

B A N I S C H

A S S O C I A T E S, I N C.

Planning and Design

REPORT OF THE SPECIAL MASTER

REGARDING THE FAIRNESS OF

A SETTLEMENT AGREEMENT BETWEEN

ENGLEWOOD CITY

AND

FAIR SHARE HOUSING CENTER

IN THE MATTER OF THE APPLICATION

OF THE CITY OF ENGLEWOOD

DOCKET No. BER-L-4069-19

Prepared by:

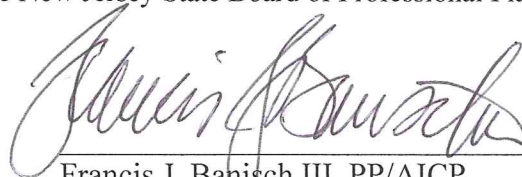
Francis J. Banisch III, PP/AICP

111 Main Street

Flemington, NJ 08822

Revised January 10, 2023

The original document was appropriately signed and sealed on January 10, 2023, in accordance with Chapter 41 of Title 13 of the New Jersey State Board of Professional Planners.



Francis J. Banisch III, PP/AICP

Professional Planner #8600

Introduction

The purpose of this report is to present my review and recommendations as the Court-appointed Special Master regarding whether a Settlement Agreement ("Settlement") dated November 21, 2022 between the plaintiff City of Englewood ("City") and interested party Fair Share Housing Center ("FSHC") is fair and reasonable to low- and moderate-income households. It also acknowledges that a compliance plan based upon this agreement will provide a realistic opportunity for the construction of the City's fair share of the region's affordable housing need.

Notice of the fairness and preliminary compliance hearing scheduled for January 10, 2023, which was provided in accordance with the Court's instructions, included a description of the Settlement Agreement and indicated the Settlement Agreement was available for inspection and photocopying at the Englewood City Clerk's office and on the City's website.

This report addresses the fairness of the settlement to the protected class of low- and moderate-income households as it relates to the provision of affordable housing. It also provides a preliminary assessment of the City's eligibility for a judgment of compliance and repose and the steps needed to complete this process.

Basis for Evaluation of Fairness of Settlement Agreement

The Settlement between the City and FSHC, approved by the City on November 1, 2022, has been reviewed to determine whether any element of the settlement would not be fair to the interests of existing and future low- and moderate-income households in Englewood's housing region.

In evaluating the fairness of the Settlement, guided by the general principles and standards set forth in *Morris County Fair Housing Council v. Boonton Twp.* 197 N.J. Super. 359, 369-71 (Law Div. 1984), I have used the criteria set forth in *East/West Venture v. Borough of Fort Lee*, 286 N.J. Super 311, 329 (App. Div. 1996), which outlines the issues involved in approving a settlement of *Mount Laurel* litigation.

According to the Settlement, the City will address a 1987-2025 fair share obligation consisting of

- | | | |
|---|---|-----------|
| • present need (rehabilitation share) | - | 380 units |
| • prior round obligation (1987-1999) | - | 152 units |
| • prospective need obligation (1999-2025) | - | 819 units |

The methods by which the City will address this obligation are outlined below.

Addressing the Present Need

The Settlement acknowledges that the City has a 380-unit indigenous need rehabilitation share. The City's program will include participation in the Bergen County Rehabilitation program, establishment of a rental rehabilitation program through the City, and the

rehabilitation of 152 units in the Vincent K. Tibbs Senior Housing development utilizing Hurricane Ida funds distributed by FEMA. In addition, the City may seek a structural conditions survey to determine any adjustments to the present need obligation.

Addressing the Prior Round

Englewood has a prior round obligation of 152 units which is addressed as follows:

Table 1
Credit Allocation for Affordable Housing Sites for Prior Round

Name of Development	Status	Type	Credits	Bonus credits	Total Credits
Westmoor Gardens	Completed	Family Rental	64		64
Shepherd House	Completed	Supportive and Special Needs Housing	12	12	24
Independence Hall	Completed	Supportive and Special Needs Housing	8	1	9
J-ADD (UJC) Group Home	Completed	Supportive and Special Needs Housing	4		4
PSCH- Phelps Avenue	Completed	Supportive and Special Needs Housing	4		4
PSCH- Knickerbocker Rd.	Completed	Supportive and Special Needs Housing	4		4
167-169 Morse	Completed	Family Rental	4		4
Garrett Apartments	Completed	Family Rental	34		34
First Baptist Church	Completed	Supportive and Special Needs Housing	5		5
Total			139	13	152

Addressing the Third Round

Table 2 identifies completed projects that qualify for 95 affordable housing credits toward the City's third round obligation of 819 affordable units.

Table 2
Credit Allocation for Affordable Housing Sites for Third Round

Name of Development	Status	Type	AH units
Westmoor Gardens (extension of affordability controls)	Completed	Family Rental	64
Habitat for Humanity	Completed	Family For-sale	4
Foti	Completed	Family Rental	3
Vantage Health	Completed	Supportive and Special Needs Housing	3
Englewood Avenue Senior	Completed	Age-restricted	6
Flatrock Square (ERA South LLC) (Block 2605, Lot 2.03)	Completed	Family Rental	14
Bristol (Assisted Living)	Completed	Age-restricted Assisted Living	1
Total			95

Addressing the Third Round RDP

The third-round obligation of 819 units is reduced to 724 units after accounting for the 95 units in Table 2 above. Additionally, the City is eligible for a vacant land adjustment resulting in a Realistic Development Potential (RDP) of 76 units, which will be addressed as follows:

Table 3:
Third Round RDP Compliance Mechanisms

Compliance Mechanism	Block/Lot	Units
ERA – Hotel Pad	Block 2602; Lot 3.03	33
Bristol	Assisted Living Facility	19
202 First Street		4
Vivian (ERA South)		1
Rental Bonuses		19
Total		76 units

ERA South LLC (Hotel Pad) Block 2602, Lot 3.03

The City’s 2014 Judgement of Repose identified the rezoning of this site to permit up to 45 residential units, with a 12.5% set-aside however the agreement was amended in 2022 to permit up to 220 residential units with a 15% set-aside, or at least 33 affordable units.

Bristol (Assisted Living)

The Bristol Assisted Living project will provide 273 units of assisted living with a 10% set aside for Medicaid recipients (27 affordable units).

202 First Street

The Zoning Board of Adjustment approved a project located at 15 S. Dean Street which permitted 4 affordable units to be provided off-site. These units have been constructed with affordability controls in effect since August 2022.

Addressing the Third Round Unmet Need

After subtracting the RDP from the third-round obligation, the City has an unmet need of 648 units, which will be addressed in part through overlay zoning, a program to encourage the production of up to 25 units of 100% affordable housing through a partnership with a non-profit agency, and a mandatory set-aside ordinance.

Overlay Zoning

The following areas have been identified as overlay zones which will permit additional inclusionary development options.

- First Student Charter Bus, Block 2407, Lot 7 and Block 2801, Lot 1, which will permit 35 dwelling units per acre.
- Areas 1, 2, 3, 4, 6, 8, 10, 11, 12, 13, and Area 14 also known as Care One, will permit 15 dwelling units/acre.
- Area 5, which will allow up to 50 dwelling units per acre
- Area 7, which will allow up to 35 dwelling units per acre
- Area 9, which will permit up to 35 dwelling units per acre.

100% Affordable Housing Project

The City agrees to establish a program to assist non-profit affordable housing organizations to develop up to 25 units of affordable family housing by July 1, 2025. To achieve this goal, the City will provide funding for the project in the Spending Plan; however, the City is not obligated to adopt a “resolution of Intent to Bond” or use funds outside of the Affordable Housing Trust Fund. The program includes annual meetings with non-profit agencies, annual duly noticed meetings to discuss potential projects, ideas, and markets, and upcoming decisions including a written report prior to the annual meeting regarding the City’s efforts over the past year to achieve its goals. Should these efforts fail to provide 25 affordable units by July 2025, that shall not be a cause of action by any party against the City of Englewood.

Mandatory Set Aside

The City will adopt a Mandatory Set-Aside Ordinance that will require 20% of for-sale units and 15% of rental units to be set aside for low and moderate income households for all multifamily developments of 5 units or more.

Fairness Evaluation of the Settlement Agreement

The fairness of a settlement to the protected class of low- and moderate-income households has long been a concern of the Court. The question of whether or not “the settlement adequately protects the interests of the lower-income persons on whose behalf the affordable units proposed by the settlement are to be built” led the Appellate Court to establish a five-part analysis for evaluating the fairness of a settlement in a *Mount Laurel* lawsuit in *East/West Venture v. Borough of Fort Lee*, 286 N.J. Super. 311, 328-329 (App. Div. 1996) as follows:

1. **Consideration of the number of affordable units being constructed.** The Settlement Agreement acknowledges that the City has a 819-unit obligation for the third round. The City will implement a variety of mechanisms to continue to provide affordable housing opportunities for a substantial portion of the third round obligation. The Settlement Agreement confirms the City’s commitment to implement inclusionary and overlay zoning to provide affordable housing units.
2. **The methodology by which the number of affordable units provided is derived.** The settlement offer by FSHC, which forms the basis for this settlement, is derived from a methodology that is consistent with Judge Jacobson’s 2018 opinion regarding prior round methodology and which FSHC and Englewood accept for settlement purposes only.
3. **Other contributions by the developer.** This prong of the *East/West Venture* test is not strictly applicable to a settlement that does not involve a builder/plaintiff. However, the terms of the Settlement provide that:
 - a) at least half of all affordable housing units addressing the Third Round Prospective Need shall be available to family households;
 - b) the City will require at least 13 percent of all of the new affordable housing units in its Plan to be affordable to very low income households earning 30 percent or less of median income and that at least half of these units will be available to families
 - c) at least 25 percent of the Third Round Prospective Need obligation shall be met with rental units, of which at least 50 percent shall be available to families;
 - d) no more than 25 percent of affordable units shall be age-restricted;
 - e) rental bonuses shall be as set forth at N.J.A.C. 5:93 and shall not exceed the rental obligation (at least 25 percent of the City's new construction fair share obligation);
 - f) at least 50 percent of all affordable units in each inclusionary site shall be affordable to low income and very low income households with the remainder affordable to moderate income households;

g) the City will comply with affirmative marketing and affordability regulations set forth at N.J.A.C. 5:80-26.1, *et seq.* (UHAC) except that in lieu of the requirement at N.J.A.C. 5:80-26.3(d) for 10 percent of all low and moderate income rental units to be affordable to households earning 35 percent or less of median income, the requirement shall be that 13% of all low and moderate income rental units shall be affordable to households earning 30 percent or less of median income.

h) the City will expand the list of community and regional organizations that will receive notice of the availability of affordable housing units (in the Affirmative Marketing Plan) the following additional organizations: Fair Share Housing Center, the New Jersey State Conference of the NAACP, Bergen County NAACP, Jersey City NAACP, Paterson NAACP, Passaic NAACP, Hoboken NAACP, the Latino Action Network, the Bergen County Housing Authority, Northeast New Jersey Legal Services, Bergen Urban League, Garden State Episcopal CDC, Mount Olive Baptist Church, Urban League Affordable Housing & CDC, Bergen County Housing Coalition, Fair Housing Council of Northern NJ, New Jersey Community Development, Advance Housing, Paterson Habitat for Humanity, Family Promise of Bergen County, Saint Paul's Community Development Corp., Supportive Housing Association of New Jersey, Islamic Center of New Jersey, Monarch Housing Associates and the New Jersey Housing Resource Center.

i) within 120 days of the Court's approval of the settlement agreement, the City will adopt the Housing Element and Fair Share Plan and all required implementing ordinances to ensure that all of the foregoing occurs.

4. **Other components of the Agreement that contribute to the satisfaction of the constitutional obligation.** The process of obtaining the Court's approval of the City's Third Round Housing Element and Fair Share Plan, the scrutiny that document has received from FSHC, and the conditions contained in the Settlement and this report requiring the City to adopt certain master plan and ordinance amendments will allow the City to move forward in the satisfaction of its constitutional obligation.

5. **Other factors that may be relevant to the fairness of the settlement.** This Settlement will ensure that the interests of lower income households will be advanced through the Court's approval, since the Agreement provides for a continuing monitoring program throughout its duration. A Spending Plan amendment will also be required, with a review of its provisions by the Court.

The Agreement requires annual reporting on the collection and expenditure of trust funds as well on the status of various components of the Fair Share Plan to address its housing obligation. It also requires a three-year status report regarding the satisfaction of the very low-income requirements and requires annual updates of regional income limits.

OBJECTOR COMMENTS AND RESPONSES

Diane and Peter Jansen, 589 Ridgeland Terrace, Englewood, NJ 0763, dated December 6, 2022

The Jansens object to the proposed Settlement Agreement and articulate two primary concerns related to flooding and the proposed affordable housing sites. The first raised Concerns are expressed over flooding in the East Hill area of Englewood, which includes the Business District and lower-income residential districts, an area that sustained heavy flooding during Hurricane Ida. The flood-prone areas near West Englewood Avenue is also an area of concern. The Jansens believe development outside of flood-prone areas should be investigated to reduce impacts of climate change hazards on vulnerable populations.

City of Englewood Response to Diane and Peter Jansen objection, prepared by Edward J. Buzak, Esq, dated December 22, 2022

The City acknowledges that flooding has occurred throughout areas of the City due to overburdened drainage facilities that have left residents displaced or disrupted. The city states that any new development will include critical consideration of flooding and stormwater management.

Master's Response

New Jersey environmental regulations regarding stormwater management and the protection of wetlands and flood plains, which will govern future development, are designed to reduce risk to human life and property. The City has selected sites for future affordable housing that are well located in relation to community and commercial services.

Intervener 31 E Palisades Ave LLC and 7 North Woodland St. LLC objection prepared by Joshua Zielinski, Esq. dated December 6, 2022

The Interveners object to the Settlement on the grounds that the agreement will not protect the interests of the protected class because the rezoning will not provide a realistic opportunity for construction of affordable housing. The objection claims that that if the affordable housing cannot actually be built, that there is no realistic opportunity for such construction.

City of Englewood Response to 31 E. Palisades Avenue, LLC and 7 North Woodlawn Street LLC, prepared by Edward J. Buzak, Esq, dated December 22, 2022

The Borough contends that the Interveners objection and request for site-specific relief does not meet the applicable criteria for a Fairness Hearing and is therefore not relevant to the Fairness Hearing. Rather, the purpose of the hearing is for the Court to determine the fairness of the terms and conditions of the Settlement Agreement to the protected class of low- and moderate-income households. In addition, the City calls attention to the dramatic density increase required by the Intervener proposals (60 units per acre and

later 48 units per acre) “essentially covering the entirety of the five acre assembled parcel” in the lowest density residential area in the City. The City also claims that objection illustrates that the Interveners do not seek to further the interests of low-and-moderate-income households but rather to solely establish an assisted living facility.

Master’s Response

The record does not reflect that zoning for 15 units/acre in Englewood’s 2-acre zone would not constitute a realistic opportunity for the construction of inclusionary affordable housing. Additionally, while the Intervener claims that assisted living and memory care facilities are not provided in any residential zones in the City, it is not uncommon for such facilities to be situated near highways in commercial and other non-residential neighborhoods.

The Intervener claims that the Special Master and FSHC “reacted favorably” to the assisted living proposal with 15 Medicaid beds. Such a reference appears to relate to settlement discussions, wherein a range of potential options was explored. The delivery of 15 family units would result from the proposed rezoning whereas the proposed assisted living proposal would produce 15 Medicaid beds, not 15 affordable family units arrayed across the required bedroom distribution.

The City noted during mediation that the Intervener’s proposals failed to satisfy the site suitability criterion related to land use compatibility, because the proposed buildings, of a long, tall monolithic nature with extensive site coverage, would be out of scale with the low density residential neighborhood character,

Conclusion and Conditions

This report has been prepared in anticipation of the upcoming Fairness Hearing before the Honorable Christine A. Farrington, J.S.C. on January 10, 2023 in the matter of the Application of the City of Englewood for a Determination of *Mount Laurel* Compliance (Docket No. BER-L-4069-19).

The Court is being asked to determine whether the approval of the Settlement between Englewood and FSHC is fair to the interests of low- and moderate-income households. Based upon the analysis undertaken herein, I am of the opinion that the compliance framework outlined in the Englewood City/FSHC Settlement Agreement is fair to and adequately protects the interests of low- and moderate-income households and satisfies the criteria set forth by the Appellate Division in East/West Venture.

Subject to supplementation as outlined in Attachment A, I also find that Englewood City has created a realistic opportunity for satisfaction of the City’s affordable housing obligation for the period from 1987 through 2025, pursuant to the Mount Laurel decisions, the Fair Housing Act, applicable COAH regulations, and the Supreme Court’s decision in *Re N.J.A.C. 5:96 and N.J.A.C. 5:97*, 221 N.J.(2015).

I further note that the FSHC, an affordable housing advocate and party to the settlement agreement, has also concluded that the compliance plan contained in the settlement

agreement is fair and reasonable to the interests of low and moderate-income households. This is significant, in light of the holding in *Morris County Fair Housing Council v. Boonton Twp.*, 197 N.J. Super, 359 (Law Div. 1984), *aff'd o.b.* 209 N.J. Super, 108 (App. Div. 1986), wherein the Court concluded that "...it may be assumed that generally a public interest organization will only approve a settlement which it conceives to be in the best interest of the people it represents."

Additionally, for the reasons provided herein, I find that Englewood's allocation of units and credits for its prior round and third round obligations is designed to implement the March 10, 2015 decision of the N.J. Supreme Court In Re N.J.A.C. 5:96 and 5:97, insofar as can be determined at this time.

Finally, the City has agreed with FSHC to enact plans, resolutions and ordinances that have not yet been provided. As such, constitutional compliance cannot be achieved until these other steps are completed. Subject to supplementation as outlined in Attachment A, I also find that Englewood City has created a realistic opportunity for satisfaction of the City's affordable housing obligation for the period from 1987 through 2025, pursuant to the Mount Laurel decisions, the Fair Housing Act, applicable COAH regulations, and the Supreme Court's decision in *Re N.J.A.C. 5:96 and N.J.A.C. 5:97*, 221 N.J. (2015).

Cc via email: Honorable Christine Farrington, J.S.C.

Edward Buzak, Esq.

William Bailey, Esq.

Joshua Bauers, Esq.

Joshua Zielinski, Esq

Diane Jansen

Peter Jansen

ATTACHMENT A
REQUIRED ELEMENTS OF FINAL AFFORDABLE HOUSING COMPLIANCE PLAN
City of Englewood, Bergen County

1. The compliance proposals contained in Tables 1, 2 and 3 of this report and the applicable terms of the executed Settlement with FSHC shall be referenced in the Housing Element and Fair Share Plan, which, following review by the Special Master, shall be adopted and submitted to the Court for approval as part of the final Judgment of Compliance and Repose.

The HE/FSP shall provide documentation of the creditworthiness of all existing units and shall be prepared according to the requirements of the Fair Housing Act (FHA), which identifies the "Essential components of the municipality's housing element" at N.J.S.A. 52:27D-310, as follows:

A municipality's housing element shall be 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, and shall contain at least:

- a. An inventory of the municipality's housing stock by age, condition, purchase or rental value, occupancy characteristics, and type, including the number of units affordable to low and moderate income households and substandard housing capable of being rehabilitated, and in conducting this inventory the municipality shall have access, on a confidential basis for the sole purpose of conducting the inventory, to all necessary property tax assessment records and information in the assessor's office, including but not limited to the property record cards;
- b. A projection of the municipality's housing stock, including the probable future construction of low and moderate income housing, for the next ten years, taking into account, but not necessarily limited to, construction permits issued, approvals of applications for development and probable residential development of lands.
- c. An analysis of the municipality's demographic characteristics, including but not necessarily limited to, household size, income level and age;
- d. An analysis of the existing and probable future employment characteristics of the municipality;
- e. A determination of the municipality's present and prospective fair share for low and moderate income housing and its capacity to accommodate its present and prospective housing needs, including its fair share for low and moderate income housing; and
- f. A consideration of the lands that are most appropriate for construction of low and moderate income housing and of the existing structures most appropriate for conversion to, or rehabilitation for, low and moderate income housing, including a consideration of lands of developers who have expressed a commitment to provide low and moderate income housing.

2. Prior to the entry of an Order granting a final Judgment of Compliance and Repose, the Fair Share Plan shall be reviewed by the Special Master for compliance with the terms of the executed settlement agreement, the Fair Housing Act and the UHAC regulations before being adopted and submitted to the Court. The Fair Share Plan document should include any proposed Ordinances and Resolutions needed to implement the Plan, including zoning amendments, an Affordable Housing Ordinance, a Development Fee Ordinance, an Affirmative Marketing Plan, a Rehabilitation Program description and Manual, a Spending Plan, resolutions appointing an Administrative Agent and a Municipal Affordable Housing Liaison, a resolution adopting the Housing Element and Fair Share Plan (Planning Board) and a resolution endorsing the Housing Element and Fair Share Plan (Governing Body).
3. The Spending Plan shall be prepared, submitted to the Special Master for review and comment, adopted by the Planning Board as part of the Plan and by the City Council as a separate action and submitted to the Court for approval before the City will be permitted to expend any funds from its Affordable Housing Trust Fund.
4. All proposed inclusionary and 100 percent affordable housing development zoning amendments shall be prepared, reviewed by the Special Master, and adopted and submitted to the Court prior to the entry of an Order granting a final Judgment of Compliance and Repose.
5. The City shall prepare and adopt an Affordable Housing Ordinance that reflects all provisions of the settlement agreement, as well as applicable UHAC and COAH Rules and an Affirmative Marketing Plan Resolution consistent with the terms of the settlement agreement. These documents shall be reviewed by the Special Master and FSHC, adopted and submitted to the Court prior to the entry of an Order granting a final Judgment of Compliance and Repose.
6. If it has not done so already, the City will need to contract with one or more Administrative Agents, responsible to the City but paid for by the owners of the affordable housing units created in the City, to administer the affordability controls on all of the low and moderate income units that have been or will be created in the City. This should be accomplished and submitted to the Court prior to the entry of an Order granting a final Judgment of Compliance and Repose.
7. If it has not done so already, the City will need to create the position of Municipal Housing Liaison by Ordinance and fill that position by Resolution of the Governing Body. This should be accomplished and submitted to the Court prior to the entry of an Order granting a final Judgment of Compliance and Repose.

Upon its timely compliance with all of the foregoing and approval of the final submission by the Court, I believe that Englewood City will be entitled to a final Judgment of Compliance and Repose through July 1, 2025.