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ALEXANDER H. CARVER, III
J.S.C.

**SUPERIOR COURT OF NEW JERSEY
LAW DIVISION – BERGEN COUNTY**

Prepared by the Court

**DONALD NUCKEL, an individual and
NORTH VILLAGE I, LLC, NORTH
VILLAGE II, LLC, GILBERT MANOR,
LLC, all limited liability corporations
organized under the laws of the State of
New Jersey,**

Plaintiffs,

v.

**THE BOROUGH OF LITTLE FERRY
and the PLANNING BOARD OF THE
BOROUGH OF LITTLE FERRY**

Defendants.

CIVIL ACTION

OPINION

DOCKET NO. BER-L-717-06

HUTT & SHIMANOWITZ, P.C. (Ronald L. Shimanowitz, Esq., appearing), and
JOSEPH A. FERRIERO, ESQ., attorneys for the Plaintiffs, DONALD NUCKEL, NORTH
VILLAGE I, LLC, NORTH VILLAGE II, LLC, and GILBERT MANOR, LLC.

JOSEPH G. MONAGHAN, ESQ., attorney for the Defendant, BOROUGH OF LITTLE
FERRY.

GIBLIN & GIBLIN, P.C. (Michael A. Gannaio, Esq., appearing), attorney for the
Defendant, PLANNING BOARD OF THE BOROUGH OF LITTLE FERRY.

ARCHER & GREINER, P.C. (Andrew T. Fede, Esq., appearing), attorneys for 110
Bergen Turnpike, LLC.

INTRODUCTION AND PROCEDURAL HISTORY.

The within matter constitutes the third phase, or compliance phase, of Mount Laurel litigation against the Borough of Little Ferry. The matter has a long and unusual history which is hereinafter set forth.

In 2006, Plaintiffs, Donald Nuckel, North Village I, LLC, North Village II, LLC, and Gilbert Manor, LLC, sought to construct an inclusionary development on property owned by North Village I, LLC, and North Village II, LLC. They filed an Action in Lieu of Prerogative Writs challenging the Borough of Little Ferry's ("the Municipality") compliance with its affordable housing obligations under the Fair Housing Act, N.J.S.A. 52:27D-301 et seq. ("FHA"), and sought a builder's remedy with respect to lands known and designated as Lots 1.01 and 1.02 in Block 5.01 on the Little Ferry Municipal Tax Map. The complaint originally included an additional claim against the New Jersey Meadowlands Commission, which was transferred to the Appellate Division by a Consent Order dated September 25, 2006.

In the first phase of the proceedings, Judge Jonathan N. Harris, J.A.D. (then sitting in the Superior Court, Law Division) entered an Order for Partial Summary Judgment on September 20, 2007, declaring the zoning ordinances of the Municipality invalid, because the ordinances were not compliant with the municipal affordable housing obligation. The Order also appointed Stuart Koenig, Esq., as Special Master to assist the Court.

In the second or builder's remedy phase of the proceedings, after trial Judge Harris granted Plaintiffs' request for a builder's remedy. The property of North Village I, LLC, has one hundred sixty units in two-story garden apartment structures, and the property of North Village II, LLC, has two hundred and forty-eight apartments in similar structures. Plaintiffs sought to demolish the existing one hundred sixty units in North Village I, and forty-eight of the units in

North Village II, to make way for an inclusionary project reflecting a maximum density of seventy-six units per acre, together with some retail space.

On March 18, 2008, Judge Harris issued a written Opinion granting Plaintiffs' request for the builder's remedy and fixed the 1987-1999 Fair Share obligation of the Municipality between twenty and twenty-eight new construction units. See generally, Donald Nuckel, et al. v. Borough of Little Ferry, Docket No. BER-L-717-06, initial decision, March 18, 2008. The Plaintiffs' builder's remedy provided for construction of residential dwelling units not to exceed six hundred thirty units, with at least ninety-five being set aside for low and moderate income households. Id. at 14-15. Ancillary retail space not exceeding 46,000 square feet was permitted to provide amenities to the residents of the development. Id. The buildings were limited to a height of eight stories, and construction was to be phased to accommodate relocation of existing tenants. Id. The set aside of low and moderate income units was to be 15% if the project was rental and 20% if the units were for sale. Id. The units were to be credited as Second Round COAH units. Judge Harris determined the rehabilitation obligation of the Municipality to be forty-two units. Id. The trial and the Opinion focused solely on Second Round compliance of the Municipality; the Third Round compliance issues were reserved for a future date.¹ An Interlocutory Order based upon the Opinion was entered on April 10, 2008.

The Order memorializing the written Opinion declared that Little Ferry's land use regulations remained invalid and unconstitutional and required the Little Ferry Planning Board and Governing Body to prepare a comprehensive compliance plan, together with ordinances and other documents to implement the plan. Defendants were to complete the process of updating

¹ At that time, the Third Round COAH regulations were not in effect because the Appellate Division had declared unconstitutional those that were previously adopted. See generally, In re Adoption of N.J.A.C. 5:94 and 5:95, 390 N.J. Super. 1 (App. Div. 2007) (invalidating COAH's Third Round growth share regulations as inconsistent with the Mount Laurel doctrine and New Jersey Constitution).

and adopting the Housing Element and Fair Share Plan, and include the builder's remedy awarded to Plaintiffs.

The Municipality prepared a Housing Element and Fair Share Plan dated June 30, 2008 (the 2008 compliance plan), which included Plaintiffs' builder's remedy, and submitted the documents to the Court and Special Master for review. In anticipation of a Court conducted Compliance Hearing on December 9, 2008, the Special Master rendered a Report on November 5, 2008. Subsequently, the Plaintiffs made various applications either to modify the Court's decision or to withdraw Plaintiffs' property from consideration as part of a compliance plan, which were denied subject to the Plaintiffs being able to present their position at the Compliance Hearing.

At the start of the scheduled Compliance Hearing, the Plaintiffs' position was that the property would not be developed for inclusionary development, and the Municipality's plan that relied on that property did not create a realistic opportunity to satisfy its obligation. As a result, the scheduled Compliance Hearing was not conducted, and Judge Harris issued an Order on December 19, 2008, permitting Plaintiffs to withdraw with prejudice their request for a builder's remedy. The matter was remanded to the Municipality for preparation and adoption of a new Housing Element and Fair Share Plan, together with adoption of implementing ordinances, without including the Plaintiffs' property as an essential component.

On March 31, 2009, the Little Ferry Planning Board adopted a 2009 Housing Element and Fair Share Plan to address both Second and Third Round obligations and to comply with Judge Harris' Order of December 19, 2008 (the 2009 compliance plan). By October 2008 COAH had adopted new Third Round regulations, but Judge Harris' written Opinion addressed Second Round compliance only. On May 1, 2009, the Municipality filed a separate complaint

seeking to have the Court review and declare Little Ferry compliant with its Third Round affordable housing obligation.

On May 15, 2009, the Special Master rendered a Report to the Court on the 2009 compliance plan. The Special Master recommended that the Municipality receive a Second Round Judgment of Compliance and Repose for a forty-two unit rehabilitation program and a Second Round or Prior Round obligation of twenty-eight units. The Special Master noted that as of June 2008 COAH had resolved the discrepancy regarding Little Ferry's Second Round obligation, and established that obligation at twenty-eight units, not the earlier twenty units. The Special Master's recommendation was based upon the Municipality having rehabilitated six units, and having administration and funding in place for an additional thirty-six units of rehabilitation. It was also based upon the Municipality satisfying its Second Round new construction obligation with seven group home rentals, seven rental bonuses, two units in an approved multi-family development (Royale Realty), and twelve units from a new River Front Overlay Zoning Ordinance (the River Front Ordinance), which would permit large scale development along the riverfront with a mandatory mixed use component including an affordable housing set-aside of either 20% or 25%, depending on whether units were rentals or for sale. The Special Master limited his comments to Second Round compliance because the case at that point in time was a Second Round case, but he expressed doubt that the then River Front Ordinance could satisfy Third Round due to the Growth Share obligation such development would generate under the then effective growth share regulations contained in N.J.A.C. 5:96 and 5:97.

A compliance hearing scheduled for June 1, 2009, was not completed because Plaintiffs filed a separate Complaint on May 27, 2009 (Docket No. BER-L-4778-09) challenging the

validity of the River Front Ordinance that had been adopted as a part of the compliance plan. The matters were consolidated. East/West Venture v. Borough of Fort Lee, 286 N.J. Super. 311, 329 (App. Div., 1996). A subsequent Complaint was filed by 110 Bergen Turnpike, LLC, challenging the same ordinance for different reasons (Docket No. BER-L-4803-09). The three matters were then consolidated. The Municipality negotiated a settlement with 110 Bergen Turnpike, LLC, which required a revision to the River Front Ordinance as well as the Housing Element and Fair Share Plan. By Order of Judge Robert L. Polifroni dated May 14, 2010, to whom the matter had been assigned when Judge Harris was elevated to the Appellate Division, the Municipality was permitted to repeal the adopted ordinance and was directed to draft a revised compliance plan and ordinance. After the adopted ordinance was repealed by Order dated December 8, 2010, the two litigations consolidated with this matter were dismissed as moot.

On January 10, 2011, the Municipality revised the Housing Element and Fair Share Plan, drafted an amended River Front Overlay Zoning Ordinance, and entered into a written agreement with 110 Bergen Turnpike, LLC. The Plaintiffs submitted their response to the compliance plan on February 10, 2011, consisting of a planner's report, a feasibility analysis, and a transcript of Little Ferry's March 20, 2010, Council meeting. The Special Master advised the Municipality that the Housing Element and Fair Share Plan, but not the River Front Ordinance, had to be adopted before it could be reviewed at a Compliance Hearing. As a result, the Housing Element and Fair Share Plan was adopted by Resolution of the Little Ferry Planning Board on April 20, 2011, and endorsed by resolution of the Little Ferry Governing Body on May 3, 2011. This Court scheduled and held a Compliance Hearing on May 20, 2011.

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

The issue before this Court is whether the Little Ferry Housing Element and Fair Share Plan complies with Judge Harris' March 18, 2008, Opinion and Order, as modified by the Order of December 19, 2008. The witnesses testifying at the May 20 Compliance Hearing were Elizabeth C. McKenzie, P.P., who rendered a report and testified as an expert Planner on behalf of the Borough of Little Ferry; Barbara Moldanado, Clerk of the Borough of Little Ferry; Art Bernard, P.P., who rendered a report and testified as an expert Planner on behalf of the Plaintiffs; and the Special Master, who rendered a report dated May 17, 2011.

At the Compliance Hearing, Little Ferry presented the testimony of Elizabeth McKenzie, P.P., a convincing expert witness with over thirty-one years of experience, who prepared the Housing Element and Fair Share Plan which was admitted into evidence. She testified that through an innovative approach—overlay zoning—the Little Ferry Plan provides a reasonable opportunity for affordable housing in the Municipality. Ms. McKenzie testified that the overlay zoning, which does not repeal the underlying zoning, provides maximum flexibility to Little Ferry in potentially delivering twenty-one affordable units from the 110 Bergen site which constitutes 75% of the Municipality's new construction obligation.

The Plaintiffs presented the testimony of Art Bernard, P.P., who rendered a report and testified as an expert planner on behalf of the Plaintiffs. In his opinion, among other issues, overlay zoning should not be utilized to fulfill a COAH obligation. However, on cross-examination he acknowledged that he objects to overlay zoning because he does not find it acceptable in the Third Round, although it is not prohibited in the Second Round, which is applicable to the subject matter.

The Borough Clerk, Barbara Moldanado, testified on the public notice for and occurrence of the May 3, 2011, meeting of the Little Ferry Governing Body at which the Housing Element and Fair Share Plan, having been adopted by Resolution of the Little Ferry Planning Board on April 20, 2011, was endorsed by Resolution of the Little Ferry Council. The issue of compliance with the Open Public Meetings Act was raised by the Plaintiffs with a proffer that their representatives had been at the site of the scheduled meeting at which the Resolution of the Governing Body was to be adopted, but that no meeting occurred. Ms. Moldanado testified credibly that the meeting indeed had occurred, and that the Council at one point had gone into closed session in a separate meeting room.

The Special Master testified with reference to his report, and with reference to the various issues raised by the parties at the hearing. He made various recommendations, which will be incorporated into this decision.

This Court is called upon to determine if the municipal plan of compliance and the supporting documents present a realistic opportunity to satisfy the affordable housing obligation of the Municipality. The normal presumption of validity that applies to municipal action does not apply to a municipality that has not satisfied its affordable housing obligation. Oceanport Holding, LLC v. Borough of Demarest, 396 N.J.Super. 622, 628 (App. Div., 2007). It is a presumption of validity that a municipality obtains if it is found compliant with the obligation. N.J.S.A. 52:27D-317a. The determination to be made constitutes an issue of law to be decided de novo. Toll Bros., Inc. v. Township of West Windsor, 173 N.J. 502, 549 (2002).

The main issue in this case turns upon whether the Municipality's Housing Element and Fair Share Plan, along with the other documents submitted for review and approval, satisfy the municipal affordable housing obligation as set forth in Judge Harris' decision rendered on March

18, 2008. See, Donald Nuckel, No. BER-L-717-06, supra. The foremost inquiry addressed in the original Mount Laurel litigation was “whether the Municipality [had] *in fact* provided a realistic opportunity for the construction of the region’s needs for affordable housing.” Id. at 8 (emphasis in original). In reviewing a Municipality’s compliance with its constitutional duties under the Fair Housing Act (FHA), courts are instructed to follow COAH guidelines and policy where possible. Id. (citing Hills Dev. Co. v. Twp. of Bernards, 103 N.J. 1, 22-23 (1996) (discussing the public policy that inheres in the FHA and COAH policies)). While COAH has been abolished by a Plan of Reorganization, and the regulations and duties are now undertaken by the Department of Community Affairs (DCA), this opinion will continue to reference COAH for ease of convenience. This Court finds that the documents prepared and adopted by the Municipality are consistent with COAH regulations, and provide the requisite realistic opportunity.

Regulations and Obligations

The Regulations assign the Borough of Little Ferry a forty-two unit Rehabilitation obligation. 40 N.J.R. 2929. The Second or Prior Round obligation (1987-1999) has been established as twenty-eight units. 40 N.J.R. 2944. The Third Round regulations and obligation were invalidated by the Appellate Division in In re Adoption of N.J.A.C. 5:96 and 5:97, 416 N.J. Super. 462 (App. Div., 2010). As a result, this Court will limit its review to Second or Prior Round compliance.

The Regulations contain a number of limitations and requirements: (1) a minimum of 25% of the obligation is required to be rental (N.J.A.C. 5:97-3.10(p)); (2) rental units, other than age-restricted units, satisfying the Prior Round obligation, are entitled to a rental bonus of one unit each (two for one), to a maximum of the rental obligation (N.J.A.C. 5:97-3.5(a)); (3) a minimum of 50% of the Prior Round units are to be low income units (N.J.A.C. 5:97-3.3); (4) the

Prior Round units are required to satisfy the bedroom distribution or no more than 20% one-bedroom, and at least 20% three-bedroom (N.J.A.C. 5:80-26.3); and (5) the units must be subject to occupancy controls pursuant to N.J.A.C. 5:80-26.5 and 26.11.

The Municipal Plan

The Municipality has filed with the Court a Housing Element and Fair Share Plan dated January 10, 2011, which addresses both the Rehabilitation and the Second or Prior Round obligation. Various other documents have been submitted for review and approval as part of the compliance plan, including a Development Fee Ordinance (Ordinance No. 1257-16-18, adopted November 10, 2008), an Affordable Housing Ordinance (Ordinance No. 1278-10-09, adopted April 14, 2009), an Affirmative Marketing Resolution (adopted by Resolution No. 112), an Administrative Agency Agreement (authorized and signed by, respectively, Resolution No. 303 on December 2, 2008, and Resolution No. 2008-96 on November 25, 2008), a Spending Plan (adopted by Resolution No. 132 on April 14, 2009), and the River Front Overlay Zoning Ordinance.

The Municipality correctly sets forth the Rehabilitation obligation as forty-two units. The Rehabilitation is controlled by N.J.A.C. 5:97-6.2. Six units have been created, and the remaining thirty-six-unit program is administered by the Bergen County Division of Community Development. Bergen County provides similar services to many other municipalities in Bergen County and is well recognized by COAH as a provider of a rehabilitation program. In the event Bergen County ceases to provide those services, the Municipality will be required to retain the services of another qualified provider. The Housing Element indicates there are a substantial number of households in the Municipality of low and moderate income means, and although

those households provide no credit to the Municipality for affordable housing under COAH Regulations, because they are not restricted in pricing as required by the Regulations, the numbers suggest that the Rehabilitation program should be successful and provide great assistance to the existing residents of the Municipality. The funding through the County program is described in the documents to be only for rental units, but it was pointed out by the Municipality and the Special Master that while the County only funds rental programs that the program would be open to units owned by low and moderate income households by funding through the municipal affordable housing trust fund. All experts agreed that the plan is generally appropriate. The Rehabilitation program is approved by this Court.

With regard to the twenty-eight units required by the Second or Prior Round obligation, the Court finds the Municipality is entitled to seven group home rental unit credits. These rental credits relate to developments on Lots 40.05 in Block 47.02 (PSCH-New Jersey, Inc.) and Lot 9 in Block 6.03 (Advance Housing, Inc.); the PSCH-New Jersey facility adds four rental credits, and the Advance Housing development adds three rental credits. N.J.A.C. 5:97-3.5(a). Although the planner retained by the Plaintiffs criticizes the extent of the paperwork provided in connection with such credits, it is undisputed that the facilities are licensed by an operator pursuant to the requirements of the State of New Jersey. Although more documentation can always be requested regardless of how much is provided, this Court finds that the units are of the type for which COAH would typically grant credits. One legitimate issue raised by Plaintiffs' expert was that the license for the PSCH-New Jersey, Inc., facility, located at 118 Niehaus Street, expired during the time the compliance plan was first adopted and the date of the hearing. Subsequent to the compliance hearing, the Defendants obtained and submitted the current license which establishes the facility remains licensed by the State. The Court grants seven rental credits

to the Municipality. These rental credits also serve to satisfy the 25% rental obligation, since seven is 25% of the 28 unit Prior Round obligation.

The Municipal compliance plan makes reference to two possible credits for a development known as Royale Realty, located at 273-281 Main Street. In 2007 the Little Ferry Planning Board had approved a development application, consisting of a site plan and variances, for twenty-four residential units on a lot of 91,658 square feet. A condition of the approval was that two of the units were to be set aside as affordable units. The approval was challenged, and at the time of adoption of the compliance plan the matter was pending in court. The Special Master raised question about the status of the litigation in his report, pointing out his understanding that the approval had been reversed. If so, the credits could not be obtained because the condition was only imposed as a result of the approval of variances. At the compliance hearing it was confirmed that the approval had been reversed on appeal, and the municipality agreed it could not seek any credit for the project. Moreover, a representative of Royale Realty appeared at the hearing to assert that the project could not be included in the plan of compliance. While the compliance plan suggests these units might be available for consideration, this Court grants no credits based upon the circumstances.

For the balance of the Prior or Second Round obligation, which would be twenty-one affordable units, the Municipality proposes to rely upon the River Front Ordinance, and the settlement agreement with 110 Bergen Turnpike, LLC. The Agreement indicates that the intention of 110 Bergen Turnpike, LLC, is to build a hotel, retail uses and affordable housing units necessary to satisfy the remaining obligation (to a maximum of twenty-eight units) on property it owns designated as Block 25, Lot 2, on the Little Ferry Tax Map, commonly known as 110 Bergen Turnpike, whenever development of that property occurs. The Ordinance is quite

liberal, allowing hotels, office use, retail and service uses, theaters, fitness centers, recreational facilities, day care facilities, restaurants, multi-family residential use, continuing care and assisted living facilities, and mixed uses consisting of any or all of the above permitted uses. The bulk requirements are equally as liberal, permitting building coverage of 75%, lot coverage of 80%, and up to fourteen stories in height depending upon the distance of setback from Bergen Turnpike. The stated purpose of the Ordinance is to facilitate private sector development of developed and vacant land along the Hackensack River waterfront between Route 46 and the Meadowlands boundary to the south, and to create economic development opportunities along with affordable housing.

The Ordinance assures the production of affordable housing by requiring a mandatory residential component of development calling for a minimum of twenty-five residential units per acre, and a maximum of sixty units per acre. Of those units, 20% are to be affordable if the units are for sale, and 15% if the units are rental units. There is an exception in the Ordinance in Section 3, Paragraph F.2, which exempts the 110 Bergen Turnpike, LLC, property from the requirement to provide residential units beyond the affordable units to which it has committed by agreement. Plaintiffs argue that this provision violates the requirement for uniformity set forth in N.J.S.A. 40:55D-62(a), and constitutes illegal contract zoning. To the contrary, the Agreement and Ordinance provision constitute the settlement of Mount Laurel litigation, designed to satisfy the municipal affordable housing obligation. In such matters, developers of affordable housing are provided different treatment than might otherwise apply. Illegal contract zoning occurs when a municipality, pursuant to agreement, rezones property without complying with procedures for amending the master plan and zoning ordinance. Toll Bros. v. Tp. of West Windsor, 334 N.J. Super. 77, 94 (App. Div., 2000); Livingston Builders, Inc. v. Livingston Township, 309 N.J.

Super. 370, 381-382 (App. Div., 1998). In Mount Laurel litigation zoning is changed by court order to provide a reasonable opportunity for affordable housing. Courts may grant such developers site specific density bonuses and mandatory set asides, which are all elements of relief not permitted under the Municipal Land Use Law. In short, Mount Laurel judgments and orders validate what would otherwise be impermissible contract zoning. Tanenbaum v. Wall Bd. of Adjustment, 407 N.J. Super. 446, 457 (App. Div., 2006).

While this Court is focused upon the plan to provide affordable housing, it is also mindful that once the Ordinance is adopted it may be subject to legal challenge. In order to avoid any claim of lack of uniformity of treatment in the River Front Zone District to be established by the Ordinance, the exception in Section 3, Paragraph F.2, could be modified in its adoption to reflect that the exception would apply to any property in the zone district where an agreement is reached to provide affordable housing without providing market rate housing. In other words, the Ordinance language could be simply modified to provide that the mandatory market rate housing units need not be provided if the developer were to enter into an agreement to provide the affordable units that would otherwise be required based upon the mandatory residential component. Such a provision would then apply to all properties in the zone district uniformly. This opinion will permit, but not require, such a modification of the Ordinance.

Additionally, Plaintiffs argue that the compliance plan should not be approved based upon the preliminary feasibility analysis they submitted. The analysis points out various issues which will arise in connection with development. Nothing in that report, or the testimony of Plaintiffs' expert planner, indicates that the site could not be developed or that it is not a suitable site for affordable housing. While the Court leaves the Municipality to address those concerns to the extent they are known, the items listed in the report must be addressed in any development

application and as part of any required outside agency approval. Other objections raised by Plaintiffs to procedure and substance, not discussed in detail, are without merit.

The River Front Ordinance and the Agreement with 110 Bergen Turnpike, LLC, create a realistic opportunity for the creation of the twenty-one affordable housing units required to satisfy the balance of the municipal Prior or Second Round obligation. The developer has obligated itself to provide the necessary units. Those units are to be provided if and when the property owned by 110 Bergen Turnpike, LLC, is developed. Based upon the current law, the Municipality could not compel a commercial developer to provide affordable housing, but there is nothing to suggest that a commercial developer could not obligate itself to provide affordable housing as part of a mixed use project, or as the result of obtaining approval to build commercial development.

While the proposal does not comport with any specific mechanisms for addressing the Fair Share obligation as set forth in COAH regulations, N.J.A.C. 5:97-6, it does create a realistic opportunity for the construction of affordable housing. This Court finds that the proposal would be authorized by N.J.A.C. 5:97-6.15, which permits a Municipality to propose innovative programs or mechanisms to provide affordable housing. Plaintiffs' planner suggested that the agreement is somehow deficient because it does not create a "firm commitment" to build the units. See, Planner's Report at 2. The obligation of the Municipality is to create a realistic opportunity for the housing to be constructed, rather than to create a guarantee. So. Burl. Cty. N.A.A.C.P. v. Tp. of Mt. Laurel, 67 N.J. 151, 179 (1975) (Mount Laurel D). In this case, the Ordinance and Agreement will compel affordable housing to be constructed upon development of the property in question whether for a hotel or for whatever other use may be proposed. The Ordinance will require additional affordable housing to be constructed on other sites in the zone

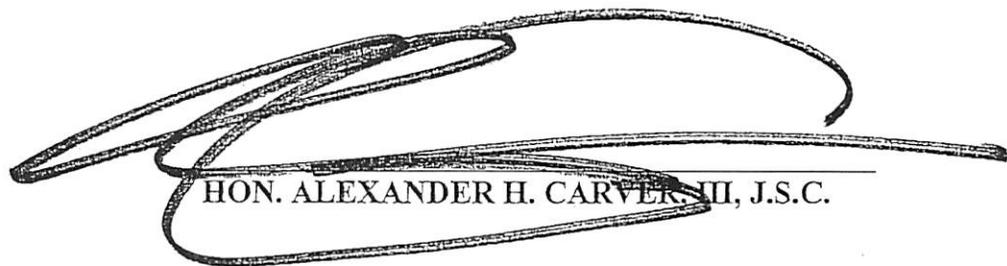
district, which may yield credit for some future affordable housing obligation. This Opinion is limited, however, to approving the twenty-one Second Round units required by the Ordinance and Agreement.

The Court approves the Housing Element and Fair Share Plan of the Municipality together with the various documents submitted for review and approval, specifically including the Development Fee Ordinance, Affirmative Marketing Plan, Affordable Housing Ordinance, and River Front Overlay Zoning Ordinance. As indicated earlier, the Rehabilitation program and documents related thereto are approved. The Municipality shall require, pursuant to the Agreement, that twenty-one affordable units, consistent with the Affordable Housing Ordinance and COAH Regulations, be constructed on the property subject to the Agreement when development of that site occurs. The requirement shall remain in effect unless modified by approval of some future compliance plan, or further order of the Court. The Agreement shall be recorded of record by the Municipality to assure that subsequent owners are aware of the obligation to provide affordable housing. The Court further orders that the Spending Plan, adopted by Resolution No. 132 on April 14, 2009, shall be referred to COAH's successor or substitute for review and approval. N.J.A.C. 5:97-8.10. The zoning ordinance shall be adopted within forty-five days, and any documents requiring amendments as a result of the Compliance Hearing shall be modified and adopted within the same time frame. N.J.S.A. 52:27D-314.

This Court does hereby grant the Municipality a Judgment of Compliance and Repose for the Second or Prior Round obligation, effective upon the adoption of the River Front Zoning Ordinance. The term of such repose shall be until the deadline for submission of a Third Round compliance plan to whatever agency may exist in place of COAH, upon resolution of the Third Round obligations either by adoption of new regulations, passage of legislation, or as directed by

any Supreme Court decision. The testimony of Ms. Moldanado is found to be credible, and further it is found that the Council adopted the Resolution approving the Housing Element and Fair Share Plan at the public portion of the meeting of May 3, 2011. However, in the event it has not already done so, the Council may take whatever corrective measures it deems appropriate to remove all doubt. The Special Master shall continue to be retained to monitor and assist the Municipality in completing the necessary adoptions, and to review and approve a phasing schedule, at the time of site plan review, for the affordable units to be constructed pursuant to the Agreement and River Front Zoning Ordinance. Upon adoption of the Ordinance, and any other documents required, the Special Master shall provide copies of the documents to COAH, together with a copy of the Judgment. The review and approval of the Spending Plan, and future monitoring of compliance, is to be transferred to COAH, or its successor, upon the Special Master determining that the documents required by this Opinion have been adopted.

Any outstanding claim for Third Round compliance is hereby dismissed, without prejudice, and any remaining causes of action in Plaintiffs' complaint, if any, are hereby dismissed. The Judgment in this matter is to be final. The Special Master shall prepare and submit a proposed form of Judgment consistent with this Opinion.



HON. ALEXANDER H. CARVER III, J.S.C.