

Prepared by the Court

In the Matter of the Application of the
Borough of Hillsdale,
Plaintiff/Petitioner

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: BERGEN COUNTY

DOCKET NO.: BER-L-5680-15

Civil Action

ORDER

This matter came before the court on February 9, 2018 for a hearing to determine the fairness of a settlement agreement (“Fairness Hearing”) between the Borough of Hillsdale and Fair Share Housing Center (FSHC). The scope of the hearing also included a preliminary determination of the sufficiency of Hillsdale’s Third Round Housing Element and Fair Share Plan. The court’s function at a Fairness Hearing is to determine whether the settlement between the Borough of Hillsdale and FSHC is fair to the protected class in the context of meeting Hillsdale’s constitutional requirement to provide affordable housing. According to New Jersey’s Constitution, municipalities must provide opportunities for the development of affordable housing for low and moderate income households, and that is the perspective from which the court must determine fairness, i.e. from the perspective of people with low and moderate income, and their opportunity to have affordable housing.

Present for the hearing were Francis J. Banisch, III, court appointed Special Master, Mark D. Madaio, Esq., appearing on behalf of the Borough and Joshua D. Bauers, on behalf of Fair Share Housing Commission (FSHC). Also present were Mayor

John Ruocco and Jonathan DeJoseph, Borough Administrator. There were no interveners or objectors.

Marked for identification and ultimately into evidence were the following:

P-1 Complaint

P-2 Order setting Fairness Hearing Date

P-3 Form of Notice

P-4 Green cards and other evidence of mailing

P-5 Proof of Publication in the Record Newspaper on January 8, 2018

P-6 Settlement Agreement

P-7 Report of the Special Master

P-8 Map of the Borough

The Borough of Hillsdale by and through its attorney, Mr. Madaio called Darlene Green, PP/AICP and the Borough Planner to explain the basis for Hillsdale's proposed Third Round Housing Element and Fair Share Plan. Ms. Green has a Bachelor of Arts in Architecture from Lehigh University and a Masters from Rutgers University in City and Regional Planning. Ms. Green is associated with Maser Consulting, P.A. Ms. Green has been a planner since 2007 and Hillsdale's Planner since 2014. The court accepted Ms. Green as an expert in planning and affordable housing.

Francis J. Banisch, III, PP/AICP testified. Mr. Banisch is the principal of Banisch Associates, Inc., a Planning and Design Consulting firm located in Flemington, New Jersey. He holds a Bachelor of Arts degree in Architecture and Urban Planning from Princeton University and is a licensed Professional Planner in New Jersey. He is a member of the American Institute of Certified Planners, American Planning Association

and New Jersey Association of Consulting Planners. Mr. Banisch has been a community planning and design consultant serving New Jersey municipalities since 1975. Additionally, he has served as a Mount Laurel Special Master for over two decades. He is the court-appointed master in seventeen Bergen County municipalities, and triple that number throughout the state.

The court notes that the proper procedure for a fairness hearing has been followed in this matter to make sure that the interests of low and moderate income households have been safeguarded. See Morris Cty. Fair Hous. Council v. Booton Twp., 197 N.J. Super. 359, 371 (Law Div. 1984). Adequate public notice of the hearing was mailed to appropriate persons and published in the Record on January 8, 2018.

The courts notes that a municipality's affordable housing obligation is comprised of three components: 1) present need (rehabilitation); 2) prior round (1987-1999); and 3) third round prospective need which runs from July 1, 1999 to June 30, 2025. "A municipality may provide its fair share of affordable units by 'means of any technique or combination of techniques' which satisfy its Mount Laurel obligation." E.W. Venture v. Borough of Fort Lee, 286 N.J. Super. 311, 336 (App. Div. 1996) (quoting N.J.S.A. 52:27D-311).

The Special Master's report and testimony notes that the parties to the Settlement Agreement have agreed the Borough's Present Need (rehabilitation share) Obligation is 26, the Prior Round Obligation is 111 and the Prospective Need is 234. These obligations were determined based upon a report prepared by David Kinsey, PP/Ph.D on behalf of FSHC. Ms. Green provided testimony at the Fairness Hearing regarding the methods Hillsdale is using to fully satisfy the present need and prior round obligations.

She also testified that Hillsdale has demonstrated that sufficient vacant land is not available to allow for development of all 234 third round units and that the realistic development potential for the Borough is 35 affordable units. Special Master Banisch agreed with the findings of Ms. Green.

The court is not here to act as the legislature or municipal planner and substitute its plan for where affordable housing units should be built for that of the municipality. See Morris Cty. Fair Hous. Council, supra, at 370. “[A] trial judge may approve a settlement [regarding a municipality’s Mount Laurel obligation]” after a ‘fairness’ hearing to the extent the judge is satisfied that the settlement adequately protects the interests of lower-income persons on whose behalf the affordable units proposed by the settlement are to be built.” E.W. Venture, supra at 328. The court must also consider whether the proposed settlement will result in the expedited construction of a significant number of low income housing units, Morris Cty. Fair Hous. Council, supra at 327. If the agreement is found to be fair, and the Borough fulfills its compliance obligations, then the court will order a judgment of repose.

The court holds, based upon the report of the Special Master, the testimony of the Borough’s Planner, Darlene Green, the endorsement of the Settlement Agreement by Mr. Bauers on behalf of FSHC, and the exhibits marked into evidence, that the settlement agreement between the Borough of Hillsdale and Fair Share Housing Center Settlement is fair to the protected class of low and moderate income persons. Hillsdale is a developed suburban community. The court finds the Borough completed a vacant land analysis pursuant to COAH’s Second Round Regulation, N.J.A.C. 5:93 in the autumn of 2015. That analysis determined that Hillsdale had a realistic development potential (RDP) of 17

units. The finding was later amended, at the request of FSHC, to 35 units, and the Borough and FSHC have accepted this calculation. The Borough's prior round obligation of 111 units, under the terms of the Settlement Agreement, is addressed entirely by Hillsdale House, a Housing and Urban Development building which is 100% affordable. The Borough's prospective need is 234 units and the Borough is fully addressing the 35-unit RDP with realistic opportunities for the creation of affordable housing. Applying the reduction of the RDP of 35 units to the prospective need results in an unmet prospective need of 199 units. Hillsdale plans to further address the unmet need portion of its third round obligation through alternative living arrangement facilities, a Borough-wide set aside ordinance, an inclusionary overlay zone area and 100% Affordable project set forth in Table 2 of the Special Master's report which is incorporated herein. The Borough set aside ordinance will not provide additional use options for the sites set forth in Table 2, each of which will require a 20% set aside for for-sale units and a 15% set aside for rental units. The Verizon site will permit a mixed-use residential zone with a residential density of 20 units per acre. The redevelopment area will permit a maximum density of 28 units per acre.

The court finds the Settlement Agreement provides for rezoning and other mechanisms which provide a realistic opportunity for achievement of the 35-unit RDP.

The Settlement Agreement between Hillsdale and Fair Share Housing Center is fair because it will fully address the Borough's constitutional obligation to create a realistic opportunity for the construction of its fair share of affordable housing. The endorsement of the Settlement Agreement by the Special Master and FSHC speaks for itself. In coming to the conclusion that the Settlement Agreement is fair, the court has

considered the criteria set forth in East/West Venture v. Borough of Fort Lee, *supra*. With regard to the criteria: (1) *Consideration of the number of affordable units being constructed*. The Special Master opines and the court finds the Settlement Agreement confirms the Borough's commitment to implement inclusionary and overlay zoning to provide affordable housing units. (2) *The methodology by which the number of affordable units is provided*. The court finds, based upon the conclusion of Special Master Banisch that the methodology used, while being debated, finds its roots in the methodology used by COAH in 1994 to determine cumulative 1987-1999 Prior Round Obligations. (3) *Other Contributions by the Borough*, the Special Master opines that this criteria is not strictly applicable to settlement agreement, but nonetheless concludes, and the court finds that at least one-half of the affordable housing units addressed in the Third Round Prospective Need will be available to family households. The Borough will require at least 13 percent of all of the new affordable housing units in its Plan to be affordable to very low income households earning 30 percent or less of median income and that at least one-half of these units will be available to families. The plan provides at least 25 percent of the Third Round Prospective Need obligation shall be met with rental units of which 50 percent will be available to families. No more than 25 percent of affordable units will be age-restricted. Rental bonuses shall be as set forth in N.J.A.C. 5:93 and shall not exceed the rental obligation. At least 50 percent of all affordable units in each inclusionary site shall be affordable to low income and very low income households with the remainder affordable to moderate income households. The Borough will comply with affirmative marketing and affordability regulations set forth at N.J.A.C. 5:80-26.1 et seq., except that in lieu of the requirement in N.J.A.C. 5:80-26.3(d) for 10

percent of all low and moderate income rental units to be affordable to households earning 35 percent or less of median income, and of particular significance to the court, the requirement shall be that 13 percent of all low and moderate income rental units shall be affordable to households earning 30 percent or less of median income. The Borough is expanding the list of community and regional organizations which will receive notice of the availability of affordable housing units in the Affirmative Marketing Plan. Within 120 days of court approval of the Settlement Agreement, the Borough will adopt the Housing Element and Fair Share Plan and all required implementing ordinances to ensure the foregoing occurs. (4) *Other components of the Settlement Agreement which contribute to the satisfaction of the constitutional obligation.* The Special Master opines and the court finds that the process of obtaining court approval and the scrutiny the Settlement Agreement has received from FSHC and the conditions contained in the Settlement Agreement and the report of the Special Master requiring adaptation of certain Master Plan and ordinance amendments will allow the Borough to move forward in the satisfaction of its constitutional obligation. 5) *Other factors relevant to the fairness of the Settlement Agreement.* Special Master Banisch opines and the court finds that the continuing monitoring of the Settlement Agreement will advance the interests of low income households.

The court also finds that the proposed settlement will result in expedited construction of low income housing units, and that the Borough's Housing Trust Funds has monies in excess of what is needed to fund its obligations pursuant to the Settlement Agreement.

If the Borough of Hillsdale fulfills the conditions of the settlement agreement, including the list of documents which need to be prepared and adopted by the Borough within 120 days of the court's order as set forth in the Settlement Agreement and the Special Master's report, and the identification of the parcel of property to be donated to Habitat for Humanity, the court will determine whether there has been compliance and make the appropriate determinations either by court order or a compliance hearing. See E.W. Venture v. Borough of Fort Lee, *supra*, at 328. At the time of the compliance hearing or entry of the compliance order, the court will determine if any of the enactments of the plan, ordinances and resolutions are ultra vires. *Id.* At 329.

The court extends immunity to August 9, 2018.

February 12, 2018


Christine Farrington, J.S.C.

X Unopposed