



Peter J. O'Connor, Esq.  
Kevin D. Walsh, Esq.  
Adam M. Gordon, Esq.  
Laura Smith-Denker, Esq.  
David T. Rammier, Esq.  
Joshua D. Bowers, Esq.

November 10, 2016

Mayor Richard Barnhart  
Town Hall  
90 North Broadway  
Pennsville, NJ 08070

**Re: In the Matter of the Application of the Township of Pennsville,  
County of Salem, Docket No.SLM-L-119-15**

Dear Mr. Barnhart:

This letter memorializes the terms of an agreement reached between the Township of Pennsville (the Township or "Pennsville"), the declaratory judgment plaintiff, and Fair Share Housing Center (FSHC), a Supreme Court-designated interested party in this matter in accordance with In re N.J.A.C. 5:96 and 5:97, 221 N.J. 1 (2015)(Mount Laurel IV) and, through this settlement, a defendant in this proceeding.

#### **Background**

Pennsville received second and third round substantive certifications from COAH. The Township's certified plans included five (5) inclusionary zoning sites (Sites #1-#5) which permitted an inclusionary development density of 4 du/acre and with a small lot single-family detached housing type. The Township enacted the certified inclusionary zoning in 2006. The existing inclusionary zoning on the five (5) sites was previously expected to generate 133 affordable housing units. By virtue of subsequent DEP environmental regulatory changes and rulings, the affordable unit yield from these sites would drop to 51 affordable units without future zoning changes by the Township.

Pennsville filed the above-captioned matter on June 29, 2015 seeking a declaration of its compliance with the Mount Laurel doctrine and Fair Housing Act of 1985, N.J.S.A. 53:27D-301 et seq. in accordance with In re N.J.A.C. 5:96 and 5:97, supra. In May 2016 FSHC recalculated the Township's third round obligation at 38 third round rehabilitation, 228 prior round obligation and 537 third round prospective need (down from 551 in the July 2015 report). The Township participated in mediation efforts with FSHC in the hopes of settling on a third round fair share obligation. Through that process, the Township and FSHC agreed to settle the litigation and to present that settlement to the trial court with jurisdiction over this matter to review, recognizing that the settlement of Mount Laurel litigation is favored because it avoids delays and the expense of trial and results more quickly in the construction of homes for lower-income households.

#### **Settlement terms**

The Township and FSHC hereby agree to the following terms:

1. FSHC agrees that the Township, through the adoption of the attached fair share plan, Exh. A, and the implementation of that plan and this agreement, satisfies its obligations under the Mount Laurel doctrine and Fair Housing Act of 1985, N.J.S.A. 53:27D-301 et seq. for the Prior Round (1987-1999) and Third Round (1999-2025).

2. At this time and at this particular point in the process resulting from the Supreme Court's Mount Laurel IV decision, when fair share obligations have yet to be definitively determined, it is appropriate for parties to arrive at a settlement regarding a municipality's Third Round present and prospective need instead of doing so through plenary adjudication of the present and prospective need.
3. For settlement purposes only, Pennsville and Fair Share Housing Center hereby agree that Pennsville's affordable housing obligations are as follows:

Rehabilitation Share (per Kinsey Report <sup>1</sup> )	38
Prior Round Obligation (pursuant to N.J.A.C. 5:93)	228
Third Round (1999-2025) Prospective Need (per Kinsey Report, as adjusted through this settlement agreement)	376

4. Due to the Township's limited fiscal capabilities and the limited additional firm water and sewer capacity approved by the Department of Environmental Protection (hereinafter referred to as DEP), the Township will request a durational adjustment (NJAC 5:93-4.3) of only its third round prospective need obligation as part of its revised third round Housing and Fair Share plan. The Township proposes to reserve water and sewer capacity for the 55 affordable units required to fully address its 228-unit prior round obligation. [NJAC 5:93-4.3(c) states "The lack of adequate capacity, in and of itself, shall constitute a durational adjustment of the municipal housing obligation. The requirement to address the municipal housing obligation shall be deferred until adequate water and/or sewer are made available."] The Township reserves the right to demonstrate through a fiscal analysis as described in NJAC 5:93-4.3(d), that the cost of providing additional water and/or sewer (above and beyond the commitment for water and sewer capacity for 55 affordable units as part of the prior round obligation) to sites identified in paragraphs six and seven below (third round sites) is cost prohibitive to the Township, thus limiting the Township's "fiscal responsibility of providing water and/or sewer" to the Third Round Inclusionary sites.
5. To account for the DEP regulatory changes, the Township proposes to significantly increase the density on each of the Township's initial certified inclusionary Sites #1-#5 and will allow attached, multi-family housing on each site. Specific to Site #5, multi-family rental flats will be allowed. With the density increase and addition of a multi-family product type, the Township anticipates inclusionary Sites #1-#5 may generate approximately 151 affordable units.
6. In addition to existing inclusionary Sites #1-#5, the Township proposes inclusionary residential zoning on three (3) new sites (Tax Block 1101, Lot 31; Block 4301, Lot 40; Block 4301, Lot 41) and proposes mixed use zoning (commercial and inclusionary residential) on one (1) additional new site (Tax Block 4201, lot 17). The mixed use zoning will provide for 70% of the developable acreage (closest to Route 49) for commercial development and will require inclusionary residential zoning on the rear 30% of the tract's developable acreage. The Township anticipates that these four (4) new sites may generate approximately 90 affordable housing units if said potential

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<sup>1</sup> David N. Kinsey, PhD, PP, FAICP, NEW JERSEY LOW AND MODERATE INCOME HOUSING OBLIGATIONS FOR 1999-2025 CALCULATED USING THE NJ COAH PRIOR ROUND (1987-1999) METHODOLOGY, May 2016.

inclusionary developer(s) finance the necessary upgrades to the Township's infrastructure.

7. The parties agree that with the addition of four (4) new inclusionary sites to the existing five (5) inclusionary sites, the Township is purposefully siting possible future inclusionary developments and shall not be required to have overlay zoning as set forth in NJAC 5:93-4.3(b) which states "If the Council (COAH) determines that a site may not receive water and/or sewer during the period of substantive certification, the Council shall not require inclusionary zoning, but may require overlay zoning requiring inclusionary development (if water and sewer become available) and/or the imposition of a development fee consistent with NJAC 5:93-8" and with NJAC 5:93-4.3(c) 4 further stating "Where a municipality has designated sites for low and moderate income housing that lack adequate water and sewer and where DEP or its designated agent approves a proposal to provide water and/or sewer to a site other than those designated for the development of low and moderate income housing in the housing element, the municipality shall amend its housing element and fair share housing ordinance to permit development of such site for low and moderate income housing." Regardless of the aforementioned provisions, the Township's inclusionary sites shall be limited to the nine (9) sites noted above.
8. The Township shall meet its Third Round Prospective Need in accordance with the following standards as agreed to by the Parties and reflected in the table in paragraph 6 above:
  - a. Third Round bonuses will be applied in accordance with N.J.A.C. 5:93-5.15(d).
  - b. At least 50 percent of the units addressing the Third Round Prospective Need shall be affordable to very-low-income and low-income households with the remainder affordable to moderate-income households.
  - c. At least twenty-five percent of the Third Round Prospective Need shall be met through rental units, including at least half in rental units available to families.
  - d. At least half of the units addressing the Third Round Prospective Need in total must be available to families.
  - e. The Township agrees to comply with an age-restricted cap of 25% and to not request a waiver of that requirement. This shall be understood to mean that in no circumstance may the municipality claim credit toward its fair share obligation for age-restricted units that exceed 25% of all units developed or planned to meet its cumulative prior round and third round fair share obligation.
  - f. The Township agrees to require 13% of all units referenced in this plan, with the exception of units constructed as of July 1, 2008, and units subject to preliminary or final site plan approval, to be very low income units, with half of the very low income units being available to families.

9. As an essential term of this settlement, within forty five (45) days of Court Approval of this Settlement Agreement, the Township shall introduce an ordinance providing for the amendment of the Township's Housing Ordinance to implement the terms of this settlement agreement and the zoning contemplated herein.
10. All units shall include the required bedroom distribution, be governed by controls on affordability and affirmatively marketed in conformance with the Uniform Housing Affordability Controls, N.J.A.C. 5:80-26.1 et. seq. or any successor regulation, with the exception that in lieu of 10 percent of affordable units in rental projects being required to be at 35 percent of median income, 13 percent of affordable units in such projects shall be required to be at 30 percent of median income, and all other applicable law. The Township as part of its HEFSP shall adopt and/or update appropriate implementing ordinances in conformance with standard ordinances and guidelines developed by COAH to ensure that this provision is satisfied.
11. The parties agree that if a court of competent jurisdiction in Salem County, or an administrative agency responsible for implementing the Fair Housing Act, calculates an obligation for the Township for the period 1999-2025 that is lower by more than twenty (20%) percent of the total prospective Third Round need obligation established in this agreement, and if that calculation is memorialized in an unappealable final judgment, the Township may seek to amend the judgment in this matter. Notwithstanding any such reduction, the Township shall be obligated to implement the fair share plan attached hereto, including by leaving in place any site specific zone changes made or continued in connection with the plan approved pursuant to this settlement agreement; taking all steps necessary to support the development of 100% affordable developments referenced herein and otherwise fulfilling fully the fair share obligations established herein. The reduction of the Township's obligation below that established in this agreement does not provide a basis for seeking leave to amend this agreement or seeking leave to amend an order or judgment pursuant to R. 4:50-1. If the Township prevails in reducing its prospective need for the Third Round, the Township may carryover any resulting extra credits to future rounds in conformance with the then-applicable law.
12. Prior to the final compliance hearing, the Township shall prepare a spending plan that shall incorporate all of the requirements of the within agreement (the "2016 Spending Plan"). FSHC may comment on or object to the approved Spending Plan. The Spending Plan shall be subject to the review and approval of the Court at the final compliance hearing. Upon approval of the 2016 Spending Plan, the parties agree that the expenditures of funds contemplated under the agreement constitute "commitment" for expenditure pursuant to N.J.S.A. 52:27D-329.2 and -329.3, with the four-year time period for expenditure designated pursuant to those provisions beginning to run with the entry of final judgment approving this settlement in accordance with the provisions of In re Tp. of Monroe, 442 N.J. Super. 565 (Law Div. 2015)(aff'd 442 N.J. Super. 563). The parties to this agreement agree that this spending plan is valid and should be approved by the court. On the first anniversary of the execution of this agreement, and every anniversary thereafter through the end of this agreement, the Township agrees to provide annual monitoring of the 'affordable housing development fee (residential and mandatory statewide non-residential)' trust fund activity to the Court, Special Master, and Fair Share Housing Center, and all entities on the affirmative marketing list in this agreement, using forms previously developed for this purpose by the Council on Affordable Housing. The monitoring shall include an accounting of any housing trust fund activity, including the

source and amount of funds collected and the amount and purpose for which any funds have been expended. The parties recognize that the expenditure of trust fund fees on administrative costs is capped at 20%. The parties further recognize that in all filings before the Court, the Township filed to affirmatively comply with the Third Round obligation, and no legal or planning expenses by the Township were created in an effort to avoid its obligation, litigate the appropriateness of a site for inclusion in the plan, or the like.

13. On the first anniversary of the execution of this agreement, and every anniversary thereafter through the end of this agreement, the Township agrees to provide annual monitoring of affordable housing activity to the Court, Special Master, and Fair Share Housing Center, and all entities on the affirmative marketing list in this agreement, using forms previously developed for this purpose by the Council on Affordable Housing or any other forms endorsed by the Special Master and FSHC.
14. The Fair Housing Act includes two provisions regarding action to be taken by the Township during the ten-year period of protection provided in this agreement. The Township agrees to comply with those provisions as follows:
  - a. For the midpoint realistic opportunity review as of July 1, 2020 as required pursuant to N.J.S.A. 52:27D-313, the Township will provide to the Court, with notice to Fair Share Housing Center and other interested parties identified in this agreement, including all entities on the affirmative marketing list in this agreement, a status report as to its implementation of its Fair Share Plan and any comments as to whether any unbuilt sites continue to present a realistic opportunity with the opportunity for any interested party to submit comments and request a hearing before the court as to whether any sites no longer present a realistic opportunity and should be replaced.
  - b. For the review of very low income housing requirements required by N.J.S.A. 52:27D-329.1, within 30 days of the third anniversary of this agreement, the Township will provide to the Court, with notice to Fair Share Housing Center and other interested parties identified in this agreement, including all entities on the affirmative marketing list in this agreement, a status report as to its satisfaction of its very low income requirements, including family low income requirements referenced herein, with the opportunity for any interested party to submit comments and request a hearing before the court as to whether the municipality has complied and whether any corrective actions should be taken.
15. A condition of this agreement is that FSHC shall be granted as part of any final judgment party status in this matter and shall be deemed to have intervened in this matter as a defendant without the need to file a motion to intervene or an answer or other pleading.
16. This settlement agreement must be approved by a court prior to going into effect through a fairness hearing process, as required by Morris Cty. Fair Hous. Council v. Boonton Twp., 197 N.J. Super. 359, 367-69 (Law Div. 1984), aff'd o.b., 209 N.J. Super. 108 (App. Div. 1986); East/West Venture v. Borough of Fort Lee, 286 N.J. Super. 311, 328-29 (App. Div. 1996). The Township shall present its planner as a witness at this hearing. FSHC agrees to not challenge the attached fair share plan in court during any fairness hearing in which it is reviewed. FSHC agrees that the municipality may receive the "judicial equivalent of

substantive certification" in accordance with the Supreme Court's decision in In re N.J.A.C. 5:96 and 5:97, 221 N.J. 1,30 (2015).

17. This settlement agreement may be enforced through a motion to enforce litigant's rights or a separate action filed in Superior Court, Salem County. A prevailing movant or plaintiff in such a motion or separate action shall be entitled to reasonable attorney's fees.
18. Unless otherwise specified, it is intended that the provisions of this Agreement are to be severable. The validity of any article, section, clause or provision of this Agreement shall not affect the validity of the remaining articles, sections, clauses or provisions hereof. If any section of this Agreement shall be adjudged by a court to be invalid, illegal, or unenforceable in any respect, such determination shall not affect the remaining sections.
19. This Agreement shall be governed by and construed by the laws of the State of New Jersey.
20. This Agreement may not be modified, amended or altered in any way except by a writing signed by each of the Parties.
21. This Agreement may be executed in any number of counterparts, each of which shall be an original and all of which together shall constitute but one and the same Agreement.
22. The Parties acknowledge that each has entered into this Agreement on its own volition without coercion or duress after consulting with its counsel, that each party is the proper person and possess the authority to sign the Agreement, that this Agreement contains the entire understanding of the Parties and that there are no representations, warranties, covenants or undertakings other than those expressly set forth herein.
23. Each of the Parties hereto acknowledges that this Agreement was not drafted by any one of the Parties, but was drafted, negotiated and reviewed by all Parties and, therefore, the presumption of resolving ambiguities against the drafter shall not apply. Each of the Parties expressly represents to the other Parties that: (i) it has been represented by counsel in connection with negotiating the terms of this Agreement; and (ii) it has conferred due authority for execution of this Agreement upon the persons executing it.
24. Any and all Exhibits and Schedules annexed to this Agreement are hereby made a part of this Agreement by this reference thereto. Any and all Exhibits and Schedules now and/or in the future are hereby made or will be made a part of this Agreement with prior written approval of both Parties.
25. This Agreement constitutes the entire Agreement between the Parties hereto and supersedes all prior oral and written agreements between the Parties with respect to the subject matter hereof except as otherwise provided herein.
26. Anything herein contained to the contrary notwithstanding, the effective date of this Agreement shall be the date upon which all of the Parties hereto have executed and delivered this Agreement.
27. All notices required under this Agreement ("Notice[s]") shall be written and shall be served upon the respective Parties by certified mail, return receipt requested, or by a recognized overnight or by a personal carrier. In addition, where feasible (for example, transmittals

of less than fifty pages) shall be served by facsimile or e-mail. All Notices shall be deemed received upon the date of delivery. Delivery shall be affected as follows, subject to change as to the person(s) to be notified and/or their respective addresses upon ten (10) days notice as provided herein:

**TO FSHC:**

Kevin D. Walsh, Esq.  
Fair Share Housing Center  
510 Park Boulevard  
Cherry Hill, NJ 08002  
Phone: (856) 665-5444  
Telecopier: (856) 663-8182  
E-mail: kevinwalsh@fairsharehousing.org

**TO THE TOWNSHIP:**

Walter J. Ray, Solicitor for the Township of Pennsville  
Masten and Ray  
254 S. Broadway, PO Box 406  
Pennsville, NJ 08070

**WITH A COPY TO THE  
MUNICIPAL CLERK:**

Angela Foote, Clerk  
Town Hall  
90 North Broadway  
Pennsville, NJ 08070

Please sign below if these terms are acceptable.

Sincerely,



Kevin D. Walsh, Esq.  
Counsel for Intervenor/Interested Party  
Fair Share Housing Center

On behalf of the Township of Pennsville, with the authorization  
of the governing body:

  
Richard Barnhart, Mayor

Dated: 11-15-2016