

**RESOLUTION NO. 2017-49
TOWNSHIP OF ABERDEEN
COUNTY OF MONMOUTH, NEW JERSEY**

**A RESOLUTION AUTHORIZING A SETTLEMENT AGREEMENT BY AND AMONG
THE TOWNSHIP OF ABERDEEN AND FAIR SHARE HOUSING CENTER TO
RESOLVE THE AFFORDABLE HOUSING ISSUES RAISED IN THE TOWNSHIP'S
DECLARATORY JUDGMENT ACTION**

WHEREAS, the New Jersey Supreme Court declared that the discriminatory use of zoning powers was illegal and provided, as a matter of constitutional law, that each developing municipality “must, by its land use regulations, make realistically possible the opportunity for an appropriate variety and choice of housing for all categories of people who may desire to live there, of course including those of low and moderate income,” In Re Adoption of N.J.A.C. 5:96 and 5:97 by the New Jersey Council on Affordable Housing, 221 N.J. 1, 6 (2015) (*Mount Laurel IV*), citing S. Burlington Cnty. NAACP v. Twp. of Mount Laurel (*Mount Laurel I*), 67 N.J. 151, 179, 187, appeal dismissed and cert. denied, 423 U.S. 808, 96 S. Ct. 18, 46 L. Ed. 2d 28 (1975), and that this constitutional obligation requires that towns must provide “a realistic opportunity for the construction of [their] fair share of the present and prospective regional need for low and moderate income housing,” Ibid., citing S. Burlington Cnty. NAACP v. Twp. of Mount Laurel (*Mount Laurel II*), 92 N.J. 158, 205 (1983), (together with *Mount Laurel I*, the *Mount Laurel Doctrine*).

WHEREAS, the Township of Aberdeen (“Township of Aberdeen”) has long engaged in the judicial process and the administrative process before the Council on Affordable Housing (COAH) established under the Fair Housing Act, N.J.S.A. 52:27D-1 et seq., to obtain approval of its affordable housing plan in compliance with its obligations under the *Mount Laurel Doctrine*; and

WHEREAS, the New Jersey Supreme Court, in *Mount Laurel IV* determined that “the

administrative forum (“COAH”) is not capable of functioning as intended by the Fair Housing Act due to the lack of lawful Third Round Rules assigning constitutional obligations to municipalities,” and, consequently “the Courts may resume their role as the forum of first instance for evaluating municipal compliance with Mount Laurel obligations;” and

WHEREAS, *Mount Laurel IV* accordingly provided for a judicial mechanism for municipalities to seek a declaratory judgment that they have complied with the *Mount Laurel Doctrine* and are entitled to immunity from exclusionary zoning lawsuits; and

WHEREAS, on July 6, 2015, the Township filed a declaratory judgment action under the procedures established by the Supreme Court in *Mount Laurel IV* encaptioned In the Matter of the Application of the Township of Aberdeen, Monmouth County, New Jersey for a Declaratory Judgment, Docket No. MON-L-2362-15 (“the Declaratory Judgment Action”) to address its *Mount Laurel Obligation*; and

WHEREAS, FAIR SHARE HOUSING CENTER (“FSHC”) is an intervenor in the Declaratory Judgment action and is a party to the settlement agreement and will be able to enforce the settlement agreement; and

WHEREAS, the settlement of *Mount Laurel* litigation is favored because it avoids delays and the expense of trial and results more quickly in the construction of homes for low and moderate-income households; and

WHEREAS, the ABERDEEN Township Planning Board (“the Planning Board”) will adopt a Housing Element and Fair Share Plan (HE/FSP) to provide for the Township’s compliance with its *Mount Laurel Obligation* which will be provided to the Governing Body for review; and

WHEREAS, Ordinances will be presented to the Governing Body for introduction and adoption to implement the HE/FSP and provide mechanisms for the provision of affordable

housing; and

WHEREAS, presented to the Governing Body for review and approval is a proposed Settlement Agreement with FSHC to resolve all disputes arising under the Township's Declaratory Judgment Action.

NOW, THEREFORE, BE IT RESOLVED by the Township Council of the Township of ABERDEEN that:

1. The Township Council will review Housing Element and Fair Share Plan and all of its constituent components to address and provide for the Township's *Mount Laurel Obligation*, subject to the Court's review and determination.
2. The Township Council will review the Ordinances to implement the Housing Element and Fair Share Plan which will be considered for adoption subject to the Court's review and determination.

The Township Council hereby approves and endorses the proposed Settlement Agreement with FSHC to resolve all disputes arising under the Township's Declaratory Judgment Action, subject to the Court's review and determination. The Mayor is hereby authorized to execute the Settlement Agreement on behalf of the Township substantially in the form as presented to the Township Council and upon the advice of counsel.

ROLL CALL VOTE:

Ayes: Councilmember Cannon, Hirsch, Kelley, Swindle and Deputy Mayor Montone

Nays: None

Abstain: None

Absent: Councilmember Martucci and Mayor Tagliarini

Adopted: February 16, 2017


Margaret Montone, Deputy Mayor


Karen Ventura, Municipal Clerk



Peter J. O'Connor, Esq.
Kevin D. Walsh, Esq.
Adam M. Gordon, Esq.
Laura Smith-Denker, Esq.
David T. Rammner, Esq.
Joshua D. Bauers, Esq.

February 16, 2017

Ronald H. Gordon, Esq.
DeCotiis, FitzPatrick, & Cole, LLP
Glenpointe Center West
500 Frank W. Burr Blvd.
Teaneck, New Jersey 07666

Re: In the Matter of the Township of Aberdeen, County of Monmouth,
Docket No. MON-L-2362-15

Dear Mr. Gordon:

This letter memorializes the terms of an agreement reached between the Township of Aberdeen (the Township), the declaratory judgment plaintiff, and Fair Share Housing Center (FSHC), a Supreme Court-designated interested party in this matter in accordance with In re N.J.A.C. 5:96 and 5:97, 221 N.J. 1, 30 (2015)(Mount Laurel IV) and, through this settlement, a defendant in this proceeding.

Background

Aberdeen filed the above-captioned matter on July 6, 2015 seeking a declaration of its compliance with the Mount Laurel doctrine and Fair Housing Act of 1985, N.J.S.A. 53:27D-301 et seq. in accordance with In re N.J.A.C. 5:96 and 5:97, *supra*. FSHC and the Township engaged in mediation in an attempt to resolve this matter. Through that process, the Township and FSHC agreed to settle the litigation and to present that settlement to the trial court with jurisdiction over this matter to review, recognizing that the settlement of Mount Laurel litigation is favored because it avoids delays and the expense of trial and results more quickly in the construction of homes for lower-income households.

Settlement terms

The Township and FSHC hereby agree to the following terms:

1. FSHC agrees that the Township, through the crediting described in this Agreement and shown in the attached Housing Element and Fair Share Plan ("Plan") and the implementation of the Plan and this agreement, satisfies its obligations under the Mount Laurel doctrine and Fair Housing Act of 1985, N.J.S.A. 52:27D-301 et seq., for the Prior Round (1987-1999) and Third Round (1999-2025).
2. At this time and at this particular point in the process resulting from the Supreme Court's Mount Laurel IV decision, when fair share obligations have yet to be definitively determined, it is appropriate for the parties to arrive at a settlement regarding a municipality's Third Round present and prospective need instead of doing so through plenary adjudication of the present and prospective need.
3. FSHC and Aberdeen Township hereby agree that Aberdeen's affordable housing obligations are as follows:

Rehabilitation Share (per Kinsey Report ¹)	64
Prior Round Obligation (pursuant to N.J.A.C. 5:93)	270
Third Round (1999-2025) Prospective Need (per Kinsey Report, as adjusted through this settlement agreement)	330

For purposes of this Agreement, the Third Round Prospective Need shall be deemed to include the gap period present need, which is a measure of households formed from 1999-2015 that need affordable housing, as recognized by the Supreme Court in its January 18, 2017, decision in *In re Declaratory Judgment Actions Filed by Various Municipalities*, ___N.J. ___, 2017 WL 192895 (Jan. 18, 2017).

- The Township's efforts to meet its present need include the following: To address its present need obligation of 64 units, the Township will engage a qualified professional affordable housing consultant to initiate and administer a housing rehabilitation program that adheres to the regulatory requirements for housing rehabilitations (incl., the rehabilitation of rental units). The rehabilitation program will be funded by the use of development fee trust fund monies. The Township reserves the right to contract with the housing rehabilitation program administered and operated by the Monmouth County Community Development Program (within the County Division of Planning). (In prior years Aberdeen Township contracted with the County to operate a housing rehabilitation program using Township funds.)

The Aberdeen Township Rehabilitation Program will be available to low and moderate income homeowners as well as property owners of properties occupied by low and moderate income tenants. The Township will provide the appropriate crediting documentation.

This is sufficient to satisfy the Township's present need obligation of 64 units.

- As noted above, the Township has a Prior Round prospective need of 270 units, which is met through the following compliance mechanisms:

Development	Units	Bonus	Credits
Inclusionary Zoning	55	55	110
The Villages at Aberdeen	8	8	16
The Bluffs	37	37	74
241 Cliffwood Properties	10	10	20
100% Affordable Units – South River Metals	127	12	139
Write Down-Buy Down/Market to Affordable –	4	0	4
817 North Concourse	1	0	1

¹ David N. Kinsey, PhD, PP, FAICP, NEW JERSEY LOW AND MODERATE INCOME HOUSING OBLIGATIONS FOR 1999-2025 CALCULATED USING THE NJ COAH PRIOR ROUND (1987-1999) METHODOLOGY, May 2016.

788 Cliffwood Avenue	1	0	1
8 Water Street (AKA 8 Bank Street)	1	0	1
6 Water Street	1	0	1
Alternative Living/Supportive & Special Needs	17	0	17
New Horizons in Autism, Inc.	4	0	4
Cerebral Palsy Association	4	0	4
Manna House	9	0	9
Total	203	67	270

6. The Township has a Third Round realistic development potential (RDP) of 178 units. That RDP will be satisfied as follows:

Development	Units	Bonus	Credits
Inclusionary Zoning	144	0	188
The Glassworks	110	44	154
Highview at Aberdeen	34	0	34
100% Affordable Units – South River Metals	18	0	18
Total	162	44	206

The RDP of 178, subtracted from the Third Round obligation of 330 units, results in an unmet need of 152 units. Additionally, after the Township complies with its RDP of 178, it remains with 28 units of compliance mechanisms that can be applied to its unmet need (206 total third round credits – RDP of 178 = 28 units to apply to unmet need). Once the remaining 28 units of compliance mechanisms are applied to the unmet need, the Township is left with an unaddressed unmet need of 124 units, which shall be addressed through the following mechanisms described in the Township's December 14, 2015 plan submission to the Court:

Development	Potential Affordable Units
Redevelopment	
Industrial Site near the South River Metals Redevelopment Area	60
Residential Properties adjacent to the Glassworks Redevelopment Area	7
Overlay Zoning	57
Commercial Strip Mall along Route 35	20
Industrial Site near Garden State Parkway	19

Mixed-Use Overlay Zone along the Neighborhood Commercial (NC) Zone along Lower Main Street	18
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7. The Township agrees to require 13% of all units referenced in this plan, with the exception of units constructed as of July 1, 2008, and units subject to preliminary or final site plan approval, to be very low income units, with half of the very low income units being available to families. The municipality will comply with those requirements as follows:

Development	Very Low Income Units
South River Metals	14
The Glassworks	11

In addition, the Township shall require as part of the unmet need mechanisms referenced above that for all developments developed as rental housing a minimum of 13 percent of the affordable units are very low income units.

8. The Township shall meet its Third Round Prospective Need in accordance with the following standards as agreed to by the Parties and reflected in the table in paragraph 6 above:
- Third Round bonuses will be applied in accordance with N.J.A.C. 5:93-5.15(d).
 - At least 50 percent of the units addressing the Third Round Prospective Need shall be affordable to very-low-income and low-income households with the remainder affordable to moderate-income households.
 - At least twenty-five percent of the Third Round Prospective Need shall be met through rental units, including at least half in rental units available to families.
 - At least half of the units addressing the Third Round Prospective Need in total must be available to families.
 - The Township agrees to comply with an age-restricted cap of 25% and to not request a waiver of that requirement. This shall be understood to mean that in no circumstance may the municipality claim credit toward its fair share obligation for age-restricted units that exceed 25% of all units developed or planned to meet its cumulative prior round and third round fair share obligation.
9. The Township shall add to the list of community and regional organizations in its affirmative marketing plan, pursuant to N.J.A.C. 5:80-26.15(f)(5), Fair Share Housing Center, the New Jersey State Conference of the NAACP, the Latino Action Network, the Greater Red Bank, Asbury Park/Neptune, Bayshore, Greater Freehold, and Greater Long Branch Branches of the NAACP, and the Supportive Housing Association, and shall, as part of its regional affirmative marketing strategies during its implementation of this plan, provide notice to those organizations of all available affordable housing units. The Township also agrees to require any other entities, including developers or persons or companies retained to do affirmative marketing, to comply with this paragraph.

10. All units shall include the required bedroom distribution, be governed by controls on affordability and affirmatively marketed in conformance with the Uniform Housing Affordability Controls, N.J.A.C. 5:80-26.1 et. seq. or any successor regulation, with the exception that in lieu of 10 percent of affordable units in rental projects being required to be at 35 percent of median income, 13 percent of affordable units in such projects shall be required to be at 30 percent of median income, and all other applicable law. The Township as part of its HEFSP shall adopt and/or update appropriate implementing ordinances in conformance with standard ordinances and guidelines developed by COAH to ensure that this provision is satisfied. All new construction units shall be adaptable in conformance with P.L.2005, c.350/N.J.S.A. 52:27D-311a and -311b and all other applicable law.
11. As an essential term of this settlement, within one hundred and twenty (120) days of Court's approval of this Settlement Agreement, the Township shall introduce and adopt a revised Housing Element and Fair Share Plan in accordance with the terms of this settlement agreement and an ordinance providing for the amendment of the Township's Affordable Housing Ordinance and Zoning Ordinance to implement the terms of this settlement agreement and the zoning including redevelopment and overlay zoning for unmet need mechanisms contemplated herein.
12. The parties agree that if a decision of a court of competent jurisdiction in Monmouth County, or a determination by an administrative agency responsible for implementing the Fair Housing Act, or an action by the New Jersey Legislature, would result in a calculation of an obligation for the Township for the period 1999-2025 that would be lower by more than twenty (20%) percent than the total prospective Third Round need obligation established in this agreement, and if that calculation is memorialized in an unappealable final judgment, the Township may seek to amend the judgment in this matter to reduce its fair share obligation accordingly. Notwithstanding any such reduction, the Township shall be obligated to implement the fair share plan attached hereto, including by leaving in place any site specific zoning adopted or relied upon in connection with the Plan approved pursuant to this settlement agreement; taking all steps necessary to support the development of any 100% affordable developments referenced herein; maintaining all mechanisms to address unmet need; and otherwise fulfilling fully the fair share obligations as established herein. The reduction of the Township's/Township's obligation below that established in this agreement does not provide a basis for seeking leave to amend this agreement or seeking leave to amend an order or judgment pursuant to R. 4:50-1. If the Township prevails in reducing its prospective need for the Third Round, the Township may carry over any resulting extra credits to future rounds in conformance with the then-applicable law.
13. The Township will prepare a revised spending plan within 120 days of the Court's approval of this Settlement Agreement for submission to the Court for review and approval. The Township reserves the right to request the Court's approval that the expenditures of funds under the revised spending plan constitute "commitment" for expenditure pursuant to N.J.S.A. 52:27D-329.2 and -329.3, and FSHC reserves the right to respond to such request and comment on the revised spending plan. The parties agree that any funds deemed "committed" by the Court shall have the four-year time period for expenditure designated pursuant to N.J.S.A. 52:27D-329.2 and -329.3 begin to run with the entry of a final judgment approving this settlement in accordance with the provisions of In re Tp. Of Monroe, 442 N.J. Super. 565 (Law Div. 2015) (aff'd 442 N.J. Super. 563). On the first

anniversary of the execution of this agreement, and every anniversary thereafter through the end of this agreement, the Township agrees to provide annual reporting of trust fund activity to the New Jersey Department of Community Affairs, Council on Affordable Housing, or Local Government Services, or other entity designated by the State of New Jersey, with a copy provided to Fair Share Housing Center and posted on the municipal website, using forms developed for this purpose by the New Jersey Department of Community Affairs, Council on Affordable Housing, or Local Government Services. The reporting shall include an accounting of all housing trust fund activity, including the source and amount of funds collected and the amount and purpose for which any funds have been expended.

14. On the first anniversary of the execution of this agreement, and every anniversary thereafter through the end of this agreement, the Township agrees to provide annual reporting of the status of all affordable housing activity within the municipality through posting on the municipal website with a copy of such posting provided to Fair Share Housing Center, using forms previously developed for this purpose by the Council on Affordable Housing or any other forms endorsed by the Special Master and FSHC.
15. The Fair Housing Act includes two provisions regarding action to be taken by the Township during the ten-year period of protection provided in this agreement. The Township agrees to comply with those provisions as follows:
 - a. For the midpoint realistic opportunity review due on July 1, 2020, as required pursuant to N.J.S.A. 52:27D-313, the Township will post on its municipal website, with a copy provided to Fair Share Housing Center, a status report as to its implementation of its Plan and an analysis of whether any unbuilt sites or unfulfilled mechanisms continue to present a realistic opportunity and whether any mechanisms to meet unmet need should be revised or supplemented. Such posting shall invite any interested party to submit comments to the municipality, with a copy to Fair Share Housing Center, regarding whether any sites no longer present a realistic opportunity and should be replaced and whether any mechanisms to meet unmet need should be revised or supplemented. Any interested party may by motion request a hearing before the court regarding these issues.
 - b. For the review of very low income housing requirements required by N.J.S.A. 52:27D-329.1, within 30 days of the third anniversary of this agreement, and every third year thereafter, the Township will post on its municipal website, with a copy provided to Fair Share Housing Center, a status report as to its satisfaction of its very low income requirements, including the family very low income requirements referenced herein. Such posting shall invite any interested party to submit comments to the municipality and Fair Share Housing Center on the issue of whether the municipality has complied with its very low income housing obligation under the terms of this settlement.
16. FSHC is hereby deemed to have party status in this matter and to have intervened in this matter as a defendant without the need to file a motion to intervene or an answer or other pleading. The parties to this agreement agree to request the Court to enter an order declaring FSHC is an intervenor, but the absence of such an order shall not impact FSHC's rights.
17. Prior to becoming effective, this settlement agreement must be approved by the Court following a fairness hearing as required by Morris Cty. Fair Hous. Council v. Boonton Twp.,

197 N.J. Super. 359, 367-69 (Law Div. 1984), aff'd o.b., 209 N.J. Super. 108 (App. Div. 1986); East/West Venture v. Borough of Fort Lee, 286 N.J. Super. 311, 328-29 (App. Div. 1996). The Township shall present its planner as a witness at this hearing. FSHC agrees not to challenge the attached Plan (Exh. A) at the fairness hearing. In the event the Court approves this proposed settlement, the parties contemplate the municipality will receive "the judicial equivalent of substantive certification and accompanying protection as provided under the FHA," as addressed in the Supreme Court's decision in In re N.J.A.C. 5:96 & 5:97, 221 N.J. 1, 36 (2015). The "accompanying protection" shall remain in effect through July 1, 2025. If the settlement agreement is rejected by the Court at a fairness hearing it shall be null and void.

18. If an appeal is filed of the Court's approval or rejection of the Settlement Agreement, the Parties agree to defend the Agreement on appeal, including in proceedings before the Superior Court, Appellate Division and New Jersey Supreme Court, and to continue to implement the terms of the Settlement Agreement if the Agreement is approved before the trial court unless and until an appeal of the trial court's approval is successful at which point, the Parties reserve their right to rescind any action taken in anticipation of the trial court's approval. All Parties shall have an obligation to fulfill the intent and purpose of this Agreement.
19. This settlement agreement may be enforced through a motion to enforce litigant's rights or a separate action filed in Superior Court, Monmouth County. A prevailing movant or plaintiff in such a motion or separate action may be entitled to reasonable attorney's fees.
20. Unless otherwise specified, it is intended that the provisions of this Agreement are to be severable. The validity of any article, section, clause or provision of this Agreement shall not affect the validity of the remaining articles, sections, clauses or provisions hereof. If any section of this Agreement shall be adjudged by a court to be invalid, illegal, or unenforceable in any respect, such determination shall not affect the remaining sections.
21. This Agreement shall be governed by and construed by the laws of the State of New Jersey.
22. This Agreement may not be modified, amended or altered in any way except by a writing signed by each of the Parties.
23. This Agreement may be executed in any number of counterparts, each of which shall be an original and all of which together shall constitute but one and the same Agreement.
24. The Parties acknowledge that each has entered into this Agreement on its own volition without coercion or duress after consulting with its counsel, that each party is the proper person and possess the authority to sign the Agreement, that this Agreement contains the entire understanding of the Parties and that there are no representations, warranties, covenants or undertakings other than those expressly set forth herein.
25. Each of the Parties hereto acknowledges that this Agreement was not drafted by any one of the Parties, but was drafted, negotiated and reviewed by all Parties and, therefore, the presumption of resolving ambiguities against the drafter shall not apply. Each of the Parties expressly represents to the other Parties that: (i) it has been represented by counsel in connection with negotiating the terms of this Agreement; and (ii) it has conferred due authority for execution of this Agreement upon the persons executing it.

26. Any and all Exhibits and Schedules annexed to this Agreement are hereby made a part of this Agreement by this reference thereto. Any and all Exhibits and Schedules now and/or in the future are hereby made or will be made a part of this Agreement with prior written approval of both Parties.
27. This Agreement constitutes the entire Agreement between the Parties hereto and supersedes all prior oral and written agreements between the Parties with respect to the subject matter hereof except as otherwise provided herein.
28. No member, official or employee of the Township shall have any direct or indirect interest in this Settlement Agreement, nor participate in any decision relating to the Agreement which is prohibited by law, absent the need to invoke the rule of necessity.
29. Anything herein contained to the contrary notwithstanding, the effective date of this Agreement shall be the date upon which all of the Parties hereto have executed and delivered this Agreement.
30. All notices required under this Agreement ("Notice[s]") shall be written and shall be served upon the respective Parties by certified mail, return receipt requested, or by a recognized overnight or by a personal carrier. In addition, where feasible (for example, transmittals of less than fifty pages) shall be served by facsimile or e-mail. All Notices shall be deemed received upon the date of delivery. Delivery shall be affected as follows, subject to change as to the person(s) to be notified and/or their respective addresses upon ten (10) days notice as provided herein:

TO FSHC:

Kevin D. Walsh, Esq.
Fair Share Housing Center
510 Park Boulevard
Cherry Hill, NJ 08002
Phone: (856) 665-5444
Telecopier: (856) 663-8182
E-mail: kevinwalsh@fairsharehousing.org

TO THE TOWNSHIP:

Ronald H. Gordon, Esq.
DeCotiis, FitzPatrick, & Cole, LLP
Glenpointe Center West
500 Frank W. Burr Blvd.
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Telecopier: (201) 928-0588
Email: rgordon@decotiislaw.com

**WITH A COPY TO THE
MUNICIPAL CLERK:**

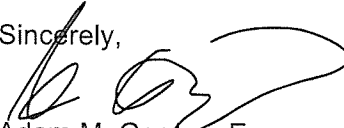
Karen Ventura
Aberdeen Township Municipal Clerk
1 Aberdeen Square
Aberdeen, NJ 07747

Telecopier: (732) 566-5912

Email: karen.ventura@aberdeennj.org

Please sign below if these terms are acceptable.

Sincerely,

A handwritten signature in black ink, appearing to read 'A. Gordon', written over the word 'Sincerely,'.

Adam M. Gordon, Esq.
Counsel for Intervenor/Interested Party
Fair Share Housing Center

On behalf of the Township of Aberdeen, with the authorization
of the governing body:

Dated: _____