
Superior Court of New Jersey
Appellate Division

Docket No. A-002677-24

IN THE MATTER OF

THE APPLICATION OF THE
TOWNSHIP OF COLTS NECK, A
MUNICIPAL CORPORATION OF
THE STATE OF NEW JERSEY

· CIVIL ACTION

·
· ON APPEAL FROM THE
· FINAL JUDGMENT OF THE
· SUPERIOR COURT
· OF NEW JERSEY,
· LAW DIVISION,
· MONMOUTH COUNTY

· DOCKET NO.: MON-L-2234-15

· Sat Below:

· HON. LINDA GRASSO JONES,
· J.S.C.

BRIEF ON BEHALF OF PETITIONER-APPELLANT
TOWNSHIP OF COLTS NECK

On the Brief:

THOMAS J. TRAUTNER, JR., ESQ.
Attorney ID # 018081999

RONALD L. ISRAEL, ESQ.
Attorney ID # 040231996

ALYSSA E. SPECTOR, ESQ.
Attorney ID # 902252012

CHIESA SHAHINIAN & GIANTOMASI P.C.
Attorneys for Petitioner-Appellant
Township of Colts Neck
105 Eisenhower Parkway
Roseland, New Jersey 07068
(973) 325-1500
ttrautner@csglaw.com

Date Submitted: August 20, 2025



TABLE OF CONTENTS

	Page
TABLE OF JUDGMENTS, ORDERS AND RULINGS ON APPEAL.....	iii
TABLE OF AUTHORITIES	iv
TABLE OF TRANSCRIPTS.....	vi
PRELIMINARY STATEMENT.....	1
PROCEDURAL HISTORY AND STATEMENT OF FACTS.....	3
A. Mediation Leading to Settlement.....	5
B. Post-Fairness Hearing Mediation	13
i. Toll’s Motion Regarding NWSE Proposal.....	17
ii. NWSE Settlement Discussions	18
C. Colts Neck’s Decision to Seek Conventional Durational Adjustment	20
D. Compliance Hearing	23
E. November 21, 2024 Trial Court Decision	26
F. Post-Decision Actions.....	31
STANDARD OF REVIEW	32
LEGAL ARGUMENT	32
I. THE TRIAL COURT IMPERMISSIBLY CONDITIONED THE TOWNSHIP’S RECEIPT OF A FINAL JUDGMENT OF COMPLIANCE AND REPOSE BY UNLAWFULLY EXPANDING THE REQUIREMENTS OF <u>N.J.A.C. 5:93-</u> 4.3(c) IN ORDER FOR THE TOWNSHIP TO OBTAIN A SEWER DURATIONAL ADJUSTMENT. Pa11-13; Pa41- 87.....	32
II. THE TRIAL COURT IMPERMISSIBLY REDRAFTED CERTAIN TERMS OF THE 2020 SETTLEMENT AGREEMENT INSTEAD OF FINDING IT NULL AND VOID. Pa41-81	40

A. The Trial Court Impermissibly Redrafted the 2020 Settlement Agreement to Include Terms that were not Bargained for by the Parties and that were Solely for the Benefit of FSHC. Pa41-7341

B. The 2020 Settlement Agreement is Null and Void Based on its Reliance Upon Sanitary Sewer Being Provided Through MRRSA. Pa41-4746

CONCLUSION50

TABLE OF JUDGMENTS, ORDERS AND RULINGS ON APPEAL

	Page
Order of Final Judgment of Compliance and Repose, dated April 21, 2025.....	Pa1
Annexed to Order: Report of the Special Adjudicator, dated March 6, 2025	Pa5
Order Granting Interested Party’s Motion for Intervention, dated April 14, 2025.....	Pa10
Order Granting Fair Share Housing Center’s Motion to Enforce Litigant’s Rights and Directing Modification of Colts Neck’s Proposed Housing Element and Fair Share Plan and Spending Plan, dated November 21, 2024	Pa11
Annexed to Order: Decision, dated November 21, 2024.....	Pa14
Order of Judgment of Fairness and Conditional Compliance and Repose Approving the Amended HEFSP Submitted to the Court by The Township of Colts Neck on June 15, 2022, dated November 21, 2024.....	Pa82
Annexed to Order: Decision, dated November 21, 2024 (Reproduced herein at pp. Pa14-Pa81)	
Transcript of Decision, dated April 14, 2025	5T

TABLE OF AUTHORITIES

	Page(s)
Cases:	
<u>Armstrong v. Bd. of Sch. Dir.</u> , 616 F.2d 305 (7th Cir. 1980)	49
<u>Brick Tp. Mun. Util. Auth. v. Diversified R.B.&T.</u> , 171 N.J. Super. 397 (App. Div. 1979)	42
<u>Dep’t of Pub. Advocate v. N.J. Bd. of Pub. Util.</u> , 206 N.J. Super. 523 (App. Div. 1985)	43
<u>East/West Venture v. Bor. of Fort Lee</u> , 286 N.J. Super. 311 (App. Div. 1996)	48, 49
<u>Graziano v. Grant</u> , 326 N.J. Super. 328 (App. Div. 1999)	41
<u>Impink ex rel. Baldi v. Reynes</u> , 396 N.J. Super. 553 (App. Div. 2007)	41, 45
<u>In re Adoption of N.J.A.C. 5:96 & 5:97</u> , 416 N.J. Super. 462 (App. Div. 2010), aff’d 215 N.J. 578 (2013)	34
<u>In re Application of Tp. of Bordentown</u> , 471 N.J. Super. 196 (App. Div. 2022)	42
<u>In re Clinton Tp. Compliance with Third Round Mount Laurel Affordable Hous. Obligation</u> , 2020 WL 476888 (App. Div. Jan. 30, 2020)	37, 38
<u>In re N.J.A.C. 5:96 and 5:97</u> , 221 N.J. 1 (2015)	<i>passim</i>
<u>In the Matter of the Application of the Municipality of Princeton</u> , Docket No. MER-L-1550-15	4
<u>Isetts v. Bor. of Roseland</u> , 364 N.J. Super. 247 (App. Div. 2003)	43
<u>James v. Federal Ins. Co.</u> , 5 N.J. 21 (1950)	41, 42
<u>Jennings v. Reed</u> , 381 N.J. Super. 217 (App. Div. 2005)	41

Kampf v. Franklin Life Ins. Co.,
33 N.J. 36 (1960)41, 47

Karl’s Sales & Serv., Inc. v. Gimbel Bros., Inc.,
249 N.J. Super. 487 (App. Div.),
certif. denied, 127 N.J. 548 (1991)42, 47

Kupersmith v. Delaware Ins. Co.,
84 N.J.L. 271 (E. & A. 1913) 41

Levinson v. Weintraub,
215 N.J. Super. 273 (App. Div.), certif. denied, 107 N.J. 650 (1987) 47

Manalapan Realty v. Manalapan Tp. Comm.,
140 N.J. 366 (1995)..... 32

Marini v. Ireland,
56 N.J. 130 (1970) 42

Morris Cty. Fair Housing v. Boonton Tp.,
197 N.J. Super. 359 (Law Div. 1984),
aff’d o.b. 209 N.J. Super. 108 (App. Div. 1986).....48, 49

Nolan v. Lee Ho,
120 N.J. 465 (1990)..... 42

Statutes & Other Authorities:

N.J.A.C. 5:93-4.3 *passim*

N.J.A.C. 5:93-4.3(c) *passim*

N.J.A.C. 5:93-4.3(c)1.....36, 37

N.J.A.C. 5:93-4.3(c)2.....36, 37

N.J.A.C. 5:93-4.3(c)3..... 10, 12, 36, 37

N.J.A.C. 5:93-4.3(c)4..... 10, 12, 36, 37

N.J.A.C. 5:93-8.16(a) 39

N.J.S.A. 40:14A-1 17

N.J.S.A. 52:27D-301..... 3

N.J.S.A. 52:27D-302(h) 34

N.J.S.A. 52:27D-311(d) 34

TABLE OF TRANSCRIPTS

	Page
Transcript of Motion, dated November 18, 2022.....	1T
Transcript of Compliance Hearing, dated December 6, 2022	2T
Transcript of Compliance Hearing, dated December 8, 2022	3T
Transcript of Hearing, dated March 7, 2025.....	4T
Transcript of Decision, dated April 14, 2025	5T

PRELIMINARY STATEMENT

This appeal arises from the trial court's unlawful expansion of the Substantive Rules of the New Jersey Council of Affordable Housing for the Period Beginning on June 6, 1994 ("COAH Rules") relating to durational adjustments. The COAH Rules set forth the criteria for a municipality's constitutional affordable housing obligation as well as provide mechanisms to defer a municipality's obligation due to lack of access to needed public utilities, including lack of sewer capacity, which is known as a durational adjustment.

Plaintiff/Appellant Township of Colts Neck ("Township" or "Colts Neck") has insufficient sewer capacity to support inclusionary development. Therefore, in 2022, Colts Neck sought a durational adjustment of its Third Round prospective need affordable housing obligation as explicitly provided for in the COAH Rules. In connection with its entitlement to a durational adjustment, Colts Neck proposed to comply with the COAH Rules as written. The trial court granted Colts Neck's application for Final Judgment of Compliance and Repose based upon its entitlement to a durational adjustment of its Third Round prospective need obligation due to its lack of sewer.

While the trial court granted Colts Neck's request for a durational adjustment, instead of enforcing the COAH Rules as written, the trial court impermissibly required Colts Neck to, among other things, commit at least \$2

million toward extending water and sewer to affordable housing in the Area 1 overlay zone and prioritize Affordable Housing Trust Funds for water and/or sewer infrastructure. The trial court mistakenly justified its expansion of the COAH Rules by impermissibly rewriting an earlier settlement agreement entered into between Colts Neck and Fair Share Housing Center (“FSHC”) in March 2020, which was no longer in effect as the bargained-for terms could not be performed and the agreement as written was no longer fair and reasonable to persons of low-and moderate-income. Specifically, the settlement agreement provided that in exchange for a durational adjustment with a waiver of N.J.A.C. 5:93-4.3(c), the Township would create overlay zoning in Area 1 and contribute up to \$2 million to connect sewer service to a proposed inclusionary development in Area 1 through Manasquan River Regional Sewerage Authority (“MRRSA”).

After the settlement was entered into and approved by the trial court, it became clear that bringing sewer to Area 1 through MRRSA within the period of repose was no longer possible and that therefore the Township was no longer entitled to a waiver. Despite recognizing that the settlement agreement required sewer to be connected from MRRSA, the trial court eliminated the waiver of N.J.A.C. 5:93-4.3(c), which allowed Colts Neck to limit inclusionary development to Area 1, and determined that Colts Neck would still be obligated

to contribute up to \$2 million toward the extension of sewer and water infrastructure to Area 1 from any service provider. In doing so, the trial court redrafted the settlement agreement to the benefit of FSHC and the detriment of the Township.

Colts Neck respectfully submits that the trial court exceeded the scope of its authority and that its orders requiring the Township to commit at least \$2 million toward extending water and/or sewer service to Area 1 and to prioritize Affordable Housing Trust Funds for water and/or sewer infrastructure be reversed.

PROCEDURAL HISTORY AND STATEMENT OF FACTS¹

On July 19, 2015, the Township of Colts Neck filed a declaratory judgment action seeking a declaration of its compliance with the Mount Laurel doctrine and the Fair Housing Act of 1985, N.J.S.A. 52:27D-301, *et seq.*, (“FHA”), in accordance with In re N.J.A.C. 5:96 and 5:97, 221 N.J. 1, 30 (2015)(“Mount Laurel IV”). Pa17². Thereafter, the litigation was largely stayed while the New Jersey Courts attempted to resolve the methodology to be employed in determining each municipality’s respective fair share obligation. Pa127. As a result of certain appellate proceedings regarding municipal

¹ Because the facts and procedural history are inextricably intertwined, they have been combined for the convenience of the Court and the parties.

² “Pa” refers to Petitioner’s Appendix.

affordable housing obligations with respect to the Gap Period³, and pursuant to Judge Jacobson’s March 8, 2018 decision in the case captioned In the Matter of the Application of the Municipality of Princeton, Docket No. MER-L-1550-15, it became apparent that Colts Neck was likely to be required to provide 306 affordable units in accordance with its Third Round (1999-2025) Prospective Need obligation. Id.

By way of background, Colts Neck is not served by any regional sewage authority. Pa157. Most of the development in Colts Neck is served by onsite septic systems and a limited number of wastewater package plants. Id. Therefore, the Township lacks the public sewer to fully address its Third Round obligation. Id. Additionally, nearly the entirety of the eastern and southeastern portions of Colts Neck are within the 3000-foot development line of Naval Weapons Station Earle (“NWSE”), the intent of which is to control the density and type of development in proximity to the base boundaries where munitions are stored, transported, handled, and tested. Pa864, 1413-33. The December 31, 2017 NWSE Joint Land Use Study (“JLUS”) provides that the construction of high density or even moderate density housing within the 3000-foot

³ The Gap Period refers to the period of time from 1999-2015 during which COAH was unable to adopt and implement rules that could survive legal challenge.

development line should be avoided for safety reasons. Pa1436. While the JLUS does not preclude development as a matter of law, the document represents:

A cooperative land use planning effort between affected local governments and [NWSE] . . . and the recommendations present a rationale and justification, and provide a policy framework to support adoption and implementation of compatible development measures. Pa1335.

In addition, the goals of the JLUS, as set forth therein, include:

To encourage local governments, together with Monmouth County, to work closely with the military installation to implement measures that encourage the introduction of new civilian development that is compatible with the continued operational utility of the military installation, and to preserve and protect the public health, safety and welfare of those living near this active military installation. Pa1335.

Colts Neck planned to address its Mount Laurel obligations through the development of multi-family and mixed-use development in the area of the Township along Route 34 located at Block 46, Lots 13, 16, 17 and Block 48, Lots 1-6, 19, and 29-41 (“Area 1”), which is outside of the 3,000-foot development review line adjacent to NWSE. Pa867. Additionally, Area 1 is served by regional roads that are best able to provide for traffic volumes associated with multi-family housing and goods and services exist in the vicinity of Area 1, making it an appropriate location for inclusionary development. Id.

A. Mediation Leading to Settlement

From June 2018 through 2019, Colts Neck along with FSHC, Colts Neck Building Associates, LLC (“CNBA”), Countryside Developers, Inc.

(“Countryside”), Carole J. Schlumpf (“Schlumpf”) and representatives of Toll Bros., Inc. (“Toll”) participated in protracted mediation sessions with Judge Dennis O’Brien and Special Master Michael Bolan (“Master Bolan”). Pa1306.

At the inception of mediation, the property owned by Schlumpf (“Schlumpf Site”) was proposed for multifamily high density housing to be developed by Toll. Pa1307. Due to planning concerns including the Schlumpf Site’s proximity to NWSE as well as certain environmental issues, the Township suggested Toll consider pursuing inclusionary development in Area 1. Id. Thereafter, Toll began investigating a proposal to acquire an approximately 14.2-acre site along Route 34 in Area 1 designated as Block 48, Lots 5, 39, and 40 (“Toll Project Site”)⁴ to be developed as an approximately 100-unit inclusionary development project with a 20% affordable housing set-aside. Id. Toll proposed bringing sanitary sewer to the Toll Project Site (and Area 1) through a sewer line to be installed along Route 34 from a connection point with MRRSA. Id. It was Colts Neck’s understanding that Toll had investigated and believed MRRSA to have available capacity. Pa1308.

Toll recognized that MRRSA and a group of municipalities that are members of MRRSA (“MRRSA Group”)⁵ would likely oppose providing sewer

⁴ Seta Realty Corp. is the owner of the Toll Project Site.

⁵ The MRRSA Group consists of the Township of Freehold, Township of Wall,

service to the Toll Project Site (and/or Area 1). Id. In this regard, however, Colts Neck, Master Bolan, FSHC, CNBA, and Countryside believed that MRRSA would be (if necessary) ordered by the trial court to cooperate with Colts Neck as an adjoining municipality in providing sewer service for an inclusionary development to facilitate the regional obligation to provide low- and moderate-income housing (in accordance with established legal precedent). Id. Indeed, during this period, Countryside instituted suit against MRRSA and the MRRSA Group, under Docket MON-L-4435-18, to “compel defendants to take the necessary action to provide sewer and water service to certain real property located in the Township of Colts Neck ... on which Countryside plan[ed] to construct a residential development with an affordable housing set aside” and it was anticipated that CNBA would be initiating litigation against MRRSA as well. Id. Toll expected its project and Area 1 to become the collateral beneficiary of the anticipated successful outcomes of the litigation against MRRSA. Id.

The primary concern expressed by Toll was the cost of bringing a sewer line up Route 34 into Colts Neck and the Toll Project Site, which Toll estimated would cost \$5 million. Pa1308-1309. Colts Neck agreed to potentially fund a portion of the anticipated \$5 million in costs to be incurred by Toll to connect sewer through MRRSA (depending upon the ultimate costs to be incurred) by:

Borough of Farmingdale, and Borough of Freehold.

(1) potentially contributing the affordable housing development fee to be paid in connection with the development of the Schlumpf Site— estimated to be \$500,000.00; and (2) paying up to an additional \$2 million to connect sewer to Area 1 through MRRSA. Pa1309. Additionally, it was proposed that Colts Neck would adopt a sewer recapture ordinance. Id. Although settlement agreements had been largely drafted by October 2019, Toll’s agreement to contribute toward FSHC’s request for legal fees remained unresolved. Pa1310.

Therefore, on March 18, 2020, Colts Neck and FSHC entered into a settlement agreement that set forth the Township’s Third Round obligation and granted a durational adjustment with a waiver of N.J.A.C. 5:93-4.3(c) in favor of creating overlay zoning in Area 1 and contributing up to \$2 million to connect sewer service to the Toll Project Site through MRRSA (“2020 Settlement Agreement”)⁶. Pa139-166.

Section II(8) of the 2020 Settlement Agreement states in pertinent part:

8. The municipality will address its Third Round Prospective Need obligation in part through a durational adjustment:

a. As demonstrated by the facts set forth in Exhibit A, the Township does not have sufficient capacity for sewer to support inclusionary development and thus is entitled to a durational adjustment in accordance with N.J.A.C. 5:93-4.3;

⁶ In March 2018, Colts Neck also entered into separate settlement agreements with Countryside and CNBA.

b. The municipality has 9 credits from existing units as reflected above and needs a total of 306 credits to meet the Third Round obligation. The municipality therefore has a 297-unit obligation out of the total of 315 credits recognized in this Agreement for which it requires a durational adjustment.

c. The municipality agrees to comply with N.J.A.C. 5:934.3 as follows:

i. The Township/Borough will seek court approval for, and FSHC will support, a durational adjustment of 297 units and address the requirements of N.J.A.C. 5:93-4.3 through the following.

.....

iii. The Township has designated and rezoned the following sites for low and moderate income housing that lack adequate water and/or sewer and recognizes that the necessary approvals to provide sewer access to the following sites pursuant to the connections described in Exhibit A are likely to be obtained within two (2) years of the date of this Agreement:

Colts Neck Building Associates
Countryside Developers
Area 1 Overlay Zoning

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

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

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

.....

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

d. The combination of the developments planned to meet the Township’s obligation, in accordance with the terms of this Agreement, are sufficient to meet and exceed the Township’s 306-unit Third Round Prospective Need. Therefore, the requirements included in N.J.A.C. 5:93-4.3(c)3 and 4 related to inclusion in a fair share plan when the DEP or its designated agent approves a proposal to provide water and/or sewer to a site other than those designated for the development of low and moderate income housing in the housing element are hereby waived in accordance with N.J.A.C. 5:93-4.3(c)4, which permits waiver of such requirements when a municipality has a plan that will provide water and/or sewer to sufficient sites to address the municipal housing obligation within the period of repose. Pa142-144.

Pursuant to Exhibit A, the provision of sewer to Area 1 is to be from MRRSA through a tie-in with Howell Wastewater Management Area, Wall Township Sanitary Sewer Service, or a closer available tie-in along Route 34 with wastewater treatment provided by Ocean County Utility Authority (“OCUA”) or Northern Water Pollution Control Facility (“NWPCF”). Pa156-161. Exhibit B provides certain additional terms related to the provision of sewer to Area 1 including that if Toll incurs actual costs in excess of \$3,000,000.00 (excluding any fees assessed by any utility authority or sewerage authority, including but not limited to connection fees or tapping fees) to extend sanitary sewer service to the Toll Project Site from a connection point with MRRSA then the Township will provide grant monies to Toll up to the amount of \$2,000,000.00 to defray the actual costs incurred by Toll in excess of \$3,000,000.00 (which may, in whole or in part, be paid from the Township’s Affordable Housing Trust Fund). Pa162-166. This requirement to provide grant monies was further explicitly contingent upon a number of conditions, including the Township receiving confirmation from MRRSA that it would provide public sewer service to Area 1. Pa139-166.

Thus, the 2020 Settlement Agreement explicitly provided that in exchange for a durational adjustment with a waiver of N.J.A.C. 5:93-4.3(c), the Township would create overlay zoning in Area 1 and contribute up to \$2 million to connect

sewer service to Area 1 through MRRSA. Id.

On June 23, 2020 and June 25, 2020, the trial court conducted a Fairness and Preliminary Compliance Hearing at which time MRRSA and the MRRSA Group noted their objection and refusal to consent to extend sewer to the Toll Project Site from a connection point along Route 34 with MRRSA and instead suggested that a sewer connection to Area 1 through NWSE be pursued. Pa1310-1311. The trial court also considered a report by Maser Consulting (“Maser Report”), prepared for and submitted by Toll, and a June 16, 2020 report prepared by Master Bolan (“Bolan Report”). Id.; Pa204-218, 1248-1297. The Maser Report acknowledged MRRSA as a path to obtain sewer subject to the outcome of litigation (expressing the belief that MRRSA had adequate sewer capacity) and expressly recommended obtaining sewer from NWSE as an alternative. Pa1253-1257. The Bolan Report highlighted that the proposed inclusionary developments in Colts Neck’s affordable housing plan met the Township’s obligation. Pa207. Thus, the settlement proposed a waiver of the requirements of N.J.A.C. 5:93-4.3(c)3 & 4 to include sites approved by NJDEP to provide water and sewer. Id.

The trial court decided to enter an Order of Fairness and Preliminary Mount Laurel Compliance (“Fairness Order”), which approved the 2020 Settlement Agreement and provided continued temporary immunity from

builder's remedy lawsuits and on August 13, 2020, entered a form of Order, which had been negotiated and agreed to by the relevant parties. Pa219-222. The Fairness Order scheduled the compliance hearing for November 16, 2020 and ordered Colts Neck to mediate with FSHC and Toll to attempt to negotiate a development agreement with Toll to address the development of the Toll Project Site, including but not limited to issues related to water and sewer. Id.

B. Post-Fairness Hearing Mediation

In view of the comments by MRRSA and the MRRSA Group as well as the express recommendation in the Maser Report, Colts Neck began communicating with the new Base Commander for NWSE about the potential for Area 1 to connect to NWSE to provide sewer. Pa1311. Additionally, pursuant to the Fairness Order, beginning on August 12, 2020, Colts Neck, Toll, and FSHC engaged in a series of mediation sessions (without the involvement of a Special Master, since Master Bolan had retired) at which time Colts Neck believed some progress was being made with respect to, for example, addressing water at the Toll Project Site. Id.; Pa1319-1320.

Recognizing that the involvement of a Special Master might be necessary to reach an amicable resolution, on September 24, 2020, Colts Neck wrote to the trial court on behalf of the parties to request the appointment of a new Special Master and the potential adjournment of the compliance hearing in light of the

same. Id. Thereafter, on November 18, 2020, the trial court appointed Frank Banisch, III, PP/AICP as Special Master (“Master Banisch”). Pa1323. In order to allow Master Banisch time to become familiar with the complexity of the issues, mediation was scheduled to recommence among Colts Neck, Toll, and FSHC on January 14, 2021. Pa1312.

Commencing in January 2021, Colts Neck, Toll, FSHC, CNBA, Countryside, MRRSA, and the MRRSA Group began participating in regular case management and settlement conferences with both Master Banisch and the trial court. Pa129. On March 19, 2021, the trial court appointed Mark Kataryniak, P.E., PTOE, as Consultant Engineer in this matter to provide assistance to Special Master Banisch. Pa1764. These conferences resulted in fruitful discussions to address an evolving approach to the Township’s plan to provide water and sewer to the sites identified in the 2020 Settlement Agreement within the period of repose. Pa129.

Toward this end, rather than continue to advocate to pursue litigation against MRRSA and the MRRSA Group – which would have unquestionably delayed resolution of sewer issues in this matter – the parties pivoted their approach to pursue obtaining sewer capacity from NWSE (as had been recommended by MRRSA, the MRRSA Group, and Toll’s expert). Id.

On August 26, 2021, Colts Neck and NWSE executed a Memorandum of

Understanding (“MOU”) confirming NWSE’s commitment to negotiating and executing an agreement to provide for sewer to the Toll Project Site and Area 1 within the period of repose. Pa884-887. At that time and through the spring of 2022, Colts Neck believed that it could demonstrate the ability to provide sewer capacity from NWSE to the Toll Project site (1) within the period of repose and (2) more quickly than if Toll were to pursue sewer access through Two Rivers Water Reclamation Authority (“TRWRA”). Id.; Pa870-883.

It had been understood that NWSE had ample capacity to provide sewer service to the Toll Project Site and the subsequent development of Area 1 as NWSE had established a sewer service area (NJ 0116645) for the collection of wastewaters and treated these wastes in a common wastewater plant, operating under the New Jersey Pollutant Discharge Elimination System (NJPDES) Discharge to Surface Water (DSW) permit number NJ0023540. Pa872.

NWSE has a wastewater plant capacity of 374,000 gallons per day (gpd). Id. Of this capacity, the Navy requires approximately 35,000 gpd. Id.; Pa885. It was understood that Toll’s proposed project would require approximately 45,000 gpd. Pa885. It was further understood that NWSE was in the process of making certain upgrades to the wastewater plant that would, in the short term, reduce the wastewater plant capacity. Id. Colt Neck had understood that the capacity of NWSE’s wastewater treatment plant would be reduced to

approximately 150,000 gpd. Pa872-873. That understanding was ultimately determined to be incorrect (as the average daily capacity would only be approximately 60,000 gpd) but, nonetheless, the plant capacity would be able to be modularly increased back to approximately 374,000 gpd. Id.

Colts Neck additionally understood that, if necessary, the plant capacity could be increased within the period of repose so that inclusionary development in Area 1 could be completed prior to July 1, 2025 (based, in part, upon taking advantage of Colts Neck's ability to facilitate working on parallel paths with NWSE and a developer such as Toll, such that the ability to connect sewer to the Toll Project Site was estimated to be faster than if Toll were to pursue a connection through TRWRA). Pa873-876. This is because TRWRA would not begin the process of reviewing a discharge request (so to facilitate a number of necessary tasks that must precede pursuing approvals from, among other agencies, NJDEP) until Toll was to obtain site plan approval. Id. This, of course, assumed that TRWRA and the Borough of Tinton Falls would approve a connection – which, based upon prior correspondence from TRWRA to the trial court, was never assured to occur.⁷ Id.; Pa1316-1317.

⁷ TRWRA is located in Monmouth Beach, approximately 13 miles from Colts Neck. In order to connect to the Two Rivers system, Toll would have to utilize equipment within the Borough of Tinton Falls. The distance to connect to TRWRA is greater than that required to connect to NWSE, and, additionally, requires more bureaucracy, more politics, and more adherence to statutory

i. Toll’s Motion Regarding NWSE Proposal

On August 16, 2021, Toll filed a Motion to Intervene and to Compel Colts Neck to consent to TRWRA providing sewer to the Toll Project Site (“Toll Motion”). In doing so, Toll represented that TRWRA was willing to provide service; however, on September 22, 2021, TRWRA wrote to the trial court advising, among other things, that “[h]aving capacity is a far cry from ‘welcomed the idea of the Toll Project connecting to its system’” and “[n]o one should be relying on any level of ‘discussion’ with TRWRA’s professionals as being equal to a commitment from the Authority to provide service.” Pa1316.

Thereafter, on September 24, 2021, the trial court conducted a hearing on the Toll Motion that resulted in the trial court entering two Orders granting limited Intervenor status to Toll and directing the parties to engage in limited discovery on disputed issues pertaining to the Toll Project Site, including issues concerning the provision of sewer service infrastructure, and scheduled a plenary hearing for February 7, 2022 to address whether sewer service through

measures than connection to NWSE. In this regard, TRWRA is subject to the Sewerage Authority Law (N.J.S.A. 40:14A-1 et seq.) and associated regulations. Any contracts proposed to be entered into by TRWRA would have to be approved by a majority of its twelve commissioners, who are appointed by each member municipality’s elected officials. NWSE, however, does not rely on elected officials but career service members, and is not subjected to the same Sewerage Authority Law and regulations. Pa131-132.

NWSE provides a realistic plan to provide sanitary sewer service to the Toll Project Site by the end of the Third Round and whether TRWRA provides an appropriate or viable or preferable alternative to NWSE. Pa889, 1174, 1510.

On October 29, 2021, Toll advised the trial court that it had “decided not to participate in discovery or the February 7 [plenary] hearing.” Pa1512-1515. As a result, the trial court conducted a case management conference and thereafter entered two related case management orders on November 30, 2021 and December 16, 2021 requiring, among other things, the exchange of settlement positions, discovery responses, and expert reports and adjourning the February 7, 2022 hearing date. Pa1174-1175, 1517.

Notably, the December 16 Order provided specifically that at the February hearing, the trial court would “not be addressing the issue of whether [TRWRA] provides an appropriate or viable or preferable alternative to the NWSE plan proposed by the Township” and that Toll could not “provide an expert report or present the testimony of expert witnesses, or present argument that TRWRA provides an alternative or better option for provision of sanitary sewer service for the subject property.” Pa1174-1175.

ii. **NWSE Settlement Discussions**

In January 2022, Colts Neck, FSHC, and MRRSA (with the involvement of Mr. Banisch and Mr. Katryniak in virtually every discussion) began to make

progress toward a potential settlement that would approve of Colts Neck's plan to pursue sewer capacity for Area 1 through NWSE. Pa132. Among other things, these settlement discussions involved Colts Neck taking steps toward providing infrastructure that would provide sewer capacity for Colts Neck's anticipated Fourth Round Obligation and having its professionals attempt to satisfy FSHC's demands by outlining and preparing a detailed timeline for every element of construction of a new sewer system. Id. Because of this progress, the plenary hearing and associated briefing schedule on the NWSE proposal was adjourned following a case management conference on March 11, 2022. Pa132-133.

Following the March 11, 2022 case management conference, while working toward addressing potentially acceptable settlement terms and timelines, Colts Neck became aware of (1) a potential issue with NWSE having concerns about providing capacity toward Colts Neck's Fourth Round Obligation and (2) the escalation of the potential cost to timely provide sewer capacity for Colts Neck's Third-Round Obligation during the period of repose. Id. After discussing these issues with Master Banisch, Colts Neck addressed these issues with the trial court and the parties at the April 8, 2022 case management conference. Pa133. As discussed at that time, Colts Neck required some limited time to conduct additional investigation, but advised of the

possibility that Colts Neck would avail itself of a durational adjustment without a waiver. Id.

C. Colts Neck’s Decision to Seek Conventional Durational Adjustment

On May 2, 2022, Colts Neck advised the trial court and the parties that it no longer believed it to be appropriate to continue to pursue either settlement discussions or a plenary hearing with respect to a proposal for sewer capacity to be provided to Area 1 from NWSE because the Township was “[n]ot confident that [NWSE] could be appropriately included as part of a viable plan to provide – within the current period of repose – available sewer capacity ...” Id. The Township advised the trial court it no longer sought a waiver from N.J.A.C. 5:93-4.3(c) and, instead, simply sought to comply with the applicable rules regarding durational adjustments under N.J.A.C. 5:93-4.3. Id.

On May 5, 2022, the trial court held a case management conference and subsequently, on May 10, 2022, entered a case management order, which provides in pertinent part:

2. The agreement entered into between the Borough of Colts Neck and Fair Share Housing Center provides for sewerage from Colts Neck’s affordable housing-inclusive (Mount Laurel) development site to run through a system operated by the Manasquan River Regional Sewerage Authority (MRRSA). The court held a fairness hearing on June 23, 2020 on this agreement, and Colts Neck’s plan in general. MRRSA has objected to this plan, indicating that it does not have available sewerage transmission capacity to provide for Colts Neck’s Mount Laurel plan sites. Colts Neck’s pursuit of the Naval Weapons Station Earle plan was a

potential alternative to MRRSA.

4. As discussed at the conferences with counsel, the court will hold an in-person hearing in the above matter for August 15, 2022, to be continued on August 16, 17 and 18, 2022 as may be needed. All counsel have indicated that they are available to participate on these dates. It is anticipated that the hearing will be a final compliance hearing, or, if Colts Neck is moving forward on a plan that is different than that presented to the court at the June 23, 2020 fairness hearing, an amended fairness hearing and final compliance hearing. At the present time Colts Neck does not have an amended agreement in place with Fair Share Housing Center, but does have an amended agreement in place with one or more developers of affordable housing-inclusive projects. This matter was filed as a declaratory judgment action by Colts Neck essentially requesting that the court approve a plan to be developed by Colts Neck for making provision for the development of Mount Laurel, affordable housing in Colts Neck. The purpose of the hearing will be for determination as to whether Colts Neck has met its Round 3 obligations under the Mt. Laurel Doctrine. Pa135-136.

On June 15, 2022, the Township submitted an Amended Housing Element and Fair Share Plan (“Amended HEFSP”) seeking trial court approval to address its Third-Round prospective need affordable housing obligation in part through a durational adjustment in accordance with N.J.A.C. 5:93-4.3 in view of its lack of sufficient capacity for sewer to support inclusionary development. Pa238-739.

Subsequent to the June 15 submission, MRRSA, with the support of the Township, continued discussions with NWSE regarding a proposal to bring sanitary sewer from NWSE to Area 1. Pa752-755. As a result, the final compliance hearing was adjourned to December 6, December 8, and December

12, 2022, as needed. Pa756-761. In accordance with the trial court's scheduling order, on October 20, 2022, MRRSA, the MRRSA Group, interested party Seta Realty, and FSHC filed objections to the Township's Amended HEFSP. In addition to filing an objection, FSHC filed a Motion to Enforce Litigant's Rights seeking to enforce its rights under the 2020 Settlement Agreement and August 13, 2020 Order, which was opposed by Colts Neck, MRRSA and the MRRSA Group. Pa764-896. On November 18, 2022, the trial court held oral argument on the Motion to Enforce Litigant's Rights. 1T⁸. At oral argument, the parties agreed that a numbers and methodology trial was not required as both Colts Neck and FSHC agreed to accept the 306 unit prospective need obligation, as calculated pursuant to Judge Jacobson's methodology. 1T 12-14; 2T 21-22. On December 5, 2022, the trial court entered a Consent Order between FSHC, MRRSA, and the MRRSA Group whereby the executing parties agreed to certain terms including the following:

(1) MRRSA and its Member Towns withdraw their opposition to FSHC's Motion to Enforce and specifically withdraw their position that the FSHC/Colts Neck Settlement is null and void, subject to the entry of this Order;

⁸ References to the transcripts are as follows: 1T refers to transcript of November 18, 2022 oral argument on FSHC's Motion to Enforce Litigant's Rights; 2T refers to transcript of December 6, 2022 compliance hearing; 3T refers to transcript of December 8, 2022 compliance hearing; 4T refers to transcript of March 7, 2025 trial court hearing; 5T refers to transcript of oral argument and trial court decision of April 14, 2025.

- (2) MRRSA and its member towns agree to provide wastewater service to Countryside with a water connection through Freehold Township;
- (3) FSHC agrees that NWS Earle is not foreclosed as a potential sewer solution for Area 1 or other locations for affordable housing within Colts Neck;
- (4) FSHC withdraws its position that the \$2 million committed by Colts Neck for sewer solutions cannot be utilized to facilitate sewer through NWS Earle or any other provider so long as the other conditions associated with FSHC's Exhibit B are met;
- (5) FSHC agrees that NWS Earle may be considered as one of the available options for sewerage treatment for Area 1; and
- (6) the trial court's execution and entry of this Consent Order shall not be construed as an adjudication of the relief sought by FSHC's Motion to Enforce against Colts Neck. Pa1574-1578.

D. Compliance Hearing

On December 6, 2022 and continuing on December 8, 2022, the trial court held a compliance hearing to determine whether Colts Neck's Affordable Housing Plan creates a realistic opportunity for the satisfaction of its fair share of housing that is affordable to the region's very low, low and moderate-income households entitling Colts Neck to a Final Judgment of Compliance and Repose ("Compliance Hearing"). 2T; 3T.

Colts Neck presented Elizabeth McManus, a licensed professional planner, who was accepted by the trial court as an expert in the field of professional planning with a specialty in Affordable Housing. 2T 36. Ms. McManus prepared the Township's Amended HEFSP and testified that the Amended HEFSP meets COAH's rules for satisfying each component of its Affordable Housing obligation. 2T 38. Ms. McManus testified that the

Township utilized the durational adjustment in order to satisfy its Third Round obligation, consistent with COAH's rules and is aided by the implementing documents included in its Fair Share Plan, such that the Township should be eligible for a judgment of repose. 2T 38. Ms. McManus explained the mechanisms by which the Township would satisfy its Third Round obligation (306 units), including a durational adjustment that reflects the Township's lack of sewer and water infrastructure to satisfy the remaining Third Round obligation, which is a total of 138 units. 2T 70-74. Ms. McManus testified that it was a conventional durational adjustment, in the respect that the Township is not eligible for a waiver. 2T 76. Ms. McManus testified that the Township's plan would produce additional Affordable Housing units or credits by way of a Market to Affordable Program, for up to three Affordable housing units, the purchase of which would be funded by the Township's Affordable Housing Trust Fund, which is permitted by the COAH Rules. 2T 74-76. Ms. McManus testified that the Township's plan to satisfy its Third Round obligation through a durational adjustment is consistent with the COAH Rules. 2T 76-78. Ms. McManus explained the Township is entitled to a durational adjustment because it lacks adequate sewer infrastructure to provide for opportunities for inclusionary housing sufficient to meet the entirety of the Township's Third Round obligation. 2T 76.

Ms. McManus testified that overlay zoning was not necessary and was not included in the Amended HEFSP as with the conventional durational adjustment, the Township does not have the power to direct where inclusionary zoning or any other type of Affordable Housing would be located. 2T 79. The purpose of Area 1 was to direct inclusionary zoning to a particular area and to insure that that particular area, Area 1, was the specified and the only location where inclusionary housing development could occur (consistent with the 2020 Settlement Agreement). 2T 79. Under the Amended HEFSP, a developer seeking to develop in Colts Neck is not limited to pursuing inclusionary development in Area 1 and may choose any site that they deem appropriate and suitable. 2T 79-80. The trial court also heard testimony from interested party, Seta Realty's experts, Special Master Banisch, and Sewer Master Kataryniak. 3T 8 -211.

The parties submitted closing briefs on December 20, 2022. On December 21, 2022, the trial court entered a Consent Order among Colts Neck, MRRSA, and the MRRSA Group whereby the parties agreed to certain terms including:

- (1) Colts Neck shall continue to permit (and facilitate if necessary) a dialog between MRRSA and the Navy relative to the production of sewer in Colts Neck through NWS Earle and not interfere or obstruct any such dialogue;
- (2) the Special Masters are authorized by the Court to continue post-Judgment to be involved in discussions regarding potential sewer production at NWS Earle;
- (3) In the event a developer submits an inclusionary development project for consideration that proposes to obtain sewer from MRRSA, Colts Neck

shall promptly provide notice of same to counsel for MRRSA and its constituent members; and

(4) nothing herein shall be construed as an adjudication that NWS Earle is the sole or preferred sewer option. Pa1579-1581.

E. November 21, 2024 Trial Court Decision

On November 21, 2024, the trial court entered the following two (2) orders, which were accompanied by a lengthy written decision: (1) Order of Judgment of Fairness and Conditional Compliance and Repose Approving the Amended HEFSP submitted to the Court by the Township of Colts Neck on June 15, 2022 subject to certain required amendments as set forth in the order (“2024 Fairness and Conditional Compliance Order”); and (2) Order granting in part FSHC’s Motion to Enforce Litigant’s Rights (“Order to Enforce Litigant’s Rights”)(collectively “November 21, 2024 Orders”). Pa11-13; Pa82-87.

The 2024 Fairness and Conditional Compliance Order required the Township to, among other things, amend the proposed Amended HEFSP to: (1) include the Area 1 overlay zoning provided in the 2020 Settlement Agreement; (2) provide that Colts Neck remains obligated under Exhibit B to the 2020 Settlement Agreement to provide the financial contribution to a sewer system in Area 1; and (3) remove the three market to affordable units and the potential application of affordable housing trust fund monies to the program. Pa82-87.

The Order to Enforce Litigant’s Rights required the Township to revise its proposed Amended HEFSP and Spending Plan to: (1) include a commitment

of at least \$2 million toward extending water and/or sewer service to affordable housing in the Area 1 Overlay Zone in accordance with the 2020 Settlement Agreement and August 13, 2020 Order, and (2) clarify that Affordable Housing Trust Funds will be prioritized for water and/or sewer infrastructure but will not be used toward NWSE during the Third Round. Pa11-13.

The trial court found that the 2020 Settlement Agreement is not void, granted the Township's request for a durational adjustment, and vacated the waiver granted to the Township under the 2020 Settlement Agreement. Pa78-79. The trial court further found that the proposed Amended HEFSP complies with the Township's Third Round obligation, with the required amendments set forth in the November 21, 2024 Orders. Pa78.

The trial court granted the Township's request for a durational adjustment citing to N.J.A.C. 5:93-4.3(c) which provides "[t]he lack of adequate capacity, in and of itself, shall constitute a durational adjustment of the municipal housing obligation. The requirement to address the municipal housing obligation shall be deferred until adequate water and/or sewer are made available." Pa70. The trial court reasoned that "[n]o objection has been presented to Colts Neck's request that the durational adjustment previously agreed to in the March 18, 2020 settlement agreement remain in place." Pa70.

The trial court found that the 2020 Settlement Agreement was not void and instead decided to “sever[e] and eliminat[e] the waiver granted to Colts Neck in the settlement agreement” and keep in place “Colts Neck’s obligations provided in the agreement concerning Area 1, as the settlement agreement remains in place.” Pa47. The trial court noted that “[u]nder the Administrative Code provision, a municipality can be granted a waiver of the obligation that a municipality would otherwise have to sign on to a plan by a developer for water and/or sewer service as long as the municipality had a court-approved plan in place to meet the municipality’s Mount Laurel obligation.” Pa71. The trial court found that “[t]he March 18, 2020 settlement agreement constituted such a plan which was approved by the court, and Colts Neck was granted the waiver as a part of the settlement agreement. The agreement thus allowed Colts Neck to, in effect, choose where the higher-density housing would be located (Countryside and CNBA and Area 1) and to refuse to agree to any plan to provide water and sewer service to other properties within the Township where a developer might want to build higher-density, inclusionary housing.” Pa71-72. In severing the waiver provision from the 2020 Settlement Agreement, the trial court further noted that “Colts Neck acknowledges that sewer service will not be brought to Area 1 within the Third Round and that it is thus not entitled to the waiver.” Pa72.

The trial court further concluded that Colts Neck must adopt and maintain overlay zoning for Area 1 that is provided for in the 2020 Settlement Agreement.

Pa56. In reaching this conclusion, the trial court explained:

Higher-density housing may in fact ultimately be developed in Colts Neck in locations other than Area 1 and at the Countryside and CNBA properties. Without the waiver, if a developer is interested in developing another site for higher-density affordable housing under Colts Neck's proposed HEFSP, Colts Neck must sign on to the developer's application to the DEP for provision of water and sewer service for that property, even if Colts Neck is not planning for development of higher-density housing on that site and the property has thus not been zoned by Colts Neck for such development. No information was presented to the court, however, indicating that any developer is waiting in the wings to develop another property for an inclusionary project, and the court is satisfied that the rezoning of Area 1, which Colts Neck has identified as an appropriate area for development of affordable housing, should be adopted and remain in place until Colts Neck's agreed upon Third Round obligation has been met. Pa55-56.

While recognizing that the FHA does not require a municipality to raise or expend municipal revenues in order to provide low- and moderate-income housing, the trial court found that "in this matter Colts Neck agreed in the March 18, 2020 settlement agreement to provide funds toward a sewer system for Area 1[,]” and “[n]othing in the FHA or Mount Laurel case law provides a basis for relieving Colts Neck from this agreed-to obligation.” Pa67. The trial court further concluded that “Colts Neck may be required to make its \$2 million financial contribution toward development of a sewer system utilizing a sewage treatment partner other than MRRSA.” *Id.* While finding that “[t]he settlement

agreement envisions that sewer service could ultimately be provided to Area 1 by MRRSA, with treatment provided by OCUA[,]” the trial court found that “[n]o reason exists, however, for limiting the provider of wastewater transmission and treatment to MRRSA and OCUA.” Id. In support of this conclusion, the trial court reasoned as follows:

The intention of the provision of the March 18, 2020 settlement agreement providing for Colts Neck’s monetary contribution was to enable a wastewater collection system to be installed for the area of Colts Neck that Colts Neck recognized was appropriate for development of a substantial amount of Colts Neck affordable housing obligation. CNBA is providing 72 actual affordable housing units and Countryside is providing 15 actual affordable housing units. Area 1 is planned to provide 142 actual affordable housing units. Water and sewer service needs to be provided to Area 1. If an alternative manner of providing sanitary sewer service for Area 1 becomes viable (i.e., MRRSA through NWSE, through NWSE directly, through TRWRA, or through another treatment provider) there is no reason why the Affordable Housing Grant could not be applied to the provision of wastewater transmission and treatment by an alternative provider. Any request for application of Colts Neck’s contributed funds to an alternative plan in lieu of MRRSA would need to be presented to the court for authorization to ensure that application of Colts Neck’s funds was appropriate, that is, that the alternative plan for sewer service actually serves Area 1 and would facilitate the provision of the anticipated 142 housing units. Pa68.

The trial court further rejected the inclusion of a market to affordable plan as set forth in the Amended HEFSP stating that:

If Colts Neck is permitted to rely upon a market to affordable program as a part of the HEFSP, it will use approximately \$700,000 of its affordable housing trust fund for the development of three units of affordable housing, and will not be applying those funds for development of a sewer system for Area 1, which Colts Neck recognized as a crucial component

of its Third round plan to bring affordable housing to Colts Neck and which is expected to produce 142 affordable units. Pa74.

The trial court found that the use of the affordable housing trust fund for three market-to-affordable units “does not provide an appropriate opportunity for the development of affordable housing within Colts Neck and is not fair and reasonable to households in need of affordable housing” and instead, “these funds could facilitate sewers and enable the construction of a substantial number of affordable units through development of a sewer system in Area 1.” Pa75.

The trial court further required that the Township cooperate with Toll Brothers or another developer of comparable reputation as provided for in the 2020 Settlement Agreement. Pa76-77. Lastly, the trial court found that the Township must satisfy the remainder of recommendations in Master Bolan’s report, which are considered routine conditions by the court. Pa77.

F. Post-Decision Actions

Thereafter, the Township adopted, under protest, an amended HEFSP and Spending Plan in accordance with the November 21, 2024 Orders, along with taking other action in compliance with the November 21, 2024 Orders, all of which were taken under protest. Pa1582-1763. On March 7, 2025, the trial court held a hearing regarding the Township’s compliance with its November 21, 2024 Orders, at which time it determined that the Township was entitled to a Final Judgment of Compliance and Repose, and instructed the parties to submit a

mutually acceptable proposed form of Order. 4T. On March 12, 2025, Seta Realty Corp. filed a motion to intervene, which the trial court granted on April 14, 2025. Pa10. On April 21, 2025, the trial court entered an Order of Final Judgment and Repose. Pa1-4. On April 30, 2025, the Township filed a Notice of Appeal. Pa88-97.

STANDARD OF REVIEW

“A trial court’s interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference.” Manalapan Realty v. Manalapan Tp. Comm., 140 N.J. 366, 378 (1995). The appellate court’s review of legal issues is de novo. Id.

LEGAL ARGUMENT

I. THE TRIAL COURT IMPERMISSIBLY CONDITIONED THE TOWNSHIP’S RECEIPT OF A FINAL JUDGMENT OF COMPLIANCE AND REPOSE BY UNLAWFULLY EXPANDING THE REQUIREMENTS OF N.J.A.C. 5:93-4.3(c) IN ORDER FOR THE TOWNSHIP TO OBTAIN A SEWER DURATIONAL ADJUSTMENT. Pa11-13; Pa41-87.

It is respectfully submitted that the trial court should have endorsed the Township’s Amended HEFSP as it meets the COAH Rules for satisfying each component of its Affordable Housing Obligation and entered an Order of Judgment of Compliance and Repose. Instead, the trial court impermissibly imposed additional requirements on the Township in order to obtain a conventional durational adjustment.

As there was no settlement agreement between the Township and FSHC, the Township sought a conventional durational adjustment in accordance with N.J.A.C. 5:93-4.3. Specifically, on June 15, 2022, the Township submitted an Amended HEFSP by which the remaining Third Round obligation of 138 units would be satisfied through compliance with the COAH Rules regarding durational adjustments. Pa258. The Amended HEFSP included the language of the COAH Rule relating to durational adjustments in its entirety, demonstrating Colts Neck's commitment to abide by the requirements concerning durational adjustments. Id. The trial court granted the Township's request for a durational adjustment as the Township does not have adequate sewer infrastructure to provide opportunities for inclusionary housing sufficient to meet the entirety of the Township's Third Round obligation. Pa70.

However, in granting the Township a conventional durational adjustment, the trial court required the Township to revise its Amended HEFSP and Spending Plan to, among other things, include the following: (1) a commitment of at least \$2 million toward extending water and/or sewer service to Area 1 through any wastewater transmission and treatment provider, not limited to MRRSA or OCUA; and (2) clarify that Affordable Housing Trust Funds will be prioritized for water and/or sewer infrastructure but will not be used toward NWSE during the Third Round. Pa11-13, 82-87.

As a matter of law, the Township cannot be compelled to expend its own money to facilitate the acquisition or construction of water or sewer infrastructure. The FHA explicitly states, “[n]othing in [this Act] shall require a municipality to raise or expend municipal revenues in order to provide low and moderate income housing.” N.J.S.A. 52:27D-311(d). The FHA further states that “[w]hile the provision for the construction of that housing by municipalities is not required, they are encouraged, but not mandated to expend their own resources to help provide low and moderate income housing.” N.J.S.A. 52:27D-302(h).

While a municipality can be compelled to adopt traditional inclusionary zoning ordinances where twenty percent (20%) of the units are affordable housing, a municipality cannot be compelled to spend its own money. In re Adoption of N.J.A.C. 5:96 & 5:97, 416 N.J. Super. 462, 471-72 (App. Div. 2010), *aff’d* 215 N.J. 578 (2013)(explicitly acknowledging that “N.J.S.A. 52:27D-311(d) can be reasonably construed simply to indicate that N.J.S.A. 52:27D-302(h) provides for the direct expenditure of municipal revenues to provide affordable housing is purely voluntary and that any municipality that chooses not to make such expenditures cannot be compelled to do so.”).

The creation of sewer infrastructure is necessary for the Township to provide low- and moderate-income housing within its borders; however, the trial

court does not have the authority under the FHA to mandate that the Township expend its own resources, i.e., be compelled to contribute general funds to construct sewer or water infrastructure in order to satisfy its affordable housing obligations.

Moreover, the trial court cannot act as a super legislature by imposing terms on the Township that are contrary to and/or not provided for by the COAH regulations. The COAH Rules address a situation in which a community has sufficient land but insufficient water and/or sewer to support inclusionary development. N.J.A.C. 5:93-4.3. Pertinent to this matter is N.J.A.C. 5:93-4.3(c) which provides:

(c) The lack of adequate capacity, in and of itself, shall constitute a durational adjustment of the municipal housing obligation. The requirement to address the municipal housing obligation shall be deferred until adequate water and/or sewer are made available. In order to provide water and/or sewer on sites the Council determines are realistic for inclusionary development, municipalities shall adhere to the following:

1. Notwithstanding the lack of adequate water and/or sewer at the time a municipality petitions for substantive certification, the municipality shall reserve and set aside new water and/or sewer capacity, when it becomes available, for low- and moderate-income housing, on a priority basis.
2. Municipal officials shall endorse all applications to the DEP or its agent to provide water and/or sewer capacity. Such endorsements shall be simultaneously submitted to the Council.
3. Where the DEP or its designated agent approves a proposal to provide infrastructure to a site for the development of low-and moderate-income housing identified in the housing element, the municipality shall permit such development; and
4. Where a municipality has designated sites for low- and moderate-income housing that lack adequate water and/or sewer and where the DEP or its designated agent approves a proposal to provide water and/or sewer

to a site other than those designated for the development of low and moderate income housing in the housing element, the municipality shall amend its housing element and fair share housing ordinance to permit development of such site for low and moderate income housing. The amended housing element and fair share housing ordinance shall be submitted to the Council within 90 days of the site's approval by the DEP or its agent. **The Council may waive these requirements when it determines that the municipality has a plan that will provide water and/or sewer to sufficient sites to address the municipal housing obligation within the substantive certification period.** (emphasis added). N.J.A.C. 5:93-4.3(c).

Pursuant to the COAH regulations, the Township is entitled to a durational adjustment due to its lack of sewer capacity. N.J.A.C. 5:93-4.3. The only requirements/conditions the Township must adhere to in connection with its durational adjustment are explicitly set forth in N.J.A.C. 5:93-4.3(c)1 –4.

In its Amended HEFSP, Colts Neck agreed to all of the durational adjustment conditions: (1) reserve and set aside new sewer capacity when it becomes available for low- and moderate-income housing on a priority basis; (2) endorse all applications to the NJDEP or its agent to provide sewer capacity; and (3) amend its housing element and fair share housing ordinance to permit development where the NJDEP or its designated agent approves a proposal to provide infrastructure to a site for the development of low- and moderate-income housing. N.J.A.C. 5:93-4.3(c)1-4.

The trial court's inability to impose additional requirements/conditions on a municipality's right to a durational adjustment beyond those

requirements/conditions in N.J.A.C. 5:93-4.3(c)1 – 4 has been specifically addressed by New Jersey courts. In Mount Laurel IV, the Supreme Court expressly stated that the judicial role of the courts is not to be a replacement agency for COAH. 221 N.J. at 29. Explaining the trial court’s role in administering Mount Laurel affordable housing cases, the Supreme Court stated that by opening the courts for “hearing challenges to, or applications seeking declarations of, municipal compliance with specific obligations,” the intention was not to create “an alternate form of statewide administrative decision maker.” Id. The Supreme Court clarified that the jurisdiction of the trial court was limited to judging such actions “on the merits of the records developed in individual actions before the court.” Id. Toward this end, the Supreme Court in Mount Laurel IV repeated that trial courts should defer to the Legislature and seek to advance the will of the Legislature by:

- Emphasizing its desire to follow the FHA processes as close as possible. Id. at 6;
- Stating it would “take our lead from the FHA.” Id. at 27;
- Stressing its desire to provide municipalities “like treatment to that which was afforded by the FHA.” Id. at 27;
- Noting that “the process developed herein is one that seeks to track the processes provided for in the FHA.” Id. at 29.

The Appellate Division’s decision, In re Clinton Tp. Compliance with Third Round Mount Laurel Affordable Hous. Obligation, 2020 WL 476888 (App. Div. Jan. 30, 2020), is one example of the proper application of the

Supreme Court's instruction in Mount Laurel IV with respect to the judicial role of the trial court. In this case, the Appellate Division upheld a trial court's finding under Mount Laurel IV, where the Township's affordable housing sites were subject to durational adjustments because the Township did not have adequate water and sewer capacity, finding that the municipality was not required to over-zone because the applicable COAH regulations did not mention over-zoning. In re Clinton Tp., 2020 WL 476888, *5. During the trial court's proceedings, the trial court reasoned that the applicable COAH regulations did not mention over-zoning and thus it was within the Township's discretion whether to over-zone. Id. at 5. On appeal, the developer argued that the trial court should have required the proposed compliance plan to include over-zoning in order to provide a realistic opportunity for success. Id. at 4. Upon review of the trial court's decision, the Appellate Division agreed with the trial court's understanding of the scope and application of the COAH rules and affirmed the trial court's holding that the developer's arguments to impose requirements/conditions on durational adjustments were meritless. Id.

Based on the guidance in Mount Laurel IV and the Appellate Division precedent set forth in In re Clinton Tp., the trial court was not authorized to impose the following conditions in order for the Township to receive a durational adjustment and Final Judgment of Compliance and Repose:

- Commit at least \$2 million of the Township’s general taxpayer funds toward building water and/or sewer service to affordable housing in Area 1;
- Require the affordable housing trust funds to be prioritized for water and sewer infrastructure but not toward NWSE during the Third Round; and
- Compel the Township to provide overlay zoning.⁹

Again, the Township’s request for a durational adjustment falls squarely within N.J.A.C. 5:93-4.3(c), and the Supreme Court and Appellate Division have made it clear that the power of the trial court cannot be manipulated to impose additional requirements beyond the COAH regulations.

Furthermore, the trial court is not permitted to prioritize Affordable Housing Grant monies and in doing so, the trial court ignored a fundamental principal in the COAH Rules – municipal discretion for how the funds are expended. N.J.A.C. 5:93-8.16(a) (Use of Money) provides that “[a] municipality may use revenues collected from development fees for any activity approved by the Council for addressing the municipal fair share.” As such, the Township has the discretion to determine how to expend its trust fund, provided doing so is

⁹ While the trial court is not authorized to compel overlay zoning, the Township does not take issue with this condition as in 2020 the Township adopted Ordinance 2020-20 which established overlay zoning in Area 1 and does not have any plan to rescind the zoning. Pa1611; 2T 81. Furthermore, as testified to by Ms. McManus, there is no need for overlay zoning limiting inclusionary development as the Township received a durational adjustment without a waiver. 2T 79.

consistent with the applicable rules. By requiring the Township to prioritize its Affordable Housing grant monies toward sewer and water infrastructure, the trial court usurped the role of the Township in determining how to expend the monies in its trust fund.

The Amended HEFSP adequately addressed the Township's Third Round affordable housing obligations and complied with the COAH Rules. As such, the trial court should have endorsed the Township's adoption of its Amended HEFSP and entered an Order of Final Judgment of Compliance. The trial court exceeded the scope of its powers, in contravention of the FHA, case law, and COAH regulations, in requiring the Township to commit at least \$2 million in general funds toward extending water and/or sewer service to Area 1 and prioritizing the Affordable Housing trust fund monies for water and sewer infrastructure. Therefore, the trial court's decision imposing these conditions in order for Colts Neck to obtain a conventional durational adjustment must be reversed.

II. THE TRIAL COURT IMPERMISSIBLY REDRAFTED CERTAIN TERMS OF THE 2020 SETTLEMENT AGREEMENT INSTEAD OF FINDING IT NULL AND VOID. Pa41-81.

It is respectfully submitted that the trial court impermissibly redrafted certain terms in the 2020 Settlement Agreement which had not been agreed to

by the parties and erroneously determined that the 2020 Settlement Agreement was not void.

“A settlement between parties to a lawsuit is a contract like any other contract, which may be freely entered into and which a court, absent a demonstration of fraud or other compelling circumstances, should honor and enforce as it does other contracts.” Jennings v. Reed, 381 N.J. Super. 217, 227 (App. Div. 2005)(internal citations omitted). “[I]t is not the function of the court to make a better contract for the parties, or to supply terms that have not been agreed upon.” Impink ex rel. Baldi v. Reynes, 396 N.J. Super. 553, 561 (App. Div. 2007)(quoting Graziano v. Grant, 326 N.J. Super. 328, 342 (App. Div. 1999)). “When the terms of the [contract] are clear, it is the function of a court to enforce it as written and not to make a better contract for either of the parties.” Kampf v. Franklin Life Ins. Co., 33 N.J. 36, 43 (1960)(citing Kupersmith v. Delaware Ins. Co., 84 N.J.L. 271, 275 (E. & A. 1913); James v. Federal Ins. Co., 5 N.J. 21, 24 (1950)).

A. The Trial Court Impermissibly Redrafted the 2020 Settlement Agreement to Include Terms that were not Bargained for by the Parties and that were Solely for the Benefit of FSHC. Pa41-73.

The trial court impermissibly redrafted the 2020 Settlement Agreement to require the Township to spend funds in support of creating sewer infrastructure in a manner not required by the 2020 Settlement Agreement and in support of

water infrastructure where the 2020 Settlement Agreement contained no such requirement.

“The court has no right ‘to rewrite the contract merely because one might conclude that it might well have been functionally desirable to draft it differently.’” Karl’s Sales & Serv., Inc. v. Gimbel Bros., Inc., 249 N.J. Super. 487, 493 (App. Div.), certif. denied, 127 N.J. 548 (1991) (citing Brick Tp. Mun. Util. Auth. v. Diversified R.B.&T., 171 N.J. Super. 397, 402 (App. Div. 1979)). “Nor may the courts remake a better contract for the parties than they themselves have seen fit to enter into, or to alter it for the benefit of one party and to the detriment of the other.” Karl’s Sales & Serv., Inc., 249 N.J. Super. at 494 (citing James, 5 N.J. at 24). “It is of course not the province of the court to make a new contract or to supply any material stipulations or conditions which contravene the agreements of the parties.” Marini v. Ireland, 56 N.J. 130, 143 (1970). Moreover, a court is not permitted to modify individual elements of a proposed affordable housing settlement. In re Application of Tp. of Bordentown, 471 N.J. Super. 196, 217 (App. Div. 2022).

While “the settlement of litigation ranks high in our public policy,” Nolan v. Lee Ho, 120 N.J. 465, 472 (1990), “it does not mean that courts will rewrite or unduly expand settlement agreements in order to deem settled or waived

things not legitimately encompassed.” Isetts v. Bor. of Roseland, 364 N.J. Super. 247, 254 (App. Div. 2003). As explained by the New Jersey Appellate Division:

The point of this policy is not the salutary effect of settlements on our overtaxed judicial and administrative calendars (although this is an undeniable benefit) but the notion that the parties to a dispute are in the best position to determine how to resolve a contested matter in a way which is least disadvantageous to everyone. In recognition of this principle, courts will strain to give effect to the terms of a settlement wherever possible. It follows that any action which would have the effect of vitiating the provisions of a particular settlement agreement and the concomitant effect of undermining public confidence in the settlement process in general, should not be countenanced.

Id. (citing Dep’t of Pub. Advocate v. N.J. Bd. of Pub. Util., 206 N.J. Super. 523, 528 (App. Div. 1985)).

In the 2020 Settlement Agreement, the Township agreed to fund an affordable housing grant to bring sewer from MRRSA to Area 1 in exchange for obtaining a waiver from COAH’s durational adjustment rules. Pa139-166. Specifically, in exchange for a durational adjustment with waiver, the 2020 Settlement Agreement required Colts Neck to provide grant monies of up to \$2 million, provided Toll or a developer of comparable reputation incurred actual costs in excess of \$3 million to extend sanitary sewer service to the Toll Project Site from extending “sanitary sewer service [to be provided by MRRSA] from the Howell Wastewater Management Area and Wall Township Sanitary Sewer as identified in Exhibit A to [the 2020 Settlement] Agreement (or extend sanitary sewer from a closer available tie-in along Route 34 or another location

acceptable to Toll [or a developer of comparable reputation] and the Township to existing sewer collection service, if available.” Id. This requirement to provide grant monies was further explicitly contingent upon a number of conditions, including the Township receiving confirmation from MRRSA that it would provide public sewer service to Area 1. Id.

The trial court improperly severed and eliminated the waiver provision, erroneously relying on Paragraph 30 of the 2020 Settlement Agreement, which provides:

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. Pa46; Pa151.

The trial court explained that it is “not removing Colts Neck’s obligations provided in the agreement concerning Area 1, as the settlement agreement remains in place, but the court is severing and eliminating the waiver granted to Colts Neck in the settlement agreement.” Pa47.

In reaching this decision, the trial court misconstrued the bargained-for exchange in the 2020 Settlement Agreement and thereby improperly severed the waiver from the 2020 Settlement Agreement, leaving the remainder of Section II(8) in place. The Township agreed to fund up to \$2 million toward bringing

sewer from MRRSA to Area 1 in exchange for obtaining a waiver from COAH's durational adjustment rules. In severing the waiver from the 2020 Settlement, the trial court left the obligation that the Township contribute up to \$2 million toward bringing sewer to Area 1 and in fact expanded this obligation to fund the provision of sewer to Area 1 through providers other than MRRSA despite recognizing that "[t]he settlement agreement envisions that sewer service could ultimately be provided to Area 1 by MRRSA." Pa67.

Additionally, while the 2020 Settlement Agreement does not include any requirement that the Township contribute money to extending water service to Area 1, the trial court added a new term to the 2020 Settlement Agreement by requiring the Township to not only contribute up to \$2 million to connect sewer to Area 1, but to also contribute up to \$2 million toward extending water service to Area 1. In doing so, the trial court exceeded the scope of its authority by making a better contract for FSHC and supplying terms that had not been agreed upon. See Impink ex. rel Baldi, 396 N.J. Super. at 561.

Furthermore, in rewriting the 2020 Settlement Agreement, the trial court ignored the past conduct of the parties, which acknowledged that the court approved 2020 Settlement Agreement was no longer in place as it required sewer to Area 1 to connect from MRRSA and that the parties had not agreed on an alternate sewer solution for Area 1, as well as the trial court's May 10, 2022

Order, which recognized that the Township and FSHC do not have an amended settlement agreement in place revising the 2020 Settlement Agreement's requirement that sewer to Area 1 be provided by MRRSA. Pa135-136.

By eliminating the waiver and expanding the requirement that the Township contribute up to \$2 million to connect water and/or sewer service to Area 1 from any provider, the trial court altered the 2020 Settlement Agreement for the benefit of FSHC and to the detriment of the Township. Under these newly drafted terms, the Township loses the benefit of the bargain it negotiated with FSHC, i.e., a durational adjustment with waiver thereby allowing the Township to limit inclusionary development to Area 1 in exchange for providing up to \$2 million toward the extension of sewer to Area 1 by MRRSA. As rewritten by the trial court, the Township can no longer limit inclusionary development to Area 1 and must contribute up to \$2 million toward extending sewer and water to Area 1. Therefore, as the trial court impermissibly rewrote the 2020 Settlement Agreement for the benefit of FSHC and to the detriment of the Township, the trial court decision must be reversed.

B. The 2020 Settlement Agreement is Null and Void Based on its Reliance Upon Sanitary Sewer Being Provided Through MRRSA. Pa41-47.

Because the trial court was required to enforce the 2020 Settlement Agreement in its entirety as written and the bargained-for terms could not be

performed, the trial court erroneously concluded that the 2020 Settlement Agreement was not null and void.

“Courts cannot make contracts for parties.” Kampf, 33 N.J. at 43 (internal citations omitted). “They can only enforce the contracts which the parties themselves have made.” Id. “[W]here the terms of a contract are clear and unambiguous there is no room for interpretation or construction and the courts must enforce those terms as written.” Karl’s Sales & Serv., Inc., 249 N.J. Super. at 493 (citing Kampf, 33 N.J. at 43); Levinson v. Weintraub, 215 N.J. Super. 273, 276 (App. Div.), certif. denied, 107 N.J. 650 (1987)).

The 2020 Settlement Agreement clearly provided that in exchange for a durational adjustment with waiver (thereby limiting inclusionary development to Area 1), Colts Neck would provide grant monies of up to \$2 million toward extending sewer to Area 1 through MRRSA if Toll or a comparable developer incurred costs in excess of \$3 million to extend sewer to Area 1 through MRRSA. Pa142-144, 156-166.

Insofar as the trial court sought to enforce the 2020 Settlement Agreement, it had to enforce the agreement as written in its entirety, including the Township’s entitlement to a waiver. See Karl’s Sales & Serv., Inc., 249 N.J. at 493 (explaining that Courts must enforce the contract as written). The 2020 Settlement Agreement explicitly provided the Township with a waiver from

COAH's durational adjustment rules pursuant to a plan for sewer to be brought to Area 1 through MRRSA within the period of repose. However, the bargained-for terms of the 2020 Settlement Agreement could not be performed, i.e., bringing sewer to Area 1 through MRRSA within the period of repose and as a result, Colts Neck was no longer entitled to a waiver. The 2020 Settlement Agreement was null and void because enforcing the contract as written would no longer be fair and reasonable to persons of low and moderate income. Toward this end, Section II.22. of the 2020 Settlement Agreement provides that if the 2020 Settlement "is rejected by the Court at a fairness hearing it shall be null and void." Pa149.

A settlement agreement must be fair and reasonable pursuant to the standards set forth in East/West Venture v. Bor. of Fort Lee, 286 N.J. Super. 311 (App. Div. 1996); see also Morris Cty. Fair Housing v. Boonton Tp., 197 N.J. Super. 359 (Law Div. 1984), aff'd o.b. 209 N.J. Super. 108 (App. Div. 1986). A settlement of Mount Laurel litigation should be approved if a fairness hearing, conducted on appropriate notice, demonstrates "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." Id. at 328. This analysis involves consideration of (1) the number of affordable housing units to be constructed; (2) the methodology by which the number of affordable units has

been derived; (3) any other contribution being made by the developer to the municipality in lieu of affordable units; (4) other components of the agreement which contribute to the municipality's satisfaction of its constitutional obligation; and (5) any other factors which may be relevant to the fairness issue. Id. at 328-39; see also Morris Cty., 197 N.J. Super. at 371-73. The fairness hearing "is not a plenary trial" but "[r]ather, the court should determine, based upon the relative strengths and weaknesses of the parties' positions, whether the settlement is fair and reasonable, that is, whether it adequately protects the interests of the persons on whose behalf the action was brought." Id. at 326-27 (citing Morris Cty., 19 N.J. Super. at 370; Armstrong v. Bd. of Sch. Dir., 616 F.2d 305, 314-15 (7th Cir. 1980) (internal quotation marks omitted)).

Because bringing sewer to Area 1 through MRRSA as agreed to was no longer possible within the period of repose, the Township was no longer entitled to a waiver and enforcement of the 2020 Settlement Agreement as written would not adequately protect the interests of lower income persons on whose behalf the affordable units proposed by the settlement agreement are to be built. Therefore, the 2020 Settlement Agreement is null and void based on its reliance upon sanitary sewer being provided through MRRSA.

As the bargained-for terms of the 2020 Settlement Agreement were no longer able to be performed and the enforcement of the 2020 Settlement

Agreement as written was no longer fair to persons of low- and moderate-income, the trial court should have determined that the 2020 Settlement Agreement was null and void.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the trial court's November 21, 2024 Orders requiring the Township to commit at least \$2 million toward extending water and/or sewer service to Area 1 and to prioritize Affordable Housing Trust Funds for water and/or sewer infrastructure be reversed.

Respectfully submitted,

CHIESA SHAHINIAN & GIANTOMASI PC
Attorneys for Petitioner-Appellant
Township of Colts Neck

By: /s/ Thomas J. Trautner, Jr.
THOMAS J. TRAUTNER, JR.

By: /s/ Ronald L. Israel
RONALD L. ISRAEL

Dated: August 20, 2025

FAIR SHARE HOUSING CENTER

510 Park Boulevard

Cherry Hill, New Jersey 08002

P: (856) 665 – 5444

F: (856) 663 – 8182

Fair Share Housing Center

By: Ariela Rutbeck-Goldman, Esq. (209022016)

arielarutbeck@fairsharehousing.org

Joshua D. Bauers, Esq. (174532015)

joshbauers@fairsharehousing.org

<p>IN THE MATTER OF THE APPLICATION OF THE TOWNSHIP OF COLTS NECK, A MUNICIPAL CORPORATION OF THE STATE OF NEW JERSEY</p>	<p>Superior Court of New Jersey Appellate Division Docket No. A-002677-24</p> <p>CIVIL ACTION</p> <p>On Appeal From: Law Division, Monmouth County Docket No. MON-L-2234-15</p> <p>Sat Below: Hon. Linda Grasso-Jones, J.S.C.</p> <p>CIVIL ACTION (Mount Laurel)</p>
---	--

**RESPONDENT FAIR SHARE HOUSING CENTER'S BRIEF IN
OPPOSITION TO THE TOWNSHIP'S APPEAL**

Dated: October 12, 2025

TABLE OF CONTENTS

TABLE OF CONTENTSii

TABLE OF AUTHORITIESiii

PRELIMINARY STATEMENT 1

STATEMENT OF FACTS & PROCEDURAL HISTORY 3

LEGAL ARGUMENT.....34

I. The Court Properly Upheld Colts Neck’s Obligations Under the March
 2020 Settlement Agreement Pursuant to FSHC’s Motion to Enforce
 Litigant’s Rights. (Pa78-Pa80).....**34**

II. The Court Correctly Held that Colts Neck’s Unilaterally Proposed Housing
 Element and Fair Share Plan was Not Constitutionally Compliant. (Pa78-
 Pa79).....**47**

III. Allowing Colts Neck to Nullify and Unilaterally Change the Terms of the
 Settlement, Despite its Clear Validity, Would Make it Harder to Resolve
 Mount Laurel Proceedings in the Future. (Pa41-Pa81).**49**

CONCLUSION50

TABLE OF AUTHORITIES

Cases

Arafa v. Health Express Corp., 243 N.J. 147 (2020)	38
Bd. of Educ., Twp. of Middletown v. Middletown Twp. Educ. Ass’n, 352 N.J. Super. 501 (Ch. Div. 2001)	31
Cty. of Morris v. Fauver, 153 N.J. 80 (1998)	38
Cypress Point Condo. Ass’n v. Adria Towers, L.L.C., 226 N.J. 403 (2016)	39
East/West Venture v. Borough of Fort Lee, 286 N.J. Super. 311 (App. Div. 1996)	34, 45
Flagg v. Essex Cnty. Prosecutor, 171 N.J. 561 (2002)	33
Gripenburg v. Twp. of Ocean, 220 N.J. 239 (2015)	33
In re Adoption of N.J.A.C. 5:96 & 5:97 (Mount Laurel IV), 221 N.J. 1 (2015)	32, 34, 46
Jannarone v. W.T. Co., 65 N.J. Super. 472 (App. Div. 1961), certif. denied, 35 N.J. 61 (1961)	36
N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 451 N.J. Super. 282 (App. Div. 2017)	32, 33
Nolan v. Lee Ho, 120 N.J. 465 (1990)	27
Quinn v. Quinn, 225 N.J. 34 (2016)	40
Rova Farms Resort, Inc. v. Inv’rs Ins. Co., 65 N.J. 474 (1974)	33
Schwartzman v. Schwartzman, 248 N.J. Super. 73 (App. Div. 1991)	41
Seidman v. Clifton Sav. Bank, S.L.A., 205 N.J. 150 (2011)	33
S. Burlington Cnty. NAACP v. Mt. Laurel Twp. (Mount Laurel II), 92 N.J. 158 (1983)	34, 45, 48

Statutes

N.J.S.A. 52:27D-301 et seq.	29, 49
N.J.S.A. 52:27D-304.1(f)(2)(a)	44
N.J.S.A. 52:27D-311d	29

Regulations

N.J.A.C. 5:93-4.3(c)	9, 10, 13, 30, 37
N.J.A.C. 5:93-4.3(d)	43, 47

PRELIMINARY STATEMENT

Fair Share Housing Center (FSHC) was founded in 1975 to enforce the constitutional Mount Laurel obligation. In the Third Round of Mount Laurel planning, spanning from 2015-2025, FSHC entered into settlement agreements with approximately 350 municipalities to comply with their constitutional obligation.

The instant action concerns one municipality that, after finally entering into a heavily negotiated settlement which the trial court determined to be fair to the protected class, decided to unilaterally change the terms of that settlement; declare the entire document null and void; and put forth its own egregiously inadequate plan for constitutional compliance. While upwards of 400 municipalities across the state now are working tirelessly to plan for and implement their Fourth Round Mount Laurel obligations, Colts Neck has barely made a dent in its Third Round obligation based on its ongoing strategy of using lack of sewer as a pretense to fail to plan for affordable housing.

In resuming its pre-1985 role to ensure the vindication of the constitutional rights of low- and moderate- income families across the state, the Supreme Court in Mount Laurel IV emphasized the role of the designated Mount Laurel judge and reaffirmed the processes available for those judges to render decisions on a town's demonstrated constitutional compliance. In the instant matter, with the assistance of two Special Adjudicators and after hearing from numerous expert witnesses, the trial court issued a comprehensive, well-reasoned decision on FSHC's motion to enforce

litigant's rights and the Township's proposed plan for compliance.

Leading up to that decision, Colts Neck had entered into the settlement agreement with FSHC and three other entities that provided numerous benefits to the Township, including allowing it to determine the specific area designated for inclusionary multifamily housing and FSHC waiving its rights on claims it had brought against the Township, including opposition to the use of Regional Contribution Agreement (RCA) credits for its prior round obligation. After a number of false starts towards building affordable housing, the Township then unilaterally proposed a plan that reallocated necessary funding for infrastructure expansion from the settlement to an unserious plan to provide just three affordable homes that the trial judge found was not realistic based on a detailed factual record.

A plain reading of the settlement reveals that Colts Neck misconstrues the terms that it claims invalidated the agreement. The durational adjustment waiver was severable under the express terms. And the agreement does not indicate that certain terms, like the waiver, are "in exchange" for other terms, such as the contribution to expand infrastructure in Area 1. Sewer connection through one regional system was part of extensive negotiation in many realms, and it was not designated as an essential term at the time of negotiation. Colts Neck's reading ignores basic elements of settlement interpretation, and its actions undermine the state's strong policy favoring the resolution of matters through settlement—especially within the context of the public interest served by expeditiously producing Mount Laurel housing.

Even if there never had been a settlement, the court still would not have approved Colts Neck's unilaterally proposed Housing Element and Fair Share Plan and would have been correct on that point under the controlling law. The trial court found, based on extensive testimony and reports, that the Township's three-home market-to-affordable proposal was not a realistic activity to address the regional fair share. In line with relevant case law and regulations, the trial court instead directed an approval of the previously agreed upon trust funds to facilitate infrastructure development and create a realistic opportunity for affordable housing for the Township to achieve compliance.

Colts Neck spent half of the Third Round on a wild goose chase for sewer infrastructure. This hopeless quest led to the withdrawal of one of the nation's most experienced housing builders from participation in the plan. When the municipality finally entered into an extensively negotiated settlement with FSHC and other parties, it then spent the remainder of the Third Round seeking to change the terms.

While such gamesmanship is in line with the Township's historical record of exclusionary zoning, it was correctly rejected by the trial court and should be emphatically rejected by this court as well. This court should affirm the trial court's November 21, 2024 order and decision.

STATEMENT OF FACTS & PROCEDURAL HISTORY¹

¹ The facts and procedural history are combined as they are inextricably intertwined.

On June 24, 2015, the Township of Colts Neck filed a declaratory-judgment complaint seeking a judicial determination that its fair share plan was constitutionally compliant. Ten years have passed since the complaint was filed, and the state has even entered a new Round of planning pursuant to the Mount Laurel doctrine.² Yet the vast majority of Colts Neck's affordable housing has not been built, and the Township has continued to resist attempts by inclusionary developers of sites included in the fair share plan to make their affordable housing projects realistic by exploring potential sewer and water options.

A. Unlike its Regional Neighbors, Colts Neck Does Not Have a Public Water or Sewer System, and This is by Deliberate Design.

Each Monmouth County town that surrounds Colts Neck has some form of public sewer and/or water system that is utilized by new affordable housing developments to help satisfy those municipalities' fair share of the regional obligation. Pa16. In contrast, Colts Neck succeeded for decades in preventing public water and sewer from being provided within its borders, except for one prior affordable housing project that managed, through litigation, to connect to Manasquan River Regional Sewerage Authority (MRRSA) system by way of Freehold Township. Pa16.

In the instant action, the trial court below examined Colts Neck's sewer

² The Fourth Round officially began on July 1, 2025. Colts Neck has opted into the new Affordable Housing Dispute Resolution Program pursuant to the Amended Fair Housing Act, but its Fourth Round plan fails to propose any new projects and merely seeks to continue its durational adjustment for the entirety of its next-decade obligation.

strategy through the Township’s own planning documents, the statements of elected officials, and the understanding of Colts Neck’s residents. See, e.g., Pa770-Pa778, at Pa771. For example, in 1996, Colts Neck’s Master Plan included a “Utility Services Plan” that plainly stated that the municipality was dedicated to limiting public sewer and water service to the maximum extent possible in order to constrain growth in the Township. Id. The plan explained that:

the need for sewage treatment facilities is neither expected nor planned except for the high density, affordable housing area adjacent to Freehold Township. It is therefore the intent of the Utility Services Plan to limit the water and sewer service areas where they exist along Swimming River Road on the east serving Tinton Falls, and to the limited area in the southwestern corners of Colts Neck abutting Freehold Township. By limiting water and sewer services to the southwestern portion of Colts Neck, the potential growth pattern in the Township is contained

[Ibid. (emphasis added)].

Even Colts Neck’s engineering expert in the trial court case observed that “[d]ecades of careful, deliberate land use planning” in Colts Neck “have resulted in a relatively low building density, largely rural municipality with virtually no municipal sewer or water services.” Pa778-Pa796, at Pa784.

Colts Neck’s explicit policy of limiting growth by thwarting public sewer and water options in the Township, as plainly stated in the master plan in the mid-1990s, remained the professed intent of its elected officials. In January 2019, four years after the Township sought an order of constitutional compliance from the

courts and in the midst of the instant litigation, J.P. Bartolomeo, Colts Neck's Mayor the previous year, was quoted on CentralJersey.com as stating:

The mission I had with the help of the Township Committee was to evolve, not change. It was to evolve this awesome town into a newer time and keep all of the values the same; open space, horses, golf courses, no sewers, no (public) water, the things we moved here for.

[Pa797-Pa799, at Pa797.]

The desire to exclude through the denial of infrastructure is also shared by Colts Neck residents. For example, at the Planning Board hearings held between August and December 2021 on the site plan application of Colts Neck Building Associates, LLC (CNBA), to construct a 360-unit inclusionary housing development in the Township, many residents expressed vehement opposition to all new development and any municipal action that would help facilitate the provision of sewer and water. See Pa800-Pa825. One resident sent correspondence to the Planning Board that was posted by the Board online that appears to have embodied the sentiments of many, which stated:

My concern, just as with others, is I don't want this town to turn into the next Tinton Falls. I came from Tinton Falls and when I was a kid, it was a really quiet town, much like Colts Neck. Now look at it. I believe that sewer and water is the beginning of the end. I hope the town will apply as much pressure as possible towards their project as it gets underway. . . .

[Pa841(emphasis added).]

In sum, the trial court viewed this history when considering the constitutionality of the Township's proposed Housing Element and Fair Share Plan (HEFSP) in the instant declaratory judgment (DJ) action.

B. After Lengthy Negotiations, In March 2020, Colts Neck Entered into Settlements With FSHC, Carole J. Schlumpf, Countryside Developers, Inc., and CNBA That Required Sewer and/or Water to be Made Realistic Within Two Years.

Throughout Third Round negotiations and even before that time, Colts Neck's RCA credits were contentious. In 2009, FSHC submitted a letter to COAH opposing Colts Neck's use of 107 RCA credits towards its Third Round obligation.³ RA02-RA04. In November 2015, immediately after the commencement of this DJ action, FSHC re-emphasized, in response to the Township's plan summary that "Colts Neck improperly relies on an [RCA] that was invalidated by the Appellate Division by order dated August 21, 2007." RA18-RA20.⁴

In March 2020, after a half-decade of negotiations, the Township of Colts Neck entered into a settlement with FSHC as well as with other developers that required the provision of sewer and/or water to specified affordable housing sites

³ Although this was a separate proposed HEFSP and separate process, FSHC's reasoning relied on P.L. 2008 c. 46, which remained applicable to Colts Neck's plan summary submitted in 2015.

⁴ The unpublished order granting summary disposition to FSHC in In re Approval of RCA Between Colts Neck and Long Branch Township, relying on In re Grant of Third Round Substantive Certification to Pennsville Township (unpublished opinion) are included in Respondent's appendix at RA05-RA12. FSHC is not relying on these orders and opinions as precedent, but rather to provide factual background as to this matter.

to be made realistic within two years (the March 2020 settlement). Pa139-Pa166.

The March 2020 settlement established Colts Neck's affordable housing obligations for the third round as follows: rehabilitation share – 25; prior round obligation – 218; and Third Round prospective need – 306. The Township accepted its Third Round obligation for the purpose of settlement only. Pa141.

And the parties also agreed, for the “purposes of settlement only,” to “accept[] and not contest” certain RCA credits. Pa140.

The March 2020 settlement included three new sites/areas that were anticipated to produce affordable housing through inclusionary development to help satisfy the Township's Third Round obligations. Pa145. The first site is Block 22, Lot 18, which is owned by CNBA, and for which Colts Neck claimed 144 credits for 72 affordable family rental units and 72 rental bonuses as part of a 360-unit inclusionary development. The second site is Block 42, Lot 4, which is owned by Countryside Developers, and for which Colts Neck claimed 15 credits for 15 affordable family for-sale units as part of a 68-unit development. The third area is a collection of sites—Block 46, Lots 13, 16, and 17, and Block 48, Lots 1-6, 19, and 39-41—which is referred to as the Area 1 Overlay Zone, totaling approximately 88 acres. Colts Neck claimed 142 credits for 142 affordable family units that would be part of developments totaling 710 units in Area 1, which is approximately 8 units per acre with a 20% affordable housing set-aside. Pa145.

Because Colts Neck did not have sufficient sewer capacity for inclusionary

development when the parties settled, it sought a durational adjustment in accordance with N.J.A.C. 5:93-4.3. At the time of the settlement, it was anticipated that sewer service and capacity was “likely to be obtained within two (2) years of the date of th[e] Agreement” for all proposed inclusionary sites (that is, by March 2022), through a connection to MRRSA’s system. (Id. at Pa142, ¶ 8(c)(iii).) For that reason, in accordance with N.J.A.C. 5:93-4.3(c)(4), FSHC agreed that the Township was entitled to a waiver allowing it to reject proposals for affordable housing sites that were not included in the HEFSP, even if such sites could obtain Department of Environmental Protection (DEP) approval for sewer service. (Id. ¶ 8(d).) Absent such a waiver, however, the Township would have been required to “amend its housing element and fair share housing ordinance to permit development” of any affordable housing site “where the DEP or its designated agent approves a proposal to provide water and/or sewer to [the] site.” Pa142; see N.J.A.C. 5:93-4.3(c)(4).

In addition to agreeing to support developer applications to MRRSA, DEP and necessary bodies politic, Colts Neck committed to make a financial contribution of up to \$2 million, to be paid in whole or in part from the Affordable Housing Trust Fund, to defray costs in excess of \$3 million that may be incurred extending sewer to Area 1 (the Affordable Housing Grant). Pa163-165. Exhibit B to the March 2020 settlement agreement provides for Colts Neck to pay money to

Toll Bros., which at the time of the agreement was a proposed developer of the specific property, for development of a sewer system within Area 1.⁵ Pa163. The settlement contemplates that, if Toll chose not to proceed with development of the site, the monies to be paid by Colts Neck toward the development of a sanitary sewer system would be made available to “to a developer of comparable reputation.” Pa164.

Although the settlement agreement specifically identified MRRSA as the primary proposed sewer solution for the inclusionary sites, it also recognized that alternatives to MRSSA might be necessary, especially as to Area 1. The settlement agreement stated “in the case of the Area 1 Overlay Zoning, a closer available tie-in along Route 34 or another location acceptable to both the developer and the Township” may be required instead of connecting to MRSSA. (Id. at ¶ 8(c)(iv)(1).) Furthermore, nowhere did the agreement prohibit or give the Township the sole authority to stop developers of the sites that Colts Neck agreed to from pursuing alternative sewer and/or water options. To the contrary, the Township committed to do everything within its authority to “provide a realistic opportunity, as may be possible given the durational adjustment, for the development of affordable housing through the adoption of inclusionary zoning or

⁵ At the time of the eventual December 2022 hearing, Toll was no longer involved with the Area 1 development site. The property that Toll Bros. sought to develop within Area 1 is owned by Seta Realty Corp., who was granted intervention in the trial court proceedings below in April 2025.

overlay zoning” on the Countryside and CNBA sites and in Area 1. (Id. ¶ 10.)

As to the Schlumpf Property, the settlement agreement allowed for the site to be developed with not more than 25 residential units with no affordable housing component. Pa150. Instead, the settlement provides for a “substantial Schlumpf Trust Fund Payment that will assist the Township in funding the infrastructure necessary for the development of Area 1.” Ibid. The funds shall be paid on a per unit basis calculated at a rate of 1.5% of the equalized assessed value for each residential unit. Ibid. The first deadline for payment is a condition of the issuance of the construction permit, with the remaining 50% of the fee as a condition of the issuance of the certificate of occupancy for each residential unit.⁶ Ibid. While it is rare for a Mount Laurel settlement to allow a developer to build a development with no affordable homes, this payment allowed for the sewer extension which would lead in the settlement to more affordable homes in the Township than would have been provided on the Schlumpf site.

Finally, as relevant below, Paragraph 16 designates certain provisions of the settlement agreement as “essential” (namely, that the Township shall introduce ordinances to implement the terms of this Agreement and a HEFSP in conformance with the terms within 120 days of the fairness hearing). In addition, the agreement includes an express condition that it “may not be modified, amended or altered in

⁶ The Schlumpf site is to be developed by Roger Mumford Homes, LLC. The site was granted final major subdivision approval on January 14, 2025. RA63-RA66.

any way except by a writing signed by each of the Parties” (Pa151, ¶ 32), and a severability clause in Paragraph 30:

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 section.

[Ibid.]

C. At the June 2020 Fairness Hearing on the Settlements, MRRSA and its Member Municipalities Opposed Any Attempt by a Development in Colts Neck to Connect to MRRSA’s System, and Colts Neck Insisted That Navy Weapons Station Earle Would Not Provide a Realistic Option for Sewer Service.

In June 2020, a fairness hearing was held on the settlements between Colts Neck, FSHC, Countryside, CNBA, and Carole J. Schlumpf.⁷ MRRSA and its member municipalities appeared as objectors, arguing that Colts Neck was not entitled to a durational adjustment waiver under N.J.A.C. 5:93-4.3(c)(4) and that new developments in Colts Neck should not be allowed to connect to MRRSA’s

⁷ Countryside had filed a separate lawsuit against MRRSA and its member towns, claiming that MRRSA had an obligation to provide sewer service to the Countryside development. Countryside and the defendants in that lawsuit filed a consent order on December 5, 2022, by which it was agreed by MRRSA and its member towns that the Countryside project would be provided with wastewater service through MRRSA. A stipulation of dismissal with prejudice as to MRRSA, Freehold Township, Freehold Borough, Howell Township, Wall Township and Farmingdale Borough was filed on January 23, 2023, with a stipulation of dismissal as to the Monmouth County Board of Chosen Freeholders filed on January 30, 2023. The Countryside development will be provided with wastewater service through MRRSA and will receive water service through Freehold Township.

system or to obtain water service through Freehold Township.

Among their contentions, MRRSA and its member municipalities claimed that there were alternative sewer and water options which were potentially viable and needed to be investigated by Colts Neck prior to attempting to connect to MRRSA's system, including on-site sewer treatment and NWS Earle, which is centrally located in Colts Neck. See, e.g., Pa842-Pa860, at 843-844 ¶¶ 2-4.

The Township dismissed arguments that NWS Earle was a realistic alternative option for sewer. Pa851. In urging the court to approve the settlement agreement over the objections, Colts Neck asserted:

NWS Earle is not available to provide water and sewer connections and it is unknown when or if this will subsequently occur. Moreover, though it is perhaps too obvious to even be said, Colts Neck is not in a position to dictate to the Department of the Navy when and to what extent sewer and water connections should become available.

[RA30-RA61, at RA59.]

Despite the objections, the trial court found the settlement fair in line with the applicable legal standards and entered a corresponding order of fairness and preliminary compliance in August 2020. Pa219-Pa222.

D. After the Fairness Hearing, Colts Neck No Longer Considered MRRSA a Realistic Sewer Option for Area 1 or CNBA Within Two Years of the Agreement, But Refused to Affirmatively Assist CNBA or Toll Bros. to Pursue Their Preferred Alternative Water and Sewer Options.

Shortly after the fairness hearing, Toll Bros., Colts Neck, and FSHC

entered into mediation, with the oversight of the court-appointed Special Adjudicator, to try to ensure that there was a realistic opportunity for Toll Bros.’ development and other projects in Area 1. While Colts Neck no longer maintained that MRRSA and Freehold Township provided a realistic sewer or water option for Area 1 or CNBA within two years of the settlement, it resisted and slow-rolled the alternatives proposed by the developers for both sites.

As to the CNBA site, the developer proposed to build an on-site package sewer treatment plant and to connect to public water through Gordon’s Corner Water Company rather than to pursue sewer treatment through MRRSA and potable water through Freehold Township. Rather than recognize and support this alternative (which the developer investigated and proposed at substantial cost), Colts Neck initially ignored the proposal and refused to consent, which forced CNBA to file a motion to enforce in August 2021, more than a year after the fairness hearing. Only after the motion was filed did the Township, under the threat of litigation, finally consent, in September 2021, to approve the necessary resolutions and enter into an agreement with CNBA to permit the proposed affordable housing development to proceed.⁸ Pa573-574.

As to Area 1 and Toll Bros. specifically, after more than a year of mediation,

⁸ In a December 5, 2022 consent order, it was agreed that CNBA would pursue the onsite package treatment plant option through the NJDEP and that CNBA would only pursue the potential for sewage transmission and treatment through MRRSA if the NJDEP did not approve an onsite treatment plant. The order additionally provided that Freehold Township would permit a water connection through Freehold Township. Pa1576.

Colts Neck steadfastly refused to permit Toll Bros. to pursue sewer through the Two Rivers Water Reclamation Authority (TRWRA) or to help facilitate the provision of on-site water. As a result, Toll Bros. filed a motion in August 2021 asking the court to order the Township to endorse all applications for Toll Bros. to obtain sanitary sewer service for its property from TRWRA and to allow for on-site water. Pa1513-1514.

In its opposition to Toll Bros.’ August 2021 motion, Colts Neck explicitly stated that it should be allowed to block Toll Bros. from pursuing a sewer connection for its affordable housing development through TRWRA because Colts Neck wanted to preclude future development in its southeast. Colts Neck’s engineer submitted a certification that stated that “[b]ased on the complexity of the sanitary sewerage force main connection to Tinton Falls, the potential for future requests to connect to the proposed force main, as well as the potential for future proposals to expand the proposed sanitary sewerage easement, Colts Neck’s concern that the proposed sanitary sewerage connection to Tinton Falls along Route 537 will limit their rights to control land use in the eastern and southeastern portions of the Township in the future is justified.” Pa876 at ¶ 28. Colts Neck’s planner similarly submitted a certification in support of Colts Neck’s position, stating that “it is appropriate from a planning perspective for Colts Neck to seek to preclude the potential for high or even moderate density development in the eastern and southeastern portions of the Township that . . . could in the future

become the subject of demands by inclusionary developers seeking to expand an existing connection to TRWRA.” Pa864 at ¶ 9 (emphasis added).

In May 2022, counsel for Colts Neck reiterated its opposition to Toll Bros.’ request, stating “it has never been assured that if (in the future) a sewer line were to connect from Area 1 to TRWRA, inclusionary developers in the Fourth Round and beyond would not be able to pursue a sewer connection to such infrastructure so to attempt to build projects in the east and south east portions of Colts Neck.” Pa125-134, at Pa130. Thus, Colts Neck explicitly stated it was blocking sewer access for a development it had already agreed to include in its Third Round fair share plan based on its hostility to hypothetical future inclusionary development in the southeast.

In addition, in response to Toll Bros.’ motion, Colts Neck set out a new position—which directly contradicted what it had asserted to the court in June 2020 (see RA59)—arguing that NWS Earle was somehow a more realistic sewer option than TRWRA and that the Township should be allowed to block Toll Bros. and any other future developer in Colts Neck from pursuing alternative sewer options. Pa884-Pa887.

In support of this position, Colts Neck submitted to the court a 4-page memorandum of understanding (MOU) with the U.S. Navy agreeing “to work together to explore options regarding Colts Neck’s desire to connect to the Navy system.” Pa884-Pa887. The MOU represented that NWS Earle “currently has more than enough capacity to meet the Parties’ needs” and “if and when” planned

upgrades to the Navy-owned sewage treatment plant were “constructed and operated, it will still have more than enough capacity for both the Parties’ needs.” Id. at Pa885. That representation was later revealed to be inaccurate. In essence, the Township relied on the mere prospect of a future agreement with the Navy and as-yet-unbuilt infrastructure as a purportedly realistic opportunity for sewer.

E. Colts Neck Represented It Would Pursue Sewer Through NWS Earle, Then Declared Six Months Later that it Was Abandoning Those Efforts.

On September 27, 2021, the court ordered limited discovery and scheduled a hearing on whether sewer service from NWS Earle to Area 1 could be considered realistic. Pa889. After Toll Bros. indicated that it could not afford to invest further resources into the discovery process, and in an effort to obviate the need for a hearing, Colts Neck entered into negotiations with FSHC and MRRSA, with input from the Special Adjudicator⁹ and court-appointed sewer expert, to attempt to formulate a plan under which NWS Earle might be made a realistic source of sewer service for Area 1. In a report dated December 29, 2021, Colts Neck’s engineering consultant, David Puchalski, submitted a report to the court determining that capacity exists, that it is feasible to construct the necessary infrastructure, and that “the construction and occupancy of the proposed 150-unit

⁹ The original Special Adjudicator—then known as “Special Master”—appointed in this matter was Michael Bolan. Special Adjudicator Bolan retired in or around June 2020, and Special Adjudicator Francis Banisch, III, was appointed Special Adjudicator in November 2020.

inclusionary development project” as well as “other developments in Area 1” before June 30, 2025 was “reasonable and practical.” Pa778-Pa795, at Pa794.

Then, in April and May 2022, after approximately six months of involved settlement discussions and drafting, Colts Neck unexpectedly revealed that it had wrongly believed the amount of available treatment capacity at NWS Earle to be greater than it was, altering the timing and nature of system upgrades that would be needed to serve affordable housing developments in Colts Neck. Pa125-Pa134. Colts Neck then announced that it “does not believe at this time – primarily based upon recent discussions about escalating costs to provide sewer capacity – that it continues to be appropriate to pursue either settlement discussions or a plenary hearing with respect to a proposal for sewer capacity to be provided to Area 1 from NWS Earle.” Id. at Pa133.

F. Colts Neck Applied for a Durational Adjustment and Approval of its Fair Share Plan.

Based on Colts Neck’s unilateral decision that it would no longer pursue sewer service from NWS Earle to Area 1, the court scheduled a compliance hearing to assess whether the Township was entitled to the declaratory relief that it seeks in this action. Pa135-Pa136.

On June 15, 2022, Colts Neck submitted its proposed HEFSP and related compliance documents, seeking a determination by the court that the Township had complied with its Mount Laurel obligations. Pa238. The Township also

requested approval of a traditional durational adjustment in view of its lack of sufficient capacity for sewer to support inclusionary development. Id.

Notably, the only items identified for Third Round expenditures in the Township’s proposed Spending Plan were a “Rehabilitation Program,” “Affordability assistance to very low-, low- and moderate-income buyers and renters of affordable housing units,” “Administration of affordable housing units and the Township’s affordable housing programs,” and a “Market to Affordable Program.” Pa716. Remarkably, the Spending Plan anticipated that out of a total of \$1,746,161 in trust funds (comprised of \$1,064,673 in available funds as of May 1, 2022 and \$681,488 in projected Third Round revenues), over half (\$969,384 or 55%) would be spent on a market to affordable program to secure at most three affordable units. As stated in the Spending Plan,

The Township of Colts Neck will spend \$969,384 on a market to affordable program in which market rate homes are purchased and sold to low or moderate income households. The applicable COAH rules requires a minimum of \$25,000 per unit to subsidize a moderate-income unit and/or \$30,000 per unit to subsidize each low-income unit; however, the Township’s anticipated subsidies will be far greater. Given the median home value of \$750,000 in the Township (July 2021 US Census Estimate), the Township intends to purchase up to 3 market rate housing units for this program.

[Pa721.]

On August 2, 2022—two months after the Township’s abandoning of its obligations under the settlement agreement—Toll Bros. advised the court that it was

terminating its plan to develop inclusionary housing in Colts Neck because it had spent significant time and resources on sewer studies, legal fees, mediation, and motions, without leading to any amount of certainty as to the proposed project.

Pa895.

G. FSHC Moved to Enforce Litigant's Rights Seeking Enforcement of the Court's August 13, 2020 Order, Which Incorporated the March 2020 settlement.

Based on the above, FSHC moved to enforce litigant's rights, seeking enforcement of the court's August 13, 2020 order, which incorporated the March 2020 settlement. Pa219-222. FSHC maintained that Colts Neck voluntarily entered into the March 2020 settlement agreement, for which it received valuable consideration, and the trial court had reviewed and approved that settlement. FSHC argued that the March 2020 settlement was binding; that the settlement language was not limited to only utilizing MRRSA; and that the Township had failed to point to any justifiable basis for its demand that the March 2020 settlement be declared null and void. FSHC also asked for reasonable fees and costs for litigating the motion.

Colts Neck opposed the motion, and the trial court heard oral argument on the motion to enforce litigant's rights in November 2022.

H. After the Special Adjudicator Issued Specific Recommendations as to Colts Neck's Settlement Obligations and Compliance, the Court Held a Hearing on Colts Neck's Unilaterally Proposed Plan for Compliance.

Over the course of two days in December 2022, the court heard testimony on

Colts Neck's proposed compliance plan from Colts Neck's planner, Beth McManus; the former Senior Vice President with New Jersey's Division of Toll Bros., Matthew Markovich; the court-appointed engineering expert, Mark Kataryniak, PE, PTOE; and from Special Adjudicator Francis J. Banisch, III, PP/AICP.

As relevant here, as reflected in the testimony of Ms. McManus, Colts Neck proposed to use approximately 55% of the \$1.7 million in available affordable housing trust funds (approximately \$970,000) on a market to affordable program that would provide no credits toward their fair share obligation and would finance a maximum of three units. 2T 74:9-12; 2T 75:18-25. With respect to the Township's prior history and conversations about sewer alternatives in Area 1, Ms. McManus testified about her prior certification, dated September 15, 2021 in opposition to Toll Bros.' motion, that, as an alternative to MRRSA, Colts Neck "has a plan that will provide sewer to Area 1 from NWSE within the period of repose." 2T 134:1-5.

Mr. Markovitch testified as to Toll Bros.' previously proposed plans to the Township, as well as cost-effective options for water in addition to sewer. 3T 47:17-24. Mr. Markovitch also affirmed that, should Colts Neck have the right to repeal the Area 1 zoning at its discretion, it would "certainly" impact the feasibility of development in Area 1, because it would be "very difficult to proceed with developing property" "[w]ithout having the certainty of knowing that the zoning accommodated the density that's necessary to make the development economically viable." 3T 50:15-20.

As reflected in the testimony of the court-appointed engineering expert Mr. Kataryniak, there are multiple points in the DEP approval process where Colts Neck could conceivably delay or obstruct the process under a durational adjustment without a waiver. Mr. Kataryniak testified that municipal funding used toward helping design and permitting would “clear a lot of hurtles towards expediting the construction process.” 3T 128:21-25, 129:1. He further averred that Colts Neck could have done more to pursue sewer service to Area 1 from NWSE. 3T 131:3-8. Mr. Kataryniak noted that future efforts to facilitate a connection to NWSE should include a process that provides for greater supervision and accountability of Colts Neck, such as clear deadlines and supervision by the court-appointed special adjudicators. In his November 18, 2021 report, Mr. Kataryniak emphasized that Colts Neck’s “active participation” is “critical in facilitating the necessary approvals needed for the expansion of sewer service area and construction of collection/treatment systems.” Pa1787. In this same report, Mr. Kataryniak recommended that the Township be required to facilitate a public-private partnership between MRSSA and the US Navy for development and provision of sewer service to Area 1, which would require “proactive participation” and “advance planning” on the part of Colts Neck. Ibid. As indicated by Mr. Kataryniak, inaction by Colts Neck was enough to jeopardize sewer connection for Area 1.

Special Adjudicator Banisch testified that “I think that we all know that significant affordable housing development in Colts Neck probably won’t happen

without a more centralized sewer solution.” 3T 147:18-20. Mr. Banisch explained, in his expert opinion as a Mount Laurel Special Adjudicator, that the difference between “\$2 million invested in infrastructure that can support hundreds and maybe more affordable units over time, compared to spending more than half of a trust fund on not even a handful of units is a little challenging as we look at this from the perspective of the protected class.” Id. 149:2-8. Mr. Banisch described the two routes for the trial court to determine that the Township was compliant: one, if the court deemed the March 2020 settlement to be in effect, and thus ordered Colts Neck to effectuate the terms of the agreement, without a durational adjustment waiver as agreed to by both parties; and the other, if the court were to conclude that the March 2020 settlement was no longer in effect, and would then to be called on to determine whether Colts Neck’s contested plan met the minimum requirements under the law. Mr. Banisch testified that he did not know of a project ever going through the process of being added to a municipal plan under a durational adjustment without a waiver and ultimately recommended that the court “find that an agreement that substantially complied with the settlement with Fair Share would be eligible for a judgment of compliance” without a waiver (id. 163:1-3).

In his December 2, 2022 report to the Court, Special Adjudicator Banisch explained that the draft spending plan devotes over \$700,000 to the market to affordable program but did not allocate any funding to essential sewer infrastructure, which “is troubling since the Settlement did not provide for a market to affordable

program but did call for a \$2M sewer infrastructure investment.” Pa1771-1772.

Echoing Mr. Katarniyak’s report from the previous year, Special Adjudicator Banisch was very clear that Colts Neck must affirmatively pursue compliance, including sewer expansion: “I recommend that the [c]ourt require these affirmative actions and a tight timeline for any required action by the Township.” Pa1779.

Additionally, he contextualized these recommendations with a reminder that Colts Neck actively obstructed Toll Brothers’ pursuit of sewer connection through TRWRA, all while maintaining immunity since 2015. Pa1778.

I. The Trial Court Issued an Order Granting in Part and Denying in Part FSHC’s Motion to Enforce Litigant’s Rights, and Scheduled a Final Hearing on Compliance with the Court’s Order.

On November 21, 2024, the trial court issued an order granting in part and denying in part FSHC’s motion to enforce litigant’s rights. Pa11-Pa14. The court ordered Colts Neck, within 90 days of the order, to revise its draft HEFSP and Spending Plan to “accord with the court-approved settlement of March 2020 and court order of August 13, 2020” by committing at least \$2 million toward extending water and/or sewer service to affordable housing in the Area 1 Overlay Zone; and clarifying that the Township will maintain the overlay zoning adopted in December 2020. Pa11-Pa87 at Pa12. The court further directed the Township, within 90 days of the order, to amend its compliance documents to clarify that the town will “support, and if necessary, endorse all applications that developers deem necessary to secure water and/or sewer service for affordable housing sites,” and “[s]pecify

that developers with proposals for affordable housing sites not already included in the [HEFSP] and that seek to apply to the [DEP] for water and/or sewer approvals for their sites may first file a motion with the Court, upon notice to and an opportunity to be heard by Colts Neck and FSHC, seeking an order finding their proposed developments suitable and requiring the municipality provide all approvals necessary to submit the application to DEP” with Colts Neck bearing the burden of proof to demonstrate that such proposed sites were not suitable. Pa12. The court also ordered Colts Neck to clarify that Affordable Housing Trust Funds (AHTF) will be prioritized for water and/or sewer infrastructure but will not be used toward NWS Earle during the Third Round and to remove the market to affordable plan from the Spending Plan. Pa13. Finally, the court set dates for Colts Neck to provide revised drafts of the amended HEFSP and Spending Plan to the Special Adjudicator and FSHC, for the Special Adjudicator to provide a compliance report to the court, and scheduled a “hearing on final compliance by Colts Neck” to be held in approximately three months’ time.¹⁰ Pa13.

In the accompanying 68-page decision, the trial court emphasized the factual history of this case before noting that “in a Mount Laurel declaratory judgment matter the court is often presented with a settlement agreement reached between the municipality that filed the complaint and FSHC, and perhaps other parties to the

¹⁰ A typographical error in the order sets this date as March 7, 2024. The hearing went forward as anticipated on March 7, 2025.

litigation.” Pa11-Pa87 at Pa24. The court observed that it was not presented “with a settlement agreement reached between Colts Neck and FSHC, but rather an application by Colts Neck asking the court to find the [March 2020 settlement] which was previously approved by the court to be void, and to grant approval to a different HEFSP, which is put forward by Colts Neck and which is not agreed to by FSHC.” Pa25.

The court then turned to the standard for vacating a settlement agreement, noting that courts require “clear and convincing” proof that the agreement should be vacated. Pa11-Pa87 at Pa44, citing Nolan v. Lee Ho, 120 N.J. 465, 472 (1990). The court noted that, “[w]hile Colts Neck argues that the court cannot amend a settlement agreement, but rather must either enforce it in its entirety or find it void in its entirety, Colts Neck is asking this court to do the thing that it asserts cannot be done. Colts Neck is asking the court to keep in place the parts of the agreement that it wants to keep and remove and replace other parts of the agreement with different provisions that Colts Neck now favors.” Pa44. The court stated:

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

Based upon the information provided by Colts Neck, a factual basis exists for the waiver provided to Colts Neck to be severed by the court. The court recognizes that the provision of sewer service to Area 1 is a complicated,

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

Applying an arbitrary deadline to Colts Neck’s obligations under the settlement agreement in an unyielding manner would ignore the reality, and the difficulty, of providing for sewer service in Colts Neck.

[Id. at Pa46-47.]

Thus, after “carefully consider[ing] all of the evidence, including the testimony of witnesses and voluminous documentation provided by the participants in the hearing, and the argument of counsel,” the court found that the March 2020 settlement agreement was not void. Id. at Pa47.

The court then turned to the terms of Colts Neck’s proposed HEFSP and the Special Adjudicator’s report. The court stressed that, in a Mount Laurel declaratory judgment action, a municipality can essentially “choose where the higher-density housing will go through its own planning and zoning, or can fail to properly plan for higher-density housing, thus leaving itself open to the filing of a builder’s remedy

lawsuit and potentially a court order that requires the municipality to provide for higher-density housing in an area not of the municipality's choosing." (Id. at Pa52). The court noted that "Colts Neck chose to file a DJ action, and the [March 2020 settlement agreement] and August 2020 order constitutes the resolution of that DJ action." Pa52. In the interim, Colts Neck received "immunity from builder's remedy lawsuits" from the time of the filing of the DJ in 2015 until the present time, and also chose to develop the Schlumpf property with a contribution toward the AHTF but no affordable housing. Pa54. In other words, Colts Neck had, for seven years, received immunity from Mount Laurel builder's remedy suits, but not built a single new unit of affordable housing. The court also emphasized the fact that Colts Neck, during the ongoing settlement conversations within the declaratory judgment case, had identified Area 1 as an appropriate area for development of affordable housing. Nonetheless, the trial court expressly allowed Colts Neck to make an application to the court for leave to rezone Area 1 to remove the overlay zoning that allows for development of inclusionary housing should "development in other areas occur at a pace that would allow Colts Neck to meet its Third Round obligation from development of properties outside of Area 1." Pa56.

Turning to the question of the Affordable Housing Grant as contemplated by the March 2020 settlement, the court noted that "[w]hile N.J.S.A. 52:27D-311d provides, "[n]othing in ... [N.J.S.A.] 52:27D- 301] et seq. shall require a municipality to raise or expend municipal revenues in order to provide low- and

moderate-income housing, in this matter Colts Neck agreed in the March 2020 settlement agreement to provide funds toward a sewer system for Area 1. Nothing in the FHA or Mount Laurel case law provides a basis for relieving Colts Neck from this agreed-to obligation.” Pa67. The court concluded that “the intention of the provision of the [March 2020 settlement agreement] providing for Colts Neck’s monetary contribution was to enable a wastewater collection system to be installed for the area of Colts Neck that Colts Neck recognized was appropriate for development of a substantial amount of Colts Neck[’s] affordable housing obligation.” Stating it succinctly, the trial court underscored that “[w]ater and sewer service needs to be provided to Area 1,” and that “[i]f an alternative manner of providing sanitary sewer service for Area 1 becomes viable (i.e., MRRSA through NWSE, through NWSE directly, through TRWSA, or through another treatment provider) there is no reason why the Affordable Housing Grant could not be applied to provision of wastewater transmission and treatment by an alternative provider.” Pa68. The court noted that the settlement agreement did not have a timeline or endpoint attached to it, and “when the clock strikes midnight on July 1, 2025,” and the Fourth Round begins, “Colts Neck’s obligation to financially contribute to sewer infrastructure for Area 1, as provided in the [March 2020 settlement agreement] and as set forth herein, will remain.” Pa69-70.

In considering the waiver in accordance with N.J.A.C. 5:93-4.3(c)(4), the court emphasized the timing of the action at hand. Specifically, the regulations allow

for waiver of such requirements when a municipality has a plan that will provide water and/or sewer to sufficient sites to address the municipal housing obligation within the period of repose. (See N.J.A.C. 5:93-4.3(c)(4)). The court thus agreed with Colts Neck that sewer service would not be brought to Area 1 within the Third Round and it was accordingly not entitled to the waiver, highlighting that, in the 7.5 years between the filing of Colts Neck's declaratory judgment complaint and the hearing on the request that the court find the March 2020 settlement to be void, sewer service was not provided to Area 1. Pa72.

In addition, the court rejected the inclusion of the market to affordable plan as set forth in the Amended HEFSP, observing that Colts Neck was proposing to use \$700,000 of its AHTF toward the development of only three affordable units. Finally, the trial court further required that the Township cooperate with Toll Bros. or another developer of comparable reputation as provided for in the 2020 Settlement Agreement. Pa76-77. Lastly, the trial court found that the Township must satisfy the remainder of recommendations in the Special Adjudicator's report, which were considered routine conditions of compliance. Pa77.¹¹

Thereafter, the Township adopted, under protest, an amended HEFSP and Spending Plan in accordance with the November 21, 2024 order, along with taking

¹¹ Special Adjudicator Banisch's recommendations incorporated previous routine conditions of compliance required by Special Adjudicator Bolan previously. Pa204-218. The routine conditions of compliance included the provision of documents such as the rehabilitation program manual, adopting the spending plan, and other administrative requirements. Pa217-218.

other action, under protest, in compliance with the order. On March 7, 2025, the trial court held a hearing regarding the Township's compliance with the November 21, 2024 order, and on April 21, 2025, the trial court entered an order of judgment and repose. Colts Neck filed its notice of appeal on April 30, 2025.¹² For the reasons that follow, FSHC asks this court to affirm the order and well-reasoned decision of the trial court.

LEGAL STANDARD

This appeal involves the trial court's decision on FSHC's motion to enforce litigant's rights pursuant to Rule 1:10-3, as well as the trial court's determination as to Colts Neck's proposed compliance.

“Rule 1:10-3 is, at bottom, a device to enable a litigant to enforce his or her rights.” In re Adoption of N.J.A.C. 5:96 & 5:97, 221 N.J. 1, 17 (2015) (“Mount

¹² On April 24, 2025, FSHC requested that the trial court set a schedule for a fee application pursuant to Rule 1:10, noting that it was a prevailing party in this litigation and that such request was previously made by FSHC in its motion to enforce litigant's rights and reply brief, dated October 20, 2022 and November 14, 2022. Colts Neck opposed FSHC's request. At the trial court's direction to file a motion for counsel fees and costs, on May 6, 2025, FSHC filed a Notice of Motion seeking an Order awarding attorneys' fees pursuant to R. 1:10-3. Thereafter, on May 7, 2025, Colts Neck filed a letter urging the Court to reject FSHC's motion based on its April 30, 2025 filed notice of appeal. The trial court subsequently withdrew FSHC's pending motion in light of the appeal, stating via clerk's notice that jurisdiction over the matter currently rests with the Appellate Division. The clerk's notice specifically noted that counsel may request reinstatement once the Appellate Division has rendered a decision. See MON-L-2234-15, Transaction ID LCV20251358038. An order memorializing such was entered by the trial court on May 15, 2025. In response to the Clerk of this Court's finality inquiry, on May 16, 2025, FSHC advised this Court of the remaining attorney's fee issue and requested that this Court dismiss Colts Neck's appeal as interlocutory. FSHC reaffirms its position that Colts Neck improperly filed the notice prior to the fee issue being resolved. Nonetheless, FSHC reserves all rights as to its fee request and, pursuant to the trial court Clerk's Notice, will seek reinstatement of the motion for attorney's fees upon resolution of this appeal.

Laurel IV"); see also id. at 19 (“Rule 1:10-3 is an appropriate vehicle for judicial assistance in enforcing rights.”). “The focus [is] on the vindication of litigants’ rights,” which does not “require establishing that the violator of an order acted with intention to disobey.” Id. at 17.

“The particular manner in which compliance may be sought is left to the court’s sound discretion.” N. Jersey Media Grp., Inc., 451 N.J. Super. 282, 296 (App. Div. 2017) (quoting Bd. of Educ., Twp. Of Middletown v. Middletown Twp. Educ. Ass’n, 352 N.J. Super. 501, 509 (Ch. Div. 2001)); ibid. (“Rule 1:10-3 . . . allow[s] for judicial discretion in fashioning relief to litigants when a party does not comply with a judgment or order” (citation omitted).

This Court reviews a trial court’s adjudication of a Rule 1:10-3 motion for abuse of discretion. N. Jersey Media Grp., Inc., 451 N.J. Super. at 296. “Although the ordinary abuse of discretion standard defies precise definition, it arises when a decision is 'made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis.’” Flagg v. Essex Cnty. Prosecutor, 171 N.J. 561, 571 (2002) (internal quotation marks and citation omitted). “[A] functional approach to abuse of discretion examines whether there are good reasons for an appellate court to defer to the particular decision at issue.” Ibid.

With respect to the trial court’s order on compliance, although a trial court’s interpretation of law is reviewed de novo, appellate courts “give deference to the trial court that heard the witnesses, sifted the competing evidence, and made reasoned

conclusions.” Gripenburg v. Twp. Of Ocean, 220 N.J. 239, 254 (2015). A final determination made by a trial court conducting a non-jury case is “subject to a limited and well-established scope of review.” Seidman v. Clifton Sav. Bank, S.L.A., 205 N.J. 150, 169 (2011). Reviewing courts should “not disturb the factual findings and legal conclusions of the trial judge unless . . . convinced that they are so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice.” Rova Farms Resort, Inc. v. Inv’rs Ins. Co., 65 N.J. 474, 484 (1974).

This is especially true in Mount Laurel declaratory judgment actions, where the New Jersey Supreme Court has directed trial courts to “employ flexibility in assessing a town’s compliance” in order to “endeavor to secure, whenever possible, prompt voluntary compliance” with affordable housing obligations. Mount Laurel IV at 15, 32. The role of a special adjudicator is also one which our courts have deferred to in Mount Laurel cases. In Mount Laurel II, the New Jersey Supreme Court held that “the trial court may appoint a special master to assist . . . in developing constitutional zoning and land use regulations.” S. Burlington County NAACP v. Mt. Laurel, 92 N.J. 158, 281 (1983). The Court explained that “[t]he use of such special masters, sometimes called ‘hybrid’ masters, is not uncommon in litigation resulting in some form of institutional change. . . . These impartial experts use their skills to help the parties formulate a remedy that will comply with the trial court’s order and supply information that the parties may not have available to them.” Id.; see also

East/West Venture v. Borough of Fort Lee, 286 N.J. Super. 311, 333 (App. Div. 1996) (“The judge’s factual findings and legal conclusions are soundly based on substantial evidence, particularly the compelling testimony and comprehensive report presented by the court-appointed master.¹³”)

Colts Neck improperly asserts that this motion is governed by a de novo standard of review. The factual record below is even for a Mount Laurel case extraordinarily complex, involving multiple court-appointed experts, testimony from experts for several parties, and years of litigation and hearings. The trial judge properly weighed competing testimony on contested factual issues such as whether the three-unit market-to-affordable program was realistic and the feasibility of providing affordable housing with or without certain contested provisions on sewer access and funding. Even if somehow a de novo standard applied, there is no error in the trial judge’s order and accompanying thorough and clear decision, rendered after hearing fact witnesses and deferring to the recommendations of the court-appointed Special Adjudicator.

LEGAL ARGUMENT

I. The Court Properly Upheld Colts Neck’s Obligations Under the March 2020 Settlement Agreement Pursuant to FSHC’s Motion to Enforce Litigant’s Rights. (Pa78-Pa80).

¹³ In April 2024, the New Jersey Supreme Court adopted the term “Special Adjudicator” as a replacement for the former use of “Special Master.”

A. The Court did not err in refusing to accept Colts Neck’s unilateral amendment to the agreement.

1. The settlement agreement, from which Colts Neck received enormous benefits, was not void.

Colts Neck declares that the March 2020 settlement agreement, from which Colts Neck received enormous benefits, was void. First, it is noteworthy that Colts Neck did not seek to invalidate along with the terms of the Settlement that it disliked. Among the benefits that the Township sought to maintain, while still invalidating other parts of the agreement, were an agreement from FSHC not to litigate Colts Neck’s eligibility for credits from disputed RCAs. On this point, the agreement specifically reads: “For the purposes of settlement only, FSHC accepts and agrees not to contest the Council on Affordable Housing’s (“COAH”) prior approval of, and the Township’s entitlement to, the above-referenced RCA credits” which Colts Neck sought to use to fulfill its Prior Round obligation (Pa139-Pa155 at Pa140) (emphasis added). This language could not be more clear. Without the settlement, there could have been—and would have been—a contested hearing about the creditworthiness of the RCAs, which had been raised by FSHC for almost a decade beforehand (see RA02-RA04; RA18-RA20). Such a compromise is a routine part of settlement and is enforced by our state’s public policy favoring settlement. See, e.g., Jannarone v. W.T. Co., 65 N.J. Super. 472 (App. Div. 1961), certif. denied, 35 N.J. 61 (1961).

More consequentially, as the trial court correctly noted, Colts Neck received immunity from builder’s remedy lawsuits for the entire Third Round as part of filing

its declaratory judgement to its fair share obligation. FSHC entered settlements with approximately 350 other towns in the Third Round process. Colts Neck's March 2020 settlement represents the outcome of the declaratory judgement process, and it outlined actionable terms of compliance for the Township to continue enjoying immunity from builder's remedy litigation. The Township also benefitted from the waiver itself, because it specifically designated Area 1 as the main site for higher-density housing. This fact was relied upon by the trial court and emphasized numerous times in its decision. As the trial court correctly summarized, "[t]he March 2020 settlement agreement thus provided Colts Neck with freedom from having to sign on to applications for development of higher-density housing outside of the CNBA, Countryside and Area 1 properties, protected Colts Neck from lawsuits filed by developers who wanted to construct higher-density housing on other properties located within Colts Neck that were not designated for such development." Pa11-Pa81 at Pa54.

Second, to the extent that Colts Neck maintains that the terms of the March 2020 settlement changed, it is Colts Neck itself who actively pursued a traditional durational adjustment without a waiver. In Colts Neck's own words, authored in its own letter to the trial court, the Township "intend[ed] to amend its Housing Element and Fair Share Plan to reflect . . . its voluntary relinquishment of the waiver of N.C.A.C. 5:93-4.3 (c)(3)," because of its "decision to no longer pursue either a settlement agreement or waiver premised upon" NWSE. Pa126. Colts Neck's stated

“decision” to relinquish its durational adjustment waiver, along with its larger decision to not follow the settlement agreement, does not magically render the settlement agreement null.

2. The durational adjustment waiver was not an essential part of the March 2020 settlement.

Next, Colts Neck incorrectly characterizes the settlement agreement as an exchange between the durational adjustment waiver and the Township’s \$2 million contribution to a sewer service connection in Area 1. The Township claims that “. . . the 2020 Settlement Agreement explicitly provided that in exchange for a durational adjustment with a waiver of N.J.A.C. 5:93-4.3(c), the Township would create overlay zoning in Area 1 and contribute up to \$2 million to connect sewer service to Area 1 through MRRSA.” Pb11-Pb12 (emphasis added).

This statement is shocking. First, the March 2020 settlement does no such thing explicitly: Nowhere is Colts Neck’s apparent bargained-for exchange indicated explicitly, or even implicitly. Colts Neck’s misleading statement flies in the face of the fact that, as a sophisticated party, should the Township have desired such a term to be made a part of the agreement, it surely could have written it. Paragraph 8 of the Settlement, as well as Exhibits A and B, all discuss the Township’s durational adjustment, yet none of those provisions refer to the waiver as an “essential” term of the agreement. In notable contrast, Paragraph 16 specifies certain terms that were designated “essential.” Clearly, if the parties had viewed the durational-adjustment

waiver as an essential term of the Settlement, they would have said so. They did not.

In effect, Colts Neck is now attempting to singlehandedly amend the Settlement to designate the durational adjustment waiver “essential,” when the clear language of the agreement shows otherwise. Such unilateral, unwritten amendments are prohibited by Paragraph 32 of the Settlement which requires written amendments to change the settlement, and more generally by well-established principles of law. See, e.g., Cty. of Morris v. Fauver, 153 N.J. 80, 100 (1998) (“A proposed modification by one party to a contract must be accepted by the other to constitute mutual assent to modify. . . Unilateral statements or actions made after an agreement has been reached or added to a completed agreement clearly do not serve to modify the original terms of a contract. . .”).

The waiver was not designated as “non-severable” in the Settlement. Under the language of Paragraph 30, the elimination of the durational adjustment waiver has no impact on the validity of the remainder of the Settlement. Specifically, Paragraph 30 of the Settlement states:

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 section.

See Arafa v. Health Express Corp., 243 N.J. 147, 169 n.2 (2020) (“clear severance

clauses . . . are indicative of the parties’ intent that the agreement as a whole survives the excision of an unenforceable provision.”)

The plain language of the Settlement is clear: the waiver is not essential to the validity of the agreement. See Cypress Point Condo. Ass’n v. Adria Towers, L.L.C., 226 N.J. 403, 415 (2016) (“when ‘the language of a contract is plain and capable of legal construction, the language alone must determine the agreement’s force and effect’”) (internal citation omitted). And the parties did not agree to amend the contract. Thus, the settlement remains valid.

3. Sewer connection through MRRSA is not essential to the March 2020 settlement.

A paradigmatic rule of interpreting settlements is to look at the plain language of the agreement. The “plain language of the contract is the cornerstone of the interpretive inquiry; when the intent of the parties is plain and the language is clear and unambiguous, a court must enforce the agreement as written, unless doing so would lead to an absurd result.” Quinn v. Quinn, 225 N.J. 34, 45 (2016).

Here, there is no express language in the contract conditioning Colts Neck’s performance on water being delivered only by MRRSA. As the trial court correctly identified, “there is no reason why the Affordable Housing Grant could not be applied to provision of wastewater transmission and treatment by an alternative provider.” Pa11-Pa81 at Pa68. At the time of the March 2020 settlement, it seemed that MRRSA provided the best opportunity for sewer connection, and therefore

MRRSA is frequently referenced as the source of potential sewer connection for Area 1 in the settlement. However, the settlement explicitly acknowledges that MRSSA is just one of the potential options for sewer connection in Colts Neck. Paragraph 8(c)(iv) and Exhibit B of the March 2020 settlement both contemplate other options, including “a closer available tie-in along Route 34 or another location acceptable to both the developer and the Township.” Pa139-Pa155 at Pa143. And the Township agreed in Paragraph 8(c)(iv) of the settlement “to support and endorse, and if necessary become a co-applicant on, any and all applications made to Monmouth County, DEP, the Manasquan River Regional Sewer Authority (“MRRSA”), any of MRRSA’s constituent members, the Ocean County Utilities Authority (“OCUA”), Ocean County and/or any other body politic or utility authority necessary in order to provide public sewer and water service to the parcels” in Area 1. Pa139-Pa155 at Pa143.

Colts Neck further agreed in Paragraph 8(c)(iv)(1) of the settlement to assist in suing MRRSA, if necessary, to secure sewer service over its objections. The provision states that Colts Neck will “join any appropriate party as a plaintiff in any litigation necessary to procure public sewer and/or water for the parcels that are the subject of a durational adjustment... including but not limited to any litigation against MRRSA, the Township of Freehold, MRRSA’s constituent members... or any other necessary party.” Pa139-Pa155 at Pa143. Clearly, the parties anticipated the possibility that MRRSA might refuse to serve one or more developments in the

plan. It is absurd for Colts Neck to assert that the agreement is null and void based on a potentiality that the settlement expressly contemplates and provides for in its terms. See Schwartzman v. Schwartzman, 248 N.J. Super. 73, 78 (App. Div. 1991).

Colts Neck has not demonstrated that the settlement agreement relies on connection solely through MRRSA, and therefore has not met the legal standard to nullify the existing settlement agreement. The trial court correctly identified that Colts Neck has not provided “clear and convincing proof” that the March 2020 settlement agreement is void. Pa11-Pa81 at Pa44.¹⁴

B. The Court properly confirmed Colts Neck’s agreed-upon responsibilities.

1. Colts Neck’s previously agreed-upon responsibility to expand sewer infrastructure is authorized by relevant statutes and regulations.

It is well-established that the municipal obligation under Mount Laurel does not simply end at the rezoning of property. “Sites only create realistic housing opportunities where water and sewer service can be brought to the site at a reasonable cost that does not unduly increase the cost of the development. Municipalities have an affirmative obligation to facilitate provision of the infrastructure necessary to make development realistically likely.” Toll Bros. v. Twp. Of W. Windsor, 303 N.J. Super 518, 543 (Law Div. 1996), aff’d, 334 N.J. Super.

¹⁴ Indeed, the Affordable Housing Grant was limited to \$2 million no matter the purveyor of the infrastructure, so it is difficult to understand Colts Neck’s use of MRRSA’s objection as a means to unilaterally change the entirety of the previously negotiated terms. In addition, these funds will substantially be provided for by the Schlumpf payment, not by Colts Neck directly.

109 (App. Div. 2000), aff'd, 173 N.J. 502 (2002).

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

“In preparing the housing element, the municipality shall consider the following techniques for providing low- and moderate-income housing within the municipality . . .

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

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

[N.J.S.A. 52:27D-311.]

In line with the relevant law, the trial court specifically examined these elements when determining whether Colts Neck had a plan “to make development realistically likely.” West Windsor, 303 N.J. Super at 543.

In addition, the COAH regulations contemplate a municipality’s “fiscal responsibility” to provide water and sewer. As relevant here, if

“[COAH] determines the cost associated with providing water and/or sewer to inclusionary sites is prohibitive, it shall limit the municipality’s fiscal responsibility of providing water and/or sewer. However, notwithstanding any limits placed on the municipality’s fiscal responsibility to provide water and/or sewer, the Council may require the municipality to designate and zone appropriate sites to accommodate the municipal housing obligation or to adopt other approaches consistent with N.J.A.C. 5:93-4.2(h).”

[N.J.A.C. 5:97-4.3(d) (emphasis added).]

The regulations discussing a “limit” to the “fiscal responsibility” of a municipality—implying that there is, indeed, a fiscal responsibility. Colts Neck has argued that it should not be obliged to contribute financially to the expansion of sewer service, not that it faces prohibitive costs as outlined in N.J.A.C. 5:93-4.3(d). The cost of extending sewer service in Colts Neck has been prohibitive to inclusionary development. The trial court, in the place of COAH, appropriately required the municipality to designate and zone appropriate sites, and adopted this approach consistent with the regulations. This court should reaffirm Colts Neck’s obligation as outlined by the settlement agreement and confirmed by the trial court.

2. Colts Neck is responsible for its Third Round prospective need obligation even after the end of the Third Round.

The trial court correctly looked to Colts Neck’s upcoming Fourth Round obligation and the Amended FHA’s “lookback” requirements toward a Third Round plan. As part of the process of adopting and seeking approval of Fourth Round fair share plans, the Legislature was clear that the starting point for any review is an “assessment of the degree to which the municipality has met its fair share obligation from the prior rounds of affordable housing obligations as established by prior court approval, or approval by the council.” N.J.S.A. 52:27D-304.1(f)(2)(a). As part of this assessment, the municipality is required to analyze the “extent this obligation remains unfulfilled” and “if a prior round obligation remains unfulfilled or a municipality never received an approval from court or the council for any prior

round, the municipality shall address such unfulfilled prior round obligation in its housing element and fair share plan.” Ibid. Colts Neck’s obligation to plan for its Third Round obligation remains, including the obligation to provide \$2 million for the extension of sewer service in Area 1. As the trial court stated, “the [March 2020 agreement] does not indicate that Colts Neck’s obligation to contribute to the cost of sewers for Area 1 would be eliminated at the conclusion of [Round] Three. Unless the housing units planned for Area 1 in Round Three have been built elsewhere in the Township, the need for the units, and the need for sewers in Area 1, will remain. When the clock strikes midnight on July 1, 2025, Colts Neck’s obligation to financially contribute to sewer infrastructure for Area 1, as provided in the [March 2020 settlement agreement] and as set forth herein, will remain.” Pa11-Pa81 at Pa69.

Unlike Colts Neck’s contention, the trial court did not add anything new to the March 2020 settlement agreement. It was Colts Neck itself that sought a full durational adjustment without a waiver. As the trial court emphasizes, Colts Neck requests an outcome that would follow the same process it opposes. “While Colts Neck argues that the court cannot amend a settlement agreement, but rather must either enforce it in its entirety or find it void in its entirety, Colts Neck is asking this court to do the thing that it asserts cannot be done. Colts Neck is asking the court to keep in place the parts of the agreement that it wants to keep and remove and replace other parts of the agreement with different provisions that Colts Neck now favors.” Pa11-Pa81 at Pa44.

In contrast, the trial court followed well-established Mount Laurel case law in affirming Colts Neck’s obligations. For example, the trial court correctly followed East/West Venture, 286 N.J. Super. at 324 (finding that the “settlement agreement binds” the municipality in a Mount Laurel proceeding). And, to the extent that the trial court ordered revisions to Colts Neck’s plan for the Township to come into compliance, this action is specifically authorized by Mount Laurel II, 92 N.J. at 278. Mount Laurel II specifically authorizes a trial court, among other means, to order revisions to a municipality’s zoning ordinance within a set time period to comply with the constitutional mandate.

3. The trial court did not require Colts Neck to raise municipal revenues for the development of sewer infrastructure.

The trial court did not require Colts Neck to raise municipal revenues for the development of sewer infrastructure. Colts Neck was ordered to contribute \$2 million to sewer infrastructure from its municipal housing trust fund, which contains fees paid by developers explicitly for the creation of low- and moderate- income housing. See Holmdel Builders Ass’n v. Holmdel, 121 N.J. 550, 570 (1990) (“such fees should be considered constituent parts of local housing elements designed to meet municipal affordable-housing obligations under the FHA”). Development fees are explicitly not taxes, and they do not contribute to general municipal revenue. Rather, they are “a form of inclusionary zoning” and “regulatory measures, not taxes.” Id. at 585.

Colts Neck was set to receive most of this funding toward infrastructure enhancements from the Schlumpf payment, so it is unclear Colts Neck's specific objection outside of its mischaracterization of the regulations. And, more broadly, under Mount Laurel IV, trial judges had the authority previously granted to COAH under the former version of N.J.S.A. 52:27D-329.2 to direct this spending. See In re Failure of the Council on Affordable Hous. to Adopt Trust Fund Commitment Regulations, 440 N.J. Super. 220, 225 (App. Div. 2015) ("we conclude that the interpretation and construction of . . . the application or disposition of the funds in question must also now be adjudicated in our courts").

Colts Neck asserts the trial court cannot compel it to spend municipal trust fund monies for the extension of sewer service and attempts to justify this argument with In re Adoption of N.J.A.C. 5:96 & 5:97, 416 N.J. Super. 462, 471-72 (App. Div. 2010), *aff'd* 215 N.J. 578 (2013), which clearly pertains to municipalities having to raise taxes and construes the statute that way. Here, the trial court limited its ruling to the expenditure of municipal housing trust funds monies, which are not a form of taxes as indicated above in Holmdel Builders. Additionally, the cost of contributing to sewer service access has not been demonstrated as "prohibitive" for Colts Neck as outlined in N.J.A.C. 5:93-4.3(d).

The Township argues that trust fund money can be used for "for any activity approved by [COAH] for addressing the municipal fair share." Pa39-Pa40. However, the trial court (acting in COAH's stead) found, based on testimony, that the market to

affordable program was not a realistic activity to address the fair share and basically an attempt to squander the money, and instead “these funds could facilitate sewers and enable the construction of a substantial number of affordable units through development of a sewer system in Area 1.” Pa11-Pa81 at Pa62. This Court should affirm the trial court’s well-reasoned decisions based on hearing testimony and considering the record before it, made squarely within its discretion and based on its Mount Laurel expertise.

II. The Court Correctly Held that Colts Neck’s Unilaterally Proposed Housing Element and Fair Share Plan was not Constitutionally Compliant. (Pa78-Pa79).

A. The proposed HEFSP did not create a realistic opportunity for Colts Neck’s fair share of the regional need.

The bedrock principle in determining whether a municipality has complied with Mount Laurel is for the housing plan to show how it has created a “realistic opportunity” for the municipality’s fair share of the regional need. Mount Laurel II, 92 N.J. at 221-222. The Supreme Court demanded an analysis that focuses on actual construction of affordable homes and determined that “whether the opportunity is ‘realistic’ will depend on whether there is in fact a likelihood—to the extent economic conditions allow—that the lower income housing will actually be constructed.” Id.

The March 2020 settlement was fair because it involved a realistic plan to provide low-and moderate- income housing, which depended on the extension of

sewer service for proposed inclusionary developments. In contrast, the June 2022 unilaterally proposed HEFSP was not fair to the protected class. As the trial court held, “[t]he court is satisfied that the potential development of three affordable housing units, using \$700,000 of the Township’s affordable housing trust fund, while failing to provide for financing of sewers within Area 1 does not provide appropriate protection of the interests of low- and moderate-income households.”¹⁵ Pa11-Pa81 at Pa60. As indicated by the trial court, the difference in affordable units is extreme: the market to affordable program would only provide three affordable units, whereas the development of a sewer system for Area 1 would be expected to produce 142 units. The magnitude of Colts Neck’s unfulfilled obligation indicates that trust fund monies should be prioritized for realistic mechanisms that address a larger portion of the fair share obligation. Even if there had never been a settlement, the trial court still correctly would not have approved Colts Neck’s proposed HEFSP because it was not compliant with controlling law.¹⁶

¹⁵ Colts Neck’s proposed spending plan dated June 14, 2022, actually allocates \$969,384 to the market-to-affordable program, even more than indicated by the trial court at Pa60, or by Special Adjudicator Banisch in his December 2, 2022 report at Pa1771.

¹⁶ Colts Neck relies on the unreported, nonprecedential case of Clinton Township (In re Clinton Twp., 2020 WL 476888), to suggest that a court is prohibited from requiring overlay zoning in the context of a durational adjustment. Even if this Court were to consider the unpublished opinion, the Township’s reliance on that case is misplaced. As an initial matter, the case concerned the question of “over-zoning,” which is entirely different from the “overlay zoning” of Area 1 (p 38). Over-zoning is the process by which a municipality plans for more units than needed to satisfy the fair share obligations. This is entirely unapplicable to the case at hand because the trial court only addresses Colts Neck’s Third Round fair share obligation of 306 units, not additional affordable units, and Colts Neck does not assert that its plan would reach that 306-unit obligation, let alone exceed it. See In re Clinton Twp. Compliance, No. A-2633-18T1, 2020 N.J. Super. Unpub. LEXIS 207 (App. Div. Jan. 30, 2020). Nonetheless, In re Clinton Twp. affirmed the trial court’s

III. Allowing Colts Neck to Nullify and Unilaterally Change the Terms of the Settlement, Despite its Clear Validity, Would Make it Harder to Resolve Mount Laurel Proceedings in the Future. (Pa41-Pa81).

Although Colts Neck continues to litigate its Third Round HEFSP, most municipalities in New Jersey are fully focused on their Fourth Round obligations. By the end of 2025, it is expected that hundreds of municipalities throughout New Jersey will have settled challenges to their Fourth Round HEFSPs. N.J.S.A. 52:27D-301 (2024). From there, the creation of new affordable units unfolds. If Colts Neck is allowed to unilaterally change the terms of its Third Round settlement to plan for 139 fewer affordable units, other municipalities may attempt to similarly alter their plans for the provision of affordable housing. Relitigating settlements would drain time and resources; delay the creation of new affordable units throughout the Fourth Round; and have a massive chilling effect statewide.

Colts Neck's unilaterally revised, unconstitutional HEFSP has successfully delayed the creation of affordable housing in the Township, despite available sites and interested developers throughout the Third Round. This Court should affirm the trial court's order and decision and require Colts Neck to finally address the vast majority of its Third Round obligation as it begins to work on its Fourth Round plan.

conclusions about the constitutionality of a proposed HEFSP. Similarly, here, this Court should affirm the trial court's conclusions about the constitutionality of Colts Neck's proposed HEFSP.

CONCLUSION

In sum, the trial court—after hearing from multiple expert witnesses and two Special Adjudicators—rightfully upheld the March 2020 settlement agreement outlining the necessary actions for Colts Neck’s Third Round compliance, and correctly rejected Colts Neck’s proposed HEFSP. For the reasons set forth herein, this Court should uphold the conclusions of the trial court, made squarely within its discretion and Mount Laurel expertise, and reject Colts Neck’s attempts to unilaterally amend the settlement agreement in the strongest possible terms.

Respectfully submitted,

/s/ Ariela Rutbeck-Goldman, Esq.
Counsel to Fair Share Housing Center

Dated: October 12, 2025

c: All counsel of record via eCourts

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-002677-24

IN THE MATTER OF THE
APPLICATION OF THE
TOWNSHIP OF COLTS NECK,
A MUNICIPAL CORPORATION
OF THE STATE OF NEW
JERSEY

Submission Date: October 20, 2025

CIVIL ACTION (Mount Laurel)

On Appeal From the Final Judgment of
the Superior Court of New Jersey, Law
Division, Monmouth County

Sat below: Honorable Linda Grasso
Jones, J.S.C.

Trial Court Docket No. MON-L-2234-15

**BRIEF ON BEHALF OF RESPONDENT
SETA REALTY CORP.**

DAY PITNEY LLP
8 Sylvan Way
Parsippany, New Jersey 07054-3801
(973) 966-6300
cgianetti@daypitney.com
cturiano@daypitney.com
*Attorneys for Respondent Seta Realty
Corp.*

Of Counsel:
Craig M. Gianetti (#036512003)

On the Brief:
Craig M. Gianetti (#036512003)
Chelsea Turiano, Esq. (#408152022)

TABLE OF CONTENTS

	<u>Page</u>
PRELIMINARY STATEMENT.....	1
PROCEDURAL HISTORY & STATEMENT OF FACTS.....	4
A. The Township Cites to Evidence Not Properly In the Record	4
B. The Township Steered Toll Toward The Seta Property.....	5
C. Manasquan River Regional Sewer Authority	7
D. Toll’s Desire to Seek Sanitary Sewer Treatment from Two River Water Reclamation Authority	9
E. FSHC Settlement Agreement	11
F. The Township Suddenly Switches To Pursuing Sanitary Sewer Treatment from NWSE.....	13
G. Toll Files a Motion to Intervene After Wasting Two Years Attempting to Resolve the Sewer Issue Amicably With the Township.....	14
H. The Trial Court Decision and November 2024 Orders	20
a. The Financial Contribution.....	20
b. The Durational Adjustment and Waiver.....	21
ARGUMENT	22
I. STANDARD OF REVIEW	22
II. THE TRIAL COURT PROPERLY FOUND THAT THE MARCH 2020 SETTLEMENT AGREEMENT WAS NOT NULL AND VOID BASED UPON THE ACTIONS OF THE TOWNSHIP (Pa34).	25
A. The \$2 Million Contribution Was Not Premised on the Waiver or Sewer Going to MRRSA, Both of Which Were Severable Pursuant to the Terms of the Settlement Agreement	27
B. The Plain Language of the FSHC Settlement Agreement States the Provisions are Severable.....	29
III. THE TRIAL COURT DID NOT IMPERMISSIBLY IMPOSE ADDITIONAL REQUIREMENTS ON THE	

TOWNSHIP OR CONDITION THE TOWNSHIP’S
JUDGMENT OF COMPLIANCE (Pa57-Pa69). 30

IV. IN PUBLIC INTEREST LITIGATION THE COURT
SHOULD MODIFY AN EXISTING ORDER TO
ADDRESS CHANGED CIRCUMSTANCES RATHER
THAN VOIDING THE WHOLE THING (Pa46-Pa49)..... 36

CONCLUSION 38

TABLE OF JUDGMENTS, ORDERS AND RULINGS

Order Granting Fair Share Housing Center’s Motion to Enforce
Litigant’s Rights and Directing Modification of Colts Neck’s
Proposed Housing Element and Fair Share Plan and Spending Plan,
dated November 21, 2024Pa11

Order of Judgment of Fairness and Conditional Compliance and
Repose Approving the Amended HEFSP Submitted to the Court by
The Township of Colts Neck on June 15, 2022,
dated November 21, 2024Pa82

TABLE OF AUTHORITIES

	Page(s)
Cases	
<u>In Re Adoption of Amendments to N.J.A.C. 5:93-1.3 & 5:93-5.3,</u> 339 <u>N.J. Super.</u> 371 (App. Div. 2001)	34
<u>Allstate N.J. Ins. Co. v. Ctr. City Fam. Prac., Inc.,</u> 2019 WL 6893963 (N.J. Super. Ct. App. Div. Dec. 18, 2019)	36
<u>E./W. Venture v. Bor. of Fort Lee,</u> 286 <u>N.J. Super.</u> 311 (App. Div. 1996)	37
<u>Lipsky v. N.J. Ass’n of Health Plans, Inc.,</u> 474 <u>N.J. Super.</u> 447 (App. Div. 2023)	23
<u>Toll Bros., Inc. v. Twp. of W. Windsor,</u> 303 <u>N.J. Super.</u> 518 (Law Div. 1996)	35, 36
<u>Toll Bros., Inc. v. Twp. of W. Windsor,</u> 334 <u>N.J. Super.</u> 77 (App. Div. 2000)	36, 37
<u>In Re Twp. of Bordentown,</u> 417 <u>N.J. Super.</u> 196 (App. Div. 2022)	23, 24
Statutes	
<u>N.J.S.A. 5:93-4.3</u>	15
<u>N.J.S.A. 52:27D-311</u>	32, 33
Regulations	
<u>N.J.A.C. 5:93-4.3</u>	1, 16, 27, 33
Rules	
<u>R. 1:10-3</u>	23, 24
<u>R. 2:6-4</u>	4

PRELIMINARY STATEMENT

For decades the Township of Colts Neck (“Township” or “Colts Neck”) has gotten away with using its sewer policy to stunt growth and the development of affordable housing – failing to satisfy its constitutional affordable housing obligation. The Township obstructed efforts to bring sanitary sewer to certain properties and failed to live up to the terms of its Settlement Agreement with Fair Share Housing Center (“FSHC”) dated March 18, 2020 (“FSHC Settlement Agreement”).

This Mount Laurel declaratory judgment case (“DJ Action”) was filed by the Township seeking a declaration that it complied with its Third Round affordable housing obligation. It required the Township to adopt a housing element and fair share plan (“HEFSP”) in conformance with the New Jersey Fair Housing Act (“FHA”) and Council on Affordable Housing (“COAH”) regulations. In March 2020, the Township and FSHC entered into the FSHC Settlement Agreement, which set the Township’s Third Round obligation and outlined the mechanisms for the Township to address that obligation. The Township sought a durational adjustment under COAH regulations for the fact that the Township lacks public sanitary sewer within its border – N.J.A.C. 5:93-4.3. The regulation allows a certain portion of its obligation to be deferred until such time that sanitary sewer is brought to the sites identified for affordable

housing. The Township also sought a “waiver” under the durational adjustment regulation whereby the Township would not have to include in its HEFSP any project that could get sanitary sewer to its property. This waiver can be granted when the municipality has a plan to bring sanitary sewer to all of the projects in its HEFSP by the end of the compliance period.

The FSHC Settlement Agreement contemplated that the Township would be entitled to a durational adjustment waiver if it took certain steps to bring sanitary sewer to certain sites, including the Area 1 District where Respondent Seta Realty Corp. (“Seta”) owns property. As part of the FSHC Settlement Agreement, the Township agreed to commit \$2 million towards bringing sanitary sewer to the Area 1 District. It also contemplated that the Township would take certain steps to bring sanitary sewer from Manasquan River Regional Sewer Authority (“MRRSA”) or some other “alternate connection point” to the properties within its HEFSP.

The history of this case and the evidence deduced at the Compliance Hearing demonstrated that the Township, though benefiting from the FSHC Settlement Agreement for years, played a shell game in getting sanitary sewer to the Area 1 District. Toll Bros., Inc. (“Toll”), a national homebuilder, was under contract to develop the Seta Property. Toll made clear to the Township that going to MRRSA for sewer was not realistic and that, based upon meetings

with Two River Water Reclamation Authority (“TRWRA”), that TRWRA was the most realistic route. The Township opposed this and gave the mirage that it had a realistic alternative for sewer – Navy Weapons Station Earle (“NWSE”). Despite claiming to the Court that NWSE was realistic multiple times, on the eve of a hearing, the Township admitted NWSE was not real and acknowledged that it was not entitled to the durational adjustment waiver because it had no means to bring sewer to the Area 1 District within the Third Round (ending June 2025). The Township then prepared a 2022 HEFSP that complied with certain terms of the FSHC Settlement Agreement, but did not include the \$2 million contribution and did not propose inclusionary zoning for the Area 1 District. FSHC filed a motion to enforce litigant’s rights requiring those two things be included and the Trial Court conducted a Compliance Hearing on the 2022 HEFSP. In a 68-page well-reasoned decision, the Trial Court found that the Township’s 2022 HEFSP did not comply with the FSHC Settlement Agreement and required certain changes to the 2022 HEFSP before a judgment of compliance could be entered. The Trial Court also rejected the Township’s argument that the FSHC Settlement Agreement was null and void. This Court should uphold that decision.

PROCEDURAL HISTORY & STATEMENT OF FACTS¹

Pursuant to R. 2:6-4, Seta adopts Respondent Fair Share Housing Center's Statement of Facts and Procedural History in full and includes the following supplemental facts.

A. The Township Cites to Evidence Not Properly In the Record.

As an initial matter, the Township's Procedural History and Statement of Facts belies the Court by heavily citing to Pa1306-Pa1314 (the "Trautner Cert.") – a self-serving certification of counsel that was never entered into the record as part of the Compliance Hearing and should thus be disregarded by this Court. (See Pb6-Pb8, Pb13-Pb14.) Seta objected to the Trautner Cert. at the Trial Court because it was obvious he lacked personal knowledge of many of the alleged "facts" in his certification, and also because it contained hearsay testimony. (SRa011-SRa012.) Further, the Trautner Cert. was filled with general statements of believed facts and of Toll's position or conduct, all without identifying who Mr. Trautner spoke with, when he spoke with them, or if he even spoke with anyone at all. (Id.) Mr. Trautner served as counsel for the Township at the Compliance Hearing and never testified and was never subject to cross-examination. The Trautner Cert. was not just a discussion of procedural history,

¹ These two sections are combined as they are inextricably intertwined.

it was an attempt to establish facts. It is entirely self-serving, and Seta's position was that Mr. Trautner should have to testify at the Compliance Hearing if his testimony were to become part of the record so he could also be subject to cross-examination. (Id.) Mr. Trautner did not testify, so those statements in the Trautner Cert. never properly became part of the record and cannot be used to establish facts.

The Trial Court recognized that relying on a certification for facts without the person testifying at the Compliance Hearing was "problematic" because there was no cross examination and that she would not consider testimonial certifications unless the person testified. (See 3T65:4-14; 67:8-15; 76:6-77:9.) In the instant appeal, the Township continues to rely on the self-serving Trautner Cert. to support a mischaracterized or misleading version of the facts that was contradicted by live testimony. Pages 5-8 of the Township's brief rely entirely on the Trautner Cert.

Notwithstanding, the following supplements FSHC's Statement of Facts based upon the facts and evidence in the record.

B. The Township Steered Toll Toward The Seta Property.

In early 2019, Toll, a publicly traded national homebuilder, entered into a contract with Seta to purchase the Seta Property and develop it for an inclusionary development as part of Colts Neck's affordable housing plan.

(Pa1225.) At the time, Colts Neck had this Mount Laurel DJ Action (filed in July 2015) pending before the Trial Court seeking a determination as to its compliance with its constitutional Third Round affordable housing obligation. (Pa1225.) Prior to being under contract for the Seta Property, Toll was under contract to purchase the property located near the intersection of Obre Road and Hockhockson Road, designated on the Township's tax map as Block 55, Lots 4, 5 and 7 ("Schlumpf Property"). (Pa1224; 3T35:22-36:2.) The Schlumpf Property is on the east side of the Township near the border of Tinton Falls with easy access to sewer and water. (Pa1225; 3T36:3.) Toll notified the Township of its proposal to develop the Schlumpf Property for a multifamily inclusionary residential development as part of the Township's affordable housing compliance. (Id.; 3T36:20-22.) At that time, the Township made clear to Toll that it did not want the Schlumpf Property developed for multi-family inclusionary residential development. (Pa1225.) Instead, the Township directed Toll towards the Seta Property, included as part of the Area 1 Overlay Zone. (Id.) The Trautner Cert. claims, and he argues in his brief, that the Township did not want multifamily housing for planning and environmental reasons. (Pa1307.) But there is no evidence or testimony to support that. To the contrary, Mr. Markovich testified that it was clear that the Township preferred multi-family housing in the Area 1 District and eventually rezoned the Schlumpf

Property for single-family housing with no affordable housing. (Pa1225; F-2².)

The Schlumpf Property was on the east side of the Township near Tinton Falls with much closer access to public sanitary sewer and water. (3T36:3-5.)

Despite the Township's direction, it turns out that the Seta Property in the Area 1 District is one of the hardest properties to develop in the Township for residential housing, given the sanitary sewer, water, and NJDOT Highway Access Plan issues.

C. Manasquan River Regional Sewer Authority.

In March of 2020, the Township entered into the FSHC Settlement Agreement, which discussed efforts the Township would take to provide sanitary sewer service to the projects identified in the agreement, including the Area 1 District. (Pa139.) The Township was well aware before it signed the FSHC Settlement Agreement that both MRRSA and Toll had objections of sewer going to MRRSA. The FSHC Agreement included as Exhibit B a form agreement concerning the Seta Property in the Area 1 District for which Toll was the contract purchaser ("Form Agreement"). (Pa162.) However, Toll was never consulted concerning this Form Agreement. (3T39:9-11.) The Form

² F-2 refers to an exhibit entered into evidence at the Compliance Hearing. All the exhibits from the Compliance Hearing are listed in 2T and 3T. Any time a document in Appellant's Appendix was also an exhibit from the Compliance Hearing, we identify it as such.

Agreement required the Township to fund \$2 million towards sanitary sewer (after a developer pays \$3 million). (Pa163.) The Township's \$2 million obligation only kicks in after a developer(s) has paid \$3 million to extend sanitary sewer to the Area 1 District. The FSHC Settlement Agreement did refer to sanitary sewer being connected to MRRSA's system, but the definition of "Proposed Connection Locations" contemplated potential different locations. (Pa143.) As with the Form Agreement, it contemplated alternative connection locations for the Area 1 District. In fact, the defined term "Required Government Approvals" in the Form Agreement did not say MRRSA with respect to sewer approval. (Pa164.) Rather, it said "any and all . . . regional sewer authorities." (Pa164.)

The FSHC Agreement recognized that the Township would have to get involved in the original lawsuit that was filed against MRRSA by other developers – Countryside Developers, Inc. and Colts Neck Building Associates – in 2018 seeking to force MRRSA to accept sanitary sewer for two inclusionary residential projects on the west side of town. (Pa143; see also Docket MON-L-4435-18 (Countryside Developers, Inc. v MRRSA); MON-L-2864-20 (Colts Neck Building Associates v. MRRSA) ("MRRSA Litigation").)

In May of 2020 (just after the FSHC Agreement was executed, but before the Fairness Hearing), MRRSA, and its member towns, filed objections to the

FSHC Agreement specifically stating it could not and would not provide sanitary sewer service to the Area 1 District or other sites in Colts Neck. (Pa209-210; see generally Pa204-Pa218 (the “Bolan Report” (the then court-appointed Special Adjudicator))).) So even before the Fairness Hearing, the Township was aware of MRRSA’s position that MRRSA could not and would not provide sanitary sewer. It is also important to note that the MRRSA Litigation was filed by Countryside Developers and Colts Neck Building Associates to obtain sewer treatment for *their* projects from MRRSA. The MRRSA Litigation did not seek that MRRSA provide sanitary sewer treatment for the Area 1 District.

D. Toll’s Desire to Seek Sanitary Sewer Treatment from Two River Water Reclamation Authority.

Similarly, prior to the Fairness Hearing on the FSHC Settlement Agreement Toll submitted an objection/comment letter on the FSHC Settlement Agreement as referenced in the Special Adjudicator Report of Michael Bolan dated June 26, 2020 (“Bolan Report”). (Pa208.) Toll’s objection to the FSHC Settlement Agreement related to the lack of sewer and water to the Toll Project and the Township’s non-committal course of action in resolving it. (Id.)

In fact, as far back as 2019 Toll engaged Maser Consulting to evaluate potential options to provide sewer service to the Seta Property and submitted a report that was provided to the Township several months prior to the Township

entering into the FSHC Settlement Agreement. (Pa1247; S-6.) The Maser Report evaluated several options to provide sewer service to the Seta Property. (Pa1247.) Specifically, Maser evaluated potential sewer routes from (1) MRRSA, (2) Western Monmouth Utilities Authority (“WMUA”), (3) Two River Water Reclamation Authority (“TRWRA”), and (4) Naval Weapons Station Earle (NWSE). (Id.) The Maser Report concluded that the most cost-effective route for the provision of sewer service to the Seta Property was NWSE – a military installation that has an on-site wastewater treatment plant for its own operations. (See Pa1265.) The next most cost-effective option for sanitary sewer service was connecting to TRWRA through the Borough of Tinton Falls. (Pa1283.) Unlike MRRSA, TRWRA did not outright reject the proposal and indicated it had the capacity. (Pa1254, Pa1256.)

Both Markovich and Volk in their certifications and testimony stated that Toll and its professionals had a meeting with TRWRA and its professionals in or around January 2020 that the Township and its professionals were present at. (3T24:1-23; 3T42:2-25.) This was three months before the FSHC Settlement Agreement. Both Volk and Markovich stated that at the meeting with TRWRA, they discussed the route sewer would take to connect to TRWRA (through Tinton Falls) and that they left with the impression that TRWRA was “interested” in and “very receptive” to providing sewer to Area 1 District. (Id.)

This led to a follow up meeting with TRWRA officials, Tinton Falls officials (where the sewer connection would be), Toll Bros. and Colts Neck in February 2020. (3T24:24-25:1; 3T42:22-25.) If TRWRA truly opposed providing sewer to the Area 1 District as the Township's Statement of Facts insinuates, would TRWRA officials have met with Toll and the Township and then have a follow up meeting with Tinton Falls where sanitary sewer would connect?

On February 21, 2020, counsel for Toll sent a letter to the Township summarizing the meetings with TRWRA and Tinton Falls and stating that Toll would not proceed with the expense of further investigating such connection unless it had a commitment from Colts Neck and an executed affordable housing agreement. (Pa1236; 3T44:8-10; S-4.)

Toll made it clear to the Township that connecting into TRWRA's sewer system, through Tinton Falls, was the most realistic option to provide sewer service to the Seta Property within the Area 1 District. (Pa1228.) Shortly after that meeting, without consultation with Toll, the Township entered into a settlement with FSHC. (Pa1229.)

E. FSHC Settlement Agreement.

Despite MRRSA's opposition to providing sanitary sewer and despite the receptive meetings with TRWRA on sanitary sewer, the Township on its own decided to settle with FSHC (who had not been involved in any discussions with

TRWRA) without having an agreement with Toll. (Pa1229.) The March 2020 FSHC Settlement Agreement discusses the Area 1 Overlay Zone receiving a possible sanitary sewer service from MRRSA, despite the Township knowing at that time that: (a) Toll did not deem the route realistic, (b) Toll was not involved in the MRRSA Litigation, and (c) Toll had positive discussions with TRWRA. This is why Toll filed an objection to the FSHC Settlement Agreement at the Fairness Hearing referenced in the Bolan Report. (Pa208.) However, with respect to the Area 1 District, Paragraph 8.c.iv.1 specifically states when discussing and defining the “Proposed Connection Locations” that “in the case of Area 1 Overlay Zoning, a closer available tie-in along Route 34 or another allocation acceptable to both the developer and the Township.” (Pa143.) As testified by Volk, TRWRA is closer than MRRSA. (3T17:1-11.)

As part of the Fairness Hearing, in response to MRRSA claiming the Township should provide sewer service for its inclusionary projects from NWSE, the Township replied in a brief to the Trial Court dated June 9, 2020 that:

NWS Earle is **not** available to provide water and sewer connections and it is unknown when or if this will subsequently occur. Moreover, though it is perhaps too obvious to even be said, Colts Neck is not in a position to dictate to the Department of the Navy, when and to what extent sewer and water connections should become available.

(Ra59 (emphasis added).)

So, in June 2020, the Township was abundantly clear that NWSE was not an option for sanitary sewer. On August 13, 2020, following a Fairness Hearing, the Trial Court entered an order approving the FSHC Settlement Agreement (“Fairness Order”). (Pa219.)

F. The Township Suddenly Switches To Pursuing Sanitary Sewer Treatment from NWSE.

Following the Fairness Hearing, in August and September of 2020, Toll and the Township continued to discuss sanitary sewer. (3T46:1-9.) Toll continued to press for TRWRA, but the Township was against it and stated they would not allow it (despite the positive meetings with TRWRA). (3T46:7-13.) That was when the Township began to push going to NWSE, despite the fact that only a few months earlier the Township made clear to the Trial Court that NWSE was not realistic and not an option. Toll, however, advised the Township that it did not believe NWSE was a realistic option given it was not clear what agreements and permits (both federal and state) would be required to allow residential connections to a private treatment plan on a Navy weapons station base. (3T46:14-21; 3T20:2-21:3.) In fact, Volk, an expert sanitary sewer engineer, has never seen such a scenario before of a residential development connecting to a private military base treatment plan. (3T20:18-21:3.) Despite

Toll's position, which was the same as the Township's only a few months earlier, the Township continued to push for NWSE.

G. Toll Files a Motion to Intervene After Wasting Two Years Attempting to Resolve the Sewer Issue Amicably With the Township.

In August 2021 Toll filed a motion to intervene, for a declaration that the Township was not entitled to a durational adjustment waiver, and for an order requiring the Township to permit Toll to pursue sewer for the Seta Property from TRWRA. Toll claimed that the Township did not have a realistic plan for sanitary sewer and was not entitled to a durational adjustment waiver. In opposition to the motion, the Township's planner stated in a certification to the Trial Court that "Colts Neck has a plan that will provide sewer to Area 1 from [NWSE] within the period of repose [June 30, 2025]." (Pa860.) The Township argued that the Court should deny Toll's motion because the Township had a plan to get sewer to the Area 1 District through NWSE by the end of the Third Round (2025). (Id.) This argument from the Township is interesting for three reasons:

1. The Township argued only months earlier that NWSE is not realistic.
2. Several months later the Township admitted to the Court that there was a "misunderstanding" and NWSE does not work to provide sanitary sewer to the Area 1 District.

3. In 2021, the Township had clearly pivoted from MRRSA to NWSE, yet at no point did the Township claim the FSHC Settlement Agreement was void because sewer was not going to MRRSA.

The Trial Court denied the motion, in part based upon the Township's claims of NWSE, and scheduled discovery and a hearing on whether NWSE was real. (SRa001-Sra004.) Thereafter, on October 29, 2021 Toll sent a letter to the Court advising that due to the Township's lack of cooperation and obstructionist behavior, it had terminated its contract and was no longer the contract purchaser of the Seta Property. (SRa005-SRa006.) Seta then became active in the DJ Action as an interested party.³ After a few adjournments, the Trial Court ultimately scheduled a hearing in July 2022 to determine whether the Township was entitled to a durational adjustment "waiver" per N.J.S.A. 5:93-4.3(c)(4) – *i.e.*, whether NWSE was realistic to provide sewer service to the Seta Property and Area 1 District prior to the end of the Third Round. (Pa1174.)

Shockingly, only a few months before hearing where the Township would actually have to prove NWSE was a realistic option, the Township submitted a May 2, 2022 letter admitting NWSE was not realistic to provide sanitary sewer service to the Seta Property and Area 1 District. (Pa125.) The Township claimed

³ Seta was eventually granted intervenor status for purposes of this appeal on April 14, 2025. (SRa013.)

that NWSE was no longer realistic because the cost was prohibitive. (Id.) The Township on its own declared to the Trial Court that it was no longer entitled to the durational adjustment waiver, and that it would just seek a durational adjustment with no plan for sanitary sewer (N.J.A.C. 5:93-4.3(a)). The Township's May, 2, 2022 letter includes a self-serving description of the history of the case, attempting to downplay the Township's conduct. But most importantly, the Township acknowledged it was "Colts Neck Decision to Voluntarily Relinquish the Waiver." (Pa133.) It also made the hearing on whether NWSE was realistic to provide sanitary sewer moot.

The Township prepared a draft Third Round HEFSP dated June 14, 2022 ("2022 HEFSP"), which no longer included the durational adjustment waiver and did not include a commitment of \$2 million for sanitary sewer to the Area 1 District. (Pa238.) It also did not provide for inclusionary zoning for the Area 1 District, which had already been adopted. Interestingly, the 2022 HEFSP did refer to the FSHC Settlement Agreement and nowhere in the HEFSP did the Township claim that the agreement was void despite it not being entitled to the durational adjustment waiver and sewer not going to MRRSA. (Pa252.)

This eventually led to the Trial Court scheduling the Compliance Hearing for December 6, 2022 and December 8, 2022 concerning the 2022 HEFSP. (Pa761; 2T; 3T.) Any opposition to the "Declaratory Judgment Relief" was due

on October 20, 2022. Seta, FSHC and MRRSA parties all filed opposition. FSHC's opposition included a motion to enforce litigant's rights under the FSHC Settlement Agreement for the Township claiming it would no longer provide the \$2 million contribution for sanitary sewer to the Area 1 District. (Pa764.)

The Township filed an "Omnibus Reply Brief" to the objections and the FSHC motion to enforce litigant's rights on November 7, 2022. (SRa008-Sra010.) It is in this brief, for the first time one month before the Compliance Hearing, that the Township *argued* that the FSHC Settlement Agreement is null and void – a settlement agreement that was court-approved (Pa219). (SRa009.) Yet, the Township did not file a cross motion or any other motion to invalidate the agreement.

On December 6, 2022 and December 8, 2022, the Trial Court conducted the Compliance Hearing. (See generally 2T, 3T.) It took the testimony of (1) the Township's Planner, Elizabeth McManus, P.P., (2) Matthew Markovich, formerly of Toll Bros. LLC, (3) Jordan Volk, P.E., a sanitary sewer civil engineer expert hired by Toll, who prepared the Maser Report (Pa1247), (4) the Trial Court's engineering sewer expert, Mark Kataryniak, P.E., and (5) the Trial Court's affordable housing planning expert, Frank Banisch, P.P. (Id.) The Trial Court entered into evidence approximately two dozen exhibits. (Id.) McManus

provided a summary of the 2022 HEFSP and confirmed the Township was no longer seeking the durational adjustment. (2T36:5-62:2.) Volk and Markovich testified as to Toll's history with the project and their efforts to obtain sanitary sewer from TRWRA, which was discussed earlier in this Statement of Facts. (See generally 3T:9-97.)

Kataryniak testified as to his role in assisting the Trial Court in analyzing the sanitary sewer issues. (3T98:16-99:4.) He addressed (a) what NJDEP approvals were required to include properties, like the Area 1 District, within a NJDEP designated sewer service area, and (b) the type of permit needed to allow construction the sanitary sewer infrastructure – a process that could take two years. (3T112:20; 3T134:19.) He further testified to the support and consents the Township would have to give when a developer applied to the NJDEP to permit a property into a sewer service area. (3T119:6.) Kataryniak also confirmed that he had no experience with connecting a residential development to a private treatment plan owned by the US Navy. (3T133:6.)

Banisch, the court's affordable housing planning expert (who replaced Michael Bolan after he retired during the pendency of the case), testified next. (See generally 3T137-211.) Banisch testified as to the Township's 2022 HEFSP. He noted that the Township was no longer proposing to contribute \$2 million on sanitary sewer for the Area 1 District and instead was proposing to use that

money towards a market to affordable program. (3T148:23.) Banisch testified that “the difference between \$2 million invested in infrastructure that can support hundreds and maybe more affordable units over time, compared to spending more than half of a trust fund on not even a handful of units is a little challenging as we look at this from the perspective of the protected class” which would be low- and moderate-income households. (3T149:2-8.) He testified that the Fairness Order required that the Township adopt a HEFSP consistent with the FSHC Settlement Agreement. Banisch opined that 2022 HEFSP was not entirely consistent with the FSHC Settlement Agreement - particularly the \$2 million contribution towards sewer to the Area 1 District and not calling for the rezoning of the Area 1 District for inclusionary residential. (3T152:9.) He noted though that the Township did rezone the Area 1 District for inclusionary housing, and that the 2022 HEFSP did not provide for rezoning the Area 1 District, so he recommended the rezoning of the Area 1 District be added to the 2022 HEFSP. (3T157:1.)

Banisch discussed Colts Neck arguments to the Court and that “when that argument stands on the shoulders of history of performance that doesn’t suggest that the town is really trying to help get affordable housing. I think the Court has to weight that somewhat heavily . . .” (3T163:5-9.)

H. The Trial Court Decision and November 2024 Orders.

On November 21, 2024 the Trial Court entered two orders: (1) granting FSHC’s Motion to Enforce Litigant’s Rights, and (2) granting the Township a Conditional Judgment of Compliance (“Conditional JOC”) subject to the Township satisfying certain conditions and amending its 2022 HEFSP. (Pa11; Pa82.) Those Orders were accompanied by a 68-page thorough decision outlining the history and the Trial Court’s reasoning for its decision. (Pa14-Pa81.) The Trial Court acknowledged that the provision of sewer service to the Area 1 District, including the Seta Property, was a complicated process, but emphasized that it was nevertheless an essential process to make the Seta Property developable for inclusionary housing. (Pa46.) The Trial Court explained that “[w]hile the March 18, 2020 settlement agreement was entered into during the Third Round . . . the fact that all of the affordable housing planned for Colts Neck in the Third Round was not developed does not make the agreement that Colts Neck entered into void.” (Id.) The Trial Court found that the Township did not provide clear and convincing proof that the Settlement Agreement should be vacated. (Pa47.)

a. The Financial Contribution.

The Conditional JOC required the Township to amend its 2022 HEFSP to still provide for the \$2 million contribution as contemplated by the FSHC

Settlement Agreement and Form Agreement. The Trial Court did not find that the Settlement Agreement envisioned sewer service be provided *only* by MRRSA. Rather, the Trial Court explained that: “No reason exists . . . for limiting the provider of wastewater transmission and treatment to MRRSA and OCUA.” (Pa67.) The Trial Court recognized that the Township itself had contemplated sewer service from another site – NWSE – and in making that consideration, did not argue that the Settlement Agreement was void. (*Id.*) Again, the Trial Court emphasized that the ultimate goal is to provide for inclusionary development, and that the Township agreed to contribute \$2 million to the cost of sewers for Area 1 – period. (Pa69.)

b. The Durational Adjustment and Waiver.

The Trial Court recognized that the Township was lodging no objection to the durational adjustment provided for in the Settlement Agreement, and therefore recognized that it remain in place. (Pa70.)

As to the waiver, however, the Trial Court recognized that the Township was no longer entitled to the waiver and severed it from the Settlement Agreement because: “In the 7 ½ years between the filing of Colts Neck’s declaratory judgment complaint and the hearing on Colts Neck’s request that the court find the March 18, 2020 settlement agreement to be void, sewer service was not provided to Area 1.” (Pa72.)

The Court ordered the Township to make certain modifications to the 2022 HEFSP to make it compliant with the Fair Housing Act, COAH regulations and the FSHC Settlement Agreement. It included requiring the Township to commit at least \$2 million toward extending sewer or water to the Area 1 District. (Pa12, Pa83.) It further required the Township to take a series of actions, contemplated by the durational adjustment regulation, to support developer efforts to bring sanitary sewer the Area 1 District. (Id.)

The Township did make changes required by the Trial Court (under protest) and received a Final Judgment of Compliance on April 21, 2025. (Pa1.)

ARGUMENT

I. STANDARD OF REVIEW

The Township attempts to argue that this is a de novo review of a legal issue or interpretation. It is not. This is an abuse of discretion standard. This DJ Action is the Township seeking the Trial Court's approval of its affordable housing plan. The Trial Court conducted a hearing, took testimony, entered exhibits and found that the 2022 HEFSP was not compliant and required changes in order to make it compliant and make it consistent with the FSHC Settlement Agreement.

A trial court's decision in a non-jury case is subject to well established scope of review. A trial court's interpretation of law is de novo but the

determination of facts and application of those facts to make legal conclusions is an abuse of discretion standard. In Re Tp. of Bordentown, 471 N.J. Super. 196, 217 (App. Div. 2022). As this Court stated in In Re Tp. of Bordentown (another Third Round affordable housing declaratory judgment case), “we give deference to the trial court that heard the witnesses, sifted the competing evidence and made reasoned conclusion. . . . We will ‘not disturb the factual findings and legal conclusions of the trial judge unless’ convinced that those findings were ‘so manifestly unsupported by or inconsistent with the competent, relevant and reasonable credible evidence as to offend the interest of justice.’” Id. (quoting Rova Farms Resort Inc. v. Inv. Ins. Co. of Am., 65 N.J. 474, 484 (1974)). Trial courts have “broad discretion when reviewing a municipality’s *Mount Laurel* Fair Share Plan.” In Re Bordentown, 471 N.J. Super. at 217-218 (citing In Re Adoption of N.J.A.C. 5:96 and 5:97, 221 N.J. 1, 30 (2015)). With respect to motions to enforce litigant’s rights under R. 1:10-3, case law is clear that the standard of review is also abuse of discretion. Lipsky v. New Jersey Ass’n of Health Plans, Inc., 474 N.J. Super. 447 (App. Div. 2023).

In the present case, the Trial Court conducted a Compliance Hearing to determine whether the 2022 HEFSP satisfactorily addressed the Township’s constitutional affordable housing obligation and complied with the Fairness Hearing Order (Pa219) approving the FSHC Settlement Agreement. The Trial

Court found that the 2022 HEFSP did not completely comply with the court-approved FSHC Settlement Agreement and required changes to the 2022 HEFSP to comply with the FSHC Settlement Agreement and to allow for a Final Judgment of Compliance.

The Township argues that it is a de novo review, but it is not. The required changes to the 2022 HEFSP outlined in the Conditional JOC were the result of a Compliance Hearing and the FSHC motion to enforce litigant's rights under R. 1:10-3. That is within the broad discretion of the trial courts when reviewing Mount Laurel fair share plans. In Re Bordentown, 471 N.J. Super. at 217. The law is clear that the standard of review is abuse of discretion.

The foundation for essentially all of the Township's argument is that the FSHC Settlement Agreement is null and void. However, the validity of the FSHC Settlement Agreement – a court-approved settlement agreement – was never actually brought in front of the Trial Court. It was raised as an argument in opposition to FSHC's motion to enforce litigant's rights, so it was addressed by the Trial Court, but there was never any motion or application to the Trial Court to nullify the court-approved FSHC Settlement Agreement or modify the Fairness Hearing Order. As such, the appropriate standard for the Conditional JOC and the Order granting FSHC's motion to enforce litigant's rights is abuse

of discretion, and it is clear as outlined below, the Trial Court did not abuse its discretion.

Notwithstanding, even if this Court determines it is a de novo review, for the same reasons outlined below, the Trial Court's findings and determinations should be upheld.

II. THE TRIAL COURT PROPERLY FOUND THAT THE MARCH 2020 SETTLEMENT AGREEMENT WAS NOT NULL AND VOID BASED UPON THE ACTIONS OF THE TOWNSHIP (Pa34).

The Township's main argument is that the FSHC Settlement Agreement was somehow rendered null and void, which the Trial Court properly rejected. The Trial Court properly highlighted how the Township benefited from the FSHC Settlement Agreement for years: (1) not having to endorse a sewer application for a site not in their HEFSP based upon the durational adjustment waiver, (2) receiving immunity from builder's remedy lawsuits, and (3) doing a single-family development with no affordable housing on the Schlumpf Property when it was originally proposed for inclusionary housing. (Pa54.) Yet, on the eve of the Compliance Hearing, seven years into its DJ Action, the Township claimed the FSHC Settlement Agreement was void (or at least the parts it did not want to comply with). Aside from the merits of this argument, there are key actions (or inactions) of the Township that demonstrate why this argument rings hollow.

- The Township claims that since sanitary sewer is not going to MRRSA, that renders the settlement agreement null and void. However, the Township on its own pivoted to NWSE from MRRSA in late 2020 and represented to the Trial Court multiple times that NWSE was going to provide sanitary sewer service prior to the end of the Third Round (which turned out to be false). (Pa863; Pa125.) Yet during that time the Township never claimed that the FSHC Settlement Agreement was void because sewer was not going to MRRSA.
- The Township for years benefited from the FSHC Settlement Agreement (as noted above), but never once, even after it was revealed NWSE was not realistic, filed a motion with the Trial Court seeking to void the FSHC Settlement Agreement. That is important because the FSHC Settlement Agreement *is a court-approved settlement*. It cannot be undone without some type of application or motion to the Trial Court. Procedurally, there would be no basis for the Trial Court to void the FSHC Settlement Agreement.
- As the Trial Court aptly noted: “Colts Neck is asking this court to do the thing that it asserts cannot be done.” (Pa44.) Colts Neck argues that that the Trial Court cannot sever the durational adjustment waiver and sanitary sewer going to MRRSA from the FSHC Settlement Agreement, but then argues that the 2022 HEFSP should be approved because it otherwise complies with the FSHC Settlement Agreement. The FSHC Settlement Agreement is either void or it is not; the Township cannot have it both ways. If it is void, that means the settlement on what the Township’s obligation is void, their immunity

is lost and there needs to be a trial on the numbers in addition to a hearing on compliance.

For those reasons alone, the Township's last-ditch effort to claim (for the first time a month before the Compliance Hearing) that the FSHC Settlement Agreement is void falls flat on its face.

A. The \$2 Million Contribution Was Not Premised on the Waiver or Sewer Going to MRRSA, Both of Which Were Severable Pursuant to the Terms of the FSHC Settlement Agreement.

The Township claims there was a bargained for \$2 million for sewer to MRRSA in exchange for durational adjustment waiver. The waiver protected the Township from having to support sewer applications for any project regardless of whether it was in the plan or not. N.J.A.C. 5:93-4.3(c). The Township argues that since the Township is no longer seeking the waiver, the \$2 million goes away or the whole FSHC Settlement agreement is void. The plain terms of the Settlement Agreement, however, prove that this argument is wholly without merit.

The history of this matter demonstrates that sewer not going to MRRSA was because of the Township's actions (or inactions). The history is clear that MRRSA would not serve properties in Colts Neck. The other developers (Countryside Development and Colts Neck Building Associates) filed the MRRSA Litigation. That litigation sought to bring sewer to *their* projects on the

west side of town. Nothing in the MRRSA Litigation sought to bring sanitary sewer to the Area 1 District, and the Township took no steps to bring sewer to the Area 1 District from MRRSA. The failure of sanitary sewer going to MRRSA was the Township's own doing.

Further, the FSHC Settlement Agreement required the Township to commit \$2 million towards bringing sewer to the Area 1 District; the \$2 million was not conditioned upon sewer going to MRRSA. That money is required because of the significant cost to bring sanitary sewer to the Area 1 District – a location the Township chose. All that was bargained for in FSHC Settlement Agreement is that the Township would seek, and FSHC would support, a durational adjustment waiver if the town did what it was supposed to do. The FSHC Settlement Agreement states in Paragraph 8.c.i, “The [Township] will seek court approval for, and FSHC will support, a durational adjustment of 297 units and address the requirements of [the regulations] through the following.” (Pa142.) In Paragraph 8.d, the parties acknowledge that if the Township does the things it says it will do, it is entitled to the waiver. (Pa144.) Nothing in the Settlement Agreement indicates that the financial contribution would be extinguished should the waiver no longer apply or if sanitary sewer did not come from MRRSA.

As noted above, the Proposed Sanitary Connection Location definition in the FSHC Settlement Agreement contemplated alternate connections other than MRRSA for the Area 1 District. (Pa143.) Further, the Form Agreement attached as an exhibit to the FSHC Settlement Agreement for sewer for the Area 1 District, speaks in detail to the \$2 million Township contribution (which is only made after a developer pays \$3 million for sanitary sewer). (Pa163.) Nowhere does the Form Agreement mention MRRSA. In fact, when it discusses the required approvals, it notes that sewer approval would be needed from a “regional sewer authority.” (Pa164.) TRWRA is a regional sewer authority. The \$2 million contribution was clearly meant to bring sanitary sewer to the Area 1 District. The Trial Court upheld that obligation and the fact that sanitary sewer may not go to MRRSA is not a basis to void the FSHC Settlement Agreement.

B. The Plain Language of the FSHC Settlement Agreement States the Provisions are Severable.

Notwithstanding the above, Paragraph 30 of the FSHC Settlement Agreement provides that the provisions of the agreement are severable and the validity of one clause does not impact the validity of another clause. (Pa151.) The Township voluntarily withdrew its “waiver” request under the durational adjustment regulation because the Township is not legally entitled to it. There is no dispute that the Township, though entitled to a durational adjustment, is not legally entitled to the waiver. That clearly makes the waiver provision

severable, and the Trial Court properly found that a basis exists for the waiver to be severed. (Pa46.)

The Trial Court also properly found that the purpose of the FSCH Settlement Agreement was to bring sanitary sewer to the Area 1 District – the area the Township chose for multifamily inclusionary development. It also properly found that the Township was no longer legally entitled to the durational adjustment waiver thereby making the provision severable under Paragraph 30 of the FSHC Settlement Agreement. The Trial Court was not persuaded by the Township’s effort to manipulate and twist the facts, and this Court should not be persuaded either.

For the reasons outlined above, the FSHC Settlement Agreement was not null and void and the Trial Court did not “redraft” the agreement.

III. THE TRIAL COURT DID NOT IMPERMISSIBLY IMPOSE ADDITIONAL REQUIREMENTS ON THE TOWNSHIP OR CONDITION THE TOWNSHIP’S JUDGMENT OF COMPLIANCE (Pa57-Pa69).

The Township argues that “as there was no settlement agreement between the Township and FSHC, the Township sought a conventional durational adjustment in accordance with N.J.A.C. 5:93-4.3.” (Pb 33.) Thus, this argument presupposes that the FSHC Settlement Agreement was null and void, which as outlined above was not the case.

Notwithstanding, the Trial Court was within its authority to grant a Conditional Judgment of Compliance requiring certain amendments to the 2022 HEFSP. The Township argues that requiring it to commit the \$2 million towards sanitary sewer service (or water) to the Area 1 District was somehow outside of the Trial Court's authority. Initially, it clearly was not because the Township had committed to it as part of the FSHC Settlement Agreement. Again, the Township wants to have its cake and eat it too. The Township claims the FSHC Settlement Agreement is null and void but then asks this Court to approve its 2022 HEFSP based upon the FSHC Settlement Agreement, except for the \$2 million contribution.

The Township's proposition that it "cannot be compelled to expend its own money to facilitate the acquisition or construction of water or sewer infrastructure," is simply incorrect and contrary to established case law and COAH regulations that require town to expend funds for affordable housing, particularly with respect to sewer. Initially, the Township agreed to provide \$2 million to help bring sanitary sewer to the Area 1 District so it can be compelled to do it. Notwithstanding, with respect to the FHA, COAH regulations and relevant case law, it is clear that towns have an affirmative obligation to facilitate providing the necessary infrastructure for affordable housing, including fronting the costs for such infrastructure.

The Township cites to the FHA with an extremely broad proposition that municipalities do not have to expend funds to provide for affordable housing. N.J.S.A. 52:27D-311(d) [“[n]othing in the [FHA] shall require a municipality to raise or expend municipal revenues in order to provide low- and moderate-income housing.”]. It is clear that the appropriate reading is that a town does not have to expend funds in the actual construction affordable housing buildings (though it is free to do so). Rather, towns can use inclusionary zoning to address affordable housing where the developer is subsidizing the cost of the affordable housing or other similar mechanisms. But if a municipality chooses not to spend money in the creation of affordable housing and does not otherwise have a realistic plan to meet its obligation, it has failed to satisfy its constitutional obligation. But to say that municipalities do not have to spend any money on affordable housing, including necessary infrastructure, is just completely without merit.

A review of the FHA, COAH regulations and Mount Laurel case law is clear that Townships have a fiscal obligation with respect to ensuring sites designated for affordable housing get sanitary sewer. The FHA requires that a municipality have in its HEFSP “a plan for infrastructure expansion and rehabilitation if necessary to assure the achievement of the municipality’s fair share of low- and moderate-income housing.” N.J.S.A. 52:27D-311(a)(4).

Further, the FHA provides that the HEFSP may include the “[u]tilization of municipally generated funds toward the construction of low- and moderate-income housing. N.J.S.A. 52:27D-311(a)(8).

More importantly, the durational adjustment regulation itself contemplates that a town has a “fiscal responsibility” towards providing sewer. N.J.A.C. 5:93-4.3(d), which many towns choose to ignore, specifically provides for a situation where a town may demonstrate that the cost of providing sewer to its affordable housing sites is prohibitive. The regulations provide that “[w]here the Council determines the cost associated with providing water and/or sewer to inclusionary sites is prohibitive, it shall limit the *municipality’s fiscal responsibility* of providing water and /or sewer.” N.J.A.C. 5:93-4.3(d) (emphasis added). Initially, the regulation clearly demonstrates that with respect to sewer, a town has a fiscal responsibility for providing it to inclusionary sites. The regulation contemplates that when the cost is prohibitive, COAH can *limit* the fiscal responsibility. Therefore, the converse is true that if the cost is not prohibitive, the town has a fiscal responsibility to provide – otherwise there would be nothing to limit. And this makes sense because a municipality has the ability to recoup costs with connection fees and usage fess under New Jersey’s sewer laws. Even the court-appointed affordable housing planner, Banisch, acknowledged that the durational adjustment regulation contemplates a fiscal

responsibility of municipalities in bringing sanitary sewer to the affordable housing sites they picked. (3T200:14.) This municipal argument that they do not need to spend money on sanitary sewer infrastructure for its affordable housing sites needs to be put to rest by this Court.

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

The courts have also recognized that a town's sewer policies can be a form of exclusionary zoning:

The courts of this state cannot tolerate a mere feint towards compliance. While historically large-lot zoning was an effective exclusionary device, the new weapons have become more sophisticated. Zero lot-line requirements *and* "**front ending**" *sewer costs*, to name but two, which may prove to be effective and responsible zoning tools in other contexts, when joined together have the cumulative effect of both a) barring

the ability and incentive of developers to come forward to build the necessary housing and b) allowing municipalities to avoid compliance not simply with a “housing requirement” but with the constitution of this state.

Toll Bros. 303 N.J. Super. at 574 (emphasis added).

The Court in the Toll Bros. case⁴ went on to find that the plaintiff “convincingly” argued that the town’s “requirement that developers ‘front’ the costs of such an expensive [sewer] system without certainty of reimbursement discouraged development of inclusionary sites.” Id. That is in effect what the Township is doing by now arguing it does not have to contribute the \$2 million towards sewer infrastructure costs.

Per the Maser Report, the rough estimate to provide sewer from TRWRA in 2019 was approximately \$3 million. Pa1285. The town is banking on that a developer is not going to go through the expensive permitting process to get sewer (dragging the Township along the whole away) and then pay for the cost of the sewer.

⁴ Ironically, it was the same Toll Bros. that was part of this case, who eventually walked away from the inclusionary project because its efforts to bring sewer to its site in the Area 1 District were blocked by the Township. In a situation like West Windsor where thousands of units were on the line, it was worth Toll Bros. to fight the fight. Where, as in this case, only 100 units are on the line, a developer will just move on because the cost to fight is not worth the benefit. That is the evil of towns using more “sophisticated weapons” for excluding the poor.

To let the Township of the hook of providing \$2 million towards sewer infrastructure would be contrary to the clear requirement that “[m]unicipalities have an affirmative obligation to facilitate provision of the infrastructure necessary to make development realistically likely.” Toll Bros., 303 N.J. Super. at 573. It will also demonstrate that towns’ “new, sophisticated weapons” for excluding the poor are winning and will continue to thwart the development of affordable housing in Colts Neck.

IV. IN PUBLIC INTEREST LITIGATION THE COURT SHOULD MODIFY AN EXISTING ORDER TO ADDRESS CHANGED CIRCUMSTANCES RATHER THAN VOIDING THE WHOLE THING (Pa46-Pa49).

Aside from the Trial Court properly acknowledging that it had authority under Paragraph 30 of the FSHC Settlement Agreement, the Trial Court also has authority under Mount Laurel case law to modify the FSHC Settlement Agreement. A settlement agreement between parties to a lawsuit is a contract. Allstate New Jersey Ins. Co. v. Center City Family Practice, Inc., No. A-1897-18T4, 2019 WL 6893963, at *1 (N.J. Super. Ct. App. Div. Dec. 18, 2019) (citing Nolan v. Lee Ho, 120 N.J. 465, 472 (1990)). In public interest litigation like Mount Laurel litigation, continued judicial oversight is called for to ensure the interests of all classes of people are represented. Toll Bros., Inc. v. Twp. of West Windsor, 334 N.J. Super. 77, 99 (App. Div. 2000). A party seeking

“modification of a consent decree must establish that a significant change in facts or law warrants revision of the decree and that the proposed modification is suitably tailored to the changed circumstance.” See Toll Bros., 334 N.J. Super. at 100 (quoting Rufo v. Inmates of Suffolk Cty. Jail, 502 U.S. 367, 378 (1992)). The factual changes which may warrant modification include “conditions which make compliance with the decree substantially more onerous, when a decree proves to be unworkable because of unforeseen obstacles, or where enforcement without modification would be detrimental to the public interest.” Id.

It is clear that Mount Laurel litigation is public interest litigation so much so that every settlement has a fairness hearing to determine if the settlement is fair to the protected class – low- and moderate-income households. E./W. Venture v. Borough of Fort Lee, 286 N.J. Super. 311, 321 (App. Div. 1996). The FSCH Settlement Agreement was approved by a court order following a Fairness Hearing. Since it is court-approved, the Trial Court can clearly make modifications as the case law above allows. (Pa219.) The question is which better protects the interest of low- and moderate-income households – the Trial Court severing or modifying the FSHC Settlement Agreement waiver provision to help ensure that sanitary sewer (or water) is brought to the Area 1 District to produce up to 142 affordable housing units, or the Township unilaterally voiding the agreement so it can continue to thwart the development of affordable housing

within its borders. The answer is obvious that, aside from the contractual right in the FSHC Settlement Agreement to sever the durational adjustment waiver, the Trial Court had the legal right under Mount Laurel jurisprudence to modify the court-approved FSHC Settlement Agreement to sever the durational adjustment waiver from the FSHC Settlement Agreement.

CONCLUSION

For all of the foregoing reasons, Seta Realty respectfully requests that this Court affirm the trial court's decision.

Respectfully submitted,

DAY PITNEY LLP
Attorneys for Respondent Seta Realty Corp.

By: /s/ Craig M. Gianetti
CRAIG M. GIANETTI
A Member of the Firm

Date: October 20, 2025

Superior Court of New Jersey
Appellate Division

Docket No. A-002677-24

IN THE MATTER OF

THE APPLICATION OF THE
TOWNSHIP OF COLTS NECK, A
MUNICIPAL CORPORATION OF
THE STATE OF NEW JERSEY

· CIVIL ACTION

·
· ON APPEAL FROM THE
· FINAL JUDGMENT OF THE
· SUPERIOR COURT
· OF NEW JERSEY,
· LAW DIVISION,
· MONMOUTH COUNTY

· DOCKET NO.: MON-L-2234-15

· Sat Below:

· HON. LINDA GRASSO JONES,
· J.S.C.

**REPLY BRIEF ON BEHALF OF PETITIONER-APPELLANT
TOWNSHIP OF COLTS NECK**

On the Brief:

THOMAS J. TRAUTNER, JR., ESQ.
Attorney ID # 018081999

RONALD L. ISRAEL, ESQ.
Attorney ID # 040231996

ALYSSA E. SPECTOR, ESQ.
Attorney ID # 902252012

CHIESA SHAHINIAN & GIANTOMASI P.C.
Attorneys for Petitioner-Appellant
Township of Colts Neck
105 Eisenhower Parkway
Roseland, New Jersey 07068
(973) 325-1500
ttrautner@csglaw.com

Date Submitted: November 5, 2025



TABLE OF CONTENTS

	Page
TABLE OF JUDGMENTS, ORDERS AND RULINGS ON APPEAL.....	ii
TABLE OF AUTHORITIES.....	iii
PRELIMINARY STATEMENT.....	1
PROCEDURAL HISTORY AND STATEMENT OF FACTS.....	3
LEGAL ARGUMENT	4
I. THE TRIAL COURT IMPERMISSIBLY REWROTE THE 2020 SETTLEMENT AGREEMENT AND IGNORED ITS CLEAR AND UNAMBIGUOUS LANGUAGE. Pa41-81	4
A. The 2020 Settlement Agreement Clearly Provided that Sewer to Area 1 Was To Be Through MRRSA.....	5
B. The Durational Adjustment Waiver and the Provision of Sewer to Area 1 Through MRRSA Were Essential Terms of the 2020 Settlement Agreement.....	8
II. COLTS NECK DID NOT ASK THE TRIAL COURT TO LEAVE CERTAIN TERMS OF THE 2020 SETTLEMENT AGREEMENT IN PLACE AND SIMPLY SOUGHT TO COMPLY WITH THE COAH RULES AS WRITTEN, WHICH DO NOT REQUIRE A FINANCIAL CONTRIBUTION TOWARD WATER AND SEWER. Pa11-13; Pa41-87	11
A. The Township Did Not Rely On Any Terms of the 2020 Settlement Agreement When It Sought a Final Judgment of Compliance and Repose Based Upon the Amended HEFSP.....	11
B. The COAH Rules and the FHA Do Not Permit the Trial Court to Compel a Financial Contribution Toward Water and Sewer Infrastructure	13
CONCLUSION.....	15

TABLE OF JUDGMENTS, ORDERS AND RULINGS ON APPEAL

	Page
Order of Final Judgment of Compliance and Repose, dated April 21, 2025.....	Pa1
Annexed to Order: Report of the Special Adjudicator, dated March 6, 2025	Pa5
Order Granting Interested Party’s Motion for Intervention, dated April 14, 2025.....	Pa10
Order Granting Fair Share Housing Center’s Motion to Enforce Litigant’s Rights and Directing Modification of Colts Neck’s Proposed Housing Element and Fair Share Plan and Spending Plan, dated November 21, 2024	Pa11
Annexed to Order: Decision, dated November 21, 2024.....	Pa14
Order of Judgment of Fairness and Conditional Compliance and Repose Approving the Amended HEFSP Submitted to the Court by The Township of Colts Neck on June 15, 2022, dated November 21, 2024.....	Pa82
Annexed to Order: Decision, dated November 21, 2024 (Reproduced herein at pp. Pa14-Pa81)	
Transcript of Decision, dated April 14, 2025	5T

TABLE OF AUTHORITIES

	Page(s)
Cases:	
<u>Brundage v. Est. of Carambio,</u> 195 N.J. 575 (2008)	4
<u>In Re Adoption of Amendments to N.J.A.C. 5:93-1.3 and 5:93-5.3,</u> 339 N.J. Super. 371 (App. Div. 2001)	14, 15
<u>Kaur v. Assured Lending Corp.,</u> 405 N.J. Super. 468 (App. Div. 2009)	4
<u>NAACP of Camden Cty. E. v. Foulke Mgmt. Corp.,</u> 412 N.J. Super. 404 (App. Div. 2011)	10
<u>Quinn v. Quinn,</u> 225 N.J. 34 (2016)	4
<u>Satellite Ent. Ctr., Inc. v. Keaton,</u> 347 N.J. Super. 268 (App. Div. 2002)	10
<u>Toll Bros., Inc. v. Twp. of W. Windsor,</u> 334 N.J. Super. 77 (App. Div. 2000)	10
<u>Tolls Bros. v. West Windsor Twp.,</u> 303 N.J. Super. 518 (Law Div. 1996)	14
Statutes and Other Authorities:	
N.J.A.C. 5:93-4.3	15
N.J.A.C. 5:93-4.3(a)	14, 15
N.J.A.C. 5:93-4.3(b)	14, 15
N.J.A.C. 5:93-4.3(c)	15
N.J.A.C. 5:93-4.3(d)	14
N.J.S.A. 52:27D-311(d)	14
<u>R. 2:6-2(a)(4)-(6)</u>	3
<u>R. 4:50-1</u>	10

PRELIMINARY STATEMENT

This is not a challenge to the Township's affordable housing obligations. This appeal involves a single discrete issue relating to the trial court's authority to compel the Township to commit \$2 million toward extending water and sewer service to Area 1 and prioritize Affordable Housing Trust Funds for water and/or sewer infrastructure. Neither the 2020 Settlement Agreement nor the COAH Rules provide this authority to the trial court.

Contrary to FSHC's and Seta's assertions, Colts Neck has consistently turned square corners in an effort to meet its obligations under the Mount Laurel doctrine and actively avoided pursuing paths that would lead to delaying its affordable housing obligations. Instead of deferring its obligation by taking a durational adjustment due to its lack of sewer, Colts Neck entered into the 2020 Settlement Agreement, which was anticipated to provide affordable housing through inclusionary development. The 2020 Settlement Agreement explicitly provided that in exchange for a durational adjustment with a waiver, the Township would create overlay zoning in Area 1 and contribute up to \$2 million to connect sewer to Area 1 through MRRSA. Once it became clear that bringing sewer to Area 1 through MRRSA within the period of repose was not possible, Colts Neck began to pursue sewer through NWSE and the parties started to work towards potentially acceptable settlement terms that would approve of Colts

Neck's plan to pursue sewer capacity for Area 1 through NWSE instead of MRRSA. After learning that NWSE may not be a viable option to provide sewer capacity within the period of repose, Colts Neck immediately advised the trial court and the parties that it would avail itself of a durational adjustment as it would no longer be appropriate to pursue a judgment of compliance and repose based on the 2020 Settlement Agreement. This is because an affordable housing plan based upon the 2020 Settlement Agreement proposing MRRSA as providing sewer capacity to Area 1 no longer created a realistic opportunity for the satisfaction of the Township's affordable housing obligations.

As the parties all recognized that the 2020 Settlement Agreement was no longer in effect and an amended settlement agreement was not in place, the Township submitted an Amended HEFSP by which the remaining Third Round obligation of 138 units would be satisfied through compliance with the COAH Rules regarding durational adjustments. Dissatisfied with the Township simply complying with the COAH Rules as written, on the eve of the compliance hearing, FSHC filed a Motion to Enforce Litigant's Rights, requesting the trial court rewrite the prior 2020 Settlement Agreement and compel the Township to set aside \$2 million of general funds to support sewer and/or water infrastructure to Area 1.

Colts Neck respectfully submits that the trial court exceeded the scope of its authority and that its orders requiring the Township to financially contribute to the extension of sewer and water to Area 1 be reversed.

PROCEDURAL HISTORY AND STATEMENT OF FACTS

The Township relies on its Statement of Facts and Procedural History submitted with its appellate brief.¹ However, the Township notes that FSHC and Seta fail to include “references to appendix and transcripts, in accordance with R. 2:6-2(a)(4)-(6), for a significant portion of their Counterstatements of Facts, and thus portions without reference to authority should be stricken.

¹ Insofar as Seta incredulously asserts that the Court should disregard Pa1306-1314 (Trautner Cert.) as it was never entered into evidence at the Compliance Hearing and Mr. Trautner was never subject to cross-examination, this argument lacks merit. Pa1306-1314 was part of the Township’s omnibus submission, which served as both a reply to the various oppositions to the Township’s Amended HEFSP and an opposition to FSHC’s Motion to Enforce Litigant’s Rights. The Trautner Cert., which includes Exhibits A to W, sets forth the procedural history behind the FSHC settlement (which is also reflected in the Township’s submission to the trial court on May 2, 2022, Pa125-134). Pa1306-1314 is properly part of the record before the trial court as part of the Township’s opposition to FSHC’s Motion to Enforce Litigant’s Rights and may be considered by this Court. Further, there would be no need to submit the Trautner Cert. into evidence or have Mr. Trautner testify at the Compliance Hearing, which was held to determine whether the Amended HEFSP satisfied the Township’s affordable housing obligations thereby entitling it to a Final Judgment of Compliance and Repose.

LEGAL ARGUMENT

I. THE TRIAL COURT IMPERMISSIBLY REWROTE THE 2020 SETTLEMENT AGREEMENT AND IGNORED ITS CLEAR AND UNAMBIGUOUS LANGUAGE. Pa41-81.

As Seta itself acknowledges on page 36 of its brief, a settlement agreement is a contract. “An agreement to settle a lawsuit is a contract which, like all contracts, may be freely entered into and which a court, absent a demonstration of ‘fraud or other compelling circumstances,’ should honor and enforce as it does other contracts.” Brundage v. Est. of Carambio, 195 N.J. 575, 600-01 (2008). “It is not the function of the court to rewrite or revise an agreement when the intent of the parties is clear.” Quinn v. Quinn, 225 N.J. 34, 35 (2016). Therefore, “when the intent of the parties is plain and the language is clear and unambiguous, a court must enforce the agreement.” Id. Moreover, “[t]he interpretation and construction of a contract is a matter of law for the court subject to de novo review.” Kaur v. Assured Lending Corp., 405 N.J. Super. 468, 474 (App. Div. 2009)(internal citations omitted).

The express language of the 2020 Settlement Agreement clearly provides that sewer service to Area 1 was to be provided by MRRSA. There is no reference to any other sewer service provider and any reference to a closer available tie in refers to the location of tie in to MRRSA, the sewer service provider. Further, the clear and unambiguous terms of Paragraph 8 leave no

doubt that the waiver of the durational adjustment requirements and the provision of sewer to Area 1 through MRRSA were essential terms of the 2020 Settlement Agreement.

A. The 2020 Settlement Agreement Clearly Provided that Sewer to Area 1 Was To Be Through MRRSA.

Seta and FSHC erroneously assert that the 2020 Settlement Agreement provides for sewer service to Area 1 by any sewer service provider.² However, the terms of the 2020 Settlement Agreement are clear: the provision of sewer to Area 1 is to be from MRRSA through a tie-in with Howell Wastewater Management Area, Wall Township Sanitary Sewer Service, or a closer available tie-in along Route 34 with wastewater treatment provided by OCUA at NWPCF.³ Pa156-161. Any reference to a closer available tie-in along Route 34

² Indeed, Seta engages in revisionist history throughout its brief starting with its refusal to acknowledge that Toll brought MRRSA to the table by advising Colts Neck at the outset that it was going to get sewer from MRRSA. Furthermore, insofar as Seta asserts that TRWRA was a viable option, not only is this argument irrelevant as the 2020 Settlement Agreement only provided for a financial contribution to extend sewer to Area 1 through MRRSA, but it ignores TRWRA's submission to the trial court in which it advises that "having capacity is a far cry from 'welcomed the idea of the Toll Project connecting to its system'" and "no one should be relying upon any level of 'discussion' with TRWRA's professionals as being equal to a commitment from the Authority to provide service." Pa1316-1317. TRWRA also advised that before even seeking to connect to TRWRA, Toll would have to obtain permission from Tinton Falls to connect to its collection system. Pa1317.

³ MRRSA is a sanitary sewer collection and conveyance system which accepts wastewater flow from nearby Farmingdale, Freehold, Freehold Township,

or another location acceptable to both the developer and the Township refers to the location of the tie-in to MRRSA, the sewer service provider. Nowhere in the 2020 Settlement Agreement does it provide for sewer collection service from a sewer service area provider other than MRRSA. Pa158.

Paragraph 7 states in pertinent part that Area 1 “will be the subject of a durational adjustment in accordance with paragraph 8 of the Agreement.” Pa141-142. Paragraph 8 provides that in exchange for a durational adjustment waiver, the Township would make a financial contribution toward extending sewer to Area 1 if MRRSA was the sewer service provider. Pa142-44. The specific terms relating to the sewer connection and financial contribution were provided for in Exhibits A and B of the 2020 Settlement Agreement. Pa156-65.

Table 1 of Exhibit A presents the Sanitary Sewer Utility Infrastructure Connections and provides as follows as it relates to Area 1 Overlay Zoning:

**Infrastructure related Utility
Details**

Area 1 Overlay Zoning

**Tie-In to Existing Sewer
Collection:**

Howell Wastewater Management area and Wall Township Sanitary Sewer Service or extend sanitary sewer service from a closer available tie-in along Route 34 or another location acceptable to both the developer and the Township

Howell, and Wall. Pa1254. The system spans approximately 103 square miles and conveys sewage to OCUA where it is treated at the NWPCF. Id.

Approximate Length of New ~ 21,800 feet

Utility Lines:

Sanitary Sewer Service Provider: Manasquan River Regional Sewerage Authority

Wastewater Treatment Plant/Regional Sewage Authority: Ocean County Utility Authority:
Northern Water Pollution Control Facility

WWTP location: Brick Pa158.

Further, Exhibit B explicitly recognizes that sewer is to be provided in accordance with Exhibit A, i.e., through MRRSA as sanitary sewer service provider, and that the financial contribution was dependent on sewer service to Area 1 being provided by MRRSA. Exhibit B provides in pertinent part:

The Toll Project site will be developed: (2) with sanitary sewer service whereby Toll Brothers will extend sanitary sewer service from the Howell Wastewater Management Area and Wall Township Sanitary Sewer as **identified on Exhibit A** to the Agreement (or extend sanitary sewer service from a closer available tie-in along Route 34 or another location acceptable to both Toll and the Township) to existing sewer collection service, if available (the “Proposed Sanitary Sewer Connection Location”) to the Toll Project Site (the “Toll Project”).

.....

In furtherance of the Toll Project, Toll Brothers and the Township will enter into an Affordable Housing Grant Agreement, whereby the Township will issue the following grant monies to Toll Brothers to facilitate the current and future creation of affordable housing in the Township:

- (1) The developer fees (the “Obre Road Developer Fees”) to be paid in connection with the development of Block 53, Lots 4, 5 and 7 located on the Tax Map of the Township of Colts Neck pursuant to the adoption of ordinances with terms specified herein (the “Obre Road Project”); and
- (2) In the event that Toll Brothers incurs actual costs in excess of \$3,000,000.00 to extend sanitary sewer service from the Proposed Sanitary Sewer Connection Location to the Toll Project Site (which actual costs incurred

shall exclude any fees assessed by a county, regional or municipal utility authority or county, regional or municipal sewerage authority, including, but not limited to connection fees or tapping fees)(“Sewer Extension Costs”), the Township will provide grant monies to Toll Brothers up to the amount of \$2,000,000.00 to defray Sewer Extension Costs incurred by Toll Brothers in excess of \$3,000,000.00 to extend sanitary sewer service to the Toll Project Site (which may, in whole or in part, be paid from the Township’s Affordable Housing Trust Fund); (the “Affordable Housing Grant”). Pa163.

Therefore, the 2020 Settlement Agreement explicitly provides that the \$2 million contribution is only for the extension of sewer to Area 1 through MRRSA.⁴

B. The Durational Adjustment Waiver and the Provision of Sewer to Area 1 Through MRRSA Were Essential Terms of the 2020 Settlement Agreement.

FSHC asserts that the durational adjustment waiver and the sewer connection through MRRSA were not essential terms of the 2020 Settlement

⁴ The Township’s preference for MRRSA to provide sewer to Area 1 is a matter of sound planning. The sewer connections to Area 1 through MRRSA are provided from Route 34; whereas, connections to Area 1 through TRWRA could potentially lead to projects in the east and southeast portions in the Township that are within the 3000-foot development review line of NWSE, which is contrary to the JLUS. Pa864-868. A desire to address affordable housing compliance with sound planning is not tantamount to bad faith. In Mount Laurel II, the Court held:

The Constitution of the State of New Jersey does not require bad planning. It does not require suburban spread. It does not require rural municipalities to encourage large scale housing developments. It does not require wasteful extension of roads and needless construction of sewer and water facilities for the out-migration of people from the cities and the suburbs. There is nothing in our Constitution that says that we cannot satisfy our constitutional obligation to provide lower income housing and, at the same time, plan the future of the state intelligently. 95 N.J. 158, 238 (1983).

Agreement because the only terms deemed “essential” are designated in Paragraph 16 of the 2020 Settlement Agreement. FSHC Db37. Paragraph 16 of the 2020 Settlement Agreement provides:

As an essential term of this Agreement, within one hundred and twenty (120) days of the Court’s approval of this Agreement after a fairness hearing, the Township shall introduce and adopt an ordinance or ordinances providing for the amendment of the Township’s Affordable Housing Ordinance and Zoning Ordinance to implement the terms of this Agreement and the zoning contemplated herein and shall adopt a Housing Element and Fair Share Plan and Spending Plan in conformance with the terms of this Agreement, and it shall submit same to the Court, the Court Master, and FSHC for review. Within one hundred and twenty (120) days after the approval of this Agreement by the Court after a fairness hearing, the Township shall adopt all ordinances required to be adopted as part of this Agreement, and it shall submit same to the Court, the Court Master, and FSHC for review. The Township shall provide all relevant documentation evidencing entitlement to credits – including, at minimum, deed restrictions and developer’s agreements – to the Court Master and FSHC at least 30 days prior to the Compliance Hearing in this matter (FSHC acknowledges having received satisfactory RCA documentation through mediation). The Township and FSHC agree to request that the Court schedule a Compliance Hearing at least one-hundred-twenty (120) days after the Court’s approval of this Agreement after a fairness hearing. Pa147.

Under FSHC’s theory, these are the only essential terms of the 2020 Settlement Agreement as there are no other provisions which include the language “essential term”. Importantly, the plain language of Paragraph 16 provides that this paragraph is “an essential term” – it does not however lead to the conclusion that this paragraph is the only essential term. “An” is an indefinite article; its use does not preclude or limit the finding that other terms of the 2020 Settlement Agreement are essential. Moreover, essential terms of a contract are

those that go “to the heart of the alleged agreement.” Satellite Ent. Ctr., Inc. v. Keaton, 347 N.J. Super. 268, 277 (App. Div. 2002). It is clear that Paragraph 8, which provided that the Township would provide grant monies of up to \$2 million toward extending sewer to Area 1 through MRRSA in exchange for a durational adjustment with a waiver, is an essential term of the 2020 Settlement Agreement (not to mention that the waiver is consideration for the \$2 million contribution, without which the agreement fails).

Further, the waiver provision cannot be severed from Paragraph 8 as its removal results in the Township losing the benefit of the bargain which it negotiated with FSHC. See NAACP of Camden Cty. E. v. Foulke Mgmt. Corp., 412 N.J. Super. 404, 437 (App. Div. 2011)(“[S]everability is only an option if striking the unenforceable portions of an agreement leaves behind a clear residue that is manifestly consistent with the ‘central purpose’ of the contracting parties[.]”). Lastly, the Mount Laurel does not provide the trial court with the authority to modify the 2020 Settlement Agreement and Seta’s reliance on Toll Bros., Inc. v. Twp. of W. Windsor, 334 N.J. Super. 77 (App. Div. 2000), is misplaced as that case is procedurally and factually distinct as, among things, it involved modification of a final judgment under R. 4:50-1.

II. COLTS NECK DID NOT ASK THE TRIAL COURT TO LEAVE CERTAIN TERMS OF THE 2020 SETTLEMENT AGREEMENT IN PLACE AND SIMPLY SOUGHT TO COMPLY WITH THE COAH RULES AS WRITTEN, WHICH DO NOT REQUIRE A FINANCIAL CONTRIBUTION TOWARD WATER AND SEWER. Pa11-13; Pa41-87.

Colts Neck did not seek to leave in place certain terms of the 2020 Settlement Agreement. The Township sought a durational adjustment in order to satisfy its Third Round obligation consistent with the COAH Rules.

A. The Township Did Not Rely On Any Terms of the 2020 Settlement Agreement When It Sought a Final Judgment of Compliance and Repose Based Upon the Amended HEFSP.

In asserting that the trial court correctly upheld the Township's obligations under the 2020 Settlement Agreement, FSHC and Seta rely on the flawed contention that the Township asked the trial court to leave certain terms of the 2020 Settlement Agreement in place. This is simply not the case. For example, the Township did not rely on the provisions in the 2020 Settlement Agreement relating to numbers. Both the Township and FSHC accepted the prior round obligation and prospective round obligation numbers, with FSHC specifically declining to proceed with a Numbers and Methodology trial. Insofar as FSHC asserts that without the 2020 Settlement Agreement, there would have been a contested hearing on RCA credits, the following colloquy that took place at oral argument on FSHC's Motion to Enforce demonstrates otherwise:

The Court: It doesn't sound to me like anyone saying let's throw the numbers out. Okay. Basically, MRRSA has very strenuously said, "Excuse me.

We weren't in that first time other than saying stop, it's not okay with us, and we can't do sewer for all of Colts Neck." So the concept is, is there something left in the agreement or not? It doesn't sound to me like either Fair Share or Colts Neck is saying that parts of the agreement that talked about, you know, the number of units, etcetera need to be thrown out. Fair Share is not saying that; is it?

Ms. Chentz: We're (indiscernible) with the exception that there's no waiver to the (indiscernible).

The Court: Okay. So basically the concept of the actual numbers in terms of have to have a certain number of units, depends on when, you know, that's a different story. And it doesn't sound to me like Colts Neck is saying the numbers that were reached are inappropriate, right?

Mr. Trautner: So again I just want to clarify, Judge, these are not numbers – there is no – Colts Neck (indiscernible) the settlement is null and void. So there are no numbers that are being enforced per the Settlement Agreement. We are simply taking the position that with respect to our compliance plan is we are willing to adopt and as expressed not being the numbers that were approved through the Jacobson trial, and if Fair Share Housing Center is willing to live with those numbers, then there's no need for a trial on the numbers. But it's not an enforcement of a settlement term; it's just we're accepting the Jacobson numbers and that's what we're proposing to have a hearing on, the Jacobson numbers.

....

Ms. Chentz: - - just to add, we don't want a litigation to shake up the numbers for a forty day trial. But I would say that in terms of Colts Neck's ability to meet those numbers, they're relying on portions of the settlement including (indiscernible) I believe for 107 RCAs that their settlement stipulates would not be contested but which the Appellate Division had thrown out. It's a whole can of worms. They don't want to throw out (indiscernible) in its entirety. They want to keep the benefit rising and throw out the pieces they don't like, and that's not (indiscernible).

Mr. Trautner: That's not true, Your Honor. The entire (indiscernible) settlement is null and void. The RCA (indiscernible) were previously approved and they stand. If Fair Share Housing Center wants to contest them, I suppose I can't stop them from doing that. But at the end of the day there is no Settlement Agreement right now and we're not selectively seeking to enforce any aspect of

the Settlement Agreement. But as to the other point, we're not relying on the RCA credits to meet our Affordable Housing obligation. They exist. They are what they are, but we are pursuing a durational adjustment without a waiver that addresses any and all outstanding Affordable Housing obligations. 1T 11:8-15:9.

It is clear that FSHC determined that it did not want a trial on the numbers and instead decided to accept the RCA credits towards Colts Neck's prior round obligation. The Amended HEFSP did not rely on the 2020 Settlement Agreement and fully addressed the Township's fair share obligation by complying with the COAH Rules as written. Therefore, the Township was entitled to a Final Judgment of Repose based upon its Amended HEFSP.

B. The COAH Rules and the FHA Do Not Permit the Trial Court to Compel a Financial Contribution Toward Water and Sewer Infrastructure.

Contrary to FSHC's assertion, the trial court impermissibly required Colts Neck to raise municipal revenue for the development of sewer and water infrastructure as Exhibit B provides that the Township contribute up to \$2 million from either its affordable housing trust fund or general municipal funds. Moreover, the Schlumpf payment (referred to in Exhibit B as the "Obre Road Developer Fee") is a separate payment from the \$2 million contribution to extend sewer to Area 1. Pa163.

COAH's durational adjustment rules do not require Colts Neck to either fund or independently create sewer or water infrastructure. Irrespective of

misleading arguments premised on selective (and out-of-context) quotes about N.J.A.C. 5:93-4.3(d) and its relationship to N.J.A.C. 5:93-4.3(a) and (b) regarding circumstances where a municipality might oppose adopting inclusionary zoning on sites that are realistic to receive sewer within the period of repose (it being undisputed that no such sites are at issue in this matter), the FHA is explicit on this point – *municipalities are not required “to raise or expend municipal revenues in order to provide low and moderate income housing.”* N.J.S.A. 52:27D-311(d)(emphasis added).

Insofar as Seta and FSHC rely on Tolls Bros. v. West Windsor Twp., 303 N.J. Super. 518 (Law Div. 1996) and In Re Adoption of Amendments to N.J.A.C. 5:93-1.3 and 5:93-5.3, 339 N.J. Super. 371 (App. Div. 2001), this reliance is misplaced as neither case stands for the proposition that the Township has an obligation to spend its own funds to create sewer infrastructure (where none exists) to address its affordable housing obligations. These cases say nothing of the kind and, instead, discuss the requirement (irrelevant to this matter) that if a municipality prepares a plan that proposes to address its affordable housing obligations by including sites to be zoned for inclusionary development, those sites can only be deemed to create a realistic housing opportunity if water and sewer can be brought to the site at a reasonable cost (by the developer) that does not unduly increase the cost of the development (the

idea being that municipalities cannot claim compliance with the Mount Laurel doctrine simply by rezoning sites that are not realistically capable of being developed within the period of repose). In re Adoption of Amendments to N.J.A.C. 5:93-1.3 and 5:93-5.3 does, however, discuss N.J.A.C. 5:93-4.3 as being the operative means by which the Legislature intended municipalities to either zone sites for inclusionary development that are realistic to receive water and/or sewer during the period of substantive certification pursuant to N.J.A.C. 5:93-4.3(a) and (b), or in the absence of the existence of such sites, to comply with the provisions of N.J.A.C. 5:93-4.3(c). Id. at 385.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the trial court's November 21, 2024 Orders requiring the Township to commit at least \$2 million toward extending water and/or sewer service to Area 1 and to prioritize Affordable Housing Trust Funds for water and/or sewer infrastructure be reversed.

CHIESA SHAHINIAN & GIANTOMASI PC
Attorneys for Appellant, Township of Colts Neck

By: /s/ Thomas J. Trautner, Jr.
THOMAS J. TRAUTNER JR.

By: /s/ Ronald L. Israel
RONALD L. ISRAEL

Dated: November 5, 2025