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Active Acquisitions, LLC

SUPERIOR COURT OF NEW JERSEY
: LAW DIVISION: MONMOUTH COUNTY

. DOCKET NO. MON-L-422-25

IN THE MATTER OF THE
APPLICATION OF THE TOWNSHIP
OF COLTS NECK, a municipal
Corporation of the State of New Jersey

Civil Action
(Mount Laurel)

**INTERESTED PARTY ACTIVE
ACQUISITIONS, LLC'S ANSWER AND
CHALLENGE TO COLTS NECK'S
FOURTH ROUND HEFSP**

Defendant/Interested Party, Active Acquisitions, LLC (“Active”), which is the contract purchaser of property within the Township of Colts Neck (the “Township”) located at 318-22 Route 537 (Block 48, Lots 25.01, 26, and 27), states by way of Answer to the Township’s January 30, 2025 Complaint for Declaratory Judgment (the “Complaint”) and by way of Challenge/Objection to the Township’s June 9, 2025 Housing Element & Fair Share Plan (filed June 11, 2025) (“2025 HEFSP”), as follows:

NATURE OF ACTION

1. Active is without sufficient knowledge or information to admit or deny the allegations in Paragraph 1 of the Complaint and, therefore, leaves the Township to its proofs.

JURISDICTION AND VENUE

2. Admit.

3. Paragraph 3 of the Complaint states a legal conclusion to which no response is required. To the extent a response is required, Active states that the cited statute and Directive speak for themselves.

4. Paragraph 4 of the Complaint states a legal conclusion to which no response is required. To the extent a response is required, Active states that the cited case speaks for itself.

5. Paragraph 5 of the Complaint states a legal conclusion to which no response is required. To the extent a response is required, Active states that the cited case speaks for itself.

6. Paragraph 6 of the Complaint states a legal conclusion to which no response is required. To the extent a response is required, Active states that the cited statute speaks for itself.

7. Paragraph 7 of the Complaint states a legal conclusion to which no response is required. To the extent a response is required, Active states that the cited regulation speaks for itself.

8. Paragraph 8 of the Complaint states a legal conclusion to which no response is required. To the extent a response is required, Active states that the cited regulation speaks for itself.

9. Paragraph 9 of the Complaint states a legal conclusion to which no response is required. To the extent a response is required, Active states that the cited regulation speaks for itself.

10. Paragraph 10 of the Complaint states a legal conclusion to which no response is required. To the extent a response is required, Active states that the cited regulation and case speak for themselves.

11. Admit.

12. Paragraph 12 of the Complaint states a legal conclusion to which no response is required. To the extent a response is required, Active states that the cited regulation speaks for itself.

13. Paragraph 13 of the Complaint states a legal conclusion to which no response is required. To the extent a response is required, Active states that the cited regulation and case speak for themselves.

14. Paragraph 14 of the Complaint states a legal conclusion to which no response is required. To the extent a response is required, Active states that the cited case speaks for itself.

15. Active is without sufficient information or knowledge to admit or deny the allegations set forth in Paragraph 15 of the Complaint and, therefore, leaves the Township to its proofs.

16. Active is without sufficient information or knowledge to admit or deny the allegations set forth in Paragraph 16 of the Complaint and, therefore, leaves the Township to its proofs.

17. Active is without sufficient information or knowledge to admit or deny the allegations set forth in Paragraph 17 of the Complaint and, therefore, leaves the Township to its proofs.

18. Paragraph 18 of the Complaint states a legal conclusion to which no response is required. To the extent a response is required, Active states that the cited case speaks for itself.

19. Paragraph 19 of the Complaint states a legal conclusion to which no response is required. To the extent a response is required, Active states that the cited case speaks for itself.

20. Paragraph 20 of the Complaint states a legal conclusion to which no response is required. To the extent a response is required, Active states that the cited case speaks for itself.

21. Paragraph 21 of the Complaint states a legal conclusion to which no response is required, except Active admits that the Township filed the referenced case which speaks for itself.

22. Paragraph 22 of the Complaint states a legal conclusion to which no response is required. To the extent a response is required, Active states that the cited statute speaks for itself.

23. Paragraph 23 of the Complaint states a legal conclusion to which no response is required. To the extent a response is required, Active states that the cited statute speaks for itself.

24. Paragraph 24 of the Complaint states a legal conclusion to which no response is required. To the extent a response is required, Active states that the cited statute speaks for itself.

25. Paragraph 25 of the Complaint states a legal conclusion to which no response is required. To the extent a response is required, Active states that the cited statute speaks for itself.

26. Paragraph 26 of the Complaint states a legal conclusion to which no response is required. To the extent a response is required, Active states that the cited statute speaks for itself.

27. Admit.

28. Admit.

29. Paragraph 29 of the Complaint states a legal conclusion to which no response is required. To the extent a response is required, Active states that the cited statute speaks for itself.

30. Paragraph 30 of the Complaint states a legal conclusion to which no response is required. To the extent a response is required, Active states that the cited statute speaks for itself.

31. Paragraph 31 of the Complaint states a legal conclusion to which no response is required. To the extent a response is required, Active states that the cited statute speaks for itself.

32. Paragraph 32 of the Complaint states a legal conclusion to which no response is required. To the extent a response is required, Active states that the cited directive speaks for itself.

33. Paragraph 33 of the Complaint states a legal conclusion to which no response is required.

34. Paragraph 34 of the Complaint states a legal conclusion to which no response is required, except Active admits that the Township adopted the referenced Resolution, which speaks for itself.

35. Admit.

36. Active is without sufficient information or knowledge to admit or deny the allegations set forth in Paragraph 36 of the Complaint and, therefore, leaves the Township to its proofs.

37. Paragraph 37 of the Complaint states a legal conclusion to which no response is required.

38. Active is without sufficient information or knowledge to admit or deny the allegations set forth in Paragraph 38 of the Complaint and, therefore, leaves the Township to its proofs.

39. Active is without sufficient information or knowledge to admit or deny the allegations set forth in Paragraph 39 of the Complaint and, therefore, leaves the Township to its proofs.

40. Active is without sufficient information or knowledge to admit or deny the allegations set forth in Paragraph 40 of the Complaint and, therefore, leaves the Township to its proofs. Active further states that the referenced Resolution speaks for itself.

41. Paragraph 41 of the Complaint states a legal conclusion to which no response is required. To the extent a response is required, Active states that the referenced Resolution speaks for itself.

42. Paragraph 42 of the Complaint states a legal conclusion to which no response is required. To the extent a response is required, Active states that the referenced Resolution speaks for itself.

43. Paragraph 43 of the Complaint states a legal conclusion to which no response is required, except that Active denies that the Township is entitled to a durational adjustment.

44. Active is without sufficient information or knowledge to admit or deny the allegations set forth in Paragraph 44 of the Complaint and, therefore, leaves the Township to its proofs. Active further states that the referenced Resolution speaks for itself.

COUNT ONE

(Declaratory Judgment, Constitutional Compliance)

45. Paragraph 45 of the Complaint does not contain an allegation to which a response is required and, therefore, Active neither admits nor denies.

46. Paragraph 46 of the Complaint states a legal conclusion to which no response is required. To the extent a response is required, Active states that the cited statute speaks for itself.

47. Admit.

48. Paragraph 48 of the Complaint states a legal conclusion to which no response is required. To the extent a response is required, Active states that the cited statute and Resolution speak for themselves.

49. Paragraph 49 of the Complaint states a legal conclusion to which no response is required.

50. Paragraph 50 of the Complaint states a legal conclusion to which no response is required, except Active denies that the Township is in compliance with its affordable housing obligations.

COUNT TWO

(Housing Element and Fair Share Plan)

51. Paragraph 51 of the Complaint does not contain an allegation to which a response is required and, therefore, Active neither admits nor denies.

52. Admit.

53. Paragraph 53 of the Complaint states a legal conclusion to which no response is required, except Active denies that the Township is in compliance with its affordable housing obligations.

COUNT THREE

(Confirmation of Immunity)

54. Paragraph 54 of the Complaint does not contain an allegation to which a response is required and, therefore, Active neither admits nor denies.

55. Paragraph 55 of the Complaint states a legal conclusion to which no response is required. To the extent a response is required, Active states that the cited statute speaks for itself.

56. Paragraph 56 of the Complaint states a legal conclusion to which no response is required. To the extent a response is required, Active states that the cited statute speaks for itself.

57. Paragraph 57 of the Complaint states a legal conclusion to which no response is required. To the extent a response is required, Active states that the cited statute and Resolution speak for themselves.

WHEREFORE, Active respectfully requests that the Court grant the following relief:

- (a) DECLARING that the Township's 2025 HEFSP is not complaint with the requirements of the Fair Housing Act and *Mount Laurel* doctrine;
- (b) DECLARING that the Township's 2025 HEFSP must be amended in order to bring it into compliance with the Fair Housing Act and *Mount Laurel* doctrine; and
- (c) ORDERING such additional relief as the Court deems just and equitable.

AFFIRMATIVE DEFENSES AND CHALLENGE TO THE TOWNSHIP'S 2025 HEFSP

Pursuant to and in accordance with N.J.S.A. 52:27D-304.1(f)(2)(b), Active Acquisitions, LLC submits this affirmative defense and challenge to the Township's 2025 HEFSP, and states as follows:

1. Active Acquisitions, LLC ("Active") is a limited liability company authorized to do business in the state of New Jersey and is the contract purchaser of certain property within the Township located at 318-22 Route 537 (Block 48, Lots 25.01, 26, and 27) (the "Property").

2. Active is interested in developing an affordable housing project on the Property. Therefore, Active is an interested party authorized to assert this challenge.

3. The Property is approximately 160 acres, of which approximately 60 acres is classified as wetlands. The Property lies between the Township's overlay zone and a connection to the Two Rivers Treatment Plant. Active is willing to develop an affordable housing project on the Property that would assist the Township with satisfying the entirety of its remaining Third Round Obligation of at least 138 units and its Fourth Round obligation of 101 units.

4. The Property is not included in the Township's 2025 HEFSP.

5. Attached as **Exhibit A** is a true copy of the Court's November 21, 2024 Order of Judgment of Fairness and Conditional Compliance and Repose Approving the Amended HEFSP Submitted to the Court by the Township of Colts Neck on June 15, 2022, and accompanying Decision (issued by Judge Jones) in the Township's Third Round *Mount Laurel* declaratory judgment action captioned *In re the Application of the Township of Colts Neck* under Docket No. MON-L-2234-25.

6. On April 1, 2025, the Court entered an Order establishing that the Township’s “prospective need” obligation for the Fourth Round is 101 affordable units. (See Trans ID LCV2025988748.)

7. On June 9, 2025, the Township’s Planning Board adopted its 2025 HEFSP, which it filed with the Court on June 11, 2025. (See Trans ID LCV20251734781.)

8. On June 24, 2025, the Township Council adopted Resolution No. 2025-117, which endorsed the adopted 2025 HEFSP. That Resolution was filed with the Court on June 12, 2025. (See Trans ID LCV20251743221.)

9. For the reasons more fully set forth in the August 27, 2025 report of Art Bernard attached hereto as **Exhibit B** and the legal brief dated August 28, 2025 attached as **Exhibit C**, which are incorporated as if fully set forth herein¹, the Township’s 2025 HEFSP is not in compliance with the Fair Housing Act and the Mount Laurel doctrine.

10. Specifically, the Township’s 2025 HEFSP should not be approved fails because it fails to adequately address sanitary sewer as part of its durational adjustment.

Active reserves the right to supplement this Answer/Challenge with additional affirmative or other defenses and challenges.

DAY PITNEY LLP

Attorneys for Defendant/Interested Party
Active Acquisitions, LLC

By: /s/ Craig M. Gianetti
Craig M. Gianetti
On Behalf of the Firm

DATED: August 28, 2025

¹ Incorporation of the Report is not intended to and does not constitute an adoptive admission.

DESIGNATION OF TRIAL COUNSEL

In the event that this matter requires a trial before the court, pursuant to *R. 4:5-1(c)* and *R. 4:25-4*, Active Acquisitions, LLC hereby designates Craig M. Gianetti, Esq., of Day Pitney LLP, as its counsel for the purposes of said trial.

DAY PITNEY LLP

Attorneys for Defendant/Interested Party
Active Acquisitions, LLC

By: /s/ Craig M. Gianetti
Craig M. Gianetti
On Behalf of the Firm

DATED: August 28, 2025

CERTIFICATION PURSUANT TO R. 4:5-1

I hereby certify, pursuant to *R. 4:5-1*, that the above matter is not the subject of any other action pending in any Court or any pending arbitration proceeding. No other party should presently be joined in this action to the best of Active Acquisitions, LLC's information and belief.

I further certify that confidential, personal identifiers have been redacted from documents now submitted to the Court/Program, and will be redacted from all documents submitted in the future in accordance with Rule 1:38-7(b).

DAY PITNEY LLP

Attorneys for Defendant/Interested Party
Active Acquisitions, LLC

By: /s/ Craig M. Gianetti
Craig M. Gianetti
On Behalf of the Firm

DATED: August 28, 2025

CERTIFICATION PURSUANT TO R. 4:6-1(d)

I hereby certify that the within Answer/Challenge was filed within the time period allowed by N.J.S.A. 52:27D-304.1(f)(2)(b) and Directive #14-24.

DAY PITNEY LLP

Attorneys for Defendant/Interested Party
Active Acquisitions, LLC

By: /s/ Craig M. Gianetti
Craig M. Gianetti
On Behalf of the Firm

DATED: August 28, 2025



New Jersey Judiciary
Civil Practice Division

Civil Case Information Statement (CIS)

Use for initial Law Division Civil Part pleadings (not motions) under Rule 4:5-1. Pleading will be rejected for filing, under Rule 1:5-6(c), if information above the black bar is not completed, or attorney's signature is not affixed.

For Use by Clerk's Office Only

Payment type <input type="checkbox"/> check <input type="checkbox"/> charge <input type="checkbox"/> cash	Charge/Check Number	Amount \$	Overpayment \$	Batch Number
Attorney/Pro Se Name CRAIG GIANETTI		Telephone Number (973) 966-6300 ext.		County of Venue Monmouth
Firm Name (if applicable) DAY PITNEY LLP			Docket Number (when available) MON-L-422-25	
Office Address - Street 8 SYLVAN WAY		City PARSIPPANY	State NJ	Zip 07054
Document Type CHALLENGE TO HEFSP			Jury Demand <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	
Name of Party (e.g., John Doe, Plaintiff) ACTIVE ACQUISITIONS, LLC		Caption IN RE TOWNSHIP OF COLTS NECK		
Case Type Number (See page 3 for listing) <u>816</u>				
Are sexual abuse claims alleged?			<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	
Does this case involve claims related to COVID-19?			<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	
Is this a professional malpractice case? If "Yes," see N.J.S.A. 2A:53A-27 and applicable case law regarding your obligation to file an affidavit of merit.			<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	
Related Cases Pending? If "Yes," list docket numbers			<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	
Do you anticipate adding any parties (arising out of same transaction or occurrence)?			<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	
Name of defendant's primary insurance company (if known)			<input type="checkbox"/> None <input checked="" type="checkbox"/> Unknown	

The Information Provided on This Form Cannot be Introduced into Evidence.**Case Characteristics for Purposes of Determining if Case is Appropriate for Mediation**Do parties have a current, past or recurrent relationship? ☒ Yes ☐ No

If "Yes," is that relationship:

☐ Employer/Employee ☐ Friend/Neighbor ☐ Familial ☐ Business☒ Other (explain) REDEVELOPERDoes the statute governing this case provide for payment of fees by the losing party? ☐ Yes ☒ No

Use this space to alert the court to any special case characteristics that may warrant individual management or accelerated disposition.

Do you or your client need any disability accommodations? ☐ Yes ☒ No

If yes, please identify the requested accommodation:

Will an interpreter be needed? ☐ Yes ☒ No

If yes, for what language?

I certify that confidential personal identifiers have been redacted from documents now submitted to the court and will be redacted from all documents submitted in the future in accordance with Rule 1:38-7(b).Attorney/Self-Represented Litigant Signature: /s/ Craig M. Gianetti

Civil Case Information Statement (CIS)

Use for initial pleadings (not motions) under *Rule* 4:5-1

CASE TYPES

(Choose one and enter number of case type in appropriate space on page 1.)

Track I - 150 days discovery

- 151 Name Change
- 175 Forfeiture
- 302 Tenancy
- 399 Real Property (other than Tenancy, Contract, Condemnation, Complex Commercial or Construction)
- 502 Book Account (debt collection matters only)
- 505 Other Insurance Claim (including declaratory judgment actions)
- 506 PIP Coverage
- 510 UM or UIM Claim (coverage issues only)
- 511 Action on Negotiable Instrument
- 512 Lemon Law
- 801 Summary Action
- 802 Open Public Records Act (summary action)
- 999 Other (briefly describe nature of action)

Track II - 300 days discovery

- 305 Construction
- 509 Employment (other than Conscientious Employees Protection Act (CEPA) or Law Against Discrimination (LAD))
- 599 Contract/Commercial Transaction
- 603N Auto Negligence – Personal Injury (non-verbal threshold)
- 603Y Auto Negligence – Personal Injury (verbal threshold)
- 605 Personal Injury
- 610 Auto Negligence – Property Damage
- 621 UM or UIM Claim (includes bodily injury)
- 699 Tort – Other

Track III - 450 days discovery

- 005 Civil Rights
- 301 Condemnation
- 602 Assault and Battery
- 604 Medical Malpractice
- 606 Product Liability
- 607 Professional Malpractice
- 608 Toxic Tort
- 609 Defamation
- 616 Whistleblower / Conscientious Employee Protection Act (CEPA) Cases
- 617 Inverse Condemnation
- 618 Law Against Discrimination (LAD) Cases

Track IV - Active Case Management by Individual Judge / 450 days discovery

- 156 Environmental/Environmental Coverage Litigation
- 303 Mt. Laurel
- 508 Complex Commercial
- 513 Complex Construction
- 514 Insurance Fraud
- 620 False Claims Act
- 701 Actions in Lieu of Prerogative Writs

Multicounty Litigation (Track IV)

- 282 Fosamax
- 291 Pelvic Mesh/Gynecare
- 292 Pelvic Mesh/Bard
- 293 DePuy ASR Hip Implant Litigation
- 296 Stryker Rejuvenate/ABG II Modular Hip Stem Components
- 300 Talc-Based Body Powders
- 601 Asbestos
- 624 Stryker LFIT CoCr V40 Femoral Heads
- 626 Abilify
- 627 Physiomesh Flexible Composite Mesh
- 628 Taxotere/Docetaxel
- 629 Zostavax
- 630 Proceed Mesh/Patch
- 631 Proton-Pump Inhibitors
- 633 Prolene Hernia System Mesh
- 634 Allergan Biocell Textured Breast Implants
- 635 Tasigna
- 636 Strattice Hernia Mesh
- 637 Singulair
- 638 Elmiron
- 639 Pinnacle Metal-on-Metal (MoM) Hip Implants

If you believe this case requires a track other than that provided above, please indicate the reason on page 1, in the space under “Case Characteristics”.

Please check off each applicable category

- ☐ **Putative Class Action**
☐ **Title 59**
☐ **Consumer Fraud**
- ☐ **Medical Debt Claim**

EXHIBIT A

PREPARED BY THE COURT

IN THE MATTER OF THE APPLICATION OF THE TOWNSHIP OF COLTS NECK, COUNTY OF MONMOUTH, STATE OF NEW JERSEY, PURSUANT TO <u>IN RE ADOPTION</u> OF N.J.A.C. 5:96, 221 N.J. 1 (2015)	: SUPERIOR COURT OF NEW JERSEY LAW DIVISION : MONMOUTH COUNTY DOCKET NO.: MON-L-2234-15 : CIVIL ACTION ORDER OF JUDGMENT OF FAIRNESS AND CONDITIONAL COMPLIANCE AND REPOSE APPROVING THE AMENDED HEFSP SUBMITTED TO THE COURT BY THE TOWNSHIP OF COLTS NECK ON JUNE 15, 2022
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THIS MATTER having been opened to the court by a June 15, 2022 application of the Township of Colts Neck requesting that the court find void the March 18, 2020 settlement agreement entered into by Colts Neck, which was approved by the court with an order granting a judgment of fairness and conditional compliance and repose on August 13, 2020, and for approval of an amended HEFSP submitted by Colts Neck and a request that the court find that the amended HEFSP complies with Colts Neck's Third Round Mount Laurel obligation, and for entry of an order of judgment of fairness and compliance and repose approving the amended HEFSP, and public notice of Colts Neck's application having been provided, all submissions having been considered by the court, and a hearing including the testimony of witnesses having been held by the court on Colts Neck's application on

December 6 and 8, 2022 and all participants in this matter having been given the opportunity to be heard;

IT IS on this 21st day of November, 2024, hereby **ORDERED** as follows:

1. The March 18, 2000 settlement agreement entered into between the Township of Colts Neck, Fair Share Housing Center and Carole Schlumpf is not void.
2. The court finds that the proposed HEFSP submitted by Colts Neck to the court complies with Colts Neck's Mount Laurel Third Round obligation, with the required amendments set forth herein.
3. Colts Neck must amend the proposed HEFSP, submitted to the court on June 15, 2022 to provide that Colts Neck must adopt and maintain in Area 1 the overlay zoning provided in the March 18, 2020 settlement agreement.
4. Colts Neck must amend the proposed HEFSP to provide that Colts Neck remains obligated under Exhibit B to the March 18, 2000 settlement agreement to provide the financial contribution to a sewer system in Area 1.
5. Colts Neck's request for a durational adjustment is granted.
6. The waiver granted to Colts Neck under the March 18, 2020 settlement agreement is vacated and Colts Neck must thus endorse all applications to the NJDEP or its agent to provide sewer capacity.

7. Colts Neck must amend its proposed housing element and fair share housing ordinance to permit development where the NJDEP or its designated agent approves a proposal to provide infrastructure to a site for the development of affordable housing.
8. Colts Neck must amend the proposed HEFSP to remove the three market to affordable units and the potential application of affordable housing trust fund monies to that program.
9. Colts Neck must work with a qualifying developer of comparable reputation to that of Toll Brothers to facilitate sewer service to Area 1.
10. Colts Neck must reserve and set aside new sewer capacity, when it became available, for affordable housing on a priority basis.
11. A judgment of fairness and conditional compliance is granted to Colts Neck in accordance with this decision.

IT IS FURTHER ORDERED, as provided in the report and testimony of Special Adjudicator Frank Banisch, that Colts Neck must comply with the following conditions before a final judgment of compliance can be issued:

1. Amend the HEFSP to include the Area 1 overlay zone.
2. Amend the HEFSP and Spending Plan to remove the market to affordable program.
3. Revise the Spending Plan to distribute funds to mechanisms in the plan, including funds for sewer.

4. Work with a qualifying developer of comparable reputation to that of Toll Bros. to facilitate sewer service to Area 1.
5. Provide adopted versions of the Planning Board and Township Committee resolutions endorsing the amended HEFSP.
6. Cease use of trust funds toward administrative expenses.
7. Provide a governing body resolution approving the Spending Plan.
8. Provide an adopted version of the draft operating manual for rental affordable units.
9. Provide a signed, adopted version of the governing body resolution approving bond issuance.
10. Provide additional information concerning the Monmouth County Rehabilitation program, including a structural conditions survey.
11. Provide an ordinance designating a municipal housing liaison.
12. Provide documents showing creditworthiness for the 7 assisted living units at Reflections at Colts Neck.
13. Provide a resolution appointing an administrative agent for affordable units other than those at CNBA.

14. Provide adopted versions of the affirmative marketing plan and resolution.

IT IS FURTHER ORDERED that Colts Neck shall provide proof of such compliance to the court and to Special Adjudicator Banisch within 90 days of the date of this conditional order of judgment of compliance and accompanying decision. Colts Neck shall provide proof of compliance via filing in ecourts, with a courtesy copy provided to the court and to Special Adjudicator Banisch.

IT IS FURTHER ORDERED that a hearing on compliance by Colts Neck with the terms of this judgment and the attached decision, which is incorporated within this judgment and made a part hereof, will be held on March 7, 2025 beginning at 9:00 a.m.

IT IS FURTHER ORDERED that the court shall retain jurisdiction over this matter as only a conditional judgment of compliance has been granted. A final judgment of compliance can be entered after Colts Neck has met the above conditions and provided proof of compliance to the court.

IT IS FURTHER ORDERED that all parties and interested participants who have registered their interest via ecourts shall receive a copy of this order and decision, which is attached hereto and made a part hereof, via notice from ecourts that the order and decision have been filed. A copy of the order and decision will be provided by

the court to Special Adjudicator Banisch and Special Engineering Master Kataryniak.

/s/ Linda Grasso Jones, J.S.C.

HON. LINDA GRASSO JONES, J.S.C.

**NOT FOR PUBLICATION WITHOUT APPROVAL
FROM THE COMMITTEE ON OPINIONS**

IN THE MATTER OF THE APPLICATION OF THE TOWNSHIP OF COLTS NECK, COUNTY OF MONMOUTH, STATE OF NEW JERSEY, PURSUANT TO <u>IN RE ADOPTION</u> <u>OF N.J.A.C. 5:96, 221 N.J. 1 (2015)</u>	: : : : : : :	SUPERIOR COURT OF NEW JERSEY LAW DIVISION MONMOUTH COUNTY DOCKET NO.: MON-L-2234-15 CIVIL ACTION DECISION
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HON. LINDA GRASSO JONES, J.S.C.

DATED: NOVEMBER 21, 2024

Ronald L. Israel, Esq. and Thomas J. Trautner, Jr., Esq. of Chiesa Shahinian & Giantomasi PC, counsel for Township of Colts Neck

Zoey Chenitz, Esq., Bassam F. Gergi, Esq. and Joshua D. Bauers, Esq., counsel for Fair Share Housing Center

John A. Rentschler, Esq., Sonnenblick Mehr & Licata, counsel for Manasquan River Regional Sewerage Authority (“MRRSA”)

Jeffrey R. Surenian, Esq. and Michael J. Edwards, Esq., Surenian, Edwards & Nolan LLC, counsel for MRRSA member towns Township of Freehold, Township of Wall, Borough of Freehold, Township of Howell and Borough of Farmingdale

William J. Wolf, Esq. of Bathgate, Wegener & Wolf, counsel for the Township of Wall

Andrew Bayer, Esq., Pashman Stein Walder Hayden, P.C., counsel for the Township of Howell

Robert F. Munoz, Esq., Davison, Eastman, Munoz, Paone, P.A., counsel for the Township of Freehold

Matthew Goode Esq., Arbus, Maybruch & Goode, LLC, counsel for the Borough of Freehold

David A. Laughlin, Esq., Birdsall & Laughlin, LLC, counsel for Two Rivers Water Reclamation Authority

Richard J. Hoff, Jr., Esq., Bisgaier Hoff, LLC, counsel for Carole Schlumpf

Craig M. Gianetti, Esq., Day Pitney LLP, counsel for Toll Brothers, Inc. and interested party Seta Realty Corp.

John A. Sarto, Esq., Giordano, Halleran & Ciesla, P.C., counsel for Colts Neck Building Associates, LLC

Bryan D. Plocker, Esq, Hutt & Shimanowitz, counsel for Countryside Developers, Inc.

Francis J. Banisch III, PP/AICP of Banisch Associates, Inc. Planning and Design, Special Adjudicator

Mark W. Kataryniak, PE, PTOE of Ferriero Engineering, Inc., Special Engineering Master

I. BACKGROUND:

A. March 18, 2020 settlement agreement:

The present matter began with the filing of a complaint for declaratory judgment (“DJ”) by the Township of Colts Neck (hereinafter “Colts Neck”) on June 12, 2015 in accordance with the direction of the New Jersey Supreme Court as set forth in the March 10, 2015 decision, In the Matter of the Adoption of N.J.A.C. 5:96 and 5:97, 221 N.J. 1 (2015) (hereinafter “Mount Laurel IV”). Colts Neck is located in Monmouth County, New Jersey. In filing a declaratory judgment action, Colts Neck was choosing to affirmatively seek, “a court order declaring its housing element and implementing ordinances – as is or as to be supplemented – constitutionally sufficient” for the Third Round of New Jersey’s Mount Laurel obligations. Id. at 25.

Colts Neck’s ability to provide for affordable housing is substantially hampered by the lack of a municipal sewer system in the Township. Colts Neck does not generally have a municipal wastewater collection system and Colts Neck is not a member of any regional sewer system or authority. Other than a housing development known as The Grande,¹ properties in Colts Neck are not serviced by a sewer system. Properties in Colts Neck generally have septic systems, with an individual package

¹ Wastewater and treatment for The Grande was provided through MRRSA through a resolution reached in prior litigation.

plant planned for development of the Colts Neck Building Associates project, which is addressed herein.

In filing its declaratory judgment complaint Colts Neck indicated that it was in the process of preparing a compliance plan for the Third Round of Mount Laurel planning and requested that temporary immunity be granted from builder's remedy lawsuits to allow Colts Neck to complete and obtain court approval of a Third Round plan. Ultimately, Fair Share Housing Center (hereinafter "FSHC"), developer Colts Neck Building Associates, LLC (hereinafter "CNBA"), Carole Schlumpf (hereinafter "Schlumpf"), Toll Brothers, Inc. (hereinafter "Toll Brothers"); Countryside Developers, Inc. (hereinafter "Countryside"), Manasquan River Regional Sewerage Authority (hereinafter "MRRSA"), Township of Wall ("hereinafter Wall"), Township of Freehold (hereinafter "Freehold Township"), "Borough of Freehold (hereinafter "Freehold Borough"), Township of Howell (hereinafter "Howell"), Two Rivers Water Reclamation Authority (hereinafter "TRWRA"), and Seta Realty Corp. (hereinafter "Seta") were permitted to intervene or to otherwise participate without the need for intervention in the litigation. A Special Master,² Michael Bolan, PP, AICP, was appointed by the court to assist the court and the parties in the matter.

On March 18, 2020 Colts Neck, FSHC and Schlumpf entered into an agreement designed to resolve the issues raised in Colts Neck's declaratory judgment complaint.

² The position is now referred to as a "Special Adjudicator."

The agreement established Colts Neck's Third Round affordable housing obligation which would be included in Colts Neck's Housing Element and Fair Share Plan (hereinafter "HEFSP") and a zoning plan to allow for the development of affordable housing. Colts Neck was required to rezone properties which were planned for development by CNBA and Countryside, as well as an area of the Township referred to as "Area 1."³ Land owned by Seta that Toll Brothers indicated that it wanted to develop for inclusionary housing is encompassed within Area 1.

Under the March 18, 2020 settlement agreement it was anticipated that sewer service would be obtained for the CNBA, Countryside and Area 1 properties included within the agreement within two years of the date of the agreement, which would have been March of 2022. Under the agreement, Colts Neck would zone property owned by Schlumpf which is not located within Area 1 for development of 25 single family homes to be served by private wells and private septic systems, with no affordable housing to be constructed within the development. Under paragraph 25 of the agreement, Schlumpf was required to make payments to Colts Neck's affordable housing trust fund and to pay \$5,000 to FSHC, representing Schlumpf's contribution to FSHC's attorney's fees assessed under the agreement to Colts Neck.

³ In addition to the CNBA and Countryside properties and Area 1, Colts Neck's Third Round HEFSP included one family for sale property producing 2 units at 704 Cross Street and an assisted living facility producing 7 units at Reflections at Colts Neck.

The settlement agreement provides, “[f]or the purpose of settlement only, the Township accepts the Third Round obligation of 306 units. The Township will utilize existing credits, proposed inclusionary zoning, and will seek a durational adjustment to meet the Third Round obligation,....” The agreement indicates that due to credits that Colts Neck is entitled to receive, Colts Neck’s obligation for the Third Round is 297 units.

The settlement agreement provides that Colts Neck will meet its obligation through several developments. CNBA would provide 72 units, with 72 bonus credits (CNBA was designated as a rental property), for a total of 144 credits. The agreement provided that CNBA’s project was “the subject of a durational adjustment in accordance with paragraph 8 of this Agreement. It is anticipated that sewer access will be obtained through Freehold Township Public Works system.” Freehold Township is a member of MRRSA, and Freehold Township’s sewer collection system connects with MRRSA. Countryside Developers would provide 15 units (family for sale, no bonus credits), with the agreement providing, “[t]he site is the subject of a durational adjustment in accordance with paragraph 8 of this Agreement. It is anticipated that sewer access will be obtained through Freehold Township Public Works system.” Other than the few units provided as described in footnote 3 of this decision, the remainder of Colts Neck’s affordable housing would be developed in the Area 1 Overlay Zoning area, which would provide 142 units and which was

described as 88.73 acres to be zoned at 8 units per acre (sale or rental), with a 20 percent set-aside for affordable housing. The settlement agreement stated, “[t]he parcels that are included within this compliance mechanism do not have access to public sewer. Therefore, they will be the subject of a durational adjustment in accordance with paragraph 8 of this Agreement.” None of the Round Three affordable-housing inclusive developments provided in the settlement agreement were anticipated to be served by a wastewater collection/treatment system operated by Colts Neck or by a system within which Colts Neck is a member municipality, as Colts Neck does not have in place a wastewater collection or treatment system and Colts Neck is not a member of any regional wastewater collection or treatment authority.

The agreement provides that Colts Neck is required to rezone the Countryside and CNBA sites and Area 1 to provide for higher-density development in accordance with the settlement agreement and cooperate with and, if necessary, to become a co-applicant on applications made to MRRSA, Ocean County Utilities Authority (hereinafter “OCUA”), the New Jersey Department of Environmental Protection (hereinafter “NJDEP”) and other necessary entities in order to provide public sewer and water service for these sites through the connection method specified in the settlement agreement. The settlement agreement does not require Colts Neck to

rezone other properties that are not listed in the settlement agreement to provide for higher-density development.

It was envisioned in the settlement agreement that Colts Neck would attempt to obtain sewer service for the Area 1 portion of the Township through a wastewater transmission system operated by MRRSA, with wastewater ultimately transmitted to OCUA's wastewater treatment plant. MRRSA was not a signatory to the settlement agreement and was not a named party in the present litigation.⁴

MRRSA has five member municipalities – Farmingdale Borough, Freehold Borough, Freehold Township, Wall Township and Howell Township. Neither MRRSA nor OCUA, which operates the sewage treatment plant that is the ultimate destination for the wastewater running through MRRSA's collection system, had signed onto the settlement agreement; rather, MRRSA vigorously opposed the plan from its inception, indicating that it did not have an obligation to provide sewage transmission and treatment to properties in Colts Neck, as Colts Neck was not a member town of MRRSA. MRRSA additionally indicated that it needed its available sewage transmission and treatment allocation for its own member towns, particularly given each member town's own Mount Laurel development obligations.

⁴ Countryside had filed a separate lawsuit against MRRSA and its member towns, claiming that MRRSA had an obligation to provide sewer service to the Countryside development. None of the proposed developers could sue Colts Neck directly in a "builders remedy" suit as provided in Mount Laurel IV because, due to the filing of the declaratory judgment action, Colts Neck enjoyed immunity from the filing of builders remedy suits.

MRRSA argued that Colts Neck needed to make arrangements for sewage treatment through the construction of facilities by Colts Neck, or through another provider.

Under the March 18, 2020 settlement agreement, Colts Neck was required to rezone the CNBA, Countryside and Area 1 properties to provide for higher-density development. Colts Neck was entitled to a durational adjustment because sewer and water service were not available for the properties, and because Colts Neck was agreeing to take certain actions with reference to the properties, Colts Neck was entitled pursuant to N.J.A.C. 5:93-4.3(c) 3 and 4 to a waiver of the requirement that it approve proposals to bring sewer and water to other sites within Colts Neck for the development of affordable housing. Under the agreement, Colts Neck was thus required to take certain actions with reference to the CNBA, Countryside and Area 1 properties, but could not be required to take action to promote development of higher density, Mount Laurel housing on other properties within the Township, as they were not included within Colts Neck's plan.

On June 23 and 25, 2020 the court held a fairness and preliminary compliance hearing on the settlement reached by the parties, and on August 13, 2020 the court entered an order granting judgment on the fairness of the settlement agreement and on Colts Neck's partial compliance with its obligations under the agreement. The court determined that the settlement agreement was fair to households in need of affordable housing, and the order entered by the court provided that a status

conference on the completion of Colts Neck's obligations under the settlement agreement would be held in October, 2020, with a final compliance hearing scheduled for November, 2020.

In case management conferences held over the following two years the court addressed with the parties progress made with reference to obtaining sewer service for the areas included within Colts Neck's plan with the parties. Special Master Bolan had retired from practice after the fairness hearing was held, and Francis J. Banisch III, PP/AICP of Banisch Associates, Inc. Planning and Design, was appointed by the court as Special Master (now known as Special Adjudicator). Mark W. Kataryniak, PE, PTOE of Ferriero Engineering, Inc., was appointed by the court as Special Engineering Master. In orders entered in early 2022 the court indicated that it would hold a hearing in May 2022 on the issue of the potential for provision of sewer service for Area 1.

The compliance hearing provide for in the August 2020 order did not take place. Colts Neck indicated in a letter to the court dated May 2, 2022 that it did not believe that the conditions of the March 18, 2020 settlement agreement could be met in a timely manner and argued that the agreement was thus void. In a June 15, 2022 submission to the court Colts Neck offered an alternate HEFSP than had been agreed to by the parties as a part of the settlement agreement, which had previously been approved by the court. Colts Neck is thus proposing a different resolution of its

declaratory judgment action than was agreed to in the parties' March 18, 2020 settlement agreement and approved by the court in the August 13, 2020 judgment.

In a Mount Laurel declaratory judgment matter the court is often presented with a settlement agreement reached between the municipality that filed the complaint and FSHC, and perhaps other parties to the litigation. Settlement of litigation ranks high in our public policy. Jannarone v. W.T. Co., 65 N.J. Super. 472 (App. Div.), certif. denied, 35 N.J. 61 (1961). The court's role in reviewing such a settlement agreement is to determine whether (1) the settlement has apparent merit; (2) notice was given to all members of the class and others who may have an interest in the settlement; (3) a court hearing was conducted where those affected had sufficient time to prepare; and (4) based upon adequate findings of fact, the settlement is fair and reasonable to the members of the protected class. See East/West Venture v. Township of Fort Lee, 286 N.J. Super. 311, 326 (App. Div. 1996). The hearing on a proposed settlement "is not a plenary trial and the court's approval of the settlement is not an adjudication of the merits of the case. Rather, it is the court's responsibility to determine, based upon the relative strengths and weaknesses of the parties' positions, whether the settlement is 'fair and reasonable,' that is, whether it adequately protects the interest of the persons on whose behalf the action was brought." Morris County Fair Housing Council v. Boonton Township, 197 N.J. Super. 359, 370 (Law Div. 1984), see also Builders League of South Jersey,

Inc., v. Gloucester County Utilities Authority, 386 N.J. Super. 462, 471 (App. Div. 2006), certif. denied 189 N.J. 428 (2007).

The court is now presented not with a settlement agreement reached between Colts Neck and FSHC, but rather an application by Colts Neck asking the court to find the prior settlement agreement between Colts Neck, FSHC and Schlumpf which was previously approved by the court to be void, and to grant approval to a different HEFSP, which is put forward by Colts Neck and which is not agreed to by FSHC.

1. CNBA property:

The March 18, 2020 settlement agreement addressed several properties that either through planned construction of affordable housing or contribution to an affordable housing trust fund were intended to provide for Colts Neck's Third Round affordable housing obligation. On March 19, 2020, at around the time of the FSHC/Colts Neck/Schlumpf settlement agreement, Colts Neck and CNBA, a developer of a property intended to provide affordable housing, entered into a settlement agreement concerning the development of the CNBA property, which is known as Block 22, Lot 18 and which is located on Route 537, near the NJ Route 18 interchange.

Colts Neck and CNBA agreed, without agreement by Freehold Township or MRRSA, that the CNBA property would obtain water and sewer service through Freehold Township and thus ultimately through MRSSA. In a September 9, 2021

amended settlement agreement, Colts Neck and CNBA agreed that water service could be provided to the property through Gordon's Corner Water Company (hereinafter "Gordon's Corner"), and wastewater treatment could be provided through an on-site package treatment plant which would require approval by the New Jersey Department of Environmental Protection (hereinafter "NJDEP"). If CNBA is unable to obtain approvals for this plan, CNBA reserved the right to pursue sewer service through another means, including through MRRSA.

In a December 5, 2022 consent order entered into at the time of the hearing held on Colt Neck's alternative HEFSP it was agreed that CNBA would pursue the onsite package treatment plant option through the NJDEP and that CNBA would only pursue the potential for sewage transmission and treatment through MRRSA if the NJDEP did not approve an onsite treatment plant. The December 5, 2022 consent order additionally provided that Freehold Township would permit a water connection through Freehold Township. No party has brought to the court's attention a need to revisit the December 5, 2022 consent order with reference to the CNBA property, and at this point in time it appears that agreement has been reached as to the manner in which water and sewer service will be provided to the CNBA property. It is the court's understanding that the water and sewer issues involving the CNBA site have been resolved and are thus no longer in dispute.

2. Countryside property:

On December 12, 2018, Countryside filed a separate lawsuit bearing Docket Number MON-L-4435-18 against MRRSA, Township of Freehold, Borough of Freehold, Township of Howell, Township of Wall, Borough of Farmingdale, and Board of Chosen Freeholders of Monmouth County requesting that judgment be entered requiring MRRSA to provide sewer service to the Countryside development and for other relief. The Countryside property is known as Block 42, Lot 4 and Block 172, Lot 15 on the Colts Neck tax map, and is located on Stone Hill Road, near the easterly border with Freehold Township and near The Grande, a completed inclusionary development which is provided with wastewater transmission and treatment through MRRSA/OCUA.

On March 20, 2020, Colts Neck entered into a settlement agreement in this matter, Docket No. MON-L-2234-15 with Countryside. The Countryside/Colts Neck agreement provided that the Countryside property would obtain sewer service through the Suez Water Company (hereinafter “Suez”), which connects to MRRSA and thereafter OCUA, and that water service would be obtained from Suez, which receives water from the Township of Freehold. Under the Countryside/Colts Neck agreement, Colts Neck agreed that it would rezone the Countryside property to allow for development consistent with the settlement agreement and to “use reasonable efforts in good faith and with continuity of purpose to cooperate with Countryside

to help facilitate the provision of public sewer and water service to the Subject Property....” Suez, MRRSA and OCUA were not signatories to the agreement between Colts Neck and Countryside and the March 20, 2020 settlement agreement did not resolve the complaint filed by Countryside against MRRSA and its member towns.

Countryside and the defendants in the separate Countryside lawsuit have resolved their differences, and in a consent order filed by the court on December 5, 2022 it was agreed by MRRSA and its member towns that the Countryside project would be provided with wastewater service through MRRSA. A stipulation of dismissal with prejudice as to MRRSA, Freehold Township, Freehold Borough, Howell Township, Wall Township and Farmingdale Borough was filed on January 23, 2023, with a stipulation of dismissal as to the Monmouth County Board of Chosen Freeholders filed on January 30, 2023. The Countryside development will be provided with wastewater service through MRRSA and will receive water service through Freehold Township. It is the court’s understanding that the water and sewer issues involving the Countryside site have been resolved and are thus no longer in dispute.

3. Schlumpf property:

Schlumpf is the owner of an approximate 37 acre property located in Colts Neck. As noted above, as a part of the March 18, 2022 settlement agreement

Schlumpf was granted the ability to develop that property with 25 single-family homes that did not include any affordable housing, with each lot to be served by a private well and septic system. Schlumpf agreed to make a payment of 1.5% of the equalized assessed value for each of the residential units developed on the property to the Schlumpf Trust Fund, which money would be “utilized to offset the costs associated with the extension of infrastructure to Area 1 “the “Schlumpf Trust Fund Payment”). Under the settlement agreement, the Schlumpf property would be developed to provide for market-rate single family homes only, but development of the property would generate money that was specifically designated to be used to bring sewer infrastructure to Area 1. It is the court’s understanding that issues involving the Schlumpf property have been resolved with the requirement that Schlumpf pay into Colts Neck’s affordable housing trust fund and are thus no longer in dispute.

4. Area 1/Toll Brothers/Seta Realty Corp. property:

All issues involving the CNBA, Countryside and Schlumpf properties have thus been resolved. The only property that is a part of Colts Neck’s Third Round Mount Laurel plan that remains at issue in the present matter⁵ is the part of town called “Area 1” in the March 18, 2020 settlement agreement. Area 1 includes Block 46, Lots 13, 16 and 17, and Block 48, Lots 1-6, 19, and 39-41 on the Colts Neck tax

⁵ Other than the recommendation by the Special Adjudicator that confirmation be provided as to the affordability restrictions for the seven assisted living units at Reflections at Colts Neck.

map, and is located on New Jersey State Highway Route 34, south of the intersection with Route 537. As noted above, the court held a fairness hearing and approved Colts Neck's plan for Area 1, which recognized that sewer service was not presently available for that area. The Seta property, which Toll Brothers had formerly indicated it wanted to develop, is located within Area 1. Seta Realty is the owner of Lots 5, 39 and 40 in Block 48. Area 1 is the primary area designated by the Township for development of higher density housing.

Area 1 does not have access to municipal water or sewer infrastructure. The March 18, 2020 Colts Neck/FSHC/Schlumpf settlement agreement provided that wastewater transmission and treatment would be provided through MRRSA, but as noted above, MRRSA has never agreed to this and in fact has consistently objected to this plan. MRRSA submits that it cannot accommodate flow from Colts Neck, other than from the Countryside development.

B. Post-August 13, 2020 judgment of fairness and preliminary compliance developments:

1. Colts Neck's request that the court void the March 18, 2020 agreement:

After entry of the March 18, 2020 settlement agreement Colts Neck determined that wastewater treatment could potentially be made available to Colts Neck properties through Naval Weapons Station Earle (hereinafter "NWSE"), which has a sewage treatment plant on-site. NWSE is a property owned and operated by

the United States government and is not subject to the jurisdiction and direction of this court. The United States government is free to enter into an agreement with Colts Neck for the provision of wastewater transmission and treatment for Area 1. This court would be unable to order the United States government to provide wastewater transmission or treatment to Colts Neck properties under the Mount Laurel doctrine. It is the court's understanding that the parties have discussed potential methods of providing sewer service to Area 1 that would involve an arrangement between Colts Neck and NWSE directly, or through management of NWSE's sewage treatment facilities by MRRSA, with NWSE providing sewer service to Area 1, but no resolution on the issue has been reached.

Colts Neck indicates in the present application before the court that it became clear that obtaining service for the subject properties would require litigation against MRRSA, and that Colts Neck would not be able to meet its obligation within the Third Round. Colts Neck indicated that it had explored the possibility of providing sewer service through Naval Weapons Station Earle, which is located near Area 1 and which has an on-site sewage treatment facility, but it had concluded that completion of such an effort within the Third Round was not possible.

By letter dated May 2, 2022, Colts Neck advised the court that the Township no longer believed the March 18, 2020 settlement plan to be viable and that it intended to pursue an alternate HEFSP. The settlement agreement had contained a

plan for sewer service for Area 1 to come through MRRSA. In the May 2, 2022 letter Colts Neck advised that it did not see a potential for providing sewer service to Area 1 within the Third Round period, due largely by “continued substantial increases in the estimated cost to timely provide sufficient sewer capacity (due, in part, to previously unanticipated economic factors, namely rising material and labor costs resulting from COVID-19, global supply chain disruptions, etc.)” Colts Neck indicated that it no longer intended to pursue an agreement with MRRSA or NWSE or pursue a hearing on the viability of Colts Neck’s continued entitlement to the waiver granted to Colts Neck in the settlement agreement. Rather, Colts Neck indicated that it intended to voluntarily relinquish its right to the waiver and simply maintain a durational adjustment pursuant to N.J.A.C. 5:93-4.3. Colts Neck indicated that it would reserve and set aside new sewer capacity when it became available for low and moderate income housing on a priority basis; endorse all applications to the NJDEP or its agent to provide sewer capacity to any property within Colts Neck; and amend its housing element and fair share housing ordinance to permit development where the NJDEP or its designated agent approves a proposal to provide infrastructure to a site for the development of low and moderate income housing. On June 15, 2022 Colts Neck submitted an amended HEFSP as indicated in its May 2, 2022 letter.

Toll Brothers, the proposed developer of inclusionary housing on the Seta property, had argued that TRWRA was a viable alternative wastewater transmission and treatment provider. Toll Brothers had explored the potential of bringing sewer service to the property through Western Monmouth Utilities Authority (hereinafter “WMUA”), MRRSA, TRWRA, and NWSE. Toll Brothers concluded that the most cost-effective plan would be to provide sewer service to Area 1 through NWSE, with the next most cost-effective plan being TRWRA.

Just as Colts Neck is not a member municipality of MRRSA, however, Colts Neck is not a member municipality of TRWRA. It appears from the information presented to the court that wastewater flowing from Colts Neck to TRWRA would need to flow through the Tinton Falls wastewater collections system. In order to have wastewater flow from Colts Neck to TRWRA, Tinton Falls and TRWRA (and potentially other member municipalities of TRWRA) would have to agree to their systems being utilized for Colts Neck wastewater, absent a court order requiring same. TRWRA and Tinton Falls are not parties to the present litigation. Additionally, sufficient capacity for Colts Neck wastewater within TRWRA would need to exist.

In a September 22, 2021 letter to the court counsel for TRWRA indicated that Colts Neck is not a member municipality of TRWRA and lies outside of TRWRA’s authorized service area, but did share a border with TRWRA customer municipality

Borough of Tinton Falls. TRWRA indicated that while it had available capacity at its treatment plant for the Toll Brothers (Seta) site, having capacity did not mean that TRWRA welcomed the idea of the Toll project connecting to its system, a position that TRWRA believed Toll Brothers had represented to the court. TRWRA indicated that as of September 22, 2021, “no application for a ‘treatment works approval’ (“TWA”) for Toll Bros’ prospective Colts Neck project has ever even been presented to TRWRA’s Board of Commissioners. The Board has never considered such a TWA, thus it has never voted for, or against, such an application.” TRWRA continued, “[t]he purpose of this letter is to make it clear to the Court, and Toll Bros, that until a TWA has been sought and obtained, no one should be relying upon any level of ‘discussion’ with TRWRA’s professionals as being equal to a commitment from the Authority to provide service.”

Seta contends that the March 18, 2020 settlement agreement is not void and argues that Colts Neck has enjoyed the immunity provided through the filing of its declaratory judgment action in June 2015 and should be bound by the terms of the settlement agreement. While two consent orders were submitted to and signed by the court in December 2022, neither consent order resolves Area 1 issues and neither was agreed to by Seta. Seta contends in its October 20, 2022 brief to the court that Colts Neck “has done nothing but use its sewer policy to delay and thwart the construction of affordable housing,” and that “[i]t is clear that Colts Neck will not

take affirmative action to facilitate the development of affordable housing without court intervention.” Seta argues that the court “should not enter a [j]udgment of [c]ompliance but rather find that the Township has failed to satisfy its constitutional affordable housing obligation,” but if the court does enter a judgment of compliance, “such an order should contain explicit and strict conditions....”

Colts Neck’s request that the court determine the March 18, 2020 settlement agreement to be void and accept the alternative HEFSP offered by Colts Neck, which was not agreed to by FSHC, was presented to the court at a two day fairness and conditional compliance hearing held on December 6 and 8, 2022.

Colts Neck’s position as set forth in its written summation to the court is:

because the bargained-for terms of the 2020 Settlement Agreement with Fair Share Housing Center (“FSHC”) no longer work – notably, the Township’s agreement to fund an affordable housing grant to bring sewer from the Manasquan River Regional Sewerage Authority (“MRRSA”) to Area 1 and, in exchange, obtain a waiver from COAH’s durational adjustment rules – the Settlement Agreement is void. As a result, Colts Neck presented a new plan (i.e., the Housing Plan) to address its affordable housing obligations.

Colts Neck argues that the Fair Housing Act does not require municipalities to create sewer or water infrastructure or raise revenues in order to provide affordable housing, and there is thus no authority to keep in place the provisions of the March 18, 2020 agreement that require Colts Neck to contribute money toward

such infrastructure. Colts Neck additionally argues that because it is required to sign on to plans and applications for water and/or sewer service if requested for properties outside of those addressed in the March 18, 2020 agreement, it should not be required to keep higher-density zoning in place for Area 1. Colts Neck indicates that it should not be required by the court to adopt or maintain overlay zoning for Area 1 to provide for development of affordable housing.

MRRSA and the five MRRSA municipalities filed opposition to FSHC's motion to enforce litigants' rights, but MRRSA's opposition was resolved by way of a consent order entered by the court in December 2022. As noted above, MRRSA is agreeing to provide sewer service to Countryside, but not to CNBA or Area 1, and is reserving its right to object to any further efforts to obtain sewer service for those properties through MRRSA.

FSHC opposes Colt's Neck application to the court, and filed a motion to enforce litigant's rights requesting that the court require Colts Neck to comply with its obligations under the March 18, 2020 settlement agreement.

2. FSHC motion:

The March 18, 2020 settlement agreement provides in paragraph 29, "[t]his Agreement may be enforced through a motion to enforce litigant's rights or a separate action filed in Superior Court, Monmouth County. Additionally, paragraph 30 of the March 18, 2020 settlement agreement provides, "[u]nless 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 provision 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.”

FSHC filed a motion to enforce litigant’s rights on October 20, 2022, requesting that the court enforce FSHC’s rights under the March 18, 2020 settlement agreement and the court’s August 13, 2020 order. FSHC specifically requests that the court require Colts Neck to adopt and maintain overlay zoning for Area 1 and provide financial support for water and sewer infrastructure for affordable housing developments in accordance with Exhibit B of the settlement agreement. FSHC contends in its motion that Colts Neck has acted in bad faith in failing to comply with its obligations under the settlement agreement and in now requesting relief from the terms of the agreement. FSHC initially objected to NWSE being considered as an alternative to MRRSA for purposes of application of Colts Neck’s contribution of \$2 million toward the development of a sewer system in Area 1 but has withdrawn that objection.

FSHC contends that the settlement agreement is not void but rather that the agreement should be upheld, with the court severing the provision recognizing Colts

Neck's right to a waiver under N.J.A.C. 5:93-4.3(c) under the agreement's severability clause in paragraph 30 of the agreement. FSHC further argues that Colts Neck should be required to amend its proposed HEFSP to provide for overlay zoning in Area 1, consistent with the settlement agreement; amend the HEFSP and spending plan to provide financing for sewer infrastructure to Area 1, consistent with Exhibit B of the settlement agreement, and comply with the conditions set forth in the Special Adjudicator's report to the court. FSHC requests that the court refrain from entering a conditional judgment of compliance and repose at this point containing conditions that must be met by Colts Neck, but rather asks that the court enter an interim order requiring completion of the necessary actions by Colts Neck with 90 days before being eligible for entry of a judgment of compliance.

In its written summation, FSHC presents the question before the court as "whether Colts Neck has done enough to uphold the rights of lower-income people to access affordable housing in the Township. In this regard, both the facts and the law indicate that the Township must be required to do more than it has proposed in its HEFSP."

In the December 5, 2022 settlement agreement FSHC withdrew its opposition to NWSE being used as an alternative to MRRSA for sewer service for Area 1, and specifically withdrew its opposition to the use of Colts Neck's \$2 million

contribution toward sewer infrastructure for a NWSE solution in lieu of the MRRSA solution provided in the March 18, 2020 settlement agreement.

FSHC thus requests that Colts Neck be required to adopt and maintain higher-density overlay zoning for Area 1, sign on to applications for water and sewer service upon request by a proposed affordable housing-inclusive development for properties outside of Area 1, and pay \$2 million toward sewer infrastructure as provided in the March 18, 2020 agreement.

MRRSA and its member towns initially opposed FSHC's motion to enforce litigant's rights, but in the December 5, 2022 consent order withdrew their opposition and specifically withdrew their position that the March 18, 2020 settlement agreement was null and void. As noted above, MRRSA is agreeing to provide sewer service for the Countryside development, but not for CNBA, which will be served through an onsite treatment plant, or for Area 1.

Colts Neck argues that the court cannot rewrite the settlement agreement entered into between the parties to simply remove the provision providing a waiver to Colts Neck, leaving the remainder of the agreement in place, but rather that the court should accept Colts Neck's new HEFSP as fair to low and moderate income households. Colts Neck contends that COAH regulations and the FHA do not permit the court to require Colts Neck to spend its own money to facilitate installation of sewer service in Area 1, and because the March 18, 2020 settlement agreement is

null and void, the court cannot require Colts Neck to do so under the terms of the settlement agreement.

The dispute between Colts Neck and FSHC was partially but not entirely resolved by way of a consent order entered by the court on December 21, 2022 which provides, relevant to the court's decision, as follows:

1. CN [Colts Neck] shall continue to permit (and facilitate if necessary) a dialog between MRRSA and the Navy relative to the production of sewer in Colts Neck through NWS Earle and shall not interfere or obstruct any such dialog between MRRSA and the Navy and/or the Court's Special Masters.
2. Upon the request of the parties, the Court authorizes its Special Masters to continue, post-Judgment, to be involved in discussions regarding potential sewer production at NWS Earle.

* * * * *

4. Nothing herein shall be construed as an adjudication that NWS Earle is the sole or preferred sewer option.

Given the settlement agreements entered into in December 2022, the court does not have before it the issue previously raised by the parties as to whether MRRSA could be compelled to allow Colts Neck or the proposed Colts Neck developers to connect to MRRSA's regional sewer system. See Bi-County Dev. of Clinton v. Borough of High Bridge, 174 N.J. 301 (2002). MRRSA has agreed to receive wastewater from Countryside, and CNBA will utilize an onsite treatment

plant. While no final determination has been made as to where wastewater from Area 1 will go, that issue is not before the court at this time.

II. ANALYSIS:

A. Colts Neck's request that the court determine that the March 18, 2020 settlement agreement is void.

Colts Neck's planner Elizabeth McManus, PP, AICP, LEED AP indicated to the court in her testimony at the December 2022 hearing and in her report dated November 7, 2022 that under the new HEFSP submitted by Colts Neck, the Township (1) qualified for a durational adjustment; (2) should not be required to adopt or maintain overlay zoning allowing for higher density housing in Area 1; and (3) should not be required to contribute financially (the \$2 million required under Exhibit B to the March 18, 2020 settlement agreement) toward sewer infrastructure for Area 1. McManus indicated that under the amended HEFSP Colts Neck was agreeing to elimination of the waiver and opined that the amended HEFSP met Colts Neck's Third Round obligations.

Colts Neck has asked the court to approve the amended HEFSP that it produced on June 15, 2022, which is not agreed to by FSHC, in lieu of the prior HEFSP which was agreed to by FSHC, on the basis that Colts Neck has determined that sewer service could not be brought to Area 1 by the end of the Third Round, which Colts Neck argues would render the March 18, 2020 settlement agreement

void. It is noted that in a report dated December 29, 2021 previously submitted to the court, McManus had indicated that NWSE provided a viable solution for provision of sewer service to Area 1 within the Third Round. Specifically, McManus indicated in the report, “SEWER SERVICE INFRASTRUCTURE FROM NWS EARLE IS VIABLE & CAN BE IN SERVICE PRIOR TO JUNE 30, 2025.” (capitalization in original). In that report McManus noted that Colts Neck’s engineering consultant, David Puchalski, “has determined that “capacity exists, that it is feasible to construct the necessary infrastructure and that the extension to the NWS Earle wastewater plant to a project that received certificates of occupancy will occur by June 5, 2025 – prior to the end of the third round.” (emphasis in original).

As noted by the New Jersey Supreme Court in Holmdel Builders Ass’n v. Holmdel, 121 N.J. 550, 555 (1990), in Southern Burlington County NAACP v. Mount Laurel Township, 92 N.J. 158 (1983) (Mount Laurel II), the Court “clarified and reaffirmed the constitutional mandate set forth in Mt. Laurel I, imposing an affirmative obligation on every municipality to provide its fair share of affordable housing.”

Affordable housing is a goal that is no longer merely implicit in the notion of the general welfare. It has been expressly recognized as a governmental end and codified under the FHA, which is to be construed in pari materia with the MLUL. See Hills Dev. Co., supra, 103 N.J. at 33-34, 510 A.2d 621. See discussion infra at 573-76. The FHA specifies that a municipality's zoning power be used to create a housing

element "designed to achieve the goal of access to affordable housing to meet present and prospective housing needs, with particular attention to low and moderate income housing." N.J.S.A. 52:27D-310. Also, the municipality must "establish that its land use and other relevant ordinances have been revised to incorporate" provisions for a realistic opportunity for the development of lower-income housing. N.J.S.A. 52:27D-311a. We thus have no doubt that provision of lower-income housing is one of the purposes of zoning incorporated by reference into the zoning enabling act.

[Holmdel Builders Ass'n v. Holmdel, 121 N.J. at 567.]

As indicated by Special Adjudicator Banisch on page 10 of his report, “[i]f the FSHC Settlement were determined to be null and void, the Township’s Fair Share obligation for the period 1999 to 2025 would no longer be set as Court-approved through the Settlement. Rather, the Township’s affordable housing obligation would have to be determined through a trial regarding the methodology and calculation of the municipal housing obligation. Subsequently, an updated HEFSP would need to be fashioned to address the revised need calculation.”

Colts Neck argues that the trial court's role when asked to enforce or vacate a settlement agreement is to approve or reject the proposed settlement in its entirety as written and this court may not revise or amend particular provisions. See Matter of Township of Bordentown, 471 N.J. Super. 196, 217 (App. Div. 2022), certif. denied 252 N.J. 533 (2023). Colts Neck contends that the court thus cannot keep in place only portions of the March 18, 2020 settlement agreement.

A settlement agreement between parties to a lawsuit is a contract. Pascarella v. Bruck, 190 N.J. Super. 118, 124, 462 A.2d 186 (App. Div.), certif. denied, 94 N.J. 600, 468 A.2d 233 (1983). "Settlement of litigation ranks high in our public policy." Jannarone v. W.T. Co., 65 N.J. Super. 472, 168 A.2d 72 (App. Div.), certif. denied, 35 N.J. 61, 171 A.2d 147 (1961). Consequently, our courts have refused to vacate final settlements absent compelling circumstances. In general, settlement agreements will be honored "absent a demonstration of 'fraud or other compelling circumstances.'" Pascarella, *supra*, 190 N.J. Super. at 125, 462 A.2d 186 (quoting Honeywell v. Bubb, 130 N.J. Super. 130, 136, 325 A.2d 832 (App. Div.1974)). Before vacating a settlement agreement, our courts require "clear and convincing proof" that the agreement should be vacated. DeCaro v. DeCaro, 13 N.J. 36, 97 A.2d 658 (1953).

[Nolan v. Lee Ho, 120 N.J. 465, 472 (1990).]

While Colts Neck argues that the court cannot amend a settlement agreement, but rather must either enforce it in its entirety or find it void in its entirety, Colts Neck is asking this court to do the thing that it asserts cannot be done. Colts Neck is asking the court to keep in place the parts of the agreement that it wants to keep and remove and replace other parts of the agreement with different provisions that Colts Neck now favors. Colts Neck thus does not seek to throw out the entirety of the March 18, 2020 agreement with FSHC, but rather wants to continue most of the provisions, only asking that some of the provisions be changed. The agreement establishes Colts Neck's affordable housing obligations for the third round as

follows: rehabilitation share – 25; prior round obligation – 218; third round prospective need – 306. Colts Neck is not seeking to reopen or reject this settled issue, but rather wants the parties to remain bound by this provision. Paragraphs II (1), (2), (3), (4), (5), (6), and (7) contain detailed settlement terms that Colts Neck is also not seeking to have voided by the court but wants to remain in place.

Colts Neck has thus presented a plan that keeps in place many of the terms of the settlement agreement reached between Colts Neck, FSHC and Schlumpf. Colts Neck has received substantial benefits under the agreement, including (1) protection from builder's remedy lawsuits as a result of the entry into the settlement agreement and August 2020 order of the court, (2) application of the waiver described herein and (3) low-density single-family development of the Schlumpf site, which Colts Neck did not want to be developed with higher-density housing.

The parties disagree as to whether Colts Neck used its best efforts to comply with its obligation under the settlement agreement, but the court does not need to reach a determination on this issue. In the May 2, 2022 letter, Colts Neck indicated that it was “not confident that NWS Earle could be appropriately included as part of a viable plan to provide – within the current period of repose – available sewer capacity for inclusionary development” in Area 1. In the letter brief submitted to the court by Colts Neck on June 15, 2022, Colts Neck indicated, “[s]ubsequent to the entry of the Fairness Order, it became clear that the implementation of the settlement

terms through litigation with MRRSA and its constituent members would result in significant delay and a successful outcome to that litigation was not assured.”

Colts Neck indicates that sewer service cannot be provided to Area 1 within the Third Round, and on this basis indicates that the waiver granted to Colts Neck under the March 18, 2020 settlement agreement be eliminated. The court can do so under paragraph 30 of the agreement, which provides that a provision can be severed. Based upon the information provided by Colts Neck, a factual basis exists for the waiver provided to Colts Neck to be severed by the court.

The court recognizes that the provision of sewer service to Area 1 is a complicated, involved process, but it is a process that is necessary to make Area 1 developable for inclusionary housing. The need for sewers in Area 1 transcends the “round” designations determined by the New Jersey Supreme Court, as applicable to Mount Laurel matters; Colts Neck will still need sewer service to develop Area 1 if this is not accomplished by the end of the Third Round. While the March 18, 2020 settlement agreement was entered into during the Third Round and was intended to provide for development of affordable housing in Colts Neck within the Third Round, the fact that all of the affordable housing planned for Colts Neck in the Third Round was not developed does not make the agreement that Colts Neck entered into void, and Colts Neck’s Third Round obligation carries into the Fourth Round. Applying an arbitrary deadline to Colts Neck’s obligations under the settlement

agreement in an unyielding manner would ignore the reality, and the difficulty, of providing for sewer service in Colts Neck.

The court has carefully considered all of the evidence, including the testimony of witnesses and voluminous documentation provided by the participants in the hearing, and the argument of counsel, and finds that the March 18, 2020 settlement agreement is not void. As noted above, “before vacating a settlement agreement, our courts require “clear and convincing proof” that the agreement should be vacated.” Colts Neck has not provided clear and convincing proof that the March 18, 2020 settlement agreement should be vacated.

Colts Neck is seeking to amend certain terms of the settlement agreement due to Colts Neck’s view that sewer service cannot be provided to Area 1 within the Third Round. The court is not removing Colt’s Neck obligations provided in the agreement concerning Area 1, as the settlement agreement remains in place, but the court is severing and eliminating the waiver granted to Colts Neck in the settlement agreement.

Special Adjudicator Banisch recommended in his report to the court and testimony provided at the December 2022 hearing that if the court were to grant a judgment of fairness and conditional compliance to Colts Neck based upon the amended HEFSP submitted by Colts Neck, the following conditions be included:

1. Amend the HEFSP to include the Area 1 overlay zone.
2. Amend the HEFSP and Spending Plan to remove the market to affordable program.
3. Revise the Spending Plan to distribute funds to mechanisms in the plan, including funds for sewer.
4. Work with a qualifying developer of comparable reputation to that of Toll Bros. to facilitate sewer service to Area 1.
5. Provide adopted versions of the Planning Board and Township Committee resolutions endorsing the amended HEFSP.
6. Cease use of trust funds toward administrative expenses.
7. Provide a governing body resolution approving the Spending Plan.
8. Provide an adopted version of the draft operating manual for rental affordable units.
9. Provide an adopted version of the draft operating manual for for-sale affordable units.
10. Provide a signed, adopted version of the governing body resolution approving bond issuance.
11. Provide additional information concerning the Monmouth County Rehabilitation program, including a structural conditions survey.

12. Provide an ordinance designating a municipal housing liaison.
13. Provide documents showing creditworthiness for the 7 assisted living units at Reflections at Colts Neck.
14. Provide a resolution appointing an administrative agent for affordable units other than those at CNBA.
15. Provide adopted versions of the affirmative marketing plan and resolution.

Many of these items are general administrative requirements that are routinely contained in a judgment of fairness or of conditional compliance if the item was not completed prior to the hearing, and inclusion of most of the items in a judgment of fairness and conditional compliance is not opposed by Colts Neck. The items that are the subject of contention are addressed herein.

B. Overlay zoning in Area 1:

Colts Neck and FSHC entered into an agreement which was approved by the court and which Colts Neck now contends is void. Colts Neck argues in its summation that “it is not the function of the Court to renegotiate or change the terms of the 2020 Settlement Agreement with FSHC,” and that “FSHC’s request that the Court rewrite the 2020 Settlement Agreement so that FSHC gets the benefit of its bargain while the Township does not is beyond frivolous and, if granted, would effectively rewrite long-standing, fundamental contract law.” Colts Neck contends,

“[s]imilarly, the argument presented by Seta (as a surrogate of Toll) that sewer should go to Two Rivers Water Reclamation Authority as opposed to Naval Weapons Station Earle (“NWSE”) is simply not relevant since Colts Neck is seeking a conventional durational adjustment as part of its new Housing Plan.” Colts Neck thus requests that the court grant a final judgment of compliance and repose based upon the amended HEFSP submitted by Colts Neck.

Through the testimony of its planner, Elizabeth McManus, Colts Neck objected to several of Special Adjudicator Banisch’s suggested conditions. With reference to the suggestion that the court require as a condition of the judgment of fairness and conditional compliance that Colts Neck be required to adopt and maintain overlay zoning in Area 1, McManus indicated that Colts Neck is giving up its waiver from the obligation to sign on to water and sewer applications in other areas, and thus no legal or factual basis exists to require Colts Neck to put and keep in place overlay zoning allowing higher-density housing in Area 1.

As indicated by Special Adjudicator Banisch on page 3 of his December 2, 2022 report to the court:

[i]n short, Colts Neck is asking the Court to approve the plan that FSHC has previously found to meet the constitutional mandate but does not want to abide by the terms of the Settlement. If the FSHC Settlement is voided, Colts Neck will forego all benefits that were associated with the Settlement, including certainty about the constitutional obligation. It also resolved a dispute about

crediting for the RCA units that will likely resurface. Instead, the Court will be called upon to determine the fair share affordable housing obligation before a compliance plan can be crafted.

A Mount Laurel declaratory judgment action filed by a municipality pursuant to Mount Laurel IV allows a municipality to have a substantial voice in deciding where higher-density development will be located within the municipality. If a municipality does not present a zoning plan approved by the court at a fairness hearing, which provides immunity from builder's remedy lawsuits, the municipality remains exposed to builder's remedy suits in which a proposed developer can request that the court allow higher-density development at a site chosen by the developer. In a DJ action, the municipality will generally meet with FSHC and the special adjudicator appointed by the court and work to reach an agreed-upon resolution as to the number of affordable units needed and where the affordable housing, which may be higher in density, will be located. If a plan is approved by the court, the municipality receives immunity from builder's remedy lawsuits, that is, lawsuits filed by developers who are proposing to build inclusionary developments, for the remainder of that Mount Laurel period. The municipality will have properly planned for the development of affordable housing within the municipality and is not required to rezone or otherwise allow for the development of higher-density housing on other properties, even if a developer comes forward indicating that it would like to develop inclusionary housing on another property within the municipality.

If a municipality did not file a DJ action in accordance with Mount Laurel IV, the municipality would be open to builder's remedy lawsuits. If a municipality did not properly plan through zoning for the development of inclusionary or other affordable housing within the municipality, a builder can potentially obtain relief through a court order that requires the municipality to rezone property to allow for higher-density housing in a location not selected by the municipality and where the municipality did not want the higher-density housing to be located. Essentially, the municipality can choose where the higher-density housing will go through its own planning and zoning, or can fail to properly plan for higher-density housing, thus leaving itself open to the filing of a builder's remedy lawsuit and potentially a court order that requires the municipality to provide for higher-density housing in an area not of the municipality's choosing. Colts Neck chose to file a DJ action, and the March 18, 2020 settlement agreement and August 2020 order constitutes the resolution of that DJ action.

The court recognizes that Colts Neck is a difficult town for development of higher-density housing. There is almost no sewer service in the Township. It is undisputed that construction of water and sewage infrastructure for Area 1 will cost millions of dollars. For example, as noted by Seta in its written closing argument, the 2019 report prepared by Maser Consulting, P.A. estimated the cost of providing

water service to Area 1 from TRWRA at \$3.2 million, and sewer service via NWSE at \$2.3 million.

In the present matter, extensive discussions were held after Colts Neck filed its declaratory judgment action in 2015 which culminated in the March 18, 2020 settlement agreement.

Paragraph 10 of the March 18, 2020 agreement provides:

The Township will provide a realistic opportunity, as may be possible given the durational adjustment, for the development of affordable housing through the adoption of inclusionary zoning or overlay zoning on the following sites:

Colts Neck Building Associates (family rental)
Block 22, Lot 18;

Countryside Developers (family for sale), Block
42, Lot 4 and Block 172, Lot 15; and

Area 1 Overlay Zoning (88.73 ac; 8 du/ac) (family
for sale or rental).

[emphasis added.]

Additionally, paragraph 16 of the agreement provides:

[a]s an essential term of this Agreement, within one hundred and twenty (120) days of the Court's approval of this Agreement after a fairness hearing, the Township shall introduce and adopt an ordinance or ordinances providing for the amendment of the Township's Affordable Housing Ordinance and Zoning Ordinance to implement the terms of this Agreement and the zoning contemplated herein and shall adopt a Housing Element and Fair Share Plan and Spending Plan in conformance with the terms of this

Agreement.... Within one hundred and twenty (120) days after the approval of this Agreement by the Court after a fairness hearing, the Township shall adopt all ordinances required to be adopted as part of this Agreement....

In exchange for zoning for the development of affordable housing on the Countryside, CNBA properties and in Area 1 as set forth in the settlement agreement, Colts Neck was provided with a waiver of the requirement to endorse developer applications for sewer service to inclusionary developments. Absent the parties' agreement, Colts Neck would have been required to sign on to any application for water and sewer service by any proposed developer of inclusionary housing, on any property located within the Township. As noted above, Colts Neck also received immunity from builder's remedy lawsuits, which absent an approved HEFSP would have been permitted under Mount Laurel IV. From the time of the filing of Colts Neck's DJ action in 2015 through the present time Colts Neck has enjoyed immunity from builder's remedy lawsuits. Additionally, the Schlumpf property was developed with a contribution by Schlumpf to Colts Neck's affordable housing trust fund, but with no affordable housing included within the development. The March 18, 2020 settlement agreement thus provided Colts Neck with freedom from having to sign on to applications for development of higher-density housing outside of the CNBA, Countryside and Area 1 properties, protected Colts Neck from lawsuits filed by developers who wanted to construct higher-density housing on other properties located within Colts Neck that were not designated for such development in the

settlement agreement, and allowed for development of the Schlumpf property, which had initially been proposed as a suitable location for development of a higher-density development including affordable housing, with no provision for on-site affordable housing.

It is unclear whether Colts Neck has adopted the overlay zoning ordinance(s) for Area 1 required under the March 18, 2020 settlement agreement. Colts Neck argues that as sewer service is not yet available for Area 1 and as it is relinquishing its right to a waiver under N.J.A.C. 5:93-4.3(c)4, it should no longer be held to the obligation, contained in the March 18, 2020 settlement agreement, that higher-density Area 1 zoning be adopted and maintained to provide for affordable housing.

Higher-density housing may in fact ultimately be developed in Colts Neck in locations other than in Area 1 and at the Countryside and CNBA properties. Without the waiver, if a developer is interested in developing another site for higher-density affordable housing under Colts Neck's proposed HEFSP, Colts Neck must sign on to the developer's application to the DEP for provision of water and sewer service for that property, even if Colts Neck was not planning for development of higher-density housing on that site and the property has thus not been zoned by Colts Neck for such development. No information was presented to the court, however, indicating that any developer is waiting in the wings to develop another property for an inclusionary project, and the court is satisfied that the rezoning of Area 1, which

Colts Neck has identified as an appropriate area for development of affordable housing, should be adopted and remain in place until Colts Neck's agreed-upon Third Round obligation has been met. If development in other areas occurs at a pace that would allow Colts Neck to meet its Third Round obligation from development of properties outside of Area 1, Colts Neck is free to make an application to the court for leave to rezone Area 1 to remove the overlay zoning that allows for development of inclusionary housing. Under those circumstances, Colts Neck will have met its obligation to provide the opportunity for the development of affordable housing in the municipality for the Third Round through the development of other properties.

It is noted that at the time of such an application by Colts Neck, Colts Neck could potentially be addressing a Fourth Round affordable housing obligation which could be relevant to any application by Colts Neck to eliminate higher-density housing zoning from Area 1, but that is not an issue currently before the court. On the record presented here, the court is satisfied that Colts Neck must adopt and maintain the overlay zoning for Area 1 that is provided for in the March 18, 2020 settlement agreement, which will allow for the development of affordable housing in that area.

C. Financial contribution by Colts Neck for Area 1 sewer system:

With reference to the provision of water and sewer service in Area 1, the March 18, 2020 settlement agreement between Colts Neck and FSHC provides in relevant part in paragraph 8c as follows:

iv. Colts Neck further agrees as follows with regard to the effort to provide water or sewer for the above-referenced sites:

1. The Township agrees to adopt resolutions endorsing the inclusion of the parcels that are the subject of a durational adjustment in the appropriate sewer service area; to support, endorse, and if necessary become a co-applicant on applications for water and sewer for the subject properties made to Monmouth County, DEP, The Manasquan River Regional Sewer Authority (“MRRSA”), any of MRRSA’s constituent members, the Ocean County Utilities Authority (“OCUA”), Ocean County and/or any other body politic or utility authority necessary in order to provide public sewer and water service to the parcels that are the subject of a durational adjustment by tie-in to existing sewer collection service through Freehold Township, Freehold Township Public Works, Howell Wastewater Management Area and/or Wall Township Sanitary Sewer Service (or in the case of the Area 1 Overlay Zoning, a closer available tie-in along Route 34 or another location acceptable to both the developer and the Township) and by tie-in to existing public potable water supply located in Freehold

Township (the “Proposed Connection Locations”); to adopt and support resolutions related to the expansion of water franchise areas; to endorse and join in any request made by any party with an interest in the parcels that are the subject of a durational adjustment to MRRSA or any of MRRSA’s constituent members regarding the procurement of a sewer allocation sufficient to service the planned developments on the parcels; to endorse and join in any request made by any appropriate party to the Township of Freehold in connection with the procurement of sewer and water service from the Township of Freehold and/or Suez Water Company so that public sewer and water service may be provided to the parcels that are the subject of a durational adjustment by tie-in to the Proposed Connection Locations; to join any appropriate party as a plaintiff in any litigation necessary to procure public sewer and/or water for the parcels that are the subject of a durational and/or water for the parcels that are the subject of a durational adjustment by tie-in to the Proposed Connection Locations, including but not limited to any litigation against MRRSA, the Township of Freehold, MRRSA’s constituent members, the County of Monmouth, the DEP, the County of Ocean, OCUA or any other necessary party.

2. The Township shall cooperate with appropriate parties, and act in good faith and with continuity of purpose to assist developers in facilitating the provision of public water and sewer to the parcels that are the subject of a durational adjustment by

tie-in to the Proposed Connection Locations. Such cooperation shall include, but not be limited to, introducing and recommending thirty (30) days after a fairness hearing in this matter a resolution supporting amendments sewer service areas and expansions of water franchise areas, entering into agreements, and taking any other reasonable steps necessary or required to help facilitate the provision of public water and sewer to the parcels that are the subject of a durational adjustment, placement within the appropriate sewer service area, and incorporation into a approved Monmouth County Water Quality Management Plan (“WQMP”) and the Township’s Wastewater Management Plan (“WMP”) to allow development of parcels that are the subject of a durational adjustment by tie-in to the Proposed Connection Locations. If necessary, the Township shall cooperate with and support any appropriate party in its efforts to obtain judicial approval, including any appeals.

3. With regard to the Area 1 Overlay sites, the Township and FSHC agree to the terms set forth in Exhibit B to this Agreement, which address the municipality’s obligation to provide funds to support the provision of sewer to the Area 1 overlay sites. The municipality agrees to provide a form of developer’s agreement that substantially incorporates and is consistent with the terms included in Exhibit B within sixty (60) days of the Court’s approval of this Agreement after a fairness hearing.

[Emphasis added.]

Pursuant to paragraph 8(d) of the March 18, 2020 settlement agreement:

The combination of the developments planned to meet the Township's obligation, in accordance with the terms of this Agreement, are sufficient to meet and exceed the Township's 306-unit Third Round Prospective Need. Therefore, the requirements included in N.J.A.C. 5:93-4.3(c)3 and 4 related to inclusion in a fair share plan when the DEP or its designated agent approves a proposal to provide water and/or sewer to a site other than those designated for the development of low and moderate income housing in the housing element are hereby waived in accordance with N.J.A.C. 5:93-4.3(c)4, which permits waiver of such requirements when a municipality has a plan that will provide water and/or sewer to sufficient sites to address the municipal housing obligation within the period of repose.

Exhibit B to the March 18, 2020 settlement agreement provides for Colts Neck to pay money to Toll Brothers, which at the time of the agreement was a proposed developer of the Seta property, for development of a sewer system within Area 1. At the time of the December 2022 hearing Toll Brother was no longer involved with the Area 1 development site. The property that Toll Brothers sought to develop within Area 1 is owned by Seta.

The March 18, 2020 settlement agreement speaks to the development of the Area 1 inclusionary housing site by Toll Brothers, but as indicated in the settlement agreement, if Toll Brothers chose not to proceed with development of the site, the monies to be paid by Colts Neck toward the development of a sanitary sewer system

would be made available to “to a developer of comparable reputation....” Toll Brother may no longer be involved with the Area 1 property, but as provided in the agreement Colts Neck’s obligation would apply to another developer of comparable reputation. If another developer of comparable reputation comes forward to develop the Seta site, and the cost of providing sewer infrastructure exceeds the amount set forth in Exhibit B to the settlement agreement, Colts Neck is required to contribute \$2 million, which is described in the settlement agreement as the “Affordable Housing Grant.”

In In re Adoption of Amendments to N.J.A.C., 339 N.J. Super 371, 384-86 (App. Div. 2001), the court stated:

The FHA specifically refers to infrastructure (sewer and water) in only two contexts: (1) a municipality's fair share is to be adjusted whenever "[a]dequate public facilities and infrastructure capacities are not available or would result in costs prohibitive to the public if provided," N.J.S.A. 52:27D-307(c)(2)(g); and (2) in preparing its housing element, a municipality is to consider a "plan for infrastructure expansion and rehabilitation if necessary to assure the achievement of the municipality's fair share of low and moderate income housing." N.J.S.A. 52:27D-311(a)(4). Thus, the Legislature intended municipalities to expand their infrastructure if necessary in order to satisfy their fair share obligation, but it also contemplated that in some municipalities this would not be possible or economically feasible, and thus it allowed for a downward adjustment of a municipality's obligation in such cases.

The substantive rules promulgated by COAH, N.J.A.C. 5:93-1.1 to -15.1, create a complex methodology for determining present and prospective regional need, credits and adjustments, preparation of a housing element, and much more. The rules address infrastructure concerns, such as the lack of sewer access, in several sections other than the two challenged by appellants. For example, in the subchapter on credits and reductions, N.J.A.C. 5:93-3.5(a) directs COAH to review previously zoned sites to determine whether they "present a realistic opportunity for low and moderate income housing before granting a reduction." In its review, COAH is to consider "environmental factors, the location of existing infrastructure and the likelihood of the current zoning to result in the creation of low and moderate income housing during the period of substantive certification." N.J.A.C. 5:93-3.5(a).

In COAH's sub-chapter on municipal adjustments, the rules address a situation in which a community has sufficient land but insufficient water and/or sewer to support inclusionary development. N.J.A.C. 5:93-4.3(a). In such a case, COAH reviews "each possible site for inclusionary development to determine if it is realistic for the site to receive the required water and/or sewer during the period of substantive certification." N.J.A.C. 5:93-4.3(a). If it is not realistic, the municipality receives a durational adjustment of its housing obligation, deferring the obligation until adequate water and/or sewer are made available. N.J.A.C. 5:93-4.3(c). COAH requires, among other things, that municipal officials endorse all applications to the DEP for water and sewer approval, and that they amend their housing element when new DEP approvals are received if the element included sites

without water and sewer access. N.J.A.C. 5:93-4.3(c)(2) and (4).

Mount Laurel II, supra, 92 N.J. at 221-22, 456 A.2d 390, defined "realistic opportunity" to mean that "there is in fact a likelihood--to the extent economic conditions allow--that the lower income housing will actually be constructed." This means a realistic, not just a theoretical, opportunity for the construction of affordable housing. Alexander's Dep't Stores, Inc. v. Borough of Paramus, 125 N.J. 100, 109, 592 A.2d 1168 (1991). "The responsibility to provide a 'realistic opportunity' for affordable housing is an obligation imposed on the municipality." Rosenshein Assocs. v. Borough of Palisades Park, 304 N.J. Super. 438, 443, 701 A.2d 448 (App. Div.1997), certif. denied, 156 N.J. 380, 718 A.2d 1209 (1998).

The availability of water and sewer connections is one of the factors considered in determining whether a municipality has provided a realistic opportunity for affordable housing. Mount Laurel II, 92 N.J. at 298, 456 A.2d 390 (ruling that a proposed inclusionary site on which water and sewer access would not be available for five to six years did not provide a realistic opportunity). However, the lack of access to sewer does not necessarily rule a site out. Urban League of Essex County v. Township of Mahwah, 207 N.J. Super. 169, 281, 504 A.2d 66 (Law Div. 1984) ("While approval of this proposal cannot be ruled out strictly on the basis of lack of access to utilities, it is a factor to be considered.") Where sewer infrastructure is not in place, it is crucial that it can be brought to a site at a reasonable cost. Toll Bros. v. Township of West Windsor, 303 N.J. Super. 518, 543, 697 A.2d 201 (Law Div.1996), aff'd, 334 N.J. Super. 109, 756 A.2d 1074 (App.Div.2000). To that end, "[m]unicipalities

have an affirmative obligation to facilitate provision of the infrastructure necessary to make development realistically likely." Ibid.

[(emphasis added).]

The importance of available public water and sewer to the potential development of real property for affordable housing has been recognized by the New Jersey Superior Court, Appellate Division. As noted by the court in In re Petition for Substantive Certification, Tp. of Southampton, County of Burlington, 338 N.J. Super. 103, 116 (App. Div.), certif. denied 169 N.J. 610 (2001), "the lack of public water or sewer service would preclude high density residential development on [a] site." Fundamentally, "sewer and other infrastructure must be available to establish a realistic opportunity for the construction of affordable housing." Id. at 117.

Development merely for development's sake is not the constitutional goal. [S. Burlington County NAACP v. Twp. of Mount Laurel,] Mount Laurel II, supra, 92 N.J. at 238 ("The Constitution of the State of New Jersey does not require bad planning. It does not require suburban spread. It does not require rural municipalities to encourage large scale housing developments."); Id. at 211, 456 A.2d 390 ("But if sound planning of an area allows the rich and middle class to live there, it must also realistically and practically allow the poor. And if the area will accommodate factories, it must also find space for workers. The specific location of such housing will of course continue to depend on sound municipal land use planning."). Nor are all aspects to the remedy fashioned in Mount Laurel II indispensable components of a remedy for the future. One can envision alternative approaches

that, perhaps, might relegate a builder's remedy to a more reserved status among available solutions to encouragement of construction of affordable housing, reducing the political turmoil that has plagued voluntary compliance with the constitutional goal of advancing the delivery of affordable housing. See [John M. Payne, Remedies for Affordable Housing: From Fair Share to Growth Share,] Land Use L. & Zoning Dig., June 1997, at 6.

[In re Adoption of N.J.A.C. 5:96, 215 N.J. 578, 610-11 (2013).]

Colts Neck recognizes its constitutional obligation to make provision for affordable housing and has identified Area 1 as, in its view, an appropriate location for such development within Colts Neck. As noted by our Supreme Court in Holmdel Builders Ass'n v. Holmdel:

Any inquiry into the validity of development-fee ordinances must inevitably consider the complex factors that contribute to the persistent and substantial shortage of low-and moderate-income housing (hereafter, lower-income or affordable housing). This inquiry necessarily begins with our seminal decisions in Mt. Laurel I and Mt. Laurel II.

The core of those decisions is that every municipality, not just developing municipalities, must provide a realistic, not just a theoretical, opportunity for the construction of lower-income housing. We realized that the solution to the shortage of affordable housing could not "depend on the inclination of developers to help the poor, [but rather must rely] on affirmative inducements to make the opportunity real." Id., 92 N.J. at 261, 456 A.2d 390.

[121 N.J. at 562-63 (emphasis in original.)]

N.J.S.A. 52:27D-311 provides, in relevant part:

a. [i]n adopting its housing element, the municipality may provide for its fair share of low-and moderate-income housing by means of any technique or combination of techniques which provide a realistic opportunity for the provision of the fair share. The housing element shall contain an analysis demonstrating that it will provide such a realistic opportunity, and the municipality shall establish that its land use and other relevant ordinances have been revised to incorporate the provisions for low- and moderate-income housing. In preparing the housing element, the municipality shall consider the following techniques for providing low- and moderate-income housing within the municipality, as well as such other appropriate techniques as have been established through applicable precedent and may be employed by the municipality:

* * * * *

(4) A plan for infrastructure expansion and rehabilitation and conversion or redevelopment of unused or underutilized real property, including existing structures, if necessary to assure the achievement of the municipality's fair share of low- and moderate-income housing;

* * * * *

(8) Utilization of municipally generated funds toward the construction of low- and moderate-income housing;

[emphasis added.]

While N.J.S.A. 52:27D-311d provides, “[n]othing in ... [N.J.S.A.] 52:27D-301] et seq. shall require a municipality to raise or expend municipal revenues in order to provide low- and moderate-income housing,”⁶ in this matter Colts Neck agreed in the March 18, 2020 settlement agreement to provide funds toward a sewer system for Area 1. Nothing in the FHA or Mount Laurel case law provides a basis for relieving Colts Neck from this agreed-to obligation.

Colts Neck may be required to make its \$2 million financial contribution toward development of a sewer system utilizing a sewage treatment partner other than MRRSA. The settlement agreement envisions that sewer service could ultimately be provided to Area 1 by MRRSA, with treatment provided by OCUA. No reason exists, however, for limiting the provider of wastewater transmission and treatment to MRRSA and OCUA. As reflected in the submissions and testimony presented by the parties - including Colts Neck - to the court, MRRSA is not the only potential provider of sewer service for Area 1. Colts Neck turned from the prospect

⁶ It is noted that by way of an amendment to the N.J.S.A. 52:27D-311 adopted and made effective March 20, 2024, the statute now provides that N.J.S.A. 52:27D-304.1, et al. “shall not be construed to require a municipality to fund infrastructure improvements for affordable housing projects beyond any commitments made in a fair share plan and housing element that has been provided with compliance certification. A municipality may fund infrastructure improvements for affordable housing projects, through the adoption of a development agreement with the applicant, beyond any commitments made in a fair share plan and housing element that has been provided with compliance certification.” The statute now specifically permits the agreement by Colts Neck in the settlement agreement and original HEFSP to fund sewer infra-structure improvements. The provision was made effective March 20, 2024, however, approximately 15 months after December 2022 when the hearing was held by this court on Colts Neck’s application and FSHC’s motion and this language is thus not being relied upon by the court in its decision on the present application by Colts Neck and motion by FSHC.

of obtaining sewer service through MRRSA to consideration of NWSE as an alternative, but ultimately concluded that it would not be able to complete the necessary negotiations, agreement and infrastructure by the end of the Third Round.

The intention of the provision of the March 18, 2020 settlement agreement providing for Colts Neck's monetary contribution was to enable a wastewater collection system to be installed for the area of Colts Neck that Colts Neck recognized was appropriate for development of a substantial amount of Colts Neck affordable housing obligation. CNBA is providing 72 actual affordable housing units and Countryside is providing 15 actual affordable housing units. Area 1 is planned to provide 142 actual affordable housing units. Water and sewer service needs to be provided to Area 1. If an alternative manner of providing sanitary sewer service for Area 1 becomes viable (i.e., MRRSA through NWSE, through NWSE directly, through TRWSA, or through another treatment provider) there is no reason why the Affordable Housing Grant could not be applied to provision of wastewater transmission and treatment by an alternative provider. Any request for application of Colts Neck's contributed funds to an alternative plan in lieu of MRRSA would need to be presented to the court for authorization to ensure that application of Colts Neck's funds was appropriate; that is, that the alternative plan for sewer service actually serves Area 1 and would facilitate the provision of the anticipated 142 housing units.

Colts Neck is not obligated under the agreement, however, to contribute financially to a sewer system to be used in an area of the Township other than Area 1. Colts Neck's obligation to contribute \$2 million toward installation of a sewage system is limited under the terms of the settlement agreement to development of a system to service properties within Area 1, which is expected to produce a substantial number of affordable housing units. If a potential developer of inclusionary housing on a property outside of Area 1 wants to obtain Colts Neck's approval for a sewage treatment option for that property, Colts Neck is obligated to sign on to the developer's application, but Colts Neck is not obligated to contribute financially toward the cost for the sewage transmission or treatment system under the March 18, 2020 agreement. The settlement agreement signed by Colts Neck provided for Colts Neck to make this contribution only for a system providing service to Area 1 and is limited to this area.

Finally, the March 18, 2020 agreement does not indicate that Colts Neck's obligation to contribute to the cost of sewers for Area 1 would be eliminated at the conclusion of Route Three. Unless the housing units planned for Area 1 in Round Three have been built elsewhere in the Township, the need for the units, and the need for sewers in Area 1, will remain. When the clock strikes midnight on July 1, 2025, Colts Neck's obligation to financially contribute to sewer infrastructure for Area 1,

as provided in the March 18, 2020 settlement agreement and as set forth herein, will remain.

D. Colts Neck's request for a durational adjustment.

Colts Neck requests that the court allow the durational adjustment which was provided in the March 18, 2020 settlement agreement to remain in place. No objection to this request has been presented to the court.

N.J.A.C. 5:93-4.3(c) provides, in relevant part, “[t]he lack of adequate capacity, in and of itself, shall constitute a durational adjustment of the municipal housing obligation. The requirement to address the municipal housing obligation shall be deferred until adequate water and/or sewer are made available.”

No objection has been presented to Colts Neck's request that the durational adjustment previously agreed to in the March 18, 2020 settlement agreement remain in place, and this request is granted.

E. Colts Neck's request for elimination of the waiver contained in the March 18, 2020 settlement agreement.

The March 18, 2020 settlement agreement between FSHC and Colts Neck provided to Colts Neck a durational adjustment for 297 units to satisfy its third-round obligation. Colts Neck agreed to rezone the Countryside, CNBA, Schlumpf and Area 1 properties and take certain actions to advance the necessary approvals for providing water and sewer service to the Countryside, CNBA and Area 1 properties. Under the agreement Colts Neck was granted a waiver of the obligation to sign on

to applications for provision of water and/or sewer service for other potential affordable-housing inclusive potential developments in other areas of the Township, for the remainder of the Third Round. The settlement agreement provides as follows:

The combination of the developments planned to meet the Township's obligation, in accordance with the terms of this Agreement, are sufficient to meet and exceed the Township's 306-unit Third Round Prospective Need. Therefore, the requirements included in N.J.A.C. 5:93-4.3(c) 3 and 4 related to inclusion in a fair share plan when the DEP or its designated agent approves a proposal to provide water and/or sewer to a site other than those designated for the development of low and moderate income housing in the housing element are hereby waived in accordance with N.J.A.C. 5:93-4.3(c) 4, which permits waiver of such requirements when a municipality has a plan that will provide water and/or sewer to sufficient sites to address the municipal housing obligation within the period of repose.

Under the Administrative Code provision, a municipality can be granted a waiver of the obligation that a municipality would otherwise have to sign on to a plan by a developer for water and/or sewer service as long as the municipality had a court-approved plan in place to meet the municipality's Mount Laurel obligation. The March 18, 2020 settlement agreement constituted such a plan which was approved by the court, and Colts Neck was granted the waiver as a part of the settlement agreement. The agreement thus allowed Colts Neck to, in effect, choose where the higher-density housing would be located (Countryside and CNBA

properties, and Area 1) and to refuse to agree to any plan to provide water and sewer service to other properties within the Township where a developer might want to build higher-density, inclusionary housing.

Colts Neck indicates that the waiver provision contained in the March 18, 2020 settlement agreement should be eliminated. As addressed above, the waiver provision relieved Colts Neck from the obligation of signing on to development applications by potential developers for land in parts of town not included within Colts Neck's HEFSP. Colts Neck acknowledges that sewer service will not be brought to Area 1 within the Third Round and that it is thus not entitled to the waiver.

The court agrees that elimination of the waiver protections granted to Colts Neck in the March 18, 2020 agreement is appropriate and that provision is thus severed from the agreement. In the 7 ½ years between the filing of Colts Neck's declaratory judgment complaint and the hearing on Colts Neck's request that the court find the March 18, 2020 settlement agreement to be void, sewer service was not provided to Area 1, the section of Colts Neck where a substantial portion of Colts Neck's affordable housing obligation was planned by Colts Neck for development. The court has been presented by the parties, including Colts Neck, with evidence and arguments that wastewater treatment should be provided to Area 1 through a public sewer system. Colts Neck's request that the court provide for an amendment

to the March 18, 2020 settlement agreement to eliminate the waiver granted to Colts Neck under the agreement is granted.

F. Requirement that Colts Neck as a condition of a judgment of the court amend the HEFSP and Spending Plan to remove the market to affordable program.

Special Adjudicator Banisch indicates in his report to the court, “Colts Neck ... proposes a market to affordable program in the housing element that is not referenced in the FSHC agreement. The draft spending plan devotes over \$700,000 to this program but does not allocate any spending for essential sewer infrastructure. This is troubling since the [s]ettlement did not provide for a market to affordable program but did call for a \$2M sewer infrastructure investment.” Colts Neck’s planner Elizabeth McManus objects to Special Adjudicator Banisch’s suggested condition that Colts Neck amend the HEFSP and Spending Plan to remove the market to affordable program; McManus indicates that devoting resources to that program was within Colts Neck’s discretion and would provide the opportunity for Colts Neck to expend development fees within four years of collection of the fees.

The court is satisfied that the potential development of three affordable housing units, using \$700,000 of the Township’s affordable housing trust fund, while failing to provide for financing of sewers within Area 1 does not provide appropriate protection of the interests of low and moderate income households. As previously addressed by the court, Colts Neck’s proposal is not a part of the settlement entered

into by Colts Neck with FSHC which was previously approved by the court, see Builders League of South Jersey, Inc. v. Gloucester County Utilities Authority, 386 N.J. Super. 462, 471 (App. Div. 2006); Morris County Fair Housing Council v. Boonton Township, 197 N.J. Super. 359 (Law Div. 1984). Rather, it is part of a proposal by Colts Neck as to how it would like to achieve compliance with its Third Round constitutional obligations. FSHC does not agree with Colts Neck's proposed HEFSP, but instead in large part opposes it.

If Colts Neck is permitted to rely upon a market to affordable program as a part of the HEFSP, it will use approximately \$700,000 of its affordable housing trust fund for the development of three units of affordable housing, and will not be applying those funds for development of a sewer system for Area 1, which Colts Neck recognized in the March 18, 2020 settlement agreement as a crucial component of its Third Round plan to bring affordable housing to Colts Neck and which is expected to produce 142 affordable units.

As indicated by Mark W. Kataryniak, the engineer appointed by the court to provide assistance on water and sewer issues in his November 18, 2022 report to the court:

Active participation by Colts Neck in the advancement of a long-range plan to provide for growth areas needed to accommodate affordable housing obligations is critical in facilitating the necessary approvals needed for the expansion of sewer service area and construction of

collection/treatment systems. Combined with strategic zoning and planning, Colts Neck would be afforded greater control over the development patterns that would arise through a developer-based solution.

In the court's consideration of the township's amended request to seek a durational adjustment without a waiver at this time, I recommend, as it relates to providing sewers to the identified sites, that Colts Neck be obligated to facilitate advancement of the plans by MRSSA and the US Navy to develop a public-private partnership for sewer service to Area 1 to the extent permitted by the Court.

It is further noted that any actions by Colts Neck to advance obtaining sewer service through NWSE would not alleviate the obligation of Colts Neck to endorse any other applications brought forth by a developer for the period of repose under the requirements of NJAC 5:93-4.3.

The court is satisfied that permitting Colts Neck to amend its HEFSP to include three market-to-affordable units, with Colts Neck potentially applying \$700,000 in affordable housing trust fund monies to those units, does not provide an appropriate opportunity for the development of affordable housing within Colts Neck and is not fair and reasonable to households in need of affordable housing. For this reason, the court rejects Colts Neck's request for approval of the portion of its amended HEFSP providing for spending \$700,000 in affordable housing trust fund monies on three market-to-affordable housing units, finding that these funds could facilitate sewers and enable the construction of a substantial number of affordable units through development of a sewer system in Area 1.

G. Condition that Colts Neck be required as a condition of a judgment of the court to work with a qualifying developer of comparable reputation to that of Toll Brothers to facilitate sewer service to Area 1.

Special Adjudicator Banisch recommends to the court that if a judgment of fairness and conditional compliance is entered by the court, the judgment should include a condition requiring Colts Neck to work with a qualifying developer of comparable reputation to that of Toll Brothers, who had formerly been interested in developing the Seta property located in Area 1, to facilitate sewer service to Area 1. As noted above, the court has found that the March 18, 2020 settlement agreement is not void. Additionally, the court has concluded that Colts Neck must do what Exhibit B to the agreement required it to do with reference to working toward facilitation of sewer service for Area 1. The agreement provides that if Toll Brothers does not move forward with development, Colts Neck shall work toward development of a sewer system for Area 1 with “a developer of comparable reputation....”

As the waiver provided to Colts Neck under the March 18, 2020 settlement agreement has been severed from the agreement, Colts Neck is essentially required to sign off on any application to the NJDEP for water and sewer service proposed by a developer in any part of the Township, including Area 1. The requirement that Colts Neck cooperate with Toll Brothers or another developer of comparable reputation is thus already required as a part of Colts Neck’s general obligation with

the removal of the waiver. No basis has been provided to remove the specific provision of the settlement agreement concerning Toll Brothers or a developer of comparable reputation, and the provision will remain as a condition of the judgment entered by the court.

H. Remainder of conditions as recommended by Special Adjudicator.

The remainder of the recommendations of Special Adjudicator Banisch are what the court would consider to be routine conditions imposed by the court. It is not disputed that Colts Neck has overspent its Affordable Housing Trust Fund monies on administrative expenses. Additionally, Colts Neck is required to provide documentation that conditions of the settlement agreement that are not in dispute have been met. It does not appear from the evidence and arguments presented that the remainder of the recommendations of Special Adjudicator Banisch are challenged by the parties. To the extent that a party is unhappy with any other conditions recommended by the Special Adjudicator and ordered by the court, it is sufficient to indicate that the evidence and arguments presented to the court support the adoption of these conditions to ensure compliance by Colts Neck with its obligations under the March 18, 2020 settlement agreement.

III. CONCLUSION:

Special Adjudicator Banisch concluded on page 12 of his December 2, 2022 report, “I find that if the Fair Share Housing Center Settlement is in effect as to Colts

Neck's fair share obligation and the compliance plan in the Settlement is fully effectuated with all implementation components, the Township would be entitled to a compliance judgment with a durational adjustment, without a waiver." Banisch continued, "[i]f the settlement ultimately governs, I recommend a conditional judgment of compliance requiring that within 90 days, the Township complete and approve and/or adopt and provide to the Court the documentation required by the Bolan Report and outlined above."

As indicated above, the court finds:

1. The March 18, 2000 settlement agreement is not void.
2. The court finds that the proposed HEFSP submitted by Colts Neck to the court complies with Colts Neck's Mount Laurel Third Round obligation, with the required amendments set forth herein.
3. Colts Neck must amend the proposed HEFSP to provide that Colts Neck must adopt and maintain in Area 1 the overlay zoning provided in the March 18, 2020 settlement agreement.
4. Colts Neck must amend the proposed HEFSP to provide that Colts Neck remains obligated under Exhibit B to the March 18, 2000 settlement agreement to provide the financial contribution to a sewer system in Area 1.
5. Colts Neck's request for a durational adjustment is granted.

6. The waiver granted to Colts Neck under the March 18, 2020 settlement agreement is vacated and Colts Neck must thus endorse all applications to the NJDEP or its agent to provide sewer capacity.
7. Colts Neck must amend its proposed housing element and fair share housing ordinance to permit development where the NJDEP or its designated agent approves a proposal to provide infrastructure to a site for the development of affordable housing.
8. Colts Neck must amend the proposed HEFSP to remove the three market to affordable units and the potential application of affordable housing trust fund monies to that program.
9. Colts Neck must work with a qualifying developer of comparable reputation to that of Toll Brothers to facilitate sewer service to Area 1.
10. Colts Neck must reserve and set aside new sewer capacity, when it became available, for affordable housing on a priority basis.
11. A judgment of fairness and conditional compliance is granted to Colts Neck in accordance with this decision.

As provided in the report and testimony of Special Adjudicator Banisch, Colts Neck must comply with the following conditions before a final judgment of compliance can be issued:

1. Amend the HEFSP to include the Area 1 overlay zone.
2. Amend the HEFSP and Spending Plan to remove the market to affordable program.
3. Revise the Spending Plan to distribute funds to mechanisms in the plan, including funds for sewer.
4. Work with a qualifying developer of comparable reputation to that of Toll Bros. to facilitate sewer service to Area 1.
5. Provide adopted versions of the Planning Board and Township Committee resolutions endorsing the amended HEFSP.
6. Cease use of trust funds toward administrative expenses.
7. Provide a governing body resolution approving the Spending Plan.
8. Provide an adopted version of the draft operating manual for rental affordable units.
9. Provide a signed, adopted version of the governing body resolution approving bond issuance.
10. Provide additional information concerning the Monmouth County Rehabilitation program, including a structural conditions survey.
11. Provide an ordinance designating a municipal housing liaison.

12. Provide documents showing creditworthiness for the 7 assisted living units at Reflections at Colts Neck.
13. Provide a resolution appointing an administrative agent for affordable units other than those at CNBA.
14. Provide adopted versions of the affirmative marketing plan and resolution.

Colts Neck shall provide proof of such compliance to the court and to Special Adjudicator Banisch within 90 days of the date of this decision and accompanying judgment. Colts Neck shall provide proof of compliance via filing in ecourts, with a courtesy copy provided to the court and to Special Adjudicator Banisch. A hearing on compliance by Colts Neck with the terms of this decision and accompanying orders will be held on March 7, 2025 beginning at 9:00 a.m.

/s/ Linda Grasso Jones, J.S.C.
HON. LINDA GRASSO JONES, J.S.C.

EXHIBIT B

Art Bernard and Associates, L.L.C.

Housing and Land Use Planning

CHALLENGE TO COLTS NECK 2025 HOUSING ELEMENT AND FAIR SHARE PLAN

AUGUST 2025

PREPARED FOR
ALR COLTS NECK PROPERTY, LLC

PREPARED BY


ART BERNARD

50 Creek Drive, Doylestown, PA 18901 Phone (609) 865-7696
E-mail: yuckygolfer@gmail.com

I am a professional planner, licensed by the State of New Jersey. I have over 50 years of planning experience with an emphasis on affordable housing. I am the Managing Member of Art Bernard and Associates, L.L.C., a professional planning firm with an office at 50 Creek Drive, Doylestown, Pennsylvania. I have been retained, by ALR Colts Neck Property, LLC (ALR Colts Neck) to analyze Colts Neck Township's 2025 Housing Element and Fair Share Plan.

CREDENTIALS

I am the managing member of my own firm. I have a Masters in City and Regional Planning (MCRP) from Rutgers University. I am a licensed professional planner with 50+ years of experience in land use planning and affordable housing. I served the New Jersey Council on Affordable Housing (COAH) from March of 1986 to October of 1994 as its Deputy and Executive Directors. During that time, I developed and supervised COAH's entire work program and was responsible for working directly with the COAH Board on all of its rules and motion decisions. I prepared the First and Second Round rules that have been upheld by the Appellate Division, which include, but are not limited to, the fair share methodology, COAH's vacant land adjustment process, COAH's durational adjustment process and municipal compliance issues.

Since leaving COAH in 1994, I have worked for 27 municipalities in various capacities. I have worked with private sector clients before local boards and in Superior Court. I have testified as an expert witness in most of the State's vicinages and I have served the Superior Court as a Special Master.

I have also consulted for the New Jersey Builders Association (NJBA) regarding affordable housing matters and I wrote the expert reports that NJBA submitted in its

successful appeals of COAH's 2004 and 2008 rule adoptions. Pursuant to the Appellate Division's 2010 order for COAH to develop third Round rules based on COAH's first and second round methodologies, I developed 1999-2023 fair share calculations. I also wrote an expert report for NJBA challenging COAH's 2014 rule proposal that the COAH Board failed to adopt.

I have served as an expert witness in the fair share trials in Middlesex and Mercer Counties. I have testified in many other court proceedings involving affordable housing issues.

During the third round declaratory judgment process, I have participated in about 70 matters as a professional planner for municipalities and private sector clients as well as a Special Master for the court. These matters involve municipalities from all over the State. Most recently, I served the Affordable Housing Dispute Resolution Program in assisting the "Program" in making 12 fair share recommendations to the County level Mount Laurel judges.

I have attached my curriculum vitae as Exhibit 1.

DOCUMENTS REVIEWED

In preparing this report, I have reviewed the Township's 2025 Housing Element and Fair Share Plan. I have also reviewed N.J.A.C. 5:93-1 et seq. and the Honorable Linda Grasso Jones, J.S.C.'s November 21, 2024 Decision, In the Matter of the Application of the Township of Colts Neck, County of Monmouth, State of New Jersey Pursuant to In Re Adoption of N.J.A.C. 5:94, 221 N.J. (2015). I have also reviewed aerials and environmental mapping of the ALR Colts Neck site on Google Maps and New Jersey Property Records.

FAIR SHARE HOUSING OBLIGATION

The Colts Neck Housing Element indicates that the Township has satisfied its prior round (1987-1999) housing obligation of 218 units. Approximately half of the obligation was addressed by entering into a regional contribution agreement with the City of Long Branch to accept 107 units of the Township's obligation (a mechanism no longer authorized by the Fair Housing Act). With the exception of one unit, the remaining prior round obligation was addressed through a large inclusionary development, known as the Grande.

The Township entered a settlement agreement with Fair Share Housing Center (FSHC) to address a third round obligation of 306 units. The Township claims to have addressed 168 units primarily with a large rental inclusionary development that is going through the process of receiving outside agency approvals and an inclusionary development in which 15 affordable units are for sale. The rental inclusionary development is being constructed by Colts Neck Building Associates; and Countryside Developers is building the 15 for sale units within an inclusionary development that Colts Neck claims is being constructed.

The only credits in the third round plan that I challenge are the seven assisted living units within Reflections at Colts Neck. The Township approved this 72 unit bed facility and, the Housing Element says that, consistent with State licensing requirements, 10 percent of the units (7 beds) were to be reserved for Medicaid recipients.

But the Township granted the facility preliminary approval in 1997 and extended that approval in 2000. It still has not been constructed. As I recall, the assisted living industry was extremely active seeking approvals in the late 1990s. It seemed like every Board of Adjustment meeting included a variance application for an assisted living facility during that time period. But, my conversations with my private sector clients indicate that the assisted living market is dormant. And, though I am not a marketing expert, the site was approved over 25 years ago and it would seem obvious that the site does not create a realistic opportunity for affordable housing.

The Township is seeking a durational adjustment for the remaining 138 units of its third round obligation and its entire 101 unit fourth round housing obligation.

THE DURATIONAL ADJUSTMENT PROCESS

The durational adjustment process is designed for municipalities that have sufficient land, but insufficient water and/or sewer to address the entire affordable housing obligation. The process is designed to identify sites that could possibly be served by public water and/or sewer and create zoning incentives for the private sector to extend infrastructure to potential inclusionary sites. The rule *requires inclusionary zoning*, that *may* be in the form of overlay zoning.

When public water and/or sewer are a scarce resource, N.J.A.C. 5:3-4.3(a) *requires* a review of a site's prospects of receiving infrastructure and the prospects of DEP or its agent approving an amendment to the areawide water quality management plan. Following such an analysis, N.J.A.C. 5:93-4.3(b) states:

- (b) If the Council determines that a site may receive water and/or sewer during the period of substantive certification, it *shall require* the site to be zoned for inclusionary development, or, if the site had already been zoned for inclusionary development, it shall require the continuation of that zoning. If the Council determines that a site may not receive water and/or sewer during the period of substantive certification, the Council shall not require inclusionary zoning but *may require* overlay zoning requiring inclusionary development (if water and sewer become available) and or the imposition of a development fee consistent with N.J.A.C. 5:93-8. (emphasis provided)

Pursuant to the concept, the overlay creates an option and an incentive to build an inclusionary development should public water and sewer service be extended to a property.

In terms of getting public water and sewer to court approved sites, the state regulations are very specific as to *the requirements* imposed on a municipality seeking a durational adjustment. I have reproduced N.J.A.C. 5:93-4.3(c)2-4 for the Program's convenience.

2. Municipal officials shall endorse all applications to the DEP¹ or its agent to provide water and/or sewer capacity. Such endorsements shall be simultaneously submitted to the Council;
3. Where the DEP or its agent approves a proposal to provide infrastructure to a site for the development of low and moderate housing identified in the housing element, the municipality shall permit such development;
4. Where a municipality has designated sites for low and moderate-income housing that lack adequate water and/or sewer and where the DEP or its agent approves a proposal to provide water and/or sewer to a site other than those designated for development of low and moderate-

¹ When the rule was adopted, the Department of Environmental Protection was known as the Department of Environmental Protection and Energy.

income housing in the housing element, the municipality shall amend its housing element and fair share housing ordinance to permit development of such site for low and moderate-income housing. The amended housing element and fair share ordinance shall be submitted to the Council within 90 days of the site's approval by the DEP or its agent. The Council may waive these requirements when it determines that the municipality has a plan that will provide water and/or sewer to sufficient sites to address the municipal housing obligation within the substantive certification period.

State agencies, during the rule making process, are required to clarify the intent of rule-making by responding to comments from the public. The responses to comments on this issue clarify COAH's determination to use public infrastructure to promote affordable housing:

Comment: A municipality should not be forced to provide for water and sewer in areas where the supply of such services is under the jurisdiction of a municipal authority, a regional authority or a private utility company. It is unreasonable to expect private citizens to pay for infrastructure costs in such instances. Such costs should be borne by the developers of the projects in question as part of the off-site contribution process.

Response: The Council expects municipalities to do everything within their control to provide infrastructure to inclusionary sites. Certainly municipalities will be expected to reserve sewer and water capacity for low and moderate income housing where sewer and water is a scarce resource. Municipalities shall be expected to support necessary 208 plan amendments and endorse CP1 applications. The Council has provided an application and process for those municipalities that believe the cost of providing infrastructure is prohibitive. (25 N.J.R. 5770, Comment 84)

Comment: The language respecting endorsing applications for sewer and water capacity should be more specific. There should be a requirement for endorsing all appropriate amendments to 208 or water

quality management plans, execution of appropriate utility service contracts and execution of any other documents required in conjunction with the provision of water or sewer. In addition, municipalities should be obligated to contact DEP when requested in support of particular water/sewer applications.

Response: As stated in an earlier comment, the Council expects municipalities to do everything within their control to provide infrastructure to inclusionary sites. Although the commenter's suggestion leaves room for interpretation, in general, all of these suggestions are within the municipality's control. (25 N.J.R. 5771, Comment 99)

This rule has been applied in Oakland Borough. Oakland is a Bergen County community that claimed that the lack of sewer capacity had prevented the construction of affordable housing. The Borough had zoned a 40 acre property near its high school for 24 single-family, detached lots that were to include five affordable units. The property was never developed as zoned.

However, pursuant to an objection to its "third round" motion for declaratory judgment, the Borough agreed to support a private developer to construct a 200 unit inclusionary development on the same 40 acre parcel. The agreement requires the Borough to take a series of actions, consistent with N.J.A.C. 5:93-4.3, to help the private developer to bring public water and sewer to the site.

More recently, the Honorable Linda Grasso Jones, J.S.C issued a decision requiring that Colts Neck similarly support inclusionary developers seeking on or off-site sewer in Colts Neck. In this matter, Colts Neck had received a waiver from the regulation requiring the affirmative measures within N.J.A.C. 5:93-4.3(c)4 because

it had designated an overlay zone (Area 1)² to promote affordable housing and had agreed to help fund up to \$2 million of sewer extension costs.

Later, Colts Neck acknowledged that sewer would not be extended to its overlay zone during the 2025 -2035 compliance period and that it was no longer entitled to the waiver.³ The Township sought relief from the requirement to help fund up to \$2 millions of sewer extension costs. Colts Necks motion for relief was denied. As described at pages 20 and 21 of the Housing Element, the court order requires the Township to:

1. Retain the Area 1 overlay zone.
2. Provide up to \$2 million toward extending sewer service to the Area 1 overlay zone.
3. Permit development where the NJDEP or its designate agent approves a proposal to provide infrastructure to a site for the development of affordable housing.
4. Prioritize its affordable housing trust funds for sewer infrastructure.
5. Bear the burden of proof if it challenges the suitability of a site that is not already in the Township's plan.

At page 63 of the Opinion, the court clarifies the Township's obligation: *"As the waiver provided to Colts Neck under the March 18, 2020 settlement agreement has been severed from the agreement, Colts Neck is essentially required to sign off on any application to the NJDEP for water and sewer service proposed by a developer in any part of the Township, including Area 1."*

The Township has agreed to implement the court's November 21, 2024 order, under protest, subject to appeal.

² The overlay zone includes: Block 46, Lots 13, 15, 16, 17; and Block 48, Lots 1-6, 19 and 39-41.

³ Page 39 of Court Decision.

THE ALR COLTS NECK SITE

THE ALR Colts Neck site lies between the Township's overlay zone and a connection to the Two Rivers Treatment Plant. ALR Colts Neck is willing to work with the Township to help it: satisfy its remaining third round obligation of at least 138 units (depending on a future ruling of the 7 beds in the assisted living facility) and the Township's entire fourth round obligation of 101 units; and reduce its potential \$2 million contribution towards any required sewer extension.

The site's address is 318-322 Route 537. It is Block 48, Lots 25.01, 26 and 27. The site is 160 acres and approximately 60 acres of the site is classified as wetlands (much of it appears to be modified agricultural wetlands). ALR Colts Neck was able to purchase a site about equidistant (approximately 1.5 miles) from the Township's overlay zone (Area 1 in Judge Jones Opinion) and a connection to the Two Rivers Sewer Authority.

The thought is to create a win-win situation. It obviously presents a profit motive for ALR Colts Neck. But it is a win for Colts Neck and low and moderate income households in that ALR Colts Neck is willing to work with the Township to minimize the Township's \$2 million dollar responsibility for a sewer extension; and the site creates a realistic opportunity for affordable housing on the ALR Colts Neck site and within the Township's overlay zone. The 160 acre subject property is relatively undeveloped with the exception of a very large home and what appears to be a stable.

It is customary to evaluate affordable housing sites based on the criteria within the following four definitions within N.J.A.C. 5:93-1 et seq.:

Available site – is a site with clear title, free of encumbrances which preclude development for low and moderate income housing. ALR Colst Neck is under contract to purchase the subject property and is unaware of any encumbrance with would preclude any of its sites from housing an inclusionary development.

Approvable site – is a site that may be developed for low and moderate income housing in a manner that is consistent with the rules or regulations of all agencies with jurisdiction over the site. A site may be approvable although not currently zoned for low and moderate income housing. The site is 160 acres and the mapping indicates that there may be 60 acres of wetlands on the property. The remaining 100 acres includes significant contiguous acres that can support a significant inclusionary development.

Developable site - is a site that has access to appropriate water and sewer infrastructure and is consistent with the applicable areawide water quality plan (including the wastewater management plan) or is included in the amendment to the water quality management plan submitted to and under review by DEP. The Township's Housing Element focuses on the lack of sewer, not water. ALR Colts Neck, with the Township's cooperation, will provide the site with water and extend a sewer line from the site, along Route 537, to a Two Rivers Connection in Tinton Falls.

Suitable site is a site that is adjacent to compatible uses, has access to appropriate streets and is consistent with the environmental policies delineated at N.J.A.C. 5:93-4. The dominant land use in the area is open fields. There are residential subdivisions located west of the subject property and set-back from

Route 537 to the north. The site is approximately a half mile from the Dorbrook Recreation Area, including tennis, soccer, pool, basketball and a skating rink.

The site has frontage along Route 537. Route 537 is a County Road designed to move traffic from one community to another. The site is about 1.5 miles from State Highway 34 which connects to Route 18 and provides access to major employment and shopping opportunities.

Th site is suitable for inclusionary development. With at least 100 acres of uplands, the site can address a large share of Colts Neck third and fourth round obligation and make it more economically viable for the Township's overlay zone to finally produce affordable housing. In many ways, the ALR Colts Neck site is the lynchpin to unlock affordable housing opportunities in Colts Neck Township.

ALR Colts Neck has provided Exhibit 2 displaying the site and a possible concept plan for the subject property. ALR Colts Neck has discussed its goals with Townships professionals and looks forward to working with the Township on this worthy endeavor.

EXHIBIT 1
CURRICULUM VITAE

Art Bernard and Associates, L.L.C.

Housing and Land Use Planning

ART BERNARD, P.P CURRICULUM VITAE

EDUCATION

Master of City and Regional Planning, Rutgers University, 1974
BA, History, Lafayette College, 1971

LICENSES AND AFFILIATIONS

New Jersey Professional Planners License #02507
American Planning Association
New Jersey Federation of Planning Officials
New Jersey Builder's Association Land Use Committee
New Jersey State Planning Commission Housing Advisory Committee
Highlands Technical Advisory Committee

PROFESSIONAL EXPERIENCE

Private Consultant

1994 to present

Managing Member of Art Bernard and Associates, L.L.C. Provide consulting services related to general land use and affordable housing. Activities include preparation of municipal plans, development ordinances and development reviews. Represent developers before municipal boards and in litigation. Specialize in representing municipalities and developers in exclusionary zoning matters before the Superior Court and the Council on Affordable Housing. Serve the Superior Court as Special Master.

New Jersey Council on Affordable Housing (COAH)

Executive Director

1993 to 1994

Developed recommendations to the Governor and Legislature. Negotiated contracts for consulting services as necessary for the proper operation of the Council. Represented the Council before relevant interest groups, governmental bodies and the general public. Acted as a hearing officer in accordance with the provisions of the Fair Housing Act and the rules established by the Council

Deputy Director**1986 to 1993**

Responsible for developing all regulatory and policy recommendations for COAH. Managed the review of housing elements and the negotiations between municipalities and parties objecting to municipal housing elements. Developed and supervised a work program pertaining to mediation training, municipal and legislative outreach, housing element review and the production of publications. Negotiated housing settlements involving over 5,000 low and moderate income housing units.

New Jersey Department of Community Affairs (DCA)
Program Development Specialist
1982 to 1986

Responsible for developing the rules for the Neighborhood Preservation Balanced Housing Program, a low and moderate income housing grant program designed to supplement the goals of New Jersey's Fair Housing Act. Co-authored the program guidelines, application criteria and review criteria for New Jersey's Small Cities Community Development Block Grant Program.

Project Manager of the New Jersey Model Subdivision and Site Plan Ordinance, designed to provide quality municipal improvements without adding unnecessary costs to the development process.

Project Manager of the New Jersey Class C Boarding House Study. Analyzed the costs associated with operating a boarding house. Assisted in developing New Jersey's Life Safety Improvement Program for boarding homes.

Responsible for representing DCA on the Delaware Valley Regional Planning commission and the New Jersey Clean Water Council. Responsible for providing technical assistance to the Division of Coastal Resources, the Pinelands Commission and the Meadowlands Commission on housing issues.

Principal Planner**1979 to 1982**

Provided technical assistance to municipalities on land use and housing issues. Co-authored the *Affordable Housing Handbook* which discussed various means of reducing the cost of housing.

Hunterdon County Planning Board
Senior Planner
1974 to 1977

Responsible for subdivision and site plan review and for providing technical assistance at municipal planning board meetings. Prepared the *Hunterdon County Economic Base Study* and the *Hunterdon County Transportation Plan*.

New Jersey Department of Health
Health Consultant
1977 to 1979

Surveyed health providers throughout New Jersey and incorporated findings into the *New Jersey Health Master Plan*.

PUBLICATIONS

"Limits to the Builder's Remedy", New Jersey Municipalities
"COAH and Its Rules: Time to Pay Attention", New Jersey Planning Officials
"Low & Moderate Income Housing in NJ Faces Double Barreled Opposition", Dimensions
"Planning for Affordable Housing", New Jersey Planning Officials
"Planning Update", THP Newsletter
"Strategies for Addressing Low Income Housing Needs", New Jersey Municipalities
Mount Laurel II: Methods of Calculating Fair Share
"The New Jersey Experience: Affordable Housing Seen as a Constitutional Obligation", Trends in Housing
"Mount Laurel II: Revisited Five Years Later", Federation Planner
"Mount Laurel II: Working Toward Compliance", New Jersey Municipalities
"Looking Beyond COAH's Numbers", New Jersey Municipalities
Requirements of a Housing Element and Fair Share Plan
"COAH Counts Successes Along Road to Affordable Housing", CUPREPORT

LECTURES/AWARDS

Associate of the Year, New Jersey Builder's Association, 1997 and 2006
New Jersey Federation of Planning Officials Citation of Merit
Edward J. Bloustein School of Planning and Public Policy, Rutgers University
Camden Law School, Rutgers University
American University Law School
Housing Conferences in New York, New Jersey, Rhode Island and Pennsylvania
Colloquium of The Seton Hall University Center for Social Justice

Municipal Clients – Served the following municipalities as municipal planner and/or affordable housing planner.

Allendale Borough, Avon Borough, Bernardsville Borough, Carteret Borough, Cherry Hill Township, Closter Borough, Delanco Township, Hampton Borough, Harrison Township, High Bridge Borough, Marlboro Township, Medford Township, Milltown Borough, Mount Laurel Township, North Plainfield Borough, Piscataway Township, Princeton Township, Ramsey Borough, South River Borough, Tinton Falls Borough, Ramsey Borough, Wall Township, Wanaque Borough, West Caldwell Township.

Court Master Assignments

Burlington City, Cinnaminson Township, Edgewater Park Township, Franklin Lakes Borough, Little Falls Township, Old Bridge Township.

Private Sector Assignments Before Local Boards, COAH and Court.

Atlantic County – Absecon City, Brigantine City, Galloway Township, Egg Harbor Township, Hammonton Town, Northfield City, Somers Point City.

Bergen County – East Rutherford Borough, Fair Lawn Borough, Glen Ridge Borough, Hobokus Borough, Little Ferry Borough, Mahwah Township, Milltown Borough, North Arlington Borough, Oakland Borough, Oradell Borough, Paramus Borough, Park Ridge Borough, Ramsey Borough, Ridgewood Borough, River Vale Township, Rutherford Borough, Tenally Borough, Upper Saddle River Borough, Verona Borough, Wallington Borough, Woodcliff Lake Borough.

Burlington County – Bordentown Township, Delran Township, Evesham Township, Mansfield Township, Moorestown Borough, Mount Laurel Township, Pemberton Township, Springfield Township, Westampton Township.

Camden County – Berlin Township, Haddonfield Borough, Pine Hill Township, Stratford Borough.

Cape May County – West Cape May Borough.

Cumberland County – Vineland City.

Essex County – Cedar Grove Township, Fairfield Township, Livingston Township, Nutley Borough, Roseland Borough, South Orange Village Township, West Orange Township.

Gloucester County – Clayton Borough, Deptford Township, East Greenwich Township, Logan Township, Newfield Borough, South Harrison Township, Swedesboro Borough, West Deptford Township, Woolwich Township.

Hudson County – Bayonne City, Hoboken City, Secaucus Town.

Hunterdon County – Alexandria Township, Clinton Town, Clinton Township, Delaware Township, East Amwell Township, Lebanon Borough, Milford Borough, Raritan Township, Readington Township, Union Township.

Mercer County –East Windsor Township, Hamilton Township, Hopewell Township, Princeton Borough, Robbinsville Township, Trenton City, West Windsor Township.

Middlesex County – Cranbury Township, East Brunswick Township, Edison Township, Highland Park Borough, Monroe Township, North Brunswick Township, Sayreville Borough, South Brunswick Township, South Plainfield Borough.

Monmouth County – Aberdeen Township, Atlantic Highlands Borough, Avon Borough, Belmar Borough, Eatontown Borough, Farmingdale Borough, Freehold Township, Hazlet Borough, Highlands Borough, Holmdel Township, Howell Township, Keyport Borough, Little Silver Borough, Manalapan Township, Marlboro Township, Middletown Township, Neptune City Borough, Ocean Township, Red Bank Borough, Rumson Borough, Sea Bright Borough, Shrewsbury Borough, Tinton Falls Borough, Wall Township.

Morris County - Chester Borough, Denville Township, Dover Town, East Hanover Township, Florham Park Borough, Hanover Township, Lincoln Park Borough, Long Hill Township, Mine Hill Township, Mountville Township, Morris Township, Morris Plains Borough, Morristown Town, Mountain Lakes Borough, Mount Arlington Borough, North Hanover Township, Parsippany Troy-Hills Township, Randolph Township.

Ocean County – Barnegat Township, Berkeley Township, Brick Township, Jackson Township, Little Egg Harbor Township, Manchester Township, Toms River.

Passaic County – Bloomingdale Borough, Clifton City, Elmwood Park Borough, Passaic City, Pompton Lakes Borough, Ringwood Borough, Wanaque Borough, Wayne Township, Woodland Park Borough.

Salem County – Oldmans Township, Pittgrove Township.

Somerset County – Bedminster Borough, Bernards Township, Branchburg Township, Bridgewater Township, Far Hills Borough, Franklin Township, Green Brook Township, Hillsborough Township, Manville Borough, Millstone Borough, Montgomery Township, Raritan Borough, Warren Township.

Sussex County – Frankford Township, Fredon Township, Green Township, Hampton Township, Hardyston Township, Lafayette Township, Newton Town.

Union County – Berkeley Heights Township, Clark Township, Cranford Township, Fanwood Borough, Hillside Township, Mountainside Borough, New Providence Township, Roselle Park Borough, Scotch Plains Township, Springfield Township, Westfield Township.

Warren County – Alpha Borough, Greenwich Township, Hacketstown Town, Harmony Township, Hopatcong Township, Oxford Township.

Pennsylvania – Buckingham Township, Forks Township, Plumstead Township, Tincum Township, Upper Mount Bethel Township, Williams Township.

New Jersey Builders Association

Wrote comments to each iteration of COAH's proposed third round rules.

EXHIBIT 2
CONCEPT PLAN

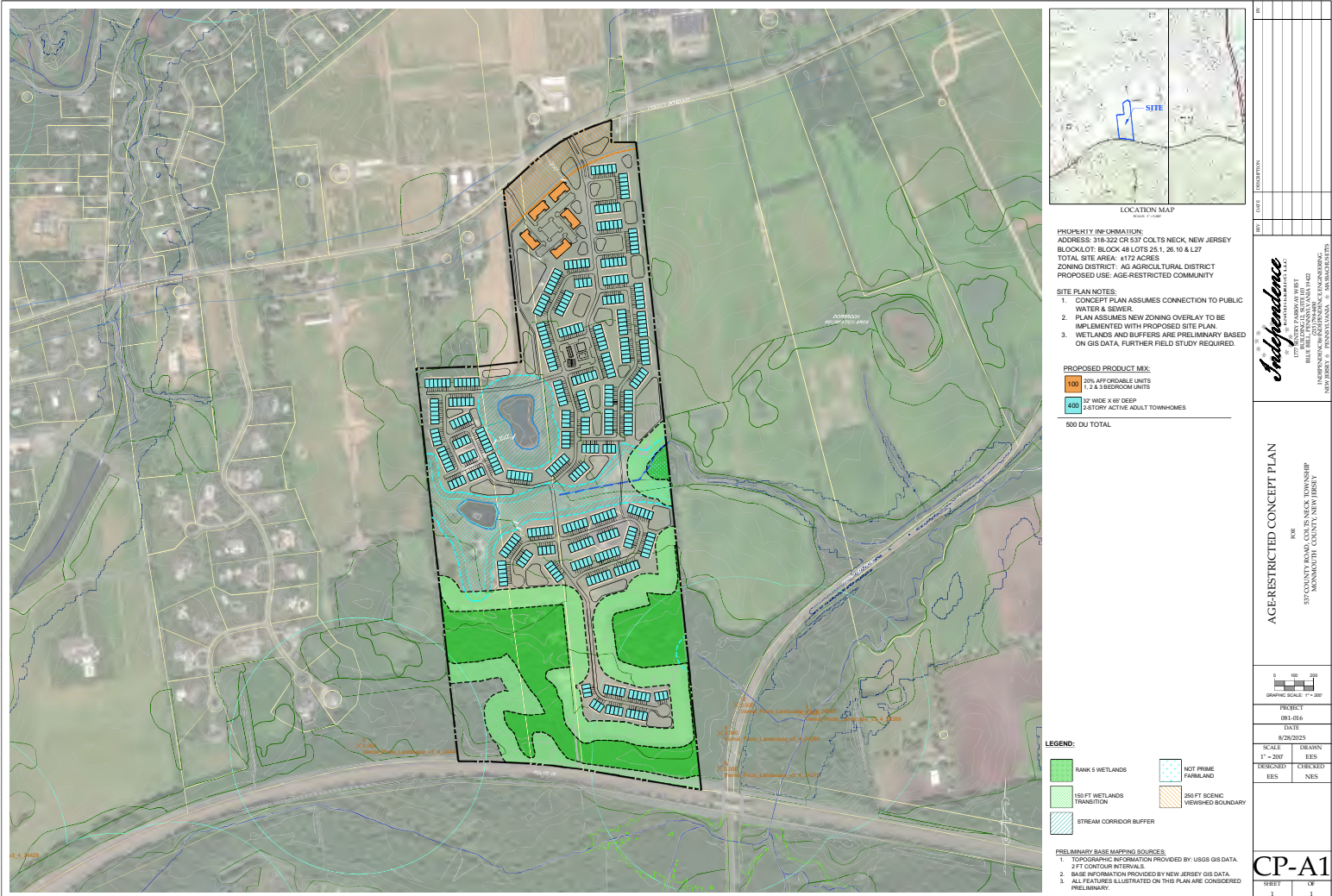


EXHIBIT C



Boston | Connecticut | Florida | New Jersey | New York | Providence | Washington, DC

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Co-Chair of Real Estate, Environmental and Land Use Practice

August 28, 2025

VIA E-COURTS

Hon. Linda Grasso Jones, J.S.C.
Monmouth County Courthouse
71 Monument Park, PO Box 1266
2nd Floor
Freehold, New Jersey 07728

Re: *In the Matter of the Application of the Township of Colts Neck*
Docket No. MON-L-422-25
Active Acquisitions, LLC's Brief In Support of its Answer/Challenge

Dear Judge Jones:

This office represents Defendant/Interested Party, Active Acquisitions, LLC (“Active”) in the above-captioned matter. Please accept this letter brief in lieu of a more formal brief in support of Active’s Answer/Challenge to the Township of Colts Neck’s (the “Township’s”) May 29, 2025 Housing Element & Fair Share Plan, which was adopted by the Township’s Planning Board on June 9, 2025 and filed with the Court on June 11, 2025 (the “2025 HEFSP”).

This brief is submitted as a supplement to Active’s Answer/Challenge as well as the expert planning report of Art Bernard, PP dated August 27, 2025 (the “Bernard Report”), which is attached to Active’s Answer/Challenge as **Exhibit B** and is incorporated by reference.¹ This brief focuses on the 2025 HEFSP’s failure to adequately address sanitary sewer as part of its durational adjustment.

¹ The incorporation of the Report is not intended to and does not constitute an adoptive admission.



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STATEMENT OF FACTS

Active is a limited liability company authorized to do business in the state of New Jersey and is the contract purchaser of certain property within the Township located at 318-22 Route 537 (Block 48, Lots 25.01, 26, and 27) (the “Property”). Active is interested in developing an affordable housing project on the Property.

The Property is approximately 160 acres, of which approximately 60 acres is classified as wetlands. The Property lies between the Township’s overlay zone and a connection to the Two Rivers Treatment Plant. Active is willing to develop an affordable housing project on the Property that would assist the Township with satisfying the entirety of its remaining Third Round Obligation of at least 138 units and its Fourth Round obligation of 101 units. As is detailed in the Bernard Report, the Property is available, approvable, developable, and suitable for an inclusionary development.

Legal Argument

I. The Township’s 2025 HEFSP Fails to Fulfill the Township’s Obligation to Facilitate Sanitary Sewer Capacity

In the Third Round, Judge Jones issued a lengthy decision discussing the facts as well as the case law concerning Colts Neck’s obligation to facilitate sanitary sewer to the Area 1 District. This was based upon the its Third Round settlement agreement with Fair Share Housing Center dated March 18, 2020 (“FSHC Settlement”) and its eventual request for a durational adjustment *without a waiver* for a portion of its obligation based upon lack a sanitary sewer for the Area 1 District pursuant to N.J.A.C. 5:93-4.3. A copy of Judge Jones’ November 21, 2024 Third Round Order and extensive Decision is attached to Active’s Answer/Challenge as **Exhibit A**.



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This COAH regulation in general sought to deal with two issues: (1) addressing towns like Colts Neck that used its sewer policy to be exclusionary and preclude the development of multi-family housing and affordable housing and (2) addressing the amount of time it takes to provide sanitary sewer in a town that does not have sanitary sewer. Subparagraph (c) of the regulation is typically referred to as a “durational adjustment.” This provides that the Township’s requirement to address its affordable housing obligation is “deferred” until adequate sanitary sewer (or water) is made available. Id. The regulation further provides that in order to provide sewer and water to sites determined to be realistic for inclusionary development, “the municipalities *shall* adhere to the following:

- (1) ...
- (2) Municipal officials *shall* endorse all application to the DEP or its agent to provide water and/or sewer capacity. Such endorsements shall be simultaneously submitted to the Council.
- (3) Where the DEP or its designated agent approves a proposal to provide infrastructure to a site for the development of low and moderate income housing identified in the housing element, the municipality *shall* permit such development; and
- (4) Where a municipality has designated sites for low and moderate income housing that lack adequate water and/or sewer and where the DEP or its designated agent approves a proposal to provide water and/or sewer to a site other than those designated for the development of low and moderate income housing in a housing element, the municipality shall amend its housing element and fair share housing ordinance to permit development of such site for low and moderate income housing The Council may waive these requirements when it determines that a municipality has a plan that will provide water and/or sewer to sufficient sites to address the municipal housing obligation with the substantive certification period.

Id. [emphasis added].



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So the regulation is clear: in order to be entitled to this durational adjustment, the Township must endorse any application to the NJDEP, or its agents, to provide sanitary sewer for an inclusionary project. The durational adjustment regulation does contain a “waiver” provision at the end of subsection (4) that provides that COAH (in this case, the Court) may “waive” these mandatory requirements to endorse sewer applications, only when COAH determines that the municipality has a plan in place that will provide sanitary sewer to the inclusionary projects “within the substantive certification period.” N.J.A.C. 5:93-4.3(c)(4).

For most of the Third Round, the Township claimed it was entitled to a durational adjustment waiver based upon the FSHC Settlement. Intervenor Toll Bros. (and then Seta Realty Corp.) argued for years the Township was not entitled to the waiver section of the durational adjustment regulation because it had done nothing to facilitate bringing sewer to the Area 1 District in the Third Round. The Township eventually acknowledged on the eve of the Third Round Compliance Hearing that it was not entitled to the waiver in the durational adjustment.

As such, Judge Jones ordered that, in addition to the Township being obligated to continue to fund \$2 million towards sanitary sewer, whether it goes to MRRSA or somewhere else, the Township had to “endorse all application to the NJDEP or its agent to provide sewer capacity” and must “amend its proposed [HEFSP] to permit development where the NJDEP or its designated agent approval a proposal to provide infrastructure to a site for the development of affordable housing.” (*See Ex. A to Answer/Challenge at Paragraphs 6-7 (pages 65-66 of decision.)*)

In her decision, Judge Jones outlined Colts Neck's history of using lack of sanitary sewer to curb development (and thus affordable housing). Unfortunately, our courts have dealt with this issue before and discussed the lack of sanitary sewer as a means to curb development. However,



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Mount Laurel case law clearly acknowledges each town's affirmative obligation to provide necessary infrastructure for affordable housing. The Appellate Division in *In Re Adoption of Amendments to N.J.A.C. 5:93-1.3 and 5:93-5.3*, 339 N.J. Super. 371 (App. Div. 2001) spoke about this obligation multiple times. "Where sewer infrastructure is not in place, it is crucial that it can be brought to a site at reasonable cost. [citation omitted]. To that end, '[m]unicipalities have an affirmative obligation to facilitate provision of the infrastructure necessary to make development realistically likely.'" Id. at 386 quoting *Toll Bros. v. West Windsor Twp.*, 303 N.J. Super. 518, 543 (Law Div. 1996).

Courts have also recognized that towns' sewer policies can be a form of exclusionary zoning:

The courts of this state cannot tolerate a mere feint towards compliance. While historically large-lot zoning was an effective exclusionary device, the new weapons have become more sophisticated. Zero lot-line requirements ***and "front ending" sewer costs***, to name but two, which may prove to be effective and responsible zoning tools in other contexts, when joined together have the cumulative effect of both a) barring the ability and incentive of developers to come forward to build the necessary housing and b) allowing municipalities to avoid compliance not simply with a "housing requirement" but with the constitution of this state.

Toll Bros. 303 N.J. Super. at 574. [emphasis added].

The Court in the *Toll Bros.* case went on to find that the plaintiff "convincingly" argued that the town's "requirement that developers 'front' the costs of such an expensive [sewer] system without certainty of reimbursement discouraged development of inclusionary sites."

The FHA, COAH regulations, and relevant case law are clear that towns have an affirmative obligation to facilitate providing the necessary infrastructure for affordable housing. The FHA requires that a municipality have in its HEFSP "a plan for infrastructure expansion and



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rehabilitation if necessary to assure the achievement of the municipality's fair share of low and moderate income housing." N.J.S.A. 52:27D-311(a)(4). As the Appellate Court aptly noted in quoting that section of the FHA, "[t]hus, the Legislature intended municipalities to expand their infrastructure if necessary in order to satisfy their fair share of low and moderate income housing" In Re Adoption of Amendments to N.J.A.C. 5:93-1.3 and 5:93-5.3, 339 N.J. Super. 371, 384-386 (App. Div. 2001).

As outlined in Judge Jones' decision, the Township never had a realistic plan for sanitary sewer. (*See* Ex. A.) They identified MRRSA but never actually did anything to help get MRRSA to provide sanitary sewer service. In the Township's 2025 HEFSP, there still is no plan for how sanitary sewer infrastructure will be brought to the Area 1 District. This lack of discussion or explanation of how it will facilitate sanitary sewer infrastructure is a fatal flaw in its plan.

In the Third Round, Toll Bros. and then Seta Realty, for the same property in the Area 1 District, proposed to bring sanitary sewer to its site from Two River Water Reclamation Authority. In the present instance Active's Property is effectively mid-way between TRWRA and the Area 1 District, thus making TRWRA a reasonable option to explore. The Township has historically been resistant to sanitary sewer service coming from TRWRA, but since the Township has no plan of its own, and based upon Judge Jone's decision and relevant case law, the Township needs to cooperate with Active in exploring, and possibly obtaining sanitary sewer service from TRWRA.



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CONCLUSION

The Township has come up short in complying with its Mount Laurel obligations. For the above-stated reasons as well as the reasons outlined in the Bernard Report, this Court and/or the Program should provide Active the following relief: (a) declaring that the Township's 2025 HEFSP is not compliant with the requirements of the FHA and Mount Laurel doctrine; (b) declare that the Township's 2025 HEFSP must be amended in order to bring it into compliance with the FHA and Mount Laurel doctrine; and (c) ordering any such additional relief as the Court deems just and appropriate.

Respectfully submitted,

/s/ Craig M. Gianetti

Craig M. Gianetti

CMG/jec