FAIR SHARE HOUSING CENTER

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Via eCourts
Hon. Robert J. Mega, J.S.C.
Union County Superior Court
2 Broad Street, 14th Floor Tower
Elizabeth, NJ 07207

Re: In the Matter of the Township of Cranford, County of Union,
Docket No. UNN-L-3976-18

Dear Judge Mega:

In accordance with the November 15, 2019 order please accept this letter on behalf of Fair Share Housing Center (FSHC) in support of the settlement agreement between FSHC and the Township of Cranford and in opposition to the objections filed on behalf of Hartz Mountain Industries, Inc., H-Conduit LP, and H-Cranford Credit LP (Hartz). FSHC requests that Your Honor approve this agreement as fair and reasonable to the interests of low and moderate-income households for the following reasons:

A. The Morris County Fair Housing and East/West Venture cases establish the legal framework for analyzing the settlement.

The settlement agreement between FSHC and Cranford is fair and reasonable when reviewed under the standards of Morris County Fair Housing v. Boonton Township, 197 N.J. Super. 359 (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 (App. Div. 1996). These two cases establish the framework upon which a court must review settlement of Mount Laurel litigation. The court in East/West found that the analysis a court undertakes in considering a Mount Laurel settlement 1) involves a consideration of the number of affordable housing units being constructed, 2) the methodology by which the number of affordable units has been derived, 3) any other contribution being made by the developer to the municipality in lieu of affordable units, 4) other components of the agreement which contribute to the municipality's satisfaction of its constitutional obligation, and 5) any other factors which may be relevant to the "fairness" issue. East/West, supra, 286 N.J. Super. At 328-329. See also, Morris County, supra, 197 N.J. Super. at 371-73, 484 A.2d 1302.

The Hartz objector's brief merely glosses over these two cases which are integral to and the foundation of any fairness hearing undertaken by the court. In its brief the objectors provide only block quotes, but no analysis, of the Morris County case, and even less for the East/West case. A true analysis of this agreement under those cases reveals that the agreement is fair and reasonable to lower income households.

First, the methodology utilized to derive Cranford's fair share obligations in this agreement weighs in favor of a finding that the agreement is fair and reasonable. The Township's Present Need (aka Rehabilitation Share) is set at 85

units. There does not appear to be an objection to the calculation of the Township's Present Need, but it is important to note that this was calculated by FSHC's expert, David N. Kinsey, PP, FAICP, and his calculation of Present Need was within one unit difference with the calculation from the Mercer County decision. The Township's Prior Round obligation is set in the agreement at 148 units. Likewise, there does not appear to be any objection as to the calculation of this number, but is it worth noting that this number was not negotiated by FSHC and Cranford and was instead set by COAH in its Prior Round rules. Finally, the Third Round fair share obligation utilized in this agreement was 440. The methodology used to derive the Township's fair share obligations is founded in the Mercer County Opinion of Judge Jacobson. This decision was the result of a 40 plus day trial and resulted in a thorough, comprehensive 219-page decision. While not the only judicial decision on the methodology in the State, nor the only methodology considered, it has been accepted by judges in several vicinages as the basis for fair and reasonable settlement agreements.

It is important to note that an additional consideration in this agreement is the Township's eligibility for and utilization of a vacant land adjustment as permitted under COAH's Prior Round rules. The Township's Third Round fair share obligation in this agreement is broken out into its realistic development potential (RDP) and unmet need. The Township is

required to satisfy its RDP entirely and to provide mechanisms to address unmet need. In this agreement the Township has done both.

Second, the consideration of the amount of affordable housing units provided weighs in favor or approval of the agreement. The Township proposes to address its Present Need via the Union County rehabilitation program and a supplemental municipally sponsored program. The Township in this agreement has provided for satisfaction of its entire Prior Round fair share obligations utilizing affordable housing units which are constructed or close to completing construction. The Township in this agreement will address its Third Round RDP of 190 utilizing a variety of existing, under construction, and proposed affordable housing units. The Township's plan to satisfy its RDP is well-rounded in that it includes a variety of affordable housing types including family rental housing, age-restricted rental housing, supportive housing for several different populations, and a market to affordable program. The Township's plan to address its unmet need is also substantial in that it provides several opportunities for redevelopment at a variety of densities from 12 du/a up to 35 du/a and requiring a 20% set-aside.

Third, the final three issues for discussion under the East/West case all weigh in favor of approval here. The agreement provides for, among other things, the Township to greatly exceed its minimum requirements for rental housing and

family rental housing. It includes check-ins to ensure that many of the various components of the agreement are actually constructed and in the event that they are not constructed that there are replacement mechanisms. The agreement provides for the Township to adopt the appropriate zoning and a Housing Element and Fair Share Plan including a spending plan and updated affirmative marketing plan. The agreement also provides for specific steps to ensure groups in Cranford's housing region with an interest in affordable housing receives notice when homes are built, and provides for Cranford to leave its plan in place and continue to implement it even in the case of future potential changes in law. All of these features of agreements have commonly been approved by courts as relevant to the East/West factors.

The objector's failure to analyze the governing case law is a glaring omission. The objector's complaints about the plan, absent an analysis of the appropriate legal framework, do not amount to a basis for rejecting the settlement.

B. The Township's Third Round RDP was calculated in accordance with applicable law. It is fair and reasonable to include the Hartz site in RDP.

i. The Hartz site is appropriately calculated into the RDP.

The agreement between FSHC and the Township includes a calculated RDP of 131 units for the Third Round. The vacant land analysis undertaken by the Township to arrive at this RDP was completed in accordance with the Prior Round rules at

N.J.A.C. 5:93-4.2. The Township analyzed sites to "determine which sites are most likely to develop for low and moderate income housing." N.J.A.C. 5:93-4.2(d). In doing so, the Township analyzed all vacant sites and sites that are likely to redevelop. The Prior Round regulations characterize these redevelopment types of sites as those that are "devoted to a specific use which involves relatively low-density development would create an opportunity for affordable housing if inclusionary zoning was in place." N.J.A.C. 5:93-4.2(d). The regulations also state that "these sites and others have the potential to develop or redevelop over time and, as such development takes place, the Council has determined that such sites shall contribute toward the housing obligation." N.J.A.C. 5:93-4.1(c).

The Hartz objectors claim that the Township's Third Round RDP was improperly calculated because it included the Hartz site in RDP rather than in unmet need. Objector Br. at 20., Bernard Report at 18. Tellingly, the objectors' brief fails to actually quote the applicable COAH regulation. The objectors claim that the Hartz site is "neither vacant nor developed with a low intensity use" and thus should not be calculated into the RDP. Objector Br. At 10. However, the rule provides that "In addition, the Council may determine that other sites, that are devoted to a specific use which involves relatively low-density development would create an opportunity for affordable housing if inclusionary zoning was in place." N.J.A.C. 5:93-

4.2(d). The plain language and intent of the regulation shows that the intent is to include in the RDP underutilized parcels that are likely to redevelop if inclusionary zoning in place, which the Hartz site plainly falls within. The objectors reading of the rule is such that only a limited type of underutilized sites should contribute to the Township's RDP and apparently that other underutilized sites must be used to address unmet need. The papers submitted by the objectors do not give examples of the low-density uses it contends would contribute toward RDP, just that the Hartz site is not one of them. The Hartz objectors elsewhere state that its site is one where "the Property is vacant, as the attractiveness of the Property for the permitted nonresidential uses has vanished and market consideration have changed over time." Objector Br. at 2. Further that, the last tenant "has vacated the building and that the existing building space is 100 percent vacant." Bernard Report at 18.

FSHC contends that this property is clearly relatively underutilized and would create an opportunity for inclusionary housing if rezoned and thus a prime candidate for redevelopment and thus inclusion in a calculation of RDP. While the objectors claim that this is a "shell game," the alternative they present also could create opportunities for "shell games" in which a municipality could claim that a clearly underutilized property should not be counted towards the RDP, and also that the municipality would be able to choose to address unmet need

through other sites. Thus, a clearly available property could be excluded in its entirety from a fair share plan based on an overly technical reading of that property purportedly not being "low-density." Or if what objectors mean in the alternative is that any such site simply must be rezoned as the owner wishes, which they appear to argue at p. 11 of their brief, it is hard to reconcile that principle with COAH's rules and longstanding practice on RDP and unmet need, as discussed further below.

ii. Cherry Hill, Livingston, and Fair Lawn are all distinguished from the present case.

The Hartz objectors seem to find meaning in these three cases as supporting its position. Aside from the fact that all three are municipalities in New Jersey and the cases involve redevelopment and affordable housing, the cases could not be more dissimilar.

First, in Fair Share Housing Center v. Cherry Hill, 173 N.J. 393 (2002), the Township had already received substantive certification with a vacant land adjustment from COAH when a large redevelopment project became available for development. In Cherry Hill, the Township (and the developer) argued that the fact of the preexisting substantive certification meant that the racetrack site must be off-limits for any contribution toward the Township's affordable housing obligations. Ultimately after a challenge from FSHC, the Supreme Court ruled that the post substantive certification change in municipal circumstances meant that the Township's RDP must be

recalculated. The Cherry Hill case was not a dispute concerning whether the racetrack site should be in the Township's RDP or in the unmet need, it was a dispute concerning whether the site would contribute to the affordable housing obligation at all. It is noteworthy that the site ultimately did go into the Township's RDP. Furthermore, the Supreme Court explicitly recognized in that case, through favorable quotation from an amicus brief filed by COAH, that the calculation of RDP and means to satisfy it are separate:

> After reviewing its vacant land adjustment rules, COAH concluded that the [Garden State Park (GSP)] property should be included in the Township's second-round plan and recalculation of the Township's RDP. However, it declined to speculate on whether or to what extent the GSP site was necessary to address the Township's RDP because "[t]he resolution of this issue requires Cherry Hill to calculate its second-round obligation and then create a plan to meet that obligation." It concluded that "[u]ntil this planning process occurs, the status of the [GSP] site and the appropriateness of any development fee to be imposed on the development of the site cannot be determined."
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> [Id. at 413-14.]

The Court remanded the matter to the trial court for consideration of whether the GSP site was needed to meet Cherry Hill's fair share obligations. In doing so, the Court noted, "Our holding here does not suggest that every available site in a municipality seeking substantive certification must be used for affordable housing." Id. at 415.

Second, Fair Lawn likewise is inapposite. In Fair Lawn the Borough included several redevelopment sites in its affordable housing plan for many years and then attempted to remove them when interested developers presented plans to develop these sites with affordable housing. In re Fair Lawn Borough, Bergen Cty., Motion of Landmark at Radburn, 406 N.J. Super. 433, 437 (App. Div. 2009). The Borough was in essence engaging in a bait and switch where it put together a paper compliance plan that it never intended to follow through on. COAH's dismissal of Fair Lawn, and the Appellate Division's affirmance of it, stemmed from that failure to implement the plan it had presented and had COAH approve, which is not the factual circumstance here.

Finally, Livingston, as noted by Objectors, involved a builder's remedy because Livingston failed to file a Third Round plan at all. Objectors Brief at 20. Certainly, when a municipality does not file a plan, site-specific relief to require rezoning a particular site is available. But again that is not the factual posture in the present case.

The Hartz objectors here argue that the law requires something that it does not and never has required; in essence that Hartz (and other similarly situated developers) are entitled to a de facto builder's remedy when a municipality requests a vacant land adjustment. Hartz argues that when large redevelopment sites become available for multi-family

inclusionary developments that these sites must be used and must be rezoned at whichever density is proposed by the site owner. The cases presented do not support that proposition. When municipalities engage in voluntary compliance as Cranford has here, there is significantly greater discretion in how and to what extent to utilize certain sites, and the standard for reviewing a settlement with a municipality that has immunity is quite different from reviewing a builder's remedy. The Court should reject the objections of Hartz and find that the settlement and the Township's overall plan is fair.

Thank you for your attention in this matter.

Respectfully,

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