness and compliance hearing. The remaining compliance objection, which is also an objection to the fairness of the settlement as discussed above, is the objection raised by Ms. Hobson to the Borough's compliance with the Mount Laurel doctrine centered upon the argument that the affordable units slated for the

O'Donnell Parcel are not fully integrated with the market rate units proposed for that site. Before addressing that particular objection, the court will address the standard of review for determining whether a municipality is in compliance with its Mount Laurel obligations.

The Supreme Court in Mount Laurel II, 92 N.J. 158, 221-222 (1983), held that a municipality must provide through its zoning ordinances a realistic opportunity for the construction of its region's fair share of affordable housing. "Realistic" is defined in Mount Laurel II in terms of "likelihood." Id. Long-standing Mount Laurel case law requires that the Mount Laurel trial courts "assess whether [the compliance] sites or mechanisms provide a realistic opportunity (i.e. likelihood) for the actual construction of [affordable] units within the compliance period." Allan-Deane, 205 N.J. Super. at 113. As the Allan-Deane court held that, if the court "is satisfied that the compliance package is realistic, it will enter a judgment of compliance." Id. As the Allan-Deane court further reasoned that

[t]he court should not look to any sites not selected or mechanisms not employed even if they might arguably be as realistic or more realistic unless an excluded site has earned a builder's remedy. Absent a builder's remedy, a municipality should have the right under Mount Laurel to choose any reasonable combination of realistic sites or realistic mechanisms that will produce the required result – the likelihood of creating affordable housing.
[Id. at 113-114, emphasis in original.]

Based on the exhibits entered into evidence by the Borough, the Special Master's reports, and the detailed, credible and persuasive testimony of the Borough's planning expert and the Special Master under the standards established in Allan-Deane, 205 N.J. Super. at 113-116, and under the standards subsequently adopted by COAH in its Second-Round rules, specifically, N.J.A.C. 5:93-5.3(b)(applicable to new construction), 5.5(a)(applicable to municipally sponsored development), and 5.6(b)(applicable to inclusionary development), the court finds that the Borough's Mount Laurel affordable housing compliance plan, after revision in accordance with

the conditions set forth below, represents a realistic opportunity – a likelihood – to create affordable housing.

For all of the reasons set forth above, the court finds that the Borough's plan complies with its Third Round Mount Laurel obligations provided that the following conditions are imposed: 1) the Second Amended Settlement Agreement is judicially amended to require full integration of affordable units with market rate units for the O'Donnell Property; and 2) ordinance 20-992, which governs the development of the O'Donnell Property, is judicially amended to require full integration of affordable units with market rate units.

The court also finds that the exhibits identified as "P" exhibits which were accepted into evidence and considered by the court, as further identified in the attached appendix, and based upon the credible testimony of the Borough's planning expert, Mr. Burgis, the Borough established a prima facie case of fairness and compliance, shifting the burden to the two objectors to prove the contrary. For the reasons set forth above, the court ultimately finds that SR Residents did not meet its burden of proving that the settlement agreement was not fair and reasonable to low- and moderate-income households in the region. For the reasons set forth above, the court ultimately concludes that Ms. Hobson proved that the settlement cannot be approved as fair and reasonable, and the Borough's compliance plan cannot be approved as complying with the Borough's Third Round Mount Laurel obligations, unless the Second Amended Settlement Agreement is further amended, and Ordinance 20-990 is amended, to require full integration of affordable units with market rate units at the O'Donnell Property. The court elects to use its discretionary authority in its review of this Mount Laurel declaratory judgement action and judicially amend the settlement agreement further as well as the ordinance that was adopted to govern the development of the O'Donnell Property to require full integration of affordable units with market rate units. As so amended, the court finds and concludes that the Second Amended Settlement Agreement is fair

and reasonable to low- and moderate-income households in the region and that the Borough is in full compliance with all of its Third Round Mount Laurel Obligations.

Final Judgement of Repose, conditioned solely upon the completion of the items identified in page 10 of the Special Master's Report dated December 21, 2021 requiring "an accessory apartment operating manual" and "resolution designating an Affordable Housing Administrative Agent," to the extent not already provided is **GRANTED** by the court for ten (10) years beginning on July 2, 2015 and ending on July 2, 2025.

APPENDIX**TABLE OF PLAINTIFF / PETITIONER'S EXHIBITS**

EXHIBIT No.	ADMIT INTO EVIDENCE DATE	DESCRIPTION
P-1	6/2/2020	Proof of Service and Proof of Publication of Notices of June 2, 2020 Fairness Hearing
P-2	7/30/2020	Proof of Service and Proof of Publication of Notices of July 30, 2020 Fairness Hearing
P-3	7/30/2020	Settlement Agreement signed 2/10/2020
P-4	7/30/2020	Amendment to Settlement Agreement signed 6/9/2020
P-5	7/30/2020	Concept 16 Plan prepared by Burgis
P-6	11/4/2020	Saddle River Planning Board Resolution #20-21 adopted on September 8, 2020 (adopting the 2020 Land Use Plan Element amendment to the 2010 Saddle River Master Plan)
P-7	11/4/2020	2020 Land Use Plan Element amendment to the 2010 Saddle River Master Plan dated August 27, 2020, adopted September 8, 2020
P-8	11/4/2020	Saddle River Planning Board Resolution #20-26 adopted on October 26, 2020 (adopting the 2020 Housing Element and Fair Share Plan Element of the Saddle River Master Plan)
P-9	11/4/2020	2020 Housing Element and Fair Share Plan Element of the Saddle River Master Plan dated October 5, 2020, adopted October 26, 2020
P-10	1/21/2021	Proof of Service and Proof of Publication of Notices of January 21, 2021 fairness and compliance hearing
P-11	1/21/2021	01. Ordinance No. 19-963 (allowing accessory apartments), adopted February 25, 2019
P-12	1/21/2021	02. Ordinance No. 19-964 (Borough-wide set-aside ordinance), adopted February 25, 2019
P-13	1/21/2021	03. Ordinance No. 19-965 (adopting affordable housing regulations and UHAC's), adopted February 25, 2019
P-14	1/21/2021	04. Ordinance No. 19-966 (development fee ordinance), adopted February 25, 2019
P-15	1/21/2021	05. Ordinance No. 19-981 (amending Ord. No. 19-966 to make it effective immediately), adopted November 21, 2019
P-16	1/21/2021	06. Ordinance No. 19-982 (amending Ord. No 19-964 to make it effective immediately), adopted November 21, 2019
P-17	1/21/2021	07. Ordinance No. 20-992 (re-zoning SRI's O'Donnell site to TIHD-1), adopted June 4, 2020
P-18	1/21/2021	08. Ordinance No. 20-993 (re-zoning SRI's Algonquin site to TIHD-2), adopted June 4, 2020
P-19	1/21/2021	09. Ordinance No. 20-1000 (re-zoning Borough's Choctaw site to AH-3), adopted September 10, 2020

P-20	1/21/2021	10. Draft Ordinance No. 2021-__ (re-zoning Borough's 78 Woodcliff Lake Road site to AH-4) to be adopted on January 18, 2021
P-21	1/21/2021	11. TMO's NJMHFA point scoring sheet with permanent lender statement, breakdown of costs, and preliminary feasibility analysis for the Choctaw and 20 E. Allendale Road 111-unit 100% affordable housing development
P-22	1/21/2021	12. NJMHFA press release dated 12/9/2020 announcing the 9% LIHTC awards, including TMO's 111-unit 100% affordable housing development
P-23	1/21/2021	13. NJMHFA letter to TMO dated 12/9/2020 awarding 9% LIHTC to the Choctaw and 20 EAR development
P-24	1/21/2021	14. 3 rd Round Rehabilitation Obligation Structural Conditions Survey Report dated December 18, 2020
P-25	1/21/2021	15. TMO Timetable (Schedule / Milestones) with preliminary feasibility analysis for the 16-unit 100% affordable housing development slated for 78 Woodcliff Lake Road
P-26	1/21/2021	16. Ordinance No. 20-984 (Bond ordinance authorizing purchase of 2 Choctaw Trail), adopted March 2, 2020
P-27	1/21/2021	17. Ordinance No. 20-985 (Bond ordinance authorizing purchase of 3 Choctaw Trail), adopted March 16, 2020
P-28	1/21/2021	18. Ordinance No. 20-1002 (Bond ordinance authorizing purchase of 1 Choctaw Trail), adopted March November 9, 2020
P-29	1/21/2021	19. Ordinance No. 20-1004 (Bond ordinance authorizing additional amount of bond for purchase of 1 Choctaw Trail), adopted December 21, 2020
P-30	1/21/2021	20. Ordinance No 20-987 (Bond ordinance authorizing purchase of 78 Woodcliff Lake Road), adopted on May 18, 2020
P-31	1/21/2021	21. Borough Council Resolution No. 200-20 (Resolution of intent to fund) adopted December 21, 2020
P-32	1/21/2021	22. Letter from Bor. Engineer Martin Spence December 21, 2020 regarding feasibility of sidewalks from the O'Donnell site to the Wandell School
P-33	1/26/2021	23. Ordinance 21-1005 adopted on January 18, 2021 creating the AHO-5 affordable housing overlay zone district 5 encompassing Block 1302, Lots 1.02, 1.03 and 1.04
P-34	1/26/2021	24. Ordinance 21-1006 adopted on January 18, 2021 creating the AH-4 affordable housing district 4 encompassing Block 1703, Lot 15 (78 Woodcliff Lake Road)
P-35	1/26/2021	25. Draft ordinance 21-1007 introduced on January 18, 2021 repealing and replacing in its entirety the municipal wide affordable housing mandatory set-aside ordinance
P-36	1/26/2021	26. Draft ordinance 21-1008 introduced on January 18, 2021 amending the affordable housing regulations ordinance

P-37	1/26/2021	27. Draft ordinance 21-1009 introduced on January 18, 2021 repealing and replacing in its entirety the affordable housing development fee ordinance
P-38	1/26/2021	28. Resolution #47-21 adopted on January 18, 2021 endorsing the 2020 Housing Element and Fair Share Plan and requesting court approval of the plan
P-39	1/26/2021	29. Resolution #48-21 adopted on January 18, 2021 adopting the Spending Plan and requesting court approval of the plan
P-40	1/26/2021	30. Draft Resolution #51-21 adopting an Affirmative Marketing Plan, scheduled for adoption on February 1, 2021
P-41	1/26/2021	31. Unpublished opinion of Judge Thomas Miller in <u>I/M/O Application of Bernards Township Compliance with Third Round Mount Laurel Obligation</u> , Docket No. SOM-L-899-15, filed November 1, 2018, approving the settlement after a fairness hearing and finding, among other things, that walkability to services is not a suitability consideration and that a traffic analysis is not required
P-42	4/27/2021	32. Ordinance 21-1007 adopted on February 16, 2021 repealing and replacing the Borough wide mandatory set-aside ordinance
P-43	4/27/2021	33. Ordinance 21-1008 adopted on February 16, 2021 amending the affordable housing regulations (replaces P-36)
P-44	4/27/2021	34. Ordinance 21-1009 adopted on February 16, 2021 repealing and replacing the development fee ord. (replaces P-37)
P-45	4/27/2021	35. Borough Council Reso #68-21 adopting on February 16, 2021 the Spending Plan (replaces P-39)
P-46	4/27/2021	36. Borough Council Reso #60-21 adopting on February 16, 2021 the Affirmative Marketing Plan
P-47	12/28/2021	37. Ordinance 21-1006 adopted on April 19, 2021 creating the AH-4 affordable housing district 4 encompassing Block 1703, Lot 15 (78 Woodcliff Lake Road)
P-48	11/15/2021	38. Second Amendment to the Settlement Agreement dated November 8, 2021
P-49	11/15/2021	39. COAH Spreadsheet of Approved RCA's
P-50	11/15/2021	40. COAH 3 rd Round Rules re: RCA's – N.J.A.C. 5:97-7
P-51	11/15/2021	41. Fairness Order entered by Judge Harris on January 11, 2000 which in para. 6 provides the "existence of Villa Marie Claire entitles the municipality to 18 credits against its fair share obligation"
P-52	11/15/2021	42. COAH 3 rd Round Rules re: credits – N.J.A.C. 5:97-4
P-53	12/28/2021	43. Corrected Second Amendment to the Settlement Agreement
P-54	12/28/2021	44. Ordinance 21-1024 adopted on December 20, 2021 repealing Ordinance 21-1006 and the AH-4 zone and restoring Block 1703, Lot 15 (78 WLR site) to R-1 zoning
P-55	12/28/2021	45. Ordinance 21-1025 adopted on December 20, 2021 expanding the AH-3 zone to include Block 1609, Lot 9 (25 E.

		Allendale Road) and the Choctaw Trail ROW and to expand permitted uses to allow special needs housing on Block 1605, Lot 1 (20 E. Allendale Road)
P-56	12/28/2021	46. Proof of Service and Proof of Publication of Notices of Hearing dated 12/14/2021
SM-1	7/30/2020	Banisch Master Report dated 7/27/2020 re: Fairness
SM-2	1/21/2021	Banisch Master Report dated 1/20/2021 re: Fairness and Compliance
SM-3	12/28/2021	Banisch Supplemental Master Report dated 3/1/2021 re: Fairness and Compliance
SM-4	12/28/2021	Banisch Second Supplemental Master Report dated 12/21/2021 re: Fairness and Compliance