



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

March 27, 2017

Robert F. Renaud, Esquire  
Palumbo, Renaud and DeAppolonio, LLC  
190 North Avenue East  
Cranford, New Jersey 07016

Christopher H. Minks, Esquire  
General Counsel  
Russo Development  
570 Commerce Boulevard  
Carlstadt, New Jersey 07072

**Re: In the Matter of the Borough of Garwood, County of Union, Docket  
No. UNN-L-2406-15**

Dear Mr. Renaud and Mr. Minks:

This letter memorializes the terms of an agreement reached between the Borough of Garwood (the Borough or "Garwood"), the declaratory judgment plaintiff, Fair Share Housing Center (FSHC), a Supreme Court-designated interested party in this matter in accordance with In re N.J.A.C. 5:96 and 5:97, 221 N.J. 1, 30 (2015)(Mount Laurel IV) and, through this settlement, a defendant in this proceeding, and 490 South Avenue, LLC, 570 Commerce Boulevard, Carlstadt, New Jersey 07072 ("490 South"), a defendant/intervenor in this proceeding.

### **Background**

Garwood filed the above-captioned matter on July 20, 2015 seeking a declaration of its compliance with the Mount Laurel doctrine and Fair Housing Act of 1985, N.J.S.A. 53:27D-301 et seq. in accordance with In re N.J.A.C. 5:96 and 5:97, supra. FSHC and the Borough, in accordance with instructions from the Honorable Karen M. Cassidy, A.J.S.C., participated in mediation facilitated by Special Master Elizabeth McKenzie, AICP, PP. Through that process, the Borough, FSHC and 490 South agreed to settle the litigation and to present that settlement to the trial court with jurisdiction over this matter to review, recognizing that the settlement of Mount Laurel litigation is favored because it avoids delays and the expense of trial and results more quickly in the construction of homes for lower-income households.

### **Settlement terms**

The Borough, 490 South, and FSHC hereby agree to the following terms:

1. FSHC and 490 South agree that the Borough, through the adoption of the attached Summary of Proposed Fair Share Plan ("the Plan"), Exh. A, and the implementation of the Plan and this agreement, satisfies its obligations under the Mount Laurel doctrine and Fair Housing Act of 1985, N.J.S.A. 52:27D-301 et seq., for the Prior Round (1987-1999) and Third Round (1999-2025), new construction obligations, and the Third Round rehabilitation obligation.

2. At this time and at this particular point in the process resulting from the Supreme Court's Mount Laurel IV decision, when fair share obligations have yet to be definitively determined, it is appropriate for the parties to arrive at a settlement regarding a municipality's Third Round present and prospective need instead of doing so through plenary adjudication of the present and prospective need.
3. FSHC, 490 South, and Garwood hereby agree that Garwood's affordable housing obligations are as follows:

Rehabilitation Share (per Kinsey Report <sup>1</sup> )	27
Prior Round Obligation (pursuant to N.J.A.C. 5:93)	19
Third Round (1999-2025) Prospective Need (per Kinsey Report, as adjusted through this settlement agreement)	136

For purposes of this agreement, the Third Round Prospective Need shall be deemed to include the Gap Period Present Need, which is a measure of households formed from 1999-2015 that need affordable housing, that was recognized by the Supreme Court in its January 18, 2017 decision in *In re Declaratory Judgment Actions Filed By Various Municipalities*, \_\_\_ N.J. \_\_\_, 2017 WL 192895 (Jan. 18, 2017).

The Borough's efforts to meet its present need include continuing participation in the Union County Home Improvement Program, which has resulted in a total of 17 units having been rehabilitated since 2010, of which 3 units were rehabilitated in the 2015-2016 time period.

4. As noted above, the Borough has a Prior Round obligation of 19 units, which is met through the following compliance mechanisms:
  - a. 4 age-restricted units (out of 71) at Block 108, Lot 9, 320 Second Avenue.
  - b. 10 affordable family rental units (out of 30) in South Avenue Redevelopment Project I (490 South) at Block 401, Lots 1-5, 400 and 450-90 South Avenue and 20, 50 and 70 Center Street.
  - c. 5 rental bonuses.
5. Although Garwood has a 136 unit Third Round obligation. The municipality, as calculated in Exh. A, has a calculated realistic development potential (RDP) of 84 units and an effective RDP yield of 90 units, leaving an unmet need of 46 units. The 90 unit RDP will be satisfied as follows:
  - a. 20 affordable family rental units (out of 30) in South Avenue Redevelopment Project I at Block 401, Lots 1-5, 400 and 450-90 South Avenue and 20, 50 and 70 Center Street.

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

- b. 8 affordable family rental units in South Avenue Redevelopment Project II at Block 403, Lots 1-6 and 19-22, located at 423-453 South Avenue and 424-440 Willow Avenue.
  - c. 17 affordable family rental units in Garwood Paperboard Project at Block 211, Lot 6, 75 North Avenue.
  - d. 22 affordable age-restricted rental units (out of 71) at Block 108, Lot 9, 320 Second Avenue.
  - e. 23 rental bonuses.
6. The RDP of 90, subtracted from the Third Round obligation of 136 units, results in an unmet need of 46 units, which shall be addressed through the following mechanisms, as more fully described in the attached fair share plan:
- a. As of right zoning for inclusionary mixed use development in the Borough's GB General Business zone in the Downtown Area.
  - b. Overlay zoning on the Garwood Mall property, Block 402, Lot 5 and NJ Transit property, Block 1000, Lot 2, a total of 6.628 acres x 20 units / acre = 133 total units x .15 = 20 affordable units
  - c. Adoption of a mandatory set-aside ordinance requiring as follows:  
  
A mandatory set-aside requirement of 20% (if the affordable units will be for sale) and 15% (if the affordable units will be for rent) shall be imposed on any multi-family residential development created through any Borough or Board action involving a rezoning, use variance, density variance, redevelopment plan or rehabilitation plan permitting redevelopment that provides an incentive in the form of an increase in the density on a site, which density is at or above six (6) units per acre and results in the construction or creation of five or more new dwelling units. This requirement does not affect the requirements for production of affordable housing on sites that are zoned for inclusionary development as part of the Plan. This requirement does not give any developer the right to any such rezoning, variance or other relief, or establish any obligation on the part of the Borough of Garwood to grant such rezoning, variance or other relief, nor does it suggest that a density of six (6) units per acre provides a sufficient financial incentive for inclusionary residential development in all cases. A property shall not be permitted to be subdivided so as to avoid meeting this requirement. All affordable units created by this mechanism shall be family affordable housing units (i.e., non-age-restricted).
7. The Borough intends to provide a realistic opportunity for the development of affordable housing through the adoption of inclusionary zoning on the following sites:
- a. South Avenue Redevelopment Project I at Block 401, Lots 1-5, 400 and 450-90 South Avenue and 20, 50 and 70 Center Street.
  - b. South Avenue Redevelopment Project II at Block 403, Lots 1-6 and 19-22, located at 423-453 South Avenue and 424-440 Willow Avenue.

c. Garwood Paperboard Project at Block 211, Lot 6, 75 North Avenue.

With respect to the South Avenue Redevelopment Project I (490 South), and as a material term of this settlement, the Borough specifically agrees (i) to the adoption of the South Avenue Redevelopment Plan permitting the 490 South I project to be redeveloped as contemplated herein, and (ii) to the execution of the Redevelopment Agreement with 490 South for the 490 South I project, which Redevelopment Plan and Redevelopment Agreement shall provide for the construction of not less than 298 apartment units, of which 30, and at least ten (10%) percent, shall be affordable units as contemplated herein; and (iii) to the execution of a financial agreement for the 490 South I project; all of which (items (i) through (iii) herein) shall be on terms and conditions mutually agreeable to 490 South and to the Borough, to permit the 490 South I project to be economically viable; and that all of these actions shall occur prior to the entry of a final judgment in this matter.

With respect to the South Avenue Redevelopment Project II (490 South II), the Borough specifically agrees (i) to adopt a Redevelopment Plan permitting the 490 South II project to be redeveloped as contemplated herein, and (ii) to enter into a Redevelopment Agreement with 490 South as the redeveloper, which Redevelopment Plan and Redevelopment Agreement shall provide for the construction of not more than 52 (and not less than 52 unless 490 South consents) stacked townhouse units, of which 8, and at least fifteen (15%) percent, shall be affordable units as contemplated herein; and (iii) to enter into a financial agreement for the 490 South II project; all of which (items (i) through (iii) herein) shall be on terms and conditions mutually agreeable to 490 South and to the Borough, to permit the 490 South II project to be economically viable; and (iv) that all of these actions shall occur prior to the entry of a final judgment in this matter, or shall be conditions subsequent to be satisfied within a reasonable time of the entry of final judgment as the Court shall determine.

8. The Borough agrees to require 13% of all units addressing the third round obligation, with the exception of units constructed as of July 1, 2008, and units subject to preliminary or final site plan approval, to be very low income units, with half of the very low income units being available to families. The municipality will comply with these requirements. With respect to the projects addressing the third round obligation, four (4) of the affordable units in 490 South I, two (2) of the affordable units in 490 South II and three (3) of the affordable units at the Garwood Paperboard Project shall be affordable to very low income households. In addition, the affordable housing ordinance shall require that a minimum of 13 percent of the affordable units in any other affordable housing developments in the Borough that are used to address the Unmet Need will be affordable to very low income households.
9. The Borough shall meet its Third Round Prospective Need in accordance with the following standards as agreed to by the Parties and reflected in the table in paragraph 6 above:
  - a. Third Round bonuses will be applied in accordance with N.J.A.C. 5:93-5.15(d).
  - b. At least 50 percent of the units addressing the Third Round Prospective Need shall be affordable to very-low-income and low-income households with the remainder affordable to moderate-income households.

- c. At least twenty-five percent of the Third Round Prospective Need shall be met through rental units, including at least half in rental units available to families.
  - d. At least half of the units addressing the Third Round Prospective Need in total must be available to families.
  - e. The Borough agrees to comply with an age-restricted cap of 25% and to not request a waiver of that requirement. This shall be understood to mean that in no circumstance may the municipality claim credit toward its fair share obligation for age-restricted units that exceed 25% of all units developed or planned to meet its cumulative prior round and third round fair share obligation.
10. The Borough shall add to the list of community and regional organizations in its affirmative marketing plan, pursuant to N.J.A.C. 5:80-26.15(f)(5), Fair Share Housing Center, the New Jersey State Conference of the NAACP, the Latino Action Network, the Supportive Housing Association of New Jersey, and the New Jersey Housing Resource Center, and shall, as part of its regional affirmative marketing strategies during its implementation of this plan, provide notice to those organizations of all available affordable housing units. The Borough also agrees to require any other entities, including developers or persons or companies retained to do affirmative marketing, to comply with this paragraph.
11. All units shall include the required bedroom distribution, be governed by controls on affordability and affirmatively marketed in conformance with the Uniform Housing Affordability Controls, N.J.A.C. 5:80-26.1 et. seq. or any successor regulation, and all other applicable law, with the exception that in lieu of 10 percent of affordable units in rental projects being required to be at 35 percent of median income, 13 percent of affordable units in such projects shall be required to be at 30 percent of median income. The Borough as part of its HEFSP shall adopt and/or update appropriate implementing ordinances in conformance with standard ordinances and guidelines developed by COAH to ensure that this provision is satisfied.
12. All new construction units shall be adaptable in conformance with P.L.2005, c.350/N.J.S.A. 52:27D-311a and -311b and all other applicable law.
13. As an essential term of this settlement, within one hundred twenty (120) days of Court's approval of this Settlement Agreement, the Borough shall adopt an Affordable Housing Ordinance and the amendments to the Borough's Zoning Ordinance required to implement the terms of this settlement agreement and the zoning contemplated herein.
14. The parties agree that if a decision of a court of competent jurisdiction in Union County, or a determination by an administrative agency responsible for implementing the Fair Housing Act, or an action by the New Jersey Legislature, would result in a calculation of an obligation for the Borough for the period 1999-2025 that would be lower by more than ten (10%) percent than the total prospective Third Round need obligation established in this agreement, which is deemed to include the Gap Period Present Need, and if that calculation is memorialized in an unappealable final judgment or is not appealed, the Borough may seek to amend the judgment in this matter to reduce its fair share obligation accordingly. Notwithstanding any such reduction, the Borough shall be obligated to implement the fair share plan attached hereto, including by leaving in place

any site specific zoning adopted or relied upon in connection with the Plan approved pursuant to this settlement agreement; taking all steps necessary to support the development of any 100% affordable developments referenced herein; maintaining all mechanisms to address unmet need; and otherwise fulfilling fully the fair share obligations as established herein. The reduction of the Borough's obligation below that established in this agreement does not provide a basis for seeking leave to amend this agreement or seeking leave to amend an order or judgment pursuant to R. 4:50-1. If the Borough prevails in reducing its prospective need for the Third Round, the Borough may carry over any resulting extra credits to future rounds in conformance with the then-applicable law.

15. The Borough will prepare a spending plan. The parties to this agreement agree that if the spending plan is found to be valid and is approved by the Court, and that the expenditures of funds contemplated under the agreement will constitute "commitment" for expenditure pursuant to N.J.S.A. 52:27D-329.2 and -329.3, with the four-year time period for expenditure designated pursuant to those provisions beginning to run with the entry of a final judgment approving this settlement in accordance with the provisions of In re Tp. Of Monroe, 442 N.J. Super. 565 (Law Div. 2015) (aff'd 442 N.J. Super. 563). On the first anniversary of the execution of this agreement, and every anniversary thereafter through the end of this agreement, the Borough agrees to provide annual reporting of trust fund activity to the New Jersey Department of Community Affairs, Council on Affordable Housing, or Local Government Services, or other entity designated by the State of New Jersey, with a copy provided to Fair Share Housing Center and posted on the municipal website, using forms developed for this purpose by the New Jersey Department of Community Affairs, Council on Affordable Housing, or Local Government Services. The reporting shall include an accounting of all housing trust fund activity, including the source and amount of funds collected and the amount and purpose for which any funds have been expended.
16. On the first anniversary of the execution of this agreement, and every anniversary thereafter through the end of this agreement, the Borough agrees to provide annual reporting of the status of all affordable housing activity within the municipality through posting on the municipal website with a copy of such posting provided to Fair Share Housing Center, using forms previously developed for this purpose by the Council on Affordable Housing or any other forms endorsed by the Special Master and FSHC.
17. The Fair Housing Act includes two provisions regarding action to be taken by the Borough during the ten-year period of protection provided in this agreement. The Borough agrees to comply with those provisions as follows:
  - a. For the midpoint realistic opportunity review due on July 1, 2020, as required pursuant to N.J.S.A. 52:27D-313, the Borough will post on its municipal website, with a copy provided to Fair Share Housing Center, a status report as to its implementation of its Plan and an analysis of whether any unbuilt sites or unfulfilled mechanisms continue to present a realistic opportunity and whether any mechanisms to meet unmet need should be revised or supplemented. Such posting shall invite any interested party to submit comments to the municipality, with a copy to Fair Share Housing Center, regarding whether any sites no longer present a realistic opportunity and should be replaced and whether any mechanisms to meet unmet need should be revised or supplemented. Any

interested party may by motion request a hearing before the court regarding these issues.

- b. For the review of very low income housing requirements required by N.J.S.A. 52:27D-329.1, within 30 days of the third anniversary of this agreement, and every third year thereafter, the Borough will post on its municipal website, with a copy provided to Fair Share Housing Center, a status report as to its satisfaction of its very low income requirements, including the family very low income requirements referenced herein. Such posting shall invite any interested party to submit comments to the municipality and Fair Share Housing Center on the issue of whether the municipality has complied with its very low income housing obligation under the terms of this settlement.
18. FSHC is hereby deemed to have party status in this matter and to have intervened in this matter as a defendant without the need to file a motion to intervene or an answer or other pleading. The parties to this agreement agree to request the Court to enter an order declaring FSHC is an intervenor, but the absence of such an order shall not impact FSHC's rights.

This settlement agreement must be approved by the Court following a fairness hearing as required by Morris Cty. Fair Hous. Council v. Boonton Twp., 197 N.J. Super. 359, 367-69 (Law Div. 1984), aff'd o.b., 209 N.J. Super. 108 (App. Div. 1986); East/West Venture v. Borough of Fort Lee, 286 N.J. Super. 311, 328-29 (App. Div. 1996). The Borough shall present its planner as a witness at this hearing. FSHC agrees not to challenge the attached Plan (Exh. A) at the fairness hearing. FSHC contends that the municipality should receive the "the judicial equivalent of substantive certification and accompanying protection as provided under the FHA" in accordance with the Supreme Court's decision in In re N.J.A.C. 5:96 and 5:97, 221 N.J. 1, 36 (2015). Although FSHC does not agree that Garwood is entitled to a Judgment of Compliance and Repose, FSHC agrees that it will not appeal any determination that Garwood is entitled to a Judgment of Compliance and Repose with immunity through July 1, 2025, should the Court grant same.

19. FSHC and 490 South agree that as a material term of this Settlement Agreement, 490 South shall pay to FSHC the sum of four thousand (\$4,000.00) dollars within 10 days of the entry of final judgment in this matter.
20. If an appeal is filed of the Court's approval or rejection of the Settlement Agreement, the Parties agree to defend the Agreement on appeal, including in proceedings before the Superior Court, Appellate Division and New Jersey Supreme Court, and to continue to implement the terms of the Settlement Agreement if the Agreement is approved before the trial court unless and until an appeal of the trial court's approval is successful at which point, the Parties reserve their right to rescind any action taken in anticipation of the trial court's approval. All Parties shall have an obligation to fulfill the intent and purpose of this Agreement.
21. This settlement agreement may be enforced through a motion to enforce litigant's rights or a separate action filed in Superior Court, Union County
22. Unless otherwise specified, it is intended that the provisions of this Agreement are to be severable. The validity of any article, section, clause or provision of this Agreement shall

not affect the validity of the remaining articles, sections, clauses or provisions hereof. If any section of this Agreement shall be adjudged by a court to be invalid, illegal, or unenforceable in any respect, such determination shall not affect the remaining sections.

23. This Agreement shall be governed by and construed by the laws of the State of New Jersey.
24. This Agreement may not be modified, amended or altered in any way except by a writing signed by each of the Parties.
25. This Agreement may be executed in any number of counterparts, each of which shall be an original and all of which together shall constitute but one and the same Agreement.
26. The Parties acknowledge that each has entered into this Agreement on its own volition without coercion or duress after consulting with its counsel, that each party is the proper person and possess the authority to sign the Agreement, that this Agreement contains the entire understanding of the Parties and that there are no representations, warranties, covenants or undertakings other than those expressly set forth herein.
27. Each of the Parties hereto acknowledges that this Agreement was not drafted by any one of the Parties, but was drafted, negotiated and reviewed by all Parties and, therefore, the presumption of resolving ambiguities against the drafter shall not apply. Each of the Parties expressly represents to the other Parties that: (i) it has been represented by counsel in connection with negotiating the terms of this Agreement; and (ii) it has conferred due authority for execution of this Agreement upon the persons executing it.
28. Any and all Exhibits and Schedules annexed to this Agreement are hereby made a part of this Agreement by this reference thereto. Any and all Exhibits and Schedules now and/or in the future are hereby made or will be made a part of this Agreement with prior written approval of both Parties.
29. This Agreement constitutes the entire Agreement between the Parties hereto and supersedes all prior oral and written agreements between the Parties with respect to the subject matter hereof except as otherwise provided herein.
30. No member, official or employee of the Borough shall have any direct or indirect interest in this Settlement Agreement, nor participate in any decision relating to the Agreement which is prohibited by law, absent the need to invoke the rule of necessity.
31. Anything herein contained to the contrary notwithstanding, the effective date of this Agreement shall be the date upon which all of the Parties hereto have executed and delivered this Agreement.
32. All notices required under this Agreement ("Notice[s]") shall be written and shall be served upon the respective Parties by certified mail, return receipt requested, or by a recognized overnight or by a personal carrier. In addition, where feasible (for example, transmittals of less than fifty pages) shall be served by facsimile or e-mail. All Notices shall be deemed received upon the date of delivery. Delivery shall be affected as follows, subject to change as to the person(s) to be notified and/or their respective addresses upon ten (10) days notice as provided herein:



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

**TO THE BOROUGH:** Robert F. Renaud, Esquire  
Palumbo, Renaud and DeAppolo  
190 North Avenue East  
Cranford, New Jersey 07016  
Phone: 908 272-9700  
Fax: 908 272-9029  
Email: rrenaud@prdlawnj.com

**WITH A COPY TO THE  
MUNICIPAL CLERK:** Clerk  
Borough of Garwood  
403 South Avenue,  
Garwood, NJ 07027  
Email: c-ariemma@garwood.org

**TO 490 SOUTH:** Christopher H. Minks, Esquire  
SVP, General Counsel  
c/o Russo Development  
570 Commerce Boulevard  
Carlstadt, New Jersey 07072  
Email: cminks@russodevelopment.com

**WITH A COPY TO:** Edward Russo, Manager  
490 South Avenue, LLC  
c/o Russo Development  
570 Commerce Boulevard  
Carlstadt, New Jersey 07072  
Email: erusso@russodevelopment.com

Please sign below if these terms are acceptable.

Sincerely,

Kevin D. Walsh, Esq.  
Counsel for Intervenor/Interested Party  
Fair Share Housing Center

On behalf of the Borough of Garwood, with the authorization  
of the governing body:

\_\_\_\_\_  
Charles P. Lombardo, Mayor  
Dated:\_\_\_\_\_

On behalf of 490 South Avenue, LLC:

\_\_\_\_\_  
Edward Russo, Manager, Russo Development and 490 South Avenue, LLC  
Dated:\_\_\_\_\_