

SUPERIOR COURT OF NEW JERSEY

SOMERSET, HUNTERDON AND WARREN COUNTIES

VICINAGE 13

Chambers of
THOMAS C. MILLER
Presiding Judge - Civil



Somerset County Superior Court
P.O. Box 3000
Somerville, NJ 08876-1262
(908) 332-7700 Ext. 13590

FILED ON ECOURTS

December 10, 2018

Jeffrey Lehrer, Esq.

Steven Kunzman, Esq.

Tracy Siebold, Esq.

Adam Gordon, Esq.

Robert Kasuba, Esq.

Brett E. Tanzman, Esq.

**RE: In the Matter of the Application of the Township of Warren
Docket No. SOM-L-904-15**

Dear Counsel:

Enclosed herewith is the Court's opinion with regards to the Fairness Hearing held by this Court.

Be advised that I am requiring that the Township's Attorney submit an Order to the Court for consideration that is reflective of the Court's opinion as a "Five Day Order."

Also, the Township shall serve this opinion and its proposed Order to all Intervenors and Interested Parties (as this Court does not have a means to do same through eCourts).

Thank you.

Very truly yours,

THOMAS C. MILLER, P.J.Cv.**THOMAS C. MILLER P.J.Cv.**

TCM/jml

Enclosure

CC: Frank Banisch, Special Master

IN THE MATTER OF THE
APPLICATION OF TOWNSHIP OF
WARREN, A Municipal Corporation of
the State of New Jersey,

Petitioner.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
SOMERSET COUNTY
DOCKET NO. SOM-L-904-15

CIVIL ACTION
(Mount Laurel)

**COURT’S OPINION CONCERNING THE FAIRNESS ASSESSMENT REGARDING
WHETHER THE SETTLEMENT AGREEMENT BETWEEN THE TOWNSHIP OF
WARREN AND THE FAIR SHARE HOUSING CENTER AND VARIOUS
INTERVENORS IS FAIR AND REASONABLE TO LOW AND MODERATE INCOME
HOUSEHOLDS**

A. PARTIES AND COUNSEL

Petitioner, Township of Warren (“Township”, “Warren” or “Petitioner”) moves for a determination that the Settlement Agreement between the Township of Warren and the Fair Share Housing Center (“FSHC”) and various Intervenors is fair and reasonable to low and moderate income households. “Warren” is represented by Jeffrey Lehrer, Esq. and Steven Kunzman, Esq. of the firm of DiFrancesco Bateman.

Intervenor, Chase Partners Warren, LLC (“Chase”) and Chase Partners Warren II, LLC (“Chase II”) appeared and was represented by Tracy A. Siebold, Esq. of the Law Firm of Nehmad, Perillo & Davis, P.C.

Intervenor, Fair Share Housing Center (“FSHC”) appeared and was represented by Adam Gordon, Esq.

Intervenor, North Hill Developers, Inc. (“North Hill”), appeared and was represented by Brett E. Tanzman, Esq. of the Wilf Law Firm.

Intervenor, K. Hovnanian North Jersey Acquisitions, LLC (“K. Hovnanian”), appeared and was represented by Robert Kasuba, Esq. of Bisgaier Hoff, LLC.

Special Master, Francis J. Banisch, III, PP, AICP, provided a report to the Court and offered sworn testimony. Mr. Banisch is associated with Banisch Associates, Inc., Planning and Design.

Interested Party, Matt Campbell, appeared on behalf of Toll Brothers.

Interested Party, Linda Coughlin, appeared as a self-represented litigant on her own behalf.

Interested Party, Mark McCarthy, appeared as a self-represented litigant on his own behalf.

Interested Party, Rick dePinho, appeared as a self-represented litigant on his own behalf.

Interested Party, James C. Burd, appeared as a self-represented litigant on his own behalf.

Interested Party, Berkeley Heights Township, appeared through its counsel, Erik Nolan, Esq. and Matt Jessup, Esq. of the firm of McManimon, Scotland & Bauman, LLC.

Interested Party, SW Mountain, LLC, appeared through its counsel, Lindsay Cambria, Esq. of the firm of Brach Eichler, LLC.

Interested Party, George Vetter, appeared as a self-represented litigant on his own behalf.

Interested Party, Warren Township Sewerage Authority, appeared through its counsel, Derrick R. Freijomil, Esq. of Riker Danzig Scherer Hyland & Perretti, LLP.¹

John T. Chadwick, IV, PP of Dolan & Dean, appeared on behalf of the Township of Warren.²

B. STATEMENT OF FACTS

1. Regarding the Supreme Court's *Mount Laurel* Process

i) The *Mount Laurel* Doctrine

The New Jersey Supreme Court prohibited the discriminatory use of zoning powers and mandated that each developing municipality “must, by its land use regulations, make realistically possible the opportunity for an appropriate variety and choice of housing for all categories of people who may desire to live there, of course including those of low and moderate income.” S. Burlington Cnty. NAACP v. Twp. of Mount Laurel (Mount Laurel I), 67 N.J. 151, 179, 187, appeal dismissed and cert. denied, 423 U.S. 808, 96 S. Ct. 18, 46 L. Ed. 2d 28 (1975)

¹ Mr. Freijomil appeared and offered a report of the status of sewer capacity within Warren Township as sewer capacity affects most development projects that are contained within the Township's Plan.

² John Chadwick appeared and offered testimony concerning the location of each of the properties contained within the Township's Plan. He also introduced a Map of the Township which depicted the size, location and configuration of the properties that are proposed to be included in the Township's Plan. The Map was accepted by the Court as Exhibit P-3.

Thereafter, in 1983, the New Jersey Supreme Court reaffirmed the constitutional obligation that towns provide “a realistic opportunity for the construction of [their] fair share of the present and prospective regional need for low and moderate income housing.” S. Burlington Cnty. NAACP v. Twp. of Mount Laurel (Mount Laurel II), 92 N.J. 158, 205 (1983) (citing Mount Laurel I, supra, 67 N.J. at 174), (together with Mount Laurel I, the *Mount Laurel Doctrine*).

“The *Mount Laurel* series of cases recognized that the power to zone carries a constitutional obligation to do so in a manner that creates a realistic opportunity for producing a fair share of the regional present and prospective need for housing low- and moderate-income families.” In Re Adoption of N.J.A.C. 5:96 and 5:97 by the New Jersey Council on Affordable Housing, 221 N.J. 1, 3-4 (2015); (footnote omitted).

It is the intent and purpose of the *Mount Laurel Doctrine* to prohibit the discriminatory use of zoning powers and zoning practices which have the exclusionary effect of making housing unavailable to persons of low and moderate income and to provide remedies to address such practices when they are proven to exist.

ii) **Regarding the Council on Affordable Housing and 3rd Round Rules and how this matter has been brought before this Court**

The Legislature codified the *Mount Laurel Doctrine* in the Fair Housing Act (“the Act”), N.J.S.A. 52:27D-301, et seq. and further established COAH as the administrative agency charged with implementing and administering the Act.

Under the Act, COAH is empowered, through its procedural and substantive rules to establish municipal affordable housing obligations, and review and approve housing plans submitted to it by granting “substantive certification” if they create a realistic opportunity for the creation of affordable housing. N.J.S.A. 52:27D-313. Under a grant of substantive certification, a municipality is insulated to a substantial extent from exclusionary zoning litigation for a period of ten years³. Ibid.

³COAH initially adopted substantive rules, governing the period from 1987 to 1993, (“The First Round Rules”), N.J.A.C. 5:92-1.1 to -18.20, Appendices A to F. It thereafter adopted substantive rules governing the period from 1987 to 1999, (“The Second Round Rules”), N.J.A.C. 5:93-1.1 to -15.1, Appendices A to H. After a lengthy period of study and review ultimately characterized by the New Jersey Superior Court - Appellate Division as “dramatic and inexplicable,” In re Six Month Extension of N.J.A.C. 5:91 et seq., 372 N.J. Super. 61, 95-96 (App. Div. 2004), certif. denied, 182 N.J. 630 (2005), COAH proposed Initial Third Round Rules on October 6, 2003.

On October 20, 2008, COAH adopted Third Round Rules intended to assess municipal affordable housing obligations for the period from 1999 to 2018 utilizing a “growth share” methodology. N.J.A.C. 5:96 and 5:97. The revised Third Round Rules were initially invalidated by the Appellate Division on October 8, 2010, in In Re Adoption of N.J.A.C. 5:96 and 5:97 by the New Jersey Council on Affordable Housing, 416 N.J. Super. 462 (App. Div. 2010). That ruling was ultimately affirmed and modified by the Supreme Court on September 26, 2013, In Re Adoption of N.J.A.C. 5:96 and 5:97 by the New Jersey Council on Affordable Housing, 215 N.J. 578 (2013), and COAH was ordered to promulgate new rules, utilizing a First and Second Round methodology, within five months of that decision. Upon COAH’s requests, the Court extended the time for adoption under an Order entered on March 14, 2014. Ultimately, however, COAH failed to adopt regulations in a stale-mated 3-3 vote. In Re Adoption of N.J.A.C. 5:96 and 5:97 by the New Jersey Council on Affordable Housing, 221 N.J. 1, 10 (2015).

Consequently, an application was made to the Supreme Court by the Fair Share Housing Center (FSHC), (a party which had challenged COAH’s rules), to enforce litigants’ rights under Rule 1:10-3. On March 10, 2015, in In Re Adoption of N.J.A.C. 5:96 and 5:97 by the New Jersey Council on Affordable Housing, 221 N.J. 1 (2015), the Court granted FSHC’s application, finding that “There is no question that COAH failed to comply with this Court’s March 2014 Order that was designed to achieve the promulgation of Third Round Rules and the maintenance of a functioning COAH,” such that “the administrative forum is not capable of functioning as intended by the [Fair Housing Act] due to the lack of lawful Third Round Rules assigning constitutional obligations to municipalities,” and, accordingly, “the courts may resume their role as the forum of first instance for evaluating municipal compliance with *Mount Laurel* obligations. . .” Id. at 19 – 20.

It is pursuant to that ruling that Warren Township petitioned this Court with its ultimate goal being to obtain a Judgment of Compliance and Repose.

Upon receipt of voluminous comments, COAH re-proposed Third Round Rules which were adopted on December 20, 2004. 36 N.J.R. 5895(a). These Initial Third Round Rules, which contained a "growth share" approach, were designed to address a cumulative municipal affordable housing obligation beginning 1987 and ending 2014.

The Initial Third Round Rules were invalidated in a significant number of respects, and the matter remanded to COAH, by the Superior Court - Appellate Division on January 25, 2007. In Re Adoption of N.J.A.C. 5:94 & 5:95, 390 N.J. Super. 1, (App. Div. 2007), certif. den. 192 N.J. 71 (2007).

iii) Jurisdiction of this Court

The Law Division of the Superior Court, Somerset County, has jurisdiction over the within matter which seeks a Declaratory Judgment of Third Round Mount Laurel Compliance and Repose pursuant to R. 4:42-3, R. 4:3-1(a)(4), N.J.S.A. 2A:16-53, J.W. Field v. Twp. of Franklin, 204 N.J. Super. 445, 456-458 (Law Div. 1985), favorably referenced in Hills Dev. Co. v. Bernards Twp., 103 N.J. 1, 29-30 (1986), N.J.S.A. 52:27D-313(a), and In re Adoption of N.J.A.C. 5:96 & 5:97, 221 215 N.J. 1 (2015), and venue of the action is before the designated Mount Laurel Judge for Vicinage 13 in accordance with paragraph 10 of the implementing order accompanying the 2015 Decision. Id. at 36.

As the Court held in In re Adoption of N.J.A.C. 5:96 & 5:97, 221 215 N.J. 1 (2015) (the “2015 Decision”), part of the process of judicial review of a municipal Third Round Housing Plan Element and Fair Share Plan (“HPE&FSP”) includes the Mount Laurel trial courts providing municipalities with temporary immunity from exclusionary zoning litigation during the period when the court is reviewing the HPE&FSP. As the Court explained:

“Because municipalities that received a grant of substantive certification promulgated housing plans in compliance with the invalidated growth share based Third Round Rules, additional court review of such towns’ housing plans will be necessary. The ordinances adopted by any such municipality, in furtherance of an approved housing element, must be evaluated to determine if they provided for a realistic opportunity for the municipality to achieve its “fair share of the present and prospective regional need for low and moderate income housing.” Mount Laurel II, supra, 92 N.J. at 205, 456 A.2d 390 (citing Mount Laurel I, supra, 67 N.J. at 174, 336 A.2d 713). Supplementation of a plan may be necessary to ensure to the court’s satisfaction that the town has provided a realistic opportunity for its fair share or present and prospective regional affordable housing need in keeping with prior rounds’ methodologies. The consideration to be employed in that analysis are addressed in Part V., infra.

That said, towns in this category may choose affirmatively to seek, through a declaratory judgment action filed on notice to FSHC and interested parties, a court order declaring its housing element and implementing ordinances – as is or as to be supplemented – constitutionally sufficient. We also acknowledge that a municipality that had received a grant of substantive certification may elect to wait to be sued. In either case, **while not entitled to the statutory presumption of validity the FHA normally would provide, these towns deserve an advantage in the judicial review that shall take place.** Implemented ordinances should not be lightly disturbed unless necessary; supplemental actions to secure compliance

with newly calculated prospective need may provide a preferred court for obtaining constitutional compliance.

While reviewing for constitutional compliance the ordinances of a town that achieved substantive certification, courts should be generously inclined to grant applications for immunity from subsequently filed exclusionary zoning actions during that necessary review process, unless such process is unreasonably protracted. As courts adapted processes to manage the multiplicity of pre-FHA filed Mount Laurel actions, see, e.g. J.W. Field, *supra*, 204 N.J. Super. 445, 449 A.2d 251, the present day courts handling these new matters should employ, similar flexibility in controlling and prioritizing litigation. We repose such flexibility in the Mount Laurel trust designated judges in the vicinages, to whom all Mount Laurel compliance-related matters will be assigned post-order, and trust those courts to assiduously assess whether immunity, once granted, should be withdrawn, if a particular town abuses the process for obtaining a judicial declaration of constitutional compliance. Review of immunity orders therefore should occur with periodic regularity and on notice.”

Id. at 25-26 (emphasis supplied)

Thus, pursuant to our Supreme Court’s decision in that matter, jurisdiction is properly before this Court. Additionally, prior to this decision, the Court has awarded temporary immunity to the Township which has been continued to this time.

C. SPECIAL MASTER FRANK BANISCH’S REPORT TO THE COURT

Frank Banisch was appointed as the Special Master in this matter by the Court on October 23, 2015. As part of his responsibilities, Mr. Banisch was to review any proposed settlement and provide advice and recommendation to the Court concerning the proposed Agreement. Thus, Mr. Banisch has been involved in this matter since its inception. He has appeared on innumerable occasions at Case Management sessions and Mediation sessions that have been held in this matter. Needless to say, he is thoroughly familiar with the parties, the subject matter, and the issues in this case.

Mr. Banisch reported to the Court on December 3, 2018 in a thirteen (13) page report which was marked by the Court as C-1 in evidence. In his report, Mr. Banisch reviewed and analyzed all of the provisions and details of the Settlement Agreement and other issues pertinent to the issues before the court in this matter.

Mr. Banisch, who is a well-recognized expert in the field of Professional Planning and Affordable Housing issues, was duly qualified and accepted as an expert witness in this case in those fields.

Basis for Evaluation of Fairness of Settlement Agreement

The Settlement between the Township, FSHC and the developers, approved by the Township on October 10, 2018, has been reviewed to determine whether any element of the Settlements would not be fair to the interests of existing and future low and moderate income households in Warren's housing region. In evaluating the fairness of the Settlement, I have been guided by the general principles and standards set forth in *Morris County Fair Housing Council v. Boonton Twp.* 197 N.J. Super. 359, 369-71 (Law Div. 1984), and the criteria set forth in *East/West Venture v. Borough of Fort Lee*, 286 N.J. Super 311, 329 (App. Div. 1996), which outlines the fairness issues involved in approving a settlement of *Mount Laurel* litigation.

According to the Settlement, the Borough is addressing a 1987-2025 fair share obligation consisting of

- | | | |
|---|---|-----------|
| • present need (rehabilitation share) | - | 38 units |
| • prior round obligation (1987-1999) | - | 543 units |
| • prospective need obligation (2015-2025) | - | 890 units |

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

Addressing the Present Need

The Settlement acknowledges that the Borough's 38-unit indigenous need rehabilitation share is being adequately addressed through a municipal program administered by Rehabco, Inc., a qualified entity to administer the rehabilitation program in compliance with the requirements set forth by the Council on Affordable Housing (COAH) in N.J.A.C. 5:93-5.2.

Addressing the Prior Round

Warren has fully satisfied its prior round obligation for the period 1987-1999 as outlined in Exhibit A to the Settlement and detailed below:

	A	B	C	D	E	F	G	H
2	1	PRIOR ROUND - OBLIGATION						
3	2	Development	Type of development	Sale	Rental	RCA	Family Rental/Special Needs Bonus Credits	Total w/ bonus
4	3a	Pre-86-4 bds/spc needs (WarrenvilleRd)	Special Needs		4		1	5
5	3b	Pre-86-3 bds/spc needs (MtHorebRd)	Special Needs		3		1	4
6	4	Town Center	Family for-sale and rental	3	3		2	8
7	5a	Township Affordable 100% WoodlandAcres (ownership)	Family for-sale	57				57
8	5b	Township Affordable 100% WhisperingHills (rental)	Family rental		60		60	120
9	5c	Township Affordable 100% LibertyCorner Village (rental)	Family rental		28		28	56
10	6a	Coop Housing B114 L22.01 & 22.02	Special Needs		15		8	23
11	6b	NJCP	Special Needs		6		6	12
12	7	Chelsea 1	Assisted Living		8			8
13	8	Jontoni	Special Needs		10		10	20
14	9	RCA - New Brunswick	RCA			166		166
15	10	Coop Housing B114.01 L73	Special Needs		10		10	20
16	11	Mt. Bethel Village	Special Needs		10		10	20
17	12	Substantial Compliance Bonus						24
18	13	Total ('87-99)		60	157	189	136	543

Addressing the Third Round

The Township's prospective and gap need units are detailed on Settlement Exhibits A and B. The Township had a total of 266 affordable unit credits as of July 1, 2015, the year the Declaratory Judgment lawsuit was filed, and another 641 credits from planned housing activity, as outlined below in an excerpt from Exhibit 1.

20	15	GAP AND PROSPECTIVE NEED - CREDITS AS OF JULY 1, 2015								
21	16									
22	17	RCA - Perth Amboy	RCA			85			85	
23	18	Promenade	Age-restricted for-sale	42					42	
24	19	Chelsea II	Assisted Living		7				7	
25	20	Whispering Hills	Extensions of controls		60				60	
26	21	Mt Bethel Village	Special Needs		31		30		61	
27	22	Brightview	Assisted Living		11				11	
28	23	Total Credits (99-25)		42	109	85	30		266	
29	24									
		GAP AND PROSPECTIVE NEED - CALCULATED NEED FOR 1999-2025 (PURSUANT TO N.J.A.C. 5-93-2.17, EXCLUDING REHABILITATION OBLIGATION)								
30	25									
31	26	Woodland Acres	Extensions of controls	57					57	
		Mtn Blvd/Berlant (3 Sites)	Family rental		20		20		40	
32	27				20		20		40	
33	28	Flag Plaza	Family rental		20		20		40	
		American Prop: Mt Bethel Area	Family rental		25		25		50	
34	29				25		25		50	
35	30	K Hov	Family for-sale	48					48	
		Mt Horeb & Mt Bethel (Vincedes)	Family rental		8				8	
36	31				8				8	
		Wagner Farm -(Block 83, Lot 4)	Special Needs		32		32		64	
37	32				32		32		64	
38	33	Hillcrest Crossing	Family rental		44		44		88	
					44		44		88	
39	34	North Hill Wash Valley	Special Needs		10		10		20	
		Lindberg Ave Twp Project	Family rental		80		46		126	
40	35				80		46		126	
41	36	Chase	Family rental and for-sale	8	67				75	
		Additional Special Needs Bedrooms (5 by 6/1/21, remainder by 12/31/24)	Special Needs		25				25	
42	37				25				25	
43	38	Total Mechanisms to Address Calculated Need (99-25)		113	331		197		641	

Intervener's Properties

Five of the sites depicted on Exhibit A are subject to the Settlement Agreement with interveners to the Township's Declaratory Judgment action. These include:

- K. Hovanian North Jersey Acquisitions, LLC - Berkeley Heights Project (Block 208; Lots 4 and 10)
- Premier Development - Block 205; Lots 58-61
- Chase Partners Warren LLC & 284 King George Road, LLC - Block 85.012, Lot 1 - 4

- American Properties at Mount Bethel Road, LLC - Block 78; Lots 15.01 & 15.02
- North Hill Developers, Inc. - Block 69; Lot 8.01

K. Hovnanian, LLC (Block 208, Lots 4 and 10)

Lands included in the K. Hovnanian Site concept plan dated January 17, 2018 will be rezoned with density and bulk standards that support the development of 192 stacked townhomes in three-story buildings, with a 25% set aside of units restricted to low and moderate income households. The Settlement provides that the low and moderate income units may be contained in buildings containing only low/moderate income units and located in one section of the site, but shall be included in the same homeowners' association as the market rate units.

Premier Development Sites (Block 205, Lots 58, 59, 60, and 61) (Block 69, Lot 8.01)

The Township will rezone the Hillcrest Crossing property at a density and with bulk standards that support development of 176 residential rental units including 44 affordable rental flats. The low and moderate-income units in the Hillcrest Project may be contained in two or more stacked flat buildings containing only low and moderate-income units and such units may be located in one section of the site.

The North Hill Developers, Inc. property, located at 107 Washington Valley Road, will be rezoned to permit special needs housing and other similar uses. The zone will provide for 10 affordable special needs units.

The overall combined affordable set-aside on the Hillcrest Project and North Hill Project would equal approximately 30%. The total set-aside from both the 44 affordable rental flats and the 10 special needs units will be phased-in with the 132 market rate units in accordance with the standard inclusionary zoning phasing pursuant to N.J.A.C. 5:93-5.6(d). If the North Hill Project is deeded by North Hill to an operator of special needs housing, then the Hillcrest Project will be relieved of this combined project phasing obligation and then only the 44 affordable housing rental flats will be phased in with the 132 market rate units in accordance with the standard inclusionary zoning phasing pursuant to N.J.A.C. 5:93-5.6(d). At that point, the North Hill Project would be developed in accordance with N.J.A.C. 5:93-5.5.

Chase Sites (Block 85.01, Lots 1-4)

The Chase site will be rezoned to permit inclusionary development comprised of 115 townhouses, 220 rental units, and a 130 room hotel with a restaurant with a liquor license. The total number of affordable units within the rental and townhouse components will be 75 units (20% set aside).

American Properties (Block 78, Lots 15.01 and 15.02)

The Township has designated the American Properties site as an Area in Need of Rehabilitation and a Redevelopment Plan has been prepared and adopted by Ordinance 17-21. The site will accommodate 105 total units of which 25 will be affordable family rentals (23.8% set aside).

Additional Affordable Housing Sites

In addition to the previously identified intervener sites, the Township has also identified the following sites to provide affordable housing.

Flag Plaza Site (Block 88.04, Lot 15)

The Flag Plaza site has been designated an Area in Need of Redevelopment and a Redevelopment Plan has been prepared and adopted through Ordinance 2017-60. The site will provide a total of 44 rental units of which 24 will be affordable family rental units (55% set aside).

Vicendese/Checchio Site (Block 71, Lot 37.01)

The Vicendese Site has also been designated as an Area in Need of Redevelopment however a Redevelopment Plan has yet to be adopted. The site is to provide 24 total units of which 8 will be affordable family rental units (33% set aside).

Berlant Site (Block 89, Lot 4, Block 90, Lot 2, Block 92, Lot 1)

The Berlant site is proposed to be an inclusionary zoning site which proposes to have 50 rental units of which 30 will be affordable family rentals. The Township has not adopted the rezoning of the property (60% set aside).

PIRHL (Block 114, Lot 22.03)

The PIRHL site has been designated an Area in Need of Redevelopment and a Redevelopment Plan has been adopted through Ordinance 17-18. The property will be a 100% affordable housing site and will provide 80 total units.

Wagner (Block 83, Lot 4)

The Wagner Farm is intended to be a 32-unit special needs project and will be rezoned.

Supportive and Special Needs Housing

Finally the Township intends to provide 25 additional supportive and special needs housing in yet to be determined locations.

Fairness Evaluation of Settlement Agreement⁴

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 Warren's settlement agreement,

1. **Consideration of the number of affordable units being constructed.** The Settlement Agreement acknowledges that the Township will satisfy the 890-unit third round obligation. In addition, the Settlement Agreement confirms the Township's commitment to implement a variety of housing opportunities through zoning to meet their fair share obligation. Additionally, a number of compliance sites will produce affordable units in excess of the presumptive 15% or 20% set-aside.
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) the Township 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.
 - (b) 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.
 - (c) at least half of all affordable housing units addressing the Third Round Prospective Need will be available to family households.
 - (d) 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.
 - (e) no more than 25 percent of affordable units will be age-restricted.
 - (f) the Township 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, The Supportive Housing Association, The Central

⁴ As analyzed by Mr. Banisch.

Jersey Housing Resource Center, and The New Brunswick, Plainfield Area, Perth Amboy, Warren/Sussex, and Metuchen/Edison branches of the NAACP.

(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) within 120 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.

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. A Spending Plan amendment will also be required and will be reviewed by the court.

D. CONSIDERATION OF THE OBJECTIONS RAISED BY VARIOUS PARTIES

In his report, Special Master Frank Banisch provided a summary of the written objections filed by several interested parties. The Court has reviewed those submissions and supplemented Mr. Banisch's report with its own finding.

1. Written submission of Rick DePinho

Mr. DePinho forwarded an undated letter that was received by the Court on November 21, 2018. Mr. DePinho complained about the local (Township) process that was employed to select sites. With regards to one particular parcel (Lot 2, Block 90), he pointed out that the site was denied variance approvals in 2007 for a multitude of site and environmental constraints, yet the site was included in the Township Plan. The Township Zoning Officer advised him that the site "has developable area", but he still questions whether the property is suitable from an environmental

standpoint. He also was critical of the process and the paucity of information that was available regarding the issues that he was concerned about.

Mr. DePinho also offered oral testimony concerning Block 90, Lot 2. He complained about the process that was employed by the Township with regards to how and why this site was chosen.

2. Written submission of Linda Coughlin

Ms. Coughlin of 105 Mountain Avenue, Warren Township, New Jersey forwarded an objection dated November 19, 2018 which provided the following objections:

1. All the storm water for Watchung High School, Woodland School, 1 Lindbergh, 2 Lindbergh, 4 Lindbergh, 115 Lindbergh and Stirling Rd. (west of Rt 78) is currently being placed into a storm drain behind the Woodland Areas property (Lot 114.01 block 68) which then is dumping all its water onto the Township owned designated wetlands property (Block114.01 Lot 72, 129 Stirling Rd/108 Mountain Ave.) and in turn has severely impacted my home and property with storm water as it is below grade of the designated wetlands and storm drain (mentioned above). This issue was brought to the attention of Mayor Sordillo on 7/25/18 and to date nothing has been done (at the request of the Mayor to do so by the town of Warren) to correct my problem. Because this Affordable Housing project "Warren Family Lindbergh Ave" Lot 114 Block 22.03 is also looking to place its storm water (per proposed plans) into this same storm water drain, my property (105 Mountain Ave. Lot 10 Block 120) and the designated wetlands (Block114.01 Lot 72, 129 Stirling Rd/108 Mountain Ave.) will be forced to handle more storm water from this project, as it will drain into this already existing over flooded and poorly designed drainage system. This issue is currently under investigation by DEP for possible Stormwater Management rule, N.J.A.C. 7:8 violations. If this current and future storm water drainage problem is not corrected, further litigation will follow.

2. Adding 1000 units and a Hotels to the following; Exit 36 (Rt 78/King George Rd.), Mountain Ave., Lindbergh Ave., and Exit 40 (Hillcrest Rd.) will add so much more traffic during rush hours to the already over capacity single lane roads leading to and from Rt 78. A traffic analysis was requested at the October 2018 board meetings by the citizens of the town of Warren, but this has not been done, to date, to my knowledge. I live on Mountain Ave. and both in the morning and at night, and when there is a tie-up accident on Rt 78 (and cars get off Rt 78 and onto Mountain Ave. to avoid the traffic) which is often. Many times, I see the cars queued up 15 30 cars deep at the traffic light on Mountain Ave. and Stirling Rd

3. In 2006-2007 when my house had to tie into the township's sewer system because my septic system failed and my yard did not perk (see possible reason for not perking, above #1). At that time, it was considered an emergency sewer tie-in situation, as I was told the township did not have the sewer capacity to accommodate my house. This process took me over two years to get approved and

installed, and I was forced to rent and use an outdoor Port a John in the winter of 2006-2007 at my home. Now, some 11 years later, sewer capacity it still is a problem, but the proposed builders of these affordable housing projects don't seem to have a problem building all these units and getting approval for sewers, which the town still does not have and must hopefully can buy from the neighboring town of Berkeley Heights. * Note; presently Mountain Ave. (by my house) still has no sewer drains or storm water drains.

Ms. Coughlin also offered oral testimony that she is already having "flooding problems" with regards to her home and property that has seriously affected her living conditions. She is concerned that if affordable housing is developed in the vicinity of her property, that the development could exacerbate her flooding problems.

3. Written submission from Township of Berkeley Heights, a contiguous municipality

The Township of Berkeley Heights, through counsel, forwarded a letter dated November 21, 2018 which expressed concerns about the proposed Settlement Agreement. The Township objects to two of the sites, namely the K. Hovnanian Site ("K Hov Site") and the Hillcrest Crossing North Hill Site ("Premier Site") on the basis that they are not "developable" or "suitable" as those terms are defined under the COAH regulations. Both sites are close to the border of Warren Township and Berkeley Heights.

The Berkeley Heights Township attorney writes:

The K. Hov Site and the Premier Site, together consist of 276 market rate units and 92 affordable housing units, the latter of which is over ten percent (10%) of Warren's total Third Round (1999-2025) affordable housing obligation of 890 affordable units pursuant to the Settlement Agreement. The K. Hov Site is located on land that borders the Township and the Premier Site is located across the street from the K. Hov Site, in very close proximity to the Township border. This identified project area does not contain the infrastructure necessary to support the construction of 368 total new residential units. As per the terms of the Settlement Agreement itself, 'sufficient sewer capacity does not currently exist for the Premier Project' and any future capacity is subject to matters that are outside the [Warren Township Sewerage Authority's] authority or control[.]' The K. Hov Site requires either sewer capacity from the Township, or from the Stage I/II sewer area of the Warren Township Sewerage Authority (the WTSA). The Township does not currently have an agreement in place with the developer of the K Hov Site or with the WTSA that governs the contemplated connections and flow required to accommodate the proposed 192 units. Further, sewer capacity to the K. Hov Site through the WTSA "would need to be obtained through Anticipated Capacity ... and K. Hovnanian would be third in priority to the extent it received any Anticipated Capacity[.]"

Thus, COAH's definition of a "Developable site" has not been satisfied by the developers of both the K. Hov Site and the Premier Site. As such, neither project creates a realistic opportunity for producing a fair share of the regional present and prospective need for housing low- and moderate-income families.

Even if the Premier and K. Hov Sites are able to obtain the required sewer capacity, there exist additional critical facts that adversely impact on the realistic development opportunity of the K. Hov and Premier Sites. Indeed, neither site satisfies the COAH definition of a "suitable" site, as the sites do not have access to appropriate streets and are not compatible with surrounding land uses. Both sites are located just feet from Interstate 78 Interchange 40, which is already overutilized, unsafe and the source of significant delay. Moreover, neither site satisfies the COAH definition of an "Approvable site", as Warren has not proven that the sites can be developed in a manner consistent with the rules and regulations of all agencies with jurisdiction over the sites. Indeed, Warren has an obligation to consult with State agencies "to determine whether construction of high density housing on the sites would conflict with the regulatory policies those agencies are charged with implementing." In Re: Petition for Substantive Certification, Township of Southampton, County of Burlington, New Jersey, 338 N.J. Super. 103, 114 (App. Div. 2001). Yet, there is no indication that Warren has assessed the impact of an additional 2,650 average daily motor vehicle traffic trip generation⁵ potentially accessing this interchange and whether the New Jersey Department of Transportation would permit construction of the additional 368 total new residential units necessary to provide for the 92 affordable housing units currently contemplated. In addition, Emerson Lane, one of only two access roads for the sites, is an overcrowded, narrow, dilapidated road that cannot absorb the additional usage. There are also insufficient utility lines in the area, significant concerns regarding pedestrian and, in particular school-aged pedestrian safety, traffic safety and other infrastructure concerns. Further, the K Hov. Site contains wetlands that need to be properly delineated before a buildable area can be determined and a number of residential units established. Warren has not conducted a thorough evaluation of the "suitability" and "approvability" of the K. Hov-and-Premier sites proposed for inclusionary development. Such-an evaluation will show that the area cannot absorb the impacts resulting from the additional 368 residential units on the proposed Sites. As a result, neither the K. Hov Site or the Premier Site are realistically capable of hosting the residential units being relied upon by Warren to satisfy its obligation to provide for affordable housing units per the terms of the Settlement Agreement.

⁵ Table 4.1 Average Daily Motor Vehicle Traffic Trip Generation Per Dwelling Unit, based on Low-Rise trips per day x 368 total units. Residential Site Improvement Standards

In short, the Township of Berkeley Heights complains that the K Hov and Premier Sites do not represent sound planning as contemplated by the COAH regulations and applicable Mt. Laurel case law.

Apparently after issuing its written objections, Berkeley Heights and Warren Township officials conferred and tentatively agreed upon a list of issues of concern to Berkeley Heights which were noted by Special Master Banisch in his Appendix 1. The Court has included that appendix as part of its record.

The concerns raised by Berkeley Heights relate to K. Hovnanian and Premier proposals that are part of Warren Township's Plan. These items remain the subject of continuing discussions and cooperation among those parties.

Berkeley Heights appeared at the Fairness Hearing, through counsel, who reiterated its objections. However, counsel also indicated that they continue to work with Warren Township officials to resolve the differences between the parties. Although they did not express any particular objection to the approval of the Settlement Agreement by the Court, counsel reserved the right to appear at the Compliance Hearing to make specific objections with regards to any particular property if the issues were not addressed to the Township's satisfaction.

4. Written submission from Mark McCarthy

Mark McCarthy filed a ten page letter objection dated November 21, 2018.⁶ Mr. McCarthy was particularly critical concerning the effect of the Township's plan on the residents of the "East Side" of the Township. Particularly he was critical of the proposed "AH Communities" Site.

The first criticism raised by Mr. McCarthy concerned the fact that forcing Mt. Laurel housing into suburban communities no longer makes sense given the preference for young people and working families to live in urban areas where amenities are more available and accessible.

He also listed several concerns about the Warren Township Settlement Agreement, including:

1. The agreement and related documents do nothing to address the root cause of what actually makes Housing in Warren Township "un-affordable" to many of those in need and eligible to receive it.

⁶ Mr. McCarthy also submitted a post-hearing one page letter to the Court. Although Mr. McCarthy did not seek leave of the Court to file the letter, the Court has reviewed and considered it.

2. The Town has not fully pursued, or disclosed to its constituents, the alternative proposals that were considered during the negotiating process.
3. The option to pursue a way to only build the 362 units to address the AH portion of the settlement was never presented to its constituents in any meaningful manner. Residents understand the need for moderate development, especially to help those in need, but cannot grasp how the plan(s) presented by Warren and surrounding towns can be implemented without disastrous impact on the infrastructure and environment.
4. The North East portion of Warren Township, which already contains a significant portion of the existing AH, is being forced to accept a disproportionate percentage of new housing which is not advantageous to incoming AH residents, or existing property owners.
5. The sewer, storm water, and roadway infrastructure in the North East portion of town is also not designed to support this level of population increase.
6. The current proposal puts over 75% of the new housing in an area serviced by a single grammar school. The required busing across already traffic filled roads is an unnecessary risk and expense. It also has the possibility to result in a more segregated school system due to all the students in a particular district being from AH communities.
7. The Township has "assumed" cooperation and is counting on significant efforts and expense from the State and County, as well as neighboring Towns to successfully implement the plan.
8. The lack of detailed site plans, project descriptions, and finalized ordinances necessary for the projects to proceed result in an unrealistic expectation that these projects could be fulfilled without severe detriment to the environment and future and current residents.
9. The ecological and environmental impacts have been ignored, or not even considered to begin with. The permanent destruction of open space and natural areas, many inhabited or preferred by threatened and endangered species, slated to be replaced by excessive percentages of impervious surface cannot be underestimated. Independent unbiased reviews of all sites must be implemented.
10. The Plan does little to convert vacant, or underutilized commercial, or similar zoned land to what many would call modern "multi use zoned areas". Converting precious agriculture land, and open space, into enormous complexes that will overwhelm existing historic homes, is unnecessary and only being done to improve profit margins for the developers. The proposed size and density of these proposed projects is detrimental to helping integrate the AH into the fabric of the neighboring properties and the Township.
11. The Township has intentionally been blatantly deceptive, vague, and misleading, in providing information to the Public, including those residents making the effort to inquire directly to the Township thru various means of communication, including OPRA requests. The Town claims "maximum transparency" yet has gone so far as to hire a Public

Relations firm to draft and disseminate information to the Public. The PR firm contract had it reporting directly to a single individual on the Township Council, and was not hired directly by the Township, but thru the law firm representing the Township at a contract rate of \$6500 per month dating back into 2017. This behavior is yet another indicator that there are complications existing that the implementation of this plan will be more difficult and complex than the Town is leading those in need of AH to believe.

12. The numbers presented to public do not accurately represent the total number and distribution in the text of the agreement. Per page 9, section "8.c" it appears there are at least 25 additional units not presented to the Public, that are included in the fine print" of the agreement.

Mr. McCarthy also presented data and graphs to support his position that (1) there has been "unjust burden and segregation" to the North East portion of the Township; (2) the sewer capacity of Stage 1 & 2 are being "overlooked"; (3) the proposal promotes expressive development and destruction of environmentally important open/green space; (4) the developments are slated for environmentally sensitive areas; and (5) the township has been intentionally deceptive, vague, misleading in the manner that has been addressed to the public.

Mr. McCarthy also offered oral testimony that more due diligence should be required before each site was accepted, particularly on issues involving traffic, environmental issues and sewer capacity. He also indicated that there was a multitude of questions that were left unanswered by the Township's submissions.

5. James C. Burd⁷

James C. Burd of Mercer County appeared on behalf of a group known as "Citizens Approving Affordable Housing." Mr. Burd expressed some familiarity with Judge Jacobson's "Affordable Housing" decision in Mercer County. Mr. Burd expressed his opinion that Affordable Housing needs to be "re-thought" so that affordable housing is analyzed on a regional (rather than a municipality) wide basis. He also indicated that some "out-of-the-box" thinking is needed so that affordable housing is constructed in the locations in the State that are most suitable – rather than confining the analysis on a municipality by municipality basis.

6. George Vetter⁸

Mr. Vetter offered oral comments via testimony that he presented to the Court at several points during the Hearing. Mr. Vetter offered a wide range of comments that were addressed to

⁷ Mr. Burd did not submit a written objection but was permitted to testify at the hearing.

⁸ Mr. Vetter did not submit a written objection but was permitted to testify at the hearing.

site suitability, traffic, environmental issues and the overall philosophy that underlies the law regarding affordable housing in New Jersey.

7. Special Master Banisch's Response to Objections from Various Interested Parties

In addition to the comments and opinions offered in his written report, Mr. Banisch properly pointed out that many of the concerns that were raised by the Interested Parties involved site specific issues that will not be ignored, but instead are to be addressed at the site planning stage.

E. COURT HEARING OF DECEMBER 4, 2018

On December 4, 2018 this Court held the Fairness Hearing concerning the proposed "Settlement Agreement" that is the subject of this Court's opinion.

At that time the Court received the testimony of the following witnesses:

1. Special Master, Frank Banisch, Court Appointed Special Master, who is also a licensed New Jersey Professional Planner
2. John T. Chadwick, IV, PP of Dolan & Dean
3. Interested Party, Matt Campbell⁹
4. Interested Party, Linda Coughlin
5. Interested Party, Mark McCarthy
6. Interested Party, Rick dePinho
7. Interested Party, James C. Burd
8. Interested Party, Berkeley Heights Township
9. Interested Party, SW Mountain, LLC¹⁰
10. Interested Party, George Vetter
11. Interested Party, Warren Township Sewerage Authority,

The testimony of each of the witnesses was considered by the Court in its opinion. Notably, for the most part, the testimony of each witness generally tracked the reports, and/or written submissions provided by each of them to the Court as part of this Hearing.

At the Hearing, the Court accepted the following documents which were marked into evidence before the Court:

⁹ Although Mr. Campbell and SW Mountain appeared at the Hearing, neither of those parties offered testimony to the Court.

¹⁰ Although Mr. Campbell and SW Mountain appeared at the Hearing, neither of those parties offered testimony to the Court.

C1	Special Master Report of Francis J. Banisch, III, PP, FAICP dated December 3, 2018
C2	Berkeley Heights Objection
C3	Mark McCarthy Letter
C4	Richard De Pinho Letter
C5	Linda Coughlin Letter
P1	Settlement Agreement
P2	Affidavit
P3	Map

F. STANDARDS BY WHICH THE COURT SHOULD EMPLOY TO DETERMINE IF THE SETTLEMENT AGREEMENT IS FAIR AND REASONABLE TO LOW AND MODERATE INCOME HOUSEHOLDS

(i) General Standards

In this Fairness Hearing, Warren asserts that the Settlement Agreement displays the production of sufficient realistic housing opportunities to satisfy its housing obligation. Mount Laurel cases, whether brought by builders or by municipalities, are in the nature of representative actions at which the rights and interests of low and moderate income households throughout the region are determined and the future opportunity of low and moderate income households to assert those rights are foreclosed. In order to assure that those laudable goals are achieved, the parties cannot settle such cases except with the approval of the courts and a determination, upon notice to low and moderate income households and those who might act to vindicate the interests of such households, that the settlement is fair and reasonable to low and moderate income households in the region. Morris County Fair Housing Council v. Boonton Township, 197 N.J. Super. 359, 368 (Law Div. 1984), *aff'd mem. on opinion below*, 209 N.J. Super. 108 (App. Div. 1986); East/West Venture v. Borough of Fort Lee, 286 N.J. Super. 311, 326-27 (App. Div. 1996).

In this case, Warren has properly noticed the hearing scheduled for December 4, 2018 as a “fairness and compliance” hearing. This hearing is the opportunity for any party to offer evidence that the Settlement Agreement is not fair and reasonable to low and moderate income households, and is therefore noncompliant. To determine that the settlement is fair and reasonable to low and

moderate income households, this Court must find as a matter of fact that the Settlement Agreement displays sufficient realistic opportunities for the provision of safe, decent affordable housing to satisfy the Township's constitutional housing obligations. The creation of realistic opportunities for safe, decent affordable housing is the core of the Mount Laurel mandate:

Satisfaction of the Mount Laurel obligation shall be determined solely on an objective basis: if the municipality has in fact provided a realistic opportunity for the construction of its fair share of low and moderate income housing, it has met the Mount Laurel obligation to satisfy the constitutional requirement; if it has not, then it has failed to satisfy it. [Southern Burlington NAACP v. Mount Laurel Township, 92 N.J. 158, 221 (1983)(“Mount Laurel II”).]

A municipality must satisfy its entire housing obligation – satisfaction of only some portion of that obligation does not suffice:

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

Finally, the opportunity created must be determined by the Court to be “realistic,” not merely theoretical or hypothetical. Id. at 260. Whether the opportunity provided by a municipality is “realistic” is generally measured by whether the municipality has established that the requisite number of low and moderate income housing units will actually be provided, or that they have been provided. Id. at 222.

To find that a settlement agreement is fair to low and moderate income households, a court must, among other things, find that, based upon these constitutional standards, it in fact creates sufficient realistic opportunities for the provision safe, decent housing affordable to low and moderate income households to satisfy the negotiated housing obligation. Livingston Builders, Inc. v. Livingston, 309 N.J. Super. 370, 380 (App. Div. 1998).

In this respect, the role of a court in reviewing a proposed settlement agreement is analogous to that of the Council on Affordable Housing (“COAH”) under the Fair Housing Act. In re Adoption of N.J.A.C. 5:96, 221 N.J. 1, 29 (2015) (“Mount Laurel IV”). Under the applicable statutory standard, COAH could lawfully grant a municipal petition to certify its Housing Element and Fair Share Plan only if it made an affirmative finding that “the combination of the elimination of unnecessary housing cost-generating features from the municipal land use ordinances and regulations, and the affirmative measures in the housing element and implementation plan make the achievement of the municipality's fair share of low and moderate income housing realistically

possible.” N.J.S.A. 52:27D-314(b). A failure by COAH to make such affirmative findings required the reviewing court to reverse the decision by COAH granting a municipal petition. In re Petition for Substantive Certification, Twp. of Southampton, 338 N.J. Super. 103 (App. Div. 2001); In re Denville, 247 N.J. Super. 186, 200 (App. Div. 1991); In re Township of Warren, 132 N.J. 1 (1993) (no finding that the site designated for construction of public housing is “suitable”); Elon Associates, L.L.C. v. Howell, 370 N.J. Super. 475, 480 (App. Div. 2004) (site zoned for inclusionary development lacks sewer service).

As set forth in the decision of the Appellate Division in Livingston Builders, Inc. v. Twp. of Livingston, supra, a court reviewing a settlement agreement for the purpose of determining whether it is fair to low and moderate income households is guided by COAH’s criteria in determining whether the agreement creates sufficient realistic housing opportunities to satisfied the negotiated housing obligation:

By adoption of the Fair Housing Act, N.J.S.A. 52:27D–301 to –329, the Legislature, with the Supreme Court's approval, has designated the Council on Affordable Housing, acting pursuant to the Act, to establish the criteria for defining what a municipality must do to comply with its constitutional obligation to “provide through its land use regulations a realistic opportunity for a fair share of its region's present and prospective needs for housing for low and moderate income families.” N.J.S.A. 52:27D–302a; see Hills Dev. Co. v. Township of Bernards, 103 N.J. 1, 25, 31–32, 510 A.2d 621 (1986). **COAH has established those criteria, see N.J.A.C. 5.93–1.1 to –15.1, and the courts should ordinarily defer to them.** Hills Dev. Co., supra, 103 N.J. at 63, 510 A.2d 621; East/West Venture, supra, 286 N.J. Super. at 334 n. 6, 669 A.2d 260. If the relevant evidence presented at a fairness hearing held on proper notice to all interested parties shows that a proposed settlement satisfies those criteria, the settlement is entitled to the court's preliminary approval. [Id.]

The opportunity for interested parties to participate as objectors plays an essential role in the process. As the court noted in Morris County Fair Housing Council v. Boonton Township, supra, an erroneous determination by the court that a settlement is fair to low and moderate income households may cause substantial harm:

While there are substantial considerations favoring settlement of Mount Laurel litigation, it also must be recognized that the improvident entry of a judgment of compliance would be harmful to the lower income persons on whose behalf the litigation is brought. As noted previously, such a judgment ordinarily will insulate a municipality from further Mount Laurel litigation for a period of six years. Therefore, there must be assurance that a settlement is consistent with the best interests of lower income persons before a judgment of compliance is issued.

[Morris County Fair Housing Council v. Boonton Township, 197 N.J. Super. at 367.]

The Court recognizes that in certain instances objectors may be in a position to bring to the Court's attention factual evidence, expert opinion and legal analysis that may reveal deficiencies in the settlement agreement requiring that the court reject the agreement, or that it be modified. See, e.g., The Allan-Deane Corp. v. Bedminster, 205 N.J. Super. 87 (Law. Div. 1985)(court required modification of settlement agreement in response to objections), see generally, Federal Judicial Center, Manual for Complex Litigation at §21.643 at p. 326 (4th ed. 2004). Thus, any and all intervenors, interested parties or objectors were permitted to participate in the hearing and offer testimony if they so desired.

The Court also recognizes that in certain cases objectors or intervenors may have other interests or biases that may influence their advocacy. It is the Court's job to sort out those issues in its search for the truth and an equitable and fair result.

(ii) **The Supreme Court authorized Mount Laurel Judges to exercise considerable flexibility in determining whether a proposed settlement meets a Municipality's Mount Laurel obligations**

"Flexibility" remains the polestar of the authority that the Supreme Court provided to trial judges in adjudicating Mt. Laurel declaratory judgment actions stemming from Mt. Laurel IV. In re Adoption of N.J.A.C. 5:96 & 5:97 ex rel. New Jersey Council on Affordable Hous., 221 N.J. 1, 33 (2015) ("Mt. Laurel IV"). The trial court's role is to flexibly exercise discretion to ensure, to its satisfaction, that each municipality has provided a realistic opportunity for the construction of its fair share of low and moderate income housing and has met its obligation to satisfy its constitutional Mount Laurel affordable housing requirements. ("We emphasize that the courts should employ flexibility in assessing a town's compliance. . . .") In re Adoption of N.J.A.C. 5:96 & 5:97 ex rel. New Jersey Council on Affordable Hous., 221 N.J. 1, 33 (2015) ("Mt. Laurel IV").

The courts that will hear such declaratory judgment applications or constitutional compliance challenges will judge them on the merits of the records developed in individual actions before the courts.

[. . .]

[M]any aspects to the two earlier versions of Third Round Rules were found valid by the appellate courts. In upholding those rules the appellate courts highlighted COAH's discretion in the rule-making process. **Judges may confidently utilize similar discretion when assessing a town's plan, if persuaded that the**

techniques proposed by a town will promote for that municipality and region the constitutional goal of creating the realistic opportunity for producing its fair share of the present and prospective need for low- and moderate-income housing.

[. . .]

We emphasize that the courts should employ flexibility in assessing a town's compliance and should exercise caution to avoid sanctioning any expressly disapproved practices from COAH's invalidated Third Round Rules. Beyond those general admonitions, the courts should endeavor to secure, whenever possible, prompt voluntary compliance from municipalities in view of the lengthy delay in achieving satisfaction of towns' Third Round obligations.

[Mt. Laurel IV, 221 N.J. at 29-30 (emphasis added)]

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

(iii) Considerable deference should be given to a settlement endorsed by a public interest group such as the Fair Share Housing Center

The Courts should also give considerable deference to the Settlement Agreement in this matter because it is between the Township and FSHC and is designed to afford a realistic opportunity for the provision of affordable housing.

Morris Co. Fair Housing Council v. Boonton Tp., 197 N.J. Super. 359 (Law Div. 1984) involved circumstances similar to the present matter. Significantly, as stated by Judge Skillman, in the case of developers engaged in Mt. Laurel claims, standing was to be granted "not to pursue their own interests, but rather as representatives of lower income persons" affected by exclusionary zoning. Id. at 366. Here, as memorialized in the Settlement adopted by Fair Share Housing Center on behalf of low and moderate income individuals seeking housing in Warren, those interests have received "actual and efficient protection" as required in this proceeding. Id. at 365 (citation omitted). That fact is accorded due weight in the Court's decision.

The Court also recognizes that, as stated by Judge Skillman: "[t]he risks of improvidently approving a settlement and issuing a judgment of compliance are most acute in Mount Laurel

litigation brought by developers.” *Id.* at 367 (emphasis added). Judge Skillman added that, rather than descend into a “morass of facts, statistics, projections, theories and opinions,” *Id.* at 371-72, the settlement of a Mt. Laurel controversy should turn solely on a determination that the settlement protects the interests of the persons on whose behalf the action was brought. *Id.* at 369-371. Where, as in this case, a public interest group such as the Fair Share Housing Center has competently represented the interests of low income persons, the dangers of improvident settlement are substantially reduced. *Id.* at 368. Even then, the Court is mindful that even a public organization may incorrectly evaluate the strengths and weaknesses of its claim or be overly anxious to settle a case for internal organizational reasons. *Morris County Fair Housing Council v. Boonton Township*, 197 N.J. Super. 359, 367-368 (Law Div. 1984), *aff’d mem. on opinion below*, 209 N.J. Super. 108 (App. Div. 1986). For that reason, the Court has also scrutinized the elements of the settlement as well as the testimonial and documentary evidence that was offered.

FURTHER ANALYSIS AND CONCLUSION

The Court is tasked with determining whether the interests of low and moderate income households will be served by the approval of the Warren Settlement Agreement with FSHC and the various developers. In that regard, the Court has considered all of the testimony and evidence presented to the Court in accordance with the standard enunciated in this opinion. The Court finds the testimony and the report of Special Master Frank Banisch to be thorough, credible and particularly compelling.

As noted in 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.” Clearly FSHC, an affordable housing advocate, has concluded that the compliance plan contained in the Settlement Agreement is fair and reasonable to the interests of low and moderate-income households, or it would not endorse the settlement.

The Court finds that the Settlement provides for a substantial amount of affordable housing and that this settlement agreement satisfies the criteria set forth by the Appellate Division in *East/West Venture*, and that the interests of low and moderate income households will be advanced by the Court's approval of the Settlement Agreements. In fact, Mr. Banisch offered such an opinion in his report and at the Hearing. The Court finds Mr. Banisch's testimony (and his report) to be

particularly compelling with regards to the issue before the Court. The Court finds that the agreement passes the fairness test, provided compliance with the site suitability criteria can be demonstrated for all sites proposed as part of the Township's compliance plan.

Additionally, for the reasons provided herein, the Court finds that Warren'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 the report of Special Master Frank Banisch, the Court finds that Warren Township has created a realistic opportunity for satisfaction of the Township'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).

The Court recognizes that many of the individual objectors and Berkeley Heights Township questioned certain aspects of the suitability of the sites proposed by the Township. In fact, Berkeley Heights specifically reserved the right to appear at the Compliance Hearing to raise certain suitability issues if they are not satisfactorily addressed.¹¹ Mr. Banisch has indicated familiarity with each of the sites, and has noted that based upon the information that he has seen, the sites appear to be feasible for the proposed development and therefore in his judgment, is realistic and suitable. The Court adopts Mr. Banisch's opinion on the subject.

In his testimony, Mr. Banisch provided a caveat that any development on the proposed sites would have to proceed through the Board approval process. At that state, engineering studies and analysis, including potential traffic, environmental and storm water runoff studies could be performed.

That process is usual and customary for development projects. Those detailed studies are not necessary at this stage, however, in order for the Court to render a Fairness determination.

As a result, the Court finds that the settlement to be fair to the protected class. Additionally, the Court finds that upon compliance with the requirements outlined Special Master Banisch's Report, that Warren Township will be entitled to a final Judgment of Compliance and Repose through July 1, 2025.

¹¹ Which is a right of any intervenor or interested party.

The Court will establish a 150-day timeframe for completion of the items in the conditions recommended by the Special Master which are as follows:

1. The compliance proposals contained in Exhibit A and B of Mr. Banisch's 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;
- 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.
- c. An analysis of the municipality's demographic characteristics, including but not necessarily limited to, household size, income level and age;
- 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 Township Committee as a separate action and submitted to the Court for approval before the Township 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 Township 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 Township will need to contract with one or more Administrative Agents, responsible to the Township but paid for by the owners of the affordable housing units created in the Township, to administer the affordability controls on all of the low and moderate income units that have been or will be created in the Township. 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 Township 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, the Special Master opines that Warren Township will be entitled to a final Judgment of Compliance and Repose through July 1, 2025.

The Township shall provide an Order consistent with the Court's opinion. Also, the Township shall serve this opinion and its proposed Order to all Intervenors and Interested Parties (as this Court does not have a means to do same through eCourts).