

Clinton Township – Fair Share Housing Center Affordable Housing Settlement Facts and FAQ's

As you know the Township has recently entered into an extensive affordable housing settlement with the Fair Share Housing Center (FSHC) for which the negotiations were necessarily confidential. FSHC is the only public interest organization entirely devoted to defending the housing rights of New Jersey's poor through enforcement of the Mount Laurel doctrine, which has been established through a series of New Jersey Supreme Court decisions that require all towns to provide their "fair share" of their region's need for affordable housing. FSHC is an organization designated by the New Jersey Supreme Court as an "interested party" in all affordable housing cases in the State. As a party to our settlement agreement, FSHC will jointly defend it with us if a developer challenges the settlement at the "fairness" hearing which the Superior Court will conduct on the settlement on February 12, 2018 and/or attempts to substitute their project for any of the projects contained in the settlement agreement.

The questions and answers set forth below are an attempt at explaining the reasons that the Township entered the settlement agreement with FSHC and the logic behind the projects included in the settlement agreement.

Why are the courts involved with affordable housing in the State? In 1975, the New Jersey Supreme Court decided Mount Laurel I which held that municipalities could not exclude low and moderate income citizens through zoning and that municipalities located in "growth" areas had an affirmative obligation to provide through zoning their "fair share" of their region's need for affordable housing. In 1983, the New Jersey Supreme Court decided Mount Laurel II which held that **all** municipalities had an affirmative obligation to provide through zoning their "fair share" of their region's need for affordable housing and, significantly, ruled that any builder/plaintiff who brought a Mount Laurel II lawsuit against a municipality and successfully obtained a ruling from the court that the municipality's zoning ordinances did not satisfy the Mount Laurel obligation, would be entitled to a "builder's remedy" which is a site specific re-zoning of the builder/plaintiff's site. The Mount Laurel II Court also ruled that the trial courts had to establish fair share numbers for all municipalities within their jurisdiction to make resolution of Mount Laurel cases easier to attain.

Much litigation followed which finally resulted in the Legislature passing the Fair Housing Act in 1985 (FHA) which created the Council on Affordable Housing (COAH) to establish an administrative mechanism to resolve affordable housing issues outside the courts and to promulgate regulations which would define each municipality's affordable housing obligation without the involvement of the courts. In 1986, the New Jersey Supreme Court decided Mount Laurel III, which upheld the FHA and transferred all cases pending in the courts to COAH. COAH subsequently adopted the required regulations which produced fair share numbers well below the numbers that had been determined by the courts. Over the years, COAH amended and re-adopted the regulations which went through several iterations and much additional litigation. While the courts upheld the vast majority of the "First Round" and "Second Round" regulations, the majority of the "Third Round" regulations, and all of the so-called "growth share" based regulations, were invalidated by the courts. The case invalidating the Third Round regulations made it up to the New Jersey Supreme Court. By that time, the executive branch had made COAH non-functional through not appointing a full complement of COAH members so that COAH was unable to adopt the required regulations and the Court's patience was exhausted. Consequently, in March of 2015, the New Jersey Supreme Court decided Mount Laurel IV, which held that: (1) the courts would assume responsibility for determining affordable housing issues in the State; (2) the courts would also assume responsibility for establishing the fair share obligation of each municipality for the so-called Third Round period running from 1999-2025; and (3) before addressing Third Round obligations, municipalities

would also be required to address all prior round obligations (the First Round was from 1987-1993 and the Second Round was from 1993-1999).

What are the First and Second Round affordable housing obligations for our Township and what does the settlement agreement have to say about that? According to all planning experts that are involved in the current Mount Laurel IV affordable housing cases in the courts, the Township has a prior round obligation of 335 units from the First and Second rounds, of which 167 units have not yet been constructed.

Under the settlement agreement, the Township will zone to satisfy the remaining prior round obligation of 167 units by providing for two 100% affordable housing projects. The first project associated with this particular obligation is the so-called “Ingerman” or “Beaver Brook Homestead” project, a 100% affordable project on an approximately 11-acre lot located on Beaver Ave which will have 66 physical units on a 5-acre portion of the lot and, with the addition of 66 “rental bonus credits,” will yield 132 credits towards our 167 unit obligation. The second project is the so-called “Marookian” 100% affordable project on 6 acres of the 139-acre Marookian tract located on Route 31 south. This project will have 84 physical units, with 26 of the 84 units, as well as an additional 7 “rental bonus credits,” being credited to our 167-unit obligation. The one unit remaining from our 167-prior round obligation will be provided through the redevelopment of the Old Municipal Building site in Annandale Village for 10 apartments. All of this is “catch-up” from our pre-1999 obligations.

The Ingerman or Beaver Ave project has received preliminary site plan approval from the Planning Board and very advantageous financing from NJHMFA. An application for final site plan approval is pending before the Planning Board and it is anticipated that the Planning Board will hear the application shortly. It is anticipated that a Request for Proposal (RFP) for the development of the Marookian project will be formulated in the first quarter of 2018. The Township has secured the required water and sewerage for both projects as well as for the redevelopment of the Old Municipal Building; all three projects have been in our Affordable Housing Plan since April 2015.

So, we’ve discussed pre-1999 obligations; what about the new needs associated with the Third Round period (1999-2025)? As one can probably derive from the time span involved, from 1999 to the present there has been extensive litigation centered around how to calculate and then distribute affordable housing needs. As mentioned above, in 2015 responsibility for determining the obligation of each municipality reverted to the courts. However, the Supreme Court did not endorse a specific method to calculate this need for the State or each municipality and another round of litigation began. A so-called “numbers trial” was conducted earlier this year in Mercer County before a well-respected judge. This was an action which pitted several Mercer towns against FSHC and major developers and a decision is expected in the near future which will decide on the method to calculate municipal fair share obligations. In order to prepare for settlement negotiations with FSHC we reviewed the report authored by the judge’s appointed master (expert planning consultant) plus the reports authored by FSHC’s expert and by the municipal expert who was retained by a consortium of approximately 280 municipalities (which included our Township). Therefore, while we are not certain of **exactly** what our number might be when a final formula is determined, we (like most other municipalities) are convinced that negotiating a settlement now is in the best interests of the Township. The agreement we reached actually contains a clause that will lower our fair share number in the event that the fair share calculation by Judge Thomas Miller, the Judge having jurisdiction over our case, is 10% or more less than our settlement number.

That’s nice but why settle and not continue to litigate? Well, let’s look at an example of what could happen if a Township chooses to litigate rather than settle. A judge recently decided that the Township of South Brunswick had failed to make sufficient progress towards meeting its affordable housing obligations. The

court then mandated a requirement requiring the construction of more than 2,900 affordable housing units. In addition, the judge appointed a hearing officer to substitute for the Planning Board in reviewing applications for **inclusionary** developments (i.e., – typically 4 market rate for every 1 affordable unit or worse). So development in that Township is now in the hands of builders rather than the local elected and appointed officials.

OK, so how did we negotiate the overall plan contained in the settlement? First, we had to come to a number and our discussions started with an obligation, from FSHC’s perspective, of 1,454 units (which was capped by law at 913 units). However, the Township had opted to conform to the Highlands Regional Master plan in June of 2015 which, in addition to improving ground water quality, significantly reduced overall development potential within the Township. Between this action, our reading of the Mercer County Judge’s master’s report and a small “bonus” reduction for settling, we were successful in reducing our obligation to 337 affordable units (279 physical dwelling units).

Once the Third Round fair share obligation was agreed upon, we then had to come up with what is known as a “compliance plan,” which is a plan that provides the mechanisms for creating a realistic opportunity for the affordable housing required to satisfy our fair share obligation to be constructed. To this end, during the past spring and summer, our professionals considered proposals from and interviewed those developers who had expressed interest in building affordable housing in the Township. These proposals were then discussed with Council and the Planning Board in executive session and ranked as to their effect on our community versus the number of credits toward our fair share number which each would generate.

How about some information about the projects included in the settlement’s compliance plan?

- The Marookian project: As set forth above, this is a 100% affordable project on 6 acres of the 139-acre Marookian tract located on Route 31 south. The Marookian project will have 84 physical units, with 58 of the 84 units being credited towards our Third Round fair share obligation. (as above, 26 of the 84 units, as well as an additional 7 “rental bonus credits,” are being credited to our 167-unit prior round obligation.)
- The Windy Acres project: The Windy Acres project is a 100% affordable project on a 25-acre tract of land. The Windy Acres project will have 89 physical units but currently there is no sewer and water available. As such, the Windy Acres project is subject to a “durational adjustment,” which is a deferral of the project until sewer and water becomes available. While both utilities are very close to the site, capacity still needs to be obtained. This is the same location on Main Street which has been proposed for up to 150 units over the years
- The 108 Alton Place project: This is located at 108 Alton Place on the west side of the Beaverbrook neighborhood on a 16-acre lot currently developed with only one single family home. It is an inclusionary development of 138 units of which 28 (20%) will be set aside as affordable housing. This is a density comparable to other developments in Beaverbrook and it will be constructed to blend with them. As with Windy Acres, utilities are in the adjacent streets but capacity needs to be obtained for both water and sewer. Thus, the 108 Alton Place project is also subject to a durational adjustment.
- The Headley Farm project. The Headley Farm project is a 400-unit inclusionary development proposed on a 155-acre parcel which would generate 104 affordable units (an extraordinary high 26% set aside). This site was previously approved for 21 large single family homes and has been graded with roads already installed. This project would rely on on-site utilities and will also require it’s inclusion in a new Highlands Center. A development of this size will generate significant traffic and so improvements at the junction of Petticoat Lane and Route 22 are envisioned. This project lies above and close to the Annandale train station. Pedestrian access to the station, and emergency vehicle (ONLY) access through the station to this project are envisioned.

What other projects were discussed with developers? A number of other projects were discussed with developers, two of which warrant discussion here:

- A 491-unit garden apartment/townhouse inclusionary development was proposed by an intervenor in our court action on Block 82, Lot 54, a 93-acre lot. This parcel has a flag on Allerton Road and touches Smoke Rise Lane, both of which were proposed as entrances to the development. Additionally, the lot is heavily impacted by environmental features such as wetlands and Highlands water protection buffers. The proposal included 90 units of affordable housing (a set-aside of only 18%). The Township Council and Planning Board rejected this project as inappropriate.
- The owner of the Beaver Brook Golf Course proposed an inclusionary project on Block 79.02, Lot 9, the 77-acre southern portion of the golf course. The northern part of the course would be retained as a 9-hole course. No specific parameters were advanced by the owner. The Township Council and Planning Board rejected this project as inappropriate.

What are the next steps? As indicated above, a fairness hearing has been scheduled for February 12, 2018 which will be conducted by Judge Miller, the Judge having jurisdiction over our case. The purpose of the fairness hearing is for the court to determine if the settlement agreement is fair and reasonable. If so, the court will approve it. Any member of the public may attend the hearing which will be held in the Somerset County Courthouse. Any member of the public, any developer interested in constructing affordable housing in the Township, and any organization in favor of or against affordable housing may participate if they follow the procedures set out in the Notice of the Fairness Hearing which the Township special affordable housing attorney will have published in the newspaper and which we will post on the Township website. Assuming that Judge Miller approves the settlement agreement after the fairness hearing as fair and reasonable, a so-called “Compliance Hearing” will then be conducted by Judge Miller approximately 120-days later to review and approve the zoning ordinances that by then will be adopted to implement the settlement to determine whether those ordinances and the overall compliance plan creates a “realistic opportunity” to produce the affordable housing needed to satisfy the Township’s obligations. Before the compliance hearing, there will be hearings before the Planning Board and Township Council on the adoption of an amended Housing Plan Element of the Master Plan, Fair Share Plan, and amended Land Use Plan. After the compliance hearing, assuming that Judge Miller approves the compliance plan and proposed ordinances, there will be hearings before the Planning Board and Township Council on the adoption of the implementing zoning ordinances. Finally, before any project is constructed, there will be hearings before the Planning Board on applications for site plan approval.

As new information becomes available, this document will be updated and/or additional explanatory documents will be posted on the Township web site.