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October 9, 2018

Gerald J. Muller, Esq.  
Miller Porter & Muller, P.C.  
Suite 540  
One Palmer Square  
Princeton, New Jersey 08542

**Re: In the Matter of the Application of the Township of West Windsor,  
County of Mercer, Docket No. MER-L-1561-15**

Dear Mr. Muller:

This letter memorializes the terms of an agreement reached between the Township of West Windsor (the Township or "West Windsor"), the declaratory judgment plaintiff, and Fair Share Housing Center (FSHC), a Supreme Court-designated interested party in this matter in accordance with In re N.J.A.C. 5:96 and 5:97, 221 N.J. 1, 30 (2015) (Mount Laurel IV) and an intervenor-defendant in this proceeding ("the Parties").

### **Background**

West Windsor filed the above-captioned matter on July 7, 2015 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. in accordance with In re N.J.A.C. 5:96 and 5:97, supra. Through the declaratory judgment process, the Township and FSHC have agreed to settle the litigation and to present that settlement to the trial court with jurisdiction over this matter to review, recognizing that the settlement of Mount Laurel litigation is favored because it avoids delays and the expense of trial and results more quickly in the construction of homes for lower-income households.

### **Settlement terms**

The Township and FSHC hereby agree to the following terms:

1. FSHC agrees that the Township, through the adoption of a Housing Element and Fair Share Plan conforming with the terms of this Agreement (hereafter "the Plan") and through the implementation of the Plan and this Agreement, satisfies its obligations under the Mount Laurel doctrine and Fair Housing Act of 1985, N.J.S.A. 52:27D-301 et seq., for the Prior Round (1987-1999) and Third Round (1999-2025).
2. At this time and at this particular point in the process resulting from the Supreme Court's Mount Laurel IV decision, when Third Round fair share obligations have yet to be definitively determined, it is appropriate for the parties to arrive at a settlement regarding a municipality's Third Round rehabilitation and new construction obligation. While the court has reached a plenary adjudication of the rehabilitation and new construction obligation, the court has not yet adjudicated certain issues as to the implementation of that obligation or compliance, and the parties absent entering into this settlement would have the right to appeal that adjudication.

3. FSHC and West Windsor hereby agree that West Windsor's affordable housing obligations are as follows:

Rehabilitation Obligation (per Structural Conditions Survey attached hereto as Exh. A)	30
Prior Round Obligation (pursuant to N.J.A.C. 5:93)	899
Third Round (1999-2025) New Construction Obligation	1500

4. For purposes of this Agreement, the Third Round New Construction Obligation shall be deemed to include the Gap Period present need for new construction to address the affordable housing needs of households formed from 1999-2015, a need that was recognized by the Supreme Court in In re Declaratory Judgment Actions Filed By Various Municipalities, 227 N.J. 508 (2017), and the Prospective Need, which is a measure of the affordable housing need anticipated to be generated between July 1, 2015 and June 30, 2025. The parties for purposes of this Agreement have agreed for the purposes of settlement that the 1500-unit obligation for the Third Round New Construction Obligation determined through the March 8, 2018 decision of the trial court ("Methodology Opinion"), in combination with all of the provisions of this Agreement, represents a fair and reasonable settlement of this litigation pursuant to the standards elucidated by East/West Venture v. Borough of Fort Lee, 286 N.J. Super. 311 (App. Div. 1996) and related case law, recognizing that (a) both parties could have raised issues on appeal of the trial court's Methodology Opinion that could have resulted in a higher or lower fair share obligation, and (b) that the other aspects of this settlement resolve additional important issues, beyond the fair share obligation, that are relevant to the East/West Venture analysis of the fairness and reasonableness of the settlement, issues that have not yet been adjudicated by the trial court as of the date of the settlement, including, but not limited to, whether and how the 1000-unit cap pursuant to N.J.S.A. 52:27D-307 and related case law might apply to the Township, and what compliance mechanisms will be required of the Township to meet its fair share obligation. Both the Township and FSHC agree to support this agreement as fair and reasonable before the trial court, and if an appeal is filed by a third party, upon any appeal to the Appellate Division and/or Supreme Court.
5. The Township's efforts to meet its rehabilitation obligation shall include the following: funding and implementation of a housing rehabilitation program targeted at the rehabilitation of 30 existing very low, low or moderate income owner-occupied or renter-occupied housing units in the Township. This is sufficient to satisfy the Township's rehabilitation obligation of 30 units.
6. As noted above, the Township has a Prior Round new construction obligation of 899 units, which is met through the compliance mechanisms presented in Exhibit B to this Agreement.
7. The Township has implemented or will implement the mechanisms presented in Exhibit C to this Agreement to address its Third Round prospective need of 1500 units. Of these mechanisms, 155 units result from developments, namely 75 affordable units on the South portion of the Mack-Cali development, 32 special needs bedrooms or market to affordable units, and 48 affordable units from the re-occupancy of the existing occupied Princeton Theological Seminary apartments, that may not present a realistic opportunity by the time final judgment is entered in this case but will present a realistic opportunity

during the Third Round based on the terms described in Exhibit C. Mack-Cali may not proceed with construction of its 75 units until January 1, 2025. The Township does not have to begin implementation of the special needs and market to affordable program, in the form of identifying sites, soliciting sponsors, and identifying funding sources, until July 1, 2021. If the 48 Princeton Theological Seminary Phase 2 units are not provided by January 1, 2025, the Township will find another mechanism to address any shortfall. The parties agree that allowing the timing established for these developments by Exhibit C is a fair and reasonable resolution of pending issues regarding the 1000-unit cap that, as of the date of this settlement, have not been adjudicated by the court.

8. The Township will provide a realistic opportunity for the development of affordable housing through the adoption of the specified land use measures below, subject to the provisions set forth in paragraph 7, on the following sites for which such land use measures (or a prior land use board approval with an inclusionary requirement) are not already in place, as more fully described in Exhibit C:

Adoption of inclusionary zoning: American Properties/Heritage Village, Garden Homes, Roseland/Mack-Cali, Bear Creek Senior Living  
Implementation of an existing redevelopment plan and redeveloper agreement adopted on June 11, 2018: AvalonBay  
Implementation of an existing inclusionary redevelopment plan through a redevelopment agreement adopted on December 18, 2017: 400 Steps.

9. The Township will provide a realistic opportunity for the development of additional affordable housing that will be developed or created through means other than inclusionary zoning on the Community Options and Project Freedom developments, and through 32 special needs bedrooms or market to affordable units, as more fully described in Exhibit C.

In accordance with N.J.A.C. 5:93-5.5, the Township recognizes that it must provide evidence that the municipality has adequate and stable funding for any non-inclusionary affordable housing developments. The municipality is required to provide a pro forma of both total development costs and sources of funds and documentation of the funding available to the municipality and/or project sponsor, and list any funding applications still pending. The COAH Rules require that in the case where an application for outside funding is still pending, the municipality shall provide a stable alternative source, such as municipal bonding, in the event that the funding request is not approved. In the Township's case, there are no pending applications for Community Options and Project Freedom because funding applications have been approved. The Township has worked with Community Options and Project Freedom to advance funds and otherwise assist the developments. The Community Options and Project Freedom developments are anticipated to be constructed and occupied over the next year, as described further in Exhibit C. To the extent that these projects are already under construction or renovation at the time of the final Compliance Hearing, such documentation will not be required. As for the 32 special needs bedrooms or market to affordable units, the Township will meet this obligation as described in Exhibit C.

10. The Township agrees to require 13% of all affordable units referenced in this Agreement, excepting those units that were constructed or granted preliminary or final site plan approval prior to July 1, 2008, to be very low income units, with at least half of

the very low income units being available to families. The municipality will comply with those requirements as set forth in Exhibit C.

11. The Township shall meet its Third Round New Construction Obligation in accordance with the following standards as agreed to by the Parties and reflected in Exhibit C:

- a. Third Round bonuses will be applied in accordance with N.J.A.C. 5:93-5.15(d).
- b. At least 50 percent of the units addressing the Third Round New Construction Obligation shall be affordable to very-low-income and low-income households with the remainder affordable to moderate-income households.
- c. At least twenty-five percent of the Third Round New Construction Obligation shall be met through rental units, including at least half in rental units available to families.
- d. At least half of the units addressing the Third Round New Construction Obligation in total must be available to families.
- e. The Township agrees to comply with an age-restricted cap of 25% and to not request a waiver of that requirement. This shall be understood to mean that in no circumstance may the municipality claim credit toward its fair share obligation for age-restricted units that exceed 25% of all units developed or planned to meet its cumulative prior round and third round fair share obligation. As reflected in Exhibits B and C, the Township's prior round and third round plans provide for only 252 age-restricted units, which is well below the cumulative age-restricted cap of 25% of (899+1500 – 121 RCA units) or 569.

12. The Township shall add to the list of community and regional organizations in its affirmative marketing plan, pursuant to N.J.A.C. 5:80-26.15(f)(5), Fair Share Housing Center, the New Jersey State Conference of the NAACP, the Latino Action Network, STEPS, Ocean, Inc., the Greater Red Bank, Asbury Park/Neptune, Bayshore, Greater Freehold, Greater Long Branch, and Trenton Branches of the NAACP, and the Supportive Housing Alliance. As part of its regional affirmative marketing strategies during its implementation of the affirmative marketing plan, the Township and/or its administrative agent shall provide notice to those organizations of all available affordable housing units, along with copies of application forms. The Township also agrees to require any other entities, including developers or persons or companies retained to do affirmative marketing, to comply with this paragraph.

13. All units shall include the required bedroom distribution, be governed by controls on affordability and affirmatively marketed in conformance with the Uniform Housing Affordability Controls, N.J.A.C. 5:80-26.1 et. seq. or any successor regulation, with the exception that in lieu of 10 percent of affordable units in rental projects being required to be at 35 percent of median income, 13 percent of affordable units in rental projects shall be required to be at 30 percent of median income, and all other applicable law. The Township as part of its HEFSP shall adopt and/or update appropriate implementing ordinances in conformance with standard ordinances and guidelines developed by COAH to ensure that this provision is satisfied. Income limits for all units that are part of the Plan required by this Agreement and for which income limits are not already established through a federal program exempted from the Uniform Housing Affordability Controls pursuant to N.J.A.C. 5:80-26.1 shall be updated by the Township annually within 30 days of the publication of determinations of median income by HUD as follows:

- a. Regional income limits shall be established for the housing region in which the Township is located (in this case, Housing Region 4) based on the median income by household size, which shall be established by a regional weighted average of the uncapped Section 8 income limits published by HUD. To compute this regional income limit, the HUD determination of median county income for a family of four is multiplied by the estimated number of households within the county according to the most recent decennial Census. The resulting product for each county within the housing region is summed. The sum is divided by the estimated total number of households from the most recent decennial Census in the Township's housing region. This quotient represents the regional weighted average of median income for a household of four. The income limit for a moderate-income unit for a household of four shall be 80 percent of the regional weighted average median income for a family of four. The income limit for a low-income unit for a household of four shall be 50 percent of the HUD determination of the regional weighted average median income for a family of four. The income limit for a very low income unit for a household of four shall be 30 percent of the regional weighted average median income for a family of four. These income limits shall be adjusted by household size based on multipliers used by HUD to adjust median income by household size. In no event shall the income limits be less than those for the previous year.
- b. The income limits attached hereto as Exhibit D are the result of applying the percentages set forth in paragraph (a) above to HUD's determination of median income for FY 2018, and shall be utilized until the Township updates the income limits after HUD has published revised determinations of median income for the next fiscal year.
- c. The Regional Asset Limit used in determining an applicant's eligibility for affordable housing pursuant to N.J.A.C. 5:80-26.16(b)3 shall be calculated by the Township annually by taking the percentage increase of the income limits calculated pursuant to paragraph (a) above over the previous year's income limits, and applying the same percentage increase to the Regional Asset Limit from the prior year. In no event shall the Regional Asset Limit be less than that for the previous year.
- d. The resale prices of owner-occupied low- and moderate-income units may increase annually based on the percentage increase in the regional median income limit for each housing region determined pursuant to the process outlined above. In no event shall the maximum resale price established by the administrative agent be lower than the last recorded purchase price.
- e. The rent levels of very-low-, low- and moderate-income units may be increased annually based on the percentage increase in the Housing Consumer Price Index for the Northeast Urban Area, upon its publication for the prior calendar year. This increase shall not exceed nine percent in any one year. Rents for units constructed pursuant to low income housing tax credit regulations shall be indexed pursuant to the regulations governing low income housing tax credits.

The parties agree to request the Court prior to or at the fairness hearing in this matter to enter an order implementing this paragraph of this Agreement, the terms of which shall also be reflected in the Township's Affordable Housing Ordinance.

14. All new construction units shall be adaptable in conformance with P.L.2005, c.350/N.J.S.A. 52:27D-311a and -311b and all other applicable law.

15. As an essential term of this Agreement, within ninety (90) days of Court's approval of this Agreement at 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.
  
16. As part of the implementation of this Agreement required in paragraph 15, the Township shall repeal Section 200-243.2 of the Township's Code and replace it with a new Mandatory Set-Aside Ordinance, the form of which shall be reviewed by FSHC and the Special Master prior to its adoption, that will require twenty-five (25) percent of the units in any future, currently unanticipated multifamily residential developments approved for construction at a density of at least six (6) or more units per acre and at least twice the density previously permitted, and also resulting in five (5) or more new dwelling units over the number of units previously permitted, to be affordable, consistent with all of the terms of this Agreement including but not limited to paragraph 13. This requirement shall apply to all municipal actions approving multifamily residential development that meet the foregoing qualifications as to density and new dwelling units, including development resulting from the rezoning of single-family residentially zoned property to allow for multifamily residential and/or mixed-use development or the rezoning of non-residentially zoned property to allow for multifamily residential and/or mixed-use development, or the adoption or amendment of a redevelopment plan to allow for multifamily residential and/or mixed-use development, or grant of a variance to allow for multifamily residential and/or mixed-use development where it was not previously permitted, or any of the foregoing municipal actions that allow a higher density of multi-family residential development than previously permitted, subject to the foregoing qualifications as to density and new dwelling units, with the explicit agreement that this requirement governs municipal actions only and shall not be construed to entitle any property owner or developer to such municipal actions, nor shall any property be permitted to be subdivided so as to avoid compliance with this requirement.
  
17. The parties agree that if a decision of a court of competent jurisdiction in Mercer County, a decision by the Appellate Division or Supreme Court, or a determination by an administrative agency responsible for implementing the Fair Housing Act, or an action by the New Jersey Legislature, would result in a calculation of an obligation for the Township for the period 1999-2025 that would be lower by more than ten (10%) percent than the total Third Round new construction obligation established in this Agreement, and if that calculation is memorialized in an unappealable final judgment, the Township may seek to amend the judgment in this matter to reduce its fair share obligation accordingly. FSHC agrees to support such an application to amend the judgment if filed by the Township unless FSHC believes the criteria set forth above have not been met. Notwithstanding any such reduction, the Township shall be obligated to adopt a Housing Element and Fair Share Plan that conforms to the terms of this Agreement and to implement all compliance mechanisms included in this Agreement, including by adopting or leaving in place any site specific zoning adopted or relied upon in connection with the Plan adopted pursuant to this Agreement; taking all steps in accordance with paragraph 9 of this Agreement necessary to support the

referenced 100% affordable developments except to the extent that substitutions are expressly permitted by the terms of this Agreement; and otherwise fulfilling fully the fair share obligations as established in this Agreement. The reduction of the Township's Third Round new construction obligation below that established in this Agreement does not provide a basis for seeking leave to amend this Agreement or seeking leave to amend an order or judgment pursuant to R. 4:50-1. If the Township prevails in reducing its Third Round new construction obligation, the Township may carry over any resulting extra affordable units to future rounds in conformance with then-applicable law.

18. The Township shall prepare a Spending Plan within the period referenced above, subject to the review by FSHC and the approval of the Court, and reserves the right to seek approval from the Court that the expenditures of funds contemplated under the Spending Plan constitute "commitment" for expenditure pursuant to N.J.S.A. 52:27D-329.2 and -329.3, with the four-year time period for expenditure designated pursuant to those provisions beginning to run with the entry of a final judgment in this matter that includes approval of the Spending Plan in accordance with the provisions of In re Tp. Of Monroe, 442 N.J. Super. 565 (Law Div. 2015) (aff'd 442 N.J. Super. 563). On the first anniversary of the Court's entry of final judgment in this matter, and on every anniversary of that date thereafter through July 1, 2025, the Township agrees to provide annual reporting of trust fund activity to the New Jersey Department of Community Affairs, Council on Affordable Housing, or Local Government Services, or other entity designated by the State of New Jersey, with a copy provided to Fair Share Housing Center and posted on the municipal website, using forms developed for this purpose by the New Jersey Department of Community Affairs, Council on Affordable Housing, or Local Government Services. The reporting shall include an accounting of all housing trust fund activity, including the source and amount of funds collected and the amount and purpose for which any funds have been expended.

19. On the first anniversary of the entry of final judgment in this matter, and every anniversary thereafter through the end of this Agreement, the Township agrees to provide annual reporting of the status of all affordable housing activity within the municipality through posting on the municipal website with a copy of such posting provided to Fair Share Housing Center, using forms previously developed for this purpose by the Council on Affordable Housing or any other forms endorsed by the Special Master and FSHC.

20. The Fair Housing Act includes two provisions regarding action to be taken by the Township during the ten-year period of protection provided in this Agreement. The Township agrees to provide notice in accordance with those provisions as follows:

- a. For the midpoint realistic opportunity review due on July 1, 2020, as required pursuant to N.J.S.A. 52:27D-313, the Township will post on its municipal website, with a copy provided to Fair Share Housing Center, a status report as to its implementation of the Plan and as to whether any unbuilt sites or unfulfilled mechanisms, other than those specifically covered in paragraph 7. that are not required to be fulfilled by the midpoint review, continue to present a realistic opportunity and whether

any mechanisms to meet unmet need should be revised or supplemented. .

- b. For the review of very low income housing requirements required by N.J.S.A. 52:27D-329.1, within 30 days of the third anniversary of the entry of final judgment in this matter, and every third year thereafter, the Township will post on its municipal website, with a copy provided to Fair Share Housing Center, a status report as to its satisfaction of its very low income requirements, including the family very low income requirements referenced herein. .

21. This Agreement must be approved by the Court following a fairness hearing as required by Morris Cty. Fair Hous. Council v. Boonton Twp., 197 N.J. Super. 359, 367-69 (Law Div. 1984), aff'd o.b., 209 N.J. Super. 108 (App. Div. 1986); East/West Venture v. Borough of Fort Lee, 286 N.J. Super. 311, 328-29 (App. Div. 1996). The Township shall present its planner as a witness at this hearing. FSHC agrees to support this Agreement at the fairness hearing. In the event the Court approves this proposed settlement, the parties agree that, following adoption of the ordinances and plans referenced in paragraph 15, the Township will be entitled to the "judicial equivalent of substantive certification and accompanying protection as provided under the FHA", 221 N.J. at 6, which, in the Mercer County declaratory judgment actions, has been a "Judgment of Compliance and Repose" ("JOR"). If this Agreement is rejected by the Court at a fairness hearing, it shall be null and void.
22. The Township agrees to pay FSHC's attorneys fees and costs in the amount of \$100,000 within thirty (30) days of the Court's approval of this Agreement pursuant to a duly-noticed fairness hearing. FSHC agrees that this payment will fully address any claim of attorneys fees and costs that FSHC has made or could have made against the Township in relation to this matter from the date of the filing of this action through the entry of a final judgment in this matter in accordance with the process provided for in paragraph 21.
23. If an appeal is filed of the Court's approval or rejection of this Agreement, the Parties agree to defend the Agreement on appeal, including in proceedings before the Superior Court, Appellate Division and New Jersey Supreme Court, and to continue to implement the terms of this Agreement if the Agreement is approved before the trial court unless and until an appeal of the trial court's approval is successful, at which point the Parties reserve their right to rescind any action taken based upon the trial court's approval. All Parties shall have an obligation to fulfill the intent and purpose of this Agreement.
24. This Agreement may be enforced through a motion to enforce litigant's rights or a separate action filed in Superior Court, Mercer County.
25. 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, provided that this paragraph shall not supersede paragraphs 21 and 23 of this Agreement.

26. This Agreement shall be governed by and construed by the laws of the State of New Jersey.
27. This Agreement may not be modified, amended or altered in any way except by a writing signed by each of the Parties.
28. This Agreement may be executed in any number of counterparts, each of which shall be an original and all of which together shall constitute but one and the same Agreement.
29. The Parties acknowledge that each has entered into this Agreement on its own volition without coercion or duress after consulting with its counsel, that each party is the proper person and possess the authority to sign the Agreement, that this Agreement contains the entire understanding of the Parties and that there are no representations, warranties, covenants or undertakings other than those expressly set forth herein.
30. Each of the Parties hereto acknowledges that this Agreement was not drafted by any one of the Parties, but was drafted, negotiated and reviewed by all Parties and, therefore, the presumption of resolving ambiguities against the drafter shall not apply. Each of the Parties expressly represents to the other Parties that: (i) it has been represented by counsel in connection with negotiating the terms of this Agreement; and (ii) it has conferred due authority for execution of this Agreement upon the persons executing it.
31. Any and all Exhibits and Schedules annexed to this Agreement are hereby made a part of this Agreement by this reference thereto. Any and all Exhibits and Schedules now and/or in the future are hereby made or will be made a part of this Agreement with prior written approval of both Parties.
32. This Agreement constitutes the entire Agreement between the Parties hereto and supersedes all prior oral and written agreements between the Parties with respect to the subject matter hereof except as otherwise provided herein.
33. No member, official or employee of the Township shall have any direct or indirect interest in this Agreement, nor participate in any decision relating to the Agreement which is prohibited by law, absent the need to invoke the rule of necessity.
34. Anything herein contained to the contrary notwithstanding, the effective date of this Agreement shall be the date upon which all of the Parties hereto have executed and delivered this Agreement.

35. All notices required under this Agreement ("Notice[s]") shall be written and shall be served upon the respective Parties by certified mail, return receipt requested, or by a recognized overnight or by a personal carrier. In addition, where feasible (for example, transmittals of less than fifty pages) shall be served by facsimile or e-mail. All Notices shall be deemed received upon the date of delivery. Delivery shall be effected as follows, subject to change as to the person(s) to be notified and/or their respective addresses upon ten (10) days notice as provided herein:

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

**TO THE TOWNSHIP:** Gerald J. Muller, Esq.  
Miller Porter & Muller, P.C.  
Suite 540  
One Palmer Square  
Princeton, New Jersey 08542  
Phone: (609) 921-6077  
Telecopier: (609) 497-1439  
Email: gmuller@mpmglaw.com

**WITH A COPY TO THE MUNICIPAL CLERK:** Gay Huber, RMC, CMC  
Township Clerk  
271 Clarksville Road  
P.O. Box 38  
West Windsor, New Jersey 08550  
Phone: (609) 799-2400  
Telecopier: (609) 799-1610  
Email: ghuber@westwindsortwp.com

Please sign below if these terms are acceptable.

Sincerely,

Adam M. Gordon, Esq.  
Counsel for Intervenor/Interested Party  
Fair Share Housing Center

On behalf of the Township of West Windsor, with the authorization  
of the governing body:

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Dated: \_\_\_\_\_

West Windsor settlement agreement – revised 10-9-18