Art Bernard and Associates, L.L.C.

Housing and Land Use Planning

OBJECTION TO CRANFORD SETTLEMENT AGREEMENT

JANUARY 2020

PREPARED FOR:
HARTZ MOUNTAIN INDUSTRIES, INC.

PREPARED BY:

ART BERNARD, P.P.

77 North Union Street, Lambertville, New Jersey 08530 Phone (609) 397-8070

E-mail: yuckygolfer@gmail.com

TABLE OF CONTENTS

9 Market to Affordable Program
10 Elsie/Burnside Avenue Environmental Constraints
11 May 14, 2015 Report on Unmet Need

This report provides my professional opinion regarding the November 2019 settlement agreement between Cranford Township and Fair Share Housing Center (FSHC). I have been retained by Hartz Mountain Industries, Inc. (Hartz). to prepare this report. Hartz has offered to redevelop its property at 750 Walnut Avenue, currently developed as a heavily developed, but largely vacant, non-residential use and surface parking, for an inclusionary development at 30 units per acre.

In preparing this report, I have focused on Cranford's future response to its third-round housing obligation. The Township is seeking credits for its second-round obligation and part of the third-round housing obligation. In my May 17, 2019 Report, I indicated that the Township must provide documentation for 19 group home credits and for the Needlepoint family rental. I will not repeat those arguments because the issues raised by this settlement are so much more substantial than these credits: and I assume that Fair Share Housing Center (FSHC) will require the pertinent crediting documentation prior to the court ruling on municipal compliance.

I have written this report based on the information available in the settlement agreement and in the Township's 2018 Housing Element. Hartz has made OPRA requests for documents that could supplement this report, if the information was provided by the Township

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 40+ 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, the issue of credits, COAH's vacant land adjustment process and municipal compliance.

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, in six (6) municipalities.

I have also consulted for the New Jersey Builders Association (NJBA) as to 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. I have attached my curriculum vitae as Exhibit 1.

DOCUMENTS REVIEWED

In preparing this report, I have reviewed the settlement agreement that is subject to the fairness hearing. Since there is very little detail provided within the settlement agreement, I have reviewed Cranford's Housing Element and Fair Share Plan, prepared by Harbor Consultants and adopted on December 18, 2018. I have reviewed Judge Jacobson's March 2018 Mercer County fair share decision. I have reviewed N.J.A.C. 5:93-1 et seq. and N.J.A.C. 5:97-1 et seq. I have reviewed various decisions rendered by the courts and COAH. I have reviewed COAH's records regarding municipalities that have prepared housing elements alleging that vacant land is a scarce resource for purposes of addressing the municipal housing obligation. I have also reviewed a March 2017 rezoning study for 750 Walnut Avenue, prepared by Phillips, Preiss Grygiel, L.L.C.

OVERVIEW

Pursuant to the settlement agreement, Cranford has a third-round housing obligation of 440 housing units. Land is a scarce resource in Cranford and the Township is seeking a vacant land

adjustment pursuant to COAH's rules. When land is a scarce resource, a municipality must compute the capacity of vacant sites and sites devoted to a low density use to accommodate affordable housing. This capacity analysis is called the realistic development potential. The municipality must then develop a plan for its realistic development potential. However, the remaining obligation does not go away. The municipality must develop a separate plan for its remaining obligation, or "unmet need." by promoting affordable housing on sites that are already developed. The concepts of realistic development potential and unmet need are fundamental to understanding the proposed settlement and Hartz's objections to the settlement.

Cranford has produced affordable housing in the past – some of it from two builder's remedy suits. The first, filed by Lehigh Acquisition, settled and has resulted in affordable family rentals. It is my understanding that the second builder's remedy suit, involving Block 291, Lot 15.01 and Block 292, Lot 2, (the Birchwood site) has yet to produce affordable housing.

In my opinion, it is fair to say that the vast majority of FSHC settlements, if not all, rely on COAH's second round rules, N.J.A.C. 5:93-1 et seq. These rules provide guidance as to applying credits to the fair share and determining the municipal land capacity for accommodating the remaining housing obligation. The Cranford settlement deviates substantially from the clear language in the regulations. While other settlements have followed a similar approach as used in Cranford, the frequent use of this approach does not change the direction provided by the state regulations and the New Jersey Fair Housing Act.

While Cranford and FSHC may ask the court to use its discretion to deviate from the state regulations and the direction of the Fair Housing Act, *in my opinion, the interests of low and moderate income households are much better served if the court uses its discretion to follow the direction provided by the Fair Housing Act and N.J.A.C. 5:93-1 et. seq.* Following the direction provided by the regulations and FHA will provide much more affordable housing to very low, low and moderate income households.

THE BASIC ISSUES

This report focuses on two fundamental issues. The first issue is how a municipality receives credit for past housing activities when a municipality seeks a vacant land adjustment.

The Fair Housing Act (FHA) provides clear direction as to: computing the municipal fair share; receiving credits for past housing activities; and proceeding through the vacant land adjustment process. The Legislature directed COAH to estimate the prospective need at the State and regional level and then compute the municipal fair share after crediting housing that has actually been produced in a specific community (Section 307(c)1). *After the prospective fair share is computed*, Section 307(c)2 provides for COAH to provide criteria to adjust *the fair share* based on available vacant and developable land and infrastructure conditions. (See Exhibit 2)

Consistent with the FHA's direction, N.J.A.C. 5:93-2 provides standards related to calculating the State and regional need and allocating that need to individual municipalities. N.J.A.C. 5:93-3 provides criteria for credits that are subtracted from the municipal allocation of regional need to determine the municipal fair share. Then the initial paragraph of N.J.A.C. 5:93-4 (Exhibit 3) begins with the following:

> Subchapter 4. Municipal Adjustments
>
> 5:93-4.1 Purpose and background
>
> (a) *Subchapters 2 and 3 delineate the criteria for determining the municipal housing obligation.* (emphasis provided) However, there may be instances where a municipality can exhaust an entire resource (land, water or sewer) and still not be able to provide a realistic opportunity for addressing the need for low and moderate income housing as determined by the Council. This subchapter outlines standards and procedure for municipalities to demonstrate the municipal response to its housing obligation is limited by the lack of land, water or sewer. The procedures in this subchapter shall not be used to reduce or defer the rehabilitation component.

So, the FHA and the second-round rules are clear that credits are granted to determine the fair share before employing the adjustment process designed to determine the municipal capacity to accommodate the fair share. Neither the FHA nor the regulations "carve out" a separate

process of applying credits for municipalities in which land is a scarce resource. The rules establish a uniform process for all municipalities.

The second issue involves the vacant land adjustment process described at N.J.A.C. 5:93 - 4.2. The second-round adjustment process requires a two-step process. The first step involves calculating the municipal capacity to absorb affordable housing. The capacity analysis is called the realistic development potential.

N.J.A.C. 5:93-4.2(d) is clear that the realistic development potential is based on vacant sites and sites that are devoted to a low-density use. (See Exhibit 3) The regulation provides a municipality with flexibility in addressing its realistic development potential at N.J.A.C. 5:93-4.2(g). This rule clearly says that a municipality need not incorporate all sites used to calculate the realistic development potential in addressing the realistic development potential if it can otherwise address the realistic development.

It is often not difficult to address the realistic development potential without zoning all sites used in calculating the realistic development potential. This is, in part, due to the extra credit, the regulations allow for building rental housing. Since the regulations require rental housing and the regulations allow an extra credit for providing a realistic opportunity for providing rental housing, a municipality may sometimes address the realistic development potential, without using all sites used in its calculation, by doing no more than creating the rental housing required by rule. So, a municipality may reduce 20 units from its realistic development potential by creating 10 units of non-age restricted rental housing. Thus, if there are two sites that have a realistic development potential of 10 and the municipality is able to structure an agreement with a developer to build 10 affordable family rentals on one of the sites, the community can receive 20 units of credit for one of the sites and avoid zoning the second site for affordable housing.

When land is a scarce resource, the realistic development potential is, by definition, less than the municipal fair share. In such a situation, the remaining fair share obligation, the unmet need, does not "go away." The municipality must also address the unmet need by promoting the

redevelopment of developed sites. N.J.A.C. 5:93-4.2(h) provides direction as to what type of sites might be rezoned to address the unmet need.

> If the realistic development potential described in (e) above is less than the municipal calculated need, minus credits,[1] pursuant to N.J.A.C. 5:93-3.4, the Council shall review the existing municipal land use map for areas that may develop or redevelop. Examples of such areas *include, but are not limited to* (emphasis provided); a private golf club owned by its members, publicly owned land; downtown mixed use areas; high density residential areas surrounding the downtown; areas with a large aging housing stock appropriate for accessory apartments; and properties that may be subdivided and support additional development. . . .

The rule placed on COAH - not the municipality - the ultimate responsibility to determine how these sites would be rezoned to address the unmet need. N.J.A.C. 5:93-4.2(h):

> . . . After such an analysis, *the Council, may require* (emphasis provided) at least any combination of the following in an effort to address the housing obligation:
>
> 1. Zoning amendments that permit apartments or accessory apartments.
> 2. Overlay zoning requiring inclusionary development or the imposition of a development fee, consistent with N.J.A.C. 5:93-8; in approving an overlay zone, the Council may allow the existing use to continue and expand as a conforming use, but provide that where the prior use on the site is changed, the site shall produce low and moderate income housing or a development fee: or
> 3. Zoning amendments that include a development fee.

State agencies have the opportunity to explain their rules by responding to public comments in the New Jersey Register. COAH explained the intent of this rule at 25 N.J.R. 5770:

> Comment: After the realistic development potential is determined, the rule proposal says that the Council may require at least some combination of methods to capture a contribution toward affordable housing as development or redevelopment occurs. Insofar as this language is

[1] Once again, the rule is clear that credits should be taken from the housing obligation prior to the calculation of the realistic development potential.

> intended to give the Council discretion in which combination of backup provisions to apply, this language is acceptable. However, it could be read to allow the Council not to require any backup provisions at all.
>
> Response: *The language is intended to give the Council discretion in the appropriate method(s) to capture the contribution toward affordable housing* (emphasis provided). In general, some method(s) will be required of all municipalities seeking a vacant land adjustment.

The rule does not establish a "cookie-cutter" approach toward addressing the unmet need. Rather, the rule allows the reviewer to craft a response that would be most beneficial to low and moderate income households based on a municipal specific analysis of potential housing opportunities.

In summary, the second-round rules, limit the calculation of the realistic development potential to vacant sites and sites devoted to a low density use and provides the municipality the ability some flexibility as to which sites to use in addressing the realistic development potential. The rules view a developed site that may redevelop as a site that COAH or the court may require to be rezoned to address the unmet need.

Why would the regulation provide a municipality more flexibility in addressing the realistic development potential than the unmet need? The distinction is appropriate because COAH and the courts have a track record of success in providing a realistic opportunity on vacant sites and sites devoted to a low-density land use. COAH and the courts have found that zoning such sites for attached housing, at sufficient densities with a maximum set-aside of 20 percent, has been successful in creating a financial incentive for affordable housing.

There are no such standards for properties that have been developed for more intensive uses. There is no track record, on which COAH and the courts can rely to determine when it has created an economic incentive to redevelop a thriving lumberyard; to redevelop an abandoned manufacturing use that requires soil remediation; or at what point an office use with multiple vacancies is ripe for redevelopment that would yield affordable housing.

The COAH approach, adopted by rule, therefore, provides municipalities with more flexibility in addressing a realistic development potential based on vacant and low density sites, in part, because such sites are often interchangeable. There is a track record indicating that the rezoning provided by COAH's rules can be successful on most vacant or low density sites. But the rule providing municipalities more flexibility in addressing the realistic development potential, is part of a rule package that does not provide a municipality with the same flexibility with regard to zoning for the unmet need. Again, the difference in approaches is warranted because redevelopment sites are not interchangeable. Neither COAH nor the courts have a track record to determine the zoning necessary to promote inclusionary redevelopment. In fact, as will be discussed later, the track record of guessing which sites might redevelop and what it will take to promote redevelopment is poor at best.

The rule provides an incentive for a property owner/developer to come forward with sites, like 750 Walnut Avenue, that will redevelop along with a concrete proposal for providing affordable housing. COAH's procedural rules, provides for negotiations, through the mediation process established by the FHA, before COAH decides how to respond to the offer to redevelop a site. *I would emphasize that the idea of the adjustment process is to identify ways to provide, not avoid, affordable housing.*

HOW DOES THE SETTLEMENT DIFFER FROM THE RULE ADOPTION?

The municipal assignment of regional need is the municipal responsibility for addressing its portion of the housing need. Credits are a measure of municipal past housing activity that has already addressed part of the municipal affordable housing responsibility. The realistic development potential is a measure of land capacity to address the remaining obligation in the future.

The settlement deviates from the rule by subtracting credits (past housing activity) from the realistic development potential (how much affordable housing can we expect from vacant and underutilized properties in the future). Subtracting credits from the realistic development

potential is illogical because the realistic development potential calculation does not include the land on which the existing affordable housing is located. It, therefore, diminishes the capacity of the municipality to address its remaining obligation in the future based on what has been done on other land in the past. It is an "apples to oranges comparison" that minimizes the amount of housing likely to be produced in the Township. Credits are subtracted from the entire municipal housing obligation for all other municipalities; and there is no reason or authorization to subtract credits from the realistic development potential authorized by the Fair Housing Act or the State regulations.

In writing COAH's first and second round rules, I worked closely with the New Jersey Attorney General's office in preparing the rule proposals, responding to public comments and preparing the rule proposals for rule adoption. The experience educated me on the requirements of proper rule-making. I am, for example, aware of the importance of the FHA, COAH's enabling legislation in the formulation of proper rule-making.

I am also aware that the Supreme Court relied heavily on COAH's enabling legislation when it invalidated N.J.A.C. 5:96-1 and 5:97-1 et seq. At page 51 of In Re Adoption of N.J.A.C. 5:96 and 5:97 by N.J. Council on Affordable Housing, the Supreme Court found that "COAH must not, "under the guise of interpretation," enact regulations that are "plainly at odds" with the FHA."

I find that FHA is very clear in requiring that credits be applied to determine the fair share at Section 307(C)1 of the FHA prior to the adjustment process described at Section 307(C)2 of the FHA. It is during the adjustment process that the realistic development potential is calculated. Thus, in my opinion, it is totally contrary to the FHA to subtract credits from the realistic development potential.

To illustrate the impact of this issue, the parties (FSHC and Cranford) to the settlement have agreed that the Township's third round housing obligation is 440 units. At page 4 of the settlement, the parties have agreed that the Borough's realistic development potential is 151 (131

+ 20 for reducing the density on a builder's remedy site without court authorization). [2] The parties have also agreed that the Township is eligible for 81 units of third-round credit for housing that is complete or under construction (including an extra credit for family rentals at 31 Centennial and 109 Walnut). (See table on page 4 of settlement agreement – Exhibit 4)

If one subtracts the 81 units of credit from the 440 unit third round housing obligation, the remaining fair share is 359 units and the municipality would proceed to a realistic development potential calculation of 151. However, by subtracting the 81 units from a realistic development potential of 151, the Township's remaining realistic development potential is only 70. The difference between the two approaches is huge and the court should reject the settlement's compliance plan because it is contrary to the plain language in the FHA and N.J.A.C. 5:93-4.2.

The settlement proposes including a number of sites that are already fully developed, and, in some cases, actively used in the calculation of its realistic development potential. This practice of including fully developed site, especially those that are actively used, in the realistic development potential provides the illusion of creating more housing opportunities by increasing the realistic development potential, which should be based on vacant and low density sites only. However, the practice of increasing the realistic development potential with fully developed sites allows the municipality the flexibility to eliminate sites or reduce the density on sites that may have the greatest potential to yield affordable housing and maintain sites that appear problematic. It does so by increasing the municipal rental obligation and the extra credit authorized for providing rentals.

For example, the settlement agreement increases Cranford's realistic development potential by three units for the Riverfront family rentals and by another three units for the Woodmont family rentals (Exhibit A- Table 2 of settlement agreement – Exhibit 4 of this report). These two rental

[2] The settlement agreement calculates the rental obligation and rental bonus based on 131 units, not 151. Thus, the Township may receive a bonus, or extra credit for 33 low and moderate income units. (see paragraph 9(a)). For some reason, the settlement bases the limit on age-restricted units on 25 percent of 151, not 121. I am unaware of FSHC computing the rental obligation and the cap on age-restricted housing based on a different number in any other municipality. The result is that settlement allows Cranford to provide less rentals and more age restricted housing 37.

communities were built years ago and most of the housing has been credited properly toward Cranford's second-round obligation. The settlement provides 12 units of credit for the six-unit obligation added to the third-round realistic development potential. Thus, by increasing the third-round realistic development potential based on a small portion of the Riverside and Woodmont communities, the settlement actually results in a decrease of 6 units that Cranford must produce in the future.

An analysis of Exhibit A, Table 2 indicates that the three units from the much larger Riverside and Woodmont communities were added to the Township's realistic development potential due to changed circumstances. *What were the changed circumstances and why do the changed circumstances only apply to three units in each constructed community and not the other 16 affordable units in the Riverfront community nor the other 21 affordable units in the completed Woodmont community?* (see prior round compliance table at page 3 of settlement agreement)

In previous sections, I have explained that the second-round rule creates an incentive for property owners and developers to come forward with sites that can be redeveloped for affordable housing by providing for COAH or the court to rezone their properties to address the unmet need.

The settlement deviates from the State regulations by including fully developed sites in the realistic development potential calculation. The flexibility, at N.J.A.C. 5:93-4.2(g), allowing a municipality to not utilize all sites included in the calculation of the realistic development potential, provides an incentive for a municipality to lower the density associated with calculating the realistic development potential to make it easier to eliminate or minimize its use of specific sites. The settlement proposes to minimize the use of the Hartz site by utilizing a lower density for realistic development potential purposes (18 units per acre instead of 30). The settlement also provides an artificially low realistic development potential by excluding six acres of the Hartz site based on the possibility that PSE&G will utilize its power to condemn the six acres for a power plant. There is no authorization to exclude acreage from the realistic development potential based on a "potential condemnation" by a utility.

With regards to the possibility of PSE&G's purchase of a portion of the Hartz site, it is my understanding that Cranford actively opposed the purchase, due to neighborhood opposition. It is also my understanding, based on discussions, with my client, that there are no longer any discussions regarding this purchase. Thus, there is no statutory or practical reason to exclude any portion of the Hartz site from a potential inclusionary development.

As will be discussed later in this report, it is my opinion that the Hartz site is suitable to be developed at 30 units per acre. It is extremely similar in character to a site in Englewood Cliffs that FSHC agreed should be developed at 30 units per acre. Given that the Hartz site is 30.5 acres in size, at 30 units per acre, the Hartz site could generate 181 low and moderate income units. By lowering the density of the Hartz site, for realistic development potential purposes, to 18 units per acre and artificially eliminating six acres of the site from development, the settlement calculates the realistic development potential of the Hartz property to be only 88 low and moderate income units.

By subtracting 81 credits from the total realistic development potential 151, instead of the total 440 third round housing obligation, the Borough can reduce its remaining realistic development potential to 70 units, rather than reducing its total third round housing obligation to 359 housing units. Using this approach, the Township can more than address its realistic development potential with only 49 affordable housing units from the Hartz tract.

In fact, using this approach, the Township claims that it has surplus units in addressing its realistic development potential. *This raises the question of how it is possible that a Township that qualifies for a vacant land adjustment can have surplus affordable housing units?*

I estimate that I have been involved in over 60 declaratory judgment actions. I understand the value of settlements to the court. But I also understand that the settlements are supposed to be fair to the protected class. I find that this settlement is sacrificing over 130 *real* units that would be constructed on the Hartz site in the near term and replaces those real units with developments that are problematic and/or in the preliminary stages of planning.

WHAT DID COAH DO AND WHAT DID I DO?

The Supreme Court directed the courts to follow COAH's prior round rules in computing fair share and fashioning compliance plans. It did not direct the courts to be concerned about "what COAH actually did." Given that COAH was finally recognized as not being a functional agency after failing to adopt valid rules after 1994, it is not surprising that the Supreme Court's 2015 emphasis was on court approved rules and not on the actual actions of a failed agency.

However, whenever a dispute is involved regarding the regulations, it is common for municipal representatives to argue that COAH did something different than follow its own rules. This section will discuss the manner in which COAH actually implement its rules. However, the actions of a failed agency do not change what the rules actually say.

COAH went through a three-year process of adopting N.J.A.C 5:93-1 et seq. The rules apply to all municipalities, including those seeking a vacant land adjustment. The process included an issue paper that was distributed to the public. The process included public hearings on the issue paper that lead to a rule proposal. Following the rule proposal, COAH conducted six public hearings during a designated comment period. COAH had the benefit of all of the comments from the comment period and drafted responses to each comment in adopting the rule. The rule was published in the June 6, 1994 Register. It was appealed and upheld by the courts.

In 1995, COAH created a special process for applying credits in a municipality seeking a vacant land adjustment during the Paramus second round petition for substantive certification. Rather than taking credits from the total municipal obligation like any other municipality, COAH allowed a municipality seeking a vacant land adjustment to subtract its credits from its realistic development potential. The process leading up to this policy decision involved Paramus asking a question and the COAH staff approaching a COAH subcommittee to answer the question. The subcommittee's response was then approved by the COAH Board. The other parties to the Paramus substantive certification had no idea that this issue was going to be discussed, let alone resolved. The regulated public had no opportunity to comment on COAH's change in direction. In my opinion, COAH's action was a classic example of improper rule making and was contrary to the clear direction provided by the Fair Housing Act.

Apparently, the Attorney General's office was unaware of COAH's illegal "rule-making" when it filed its amicus brief to the Supreme Court involving a Cherry Hill issue, in 2002. In that brief, the Attorney General's office consistently informs the court that fair share is calculated by subtracting credits from the regional allocation of need (pre-credited need), not the realistic development potential. The amicus brief is clear that the Attorney General's office knew that Cherry Hill had already received a vacant land adjustment (see pages 42 and 43 of amicus brief (Exhibit 5) where the Attorney General's office recognizes a realistic development potential of 735 housing units).

In terms of my involvement with the issue, I was representing a property owner in Paramus and I helped the attorney, with whom I was working, draft an objection to COAH's "secret rule making." However, the illegal rule-making was already complete by the time my client and the regulated public had an inkling that the discussion was taking place. I subsequently filed other objections regarding the issue. (Exhibit 6) Subsequent to 2006, approximately 11 years after, COAH had begun applying credits to the realistic development potential, I applied COAH's "Paramus" application of the rule in West Caldwell and in Cherry Hill. My application of the amended "rule" did not eliminate any developer from building affordable housing. In West Caldwell, the developer had already established its right to a "builder's remedy." In Cherry Hill, the developer reached a settlement to redevelop two different areas of the Township.

With regards to the issue of including developed sites in the realistic development potential or the unmet need, COAH's actions changed over the years. From 1994 through 2000, COAH applied the rule as written and required developed sites to be rezoned to address the unmet need. Thus, it required Englewood Cliffs to zone an office building, formerly used by Prentice Hall, to address the unmet need. It also required similar zoning in Wood-Ridge on a former Curtis Wright site. Fair Lawn was also required to create an overlay zone option to redevelop sites to address the unmet need. (See Exhibit 7)

From 2000 to 2006, COAH often ignored the concept of unmet need and often required little or no plan to address it. In March of 2002, my office conducted a comprehensive study of 33

municipalities that had received vacant land adjustments for second round housing obligations. Of the 33 municipalities that had received vacant land adjustments at that time, COAH had certified nine (9) municipalities even though the municipality did not adopt any plan to address the unmet need. Eight (8) other municipalities were certified based on plans in which the only response to the unmet need was the adoption of a development fee ordinance. Only 13 of the 33 (39 percent) municipal plans included overlay zones.

In 2006, COAH found several sites that were developed, and offered to COAH as affordable housing site, to be sites that should be included in the realistic development potential because *they were sites devoted to lower density development.* These sites involved petitions for substantive certification in Atlantic Highlands and Haddonfield (Exhibit 8). I have found no case in which COAH determined that a site devoted to an intense office building and surface parking should be included in the realistic development potential.

Perhaps some of the confusion related to this issue stems from the Attorney General's discussion of the Garden State Race Track in Cherry Hill in its amicus brief to the Supreme Court. The Attorney General said that the Garden State Race Track was a site that COAH may require to be used to address the "unmet realistic development potential" and referenced N.J.A.C. 5:93-4.2(h). However, COAH's rules do not include the term "unmet realistic development potential." On the contrary, the rule requires that the realistic development potential must be met in full. The rule clearly includes the concept of unmet need and the reference to N.J.A.C. 5:93-4.2(h) refers to the unmet need regulation. That rule (N.J.A.C. 5:93-4.2(h)) specifically authorizes COAH/court to require a municipality to require the rezoning of a fully developed property, much as COAH did in Englewood Cliffs and Wood-Ridge in the late 1990s.

With regard to my advocacy on this issue, I continued to promote substantially developed sites as a response to the unmet need from 1994 until my involvement in Cherry Hill (sometime after 2006). In Cherry Hill, there was an existing court order indicating that specific sites would add to the fair share as they became available. I believe it is fair to say that all the parties to the litigation equated the court's use of the term "fair share" to mean "realistic development potential," since the fair share is a regional calculation that does not include sites becoming

available. In Cherry Hill, FSHC insisted that at least one developed site be included in the realistic development potential as part of a settlement.

After Cherry Hill, I continued to include developed sites in the realistic development potential until 2018. In 2018, one of the court masters asked me to go through the vacant land adjustment process with he/she. In preparing for my meeting with the court master, I reread the rule and "refreshed" my recollection of the actual language of the rule. I then reread what COAH actually did in Atlantic Highlands and Haddonfield and realized that COAH included the developed sites in the realistic development potential because, as the rule allows, it found the sites to be sites devoted to a low density use.[3] I reread the Attorney General's amicus brief in the Cherry Hill and noted the clear error in the brief. Since then I have urged the court to apply the rule as written and use its discretion to require the rezoning of fully developed sites made available for affordable housing as sites to address a portion of the municipal unmet need.

THE RULE AS ADOPTED

As discussed, the parties have agreed, pursuant to the settlement, that Cranford's third round housing obligation is 440 units. The parties have agreed, pursuant to the table on page 4 of the settlement that the Township may be eligible for 81 credits for existing affordable housing and affordable housing under construction. Pursuant to the rule and FHA, the Township's remaining housing obligation is 359 affordable housing units.

The Township and FSHC have agreed upon a realistic development potential of 151. However, most of the sites are substantially developed (some in productive use) and should not be included in the realistic development potential at all.

There are two sites that should be included in the realistic development potential. Block 573, Lots 9, 10 and 12.02 and Block 574, Lots 14 and 15 and Block 606, Lots 1-5 is a site identified in the Township's 2013 judgment of compliance. It is my understanding that the court's prior

[3] My previous reading of the Atlantic Highlands and Haddonfield decisions were that COAH included these developed sites in the realistic development potential because they had been offered as affordable housing sites.

Court Master, Ms. Elizabeth McKenzie, identified this 3.19-acre site to have a realistic development potential of five units based on a density of eight units per acre.

The second site that should be included in the realistic development potential is the Myrtle Special Needs site. In my May 17, 2019 objection to the Township's Housing Element, I recommended that the realistic development potential of this site be two, instead of 1 and the Township has made this minor change in the settlement agreement.

So, based on the sites discussed in the settlement agreement, the Township's realistic development potential would be seven units.

All the other proposed sites on page 4 of the settlement agreement, including the EF Britten site (3 units), the North Avenue Redevelopment Site (8 units), the 201 Walnut Avenue (Wells Fargo) site (8) units and the 750 Walnut Avenue (Hartz) site (49 units) are all developed. They are redevelopment sites that the Township can rezone to address the unmet need. The Township is proposing a total of 76 units on these four sites.

In fact, if one examines the table on Page 4, one finds that the Township is only proposing to create a total of 88 new units (including the Hartz site) toward addressing its third-round housing obligation. Hartz can easily accommodate 181 affordable housing units on its site alone.

The Township should be ordered to develop a plan for its seven-unit realistic development potential and zone the other sites to address its unmet need. I would note that it is already proposing to rezone the sites on which it proposes to offer inclusionary development at the following densities: EF Britten at 20 units per acre; North Avenue Redevelopment at 30 units per acre; 201 Walnut Avenue at 47 units per acre; and only part of the Hartz site at nine units per acre. The following section will demonstrate that the Hartz site can accommodate a much higher density and much more affordable housing.

THE HARTZ SITE

750 Walnut Avenue, Block 541, Lot 2, is the Hartz site. (Exhibit 8) It is a triangular 30.5-acre site that has been developed as office and warehouse space. It is currently developed as 420,149 square feet of outdated office/warehouse space and surface parking that consumes much of the property. According to a March 2017 rezoning study, prepared by Paul Grygiel, P.P., AICP, Bank of America has moved from the building. My client informs me that Lab Corp has since vacated the building and that the existing building space is 100 percent vacant. The movement of tenants from outdated suburban locations to state of the art urban settings is part of a trend that has been well-documented in the literature.

As discussed earlier, the realistic development potential is a capacity analysis of vacant sites and sites devoted to a low-density use. 750 Walnut Avenue is not a vacant site. It is not a site devoted to a low-density use. Therefore, pursuant to the rule as written, it is not a site that should be included in the RDP. The site is the home of an intense, antiquated non-residential use, with accessory surface parking, that is ripe for redevelopment. It is a site covered by N.J.A.C. 5:93-4.2(h), a site that is considered when the capacity of vacant land and sites with relatively low density development to absorb affordable housing (the realistic development potential) is insufficient to satisfy the total housing obligation. In such circumstances, the regulation places upon COAH or a court the responsibility to determine how such properties should be rezoned to address the remaining unmet housing obligation.

Thus, the rules, as written, envision sites like 750 Walnut Avenue to be a response to the unmet need; and the rules, as written, envision a robust response to the unmet need.

It has been relatively common for owners of outdated non-residential buildings, in suburban locations, to offer the conversion of these outdated properties into multi-family housing. For example, my clients in Upper Saddle River and South Plainfield have been successful in reaching settlements that permit outdated office buildings to be redeveloped as multi-family housing serving the needs of low and moderate income households. Montvale is another example of a municipality that agreed to repurpose the vacated Mercedes Benz property into a mixed-use development that will include affordable housing. My understanding of the Roseland

settlement is that Roseland is working with Mack-Cali to repurpose several office buildings to inclusionary developments.

The Supreme Court and the State regulations consider the State Development and Redevelopment Plan (SDRP) in reviewing sites for affordable housing. The SDRP is a growth management plan that encourages growth to be concentrated into specific areas of the State. Within the framework of the SDRP's Planning Area structure, the Hartz property lies in Planning Area 1 (PA-1), the Metropolitan Planning Area.

The SDRP encourages much of the State's development and redevelopment to occur in Planning Area 1. It promotes compact forms of development in this Planning Area. The SDRP promotes dense settlement patterns and redevelopment in Planning Area 1 to encourage the use of public transportation. It also encourages the introduction of housing into appropriate non-residential settings.[4]

The 30.5 acre Hartz site is, by far, the largest site identified in the settlement agreement, for affordable housing. In a municipality seeking a vacant land adjustment, it is important that the site be used efficiently.

The character of the area can accommodate a density of 30 units per acre. Walnut Avenue has a very wide cartway. It is a street designed to move traffic from one community to another. In addition, the site is located a short drive from a Garden State Parkway interchange. The "Parkway" provides future residents with excellent access to regional employment, shopping and recreation opportunities. Indeed, the property has already been zoned to generate a great deal of traffic by placing the property in the C-3 Zone, permitting: business, administrative, executive and professional offices; health care facilities; office-distribution centers; research laboratories; essential services; and golf courses.

[4] 2001 State Development and Redevelopment Plan, pages 191-192.

The Hartz site is triangular in shape and is buffered from other residential development on all three sides. On the west, the site is buffered by the Hyatt Hills Golf Complex. To the north, the New Jersey Transit right-of-way creates a significant buffer to the single family detached homes on the other side of the train's right-of- way. Walnut Avenue creates another significant space between the single family detached homes to the east.

Walnut Avenue's intersection with Raritan Avenue is only about a quarter mile from the center of the subject property. Raritan Avenue has been developed for a variety of commercial uses, that include, but are certainly not limited to a Whole Foods and a shopping center anchored by Shop-Rite. The Shop-Rite shopping center is less than a mile from the subject property and the Whole Foods is even closer. It is sound planning to place high density housing in close proximity to shopping opportunities.

The existing C-3 Zone permits three (3) story development. I conclude that the property is suitable for four (4) story development given the need for affordable housing and the ability of the site to accommodate 30 units per acre and still provide significant building set-backs that augment the existing perimeter buffers already in place (the golf course, rail line and Walnut Avenue). (See Concept Plan at Exhibit 8)

As noted above, the Hartz site is immediately adjacent to a golf course, a railroad right-of-way and Walnut Avenue. The proposed buildings are set-back from Walnut Avenue, closer to the existing golf course. The proposed four (4) story structures are set-back 70 - 100 feet from Walnut Avenue and, at least 50 feet from the New Jersey Transit right of way (which is approximately 100 feet wide). I conclude that the proposed four (4) story community will not deprive its neighbors of air and light.

Hartz has prepared a concept plan that demonstrates that the site can accommodate 907 housing units and still provides: parking that complies with RSIS standards; generous set-backs; and an 8,200 square foot clubhouse. The site amenities would include, but not be limited to, two (2) swimming pools, a fitness center and outdoor gathering places.

Perhaps, most significantly, to the best of my knowledge, Hartz is the only proposed Cranford site, on which a developer is offering to build affordable housing. The 181 units proposed for this site are real.

THE SETTLEMENT'S TREATMENT OF THE HARTZ SITE

Rather than zone the Hartz site to provide 181 units of affordable housing, the settlement includes a portion of the site as part of the Township's realistic development potential. It excludes six acres of the site because of the perceived possibility that PSE&G might condemn a portion of the site for its use. There is no authorization in the State regulations that authorize lowering the development potential of a site based on a possible condemnation or sale (See N.J.A.C. 5:93-4.2). In addition, as discussed earlier, it is Hartz's understanding that PSE&G no longer has any interest in purchasing/condemning the Hartz property.

In order to justify the exclusion of six acres of land from the realistic development potential calculation, the settlement cites N.J.A.C. 5:93-4.2(e)(5)(ii) (see Exhibit 3). But that portion of the State regulations does not discuss condemnation and is limited to open space acquisition. Furthermore, that section of the State regulations requires that the purchase of the land already be recommended in the municipal master plan.

Should the purchase of the site not occur within a one year period, the settlement states that a realistic development potential shall be calculated for the six acres at issue; but that the realistic development potential may be addressed with the surplus credits for housing built in the Township (se paragraph 10(c)). This concept of surplus credits is antithetical to the idea that land is a scarce resource in a municipality.

Even though the realistic development potential of 24.5 acres of the Hartz site is calculated at 18 units per acre,[5] the settlement agreement allows the Township to zone the 24.5 acres at a density of only nine units per acre with a 20 percent set-aside for affordable housing. Perhaps, realizing that nine units per acre may not be sufficient to provide an incentive to redevelop the subject

[5] If the Hartz site were included in the realistic development potential, it is my opinion that the density should be 30 units per acre.

property, the settlement also allows the Township to adopt a redevelopment plan for the 24.5 acres with the power of condemnation and to select a different developer to build the site at a density of 10 units per acre with a 20 percent set-aside.

However, the settlement agreement does not require the Township to bond if necessary to support an inclusionary development at only 10 units per acre on this site. It is quite possible that the cost of condemnation could be substantial and no redeveloper will be interested in building an inclusionary development without a substantial subsidy from the Township in the form of conveying the land to the redeveloper at a discount or some other subsidy that may require bonding. The potential need for some subsidy to a developer is particularly real because the settlement agreement allows the Township to require all market-rate unis on the Hartz site to be age-restricted (Paragraph 10)a)). Thus, the Township is claiming the right to severely limit the number and types of households that may live on the Hartz property.

The settlement's treatment of the Hartz property would not be possible without deviating from COAH's rules by: including substantially developed sites in the calculation of the realistic development potential instead of rezoning the site as part of the unmet need; understating the density used to calculate the realistic development potential of the Hartz site; understating the realistic development potential by eliminating six acres due to PSE&G's former interest in the property; and subtracting potential credits from the realistic development potential instead of the total third round housing obligation.

THE OTHER SITES PROPOSED TO ADDRESS THE REALISTIC DEVELOPMENT POTENTIAL

The E.F. Britten site is Block 474, Lot 1. It is located at 24 South Avenue. It is not a vacant site and it is not a site devoted to a low-density use. It is a site that should be a possible response to the unmet need.

The Township's December, 2018 Housing Element says that this .75 acre property has recently gone on the market. It lies between the New Jersey Transit Line and South Avenue West. It lies between intensely developed commercial areas and surface parking. There is a service station

immediately across South Avenue. Other uses across South Avenue West include: a day care center, medical office space and a church.

The Township has proposed zoning this site at a density of 20 units per acre with a 20 percent set-aside to produce three affordable units. It is also seeking a three-unit rental bonus due to the construction of rentals. However, N.J.A.C. 5:95-5.15 recognizes that the MLUL does not grant municipalities the authority to regulate whether housing is owner-occupied or rented. In order to satisfy a rental obligation and receive a rental bonus, there must be an agreement with a developer to redevelop this property with the construction of affordable, rental housing. (N.J.A.C. 5:93-5.15(d))

I am unaware of any interest in redeveloping this property. I am unaware of any commitment to construct affordable rental housing. The municipality should not receive a rental bonus for this site.

The settlement agreement envisions that the North Avenue Redevelopment Area (Block 193, Lots 10-14 and a portion of Lot 6.01, approximately 1.41 acres) will provide eight affordable housing units. It also is seeking a rental bonus of two units for family rental housing.

But, the redevelopment of this site is complicated by diverse ownership. The properties include two municipal buildings, including a fire station.[6] Thus, someone must consolidate the parcels and the municipality must relocate the uses occupied on the two properties it owns.

If the Court accepts this site at all, the Court should require a timetable for that relocation to occur. If it does not occur prior to 2025, the North Avenue Redevelopment site clearly does not create a realistic opportunity to address the 1999-2015 housing obligation.

The settlement agreement does not indicate that there is any developer associated with the North Avenue Redevelopment site and it does not indicate that there is any agreement to build rentals.

[6] It appears that Lot 14 is another Cranford owned property with a building located on it.

The Redevelopment Plan does not indicate that there is any redevelopment effort (such as condemnation) envisioned which will assist any redeveloper to consolidate the properties and build the affordable housing. There is no timetable for relocating the uses on the two municipal properties. There is no indication that this proposal creates a realistic opportunity for affordable housing or is worthy of any rental bonus.

The Wells Fargo Redevelopment site is at 201 Walnut Avenue. It is not a vacant site. It is not a site devoted to a low-density use. It is a site that should be included in the Township's response to the unmet need. There is no indication that a developer is offering to build affordable housing on this site. The redevelopment agreement does not require a redevelopment plan for this property until a year after any approval this Court grants the settlement agreement.

The Township is proposing eight units and is seeking a seven-unit rental bonus for this site. But again, the settlement agreement does not indicate that there is any developer that has agreed to build affordable rentals on this property. The Township should not receive a rental bonus based on the clear language at N.J.A.C. 5:93-5.15(d), which only permits a rental bonus to be granted in advance of construction when there is an agreement with a developer to build rentals.

The settlement agreement provides no information related to the eight Myrtle Special Needs units, for which the Township seeks 16 units of credit. The Housing Element, at Appendix Y depicts a concept plan for two (2) four unit/bedroom special needs facilities located at Block 573, 10 and 12.02.

However, the Housing Element does not explain how this 100 percent affordable project will be constructed. It is my experience that it is highly unlikely that the private sector would agree to build special needs housing at minimal rents without a quid pro quo. Absent an agreement with a developer, the municipality clearly has not created a realistic opportunity for these eight (8) units/bedrooms.

If it is the municipality's intent to build the housing units themselves, it must satisfy the criteria for a municipal construction site as articulated at N.J.A.C. 5:93-5.5. Cranford must demonstrate

control of the site. It must develop a pro forma quantifying the costs, revenues and subsidies necessary to build the housing. It must develop a timetable to build the housing with construction starting within two (2) years of a court's fairness or compliance determination; and it must agree to pay for it, no matter what the costs, should outside agency funding not be available within the two (2) year construction schedule. Probably for this reason, the settlement agreement requires the Township to develop a realistic opportunity for building this housing at Paragraphs 9(d) and 9(e).

Similarly, the settlement agreement recognizes that the Township has not created a realistic opportunity to create five affordable housing units by converting market housing to housing that is affordable to and occupied by low and moderate income households. The parties to the settlement agreement have agreed that four of the "market to affordable" units will be low income units.

Exhibit 9 provides COAH's data regarding the market to affordable program. According to its records, approximately 130 municipalities have proposed the program. Only about 38 have produced any; and only 16 municipalities have produced as many as five market to affordable housing units.

The subsidies associated with creating a market to affordable unit, especially for a low income unit, are often very high. Probably due to the problematic nature of any market to affordable program, the agreement provides a performance schedule for their production. It also provides alternative ways for the Township to address these five units.

The plan for addressing the realistic development potential, includes a proposal to assist a provider of special needs housing to build seven units of supportive housing. Paragraph 9(b) of the settlement agreement requires the Township to enter into an agreement with the ultimate provider of the special needs housing. I am assuming that Paragraph 9(d) and 9(e) are included, in part, to ensure that Cranford follow-through with its commitment to build the supportive housing by; creating a schedule for constructing the housing units within two years of any court

approval of this settlement and requiring Cranford to bond, if necessary, to build the special needs housing.

The settlement also recognizes that there may be a change in circumstance, in the form of a new site, that may increase the Township's realistic development potential. The settlement allows the Township to use its claimed surplus units to address the housing that might have been generated by the possibility of this changed circumstance. Again, the concept of surplus units is inconsistent with the entire concept of a vacant land adjustment – a scarce resource preventing the municipality from addressing the entire housing obligation. This concept is not possible without deviating from COAH's rule by applying credits to the realistic development potential rather than the total housing obligation.

In summary, the Township's settlement for its realistic development potential is a plan to create a realistic opportunity at some point in time. The plan is problematic in that assumes the production of affordable housing on three sites (EF Britten, North Avenue Redevelopment and 201 Walnut Avenue) that are fully developed on which no developer has expressed an interest in building affordable housing. It includes a vague intent to build eight units on Myrtle Avenue; but the plan to build the housing will follow at some point in the future. The settlement for the realistic development potential includes five market to affordable units that is so undefined that the settlement already includes "an out" for the municipality to address the five units required in another manner. The settlement also includes the construction of seven units of supportive housing; but the Township has not identified control of a site, a definitive provider or a timetable for construction. Finally, contrary, to the specific language at N.J.A.C. 5:97-5.15(d), the settlement grants a rental bonus, or extra credit, for rental units when the rentals are not constructed and there is no agreement with a developer to build the affordable rentals in a timely manner.

CRITIQUE OF CRANFORD'S RESPONSE TO THE UNMET NEED

Cranford Township proposes to address its unmet need with five (5) overlay zones that purport to provide an incentive to build affordable housing. An overlay zone does not remove the uses permitted in the impacted zoning district. Normally, it adds another development option

designed to produce affordable housing. Property owners are not obligated to opt for the affordable housing development option.

Three of the proposed overlay zones (the D-C, the D-B and the D-T) were included in the Township's December 2018 Housing Element and Fair Share Plans. My understanding is that these areas already permit housing to be constructed at a density of 20 units per acre and the Township's 2018 Housing Element was proposing to impose a set-aside of affordable housing without granting any density bonus. I raised the density bonus issue in my May 17, 2019 Report and the Township has amended its plan to increase the densities in the overlay zones to 35 units per acre in the D-C Zone, 30 units per acre within the D-B Zone and 25 units per acre within the D-T Zone. In order to achieve the increased densities, a developer would have to provide a 20 percent set-aside for affordable housing.

However, the court should not expect a great deal of housing from these overlay zones. One issue is whether a developer can still create apartments at 20 units per acre without any affordable housing. If so, I doubt that the increased densities attached to the affordable housing option creates an incentive to create affordable housing.

The second issue involves the bulk standards associated with the overlay zone. The settlement agreement does not provide the height or parking standards associated with the overlay zone. If the zone requires RSIS parking compliance and a commercial/other non-residential use on the bottom floor, it may be impossible to achieve the densities associated with the overlay zone within the height limitations of the overlay zones.

The Township has replaced other overlay zones proposed in the December 2018 Housing Element with an overlay zone near the intersection of Park Street and Myrtle Street. There are four lots involved, all in diverse ownership. Each property has been developed as a non-residential use. The settlement agreement proposes redeveloping these properties at a density of 12 units per acre.

The settlement agreement does not reference an agreement with any owner of the Park Street properties to redevelop them to include affordable housing. The proposed density is modest given the magnitude of the unmet need and the character of the area. At most, this 2.6 acre overlay zone, at 12 units per acre and a 20 percent set-aside, will yield five affordable units.[7]

The second overlay zone involves six properties near the intersection of Elsie Avenue and Burnside Avenue. Four of these properties are owned by Cranford. The overlay zone consists of 1.539 acres and the settlement indicates that the properties will be zoned at a density of 12 units per acre with a 20 percent set-aside. Cranford owns approximately 1.3 acres within this overlay zone. Much of its property is vacant and wooded. Most of it, according to the DEP digital records, is also in the 100 year flood plain. (Exhibit 10) Given the apparent environmental constraints of this property, the settlement's addition of this overlay zone is problematic at best. It is unlikely to produce affordable housing units.

The court should be aware that the track record for overlay zones in producing affordable housing is not inspiring, especially when applied to sites where no developers have proposed inclusionary development. Many in the field have characterized overlay zoning as aspirational, with the hope that they create affordable housing. There is no standard on which the court can rely to determine the zoning mechanisms necessary to stimulate affordable housing in substantially developed area. I researched COAH's track record with regards to addressing unmet need during my representation of Cherry Hill. (Exhibit 5)[8]

In preparing a May 14, 2015 Report for Cherry Hill, I reviewed COAH's regulations and the requirements that COAH has imposed on municipalities since 1994. I personally reviewed the compliance reports written by COAH staff between 1994 and 2002 in March of 2002. I have

[7] Paragraph 12(b) of the settlement agreement says that various areas will be overlaid with zoning that provides a compensatory benefit for producing affordable housing. The language excludes the Park Street overlay zone. It is not clear if this omission is an oversight or intentional.

[8] The Cherry Hill plan that I prepared was the result of a settlement with FSHC. The plan incorporated previously developed sites in the RDP, in part, due to the language of a court order and to satisfy FSHC. The Township addressed its RDP and received credit for over 2000 units. The plan, resulting from the settlement, included all developers that had offered sites for affordable housing. The Township's plan for the unmet need may be the most robust plan approved by COAH or a court.

also reviewed COAH's *Municipal Status Reports* of second round compliance. With regards to third round substantive certifications of municipalities that received a second-round vacant land adjustment, I have relied on a July 25, 2013 planner's report, prepared by Ms. Mary Beth Lonergan, P.P., in a matter involving Haddonfield Borough and Estaugh Commons, L.L.C. The Lonergan report provides information regarding the efforts of 10 municipalities to address the unmet need. I have supplemented the data from these sources with COAH's December 20, 2013 data regarding the total number of units built in municipalities that have received vacant land adjustments. I have limited this analysis to municipalities before COAH because I am unaware of a data source that provides the same information for municipalities seeking repose in court.

Exhibit 4 to my Cherry Hill Report includes a chart providing data on 54 municipalities that have received vacant land adjustments from COAH. The chart provides the fair share number, the realistic development potential and the units actually constructed in response to the unmet need. Units constructed toward the unmet need were calculated by subtracting units built from the realistic development potential. If the units built exceed the RDP, the municipality is given credit toward the unmet need (since the unmet need is that portion of the housing obligation in excess of the RDP). The data regarding the certification date and fair share are derived from COAH's Second Round *Municipal Status Report* as well as the narrative and appendices in the Lonergan Report. The RDP is derived from the *Municipal Status Report* by subtracting the numerical vacant land adjustment from the new construction obligation (see new and adjustment columns). It is also derived from the COAH Compliance Reports in the appendix of Ms. Lonergan's report. The units constructed are gleaned from COAH's monitoring records as of December 20, 2013.

Of the 54 municipalities, 28 municipalities (more than half) had not created a single affordable unit in response to its unmet need.

As of my May 14, 2015 Report, Cherry Hill had created 1,067 low and moderate income units. Since its realistic development potential was calculated to be 706, the Township had created 361 units toward its unmet need. Cherry Hill's 361 units toward the unmet need was the most in New Jersey and was 29 percent of the total units created toward the unmet need of the 54 COAH

municipalities combined (1,254 units). Cherry Hill continues to be providing affordable housing by creating redevelopment opportunities with developers interested in building multi-family housing on previously developed properties.[9]

The main point to be made is that, in order to promote affordable housing, the courts should recognize that, while municipalities have no intrinsic interest in building affordable housing, developers do because it is their business. The second-round rules, as written, provided COAH and, of course, the courts the power to recognize the efforts of the private sector and treat the private sector as a resource.

One of the problems with overlay zones in the Cranford downtown area is that the parcels of land are small and in diverse ownership. To be effective, the overlay zones must provide an incentive for diverse property owners to cooperate and consolidate lots in order to effectively use a housing option.

I have analyzed the parcels of land in Cranford's three downtown overlay zones. As the D-C Zone was defined in the December 2018 Housing Element and Fair Share Plan, it included 87 parcels and a total of 20.26 acres. The average lot size was less than a quarter acre and few of the lots were in common ownership.

---

[9] In my professional opinion, there are two reasons why the Cherry Hill experience is so different than the remainder of the State. The first reason involves COAH's inability/refusal to enforce its own regulation to promote redevelopment in an effort to address the unmet need contrasted with FSHC's determination to enforce the production of affordable housing in Cherry Hill.

But the second reason involves the unpredictable nature of the redevelopment process. There is no density standard that creates an incentive to redevelop properties for inclusionary development that are currently: used as a thriving lumber yard; or inhabited by outdated buildings on contaminated properties that will require extensive remediation. It can be fairly common for a municipality to provide an overlay zone on properties and find that no one is interested within the overlay zone; but that other property owners outside of the overlay zone are interested in providing affordable housing.

In Cherry Hill, two (2) properties (Dwell and Pro Build (involving 58 affordable units)), that have contributed to the unmet need, have been approved as a result of receiving use variances. The Garden State Race Track is being redeveloped for a mixed-use development that will include over 200 affordable housing units as a result of municipal efforts to promote redevelopment and FSHC's efforts to promote affordable housing. In addition, a developer that sought to build an inclusionary development on the Woodcrest Golf Course reached a settlement agreement that results in the developer redeveloping two (2) large developed parcels for inclusionary development (Hampton Road and Park Boulevard (involving 148 affordable units).

As described in the December 2018 Housing Element, the D-B Zone included 56 parcels and a total of 18.50 acres. The average lot size was one-third of an acre and few of the lots were in common ownership.

The D-T Zone included nine parcels and a total of 5.62 acres. The average lot size was .62 acres. Of the 5.62 acres, 2.76 acres were owned by churches and .69 acres were owned by the Township. Thus, only 2.17 acres were owned by the private sector and none of the private sector lots were in common ownership.

Even with financial incentives, many commercial properties are encumbered by long term leases. The settlement agreement provides no information regarding the lease status of any of the properties in its downtown overlay zones.

In contrast, Hartz is offering 30.5 acres that the Borough concedes is suitable for attached housing. Hartz is ready, willing and able to build multi-family housing at 30 units per acre, with a 20 percent set-aside, yielding 181 low and moderate-income units.

CONCLUSION

FSHC and Cranford have agreed that the Township has a third-round housing obligation of 440 low and moderate income units. Cranford is seeking 81 credits for past housing activities. The State regulations and the Fair Housing Act provide that credits be applied to the total 440-unit housing obligation to determine the remaining fair share obligation. Applying the rules as written, Cranford's remaining housing obligation, or unmet need, assuming that it receives all of its credits, is 359.

Cranford is seeking a vacant land adjustment. When a municipality seeks a vacant land adjustment, it must compute and address a realistic development potential based on the capacity of vacant sites and sites devoted to a low-density use. (N.J.A.C. 5:93-4.2(d)). Based on the regulation, as written, the Township's realistic development potential would be seven.

The Township must then address the 359-unit remaining portion of the housing obligation, the unmet need, by promoting affordable housing through the use of properties that are more substantially developed. (N.J.A.C. 5:93-4.2(h). The EF Britten, North Avenue Redevelopment, 201 Walnut Avenue and Hartz sites are all examples of sites that could and should be rezoned to address the unmet portion of the municipal obligation. In addition, the Township has offered to provide overlay zoning on various downtown areas with the hope that these overlay zones can provide affordable housing.

With the exception of the Hartz site, I am not aware of anyone's interest in building affordable housing on any of the sites or areas designated for affordable housing. In contrast, Hartz is an experienced inclusionary developer and is ready, willing and able to build affordable housing. It has prepared a concept plan that demonstrates how it can construct 181 low and moderate income units and still provide generous set-backs to surrounding land uses. The state regulations, at N.J.A.C. 5:93-4.2(h), provide the court with the authority to require the Hartz site to be rezoned so that it can produce 181 low and moderate income units.

Instead of the scenario outlined by the State regulations, the settlement outlines a different path that enables Cranford to argue: that it has insufficient vacant sites and sites devoted to low density uses to address its housing obligation; and, at the same time, argue that it has a surplus of affordable housing. These arguments would not be possible without deviating from COAH's rules by: including substantially developed sites in the calculation of the realistic development potential instead of rezoning the site as part of the unmet need; understating the density used to calculate the realistic development potential of the Hartz site; understating the Hartz site's realistic development potential by eliminating six acres due to PSE&G's interest in the property; and subtracting potential credits from the realistic development potential instead of the total third round housing obligation. In addition, these arguments would not be possible unless the settlement deviated from N.J.A.C. 5:97-5.15(d) and allowed a rental bonus prior to the construction of affordable housing without a developer agreeing to build affordable rental housing.

As a result of all the deviations from the State regulations, the settlement agreement proposes relatively low density zoning on the Hartz site to yield anywhere from 45-49 units, instead of the 181 proposed. The settlement agreement proposes to zone the Hartz site at 9-10 units per acre. Yet it proposes: 20 units per acre on the EF Britten site; 30 units per acre on the North Avenue Redevelopment site; 47 units per acre on the 201 Walnut Avenue site; and densities ranging from 12 units per acre to 35 units per acre in various overlay zones identified in the settlement agreement. In my professional opinion, the Hartz site can accommodate densities more similar to the 30 units per proposed on the North Avenue Redevelopment site.

The much lower density on the Hartz site might not be so eye opening if it were not the only site, of which I am aware, that has an experienced developer of affordable housing offering to build an inclusionary development. The lower density on the Hartz site appears particularly unfair to Hartz as well as low and moderate income households because the other components of the Township's plan appear so problematic.

There is no standard or track record to indicate that the proposed zoning of the EF Britten, North Avenue Redevelopment and 201 Walnut Avenue sites will create a realistic opportunity. Moreover, at this point, there is no basis to grant a rental bonus for any of these sites. The rental bonus for these sites, proposed in the settlement agreement totals 12 units.

With regard to the North Avenue Redevelopment site, we know that the site includes an existing fire station and another municipal building that must be relocated prior to the construction of an inclusionary development. If this site is accepted at all, the Court should get a timetable for that relocation and redevelopment to occur. If the redevelopment is unlikely to occur prior to 2025, the North Avenue Redevelopment site clearly does not create a realistic opportunity to address the 1999-2015 housing obligation.

Rather than zone the Hartz site for a higher density, the Township is relying on a five-unit market to affordable program. Market to affordable programs have been notoriously unsuccessful throughout the State and the settlement agreement seems to recognize how

problematic market to affordable programs are by providing an "out" to address these five units in another way.

Rather than zone the Hartz site to address the unmet need as per N.J.A.C. 5:93-4.2(h), Cranford is proposing a series of overlay zones in downtown areas. Such rezonings have generated relatively little affordable housing and rezoning the downtown area should not be at the expense of more density on the Hartz site, which is, to the best of my knowledge, the only site owned by a developer that has offered to build inclusionary development.

In looking at the other components of the Township's settlement, I find no evidence that any of the proposed rezoning of properties are as promising as rezoning the Hartz property. Thus, in a very real way, I find that the settlement is unfair to low and moderate income households in that it will result in substantially less affordable housing units. The State regulations provide the authority to rezone the Hartz property for a higher density and I would urge the court to order the rezoning of the Hartz property at a density that will result in much more affordable housing, i.e., at a density of 30 units per acre as applied to the entire Hartz site.