

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

A SETTLEMENT AGREEMENT BETWEEN

MILLBURN TOWNSHIP

AND

FAIR SHARE HOUSING CENTER

IN THE MATTER OF THE APPLICATION

OF THE TOWNSHIP OF MILLBURN

DOCKET No. ESX-L-2778-18

January 25, 2021

Prepared by:

Francis J. Banisch III, PP/AICP

111 Main Street

Flemington, NJ 08822

The original document was appropriately signed and sealed on January 25, 2022, in accordance with Chapter 41 of Title 13 of the State Board of Professional Planners.



Francis J. Banisch III, PP/AICP

Professional Planner #8600

Introduction

The purpose of this report is to present my review and recommendations as the Court-appointed Special Master regarding whether a Settlement Agreement (“Settlement”) between the plaintiff Township of Millburn ("Township") and interested parties 249 Millburn Avenue, LLC (“249”), Woodmont Properties (“Woodmont”) and Fair Share Housing Center ("FSHC") is fair and reasonable to low- and moderate-income households.

Notice of the fairness hearing scheduled for December 15, 2021, 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 Millburn Township Clerk’s office. The hearing did not proceed on December 15, 2021 and was rescheduled for January 28, 2022. Notice of the hearing on January 28, 2022 was posted on the Township website as directed by the Court.

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 Township’s eligibility for a judgment of compliance and repose and the steps needed to complete the process of securing such judgment.

Basis for Evaluation of Fairness of Settlement Agreement

The July 30, 2021 Settlement between the Township and FSHC 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 Millburn’s housing region. In evaluating the fairness of the Settlement, guided by the general principles and standards set forth in *Morris County Fair Housing Council v. Boonton Twp.* 197 N.J. Super. 359, 369-71 (Law Div. 1984), I have used the criteria set forth in *East/West Venture v. Borough of Fort Lee*, 286 N.J. Super 311, 329 (App. Div. 1996), which outlines the issues involved in approving a settlement of *Mount Laurel* litigation.

According to the Settlement, the Township will address a 1987-2025 fair share obligation consisting of

- present need (rehabilitation share) - 109 units
- prior round obligation (1987-1999) - 261 units
- prospective need obligation (1999-2025) - 1,115 units

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

Addressing the Present Need

The Settlement acknowledges that the Township has a 109-unit indigenous need rehabilitation share. The Township has indicated that they will meet this obligation by continuing its partnership with the Essex County Housing Rehabilitation Program, as well as through a municipally-sponsored program in accordance with NJAC 5:93-5.2.

The Township may seek an adjustment to the present need obligation by conducting a structural conditions survey consistent with NJAC 5:93-5.2 within 90 days of the fairness hearing to permit time for review prior to the compliance hearing.

Addressing the Prior Round and Third Round Obligation

Millburn has a prior round obligation of 261 units and a Third-Round obligation of 1,115 units for a total of 1,376 units. Millburn prepared a Vacant Land Analysis (VLA) and the Settlement recognizes a Realistic Development Potential (RDP) of 114 units. Table 1 outlines the mechanisms to address the 114-unit RDP obligation.

Table 1: Third Round RDP Compliance Mechanisms

Name of Development	AH units/ credits	Bonus credits	Total Credits	Comments/Status
Canoe Brook (Block 5303 Lots 1, 3 and 4)	30	29	59	Complete and occupied; family rental units
Silverman Group/ 85 Woodland Avenue LLC (Block 1904 Lot 72-75)	12	0	12	Site has been rezoned; application for site plan approval granted May 2021
Wells Fargo site (Block 1211 Lots 1 and 7)	8	0	8	Site included in the March 4, 2020, Amendment to the Master Plan; Site Plan approval granted February 3, 2021
249 Millburn Ave. LLC/Annie Sez (Block 705 Lot 1)	30	0	30	Site will be rezoned for a total of 150 Units, of which 20% or 30 units will be affordable family rental units
Special Need Housing – United Jewish Federation (90 Undercliff Rd) and/or Essex County ARC (81 Willow St)	5+	0	5	The Township shall during the compliance phase of this litigation demonstrate the creditworthiness for at least 5 credits for special needs housing at either or both of these sites.
Total	85	29	114	

As seen in Table 1, three of the sites are either under construction or are approved. The information regarding those sites must be fully outlined in the Township’s Housing Element and Fair Share Plan.

249 Millburn Avenue, LLC/Annie Sez (Block 705, Lot 1)

The site is home to the former Annie Sez, which has been vacant for an extended period of time. The site was identified in the Township’s 2018 Master Plan Reexamination report as a redevelopment opportunity, which recommended it be rezoned for multi-family housing due to its proximity to the downtown area and Millburn train station.

The Township will rezone the site to permit 150 multi-family residential units with a 20% set aside resulting in 30 family rental units. The site will be developed with a four-story building and wrapped parking deck as depicted on the 249 Millburn Avenue Concept Plan. The affordable units will be integrated with the market-rate units and units will comply with UHAC bedroom and income mix requirements.

Addressing the Third Round Unmet Need

As noted above, the Township has 114 units/credits toward the prior and third round obligation of 1,376 units. As indicated in Table 1, the Township will apply these 114 units to meeting the RDP, leaving an unmet need of 1,262 units. This unmet need will be addressed as follows:

Overlay Zoning

C – Zone (Canoe Brook Country Club)

The Canoe Brook Country Club consists of 129 acres and is located in the southern portion of the Township. The Township will provide an overlay zone to allow up to 50% age-restricted housing at a density of 8 units per acre with a 20% set aside.

B-2 Zone (Southern Boundary Morris Turnpike area)

The southern portion of the B-2 Zone with Morris Turnpike will be rezoned to allow for the creation of residential housing at 18 units per acre with a 20% set aside.

B-2 Zone (between Millburn Avenue and the railway tracks from Myrtle Avenue to Essex Street)

This portion of the B-2 Zone will be rezoned to allow for the creation of residential housing at 40 units per acre with a 20% set aside.

B-4 Zone

The B-4 Zone will be rezoned to provide an overlay zone permitting 25 dwelling units per acre with a 20% set aside.

CMO Zone

The CMO Zone will be rezoned to provide an overlay zone permitting 18 dwelling units per acre with a 20% set aside.

OR-1 Zone

The OR-1 Zone will be rezoned to provide an overlay zone permitting 20 dwelling units per acre with a 20% set aside.

Woodmont Property (Block 5302, Lot 5)

The subject property is currently owned by New Jersey American Water Company and consists of 25 acres. Woodmont is seeking a subdivision of the property to purchase the developable portion of the site consisting of 5 to 8 acres. Rezoning of the site has already been undertaken by the Township and will permit 195 multi-family residential units with a 20% set aside, which will account for 39 affordable units. The affordable units will be integrated with the market rate units, comply with all UHAC requirements for bedroom and income mix, and provide a 30-year deed restriction.

Woodmont has entered into a contract with New Jersey American Water for the purchase of the property but understands the sale of the site is subject to outside agency approvals including the New Jersey Watershed Property Review Board, the New Jersey Board of Public Utilities and NJDEP. The application to the WPRB is premised on the property being used to address a compelling public need.

75-Unit Affordable Family Rental Development

The agreement calls for the Township to provide a realistic development opportunity for the construction of a 100% affordable housing project consisting of 75 family units. The development will include no more than 15 1-bedroom units, at least 23 3-bedroom units, and the remainder of the units shall be 2-bedrooms. The development income level mix will consist of at least 50% of each bedroom type consisting of low-income units, including very-low-income units. The remainder will be moderate income units. Supportive and special needs housing may be incorporated into the project.

The proposed site for the development is located on Block 1207, Lots 7 and 9, which is the current Township DPW site. The site consists of 4.57 acres and will include the development and adequate space for amenities and recreational opportunities. Given the sites use as a DPW facility, the extent of any contamination of the property is unknown and will need to be evaluated to determine if the site is available for residential development.

The Township was to provide information regarding the site by December 31, 2021, including a timetable to ensure the realistic development potential of the site. While the December 31 timetable was not met, FSHC has agreed to work with the Township to proceed with a revised concept plan at this time.

The Township must provide a stable funding source for the development, implementation schedule for each step of the process and agree to a construction start date of October 1, 2023. Should a site for the project not be identified by February 28, 2022, the Township immunity from Builder's Remedy litigation will be terminated with the exception of the Woodmont, Canoe Brook, Silverman Group, Wells Fargo, and the Annie Sez sites.

Mandatory Set Aside Ordinance

The Township will adopt an ordinance requiring a mandatory affordable housing set-aside for all new multifamily residential developments of five (5) units or more. The set-aside for

rental developments will be fifteen percent (15%) and the set-aside for for-sale developments will be twenty percent (20%). The provisions of the ordinance shall not apply to residential expansions, additions, renovations, replacement, or any other type of residential development that does not result in a net increase in the number of dwellings of 5 or more.

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) as follows:

1. **Consideration of the number of affordable units being constructed.** The efforts by interested parties Woodmont and 249 will result in the construction of 69 family rental units. These developer efforts, along with those of others cited in the Settlement, will produce a total of 124 actual units and 29 bonus credits in a town that until recently had no affordable units.

The Settlement Agreement acknowledges that the Township has a 114-unit RDP, leaving a 1,262-unit need unmet. The Settlement Agreement confirms the Township’s commitment to implement inclusionary zoning to satisfy the RDP as well as overlay zoning and 100% affordable developments to provide additional affordable housing opportunities toward the third-round unmet need.

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 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. In addition to the very low income mix in the proposed requirements of the inclusionary developments The Township has identified that, should the Mall site be repurposed, those units will be solely dedicated to very-low income.

- 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 Township'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 Township 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 60 days of the Court's approval of the settlement agreement, the Township will adopt the Housing Element and Fair Share Plan, and all required implementing ordinances to ensure that all the foregoing occurs.

4. Other components of the Agreement that contribute to the satisfaction of the constitutional obligation.

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 New Jersey State Conference of the NAACP, the Latino Action Network, East Orange NAACP, Newark NAACP, Morris County NAACP, Elizabeth NAACP, housing partnership of Morris County, Community Access Unlimited, The Northwest New Jersey Community Action Program (NORWESCAP), Homeless Solutions of Morristown, and Supportive Housing Association.

The process of obtaining the Court's approval of the Township'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 Township to adopt certain master plan and ordinance amendments will allow the Township to move forward in the satisfaction of its constitutional obligation.

Additionally, 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.

The Settlement guides the Borough's Third Round Housing Element and Fair Share Plan, and the scrutiny that the 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 satisfy 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 be required, subject to review of its provisions by the Court.

The agreement requires that “any funds deemed ‘committed’ by the Court” must be expended within four years of the issuance of a final judgment on the Settlement Agreement and requires annual reporting on the collection and expenditure of trust funds as well as annual reporting on the status of various components of the Fair Share Plan to address its housing obligation.

It also provides for a three-year status report regarding the satisfaction of the very low-income requirements established by the Fair Housing Act and the Settlement Agreement and requires annual updates of regional income limits that are used to income qualify households, establish initial affordable sales prices and rents and index permitted increases in sales prices and rents.

Review of Objections

Thomas F. Carroll, Esq., on behalf of Woodmont Properties, LLC, dated November 8, 2021

Woodmont Properties, LLC objects to the adoption of the Ordinance 2582-21 associated with the development of Block 5302, Lot 5, citing 3 provisions in the ordinance that were not agreed upon by Woodmont.

The first issue identified is the inclusion of language in Section 8 which states that the ordinances shall take effect upon final passage and publication as required by law *and the granting of an exemption from the Watershed Property Review Board (WSPRB) and the New Jersey Board of Public Utilities (BPU)*.... Woodmont contends that such language gives the impression that the zoning is conditional and subject to attack.

The second issue Woodmont identifies is compliance with Township, NJDEP, and WSPRB stormwater management regulations that may at times be conflicting. Woodmont contends that the language in the ordinance may require conflicting approvals and exemptions to the various stormwater management rules between the Township’s ordinance, NJDEP, and WSPRB which could result in the site plan being passed between the agencies in an inefficient manner. Rather Woodmont would seek to only be required to gain stormwater approvals from WSRPB.

The last issue in the ordinance is the prohibition of rooftop amenities on-site. Woodmont seeks to include a rooftop amenity however such uses are prohibited throughout the Township.

Thomas F. Carroll, Esq., on behalf of Woodmont Properties, LLC, dated December 1, 2021

Mr. Carroll provided a subsequent letter with supporting report from Art Bernard, PP, regarding adopted Ordinance 2585-21. Mr. Carroll reiterates and elaborates on the three previously noted provisions in the adopted ordinance being the stormwater water management approval language, the need for WSPRB approvals to make the zoning effective, and the prohibition on rooftop amenities.

Art Bernard, PP, provided a report entitled “Objection to Ordinance 2585-21, Implementing Millburn-Woodmont Settlement”, dated December 1, 2021. Mr. Bernard’s report further reviews the ordinance against the three main Woodmont Properties issues and his comments are briefly summarized below:

Conditional Zoning – The ordinance’s language states that the zoning does not become effective until the WSPRB grants an exemption regarding stormwater. The inclusion of this provision can be interpreted that the zoning is conditional and not by-right and can lead WSPRB to infer that the zoning is not binding. In addition, Mr. Bernard contends that conditional zoning is contrary to the Fair Housing Act.

Stormwater – The ordinance requires stormwater approvals from the Township ordinance, WSPRB (based on NJDEP regulations). In this case, the site plan could receive approval from the Planning Board, however, WSPRB review of the stormwater plan could seek changes or modifications, which may result in the site plan being directed back to the Township Planning Board for approval. In addition, the WSPRB only meets twice a year. This could be seen as a potential delay in the approval process as the site plan shifts between approving agencies. Since NJDEP regulations regarding stormwater are reviewed and approved through WSPRB, the inclusion of the Township’s stormwater approval appears redundant. A delay in the process could also be seen as being contrary to the Fair Housing Act, because such a delay impedes the production of affordable housing process.

Rooftop Amenity – Mr. Bernard’s report contends that the exclusion of the amenity is contrary to the Fair Housing Act which seeks to eliminate unnecessary housing cost-generating features and the affirmative measures in the housing element and implementation plan to achieve affordable housing. The location of the property between John F. Kennedy Parkway and the reservoir means the inclusion of a rooftop amenity will not negatively impact adjoining land uses.

Letter from Jean Pasternak, 342 Hobart Avenue, Short Hills, NJ, 07102, dated November 29, 2021

Ms. Pasternak objects to the lack of transparency throughout the process and argues that little to no public participation was conducted as part of the ongoing settlement agreements. She also states that there is little access to the information or communication regarding the affordable housing settlement agreement and was rarely mentioned at Township Committee meetings. In addition, Ms. Pasternak states that the proposed 75-unit project at the DPW site was previously contemplated in 2008 for affordable housing but was rejected by residents.

Letter from Alexander Shushkovsky, 26 Whittingham Terrace, Millburn, NJ, 07041, dated November 30, 2021

Mr. Shushkovsky objects to the proposed developments citing burdens on infrastructure, traffic, parking, and increase taxes, all of which will result in a reduction in the lifestyle that current residents enjoy. Mr. Shushkovsky concludes that other means of addressing affordable housing should be found that reflect the existing character of the Township.

Letter from Mary McNett, 9 Park Circle, Short Hills, NJ 07078, dated November 30, 2021

Ms. McNett states in her letter that the community was not provided ample opportunity to discuss the settlement agreement or provide input on mechanisms to address affordable housing obligations. Ms. McNett feels that alternative housing that provide opportunities to all demographics has been a goal of the Township, however the current plan does not meet the needs of a diverse population. Ms. McNett also states that the proposed 75-unit 100% affordable project at the DPW site will be isolated and does not foster inclusive residential development.

Letter from Perri Urso, 510 Millburn Avenue, Short Hills, NJ 07078, dated December 1, 2021

Ms. Urso provided a letter of objection stating there was a lack of transparency throughout the settlement agreement process and that the governing body did not offer residents an opportunity to review, consider, or provide public input regarding the settlement agreement and proposed affordable housing sites. Ms. Urso states that the Township is already seeing negative impacts of development through taxes, school capacity and haphazard zoning.

Letter from Jeffrey S. Feld, Esq., 11 Alexander Lane, Short Hills NJ, 07078, dated November 29, 2021

Mr. Feld provided a letter indicating his desire to attend the Fairness Hearing on December 15, 2021 and including a series of questions he hopes to have answered which include, but are not limited to, if the court prohibited disclosure of the terms of the settlement agreement, if outside counsel had a conflict of interest, the terms of the DPW site and its relation to the 2008 plan, the status of the Wells Fargo site, inclusionary zoning best practices, and legal malpractice of attorney/client privilege. Included in the letter are

several exhibits consisting of Township open records related to the settlement agreement process.

Letter from Jeffrey S. Feld, Esq., 11 Alexander Lane, Short Hills NJ, 07078, dated December 8, 2021

Mr. Feld submitted a supplemental letter outside of the deadline for public comment, reiterated transparency concerns and issues with the Township Committee's handling of the settlement agreement and public involvement. Mr. Feld claims the recent Township Committee meeting was not conducive to public engagement and continues to seek involvement with the settlement agreement process.

Letter from David R Cosgrove, 99 Oakview Terrace, Short Hills NJ, 07078, dated November 23, 2021

Mr. Cosgrove's letter requests information on how to be sent copies of any submissions for the Fairness hearing and be given information on how to attend the virtual hearing. Mr. Cosgrove seeks to reserve the right to ask questions at a later date or during the hearing once he has more information.

Letter from Fair Share Housing Center, 510 Park Boulevard, Cherry Hill, 08002, dated December 12, 2021

FSHC cites the case law underpinning the fairness review process for affordable housing cases and addresses the comments in the record from Millburn residents. FSHC endorses the township's plan to address the 114-unit RDP and it's proposals toward unmet need.

Responding to objections from Millburn residents, Fair Share notes the essential purpose of the fairness hearing, which is determining the fairness of the agreement *to the protected class*.

In citing the Appellate Division in East/West, FSHC noted that "the judge should not adjudicate the zoning and planning issues implicated by the agreement" in determining the fairness of the settlement agreement.

While Fair Share recommends a thoroughgoing review of objections by Woodmont to the form of the ordinance already adopted, these are the very zoning and planning issues that the appellate division advised be kept separate from the fairness hearing. I recommend limiting the Court's determination in this hearing to the fairness of the agreement to the beneficiary class.

Special Township Attorney Edward Buzak letters dated December 10, 2021 and January 20, 2022

Attorney Buzak correctly acknowledges the role and limited scope of the fairness hearing and that the regulations supporting a judgement of compliance are not the subject of the

hearing. He notes that the purpose of the fairness hearing is to allow the Court to assess the provisions of the Settlement and determine “whether any aspect of the settlement would be unfair” to the low and moderate income protected class. It is not intended to evaluate the impacts on all affected parties or the sufficiency of implementing regulations.

Mr. Buzak also notes that the fairness hearing is not the appropriate venue to challenge a land use ordinance.

Summary of Response to Objections

Throughout Mt. Laurel jurisprudence, the Court has recognized that the prospects for affordable housing are not promising when parochial interests can prevent zoning for apartments or townhouses and permit only single-family dwellings.

The builder’s remedy, where the Court recognized that builders and developers could assist in delivering affordable units, was crafted for times when local fair share plans are found to be inadequate or nonexistent. When this happens, zoning is changed to permit inclusionary development - frequently in single family residential neighborhoods. Mr. Laurel IV offered municipalities the opportunity to have the Courts determine constitutional compliance and over 300 towns have FSHC settlements in place.

Court rulings and COAH rules have long recognized the need for inclusionary development standards, to assure that builders are sufficiently motivated and rewarded for building affordable units. When units are for sale, COAH rules require a minimum density of 6 units/acre with a maximum affordable unit set-aside of 20%.

None of the comments from objectors has persuasively alleged that there is something unfair to the protected class about the Settlement. Charges are made that local officials would not or could not disclose details of the fair share plan until it was too late for meaningful public input. This may indicate a misunderstanding about the nature of the confidential negotiations that lead to settlements, where participants agree to maintain confidentiality.

Objectors recited concerns about increasing taxes, parking, and segregation of affordable units. These are issues that are properly addressed during the site plan review process, where the public will have ample opportunity to review and comment on the proposed designs.

The proposal for a 100% affordable development of 75 units at the DPW site, funded in part from the trust fund and through potential HMFA credits, is well within the scope of appropriate methods of affordable housing production.

The purpose of the fairness hearing is solely to determine whether the provisions of the Settlement Agreement are fair to the protected class. Challenges to sites and implementation of ordinances are appropriate at the compliance hearing, where the Court determines whether the Fair Share Plan creates the realistic opportunity required by New Jersey's Constitution, Mt. Laurel jurisprudence, COAH rules and the FHA. Site design

concerns are best resolved during site plan review, where binding conditions can be part of any approvals.

Conclusion and Conditions

This report has been prepared in anticipation of the upcoming Fairness Hearing before the Honorable Robert H. Gardner, J.S.C, on December 15, 2021, in the matter of the Application of the Township of Millburn for a Determination of *Mount Laurel* Compliance (Docket No. ESX-L-2778-18).

The Court is being asked to determine whether the approval of the Settlement between Millburn and FSHC is fair to the interests of low- and moderate-income households. I note that the FSHC, an affordable housing advocate and party to the settlement agreement, has 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."

Based upon the analysis undertaken herein, I find the settlement between Millburn and FSHC to be fair to low- and moderate-income households and recommend its favorable consideration by the Court. I am also of the opinion that the compliance framework outlined in the Millburn Township/FSHC Settlement Agreement adequately protects the interests of low- and moderate-income households.

Additionally, for the reasons provided herein, I find that Millburn'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 Millburn 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).

In conclusion, it is my opinion that the settlement 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 Agreement.

ATTACHMENT A
REQUIRED ELEMENTS OF FINAL AFFORDABLE HOUSING COMPLIANCE PLAN
Township of Millburn, Essex County
January 2022

1. The compliance proposals contained in Table 1 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;
- 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 Council 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, I believe that Millburn Township will be entitled to a final Judgment of Compliance and Repose through July 1, 2025.