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June 11, 2020

Via Electronic Mail
Diana P. McGovern, Esq.
Zimmerer, Murray, Conyngham & Kunzier
Park 80 West, Plaza Two
250 Pehle Avenue, Suite 108
Saddle Brook, New Jersey 07663

Re: Block 7800, Lots 1, 2, 3 & 25
Amended Affordable Housing Settlement – Proposed Modification of Zoning Board Condition

Dear Ms. McGovern:

This firm represents the Township of Nutley (the "Township" or "Nutley") in its affordable housing litigation. The purpose of this correspondence is to advise the Township's Zoning Board of Adjustment (the "Zoning Board") of recent developments in the Township's affordable housing litigation and corollary issues for the Zoning Board to consider in connection with previously-approved developments. We believe that it is helpful to provide a brief historical backdrop for the Zoning Board, which is set forth in greater detail below.

The history of affordable housing in New Jersey is a long one, going back nearly 40 years. In 1975, the Southern Burlington County NAACP challenged the zoning ordinance of Mount Laurel Township on the grounds that it excluded low- and moderate-income households from obtaining housing. As a result of this lawsuit, the New Jersey Supreme Court ruled that the New Jersey State Constitution requires each developing municipality to provide zoning which creates a realistic opportunity for the construction of its "fair share" of low- and moderate-income housing. This decision was the first of its kind and is commonly referred to as "Mt. Laurel I."

In 1983, following years of additional litigation, the Supreme Court affirmed its holding in Mt. Laurel I and created a mechanism to enforce fair share obligations. This decision is commonly referred to as "Mt. Laurel II," and the mechanism it created is called the "builder's remedy." If a developer proves that a municipality is non-compliant with its fair share obligation, it is awarded a builder's remedy. A builder's remedy provides the developer with court-ordered zoning and density for multi-family housing without municipal oversight that is usually provided under the planning and/or zoning board application process.

On July 2, 1985, in response to the Supreme Court's decision in Mt. Laurel II, the Legislature enacted the Fair Housing Act. The Fair Housing Act did two important things: first, it created a state agency referred to as the Council on Affordable Housing ("COAH"), which was charged with calculating and assigning fair share obligations to affected municipalities. COAH established "rounds," which are time frames within which municipalities are required to provide a reasonable opportunity for affordable housing to be built. Round One was 1987 – 1993, Round Two was 1993 – 1999, Round Three is 1999 – 2025, and Round Four is 2025 forward. Second, it provided municipalities with a voluntary administrative process through which towns could satisfy their fair share obligations instead of litigating builder's remedy lawsuits in the courts.

For decades, Nutley, like hundreds of other municipalities, participated in the administrative process established by COAH, and consistently satisfied its affordable housing obligation. However, COAH became politically paralyzed and never adopted constitutionally compliant regulations for Round Three.

On March 10, 2015, following years of inaction by COAH and litigation, the New Jersey Supreme Court, in another landmark decision, ruled that the agency's administrative process had failed and assigned affordable housing compliance to the courts. The Supreme Court established a process by which towns could file declaratory judgment actions and prove their compliance with fair share obligations. The Court also afforded towns with some protection from builder's remedy lawsuits while fair share obligations were determined, but such protection was contingent on a town acting in good faith.

In July 2015, the Board of Commissioners directed our firm to file a declaratory judgment action as outlined by the Supreme Court. Due to the Township's history of compliance with its fair share obligation, we received temporary immunity from builder's remedy actions. It is worthwhile to note that the Township was not alone in this endeavor - approximately 300 other towns throughout New Jersey filed similar cases. Experts were engaged by all sides to determine municipal affordable housing obligations for the Third Round.

Fair Share Housing Center's expert initially estimated that the Township's obligation was approximately 500 affordable units, which was firmly disputed by the Township. We then engaged in lengthy litigation and settlement negotiations with Fair Share Housing Center.

While these negotiations were ongoing, two applications for development were filed with the Township's Zoning Board, including the Russ project located at Block 7800, Lots 1, 2, 3, & 25, and the Oliver project located at Block 5902, Lots 28 & 29. Given the uncertain state of affairs as to the Township's affordable housing obligation, we recommended that the Zoning Board impose an affordable housing set-aside on both projects, as is commonly done throughout the State, to strengthen our settlement position with Fair Share Housing Center. In short, the Russ project was ultimately approved by the Zoning Board and a memorializing resolution adopted on or about November 13, 2017. Critically, Condition 1(c) in the subject resolution imposed a fifteen percent (15%) set-aside on the project, thus requiring 4 units to be reserved and designated as affordable housing.

Approximately one year later, in November 2018, the Township approved a settlement agreement with Fair Share Housing Center. This agreement established the Township's Third Round obligation at 85 affordable units. A significant part of this obligation was satisfied *vis a vis* existing affordable unit in the Nutley Parkside Apartments, while balance of the Third Round obligation, totaling 55 affordable units, was required to be met through zoning on the Prism Redevelopment site. The affordable units from the Russ and Oliver projects were ultimately classified as surplus credits in the settlement agreement, meaning that they were not necessary for the Township to satisfy its Third Round obligation.

This agreement was subsequently endorsed by the Superior Court, Essex County, in January 2019. Subsequent thereto, the Special Master assigned to the Township's declaratory judgment action expressed concerns that the Russ project was not creditworthy because the approved site plan did not meet the bedroom distribution requirements set forth in the Uniform Housing Affordability Controls, i.e., it did not include three-bedroom units.

In an effort to resolve the issue, we then engaged in another round of lengthy negotiations with Fair Share Housing Center. Ultimately, the parties resolved the issue as follows: (i) the Township would assess a fee in lieu of each affordable unit required for the Russ project at the rate of $50,000.00 per affordable unit, for a total of $200,000.00; (ii) the developer of the Russ project would pay said fee to the Township's affordable housing trust fund; (iii) the in-lieu fees would be partially utilized by the Township for its home rehabilitation program, which is only available for Nutley residents; and (iv) a portion of the fee would be granted to a rooming house located on Hillside Avenue for capital repairs and maintenance. Additionally, the rooming home operator would deed restrict ten of its single-resident bedrooms for low-income individuals, thus creating and preserving affordable housing while not impacting the Township's public services.

The above-noted negotiations were subsequently memorialized in an amended settlement agreement that was approved by the Board of Commissioners on or about June 4, 2020. A fully-executed copy of the same will be provided to the Zoning Board upon receipt of Fair Share Housing Center's signature page.

In order to effectuate the above, we advised the Township that the developer of the Russ project would have to seek relief from Condition 1(c) in the Zoning Board's resolution of approval. While we defer to your review of the issue, in our opinion, the removal of the condition, coupled with the payment in lieu which will create additional affordable housing within the Township, does not constitute the removal of a significant condition which would necessitate public notice under N.J.S.A. 40:55D-12(a).

Please feel free to contact us with any questions concerning the foregoing.

Very truly yours,

/s/ John P. Inglesino
JOHN P. INGLESINO

JPI/dwo
cc: Dave Berry (via electronic mail)

FIRST AMENDED AND RESTATED SETTLEMENT AGREEMENT

This Settlement Agreement (the "Agreement") is entered into this ___th day of June, 2020 by and between:

The **TOWNSHIP OF NUTLEY**, a body politic of the County of Essex, State of New Jersey, with offices located at 1 Kennedy Drive, Nutley, New Jersey 07110 (the "Township"); and

FAIR SHARE HOUSING CENTER, an entity formed under the laws of the State of New Jersey with offices located at 510 Park Boulevard, Cherry Hill, New Jersey 08002 ("FSHC") (FSHC and the Township are hereinafter sometimes individually referred to as a "Party" and collectively referred to as the "Parties").

WITNESSETH

WHEREAS 1, over the past decade, the New Jersey Council on Affordable Housing ("COAH") has failed to adopt constitutionally compliant Third Round Rules that have withstood judicial scrutiny; and

WHEREAS 2, the Township was previously granted substantive certification by COAH for the Second Round on September 2, 1998, and extended substantive certification on February 9, 2005; and

WHEREAS 3, on February 23, 2006, COAH approved the Township's original development fee ordinance and, on February 8, 2010, COAH approved the Township's amended development fee ordinance; and

WHEREAS 4, the Township subsequently petitioned COAH for Third Round substantive certification on July 13, 2009 and, although said petition was deemed complete and no objections were filed thereto, COAH failed to act on such petition; and

WHEREAS 5, in connection with its Third Round petition, the Township also submitted a Spending Plan for approval to COAH in accordance with N.J.A.C. 5:97-8.1(d), and said Spending Plan was subsequently approved by the Department of Community Affairs ("DCA") on or about February 6, 2012; and

WHEREAS 6, on March 10, 2015, the New Jersey Supreme Court issued its decision in In re Adoption of N.J.A.C. 5:96 and 5:97 ex rel. New Jersey Council on Affordable Housing, 221 N.J. 1 (2015) ("Mt. Laurel IV"), which terminated COAH's jurisdiction to administer and approve municipalities' affordable housing plans, determined that the Court would reassert primary jurisdiction over the same and directed interested municipalities to petition the Court for immunity while constitutionally compliant housing plans were prepared; and

WHEREAS 7, on or about July 7, 2015, the Township filed a declaratory judgment action in the case entitled In the Matter of the Application of the Township of Nutley for A Determination of Mount Laurel Compliance, bearing Docket No. ESX-L-4800-15 (the "Township's DJ Action") seeking a declaration of its compliance with the Mt. Laurel doctrine and the Fair Housing Act of 1985, N.J.S.A. 52:27D-301, et seq., in accordance with Mt. Laurel IV, and also petitioned the Court for approval of a Spending Plan as the same may be prepared and temporary immunity from builder's remedy lawsuits; and

WHEREAS 8, by Order dated September 15, 2015, the Township was granted temporary immunity from builder's remedy actions, and continues to enjoy immunity as of the date of this Agreement; and

WHEREAS 9, the Parties recognize that the settlement of Mt. Laurel litigation is favored because it avoids delays and the expense of trial and results more quickly in the construction of homes for lower-income households; and

WHEREAS 10, the Parties have mediated this matter on multiple occasions and have agreed to settle the litigation and to present that settlement to the trial court with jurisdiction over this matter to review; and

WHEREAS 11, the Township and FSHC are parties to that certain Settlement Agreement, dated as of November 2018 (the "Original Agreement"); and

WHEREAS 12, the Original Agreement was approved by Court Order dated January 14, 2019, following a duly-noticed fairness hearing; and

WHEREAS 13, subsequent to the Court's approval of the Original Agreement, the parties identified various crediting issues with certain compliance mechanisms noted in the Original Agreement, and desire to enter into this First Amended and Restated Settlement Agreement to resolve said issues; and

WHEREAS 14, Paragraph 26 of the Original Agreement provides that the same may be amended in a writing signed by both Parties thereto; and

WHEREAS 15, each Party to the Original Agreement agrees to the terms and provisions of this Agreement and further acknowledges that this Agreement supersedes the Original Agreement; and

WHEREAS 16, pursuant to the Parties' settlement negotiations the Parties request that the Superior Court, Essex County, find that this Agreement, and the approach to meeting the Township's Prior Round and Third Round Mt. Laurel obligation, as detailed herein, is fair to the interests of lower-income households in the region and entitles the Township to protection from Mt. Laurel litigation for a period through July 1, 2025, as shall be set forth in an order entered by the court approving this Agreement; and

WHEREAS 17, the Parties recognize that this Agreement must be reviewed by the Court in accordance with the requirements of Morris County Fair Housing Council v. Boonton Township, 197 N.J. Super. 359, 364 (Law Div. 1984), aff'd o.b., 209 N.J. Super. 108 (App. Div. 1986) and East/West Venture v. Borough of Fort Lee, 286 N.J. Super. 311, 328 (App. Div. 1996), and that, in order to approve the settlement, the Court must find that it adequately protects the interests of lower-income persons for whom the affordable units proposed by this settlement are to be built; and

WHEREAS 18, at this time and at this particular point in the process resulting from the Supreme Court's Mt. Laurel IV decision, when fair share obligations have yet to be finally determined, it is appropriate for the Parties to arrive at a settlement of those obligations using a mutually-agreed upon process for determining said obligations in the context of a settlement rather than litigate a full resolution of those obligations; and

WHEREAS 19, in order to amicably resolve this matter in a way that all Parties agree complies with the Mt. Laurel doctrine, the Parties have agreed to following terms and conditions set forth herein.

NOW THEREFORE, in consideration of the foregoing recitals, the promises and obligations set forth herein, and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, and intending to be legally bound, the Parties mutually agree as follows:

General Settlement Terms Applicable to All Parties.

1. **Incorporation of Recitals.** The Parties incorporate the foregoing recitals as if fully set forth at length herein and made a part hereof.

2. Purpose of Agreement. The purpose and intent of this Agreement is to resolve the Township's DJ Action on terms that are fair to lower-income households in accordance with the requirements of the Mt. Laurel doctrine and Fair Housing Act of 1985, N.J.S.A. 52:27D-301 et seq., for the Prior Round (1987-1999) and Third Round (1999-2025).

3. Adoption of Housing Plan. Prior to the compliance hearing to be held on this matter, the Township will adopt a Housing Element and Fair Share Plan (the "Plan") and Spending Plan to comport with the terms of this Agreement. For purposes of settlement and a fairness hearing, all Parties agree that the foregoing is sufficient. Furthermore, all Parties agree that the Township, through the future adoption of a Plan that comports with the requirements of this Agreement, and the implementation of said Plan and this Agreement, satisfies its obligation under the Mt. Laurel doctrine and Fair Housing Act of 1985, N.J.S.A. 52:27D-301 et seq., for the Prior Round (1987-1999) and Third Round (1999-2025).

4. Resolution of Litigation. At this time and at this particular point in the process resulting from the Supreme Court's Mount Laurel IV decision, when fair share obligations have yet to be definitely determined, it is appropriate for the Parties to arrive at a settlement regarding the Township's Third Round Rehabilitation Share, Gap Period Present Need, and Third Round Prospective Need instead of doing so through plenary adjudication.

5. Establishment of the Fair Share Obligation. In accordance with Morris County Fair Housing Council, supra, 197 N.J. Super. at 370-71, the Parties hereby agree that the Township's affordable housing obligations are as follows:

a. The **Rehabilitation Share**, as calculated by Dr. Kinsey, PhD, FAICP, PP, is 256. All Parties agree that the Township may seek to demonstrate during the compliance hearing in this matter that it has received credits toward its Rehabilitation Share and/or demonstrate, via a survey conducted in accordance with applicable law, that it is entitled to a reduction of its Rehabilitation Share. The parties anticipate the Special Master will review this issue and recommend to the Court how many credits toward the Rehabilitation Share the Township should receive or whether it is entitled to a reduction. To the extent that the Township has a Rehabilitation Share that remains to be fulfilled, it shall be addressed as outlined in paragraph 6 herein.

b. The **Prior Round** obligation, per N.J.A.C. 5:93, is 29.

c. The **Gap Period Present Need** obligation which, for purposes of this Agreement is the measure of households formed from 1999-2015 that need affordable housing, as recognized by the Supreme Court in In re Declaratory Judgment Filed by Various Municipalities, 227 N.J. 508 (2017), is 85. Although the Township does not concede nor does it agree that this is an accurate calculation of its fair share obligation, the Parties agree for settlement purposes to utilize this calculation as the basis for the Gap Period Present Need.

d. The **Third Round Prospective Need** obligation which, for purposes of this Agreement spans the period 2015-2025, is 0. The Parties acknowledge and agree that the Township became, in 2016, a qualifying Urban Aid municipality pursuant to N.J.A.C. 5:93-2.3(b) and, as such, is exempt from any allocation of Third Round Prospective Need. The Parties further agree that, notwithstanding any potential change to the Township's status as a qualifying Urban Aid municipality, its Third Round Prospective Need obligation shall be and shall remain at 0. The Parties further agree that the Township is permitted to seek such an exemption for the Fourth Round, if and as the same may be determined in the future.

6. Satisfaction of Rehabilitation Share. The Township's efforts to meet its Rehabilitation Share, which may be reduced by the Court in accordance with applicable law, include participation in a joint rehabilitation and shared services program with Essex County. By way of this program, the Township shall provide deferred loans to qualifying rehabilitation projects located in the Township, which shall be overseen by Essex County, whose rehabilitation funds shall be partnered with the Township's funds. This partnership with Essex County will result in a significant increase in potential loan availability and amounts for qualified projects located in the Township, and will likely result in a significant reduction of administration and other related costs and expenses. The Township's entitlement to rehabilitation credit shall be determined at the Final Compliance hearing to be held in the future, and the Parties anticipate that the Special Master will make a recommendation regarding the same at such time. All Parties agree that the foregoing will be sufficient to satisfy the Township's Rehabilitation Share of 256 units.

7. Satisfaction of the Prior Round. As noted above, the Township has a Prior Round prospective need of 29 units, which is met through the following compliance mechanisms:

PRIOR ROUND UNITS							
Project	**Status**	**Location**	**Affordable Units**	**Tenure**	**Very-Low**	**Low**	**Mod.**
Nutley Parkside Apartments	Occupied	Block 6201, Lot 3	7 Units (capped)	A/R Rental	0	7	0
ARC of Essex County	Occupied	Block 8400, Lot 19	5 Rooms	Rental	0	5	0
Project Live Inc.	Occupied	Block 7200, Lot 27	3 Rooms	Rental	0	3	0
Group Home	Occupied	Kingsland St.	4 Rooms	Rental	0	4	0
Project Live Inc.	Occupied	Block 9501, Lot 10	3 Rooms	Rental	0	3	0
Rental Bonus			7				
Total			29 Credits		0	29	0

Satisfaction of the Gap Period Present Need. As noted above, the Township has a Gap Period Present Need obligation of 85, which is met and exceeded through the following compliance mechanisms:

GAP PERIOD PRESENT NEED UNITS							
Project	**Status**	**Location**	**Affordable Units**	**Tenure**	**Very-Low**	**Low**	**Mod.**
Nutley Parkside Apartments	Occupied	Block 6201, Lot 3	20 Units (capped)	A/R Rental		20	
Prism Redevelopment Project	Planning Process	Identified Below	43 affordable family rentals (out of 55 total)	Rental	6	16	21
Rental Bonus			22				
Total			85				
SURPLUS CREDITS TOWARDS FOURTH ROUND[1]							
Project	**Status**	**Location**	**Affordable Units**	**Tenure**	**Very-Low**	**Low**	**Mod.**
Nutley Parkside Apartments	Occupied	Block 6201, Lot 3	1 Unit (capped)	A/R Rental		1	
Center for Family Support	Occupied	Block 5700, Lot 4	4 Rooms	Rental	4	0	0
Mental Health Ass'n of Essex County	Occupied	Block 403, Lot 12	6 Rooms	Rental	6	0	0
250 High Street, LLC	Approved	Block 2300, Lot 1	1 Unit	Rental	0	1	0
Prism Redevelopment Project	Planning Process	Identified Below	12 affordable family rental units (out of 55 total)	Rental	2	4	7
Total			24				

[1] Does not include any potential bonus credits which may be available in the Fourth Round.

8. The Prism Site. The former Hoffman La Roche campus, now owned by Prism Capital Partners ("Prism"), is comprised of approximately 52 acres within the Township's borders (the "Prism Site"). Said Site is comprised of the following parcels, as designated on the Township's official Tax Map: Block 102, Lots 2 and 9; Block 200, Lots 1, 2, 3, 4, 5, 6 and 24; Block 201, Lot 1; Block 300, Lots 1 and 20; Block 2000, Lots 1, 4 and 5; Block 2101, Lot 1; and Block 2304, Lot 17. On March 3, 2015, the Township adopted a resolution finding that the Prism Site (excepting Block 102, Lot 9) met the statutory criteria to be designated as a condemnation area in need of redevelopment. On July 19, 2016, the Township adopted a Phase I redevelopment plan for 10.98 acres of the Prism Site and permitted the establishment of a new private medical school and related uses to be leased and operated by a joint venture between Hackensack University Health Network and Seton Hall University. The Township and Prism are currently engaged in a long-term and comprehensive planning process for the balance of the Prism Site. As part of its efforts to address its Gap Period Present Need obligation, the Township shall, within two years of the Court's approval of this Agreement, adopt a redevelopment plan(s), or phases thereof, to permit the construction of at least 55 family-rental affordable units, including very-low, low-, and moderate-income units, as the same have been defined in this Agreement. During the two-year period following the approval of this Agreement, the Township agrees to take all steps needed to ensure that the purposes of the Agreement will be achieved, including by ensuring that there is sufficient land remaining on the site for the development of 55 family-rental affordable units.

9. In-Lieu Contributions for Housing Activities. The Parties agree that the Township shall assess an in-lieu fee in the amount of $50,000.00 per unit for 4 affordable units in the approved development identified as the Centre and Bloomfield project, located at Block 7800, Lots 1, 2, 3 and 25, and the 5 affordable units in the approved development identified as the Centre

Street Project, located at Block 5902, Lots 28 and 29. The Parties acknowledge that these units were previously counted as surplus credits in the Original Agreement and the Township shall no longer be entitled to the 9 surplus credits as stated in the Original Agreement. The Township shall utilize these funds as stated in the Paragraph 10, below, and any surplus monies funds shall be utilized for qualifying affordable housing activities as set forth in the Township's Spending Plan.

10. Contribution to the Rooming Home. The Parties acknowledge that a 22-bedroom rooming house is located at 265 Hillside Avenue. Although no affordability controls are currently in place, the establishment has provided de facto affordable housing for several decades. With the agreement of the rooming home operator, the Township shall contribute $65,000.00 from its Affordable Housing Trust Fund for qualifying repairs and maintenance to the rooming house. In exchange, the operator shall record a deed restriction establishing affordability controls for a period of ten (10) years on ten (10) of the bedrooms located within the rooming house. Excepting income requirements and rental limitations, the deed restriction shall not impact or otherwise effect the operator's tenant selection or marketing process. The Parties acknowledge that the recordation of the deed restriction does not, ipso facto, render the restricted units in the rooming house as creditworthy. Nevertheless, the Parties acknowledge that the provision of funding for this use enhances the ongoing supply of affordable rental housing for low- and-moderate households and is an appropriate use of funds.

11. Very-Low-Income Units. The Township shall require and the Parties agree that thirteen percent (13%) of all Gap Period Present Need units referenced herein, with the exception of units constructed or subject to preliminary or final site plan approval as of July 1, 2008, shall be very-low-income units, with half of the very-low-income units being available to families. The Township will comply with those requirements by amending its zoning ordinance to provide as such, if necessary. At the time of the compliance hearing, the Township will demonstrate its satisfaction of the low-, very low-, and moderate- income requirements and, if necessary, undertake corrective action to address any deficiencies in income-split requirements during the period of repose.

12. Miscellaneous Third Round Requirements. The Township shall address its Gap Period Present Need obligation in accordance with the following standards as agreed to by the Parties and as reflected in the table in Paragraph 8 above:

a. Third Round bonuses will be applied in accordance with N.J.A.C. 5:93-5.1(d).

b. At least fifty percent (50%) of the units addressing the Gap Period Present Need shall be affordable to very-low-income and low-income households with the remainder affordable to moderate-income households.

c. At least twenty-five percent (25%) of the Gap Period Present Need shall be met through rental units, including at least half in rental units available to families.

d. At least half of the units addressing the Gap Period Present Need must be available to families.

e. The Township agrees to comply with an age-restricted cap of twenty-five percent (25%) and to not request a waiver of that requirement. This shall be understood to mean that in no circumstance may the Township claim credit towards its Gap Period Present Need obligation for age-restricted units that exceed twenty-five percent (25%) of all units developed or planned to meet its cumulative Prior Round and Gap Period Present Need obligations. The Township may, however, in its discretion, utilize such age-restricted units to satisfy its Present Need rehabilitation obligation.

13. Affirmative Marking Requirement. The Township shall add to the list of community and regional organizations in its affirmative marketing plan, pursuant to N.J.A.C. 5:80-26.15(f)(5), Fair Share Housing Center (510 Park Boulevard, Cherry Hill, NJ 08002), the New Jersey State Conference of the NAACP, the Latino Action Network (P.O. Box 943, Freehold, NJ 07728, East Orange NAACP (P.O. Box 1127, East Orange, NJ 07019), Newark NAACP (P.O. Box 1262, Newark, NJ 07101), Morris County NAACP (P.O. Box 2256, Morristown, NJ 07962), Elizabeth NAACP (P.O. Box 6732, Elizabeth, NJ 07206), and the Supportive Housing Association, and shall, as part of its regional affirmative marketing strategies during its implementation of this plan, provide notice to those organizations of all available affordable housing units. The Township also agrees to require any other entities, including developers or persons or companies retained to do affirmative marketing, to comply with this paragraph.

14. Affordability Controls. All units shall include the required bedroom distribution, be governed by controls on affordability and affirmatively marketed in conformance with the Uniform Housing Affordability Controls, N.J.A.C. 5:80-26.1 et seq., or any successor regulation, with the exception that in lieu of ten percent (10%) of affordable units in rental projects being required to be at thirty-five percent (35%) of median income, thirteen percent (13%) of affordable units in such projects shall be required to be at thirty percent (30%) of median income, and all other applicable law. The Township shall adopt and/or update appropriate implementing ordinances in conformance with standard ordinances and guidelines developed by COAH to ensure that this provision is satisfied.

15. New Construction. All new construction units shall be adaptable in conformance with P.L.2005, c.350/N.J.S.A. 52:27D-311(a) and -311(b) and all other applicable law.

16. Reservation of Rights. The Parties agree that if a decision of a court of competent jurisdiction in Essex County, the Appellate Division, or the New Jersey Supreme Court, or a determination by an administrative agency responsible for implementing the Fair Housing Act, or an action by the New Jersey Legislature, would result in a calculation of an obligation for the Township for the period 1999-2015 that would be lower by more than twenty (20%) percent than the total Gap Period Present Need obligation established in this Agreement, and if that calculation is memorialized in an unappealable final judgment, the Township may seek to amend the judgment in this matter to reduce its fair share obligation accordingly. Notwithstanding any such reduction, the Township shall be obligated to implement this Agreement, including by leaving in place any site-specific zoning adopted or relied upon in connection with the Plan approved pursuant to this Agreement; taking all steps necessary to support the development of any 100% affordable developments referenced herein; and otherwise fulfilling fully the fair share obligations as established herein. The reduction of the Township's obligation below that established in this Agreement does not provide a basis for seeking leave to amend this Agreement or seeking leave to amend an order or judgment pursuant to R. 4:50-1. If the Township prevails in reducing its obligation for the Gap Period Present Need, the Township may carry over any resulting extra credits to future rounds in conformance with the then-applicable law.

17. Spending Plan. The Township intends to prepare a Spending Plan in compliance with the requirements set forth herein. The Parties to this Agreement agree that this Spending Plan, if it complies with the requirements of this Agreement and other applicable law, is valid and should be approved by the trial court with jurisdiction over this matter, and that the expenditure of funds contemplated under this Agreement constitute "commitment" for expenditure pursuant to N.J.S.A. 52:27D-329.2 and -329.3, with the four-year time period for expenditure designated pursuant to those provisions beginning to run with the entry of a final judgment approving this settlement in accordance with the provisions of In re Tp. Of Monroe, 442 N.J. Super. 565 (Law Div. 2015) (aff'd N.J. Super. 563). On the first anniversary of the execution of this Agreement, and every anniversary thereafter through the end of this agreement, the Township agrees to provide annual reporting of trust fund activity to the New Jersey Department of Community Affairs, Council on Affordable Housing, or Local Government Services, or other entity designated by the State of New Jersey, with a copy provided to FSHC and posted on the municipal website, using forms developed for this purpose by the New Jersey Department of Community Affairs, Council on Affordable Housing, or Local Government Services. The reporting shall include an accounting of all housing trust fund activity, including the source and amount of funds collected and the amount and purpose for which any funds have been expended.

18. Annual Reporting. On the first anniversary of the execution of this Agreement, and every anniversary thereafter through the end of this agreement, the Township agrees to provide annual reporting of the status of all affordable housing activity within the municipality through posting on the municipal website with a copy of such posting provided to FSHC, using forms previously developed for this purpose by COAH or any other forms endorsed by the Special Master and FSHC.

19. Mid-Point Review. The Fair Housing Act includes two provisions regarding action to be taken by the Township during the ten-year period of protection provided in this Agreement. The Township agrees to comply with those provisions as follows:

a. For the midpoint realistic opportunity review due on July 1, 2020, as required pursuant to N.J.S.A. 52:27D-313, the Township will post on its municipal website, with a copy provided to FSHC, a status report as to its implementation of its Plan and an analysis of whether any unbuilt sites or unfulfilled mechanisms continue to present a realistic opportunity or should be revised or supplemented. Such posting shall invite any interested party to submit comments to the municipality, with a copy to FSHC, regarding whether any sites no longer present a realistic opportunity and should be replaced or revised or supplemented. Any interested party may by motion request a hearing before the court regarding these issues.

b. For the review of very-low-income housing requirements required by N.J.S.A. 52:27D-329.1, within thirty (30) days of the third anniversary of this Agreement, and every third year thereafter, the Township will post on its municipal website, with a copy provided to FSHC, a status report as to its satisfaction of its very-low-income requirements, including the family very-low income requirements referenced herein. Such posting shall invite any interested party to submit comments to the municipality and FSHC on the issue of whether the municipality has complied with its very-low-income housing obligation under the terms of this settlement.

20. Fairness Hearing. This Agreement must be approved by the Court following a fairness hearing as required by Morris Cty. Fair Hous. Council v. Boonton Twp., 197 N.J. Super. 359, 367-69 (Law Div. 1984), aff'd o.b., 209 N.J. Super. 108 (App. Div. 1986); East/West Venture v. Borough of Fort Lee, 286 N.J. Super. 311, 328-29 (App. Div. 1996). The Township may present its planner as a witness at this hearing, and the Special Master shall testify as to fairness of the Agreement. For purposes of settlement, FSHC agrees not to challenge this Agreement at the fairness hearing but shall indicate its support of the same on the record at the fairness hearing or in writing to the Court prior to the fairness hearing. In the event the Court approves this proposed settlement, and so long as the Township prepares a Plan and Spending Plan that comports with the requirements of this Agreement by the time of the compliance hearing, the Parties contemplate the municipality will receive "the judicial equivalent of substantive certification and accompanying protection as provided under the FHA," as addressed in the Supreme Court's decision in Mt. Laurel IV, and conditioned on the Township adopting the requisite implementing ordinances within the timeframes set forth herein. Subject to the foregoing, the "accompanying protection" shall remain in effect through July 1, 2025. If the Agreement is rejected by the Court at a fairness hearing, it shall be null and void.

21. Appeal. If an appeal is filed of the Court's approval or rejection of the Agreement, the Parties agree to defend the Agreement on appeal, including in proceedings before the Superior Court, Appellate Division and New Jersey Supreme Court, and to continue to implement the terms of the Agreement if the Agreement is approved before the trial court unless and until an appeal of the trial court's approval is successful at which point, the Parties reserve their right to rescind any action taken in anticipation of the trial court's approval. All Parties shall have an obligation to fulfill the intent and purpose of this Agreement.

22. Process for Agreement to Become Final:

a. The Board of Commissioners has considered and approved execution of this Agreement.

b. If the Court upon review of the Agreement finds that it is fair and consistent with East/West Venture v. Bor. Of Fort Lee, 286 N.J. Super. 311 (App. Div. 1996), the Parties anticipate that the Court will enter an Order approving this Agreement and, upon the satisfaction of all conditions recommended by the Special Master, as endorsed by the Court, or as independently imposed by the Court, will upon a further hearing enter a final order granting the Township the judicial equivalent of substantive certification, with all of the immunities and rights that such a Judgment confers upon the Township, through July 1, 2025, to be more specifically set forth in the Judgment entered by the Court approving the Agreement and granting the Township the judicial equivalent of substantive certification.

c. Prior the compliance hearing to be held on this matter, the Township shall adopt a Plan and Spending Plan that comports with the requirements of this Agreement and present the same to the Court for approval.

23. Attorneys' Fees. The Township previously agreed to pay FSHC $4,000.00 in satisfaction of any claims for attorney fees and costs in this matter within thirty (30) days of approval of the fairness of the Original Agreement. The Parties acknowledge that such payment was made.

24. Enforcement. This Agreement may be enforced through a motion to enforce litigant's rights or a separate action filed in Superior Court, Essex County. A prevailing movant or plaintiff in such a motion or separate action shall be entitled to reasonable attorney's fees.

25. Severability. Unless otherwise specified, it is intended that the provisions of this Agreement are severable. The validity of any article, section, clause or provision of this Agreement shall not affect the validity of the remaining articles, sections, clauses or provisions hereof. If any section of this Agreement shall be adjudged by a court of competent jurisdiction to be invalid, illegal, or unenforceable in any respect, such determination shall not affect the remaining sections.

26. Governing Law. This Agreement shall be governed by and construed by the laws of the State of New Jersey.

27. No Modification. This Agreement may not be modified, amended or altered in any way except by a writing signed by each of the Parties.

28. Counterparts. This Agreement may be executed in any number of counterparts, each of which shall be an original and all of which together shall constitute but one and the same Agreement.

29. Voluntary Agreement. The Parties acknowledge that each has entered into this Agreement on its own volition without coercion or duress after consulting with its counsel, that each Party is the proper person and possesses the authority to sign the Agreement, that this Agreement contains the entire understanding of the Parties and that there are no representations, warranties, covenants or undertakings other than those expressly set forth herein.

30. Preparation. Each of the Parties hereto acknowledges that this Agreement was not drafted by any one of the Parties, but was drafted, negotiated and reviewed by all Parties and, therefore, the presumption of resolving ambiguities against the drafter shall not apply. Each of the Parties expressly represents to the other Parties that: (i) it has been represented by counsel in connection with negotiating the terms of this Agreement' and (ii) it has conferred due authority for execution of this Agreement upon the persons executing it.

31. Exhibits and Schedules. Any and all Exhibits and Schedules annexed to this Agreement are hereby made a part of this Agreement by this reference thereto. Any and all Exhibits and Schedules now and/or in the future are hereby made or will be made a part of this Agreement with prior written approval of all Parties.

32. Entire Agreement. This Agreement constitutes the entire Agreement between the Parties hereto and supersedes all prior oral and written agreements between the Parties with respect to the subject matter hereof except as otherwise provided herein.

33. **Conflict of Interest**. No member, official or employee of the Township shall have any direct or indirect interest in this Agreement, nor participate in any decision relating to the Agreement which is prohibited by law, absent the need to invoke the rule of necessity.

34. **Effective Date**. Notwithstanding anything herein contained to the contrary, the effective date of this Agreement shall be the date upon which all of the Parties hereto have executed and delivered this Agreement.

35. **Notices**. All notices required under this Agreement ("Notice[s]") shall be written and shall be served upon the respective Parties by certified mail, return receipt requested, or by a recognized overnight or by a personal carrier. In addition, where feasible (for example, transmittals of less than fifty pages) shall be served by facsimile or e-mail. All Notices shall be deemed received upon the date of delivery. Delivery shall be affected as follows, subject to change as to the person(s) to be notified and/or their respective addresses upon ten (10) days-notice as provided herein:

TO FSHC:	Kevin D. Walsh, Esq. Fair Share Housing Center 510 Park Boulevard Cherry Hill, NJ 08002 Phone: (856) 665-5444 Telecopier: (856) 663-8182 E-mail: kevinwalsh@fairsharehousing.org
TO THE TOWNSHIP:	Clerk, Township of Nutley Township of Nutley Municipal Building 1 Kennedy Drive, Nutley, New Jersey 07110
WITH A COPY TO:	John P. Inglesino, Esq. & Derek W. Orth, Esq. Inglesino, Webster, Wyciskala & Taylor, LLC 600 Parsippany Road, Suite 204 Parsippany, New Jersey 07054

TO SPECIAL MASTER:

Elizabeth McManus, PP, AICP
Kyle & McManus Associates
P.O. Box 236
Hopewell, New Jersey 08525

In the event any of the individuals identified above has a successor, the individual identified shall name the successor and notify all others identified of the successor.

[SIGNATURES ON FOLLOWING PAGES]

IN WITNESS WHEREOF, the Parties have caused this Settlement Agreement to be executed by their duly authorized representatives as of the date first written above.

Witness/Attest:

TOWNSHIP OF NUTLEY
a public body corporate and politic

Eleni Pettas, RMC, Municipal Clerk

Dated: June 4, 2020

By: ______________________
Mauro G. Tucci, Mayor

Dated: 6/4/2020

FAIR SHARE HOUSING CENTER

Dated: 6/12/20

By: ______________________
~~Kevin D. Walsh~~, Executive Director
Adam M. Gordon

Dated: 6/12/20