B A N I S C H
A S S O C I A T E S, I N C.
Planning and Design

REPORT OF THE SPECIAL MASTER

REGARDING THE FAIRNESS OF

SETTLEMENT AGREEMENT BETWEEN

WATCHUNG BOROUGH AND FAIR SHARE HOUSING CENTER

IN THE MATTER OF THE APPLICATION
OF THE BOROUGH OF WATCHUNG
DOCKET No. SOM-L-902-15

August 6, 2018

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The original of this report has been signed and sealed according to law

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Introduction

The Borough of Watchung ("Borough") has approved a Settlement Agreement to aid in meeting the constitutional fair share housing obligation. The purpose of this report is to present my review and recommendations, as Court-appointed Special Master, regarding whether the settlement agreement with Fair Share Housing Center ("FSHC Agreement") adequately protect the interests of the lower-income persons.

Notice of the fairness hearing scheduled for August 9, 2018, which was provided in accordance with the Court's instructions, included a description of the Settlement Agreement and indicated the Settlement Agreement was available for inspection and photocopying at the Watchung Borough Clerk's office.

This report addresses the fairness of the Settlement to the protected class of low and moderate income households as it relates to the provision of affordable housing. It also provides a preliminary assessment of the Borough's eligibility for a judgment of compliance and repose and the steps needed to complete this process.

Fairness of Settlement Agreement

The FSHC agreement, which was approved by the Borough on June 7, 2018, has been reviewed to determine whether any element of the settlement would not be fair to the interests of existing and future low and moderate income households in Watchung's housing region. I have evaluated the fairness of the Settlement Agreement using the criteria set forth in East/West Venture v. Borough of Fort Lee, 286 N.J. Super 311, 329 (App. Div. 1996), which outlines the issues involved in approving a settlement of *Mount Laurel* litigation.

According to the Settlement, the Borough will address a fair share obligation consisting of

- present need (rehabilitation share) - 30 units
- prior round obligation (1987-1999) - 206 units
- prospective need obligation (1999-2025) - 396 units

The methods by which the Borough will address this obligation are outlined below.

Addressing the Present Need

The Settlement Agreement acknowledges a 30-unit rehabilitation obligation, but reduces this number to 4 units, based on a municipal windshield survey of properties in the Borough. The 4-unit present need will be completed through a municipally sponsored rehabilitation program in compliance with the requirements set forth in N.J.A.C. 5:93-5.2.

Addressing the Prior Round

Watchung has a prior round obligation of 206 units. The Borough received a second round vacant land adjustment resulting in a realistic development potential (RDP) of 169 units. This obligation was met though the programs identified in Table 1.

Table 1
Tabulation of Prior Round Credits

Project	*Credit*	*Bonus*	*Total*
Johnston Drive Group Home	3	0	3
Lakeside Villas at Watchung (age restricted)	8	0	8
RCA Phillipsburg	57		57
The Point at Watchung	40		40
Rental Bonus		43	43
Accessory Apartment Program (Proposed)	10	0	10
TomTom Realty	3		3
BNE Real Estate Group (proposed)	5		5
Total	126	43	**169**

The 169 units being applied to the prior round include 154 existing units and 15 proposed units through the accessory apartment program and BNE Real Estate site. This leaves an unmet need of 37 units to be carried forward to the third round.

Addressing the Third Round RDP

While the Borough's prospective need is 396 units, the Borough has identified and the FSHC settlement acknowledges a realistic development potential (RDP) of 53 units. The units and credits to satisfy the third round RDP are shown on Table 2. The surplus 8 credits will be applied to the unmet need.

Table 2
Tabulation of Third Round RDP units

Project	*Credit*	*Bonus*	*Total*
Brandywine at Mountain Ridge Assisted Living (Proposed)	2		2
Watchung Associates, LLC (rental)	4	0	4
BNE Real Estates (Proposed)	41	0	41
Rental Bonus		14	14
Total	47	14	**61**

Addressing the Third Round Unmet Need

After applying the credits identified in Table 1 (169) and Table 2 (61) to the prior round, the Borough's third round unmet need is 372 units (37 prior round unmet need + 335 third round unmet need = 372 units). This will be addressed by affordable housing overlay zones as follows:

Route 22 Affordable Housing Overlay Zone

- Block 64.02, Lot 3 (Liccardi Ford) – 5 acres
- Block 64.02, Lot 5 (Mount Saint Mary Academy) – 13.7 acres

The overlay will permit 14 units/acre with a 20% set aside for for-sale units and 18 units/acre with a 15% set aside for rental units. Inclusionary housing will be permitted as a conditional use.

Somerset Street/Watchung Avenue Affordable Housing Overlay Zone
This zone will permit mixed-use retail and residential uses 6 units/acre with a 20% set-aside for for-sale units and 10 units/acre with a 15% set-aside for rental units.

BNE Real Estate Group
The Borough will adopt an inclusionary zone for Block 74.02, Lots 19.01 and 19.02 and Block 73.04, Lots 5 and 10. The agreement will be to provide 46 affordable housing units.

Mandatory Set-Aside Ordinance
The Borough will also adopt a mandatory set-aside ordinance which will require a 20% set aside from any multi-family development of 5 or more units at a density of 6 units/acre or greater. The ordinance will require a 20% set-aside if the affordable units are for sale and a 15% set-aside for affordable rental units.

Fairness Evaluation of the Settlement Agreement

The fairness of a settlement to the protected class of low and moderate income households has long been a concern of the Court. The question of whether or not "the settlement adequately protects the interests of the lower-income persons on whose behalf the affordable units proposed by the settlement are to be built" led the Appellate Court to establish a five-part analysis for evaluating the fairness of a settlement in a *Mount Laurel* lawsuit in East/West Venture v. Borough of Fort Lee, 286 N.J. Super. 311, 328-329 (App. Div. 1996). I have applied that five-part analysis to Watchung's settlement agreement, as follows:

Settlement Agreement with FSHC

1. **Consideration of the number of affordable units being constructed.** The Settlement Agreement acknowledges that the Borough has satisfied the 169-unit prior round RDP and exceeds the 53-unit third round RDP by 8 units. In addition, the Settlement Agreement confirms the Borough's commitment to implement either rezoning or overlay

zones, as well as a Borough-wide ordinance requiring any multifamily development of 6 or more units per acre to provide affordable housing set-asides.

2. **The methodology by which the number of affordable units provided is derived.** The settlement offer by FSHC, which forms the basis for this settlement, is derived from a methodology that FSHC asserts follows the prior round methodology.

3. **Other contributions by the developer.** This prong of the East/West Venture test is not strictly applicable to a settlement that does not involve a builder/plaintiff. However, the terms of the Settlement provide that:

a) at least half of all affordable housing units addressing the Third Round Prospective Need shall be available to family households;

b) the Borough will require at least 13 percent of all of the new affordable housing units in its Plan 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. The BNE project will include 6 very low income units.

c) at least 25 percent of the Third Round Prospective Need obligation shall be met with rental units, of which at least 50 percent shall be available to families;

d) no more than 25 percent of affordable units shall be age-restricted;

e) 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);

f) at least 50 percent of all affordable units in each inclusionary site shall be affordable to low income and very low income households with the remainder affordable to moderate income households;

g) 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.

h) 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) the following additional organizations: Fair Share Housing Center, the Latino Action Network, the New Jersey State Conference of the NAAPC, NORWESCAP, Central Jersey Resource Center, and the Supportive Housing Association.

i) within 180 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. (See Attachment A)

4. **Other components of the Agreement that contribute to the satisfaction of the constitutional obligation.** The process of obtaining the Court's approval of the Borough's Third Round Housing Element and Fair Share Plan, the scrutiny that document has received from FSHC, and the conditions contained in the Settlement and this report requiring the Borough to adopt certain master plan and ordinance amendments will allow the Borough to move forward in the satisfaction of its constitutional obligation.

5. **Other factors that may be relevant to the fairness of the settlement.** This Settlement will ensure that the interests of lower income households will be advanced through the Court's approval, since the Agreement provides for a continuing monitoring program throughout its duration. Since a Spending Plan amendment will be required, a review of its provisions by the court in the future will be important.

In conclusion, the Court is being asked to determine whether the interests of low and moderate income households will be served by the approval of the referenced settlement agreement. As a result of my analysis, it is my opinion that the settlement provides for a substantial amount of affordable housing and satisfy the criteria set forth by the Appellate Division in East/West Venture. Thus, the interests of low and moderate income households will be advanced by the Court's approval of the Settlement Agreement.

Review of Objections

I received correspondence dated July 23, 2018 from Watchung resident Amira Padilla. Ms. Padilla objects to the proposed BNE affordable housing development off Bonnie Burn Road, citing environmental impacts, the size of the complex, flooding, increased traffic, school overcrowding and sewer system impacts.

The BNE parcels total 41 acres, of which more than 19 acres are developable.

Conclusion and Conditions

This report has been prepared in anticipation of the upcoming Fairness Hearing before the Honorable Thomas C. Miller, J.S.C. on August 9, 2018 in the matter of the Application of the Borough of Watchung for a Determination of *Mount Laurel* Compliance (Docket No. SOM-L-902-15). The Court is being asked to determine whether the interests of low and moderate income households will be served by the approval of the referenced Settlement Agreement with FSHC.

As noted above, the FSHC Settlement satisfies the criteria set forth by the Appellate Division in East/West Venture. I further note that the FSHC, an affordable housing advocate and party to the Settlement Agreement, has also concluded that the compliance

plan contained in the Settlement Agreement is fair and reasonable to the interests of low and moderate-income households. This is significant, in light of the holding in Morris County Fair Housing Council v. Boonton Twp., 197 N.J. Super, 359 (Law Div. 1984), aff'd o.b. 209 N.J. Super, 108 (App. Div. 1986), wherein the Court concluded that "...it may be assumed that generally a public interest organization will only approve a settlement which it conceives to be in the best interest of the people it represents."

Additionally, for the reasons provided herein, I find that Watchung's allocation of units and credits for its prior round and third round obligations is designed to implement the March 10, 2015 decision of the N.J. Supreme Court In Re N.J.A.C. 5:96 and 5:97, insofar as can be determined at this time.

Subject to supplementation as outlined in Attachment A, I also find that Watchung Borough has created a realistic opportunity for satisfaction of the Borough's affordable housing obligation for the period from 1987 through 2025, pursuant to the Mount Laurel decisions, the Fair Housing Act, applicable COAH regulations, and the Supreme Court's decision in Re N.J.A.C. 5:96 and N.J.A.C. 5:97, 221 N.J. (2015).

ATTACHMENT A
REQUIRED ELEMENTS OF FINAL AFFORDABLE HOUSING COMPLIANCE PLAN
Borough of Watchung, Somerset County
August 6, 2018

1. The compliance proposals contained in Table 1 and Table 2 of this report and the applicable terms of the executed Settlement with FSHC shall be referenced in the Housing Element and Fair Share Plan, which, following review by the Special Master, shall be adopted and submitted to the Court for approval as part of the final Judgment of Compliance and Repose.

The HE/FSP shall provide documentation of the creditworthiness of all existing units and shall be prepared according to the requirements of the Fair Housing Act (FHA), which identifies the "Essential components of the municipality's housing element" at N.J.S.A. 52:27D-310, as follows:

> A municipality's housing element shall be designed to achieve the goal of access to affordable housing to meet present and prospective housing needs, with particular attention to low and moderate income housing, and shall contain at least:
>
> a. An inventory of the municipality's housing stock by age, condition, purchase or rental value, occupancy characteristics, and type, including the number of units affordable to low and moderate income households and substandard housing capable of being rehabilitated, and in conducting this inventory the municipality shall have access, on a confidential basis for the sole purpose of conducting the inventory, to all necessary property tax assessment records and information in the assessor's office, including but not limited to the property record cards;
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> b. A projection of the municipality's housing stock, including the probable future construction of low and moderate income housing, for the next ten years, taking into account, but not necessarily limited to, construction permits issued, approvals of applications for development and probable residential development of lands.
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> c. An analysis of the municipality's demographic characteristics, including but not necessarily limited to, household size, income level and age;
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> d. An analysis of the existing and probable future employment characteristics of the municipality;
>
> e. A determination of the municipality's present and prospective fair share for low and moderate income housing and its capacity to accommodate its present and prospective housing needs, including its fair share for low and moderate income housing; and
>
> f. A consideration of the lands that are most appropriate for construction of low and moderate income housing and of the existing structures most appropriate for conversion to, or rehabilitation for, low and moderate income housing, including a consideration of lands of developers

who have expressed a commitment to provide low and moderate income housing.

2. Prior to the entry of an Order granting a final Judgment of Compliance and Repose, the Fair Share Plan shall be reviewed by the Special Master for compliance with the terms of the executed Settlement Agreement, the Fair Housing Act and the UHAC regulations before being adopted and submitted to the Court. The Fair Share Plan document should include any proposed Ordinances and Resolutions needed to implement the Plan, including zoning amendments, an Affordable Housing Ordinance, a Development Fee Ordinance, an Affirmative Marketing Plan, a Rehabilitation Program description and Manual, a Spending Plan, resolutions appointing an Administrative Agent and a Municipal Affordable Housing Liaison, a resolution adopting the Housing Element and Fair Share Plan (Planning Board) and a resolution endorsing the Housing Element and Fair Share Plan (Governing Body).

3. The Spending Plan shall be prepared, submitted to the Special Master for review and comment, adopted by the Planning Board as part of the Plan and by the Borough Council as a separate action and submitted to the Court for approval before the Borough will be permitted to expend any funds from its Affordable Housing Trust Fund.

4. All proposed inclusionary and 100 percent affordable housing development zoning amendments shall be prepared, reviewed by the Special Master, and adopted and submitted to the Court prior to the entry of an Order granting a final Judgment of Compliance and Repose.

5. The Borough shall prepare and adopt an Affordable Housing Ordinance that reflects all provisions of the Settlement Agreement, as well as applicable UHAC and COAH Rules and an Affirmative Marketing Plan Resolution consistent with the terms of the Settlement Agreement. These documents shall be reviewed by the Special Master and FSHC, adopted and submitted to the Court prior to the entry of an Order granting a final Judgment of Compliance and Repose.

6. If it has not done so already, the Borough will need to contract with one or more Administrative Agents, responsible to the Borough but paid for by the owners of the affordable housing units created in the Borough, to administer the affordability controls on all of the low and moderate income units that have been or will be created in the Borough. This should be accomplished and submitted to the Court prior to the entry of an Order granting a final Judgment of Compliance and Repose.

7. If it has not done so already, the Borough will need to create the position of Municipal Housing Liaison by Ordinance and fill that position by Resolution of the Governing Body. This should be accomplished and submitted to the Court prior to the entry of an Order granting a final Judgment of Compliance and Repose.

Upon its timely compliance with all of the foregoing and approval of the final submission by the Court, I believe that Watchung Borough will be entitled to a final Judgment of Compliance and Repose through July 1, 2025.