



P.O. Box 236  
2 East Broad Street, 2<sup>nd</sup> Floor  
Hopewell, NJ 08525  
609-257-6705 (v)  
609-374-9939 (f)  
info@kylemcmamus.com

---

The Honorable Michael C. Gaus, J.S.C.  
Superior Court of New Jersey  
Sussex County Courthouse  
43-47 High Street, 2nd Floor  
Newton, New Jersey 07860

May 31, 2019

**Re: IMO the Application of the Township of Randolph**  
**Docket No: MRS-L-1640-15**

Dear Judge Gaus,

In accordance with your Order dated May 22, 2019, this letter reviews Randolph Township's draft April 10, 2019 Housing Element and Fair Share Plan (hereinafter the "Housing Plan"), related ordinances, the Motions to Revoke Immunity filed by Fair Share Housing Center (hereinafter "FSHC"), developer-intervenor LYS Realty Associates and Sport Realty Management Corp. (hereinafter "LYS"), and the municipality's history of efforts to comply with its affordable housing obligation.

The Township's Housing Plan was required to be filed with the Court pursuant to a January 25, 2019 Order issued by the Hon. Maryann L. Nergaard. This Housing Plan, filed on April 30, 2019, addresses the rehabilitation obligation, prior round obligation, and third round obligation with a variety of affordable housing strategies. Subsequent to the Township's April 30, 2019 submittal of the Housing Plan, FSHC and LYS on May 8, 2019 filed motions to revoke Randolph Township's immunity.

Please see page 12 herein for a summary of findings and recommendations regarding the Township's Housing Plan.

### **Randolph's Compliance History**

The Township has a history of adopting housing plans and seeking compliance from COAH. The Township received first round substantive certification from COAH in 1987 and 1988. The Township petitioned COAH for second round substantive certification in 1995 and received a report from COAH requesting additional information in 2000. In response, the Township provided an updated plan and information in 2001. The Township later adopted housing plans in 2003 and 2004, with the 2003 housing plan addressing the prior round obligation and the 2004 housing plan addressing COAH's 2004 third round rules. COAH issued a report requesting additional information in 2005. The Township adopted another third round housing plan in 2010 but was unable to receive substantive certification before the applicable substantive rules were overturned by the Court.



Subsequent to the Mount Laurel IV decision, the Township filed a Complaint for Declaratory Judgment on July 2, 2015<sup>1</sup>. The Township has four intervenors currently – LYS, Canoe Brook Development LLC, American Properties and KAB Associates. Due to a lack of water supply, the Court imposed a scarce resource restraint in a June 6, 2018 Amended Consent Order Imposing Scarce Water Resources Restraints that sets forth the Township’s limited water resources and how it may be allocated.

The Housing Plan was submitted pursuant to an Order dated January 25, 2019 that required the Township to submit a “draft updated Housing Element and Fair Share Plan (“Plan”) with all of the supporting information required by law”.

### **Randolph’s Housing Plan**

As will be more fully detailed in this letter, the Housing Plan addresses the rehabilitation obligation, prior round obligation, and third round obligation with a variety of affordable housing strategies. Integral to the portion of the Housing Plan that addresses the third round obligation, is the Township’s prior receipt of a scarce resources order on June 6, 2018 which sets forth the Township’s limited water resources and how it may be allocated.

### **Satisfaction of the Rehabilitation Obligation**

The 33-unit rehabilitation obligation cited in the Housing Plan is consistent with the methodology determined by the Hon. Judge Jacobson, A.J.S.C. in her March 2018 decision, In the Matter of the Application of the Municipality of Princeton, Docket. No. MER-L-1550-15 (Law Div., Mercer Cty., March 29, 2018). The obligation was extrapolated and applied to all New Jersey municipalities by Econsult Solutions, in “Statewide and Municipal Obligations Under Jacobson Opinion”. The Township must seek settlement of the rehabilitation obligation with FSHC or an adjudication of the obligation should it wish to utilize the 33-unit obligation.

The Township proposes to participate in the Morris County Housing Rehabilitation Program to satisfy this obligation. However, since County programs such as that in Morris County are only available to homeowners, the Township will also be required to establish a municipally-operated rehabilitation program that is available to renter-occupied households (N.J.A.C. 5:93-5.2(f)). Note that the municipality may also satisfy all or a portion of the rehabilitation obligation with “new construction” affordable units (N.J.A.C. 5:93-5.1).

The Township should provide additional detail indicating how the rehabilitation obligation will be satisfied and provide the necessary documentation in support, consistent with the standards in N.J.A.C. 5:93-5.2. The following items are necessary should the obligation be met via participation in the County program and operation of a municipal program:

- Contract with the County for participation in the Morris County Housing Rehabilitation Program;
- Contract with an organization to operate the municipal program; and
- Operating manual for the County and municipal programs.

---

<sup>1</sup> The “Mount Laurel IV” decision refers to On March 10, 2015 the N.J. Supreme Court delivered In the Matter of the Adoption of N.J.A.C. 5:96 and 5:97 by the New Jersey Council on Affordable Housing, 221 N.J. 1 (2015)



**Satisfaction of the Prior Round Obligation**

The Township has a variety of affordable units that contribute toward meeting the prior round obligation. However, the Housing Plan does not indicate how the 261 unit obligation, including the rental obligation, will be satisfied. Instead, it cites an Order issued by the Hon. Stephan C. Hansbury, P. J. Ch. on October 10, 2018 that states, “the Township of Randolph satisfied its entire 261 unit prior round (1987-1999) affordable housing obligation as of 2005”. Notwithstanding reliance on this Order, the Housing Plan acknowledges on page 5 that additional information may be necessary to confirm compliance.

The Order does not appear to absolve Randolph from indicating how the prior round obligation is satisfied now in 2019 since it specifies the obligation is satisfied “as of 2005” and does not make specific findings as to which units shall be reserved for that portion of the obligation. Note that “as of 2005” corresponds to the most recent COAH report addressing the Township’s compliance.

While the Housing Plan does not identify the units proposed to meet the prior round obligation, it does identify all previously constructed or approved projects. The following table *assumes* those units which are proposed to meet the prior round obligation based on projects identified in the Housing Plan that are not proposed for third round credit. This table also *assumes* the Township is eligible for maximum bonus credits, which appears likely given the number of rental affordable units. As shown in the table, it appears the Township has surplus credits that may be carried over to the third round. This should be verified and amended as necessary as part of an updated housing plan.

Satisfaction of the 261-Unit Prior Round Obligation						
Name	Program Type	Unit Type	Sale / Rental	Units	Bonus Credits	Credits
Canfield Mews	Inclusionary Zoning	Family	Rental	38		38
Arrowgate	Inclusionary Zoning	Family	Rental	27		27
India Brook	Prior Cycle Credits	Age-restricted	Rental	100		100
Woodmont	Inclusionary Zoning	Family	Sale	40		40
Brookside Village	Inclusionary Zoning	Family	Rental	10		10
Peer Group Housing	100% Affordable	Special Needs	Rental	4		4
ARC Much Dignity House	100% Affordable	Special Needs	Rental	6		6
Skylands Group Home	100% Affordable	Special Needs	Rental	4		4
School House Group Home	100% Affordable	Special Needs	Rental	5		5



Satisfaction of the 261-Unit Prior Round Obligation						
Name	Program Type	Unit Type	Sale / Rental	Units	Bonus Credits	Credits
Bonus Credits	n/a	Family or Special Needs	Rental	0	66	66
<b>Total</b>				<b>234</b>	<b>66</b>	<b>300</b>

The Township should provide detail on how the prior round obligation will be satisfied. This should include identification of each project, the number of affordable units and bonus credits for each project proposed to contribute. While COAH’s 2005 report does indicate these sites meet COAH criteria, the continued affordability and satisfaction of income and bedroom distribution requirements should be verified for compliance with the applicable standards such as the Uniform Housing Affordability Control Rules (N.J.A.C. 5:80-26.1.). Unfortunately, in my experience COAH reports have indicated units are eligible for credit without reviewing such information. It is unclear from the 2005 report if detailed information was reviewed and it does not appear the information was reviewed as part of the 2018 Order. Such verification can be done with the unit and project monitoring information that was required to be submitted to COAH, or similar documentation.

**Identification of the Third Round Obligation**

The Housing Plan fails to identify a third round obligation that is consistent with the methodology set forth in N.J.A.C. 5:93 or the various court decisions on the topic, most notably and recent the March 2018 decision, In the Matter of the Application of the Municipality of Princeton, Docket. No. MER-L-1550-15 (Law Div., Mercer Cty., March 29, 2018). Instead, the Township suggests the third round obligation should be based on available water *in Randolph and its ability to serve its affordable housing sites*. This is distinguishable from the accepted methodology and direction from the Supreme Court in Mount Laurel IV, which, very generally, calculates the obligation based on the *regional need for low and moderate income housing*.

Rather than utilizing the appropriate methodology and compliance mechanisms, as required by the January 25, 2019 Order, the Housing Plan relies on the scarce resource order and a request for a waiver from using an entire resource of land for addressing its obligation (N.J.A.C. 5:93-4.5). The Housing Plan, on page 26, provides the following additional detail:

*Overall, the total obligation is broken down under Table B, which shows that there are: a) one hundred and twenty-five (125) surplus credits from previously constructed units that may be applied to the Third Round obligation; b) twenty-seven (27) rental bonus credits; c) up to forty (40) affordable units from sites in the Dover service area; d) up to seventeen (17) affordable units from sites listed in Appendix A of the SRO; and e) fifty-four (54) units from sites not listed within the SRO. Therefore, the Township has determined that due to its limited water capacity it is able to realistically provide inclusionary zoning revisions that generate a total third round affordable*



housing obligation of two-hundred and sixty-three (263) affordable housing units, with the new construction obligation portion of that adjusted number being one-hundred and eleven (111).  
(Emphasis added)

It appears the Township proposes to provide 263 credits toward the third round obligation; this includes 111 new affordable units and 152 existing or previously approved units. As a result, the Township proposes a 263 unit third round obligation. Note also that the Township is proposing one overlay district and a mandatory set-aside ordinance as additional mechanisms. As stated in the above excerpt, the Housing Plan suggests that the calculation of the third round obligation is based only on the development that can be accommodated given the available water. This method of calculating the third round obligation is inconsistent with COAH's substantive rules (N.J.A.C. 5:93), and therefore the Mount Laurel IV decision since in that decision the NJ Supreme Court directed the Trial Courts to continue to rely on the Second Round rules, with certain specific exceptions that do not apply to this issue.

Identification of the obligation consistent with the prior round methodology and applicable case law is critical to determining if the Township has met its fair share obligation, including sub-components of the obligation such as the rental obligation. It is a detriment to this process and the needs of the region's low and moderate income households that Randolph failed submit a housing plan consistent with accepted methodology, relevant case law, decades of compliance oversight by COAH, and the approximate 200 settlements with FSHC that have occurred since March 2015.

It should also be noted that the calculation of capacity for only 111 new affordable units may be inconsistent with the intent of the June 6, 2018 Amended Consent Order Imposing Scarce Water Resources Restraints. The Order states no new connections to the water system or allocations of water demand are permitted except for certain categories of single-family homes and those projects set forth in Table A. However, a September 11, 2018 letter from the Township Engineer, Paul Ferriero, PE, which supports the 263 unit obligation also reserves water capacity for nonresidential uses and the school. These reservations are appropriate for the waiver request (see below for more detail on the waiver) and would need to be supported by the waiver criteria set forth in N.J.A.C. 5:93-4.5. Additionally, it appears the Township is proposing to utilize water from the Town of Dover to support 40 affordable units (Gateway Apartments, EA Porter site, and the Morris County Housing Authority site); however, that available water capacity is specifically not addressed in the September 11<sup>th</sup> Engineer's letter. While it is certainly positive that this water is available for affordable housing construction in Randolph, its availability and use should be confirmed and explored in an amended Engineer's letter.

The 263 credits should be compared to the 643 unit obligation calculated pursuant to the March 2018 decision, In the Matter of the Application of the Municipality of Princeton, Docket. No. MER-L-1550-15 (Law Div., Mercer Cty., March 29, 2018) and to the 1,054 unit and 1,447 unit obligations calculated by FSHC<sup>2</sup>. Since the March 2018 decision many municipalities have settled for the obligation calculated pursuant to that decision, or some upward

---

<sup>2</sup> FSHC commissioned Dr. David Kinsey to prepare a fair share methodology which would calculate the regional need for the 1999-2025 period and allocate that housing need to the constituent municipalities in each housing region. As part of this effort, Dr. Kinsey authored several reports with variations to his methodology that have been submitted to various Superior Courts. The statewide report dated May 2016 allocated Randolph a Third Round obligation of 1,131 units and the statewide report issued in July 2016 stated a third round obligation of 1,447 units.



adjustment of it. As such, Randolph’s proposed third round obligation is at least 380 units less than the obligation extrapolated from the March 2018 decision and which it may have the ability to settle upon.

The fact that Randolph does not have adequate water to fulfill its obligation is not unique in New Jersey. There are many municipalities around the state that have been the subject to similar scarce resource orders – including those in the Highlands region. Additionally, such lack of infrastructure is specifically anticipated and accommodated in COAH’s rules regarding a durational adjustment, with N.J.A.C. 5:93-4.1(a) stating the following:

*Subchapters 2 and 3 delineate the criteria for determining the municipal housing obligation. However, there may be instances where a municipality can exhaust an entire resource (land, water or sewer) and still not be able to provide a realistic opportunity for addressing the need for low and moderate income housing as determined by the Council. This subchapter outlines standards and procedures for municipalities to demonstrate that the municipal response to its housing obligation is limited by the lack of land, water or sewer.*

N.J.A.C. 5:93-4.3(c) goes on to state, “The lack of adequate capacity, in and of itself, shall constitute a durational adjustment of the municipal housing obligation. The requirement to address the municipal housing obligation shall be deferred until adequate water and/or sewer are made available.” This section, nor any other portion of COAH’s rules, do not permit a municipality to *change* the obligation to reflect the available infrastructure, water in this case. Instead, COAH’s rules create a process for the municipality to *defer* the obligation until if or when the infrastructure is available. While, this is referred to as a durational *adjustment*, it is not a permanent adjustment or change of the obligation. There are many municipalities who have received or are seeking a Judgment of Repose (or previously substantive certification) who do not have adequate sewer and/or water to meet their entire obligation, yet are satisfying the third round obligation pursuant to the durational adjustment standards. This applies to municipalities both in and out of the Highlands region. The application of a durational adjustment is fully appropriate and the intended compliance path for a municipality subject to a scarce resource order, such as Randolph.

Instead of eliminating a portion of the obligation, the durational adjustment creates affordable housing mechanisms that maximize use of the available infrastructure for affordable housing and create opportunities for further affordable housing should additional infrastructure (additional water capacity in this instance) become available. The durational adjustment rules (N.J.A.C. 5:93-4.3(d)) require the municipality to “reserve and set aside new water and/or sewer capacity, when it becomes available, for low and moderate income housing, on a priority basis”, “endorse all applications to the DEP or its agent to provide water and/or sewer capacity”, approve development that includes affordable housing that has been permitted by DEP, and include such sites in the housing plan.

The Township states a waiver, pursuant to N.J.A.C. 5:93-4.5, is requested rather than seeking a durational adjustment. The following is a complete excerpt of this waiver section in COAH’s rules:

*5:93-4.5 Waivers*

- (a) *The Council shall entertain waiver requests by motion, in accordance with N.J.A.C. 5:91-12 from municipalities seeking relief from the following requirements:*
- The use of an entire resource (land, water, sewer) in addressing the municipal housing obligation; and*



2. *The requirement to impose development fees on all development within the municipality.*
- (b) *The criteria for evaluating such a waiver request shall include one or more of the following:*
1. *Past inclusionary practices, measured by the following criteria: jobs to housing ratio; municipal median income as compared to regional median income; and the percentage of low and moderate income households in the municipality as compared to the percentage in the housing region;*
  2. *A demonstration of hardship. To demonstrate hardship related to the imposition of development fees, the municipality shall, at a minimum, document that the imposition of development fees would retard necessary economic development within the municipality. To demonstrate hardship related to utilizing all available land, water and sewer capacity, the municipality shall (where applicable), at a minimum, document prospects for obtaining additional capacity and the public good realized by allowing competing land uses a reservation of the limited capacity; or*
  3. *A demonstration that the municipality has actively pursued its municipal housing obligation by petitioning for certification prior to litigation.*

The Housing Plan does not address the above cited criteria in support of the waiver request. Regardless, it does not appear the waiver provision has been applied properly. The Township seeks relief from identifying and fulfilling its obligation; however, the waiver provision in N.J.A.C. 5:93-4.5 is available to request relief from having to utilize all available water capacity for the purpose of creating affordable housing; it is not a waiver from the methodology or a waiver to eliminate a portion of the obligation. In receiving approval to provide water to single-family homes, it appears the Township has functionally already received the waiver.

The Township should identify a third round obligation, indicate if durational adjustment is requested, and indicate how the third round obligation will be fully satisfied using existing and planned affordable housing credits as well as a durational adjustment as outlined in N.J.A.C. 5:93-4.3.



### Satisfaction of the Third Round Obligation

The Township identified the following 263 credits for the third round obligation.

Credits Contributing Toward the Third Round Obligation						
Name	Program Type	Unit Type	Sale / Rental	Units	Bonus Credits	Credits
Existing Affordable Units						
Woodmont	Extension of Controls	Family	Sale	40		40
Boulder Ridge	Inclusionary Zoning	Family	Sale	17		17
Grecco Realty	Inclusionary Zoning	Age-restricted	Rental	5		5
Rose of Sharon	Inclusionary Zoning	Family	Rental	1		1
Bennet Avenue	100% Affordable	Family	Rental	32		32
Morris County Affordable Housing Corp.	100% Affordable	Family	Rental	6		6
Habitat House (59/15)	100% Affordable	Family	Sale	1		1
Habitat House (134/3.02)	100% Affordable	Family	Sale	1		1
Habitat House (134/9)	100% Affordable	Family	Sale	1		1
High Avenue House	100% Affordable	Special Needs	Rental	4		4
Our House	100% Affordable	Special Needs	Rental	3		3
Sunrise	Assisted Living	Age-restricted	Rental	8		8
Brightview	Assisted Living	Age-restricted	Rental	6		6
Proposed Affordable Units						
Randolph Mountain	Inclusionary Zoning	Family	Sale	7		7
KAB Mount Freedom	Inclusionary Zoning	Family	Rental	10		10





Credits Contributing Toward the Third Round Obligation						
Name	Program Type	Unit Type	Sale / Rental	Units	Bonus Credits	Credits
Canoe Brook	Inclusionary Zoning	Family	Rental	20		20
Elbaum Site	Inclusionary Zoning	Family	Rental	4		4
Avalon Bay	Inclusionary Zoning	Family	Rental	30		30
Gateway Apartments	Inclusionary Zoning	Family	Rental	13		13
EA Porter	100% Affordable	Family	Sale	25		25
Morris County Housing Authority	100% Affordable	Family	Sale	2		2
Bonus Credits	n/a	Family or Special Needs	Rental	0	27	27
<b>Total</b>				<b>236</b>	<b>27</b>	<b>263</b>

In addition to the above credits, which are proposed to present a realistic opportunity, the Township proposed two additional mechanisms to capture additional affordable housing opportunities that may arise – overlay zoning of Block 196, Lots 2, 3, 4, and a mandatory set-aside ordinance.

Apart from Randolph Mountain at 20% and the Elbaum site at 18.2%, the Township is proposing only 15%-16% affordable housing set-asides for the proposed inclusionary housing projects. The Township should seek set-asides of not less than 20% in order to maximize the amount of affordable housing units that may be created from the limited water availability.

The following identifies the additional information that is necessary to confirm the credits in the above table. The various additional information is required by COAH’s rules, N.J.A.C. 5:93, and/or the UHAC rules, N.J.A.C. 5:80-26.1 et seq. The following also identifies any other concerns for each applicable project.

- Existing Units Addressed in COAH’s 2005 Report. As stated above for the prior round units, the Township should verify the continued affordability and compliance with income and bedroom distribution requirements. This verification can be done with the unit and project monitoring information that was required to be submitted to COAH, or similar documentation.
- Existing Units Not Addressed in COAH’s 2005 Report. This category includes the assisted living facilities and the 100% affordable housing projects, except for Bennet Avenue and Morris County Affordable Housing Corp.
  - Assisted living facilities. The Township must provide the crediting documentation set forth in



N.J.A.C. 5:93-5.16. This includes verification of the license and Medicaid beds, as well as 30 year affordability controls

- 100% Affordable Housing Projects. The Township must provide evidence of proper administration, affordability controls, affirmative marketing, and compliance with the income and bedroom distribution requirements.
- Proposed Affordable Units - All. The Township will need to provide a draft or adopted ordinance for each site, and detail compliance with administration and affirmative marketing requirements.
- KAB Mount Freedom. The Township's site suitability discussion should address the Highlands Open Water Buffer which encompasses most of the site. The Highlands RMP, as well as the Township's draft Highlands Area Land Use Ordinance, provides standards for development within the buffer. The buffer's inclusion on the map suggests relevance for the Township's decision making for the site; the Housing Plan should provide detail.
- Canoe Brook. The Housing Plan proposes construction of 129 units on the site, whereas 190 units have been proposed by the developer. While mediation often results in settlement with a development smaller than that which was originally proposed by the developer, it is unclear if a reduction of approximately one-third of the units would create a realistic opportunity. It is unclear from the Housing Plan whether the density was limited due to the available water or due to character concerns. It does not appear the site configuration or environmental constraints are limiting factors. Mr. Kasuba, representing Canoe Brook, in a May 24, 2019 letter states the proposed 190 units does not exceed the water allocation for the site if an alternative bedroom distribution is utilized for the market rate units. It goes on to state the Township assumes three-bedroom market rate units but that Canoe Brook's proposal is for a mix of bedrooms with only 30% of the market units having three bedrooms. The Township's engineer should verify this or provide alternative supporting information. Should water be available for the 190 units, the Township should consider the additional development on the site since doing so will increase the supply of affordable housing available to low and moderate income households without increasing the necessary water allocation.
- The Elbaum Site. The Township's discussion of this site should address how the proposed zoning creates a realistic opportunity where there are existing uses. Review of tax records indicate that the lots are developed residentially.
- Avalon Bay. The Housing Plan proposes construction of 200 units on the site, whereas 300 units have been proposed by the developer. While mediation often results in settlement with a development smaller than that which was originally proposed by the developer, it is unclear if a reduction of one-third of the units would create a realistic opportunity, particularly given the fact that the site is occupied by a catering facility. This concern is in part supported by the May 13, 2019 letter from Mr. Inglesino, representing Avalon Bay, stating the reduction is "unacceptable". Additionally, this May 13<sup>th</sup> letter outlines how the water capacity assigned to the site does not properly account for the water allocation for the existing use and states the 300 unit project would yield a total peak demand that is less than the current peak demand for the existing and approved facilities on the site. The Township's engineer should verify this or provide alternative supporting information. Should water be available for the 300 units, it seems the Township should provide for additional development on the site since the Housing Plan only identifies water capacity as the factor which should constrain density on the site.



- Gateway Apartments. The Township should increase the set-aside to 15%; with 13 of 88 units reserved for affordable housing the set-aside is only 14.77%. Additionally, the Township should provide site suitability for this proposal. While the site appears suitable for the use since it currently occupied with a multi-family development, site suitability analysis is needed to determine adequate land, road access, parking and any environmental limitations. Additionally, the Township should consider obtaining a letter demonstrating a firm commitment for construction of rental units from the property owner; doing so would make the units eligible for bonus credits.
- Bonus Credits. The Township is taking bonus credits based on 25% of the new 111 affordable units it finds it has water capacity for. These bonus credits presumably reflect the rental obligation the Township believes it must meet. The Housing Plan must identify those specific units proposed for bonus credits in order to determine eligibility for said credits. Additionally, the rental obligation (and therefore eligible bonus credits) should be based on the entirety of the third round obligation (i.e. 25% of 263 pursuant to the Township's Housing Plan).

In addition to simply meeting the total obligation, municipalities are required to meet sub-components of the obligation. Except for the very low income obligation, the Housing Plan does not address these requirements but should be amended to do so. The following lists summarizes these requirements and provides any necessary commentary.

- **Minimum Rental Units / Maximum Rental Bonuses:** 25% of the obligation, rounded up. While the Township proposed 27 bonus credits and this presumably reflects the proposed rental obligation, these requirements should be specifically addressed in the Housing Plan and should be based on the entire third round obligation.
- **Maximum Age-Restricted Units:** 25% of the obligation, rounded down.
- **Minimum Family Units:** Family housing is not specifically required in N.J.A.C. 5:93; however, it is my experience and understanding that all settlement agreements with FSHC provide minimum family housing in the amount of 50% of the third round obligation, 50% of the third round rental obligation and 50% of the very low obligation. The Township should address family housing if it wishes to seek a settlement with FSHC on the obligation and the compliance plan.

### **Administration and Trust Fund**

The Housing Plan states the Township will prepare a new affordable housing ordinance and affirmative marketing plan, as well as a new development fee ordinance and spending plan. These items are required by law and should be included in the next submission unless otherwise indicated by the Court.



## Summary of Findings and Recommendations

The following summarizes the finding and recommendations above regarding the Township's Housing Plan. These findings and recommendations should be reflected in an Amended Housing Plan.

1. The Township should provide additional detail indicating how the rehabilitation obligation will be satisfied and provide the necessary documentation in support, consistent with the standards in N.J.A.C. 5:93-5.2. The following items are necessary should the obligation be met via participation in the County program and operation of a municipal program.
2. The Township should indicate how the prior round obligation will be satisfied. This should include identification of each project, the number of affordable units and bonus credits proposed to contribute.
3. The Township should provide the necessary documentation to confirm compliance of the prior round units with the applicable standards such as the Uniform Housing Affordability Control Rules (N.J.A.C. 5:80-26.1.).
4. The Township should identify a third round obligation consistent with the prior round methodology and applicable case law and provide justification for it.
5. If the third round obligation cannot be fulfilled due to a lack of water availability, the Township should request a durational adjustment pursuant to N.J.A.C. 5:93-4.3.
6. The Township should seek increased affordable housing set-asides of not less than 20% from the proposed inclusionary housing sites.
7. The Township will need to provide a draft or adopted ordinance for each proposed affordable housing site, and detail compliance with administration and affirmative marketing requirements.
8. The site suitability discussion for the KAB Mount Freedom site should address the Highlands Open Water Buffer.
9. The Township should consider additional density for the Canoe Brook site that can be accommodated given the available water and based on an alternative bedroom distribution for the market units as indicated by the developer.
10. The Housing Plan should provide detail on how the Elbaum site creates a realistic opportunity.
11. The Township should verify the additional water available to the Avalon Bay site and, if verified, the Housing Plan should increase the density to maximize construction of affordable units on the site.
12. The Housing Plan should increase the set-aside and address site suitability for the Gateway Apartments site.
13. The Housing Plan should address subcomponents of the third round obligation such as the rental obligation, maximum senior units, and – if settlement with FSHC is desired – minimum family units.



### **Motions to Revoke Immunity filed by FSHC and LYS**

Both FSHC and LYS state the Township's immunity should be revoked, largely due to the Township's lack of identification of a third round obligation that is consistent with N.J.A.C. 5:93, misuse of the requested waiver, lack of request for a durational adjustment, and lack of fulfilling the third round obligation pursuant to the applicable COAH rules (N.J.A.C. 5:93). These concerns are reflected in the comments above regarding the Township's Housing Plan.

The Supreme Court made it clear that while trial Courts should be "generously inclined" to grant applications for temporary immunity during the review of municipal plans, that review should not be "unreasonably protracted." 221 N.J. at 26. As stated below, the Supreme Court instructed the Trial courts to authorize exclusionary zoning actions seeking a builder's remedy if the municipality is "determined to be constitutionally noncompliant."

*The courts should endeavor to secure, whenever possible, prompt voluntary compliance from municipalities in view of the lengthy delay in achieving satisfaction of towns' Third Round obligations. If that goal cannot be accomplished, with good faith effort and reasonable speed, and the town is determined to be constitutionally noncompliant, then the court may authorize exclusionary zoning actions seeking a builder's remedy. 221 N.J. at 33 (emphasis added)*

A loss of immunity is the most devastating consequence for a municipality involved in this process. While I share these concerns raised about the Township's Housing Plan and recognize it's been more than 4 years since the Mount Laurel IV decision, it should also be recognized the Township met the deadline to submit a housing plan imposed by the Court and that the Township appears in all likelihood to qualify for a durational adjustment. Not only does the durational adjustment provide a clear path toward compliance, but the Township should be able to accomplish it quickly given the available data regarding water availability and the proposals to provide affordable housing by the various developers.

An Order issued on May 22, 2019 by Your Honor states the Township shall file a response to this report and the motions to revoke immunity by June 14, 2019, that replies to all shall be filed by FSHC and LYS by June 21, 2019, and that the Motion hearing is scheduled for June 27, 2019. This schedule alone provides the municipality nearly one month to provide the additional information requested herein and to consider the guidance herein that a durational adjustment is the appropriate path for compliance. I recommend that the Township be given a short timeframe (perhaps 30 days) to submit an amended Housing Plan that meets the requirements of N.J.A.C. 5:93 (including identification of an affordable housing obligation consistent with the prior round methodology) as set forth herein to demonstrate compliance in meeting its constitutional obligation and also identification of likely (or perhaps existing at that time) settlement agreements with the various parties.

Additional comments on this topic may be requested and provided upon receipt for the Township's response and replies by FSHC and LYS.



Please do not hesitate to contact me with any question you may have.

Sincerely,

A handwritten signature in black ink, appearing to read "Elizabeth McManus". The signature is fluid and cursive.

Elizabeth McManus, PP, AICP, LEED AP

- C. Edward J. Buzak, Esq.
- Joshua Bauers, Esq.
- Richard Hoff, Esq.
- Robert Kasuba, Esq.
- Henry L. Kent-Smith, Esq.
- Irina B. Elgart, Esq.
- John P. Inglesino, Esq.
- Derek Orth, Esq.
- Bruce Snyder, Esq.