

**MASTER'S REPORT ON A SETTLEMENT AGREEMENT  
AND PRELIMINARY COMPLIANCE DETERMINATION  
FOR THE *MOUNT LAUREL* FAIRNESS HEARING  
BOROUGH OF EMERSON  
BERGEN COUNTY, NEW JERSEY**

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*IMO Application of the Borough of Emerson  
Docket No. BER-L-6300-15*

**March 16, 2018**

*Prepared for:*

**The Honorable Gregg A. Padovano, J.S.C.  
Superior Court of New Jersey  
Bergen County Justice Center  
10 Main Street  
Hackensack, NJ 07601**

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## 1.0 INTRODUCTION

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This report addresses a Settlement Agreement that is proposed to resolve Mount Laurel litigation through the establishment of a Third Round fair share obligation for the Borough of Emerson, Bergen County (“Borough” or “Emerson”) in the case entitled In the Matter of the Application of the Borough of Emerson, Docket No. BER-L-6300-15. In addition, the report reviews Emerson’s preliminary compliance summary as reflected in the terms of the Settlement Agreement (“Agreement”). This report has been prepared in light of the upcoming Fairness Hearing initially scheduled on January 24, 2018 and subsequently adjourned and rescheduled before the Honorable Gregg A. Padovano, J.S.C., on March 23, 2018.

The purpose of the Fairness Hearing is for the Court to determine whether the terms of the contemplated Agreement between the Borough of Emerson and Fair Share Housing Center (“FSHC”) are fair and reasonable to the interests of low- and moderate-income households within the region. I am writing in my capacity as Special Master appointed by the Honorable Menelaos W. Toskos, J.S.C., in the above-captioned matter per Court Order of September 4, 2015.

Emerson filed a Complaint for Declaratory Judgment on July 8, 2015 seeking a declaration of its compliance with the Mount Laurel doctrine and the Fair Housing Act, N.J.S.A. 52:27D-301 et seq., in accordance with the New Jersey Supreme Court’s March 10, 2015 decision In re N.J.A.C. 5:96 and 5:97, 221 N.J. 1, (2015). As a Mount Laurel Trial Judge for Bergen County, Your Honor directed Bergen County municipalities and FSHC to attempt to settle Third Round fair share obligations. Following a series of case management conferences, Emerson’s attorney, Wendy Rubinstein, Esq., and Joshua D. Bauers, Esq. and Adam M. Gordon, Esq. from FSHC engaged in settlement discussions that resulted in an agreement which established the Borough’s fair share obligation including a Third Round Rehabilitation Share of 20 units, a 74-unit Prior Round (1987-1999) obligation, and a 234-unit Third Round (1999-2025) Gap and Prospective Need obligation. As discussed in more detail below, the Borough has limited vacant developable land and, as such, continues to be eligible for a vacant land adjustment. The Borough’s 74-unit Prior Round obligation is reduced to a 20-unit Prior Round realistic development potential (“RDP”) and the 234-unit Third Round obligation is reduced to a 53-unit Third Round RDP, resulting in a combined Prior Round and Third Round unmet need of 235 units. Settling the Borough’s Third Round fair share obligation is clearly a preferable approach to resolving affordable housing disputes thereby minimizing the time and expense of a Court action.

Public notice of the Borough's fairness hearing was published in accordance with established Mount Laurel case law. The notice properly summarized the salient points of the Agreement, directed any interested members of the public to the Borough Clerk's office where they could review the Agreement, described the purpose of the Court hearing that was to be held on January 24<sup>th</sup> and subsequently adjourned by the court to March 23<sup>rd</sup>, and invited written comments on the Agreement to be filed no later than January 9, 2018.

In response to the public notice, the Borough received objections in a letter, dated January 8, 2018, from Richard P. De Angelis, Esq., the attorney representing 214 Kinderkamack, LLC ("214 Kinderkamack") and Delores Della Volpe, Trustee ("Della Volpe"), property owners in the Borough whose properties are located in a designated Redevelopment Area, which is included in the Borough's proposed preliminary compliance plan as a means to address its Third Round obligation. Della Volpe and 214 Kinderkamack are currently challenging the Borough's Redevelopment Area designation and potential proposed use of eminent domain in separate matters before the Court and also object to the inclusion of this redevelopment site in the Borough's Agreement with FSHC and, thus, as part of the Borough's proposed compliance plan, as not providing a realistic opportunity for the production of affordable housing. Both the Borough's counsel team (Wendy Rubinstein, Esq., Doug Doyle, Esq. and John Stone, Esq.) and Adam Gordon, Esq. of FSHC have filed responses to the objections. The objections and the responses will be specifically addressed in Section 6 of this report.

As discussed in detail below, this report recommends approval of the Settlement Agreement between FSHC and Emerson to the Court and recommends preliminary approval of the Borough's proposed fair share compliance measures.

## **2.0 BACKGROUND**

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During the First Round (1987 to 1993), Emerson did not petition the Council on Affordable Housing ("COAH") for substantive certification. Emerson was subsequently involved in a Mount Laurel lawsuit during the Second Round. In March 2000, an entity known as Community Developers and Management, L.L.C. ("Community Developers") filed litigation requesting builder's remedy relief.<sup>1</sup> On November 2, 2001, the Court issued an Interim Judgment that dismissed the case with prejudice and

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<sup>1</sup> Community Developers and Management, L.L.C. v. Borough of Emerson et al., Docket No. BER-L-2734-00

directed the Special Master, Dr. David N. Kinsey, to prepare a compliance plan for the Borough. The November 2001 Interim Judgment also approved a vacant land adjustment, which resulted in an adjusted Prior Round fair share obligation of 20 units based on a realistic development potential ("RDP") of 2 units for the Community Developers site and 18 units for a site known as Marek Farm.

On March 13, 2002, the Court ultimately declined to approve the Special Master's compliance plan and directed Emerson to prepare a Housing Element and Fair Share Plan. The Court conditionally approved the Borough's Plan on June 4, 2002. The Borough's 2002 Plan addressed the 20-unit RDP with a five-unit regional contribution agreement ("RCA") with Ridgefield Borough, a 10-bedroom group home, and five (5) associated rental bonuses. Additional compliance mechanisms implemented by the Borough included an Affordable Housing Regulations Ordinance, a Borough-wide overlay zone requiring a 20% affordable housing set-aside for any residential development with five (5) or more units, adoption of a Development Fee Ordinance, and adoption of a Spending Plan. The Development Fee Ordinance and Spending Plan were both approved by the Court. On April 16, 2004, the Court issued a Judgment of Compliance and Repose for a period of six (6) years from August 6, 2003.

On December 31, 2008, the Borough petitioned the Council on Affordable Housing ("COAH") for Third Round Substantive Certification. The Borough's 2008 Housing Element and Fair Share Plan proposed that the Borough's Prior Round (1987-1999) obligation of 74 units be reduced to zero (0) units by virtue of an updated vacant land adjustment. The Borough proposed to update their Development Fee ordinance and Spending Plan, along with creating Municipal Housing Liaison and Administrative Agent positions for the Borough and adopting an Affirmative Marketing Ordinance. The Ordinances updating the Development Fee Ordinance and creating the new positions were adopted on September 1, 2009. However, the Borough did not receive Third Round substantive certification prior to the invalidation of COAH's 2008 growth share approach by Judge Skillman's October 2010 Appellate Division decision, which was upheld by the New Jersey Supreme Court's September 2013 decision.

On March 10, 2015, the New Jersey Supreme Court issued a ruling on the Motion In Aid of Litigant's Rights (In re Adoption of N.J.A.C. 5:96 & 5:97 by N.J. Council on Affordable Housing, 221 N.J. 578 (2015)) filed by FSHC. Providing a new direction for New Jersey municipalities in their effort to comply with the constitutional requirement to provide their fair share of affordable housing, the Court transferred responsibility to review and approve housing elements and fair share plans from COAH to designated Mount Laurel trial judges. In adherence with the process laid out by the Supreme Court and the Superior Court, Emerson filed a Declaratory Judgment Motion on July 8, 2015 and a Plan Summary on December 2, 2015 with the Superior Court. The Borough was granted immunity by the Court from

exclusionary zoning lawsuits while it was negotiating the terms of the Settlement Agreement. The immunity remains in effect.

### **3.0 THE CONTEXT FOR REVIEW**

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Before addressing the Settlement Agreement, I would like to acknowledge the parties' efforts in achieving settlement of the Borough's Third Round fair share obligation. Settlement of Mount Laurel litigation including the establishment of the Borough's fair share – so long as it meets the appropriate standards for judicial approval – is clearly preferable to the adjudication of a builder's remedy dispute or other Mount Laurel dispute.

Among the most prominent advantages to settlement is that it creates a more civil atmosphere for the further interactions between the parties, such as the ongoing monitoring of the municipal means to address its fair share obligations. Cooperative working relationships increase the likelihood that FSHC and Emerson will be able to resolve differences during the monitoring period without resorting to Court action. In this way, settlements typically facilitate the local compliance process and thereby expedite the delivery of affordable housing.

The Agreement must be evaluated according to guidelines established by the Court in two principal cases: Morris County Fair Housing Council v. Boonton Twp. 197 N.J. Super. 359, 369-71 (Law Div. 1984) and East/West Venture v. Borough of Fort Lee 286 N.J. Super. 311 (App. Div. 1996). These cases require agreements in Mount Laurel litigation to be subject to a "Fairness Hearing." The scope of the Fairness Hearing was determined by the Appellate Division in a decision that upheld the hearing process conducted by then-Assignment Judge Peter Ciolino in East/West Venture, a case in which Philip Caton, PP, FAICP, served as Special Master. In its 1996 decision, the Appellate Court ruled that a settlement between a builder Plaintiff and municipal defendant in a Mount Laurel case may be approved by the Trial Court after a hearing which established that the settlement "adequately protects the interest of lower-income persons on whose behalf the affordable units proposed by the settlement are to be built" 286 N.J. Super. 311, 329 (App. Div. 1996). The Appellate Court provided specific factors for Trial Courts to consider in making fairness determinations. These factors, as modified for relevance in a case with a settlement between an intervener (FSHC) and a municipality, will be detailed in a subsequent section of this report.

Notwithstanding the continued uncertainty in the statewide affordable housing realm, I have endeavored to utilize the Second Round regulations of COAH to the greatest extent practicable in the course of this review for the Court. This approach will encourage uniformity in the interpretation of the Mount Laurel doctrine and is consistent with both legislative and judicial directives. The Fair Housing Act (P.L. 1985, c. 222) states,

*“The interest of all citizens, including low and moderate income families in need of affordable housing, would be best served by a comprehensive planning and implementation response to this constitutional obligation.” (N.J.S.A. 52:27D-302(c))*

Furthermore, the New Jersey Supreme Court, in its decision in The Hills Development Co. v. Town of Bernards, 103 N.J. 1 (1986) (commonly known as Mount Laurel III) upheld the constitutionality of the Fair Housing Act, and stated,

*“Instead of varying and potentially inconsistent definitions of total need, regions, regional need, and fair share that can result from the case-by-case determinations of courts involved in isolated litigation, an overall plan for the entire state is envisioned, with definitions and standards that will have the kind of consistency that can result only when full responsibility and power are given to a single entity.” (103 N.J. at 25)*

Lastly, in the decision, the Supreme Court also stated that to the extent that Mount Laurel cases remained before the courts,

*“...any such proceedings before a court should conform whenever possible to the decisions, criteria and guidelines of the Council.” (103 N.J. at 63)*

On March 10, 2015, the New Jersey Supreme Court delivered a unanimous decision In re Adoption of N.J.A.C. 5:96 & 5:97 by N.J. Council on Affordable Housing. This decision acknowledged COAH's inability or unwillingness to adopt administrative rules for the so-called “Third Round” of municipal affordable housing compliance. In the absence of regulatory guidance from COAH (or Legislative action), the decision instructs the Trial Courts to once again serve as the first resort for evaluating the constitutionality of municipal fair share plans.

While the Court has invalidated COAH's last two attempts to promulgate Third Round rules, the Second Round rules (N.J.A.C. 5:93) are still largely intact. In fact, these rules have been relied upon by the Trial Courts in numerous compliance and fairness hearings to evaluate the settlement agreements before the Court in order to promote the uniformity of approach which is evident in the Court's decision. I have

been guided by these principals of uniformity and consistency in the review of this Settlement Agreement.

#### 4.0 THE SETTLEMENT AGREEMENT

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I have reviewed the proposed Settlement Agreement between FSHC and the Borough of Emerson in the context of the required “Fairness” analysis. The Agreement was fully executed on November 28, 2017 by Mayor Louis J. Lamatina for the Borough and by Mr. Gordon for FSHC and was submitted to the Court and placed on file in the Borough Clerk’s office for public review.

Under the Settlement Agreement, FSHC and Emerson agree that the Borough’s fair share affordable housing obligation for the period from 1987 to July 1, 2025 is as follows:

- Present Need (Rehabilitation Share)(per Kinsey Report)<sup>2</sup>: 20 units
- Prior Round (1987-1999) Obligation (pursuant to N.J.A.C. 5:93): 74 units
- Third Round (1999-2025) Obligation (per Kinsey Report)  
as adjusted per the Settlement Agreement<sup>3</sup>: 234 units

The Settlement Agreement specifically acknowledges that the Borough’s Third Round obligation includes the “gap period present need,” which is the measure of need based on low- and moderate-income households formed from 1999-2015 that was recognized by the New Jersey Supreme Court in its January 2017 decision In Re Declaratory Judgment Actions Filed By Various Municipalities, 227 N.J. 508 (2017).

Emerson and FSHC both agree that the Borough does not accept the methodology or calculations proffered by FSHC’s consultant, David Kinsey, PhD, PP, FACIP, but agree to the above obligation for the purposes of settlement. I would note that the 74-unit Prior Round obligation was previously established by COAH. The 234-unit Third Round obligation represents a 30% reduction of Dr. Kinsey’s May 2016 calculation of the Borough’s Third Round obligation. However, the Agreement provides that Emerson

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<sup>2</sup> David N. Kinsey, PhD, PP, FAICP, “New Jersey Fair Share Housing Obligations for 1999-2025 (Third Round) Under Mount Laurel IV,” May 17, 2016.

<sup>3</sup> The Third Round fair share obligation of 234 units represents a 30% reduction from the 334-unit Third Round gap period present need and prospective need obligation (1999-2025) determined by Dr. Kinsey for FSHC in the May 2016 report noted above.

may seek to amend its Third Round obligation should a forthcoming and binding legal determination result in the calculation of a Third Round obligation more than 10% less than the 234-unit total obligation established in the Agreement. Should this reduction occur, the Borough is still obligated to implement its Fair Share Plan via all of the mechanisms set forth in the Settlement Agreement.

Emerson is essentially entirely developed and the availability of vacant land is extremely limited. As a result, the Borough remains entitled to adjust its fair share obligation in accordance with the vacant land adjustment procedure set forth in COAH's Second Round rules (N.J.A.C. 5:93-4.2). COAH's rules provide adjustments of municipal fair share allocations to reflect a municipality's RDP in response to a lack of vacant land and/or water and sewer infrastructure. With respect to Emerson, the municipal adjustment was made only in response to the lack of vacant land.

Pursuant to the Settlement Agreement, Emerson has a Prior Round RDP of 20 units and a Third Round RDP of 53 units, as well as a total unmet need of 235 units (54-unit Prior Round unmet need and 181-unit Third Round unmet need).

The Prior Round 20-unit RDP was approved by the Court in the November 2001 Interim Judgment and was based on the development potential of two (2) sites, the Marek Farm site and the Community Developer's site, the latter of which was the subject of the 2000 builder's remedy lawsuit. To reflect the increase in development potential as a result of land use conditions and approved inclusionary and affordable housing developments, the Borough prepared an updated vacant land analysis for the Third Round. The Borough's updated vacant land analysis, dated November 21, 2017, considered all vacant and Borough-owned land in Emerson, as well as any sites that have been or are likely to be redeveloped with housing during the Third Round. The table below provides summary information of all sites contributing to the Borough's 20-unit Prior Round and 53-unit Third Round RDP.

**2001 COURT-APPROVED PRIOR ROUND RDP & PROPOSED THIRD ROUND RDP**

Block	Lot(s)	Street Address / Development	Developable Acreage	Density (du/acre)	Total Units	Affordable Units (20% Set-Aside)
<b>PRIOR ROUND RDP</b>						
1201	1	650 Old Hook Road / Marek Farm	6.71	14*	90	18
417	2,3	43 Emerson Plaza West / New Concepts	0.83	14*	12	2
<b>PRIOR ROUND RDP</b>						<b>20</b>
<b>THIRD ROUND RDP</b>						
<i>Burns and Row Group Site (vacant parcels)</i>						
610	9.01	2 Lois Avenue	0.47			
613	2	7 Lois Avenue	0.97			

Block	Lot(s)	Street Address / Development	Developable Acreage	Density (du/acre)	Total Units	Affordable Units (20% Set-Aside)
<i>Subtotal</i>			1.44	8	12	2
<i>Emerson Golf Club Parcels (vacant parcels)</i>						
617	7.01	99 Palisades	5.13			
617	7.03	99 Palisades	1.87			
<i>Subtotal</i>			7.00	8	56	11
<i>Multi-Family Residential Development Completed during the Third Round</i>						
616	16	55 Emerson Plaza East / Emerson Grand	--	34	20	4
609	3	R2-ARC Contributory Site	--	36	36	7
<i>Designated Redevelopment Area</i>						
419	1-5, 6.01, 6.02, & 7-10	Lincoln Boulevard, Kinderkamack Road, Kenneth Avenue, and Linwood Avenue	--	64	147	29
<b>THIRD ROUND RDP</b>						<b>53</b>

\* per the Court's 2001 written opinion and Interim Judgment.

Per COAH's rules at N.J.A.C. 5:93-4.2(g), a "municipality may address its RDP through any activity approved by [COAH], pursuant to N.J.A.C. 5:93-5. The municipality need not incorporate into its housing element and fair share plan all sites used to calculate the RDP if the municipality can devise an acceptable means of addressing its RDP. The RDP shall not vary with the strategy and implementation techniques employed by the municipality."

Emerson has fully satisfied its 20-unit Prior Round RDP pursuant to the Borough's Court-approved 2002 Housing Element and Fair Share Plan with the following compliance mechanisms:

- A five-unit RCA with the Borough of Ridgefield.
- A completed group home/alternative living arrangement owned and operated by New Concepts comprised of five (5) units and 10 total bedrooms (credit by the bedroom).
- Maximum of five (5) prior round rental bonus credits generated by the New Concepts 10-bedroom group home/alternative living arrangement.

Emerson agrees to satisfy its 53-unit Third Round RDP with 71 credits as follows:

- Four (4) affordable family rental units completed as part of the Emerson Grand inclusionary development.
- 24 bedrooms in three (3) separate group homes/alternative living arrangements.

- 29 family affordable rental units to be provided as part of the Block 419 Redevelopment Area and pursuant to an executed Redeveloper's Agreement.
- Maximum of 14 third round rental bonus credits.

Through its vacant land adjustment, Emerson has reduced its 74-unit Prior Round obligation to a Prior Round RDP of 20 units and reduced its 234-unit Third Round obligation to a Third Round RDP of 53 units, resulting in a combined Prior Round and Third Round unmet need of 235 units. [See aerial map below for the Borough's sites to address RDP and its unmet need overlay zones.] N.J.A.C. 5:93-4.2(h) states that in addressing unmet need, COAH "may require at least any combination of the following in an effort to address the housing obligation:

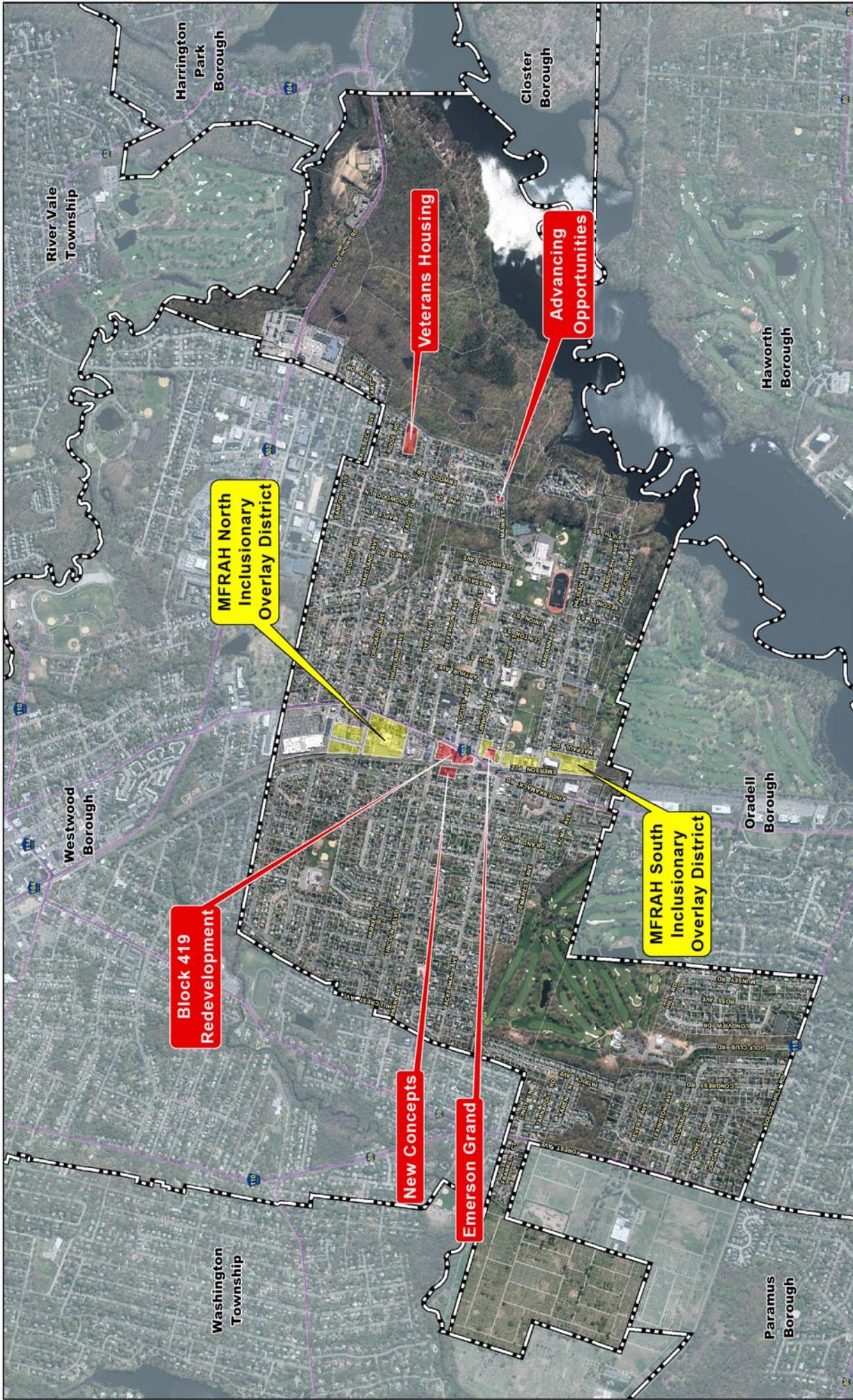
- ✓ Zoning amendments that permit apartments or accessory apartments;
- ✓ Overlay zoning requiring inclusionary development or the imposition of a development fee consistent with N.J.A.C. 5:93-8. In approving an overlay zone, [COAH] may allow the existing use to continue and expand as a conforming use, but provide that where the prior use on the site is changed, the site shall produce low- and moderate-income housing or a development fee; or
- ✓ Zoning amendments that impose a development fee consistent with N.J.A.C. 5:93-8."

As noted above, Emerson was previously required by the Court to adopt mechanisms to help in addressing its Prior Round unmet need including a Borough-wide overlay zone requiring a 20% affordable housing set-aside for any residential development with five (5) or more units, adoption of a development fee ordinance, and adoption of a spending plan. For the Third Round, the Borough has agreed to provide other means that may continue to help address the remaining combined 235-unit unmet need through the following compliance mechanisms:

- 18 surplus credits from the compliance mechanisms addressing the Third Round RDP;<sup>4</sup>
- The adoption of the Multi-Family Residential Affordable Housing Overlay District North permitting inclusionary housing development at a density of 64 dwelling units per acre on Block 214, Lots 6, 7, 8.01, 8.02, and 9; Block 213, Lots 1 through 6; and Block 405, Lots 1, 2, 3.01, 3.02, and 4 through 14 in the Borough's downtown.

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<sup>4</sup> It should be noted that paragraph 10a of the Settlement Agreement incorrectly indicates that the Borough has 17 surplus Third Round credits to address any Unmet Need. The Borough has 18 surplus credits (71 Third Round credits – 53-unit Third Round RDP = 18 surplus credits).



# Affordable Housing Sites (RDP & Unmet Need)

LOCATION: Emerson Borough, Bergen County, NJ  
DATE: January 2018

## Legend

- Affordable Housing Sites Addressing the RDP
- Inclusionary Overlay Zoning Sites Addressing Unmet Need



**Clarke**  
Clarke Caton Hintz  
Architecture  
Planning  
Landscape Architecture

- The adoption of the Multi-Family Residential Affordable Housing Overlay District South permitting inclusionary housing development at a density of 43 dwelling units per acre on Block 616, Lots 1, 2, 16, 17, and 19 through 24 and Block 617.01, Lots 2.01, 2.02, and 8, also in the Borough's downtown.
- The adoption of a Borough-wide mandatory affordable housing set-aside to be required for future multi-family residential development at a density of at least six (6) units per acre and yielding at least five (5) new dwelling units in the Borough that become permissible through planning board approval, zoning board approval, or a new or amended redevelopment or rehabilitation plan.

The required affordable housing set-aside Borough-wide and within the two (2) proposed overlay zoning districts is to be 15% for rental housing developments and 20% for for-sale developments. The Borough has agreed to introduce the overlay zoning ordinance(s) and the Borough-wide mandatory affordable housing set-aside ordinance within 120 days of the entry of a Court Order approving this Settlement Agreement.

Pursuant to the Settlement Agreement, Emerson has a Third Round Rehabilitation Share of 20 units. To address this obligation, the Borough proposes to reserve at least \$200,000 of Affordable Housing Trust Funds to complete up to 20 rehabilitations through the Affordable Critical Home Report Program Agreement between the Borough and Habitat for Humanity of Bergen County, Inc. ("Habitat). The program shall have an experienced affordable housing rehabilitation program administrator.

The Settlement Agreement also includes a variety of housing compliance mechanisms and requirements that are intended to ensure that affordable housing developed to address the Borough's fair share obligation conforms to COAH rules, the Fair Housing Act ("FHA"), and the Uniform Housing Affordability Controls ("UHAC") (N.J.A.C. 5:80-26.1 et seq.). These mechanisms are detailed in a subsequent section of this report on the fairness analysis.

Finally, within 120 days of entry of an Order approving the Settlement Agreement, the Borough shall adopt a final Housing Element and Fair Share Plan, including an updated Spending Plan, and introduce ordinances necessary to implement the terms of the Agreement including amendments to the Borough's zoning provisions and affordable housing standards.

## 5.0 PRELIMINARY COMPLIANCE DETERMINATION

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As noted above, the Borough's Third Round fair share obligation consists of:

- Third Round Rehabilitation Share: 20 units
- Prior Round (1987-1999) Obligation: 74 units
- Third Round (1999-2025) Obligation: 234 units

As previously detailed, the Borough is entitled to adjust its fair share obligation as a result of limited vacant and developable land. Emerson has a 20-unit Prior Round RDP and a 53-unit Third Round RDP, as well as a total combined unmet need of 235 units (54-unit Prior Round and 181-unit Third Round unmet need).

**Rehabilitation Share** – Pursuant to the Settlement Agreement, Emerson proposes to address its 20-unit Rehabilitation Share through completing up to 20 rehabilitations through the Affordable Critical Home Report Program Agreement between the Borough and Habitat. The Borough proposes to fund these rehabilitations by reserving at least \$200,000 of Affordable Housing Trust Funds for the program. This reservation of Affordable Housing Trust Funds must be reflected in the Borough's updated Spending Plan, as will be discussed below. The program shall have an experienced affordable housing rehabilitation program administrator. As part of the compliance phase of this matter, the Borough must provide the program agreement between Emerson and Habitat as well as an executed contract with an experienced rehabilitation program administrator [**Condition 1**]. The Borough must also indicate whether the rehabilitation program will be available to rental units to satisfy the rental component of the Present Need obligation. Additionally, the Borough must provide an operating manual for the proposed housing rehabilitation program that ensures compliance with COAH's requirements including an average expenditure of \$10,000 in hard costs per unit, the repair or replacement of at least one major system in each housing unit, and the establishment of 10-year affordability controls [**Condition 2**].

**Prior Round RDP** – the Borough has fully satisfied its 20-unit Prior Round RDP with a completed RCA with the Borough of Ridgefield and an existing 10-bedroom alternative living arrangement and its associated rental bonus credits. The following provides a preliminary compliance review of these mechanisms:

- A five-unit RCA between Emerson and the Borough of Ridgefield was executed on February 4, 2003, which provided for the transfer of \$125,000, or \$25,000 per unit, from Emerson to

Ridgefield for the implementation of a scattered site housing rehabilitation program. COAH recommended the Court approve the executed RCA by resolution of August 6, 2003. On April 16, 2004, the Court approved the RCA as part of the Borough's Judgment of Compliance and Repose. According to the Borough, the \$125,000 RCA payment has been transferred and was funded through a bond ordinance passed by the governing body in 2003.

- New Concepts for Living ("New Concepts") owns and operates a 10-bedroom group home/alternative living arrangement located on Emerson Plaza West. This group home was previously approved by the Court as a Prior Round compliance mechanism. Specifically, by Order of June 4, 2002, the Court approved a development agreement and project schedule for the proposed group home. The New Concepts group home has subsequently been constructed and is now in operation. Emerson is claiming 10 credits (credit by the bedroom) and five (5) associated rental bonuses for the New Concepts group home to assist in addressing the 20-unit Prior Round RDP. The Borough is eligible to claim up to a maximum of five (5) Prior Round rental bonuses ( $25\% \times 20 = 5$ ).

To confirm the credit-eligibility of this group home, the Borough must submit a completed DCA Supportive and Special Needs Housing Survey form that verifies information including, but not limited to, the date the facility was established, the number of bedrooms, and the terms of the affordability controls. Additionally, the Borough must provide a copy of the facility's most recent operating license [**Condition 3** – survey and license]. To be eligible for rental bonus credits, the affordability controls must be in effect for at least 30 years. Alternatively, group homes that receive funding through the Department of Human Services, Division of Developmental Disabilities that requires a 20-year renewable operational restriction are also eligible for rental bonus credits.

**Third Round RDP** – the Borough proposes to address its 53-unit Third Round RDP with a completed inclusionary family rental housing development, three (3) group homes/alternative living arrangements, a family inclusionary housing development proposed as part of a Redevelopment Plan, and rental bonus credits. The following provides a preliminary compliance review of these mechanisms:

- Emerson Grand is a multi-family inclusionary family rental housing development located at 55 Emerson Plaza East in the Borough's downtown. This development includes a total of four (4) units affordable to low- and moderate-income households. As such, the Borough is claiming four (4) credits for this development to address the 53-unit Third Round RDP. To verify the credit-eligibility of these units, the Borough must provide evidence of 30-year affordability controls such as a deed restriction, submit documentation confirming

compliance with UHAC including the income split by unit and bedroom distribution, and provide the date the development was approved and subsequently received a certificate of occupancy [**Condition 4**].

- The Borough is claiming 14 credits for a group home/alternative living arrangement on Main Street that provides housing for veterans. To confirm the credit-eligibility of this veterans housing, the Borough must submit a completed Supportive and Special Needs Housing Survey form that verifies information including the date the facility was established, the number of bedrooms, and the terms of the affordability controls. Additionally, the Borough must provide a copy of the facility's current operating license [**Condition 5** – survey and license].
- Advancing Opportunities owns and operates a group home located on Pine Drive in the Borough. The Borough is claiming three (3) credits for the Advancing Opportunities group home. To confirm the credit-eligibility of this group home, the Borough must submit a completed Supportive and Special Needs Housing Survey form that verifies the date the facility was established, the number of bedrooms, and the terms of the affordability controls. Additionally, the Borough must provide a copy of the facility's most recent operating license [**Condition 6** – survey and license].
- Center for Hope and Safety provides transitional housing in a group home for victims of domestic violence. According to a recently completed Supportive and Special Needs Housing Survey, the group home is comprised of seven (7) bedrooms that serve very low-income clients. The group home receives funding through the Department of Housing and Urban Development's ("HUD") Continuum of Care program, which is an annual renewable operating subsidy. The facility received its Certificate of Occupancy on August 18, 2003. The Borough is claiming seven (7) Third Round credits for the seven (7) bedrooms at this group home, which has been in operation for more than 15 years. As the Borough has already provided a completed survey, the Borough should just provide a copy of the facility's most recent license [**Condition 7**].
- Emerson is proposing to redevelop the entirety of Block 419 (Lots 1-5, 6.01, 6.02, and 7-10) in the Borough's downtown with a mixed-use multi-family inclusionary rental development. Block 419 is part of an area in need of redevelopment designated by the Borough in September 2004. In April 2006, the Borough adopted a Redevelopment Plan for the area known as the Central Business District Redevelopment Area, which permits the development of multi-family residential dwelling units including mixed-use development. The first phase

of the Redevelopment Plan was identified as Block 419. On January 8, 2016, the Borough solicited proposals from redevelopers interested in redeveloping Block 419. Emerson Redevelopers Urban Renewal, LLC (“EMRED”) was ultimately selected as the Redeveloper and the Borough and EMRED executed a Redevelopment Agreement on June 27, 2016. Subsequently, the Redevelopment Agreement has been twice amended. The June 2016 Redevelopment Agreement and the subsequent amendments are included as Exhibit B of the Settlement Agreement. By resolution of January 17, 2017, the Borough Council accepted the findings of a December 2016 Planning Board report that determined Block 419 continued to qualify as an area in need of redevelopment and designated Block 419 as a Condemnation Redevelopment Area. On February 6, 2018, the Borough adopted an ordinance authorizing the acquisition of properties including those of the Objectors (discussed below) by purchase or condemnation.

Although the Borough will fully detail and confirm the realistic opportunity of the site in its future housing element and fair share plan, Emerson has supplied information per the Second Round rules at N.J.A.C. 5:93-5.3 which requires municipalities to “designate sites that are available, suitable, developable, and approvable, as defined in N.J.A.C. 5:93-1.” This site meets each of these criteria, as follows:

- Available: Availability means that a site has clear title, and is free of encumbrances which preclude development for low- and moderate-income housing. Based on the February 6<sup>th</sup> Borough Ordinance authorizing the acquisition of properties including those of the Objectors by purchase or condemnation, ultimately, the entirety of the site is to be owned by the Redeveloper and we are not aware of any encumbrances that would obstruct the creation of affordable housing (see discussion of the objections that raise a legal question as to whether the Borough has a right through the FHA to condemn the objectors’ properties for an inclusionary redevelopment developed by a for-profit redeveloper in Section 6 below).
- Suitable: Suitability means that a site is adjacent to compatible land uses, has access to appropriate streets, and is consistent with the environmental policies which would be applied in determining a site’s realistic development potential. Block 419 is approximately 2.2 acres and is located in the heart of the Borough’s downtown, immediately across Linwood Avenue from the Borough’s NJ Transit Pascack Valley Line Rail Station which provides mass transit service from Spring Valley, NY to Hoboken, NJ. The site is generally bounded by Lincoln Avenue, Kinderkamack Road, Linwood Avenue and the NJ Transit commuter rail tracks. Surrounding land uses include retail, commercial,

restaurants, and offices. Directly across the rail line from the site is one of the Borough's affordable housing sites – New Concepts – along Emerson Plaza West as well as other residential uses. The site is also outside of the flood hazard area and has no wetlands or environmentally sensitive constraints. As with the remainder of the Borough, the site is in the Metropolitan Planning Area (Planning Area 1) where redevelopment is encouraged and affordable housing is preferred.

- **Developable:** Developability is measured by a site's access to water and sewer infrastructure, its consistency with the applicable areawide water quality management plan (including the wastewater management plan) or is included in an amendment to the areawide water quality management plan submitted to and under review by the DEP. We understand that the site is within the Borough's sewer service area and has current connections to the existing infrastructure with sufficient capacity to serve the proposed redevelopment.
- **Approvable:** A site is approvable if it may be developed in a manner consistent with the rules/regulations of all agencies with jurisdiction over the site. A site may be approvable even if it is not consistent with the underlying zoning. The site is outside of the flood hazard area and does not contain any known wetlands or other constraints which would require special approval from DEP.

The proposed redevelopment of Block 419 includes 147 total units, retail/non-residential uses and a structured parking garage as depicted on the Redevelopers' concept plan. As it is not expressly stated in the Redevelopment Agreement, during the compliance phase of this matter, the Borough must provide evidence that the proposed development is to be comprised of family rental units, including the affordable units [**Condition 8**]. Pursuant to the Redevelopment Agreement, the development shall be subject to a 20% affordable housing set-aside. EMRED must provide no less than a 15% on-site affordable housing set-aside, or 22 on-site affordable housing units. The remaining 5% obligation, or seven (7) affordable units, may be provided for by on-site construction, off-site construction, a payment-in-lieu of construction, or a combination of a payment-in-lieu and off-site construction. Pursuant to the Settlement Agreement, the Borough must indicate how it will provide for the realistic opportunity of the seven (7) remaining units (including one very-low income unit) at the time of the required midpoint review by July 1, 2020.

Pursuant to the Settlement Agreement, the parties agree that the Borough is providing for the realistic opportunity for the Block 419 redevelopment project through its executed Redevelopment Agreement with EMRED. This redeveloper currently holds options to

purchase all but two (2) of the properties (multiple lots) in Block 419. In the event the Redeveloper is not able to purchase one or more of the properties by the end of the first quarter of 2018, the Redeveloper shall request the assistance of the Borough to undertake good faith negotiations. Should these negotiations be unsuccessful, the Borough is committed to acquiring the property through eminent domain as authorized under Local Redevelopment and Housing Law ("LRHL") and/or the Fair Housing Act ("FHA").

As part of the Borough's updated Housing Element and Fair Share Plan, Emerson should provide additional details discussing how the Block 419 development intends to comply with UHAC including at least 30-year affordability controls and the income targeting bedroom distribution requirements. **[Condition 9]** With respect to very low-income units, pursuant to the Settlement Agreement, the Borough will require at least three (3) of the 22 total affordable units required on-site to be available to very low-income households. Should all 29 affordable housing units ultimately be provided on-site, four (4) very low-income units will be provided. The Borough should also indicate the entity that will be responsible for administering the affordable units. **[Condition 10]**

- The Borough is applying 14 rental bonuses to address its 53-unit Third Round RDP. Pursuant to N.J.A.C. 5:93-5.15, this is the maximum permitted to address the Third Round RDP ( $53 \times 25\% = 13.25$ , rounded up to 14).

It should also be noted that since all units addressing the Borough's 53-unit Third Round RDP are special needs and family rentals, the Borough has satisfied its Third Round rental requirement and is not exceeding the Third Round age-restricted cap.

**Prior Round and Third Round Unmet Need** – The Borough has a combined Prior Round and Third Round unmet need of 235 units. The Borough has an existing development fee ordinance as means to address unmet need. Additionally, pursuant to COAH's Second Round rules at N.J.A.C. 5:93-4.2, overlay zoning requiring inclusionary development is also an approved mechanism to address unmet need and specifically states "that where the prior use on the site is changed, the site shall produce low and moderate income housing." Consistent with this provision, the Borough will implement inclusionary overlay zoning on select sites in its downtown. Additionally, unmet need will be addressed through surplus credits from the compliance mechanisms addressing the Borough's Third Round RDP and through a mandatory Borough-wide affordable housing set-aside.

- The Borough is proposing to address its 53-unit Third Round RDP with 71 credits, resulting in a surplus of 18 credits. These 18 surplus credits will be used to address a portion of the Borough's 235-unit Unmet Need.

- The Borough will adopt the Multi-Family Residential Affordable Housing Overlay District North (“MFRAH North”) inclusionary zoning district on Block 214, Lots 6, 7, 8.01, 8.02, and 9; Block 213, Lots 1 through 6; and Block 405, Lots 1, 2, 3.01, 3.02, and 4 through 14. This area is located one block north of the Block 419 redevelopment site in the Borough’s downtown area. The MFRAH North district is characterized with a mix of commercial and industrial uses located in the Industrial and Manufacturing zoning district, with the exception of Lots 5 through 11 in Block 405. These lots appear to all be improved with single-family residences and are located in the R-7.5 Single-Family Residential zoning district. The Borough should ensure that it intends to include these lots in the MFRAH North inclusionary overlay zoning district. The proposed inclusionary overlay zoning district is adjacent to commercial and retail uses to the north and south and single-family residential neighborhoods to the east and west. The proposed area is bounded to the west by active railroad tracks serving NJ Transit commuter rail. Given the surrounding uses and the close proximity to the downtown, transit, and the proposed Block 419 multi-family mixed-use inclusionary redevelopment, this area appears to be appropriate for inclusionary multi-family residential development.

The Industrial Manufacturing zoning district does not permit residential uses and the R-7.5 zoning district permits single-family residential uses at approximately six (6) dwelling units per acre. The proposed MFRAH North inclusionary overlay zoning district would permit this area to be redeveloped with multi-family residential at a density of 64 dwelling units per acre subject to a mandatory affordable housing set-aside of 20% for for-sale units and 15% for rentals. Since the provisions of the proposed overlay district would permit for new residential development at a substantial increase in density, the change in use and density from the underlying zoning districts presents a viable compensatory benefit and opportunity to accommodate additional affordable housing development to assist the Borough in addressing its unmet need in the future.

- The Borough will adopt the Multi-Family Residential Affordable Housing Overlay District South (“MFRAH South”) inclusionary zoning district on Block 616, Lots 1, 2, 16, 17, and 19 through 24 and Block 617.01, Lots 2.01, 2.02, and 8.

With respect to Block 616, all lots listed, with the exception of Lot 2, were part of the Central Business District Redevelopment Area designated in 2004 and subject to the 2006 Redevelopment Plan. Lot 2 is located in the RB Residential zoning district and appears to be currently improved with a vacant single-family residence. By resolution of February 21, 2017, the Borough removed Lots 16, 17, and 19 from the designated redevelopment area. Lot 16 was recently redeveloped and is the site of the Emerson Grand mixed-use inclusionary

development. The structures on Lot 17 and 19 also appear to be more recently redeveloped or renovated and are both multi-story commercial buildings. Therefore, these lots may not be suitable for inclusion in the MFRAH South inclusionary overlay district. The remainder of this area of Block 616 is largely characterized with a mix of one-story commercial and retail uses. However, these remaining lots are already included in the Borough's Central Business District Redevelopment Area, which permits multi-family and mixed-use residential development. Therefore, as part of the Borough's Housing Element and Fair Share Plan, Emerson should reevaluate the inclusion of all parcels listed in Block 616 and must provide a discussion of the compensatory benefit to be provided to offset the imposition of an affordable housing set-aside in this portion of the MFRAH South inclusionary zoning district.

**[Condition 11]**

With respect to Block 617.01, all three (3) lots are located in the LB Limited Zoning District, which does not permit residential uses. Lot 8 is currently owned by the Borough and is utilized by Emerson's Department of Public Work and Lot 2.02 is similarly improved with single-story commercial buildings. Block 2.01 is improved with a single-family residence. It should be noted that the adjacent Lot 1 in Block 617.01 remains part of the Central Business District Redevelopment Area where multi-family residential development is currently permitted although it is developed with a single-story commercial facility. Other surrounding land uses include a single-family residential neighborhood to the east, Emerson Golf Club property to the south, and Block 616 as discussed above to the north. As is similar to the MFRAH North district, this area is in close proximity to the downtown and public transit and has compatible surrounding land uses. Therefore, this area of the proposed MFRAH South appears to be appropriate for inclusionary multi-family residential development.

The proposed overlay district would permit this area of Block 617.01 to be redeveloped with multi-family residential at a density of 43 dwelling units per acre with a mandatory affordable housing set-aside of 20% for for-sale units and 15% for rentals. The provisions of the proposed overlay district would permit for multi-family residential development on Block 617.01 where such use was not previously permitted. Therefore, the change in use presents a viable compensatory benefit and opportunity to accommodate additional future affordable housing development in this portion of the proposed MFRAH South inclusionary zoning district.

- As required in the proposed FSHC settlements in virtually all vacant land adjustment communities in Bergen County as well as across the State, the Borough will adopt an ordinance establishing a mandatory, municipal-wide affordable housing set-aside of 15 or

20% (for rental or for sale units, respectively) for all new multi-family residential developments at a density of at least six (6) dwelling units per acre and yielding at least five (5) units that become permissible through Planning Board approval, Zoning Board approval, or a new or amended redevelopment or rehabilitation plan.<sup>5</sup> At least 50% of the units must be affordable to low-income households, including the required 13% very low-income units in rental developments, and all affordable units must include the required bedroom distribution, be governed by control on affordability, and be affirmatively marketed in conformance with UHAC. The Borough shall include language in the ordinance that explicitly provides that no subdivision shall be permitted or approved for the purpose of avoiding compliance with this requirement. The ordinance will not give any developer the right to any such rezoning, variance, or other relief, or establish any obligation on the part of the Borough to grant such rezoning, variance, or other relief. In addition to Planning Board approval, Zoning Board approval, or a new or amended redevelopment or rehabilitation plan, the Borough should also list 'municipal rezoning' triggering an affordable housing setaside in the mandatory setaside ordinance. **[Condition 12]**

As part of the future compliance process in the matter, the Borough must submit the draft zoning ordinance creating the inclusionary residential overlay districts and the draft ordinance establishing a mandatory, municipal-wide affordable housing set-aside **[Condition 13]**. Adoption of these ordinances will either be a future condition of compliance or will be adopted prior to the Borough's future compliance hearing.

**Trust Fund/Spending Plan** – Pursuant to the Settlement Agreement, Emerson will prepare a Spending Plan as part of the updated Housing Element and Fair Share Plan. Additionally, pursuant to the Agreement, the Borough has agreed to reserve at least \$200,000 for the rehabilitation of up to 20 housing units based on an average hard cost of \$10,000 per unit. The Borough must account for the proposed expenditure in its revised Spending Plan and should include the associated administration cost for the rehabilitation program as well **[Condition 14]**.

The Spending Plan will be reviewed as part of the compliance phase of this matter and approved during a future Compliance Hearing. Upon approval of the Spending Plan, the Agreement acknowledges that any funds deemed committed by the Court must be expended within four (4) years of the Court's entry of a final judgment approving the Borough's compliance plan.

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<sup>5</sup> The Borough's existing overlay zoning shall be repealed.

**Fair Share Ordinance/Affirmative Marketing** – The Borough shall provide a draft updated Affordable Housing Ordinance, which Emerson must submit as part of the Borough's updated Housing Element and Fair Share Plan. Although not covered in the Agreement, the parties should agree as part of the fairness hearing whether the Borough will adopt the required implementing ordinances prior to the compliance hearing or if the adoption of the ordinance will be a future condition of compliance.

The Borough must adopt a revised Affirmative Marketing Plan, specifically including the additional groups to be noticed of affordable housing unit availability required through the Settlement Agreement, and submit such revised Affirmative Marketing Plan as part of the Borough's updated Housing Element and Fair Share Plan [**Condition 15**]. Additionally, the Borough must submit an adopted resolution appointing an existing municipal employee as Emerson's municipal housing liaison [**Condition 16**]. The Borough must submit contract(s) for an experienced affordable housing administrative agent for all existing and proposed affordable units [**Condition 17**].

## **6.0 COMMENTS/OBJECTIONS**

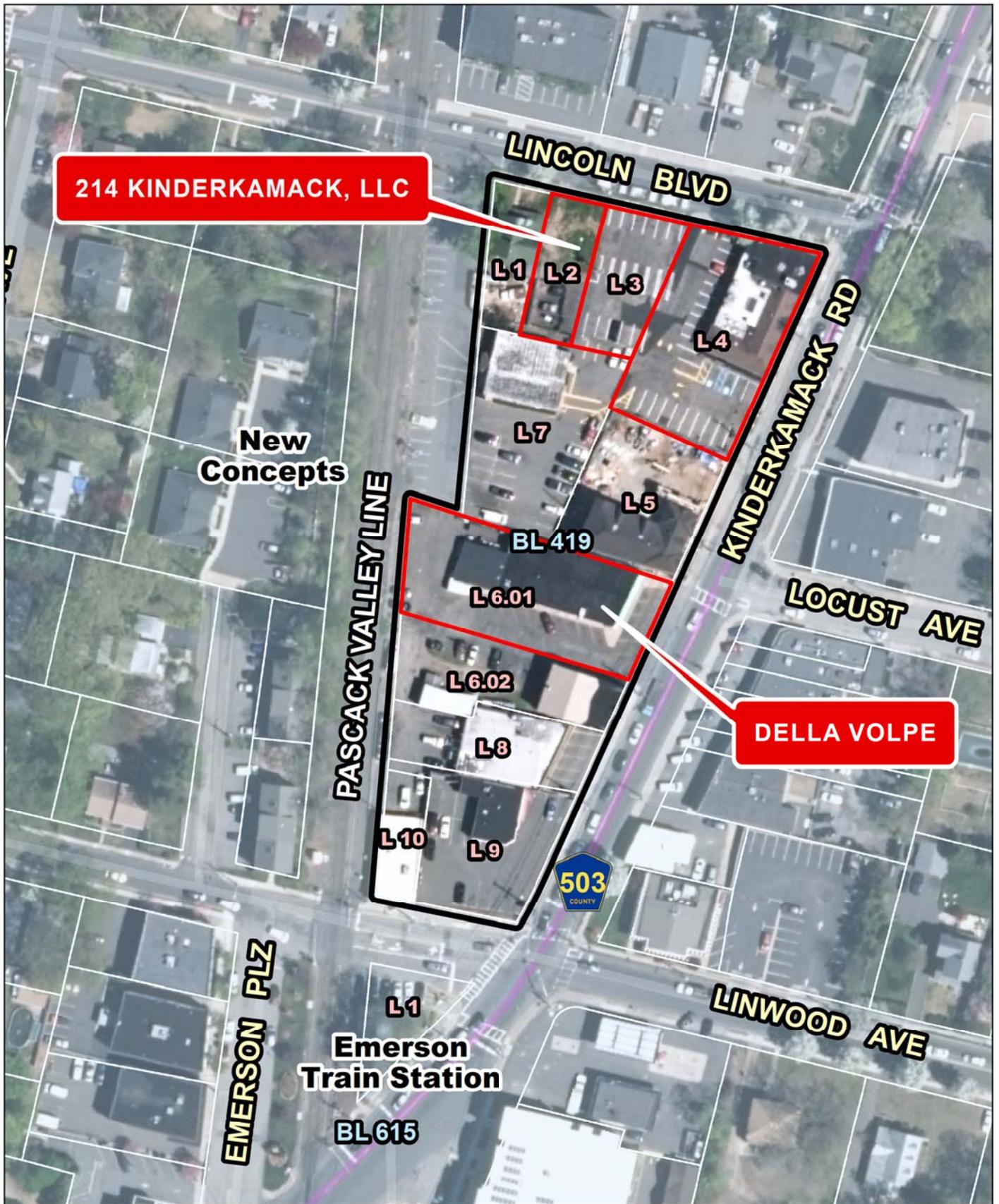
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As previously indicated, the Borough received one objection letter, dated January 8, 2018, from Richard P. De Angelis, Esq., the attorney representing 214 Kinderkamack and Della Volpe, property owners in the Borough whose properties are located on Block 419 of the designated Redevelopment Area.<sup>6</sup> Specifically, 214 Kinderkamack is the owner of Block 419, Lots 2 through 4 and Della Volpe is the owner of Block 419, Lot 6.01. [See aerial map of 419 tract area and the objectors' sites below] These properties are part of the Borough's Block 419 redevelopment project proposed to address the Borough's Third Round RDP, as well as the Third Round rental, family rental and very-low income family rental requirements set forth in the Settlement Agreement.

As will be discussed below, FSHC and the Borough filed responses to the De Angelis objections and the Borough filed a motion to compel the intervention of the objectors in order to ensure that any court decision in the Borough's DJ matter would also be binding in the other matter challenging the Borough's LIRHL procedures or future legal challenges.

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<sup>6</sup> Additional filings were submitted by Mr. De Angelis to the Court including letters dated January 12, 2018, January 17, 2018, January 22, 2018, March 5, 2018 and opposition dated February 22, 2018 to the Borough's motion.



## 419 Redevelopment Area

214 Kinderkamack, LLC - Block 419 / Lots 2-4 (0.58 Acres)  
 Della Volpe - Brook 419 / Lot 6.02 (0.35 Acres)

Clarke Caton Hintz ● ● ●  
 Architecture  
 Planning  
 Landscape Architecture

LOCATION:  
 Emerson Borough, Bergen County, NJ

DATE:  
 March 2018

Mr. De Angelis stated that the property owners objected “to the inclusion of the Block 419 project in the proposed Settlement Agreement as it may not be considered a ‘realistic opportunity’ toward achieving the Borough’s affordable housing obligations.” The objection received is largely with respect to contesting the Borough’s potential proposed use of eminent domain to acquire the above-listed properties as authorized by the LRHL and/or the Fair Housing Act. The acquisition of these properties is necessary to implement the proposed Block 419 redevelopment project. Della Volpe and 214 Kinderkamack are currently challenging the Borough’s Redevelopment Area designation and proposed use of eminent domain through the LRHL in separate matters before the Court. Due to this pending litigation before the Court, the objectors argue that the Block 419 redevelopment project should not be included in the Borough’s Settlement Agreement and proposed compliance plan. With respect to the objections regarding the LRHL, this is an existing legal challenge that will be litigated and resolved in those respective separate matters.

In order to provide perspective on the impact of the objections on the required fairness analysis of the Borough’s Agreement with FSHC and the use of the properties to not only generate a large portion of the Borough’s RDP but also to address a portion of the Borough’s fair share affordable housing obligations, I have proceeded to review the Borough’s proposed preliminary compliance measures including the Block 419 redevelopment project. In this report, I am making an assumption that the Court will find that the Borough has a right through the FHA to condemn the objectors’ properties for an inclusionary redevelopment developed by a for-profit redeveloper. This is not an opinion as to how the court should rule on the Borough’s condemnation right. To fulfill the East/West Ventures fairness analysis requirements, the legal objection as to realistic opportunity of the 419 Redevelopment Area based on the objectors’ claims that the FHA does not provide authorization for condemnation and, if it did, the FHA only authorizes condemnation for a 100% affordable housing development by a non-profit developer. Outside of the legal question raised regarding the reliance on the FHA for eminent domain, there is no evidence at this time to suggest that the project does not present a realistic opportunity for the construction of affordable housing. Should the Court’s decision on the objections ultimately call into question the realistic opportunity of the Block 419 redevelopment project, the Borough and Redeveloper will be faced with either scaling back the proposed inclusionary affordable housing site or completely eliminating it from its preliminary compliance measures. In such case, the Borough may be eligible for a reduced third round RDP as over 50% of the RDP is based on the current proposal for the 419 Redevelopment site. However, the Borough would most likely have to amend its preliminary compliance plan as well as its Agreement with FSHC as it would have to replace some number of lost family affordable rental units and family very-low income units in order to address the settlement terms in the Borough’s Agreement with FSHC.

The objectors acknowledge that the FHA does provide the Borough with authority to acquire these properties through condemnation as referenced in paragraph 9 of the Settlement Agreement as the FHA does permit the use of eminent domain as a technique for a municipality to provide affordable housing. Specifically, N.J.S.A. 52:27D-311.a(5) permits the “donation or use of municipally owned land or land condemned by the municipality for purposes of providing low and moderate income housing.” Further, N.J.S.A. 52:27D-325, Municipal Powers, states:

*“Notwithstanding any other law to the contrary, a municipality may purchase, lease or acquire by gift or through the exercise of eminent domain, real property and any estate or interest therein, which the municipal governing body determines necessary or useful for the construction or rehabilitation of low and moderate income housing or conversion to low and moderate income housing.”*

However, the objectors assert that the sale or lease of a housing unit or units acquired through condemnation is limited to a non-profit entity or a low- or moderate-income household as also provided in N.J.S.A. 52:27D-325 as follows:

*“Notwithstanding the provisions of any other law regarding the conveyance, sale or lease of real property by municipalities, the municipal governing body may, by resolution, authorize the private sale and conveyance or lease of a housing unit or units acquired or constructed pursuant to this section, where the sale, conveyance or lease is to a low or moderate income household or nonprofit entity and contains a contractual guarantee that the housing unit will remain available to low and moderate income households for a period of at least 30 years.”*

This provision is strictly referring to the sale, lease, or conveyance of housing units. Pursuant to the Redeveloper’s Agreement, the affordable units to be provided at the Block 419 redevelopment project will be leased to low- and moderate-income households.

Contrary to the objectors’ arguments, the Block 419 redevelopment project should be considered an inclusionary affordable housing site (majority market-rate units and typically up to 20% affordable housing units as upheld for decades in Mount Laurel matters either before the Courts or COAH) and the proposed development is instrumental in assisting in the fulfillment of the Borough’s affordable housing obligations. I have been involved as either a municipal affordable housing planner, an assigned special affordable housing master or assisting other special masters at Clarke Caton Hintz in countless cases where municipalities use redevelopment sites to provide inclusionary affordable housing, not just 100% affordable housing developments. Further, the use of inclusionary zoning and inclusionary developments through redevelopment to provide low- and moderate-income housing has been prevalent in many of the

at least 180 current municipal settlement agreements with FSHC throughout the State. Also, in my experience, the vast majority of affordable housing, including both inclusionary and 100% affordable developments, is provided by for-profit developers. Lastly, New Jersey's Housing and Mortgage Finance Agency's administration of the federal Low Income Housing Tax Credit Program ("LIHTC") which provides for the vast majority of funding for the construction of 100% family, senior or special needs affordable housing in the State is open to both for-profit and non-profit developers.

On behalf of FSHC, Adam Gordon, Esq., filed a series of responses to the objections including letters to the Court dated January 12, 2018, January 17, 2018, January 23, 2018 and March 14, 2018. In summary, Mr. Gordon finds that "the sole issue raised by Objectors that FSHC agrees may be a germane issue to the fairness hearing is the Borough's authority pursuant to the Fair Housing Act to pursue condemnation..." He states that the vast majority of objections raised remain more appropriately addressed as part of the Objectors' legal challenges on the Borough's redevelopment procedures which is part of a separate legal matter, not the Borough's DJ matter. Although Mr. Gordon doesn't believe the Objectors' legal arguments are correct, Mr. Gordon believes that based on the Southampton decision, the Court is required to address the Objectors' FHA claims as that does call into question the realistic opportunity of the site to address the Borough's fair share affordable housing obligations. Specifically, he states "limit the scope of [the Objectors'] legal arguments to be addressed in this [DJ matter] to legal argument #2, on the Borough's authority to take under the FHA, while making it clear that Objectors are not prejudiced from pursuing their currently pending litigation or any claims they may have on the issue of good faith;" Mr. Gordon relies on Saratoga for the point that COAH's substantive certification "does not preclude a challenge to the validity of zoning ordinances. If the COAH process, and now this court's process, were not final until any possible challenges to all implementing ordinances and related actions were adjudicated, it would be impossible to reach a final decision." In his January 17<sup>th</sup> letter, Mr. Gordon states "FSHC joins in the Borough's request for a binding determination in this matter on whether Objectors' interpretation of the condemnation powers under the FHA is correct..." Also, "FSHC agrees with the Borough that Objectors could still raise any procedural issues that arise with any condemnation action the Borough may pursue." Finally, FSHC finds that the Objectors can't have it both ways by filing objections in this DJ matter and then "claiming they should not be required to participate in proceedings or be bound by the Court's determination is simply untenable. The Court and Special Master have a responsibility to evaluate the objections received and rule on them in order to find the Settlement Agreement fair. To then allow Objectors to relitigate the same objections in a future case would violate basic principles of collateral estoppel and waste judicial resources."

The Borough's counsel also filed a number of responses to the objections including letters dated January 11, 2018, January 16, 2018 from Doug Doyle, Esq. and Brief dated February 26, 2018 and letter dated March 9, 2018 from John Stone, Esq. to the Court. Borough's counsel also finds the objectors' legal arguments as incorrect regarding the claims against the utilization of the FHA for authority for the Borough to condemn/acquire by purchase or eminent domain the objectors' properties. As noted above, the Borough also filed a motion to compel intervention by the objectors to ensure that any decisions by the court regarding the FHA issues would be applicable to the objectors' other matters and the objectors would be bound by the judicial determination. As Mr. Stone stated "binding consideration at a Fairness Hearing of [Objectors] objections will not impair consideration of their opposition to redevelopment; it will expedite that determination, while not leaving the Borough's affordable housing plan in limbo, vulnerable to subsequent attack."

## **7.0 THE FAIRNESS ANALYSIS**

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The Borough's Settlement Agreement with FSHC must be subjected to the fairness analysis embodied in the East/West Venture case referenced above. Before doing so, it is worth noting, as the Court did in Morris County Fair Housing Council v. Boonton Township 197 N.J. Super, that "...it may be assumed that generally a public interest organization will only approve a settlement which it conceives to be in the best interest of the people it represents." FSHC was involved in all aspects of this case including the determination of the Borough's fair share allocation, RDP, and unmet need mechanisms. FSHC is a public interest advocacy organization in New Jersey devoted to promoting the production of housing affordable to low- and moderate-income households. Consequently, FSHC's endorsement of the Settlement Agreement is a compelling indication that it believes the Agreement to be fair and reasonable.

Under the East/West Venture case, the Court established criteria for evaluating the fairness of settlements between municipalities and builder plaintiffs in exclusionary zoning cases. By contrast, this settlement involves a municipality and a public interest organization. Consequently, the East/West Venture fairness criteria must be adapted to serve the instant matter.

The first step under the East/West Venture case is to evaluate the number and rationale for the affordable housing units to be provided by the developer(s). However, the fairness of the Settlement Agreement between Emerson and FSHC must be viewed from a Borough-wide perspective.

First, the number and rationale for the affordable housing units to be provided must be considered by evaluating the Borough's fair share allocation under alternative methodologies. As previously mentioned, FSHC commissioned Dr. Kinsey to prepare a fair share methodology that 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 a number of reports with variations to his methodology that have been submitted to various Superior Courts. Dr. Kinsey's report released in May 2016 allocated Emerson a Present Need (Rehabilitation Share) of 20 units, a Prior Round Obligations of 74 units and a Third Round need of 334 units, comprised of a "gap period" (1999-2015) obligation of 89 units and a Prospective Need (2015-2025) of 244 units. Therefore, while Dr. Kinsey's May 2016 calculations were released prior to the January 2017 NJ Supreme Court 'gap' decision, the Third Round obligation in Kinsey's May 2016 report includes a gap period calculation for the 1999-2015 period. Subsequently, Dr. Kinsey revised the gap period calculation in April 2017 pursuant to the Court's gap decision; Emerson's gap period obligation was recalculated to be 114 units. As agreed to by FSHC, the Settlement Agreement relies on the May 2016 report prepared by Dr. Kinsey as modified for the settlement for determining the Borough's fair share obligation.

As the Court is aware, a consortium of 288 municipalities retained Econsult Solutions, Inc. ("Econsult") to prepare a fair share methodology. Econsult also produced a series of expert reports and included an allocation mechanism for each municipality. According to Econsult's most recent report released in April 2017 in response to the Court's gap decision, Emerson was allocated a Present Need of 56 units, a Prior Round of 74 units, and a total Third Round need of 176 consisting of a 68-unit Gap Period obligation (1999-2015), and a 108-unit Third Round Prospective Need (2015-2025) obligation.

In the absence of any consensus on the methodology and in light of the considerable spread in the calculations presented by the experts, I find the fair share resolution set forth in the Settlement Agreement to be fair and reasonable to the region's low- and moderate-income households. This opinion is supported by the following:

- Both the Borough and FSHC accept the Rehabilitation Share of 20 units. The Present Need calculated by Dr. Kinsey is 36 units less than the 56-unit Present Need calculated by Econsult.
- Both the Borough and FSHC accept COAH's Prior Round obligation of 74 units; this is in accordance with Mount Laurel IV, which required prior housing obligations to be addressed In Re Adoption of N.J.A.C. 5:96, 221 N.J. 1, 30 (2015).
- The 234-unit Third Round obligation represents a 30% reduction of Dr. Kinsey's May 2016 calculation. This method is consistent with the approach utilized to adjust the fair share

obligation in the majority of other Third Round settlements approved by the Court and is reasonably balanced between the allocations advanced by both experts. Additionally, this Third Round obligation reflects that which was calculated for the 1999 to 2025 period by FSHC including a gap obligation.

- The absolute fair share number is of lesser import than the municipal compliance plan's prospects for successfully delivering affordable housing in fully-developed municipalities like Emerson which are entitled to a significant fair share adjustment due to a lack of vacant land.

**Second, under the fairness analysis, any other contributions made by the municipality or FSHC must be considered.** Through the settlement, Emerson and FSHC are able to avoid delays and the expense of a trial, which results in the Borough's focus on satisfying its fair share obligation.

As stipulated in the Settlement Agreement, Emerson has fully addressed its Prior Round RDP with two (2) compliance mechanisms previously approved by the Court. These include an RCA with Ridgefield, a completed group home and rental bonuses. The Borough proposes to address its Third Round RDP with group homes/alternative living arrangements, a completed inclusionary housing development, and a proposed mixed-use, inclusionary housing redevelopment site. Again, my finding that the 419 Redevelopment Inclusionary Housing site which is producing the lion's share of the Borough's credits (29 affordable family rental units) towards the Third Round RDP assumes the Court will find that the Borough has a right under the FHA to condemn the objectors' properties for an inclusionary redevelopment developed by a for-profit redeveloper. Further, the Borough agrees to provide opportunities to address its combined Prior Round and Third Round unmet need with proposed inclusionary overlay zoning on select sites and with a mandatory municipal-wide affordable housing set-aside requirement encouraging the future production of affordable housing generally through downtown redevelopment.

**Lastly, the Court is to consider any other components of the Agreement that contribute to the municipality's satisfaction of its Mount Laurel obligation.** The Agreement includes a number of provisions which facilitate the Borough's satisfaction of its fair share housing responsibilities, now and into the future. These provisions are as follows:

- Within 120 days of the Court's approval of this Agreement, the Borough must adopt a final Housing Element and Fair Share Plan and introduce any amendments to the Borough's Affordable Housing Ordinance and Zoning Ordinance that are necessary to implement the terms of this Agreement. The Borough shall also adopt a spending plan within 120 days of

the Court's approval of this Agreement. The Spending Plan will be reviewed as part of the compliance phase of this matter and acted on during the future compliance hearing.

- The Borough shall update its affirmative marketing plan to include FSHC and other organizations in its list of community and regional organizations, and both the Borough and any other developers or administrative agencies conducting affirmative marketing must provide notice to those organizations of any available affordable units.
- The Borough agrees to require 13% of all affordable units referenced in its compliance plan (approved and constructed after July 1, 2008) to be affordable to households earning 30% or less of the regional median income, with at least half of the very-low income units being available to families. Pursuant to the Settlement Agreement, the Borough will comply with this requirement by providing at least three (3) very low-income family rental units at the Block 419 redevelopment site (and possibly one (1) very low-income family rental unit off-site), three (3) very low-income bedrooms at the Advancing Opportunities group homes, and seven (7) very low-income bedrooms at the Center for Hope and Safety and by requiring that 13% of all affordable units developed in the MFRAH North and South inclusionary overlay zoning districts be very low-income units.
- At least half of all units addressing the Borough's Third Round obligation (RDP and unmet need) will be made affordable to low-income households (which include the 13% requirement for very low-income units); the remainder will be made affordable to moderate-income households.
- At least 25% of the Borough's Third Round obligation (RDP and unmet need) shall be met through rental units, at least half of which will be available to families.
- At least half of the units addressing the Borough's Third Round obligation (RDP and unmet need) must be available to families.
- No more than 25% of units addressing the Prior Round RDP, Third Round RDP or combined unmet need shall be age-restricted.
- Rental bonuses shall be calculated in accordance with COAH's Second Round rules N.J.A.C. 5:93 – 5.15 (d) and shall not exceed the rental obligation.
- All affordable housing units created pursuant to the Settlement Agreement will comply with UHAC rules, with the exception of the third bullet point in which UHAC rules have been superseded by an amendment to the Fair Housing Act.

- Income limits for all affordable units that are part of the Borough's compliance plan and for which income limits are not already established through a federal program exempted from UHAC shall be updated by the Borough annually within 30 days of the publication of determinations of median income by HUD using the methodology set forth in the Settlement Agreement.
- On the first anniversary of the granting of a Final Judgment of Compliance and Repose, and every anniversary thereafter through the end of the period of protection, the Borough agrees to provide a report of trust fund activity and report of the status of all affordable housing activity within the municipality. The reporting is to be posted on the Borough's municipal website with a copy to FSHC.
- Within 30 days of the third anniversary of the Final Judgment of Compliance and Repose, and every three years thereafter through the end of the period of protection, the Borough will publish on its website and submit to FSHC a status report regarding its satisfaction of the very low-income requirement pursuant to N.J.S.A. 52:27D-329.1.
- For the midpoint realistic opportunity review due on July 1, 2020 as required pursuant to N.J.S.A. 52:27D-313, the Borough will post on its municipal website, with a copy provided to FSHC, a status report as to the implementation of its HEFSP. This midpoint review permits any interested party, such as FSHC, to request by motion a Court hearing regarding whether any sites in the Borough's compliance plan no longer present a realistic opportunity for affordable housing development and should be replaced. As mentioned above, during the review, the Borough must indicate how it will provide for the realistic opportunity of the possible seven-unit obligation (29 – 22 required on-site affordable housing units = 7) from the Block 419 redevelopment project if the balance of the seven (7) affordable units are not to be built on-site.

These provisions are affirmative actions on the part of the Borough and FSHC that facilitate the viability that Emerson will foster affordable housing development in accordance with all regulatory and statutory requirements, thereby contributing to the satisfaction of the Borough's Mount Laurel obligation on a continuing basis.

For the reasons cited above, I find that the Settlement Agreement between Emerson and FSHC is fundamentally fair to the interests of low- and moderate-income persons.

## **8.0 CONCLUSION & RECOMMENDATIONS**

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Based on my review above, I find that the Settlement Agreement between FSHC and the Borough of Emerson is fundamentally fair to the interests of low- and moderate-income persons. As such, I would recommend that Your Honor approve the Agreement. As noted above in Section 6, my recommendation assumes that the Court will find that the Borough has a right through the FHA to condemn the objectors' properties for an inclusionary redevelopment developed by a for-profit redeveloper.

In addition, notwithstanding the required additional documentation for inclusion in the Borough's subsequent final compliance plan as contemplated by the Agreement, I would recommend that Your Honor approve the Borough's RDP determinations as well as the Borough's preliminary compliance efforts addressing the Prior Round RDP and Third Round RDP and the combined unmet need mechanisms. The Court may wish to enumerate the conditions noted herein in a Third Round Order approving the Settlement Agreement and preliminary compliance efforts.

I would be happy to answer any questions that Your Honor or the parties may have either prior to or at the Fairness and Preliminary Compliance Hearing.