In the Matter of the Application of the Borough of Montvale

Docket # BER-L-750-25

PROGRAM RECOMMENDATION STATEMENT OF REASONS

This matter came before the Affordable Housing Dispute Resolution Program (Program) pursuant to a complaint for declaratory judgment brought by the Borough of Montvale (Petitioner) pursuant to N.J.S.A. 52:27D-304.2-304.3 and 304(1)(f)(1)(c) of the New Jersey Fair Housing Act, N.J.S.A. 52:27D-301 et seq. (collectively, FHA) and in accordance with Section II.A of Administrative Directive #14-24.

On October 18th, 2024, pursuant to the FHA (as amended) the New Jersey Department of Community Affairs (DCA) issued its report entitled, "Affordable Housing Obligations for 2025-2035 (Fourth Round)." The report set forth the "Present Need" and "Prospective Need" obligations of all New Jersey municipalities for the Fourth-Round cycle.

With regards to the Petitioner, the Present Need obligation of the Petitioner has been calculated and reported as 30 affordable units. Its Prospective Need obligation was calculated and reported as 348 affordable units. The main issue before the Program is the allocation of Prospective Need units of affordable housing. Petitioner accepted the Present Need allocation, subject to a windshield survey but disputes the Prospective Need calculation. The main issue before the Program is the allocation of the Prospective Need units of affordable housing.

The Petitioner timely adopted a resolution seeking a deviation from its assigned Prospective Need obligation based upon the recommendation of its counsel and/or experts. Petitioner, a Bergen County municipality, is located within affordable housing region 1. In this case, the Petitioner requests that its Prospective Need obligation be reduced to **176**. The Petitioner's complaint was timely and properly with the Program. There is a **172**-unit difference between the DCA and the Petitioner's calculations for its Prospective Need obligation.

The Petitioner's position has been challenged by New Jersey Builders Association (Builders), SHG Montvale MG I, LLC (SHG) and Fair Share Housing Center (Fair Share)(collectively Challengers). The Challengers contend that Petitioner's calculations fail to comply with the statutory methodology framework. Each challenge was supported by its own expert.

Builders relies upon the report of its expert J. Creigh Rahenkamp (Rahenkamp Report). Builders takes the position that the Petitioner's calculations are inconsistent with the FHA by seeking to reduce the Petitioner's Prospective Need without accounting for the impact of that reduction on the regional aspect of the allocation model.

SHG is represented by excellent counsel seeking to protect the interest of this local developer that owns extensive properties in Montvale. SHG relies upon the expert report of Mr. Art Bernard (Benard Report). Bernard reached the conclusion, like Rahenkamp, that Petitioner's calculations failed to comply with the FHA because they did not include an amended regional share of the land capacity factor. SHG pointed out that their interest was not "site specific" and that their objective was to uphold the DCA calculations. It should be noted that SHG had previously participated in the third round with Petitioner and it was pointed out that SHG has not fully complied with the agreements and orders to build affordable housing units in Montvale.

Fair Share relies upon the report of its expert Dr. David N. Kinsey (Kinsey Report). Fair Share calculated a prospective need allocation assessment for all 159 towns seeking to deviate from the DCA calculations. As stated by Dr. Kinsey in his report, the analysis was prepared to avoid dilution of the constitutional housing obligation, and out of fairness to the municipalities that accepted the DCA calculation. Fair Share recalculated the developable land among these 159 municipalities based on valid exclusion criteria and fairly reallocated the remaining Prospective Need of these municipalities. Dr. Kinsey's analysis concluded that that the proper allocation for Petitioner is **276** for a Prospective Need obligation. This calculation is 72 units lower than the initial DCA determination of 348. Fair

Share's Kinsey calculation resulted in a number much closer to the Petitioner's calculation.

In accordance with AOC directive and statutory framework, the Program assigned this case to program member Julio L. Mendez A.J.S.C. (ret.) to address the case in accordance with the FHA and ADC Directive. The Program member convened a settlement conference, but when settlement negotiations failed, a session was held in order that each party presented its position. The session was held "on the record".

The Program member was impressed by the town officials, lawyers and experts that appeared at the conference. Likewise, the Program was impressed by Fair Share, Builders, SHG and their lawyers and experts. Despite aggressive advocacy reflected in the filings and arguments by all sides, the parties made a solid effort to reach common ground, and they came quite close.

On all sides, the experts, professionals and officials engaged in fruitful dialogue that often-resolved issues regarding specific properties. While there was no final settlement, and there are still significant differences, the lines of communication built during this process provide a solid foundation to continue the discussions moving forward at the next phase.

The Program is pleased that Petitioner actively and positively engaged in the Program process under the new statutory framework of the FHA, even though Montvale along with 25 other municipalities in a separate action, are challenging the constitutionality of the law.[1]

Of significance, all 26 of those towns passed binding resolutions to opt into the Program and then filed complaints to participate in the affordable housing program process. Overall, these towns have achieved excellent results so far, 16 of the towns achieved common ground and settlements, 5 accepted DCA calculations and 5 towns are awaiting allocation determinations from the Program following a session.

The record before the Program member was established based on all filings and available expert reports from Fair Share, Builders, SHG and Petitioner. There were several hundred pages of expert reports and legal filings.

The parties were permitted to present arguments concerning their positions. The Program member has reviewed all filings, legal briefs and expert reports from all parties and considered all arguments.

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[1] Borough of Montvale, et. al. v. State of New Jersey, Superior Court of New Jersey, MER-L-1778-24

The following statement of reasons has been prepared to support the recommendation that is made by the Program member to the locally assigned and designated Bergen County Mount Laurel Judge.

General Overview

The Mount Laurel Doctrine, originating from two landmark decisions by the New Jersey Supreme Court—Mount Laurel I (1975)[2] and Mount Laurel II (1983)[3]—mandates that municipalities take affirmative action to provide affordable housing opportunities for low- and moderate-income families. The Mount Laurel Doctrine emerged in response to the exclusionary zoning practices of Mount Laurel Township, which sought to prevent the development of affordable housing in its rapidly suburbanizing area. These zoning policies disproportionately impacted Black communities, leading to the 1971 litigation which culminated in the Mount Laurel I decision. This decision prohibited exclusionary zoning and required towns to contribute their "fair share" of regional affordable housing needs. The subsequent Mount Laurel decisions reinforced the mandate, allowing for the enforcement of housing obligations and establishing mechanisms like the "builder's remedy," where developers could sue municipalities for non-compliance.

[2] S. Burlington County NAACP v. Mt. Laurel, 67 N.J. 151 (1975)
[3] S. Burlington County NAACP v. Mt. Laurel, 92 N.J. 158 (1983)

In 1985, the state legislature created the FHA, which led to the establishment of the Council on Affordable Housing (COAH) to manage the implementation of the doctrine. COAH faced challenges and delays in enforcement, particularly in the 2000s, which led to the New Jersey Supreme Court's intervention in Mount Laurel IV (2015). This decision reinforced the doctrine's enforcement, assigning jurisdiction to trial courts and offering municipalities limited immunity if they prepared housing plans under court supervision. By 2024, significant progress had been made, indeed the speed of development has accelerated since Mount Laurel IV. The Mount Laurel Doctrine has remodeled New Jersey's approach to affordable housing. The newly adopted statutory framework provides the roadmap for the next ten-year cycle of affordable housing obligations.

New Statutory Framework

The new framework established under P.L.2024, c.2 signed by Governor Murphy on March 20, 2024, outlines a detailed approach for determining and enforcing municipal affordable housing obligations under the Mount Laurel Doctrine and the FHA.

This law mandates that the DCA calculates regional housing needs and municipal obligations in accordance with specific formulas. The primary statutory objective is to make the affordable housing system more efficient, enforceable, and transparent. The statutory framework made significant amendments to the FHA and related housing laws to strengthen and streamline enforcement of the Mount Laurel Doctrine. These changes are aimed at addressing the state's affordable housing shortage by streamlining the planning and enforcement process while making it more transparent and accessible.

Over the years, the affordable housing process has experienced a seemingly never-ending history of litigation. The revisions are seeking to facilitate the process for municipalities to meet their obligations more effectively and avoid legal challenges and achieve lower costs. Importantly, the law codifies the fair share methodology based on the "Jacobson Methodology" as established by a Mercer County trial court in 2018[4] following a lengthy trial that ultimately resulted in standards widely accepted by both housing advocates and municipalities in interpreting the methodology as directed by Mount Laurel IV.

The DCA is tasked with making initial calculations of Present Need and Prospective Need as guidance for municipalities. In accordance with the statutory timelines, DCA has published and proposed the Fourth Round (2025-2035) fair share obligations for New Jersey's 564 municipalities, including the DCA allocation mentioned above for Petitioner.

[4] In Re the Mun. of Princeton, 480 N.J. Super. 70 (Law Div. 2018).

This Program member is of the opinion that the new legislative framework implemented by the Judiciary has been immensely successful so far. Of the 564 municipalities in New Jersey, a record **449** municipalities filed declaratory judgement actions pursuant to the new legislation, **157** more than have previously participated in the Mount Laurel process. Impressively, **290** towns accepted DCA calculations of Prospective Need, while **159** towns or about 35%, filed to deviate from the DCA numbers.

Fair Share has filed challenges in 65 of the 159 of those towns, while Builders has challenged all the 159 municipalities seeking to deviate from DCA calculations number. Very importantly, the legislative framework establishes that DCA calculations are non-binding and provides the town calculations with a presumption of validity. DCA acknowledged that its calculations are not perfect, and that it often results in land incorrectly included in their calculations.

The 159 municipalities seeking an adjustment of DCA allocation reported less developable land than the state's figures, claiming lower housing obligations. Fair Share has found that many of these claims are valid. This Program member has also found that the municipal calculations consistently point out properties in their towns that were incorrectly included in DCA calculations. As discussed in this recommendation, this is true for some of the properties in the case of Petitioner.

Significantly, Fair Share recalculated the land allocations for these 159 municipalities, ensuring a fair reallocation of the remaining housing needs. In many instances Fair Share accepts DCA numbers, in other cases calculating a higher or lower municipal allocation. Despite the statewide analysis conducted by Fair Share, the agency only challenged 65 municipalities seeking to deviate from the DCA calculations. Fair Share filed a challenge in this case.

On the other hand, Builders and SHG have taken the position, as pointed out above, that challenges to the DCA's calculations all should be rejected unless they are accompanied by a regional reallocation proposal. Builders and SHG argue that the methodology used by the DCA is consistent and fair on a regional level, and any minor errors should not derail the overall allocation process.

The Challengers point out that the Petitioner's calculations do not follow the methodology required by the statute. They take the position that when a municipality chooses to present its own calculations as to developable land, it must, consistent with the statutory formula, calculate two numbers: the sum of the total developable land area in the municipality, and the sum of the total developable land area in the region. As a result, the Challengers argue that the Petitioner's calculations fail to account for the regional need aspect of the methodology, are inconsistent with the requirements of the FHA and should not be considered by the Program.

It is important to note that the Builders expert report of J. Creigh Rahenkamp and SHG's expert report of Art Bernard did not provide detailed property analysis for each town, including the Petitioner in this case. Builders and SHG seek to broadly accept the DCA calculations and point out that towns have their full opportunity to argue the property-by-property analysis at the next stage as part of the adjustment process.

Petitioner argues that its calculations are consistent with the FHA, and that the regional impact of the methodology is constantly changing because of settlement and decisions. In other words, it is a constantly moving target.

Petitioner argues that its calculations are based on their expert analysis, and as required by the statutory framework. Petitioner highlights that DCA calculations are non-binding and that the law provides the town with a presumption of validity.

The Petitioner also argues that the Builders and SHG challenges fail in that they lack the necessary particularity required by the statutory framework.

Petitioner argues that the FHA and the procedural rules established by the Administrative Office of the Courts in Directive #14-24 ("Directive") in Section II.C. states, "Challenges that do not meet the required statutory standards set forth in N.J.S.A. 52:27D-304.1(f)(1)(c) will be dismissed." Also, N.J.S.A. 52:27D-304.1(f)(1)(c) provides that, "[a] ny challenge must state with particularity how the municipal calculation fails to comply with sections 6 and 7 of P.L.2024, c. 2 (C.52:27D-304.2 and C.52:27D-304.3) and include the challenger's own calculation of the fair share obligations in compliance with sections 6 and 7 of P.L.2024, c. 2 (C.52:27D-304.2 and C.52:27D-304.3)."

The Program will address this issue.

Regarding Builders, this Program member concludes Builders is without question an interested party and meets the very liberal standing analysis under New Jersey Law. Indeed, Builders has been an active participant in Affordable Housing litigation, including a party in the Princeton case before Judge Jacobson. At the same time, the Program member recognizes that under the amendments to the FHA, the requirement for filing a challenge includes an added element of particularity. Here again, the Program member concludes that while the Builders' expert report of Mr. Rahenkamp is not town specific in its approach, its reliance on DCA numbers is minimally sufficient to meet the particularity requirements of the statute. The Program recommends that the Builders challenge not be dismissed.

The Program reaches a similar conclusion regarding the developer SHG. Here, the conclusion of the Program is that SHG also is an interested party within the statute given that it owns property in Montvale, is an active developer in Montvale and, as stated above, a participant with outstanding obligations in the third round relative to Petitioner. While SHG's expert report of Mr. Bernard does not include SHG's own fair share obligations, it is specific to Montvale, identifies specific areas in which Mr. Bernard concludes that Petitioner's calculations fail to comply with the FHA and adopts the DCA's fair share calculations and thus it is minimally sufficient to meet the particularity requirements of the statute. The Program recommends that the SHG challenge not be dismissed. However, the concerns raised by SHG are more appropriate for the plan phase of the Program, and not for the allocation stage.

Affordable Housing Dispute Resolution Program

The law also established a unique Affordable Housing Dispute Resolution Program. The Judiciary has issued a directive outlining the process for the Program's implementation. The new streamlined process allows municipalities to submit their plans for certification. If disputes arise about the feasibility of these plans, mediation and county-level housing judges will resolve issues to ensure compliance with affordable housing goals.

Directive #14-25 promulgates procedures and guidelines implementing the Program created by L. 2024, c. 2. This law amended N.J.S.A. 52:27D-302, the FHA, abolished the Council on Affordable Housing (COAH), and created a new process for municipalities to come into constitutional compliance with their affordable housing obligations. The new law established the Program within the Judiciary for the purpose of resolving disputes associated with the FHA.

In furtherance of that end, the Administrative Director of the Courts is authorized to establish guidelines for the resolution of such matters, including the appointment of members, qualified experts, and staff. The May 17, 2024, Notice to the Bar announced the Administrative Director's appointment of members of the Affordable Housing Dispute Resolution Program, consisting of retired judges, including a chairperson. Any changes in the Program membership will similarly be announced by a notice to the bar.

This member of the Program is one of six currently handling all 159 cases involving multiple challenges. The Program has successfully heard all 159 challenges in the very narrow 30-day statutory timeline, achieving a settlement in **113** cases, which represents over 70% of the cases.

Petitioner and the Challengers did not settle the allocation dispute. The Program is now tasked with making a recommendation regarding allocation of the Prospective Need dispute, as outlined in this statement of reasons.

Fourth Round Model (2025-2035)

The Fourth Round Model of affordable housing obligations in New Jersey, as stipulated by the 2024 amendments to the Fair Housing Act, reflects an effort by the legislature to streamline the process and minimize disputes. These amendments offer municipalities the opportunity to calculate their own prospective housing needs for the 2025-2035 period. However, the Act acknowledges that no model is perfect, and thus disputes may arise.

The law created a dispute resolution program, anticipating minimal challenges to the calculations. Municipalities can challenge the state's calculations within a short, 30-day dispute resolution period. While the legislative intent is to minimize disputes, the land capacity factor has generated challenges, as some municipalities contest their obligations based on land use and development potential.

In other words, **the Program was tasked with resolving affordable housing allocation disputes in 30 days, which in the past often resulted in many years of litigation.** An immense task, and an amazing outcome so far.

Key aspects of the model revolve around determining the regional and municipal obligations based on several factors, including the change in household numbers, economic capacity, income, and land capacity. The land capacity factor has generated significant challenges from municipalities due to its broad approach to defining developable land.

The DCA developed its land capacity factor based on available land data, but this methodology has been criticized for being overly general, especially by municipalities that conducted parcel-by-parcel reviews to identify discrepancies. It is important to note that DCA acknowledges that their calculations are not perfect, and that at times properties that were incorrectly included, or at times excluded.

To analyze municipal claims on developable land, it is essential to understand the statutory basis for the land capacity factor and its application. The FHA stipulates that the land capacity factor is determined by estimating the area of developable land that may accommodate development, using specific state and federal data sources. DCA identified vacant, developable land using these sources, and excluded lands that do not meet the criteria, such as preserved open space, farmland, and wetlands.

Impressively, 290 municipalities accepted the DCA calculations. The DCA calculations are non-binding. In response to the DCA calculations, Petitioner conducted a property-by-property analysis. The Petitioner obtained its own expert planner and prepared a comprehensive report. The Petitioner highlights properties that were incorrectly included in the DCA calculation. Petitioner is seeking a prospective need allocation of **176**.

Fair Share argues that Petitioner is violating both statutory and constitutional obligations by improperly attempting to exclude developable parcels from its affordable housing obligations. Fair Share challenges the Petitioner's attempt to undercut its Mount Laurel obligation.

Fair Share points out significant concerns about the aggressive approach taken by Petitioner in excluding certain properties as outlined below:

DCA Polygon 28440 (Block 2204 Lots 23 & 28): Fair Share relies on the opinion provided in Dr. Kinsey's workbook as to why this polygon must be included. Access is available to Lot 23 so long as the Petitioner were to subdivide the property. This land is owned by a church. Churches and religious institutions often provide housing services and solutions, including in some cases affordable housing developments.

DCA Polygon 28452 (Block 1201 Lot 10): Fair Share relies on the opinion provided in Dr. Kinsey's workbook as to why this polygon must be included. This parcel has development potential with access from Hilton Place. As the workbook notes, access to the parcel could be constructed around a small area of steep slopes.

DCA Polygon 28455 (Block 1002 Lot 7); DCA Polygon 28456 (Block 1002 Lot 7): Fair Share originally included these parcels in part. Then, based on a deed restriction that the Petitioner included in its January 30, 2025, submission to the court, Fair Share was willing to allow these parcels to be excluded. However, upon further examination, Fair Share learned that these parcels were, in fact, offered by the Petitioner in its Third Round Fair Share Plan, fatally undermining any claim that they should be excluded. Indeed, Block 1002, Lot 7 is 127 Summit Avenue in the Third Round Mount Laurel Settlement Agreement between the Petitioner and Fair Share. The Petitioner received affordable housing credit towards its third-round obligation for zoning this property for inclusionary development.

Fair Share relies on Dr. Kinsey's expert analysis and documentary evidence. Fair Share argues that the Petitioner is attempting to avoid its constitutional and statutory housing obligations by excluding valid developable parcels through methods that are legally and factually unsupportable.

It is important to point out that Fair Share acknowledged that DCA's approach has errors, in that it incorrectly included certain properties of the Petitioner that are not developable.

Fair Share supports a methodology that allows for the exclusion of certain lands from the developable land calculation if they can be proven to be unsuitable for development, such as flood zones, wetlands, steep slopes, and properties with deed restrictions.

This is precisely the basis advanced by Petitioner for some of the properties. As pointed out above, Dr. Kinsey issued a report on February 27, 2025, estimating that the Prospective Need allocation for Petitioner was **276.** This calculation is **72** units below DCA initial calculations.

Despite the arguments advanced by Fair Share, the conclusion of Dr. Kinsey is that the initial DCA calculation was off the mark by a wide margin. This objective approach lends credence to both sides. The Program is impressed by Fair Share approach that acknowledges that the DCA's initial calculation was off the mark, which also lends validation to Petitioner's initial protestations of the DCA calculations.

Fair Share's position goes one step further and it allows municipalities to challenge the DCA's calculations and request the exclusion of certain lands from their developable land estimates. If these exclusions are accepted, then Fair share proposes that the resulting "lost units" be reallocated to other municipalities within the region. While this idea is intriguing, it raises concerns about statutory authority, as the Legislature did not explicitly authorize such a reallocation in the statute.

In the opinion of this Program member, the legislative framework anticipated potential issues and errors with DCA initial calculations. That is the reason that DCA numbers are non-binding, and the towns are provided with an opportunity to challenge the DCA numbers. At the same time, the town calculations are provided at the outset with a presumption of validity. The overall framework provides the towns with an opportunity to seek deviation from DCA numbers, and it established a process to mediate and resolve disputes in a streamlined and accelerated process. One of the paramount principles of the new statutory framework is to provide towns with a fair and streamlined process to resolve allocation issues. This is exactly what has taken place in this matter.

Legislative Objective

At the outset, this Program member points out that if the Challengers' position is accepted regarding the shortcomings in the Petitioner's methodology, it is likely that all towns' calculations will get rejected. At the same time, DCA calculations, with their acknowledged errors, will then be adopted as the allocation numbers. This would result in rendering meaningless the Program's purpose of achieving fair resolutions as established by the Legislature. This is not what the Legislature intended at this stage of the process. The Legislature intended to provide the towns with a fair process to highlight properties that were incorrectly added to the DCA calculations and to have meaningful mediation of disputes. Importantly, the framework does not specifically include regional reallocation.

The success of the mediation process as highlighted above is impressive. With the assistance of the Program and positive engagement of all parties, 113 out of 159 towns have settled the allocation disputes with Fair Share and Builders. The remaining 46 towns, including Petitioner, that proceeded to a session, deserve careful assessment by the program regarding the allocation disputes.

At this stage of the Program, the Challengers' position would increase a town's burden significantly by requiring a calculation of regional allocation when that regional number is constantly shifting with changes in allocations taking place because of settlements and session decisions.

This member concludes that the Program is designed to give towns an opportunity to have a fair hearing at this stage of the proceeding and not to automatically denied their arguments, particularly for towns that present compelling evidence to support their position.

Once all allocations are established, a more thoughtful approach to regional impact may be determined. This does not mean that towns will get all they want. In fact, this member has in some cases adopted DCA calculations and in other cases deviated from DCA numbers. This is precisely what the Legislature envisioned in the new law.

In this case, the Program will carefully review the calculations, disputed properties, recommendations, various arguments advanced and make an allocation determination.

The Program is designed to address and resolve disagreements between municipalities, challengers and the DCA calculations. This is precisely what the legislative framework intended. In this context, one critical issue is whether the land capacity factor, as calculated by the DCA, accurately reflects the available land for development.

This Program member recommends adjusting the Prospective Need by reducing the land considered developable in line with proven exclusions, particularly for properties where the town presents compelling evidence that the property was incorrectly included in the DCA methodology. However, this recommendation avoids adopting the reallocation formula due to concerns about its legal grounding and for all reasons expressed in this statement of reasons.

The final determination, including specific acreage reductions, will be based on an assessment of the DCA's land capacity figures, with exclusions clearly demonstrated by municipalities. This approach ensures that disputes are addressed fairly while respecting the statutory framework set by the Legislature.

In conclusion, the overall goal of the new framework fully anticipates an opportunity for municipalities to seek modifications from DCA allocation numbers, particularly when towns present compelling evidence that the land was incorrectly included by DCA calculations. The FHA marks a new era of streamlining of the process, transparency and collaboration and cost savings in affordable housing planning across New Jersey.

Recommendation of Special Adjudicator

In each case the AOC appointed an independent special adjudicator to assist the Program. In this case, Mr. Frank Banisch, PP, AICP was appointed to work closely with the Program. Special Adjudicator Banisch brings experience, knowledge and perspective to the process. This Program member finds him credible, objective, and knowledgeable regarding all issues of affordable housing, and particularly as it relates to Petitioner. He prepared a report and recommendation to the Program in this case (attached). This Program member gives his opinion substantial weight in arriving at the allocation recommendation to the Mount Laurel Judge.

In this case, the DCA's determination of Present Need is accepted by all parties and is adopted and the only issue in dispute is regarding Prospective Need.

Regarding Prospective Need, the Special Adjudicator recommends that the allocation be set at a range of **255 to 265**.

The recommendation contained in the report of Special Adjudicator Banisch is as follows:

> The only element of the DCA Report that Montvale challenged is the land capacity factor (LCF), not the calculations related to the income capacity factor and the nonresidential valuation factor. Of the three factors, LCF was the locally variable factor that municipalities frequently challenged based on more accurate data.
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> The FHA states the LCF shall be determined by estimating the area of developable land in the municipality's boundaries and regional boundaries that may accommodate development through the use of the "land use / land cover data" most recently published by the Department of Environmental Protection, data from the American Community Survey and Comprehensive Housing Affordability Strategy dataset thereof, MOD-IV Property Tax List data from the Division of Taxation in the Department of the Treasury, and construction permit data from the Department of Community Affairs, and weighing such land based on the planning area type in which such land is located.
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> NJBA [Builders], SHG, FSHC [Fair Share] and Montvale participated in an unsuccessful settlement conference on March 18. Montvale also participated in a session on March 28. The DCA Report identified 37.78 acres in the Borough as developable, resulting in a LCF of 1.91% of Housing Region 1. As noted in the Planning Report of Darlene Green, AICP, PP, Montvale determined that only 0.804 acres should have been included. As a result, the Borough's regional LCF percentage was reduced from 1.91% to 0.04%, resulting in a Round 4 obligation of 176 units for the Borough.

Without identifying any errors in the Borough's exclusions from the DCA calculation of LCF, NJBA has opined that the Borough's correction of the DCA data violates the requirements of the FHA as does the resulting reduction in the Borough's prospective need in the official DCA workbook. However, the FHA provides municipalities with a presumption of validity in their calculation of prospective need, if determined in accordance with the FHA (N.J.SA. 52:27D-304.2.6, 304.2.7).

Fair Share challenged some of the Montvale exclusions, which were discussed on March 18. Fair Share objected to the exclusion of 16.64 acres owned by Veolia at 127 Summit Avenue, on which a water tank is proposed. These lands (DCA ID # 28455 and #28456) are deed restricted to water utility use and are constrained by Category 1 waters and wetland buffers. When water utility companies purchase property for utility purposes, it is typically not for speculation or resale. I deem this exclusion appropriate since the property is deed-restricted for water utility purposes.

Another FSHC-challenged municipal exclusion involved a 2.32-acre polygon (DCA ID #28452) with an hourglass configuration on a municipally owned parcel (Block 12.01, Lot 10). Lot 10 is municipally owned and partially occupied by improved outdoor recreation areas, including baseball and soccer fields. The polygon in question is triangular in shape and situated behind homes on Hilton Place and Terkuile Rd. The Borough's most recent comprehensive Master Plan (2008) under the heading "Borough Recreation and Open Space" noted that "(I)n addition to the fact that the Boro contains only slightly more than the minimum amount of open space recommended by the NRPA, there are several issues related to the present provision of parks and recreation space in the Borough that should be recognized".

In this regard, the Master Plan cited:"- Lack of passive open space in the community accessible to residential areas." "- Absence of small neighborhood parks or recreation facilities that are within walking distance of residents and employees." In light of the foregoing, I conclude that DCA #28452 can be excluded.

Montvale also excluded undeveloped portions of the Montvale Ecumenical Free Church property (DCA #28440) on Grand Avenue, which I did not exclude.

As a result, I found that 16.64 acres of the Veolia parcel and 2.32 acres of Borough property had been properly excluded by Montvale. When this 18.96 acre is subtracted from the DCA developable acreage total of 37.79, the adjusted LCF acreage total is 18.83 acres. When this acreage is input into the DCA workbook, it recalculates Montvale from 1.9% of the regional LCF to 1.0% of the region's land capacity, with a corresponding obligation of 261.

With regard to the SHG challenge, it did not include objections to the specific exclusions proposed by Montvale. The site-specific concerns expressed by SHG can be appropriately addressed during development of the Housing Element and Fair Share Plan. I recommend that the SHG challenge before the Program be dismissed.

In summary, based on my analysis I recommend that the Round Four obligation for Montvale be set within the range **of 255-265** affordable units.

Conclusion and Recommendations

This matter concerns the Fourth Round Affordable Housing obligations for Petitioner under the amended New Jersey FHA. The dispute arises due to Petitioner's challenge to the Prospective Need figure proposed by the DCA for the Fourth Round, which it asserts should be reduced based on land capacity factors.

The issues were presented in a complaint filed by the Petitioner contesting the DCA's allocation of a 348-unit Prospective Need and seeking to reduce the allocation to 176 units. The Present Need allocation is not an issue. There is a substantial difference of 172 Prospective Need units between the initial DCA calculation and the proposed deviation by Petitioner.

As pointed out above, the Fair Share Kinsey report recalculated the Petitioner's Prospective Need at 276. In this case, the Program member is particularly impressed with Fair Share's calculation by reducing the initial DCA determination by 72 units of Prospective Need.

Importantly, Fair Share reviewed all the Petitioner's exclusions and found that many were based on valid reasoning supporting the reduction and validating the position advanced by Petitioner. However, several polygons remain disputed, Fair Share arguing that Petitioner is violating both statutory and constitutional obligations by improperly attempting to exclude developable parcels from its affordable housing obligations.

The Challengers point out that Petitioner's calculation and methodology is not in accordance with statutory framework and argue that when a municipality chooses to present its own calculations as to developable land, it must, consistent with the statute, calculate two numbers: the sum of the total developable land area in the municipality, and the sum of the total developable land area in the region.

This member is not persuaded by the argument regarding the shortcomings in Petitioner's calculations and concludes that the Program is designed to give towns an opportunity to have a fair hearing at this stage of the proceeding and not automatically deny their arguments, particularly where a town presents compelling evidence to support their position.

Once all allocations are established, a more thoughtful approach to regional impact may be determined. This does not mean that towns will get all they want. In fact, this member has in some cases adopted DCA calculations and in other cases deviated from DCA numbers.

Fair Share reviewed exclusions and found many were based on valid reasoning. There remains a dispute as to 11.05 acres excluded by Petitioner, that Fair Share argues should have been included.

The AOC appointed special adjudicator planning experts to provide guidance and expert analysis to the program. The special adjudicators are often quite familiar with the assigned towns. They provide invaluable, independent and competent expertise to the Program.

The Program member is not bound by the recommendation of the special adjudicator. Here, the Program member is impressed with Special Adjudicator Banisch and gives significant weight to his recommendation. Special Adjudicator Banisch performed an excellent job, assessing each property the town presented as incorrectly included in the DCA calculation.

Special Adjudicator Banisch's recommendation supports a deviation of the DCA number, and a reduction downward. Special Adjudicator Banisch analyzed the various disputed properties and recommended an allocation range of 255 to 265. Special Adjudicator Banisch agrees with Fair Share as it relates to the church property, and the Program agrees as well.

The other two disputed properties present more complicated issues. The Program is particularly troubled by the potential gamesmanship regarding the water utility property. In the normal course, a deed restricted property to be used for a water utility should be excluded, and this property will likely ultimately result in an exclusion as recommended by the special adjudicator. As it relates to the municipally owned property, the Program is persuaded by the Kinsey analysis.

The core issue revolves around the accurate calculation of the land capacity factor, which estimates available land for affordable housing. The statute requires using five state and federal data sources to determine developable land, and exclusions are possible with demonstrable proof (e.g., landlocked parcels, environmental restrictions).

The ongoing challenge is balancing accurate land assessments with the need to meet regional housing obligations. Here, the Petitioner presented compelling evidence that properties were incorrectly included in DCA calculations.

As this Program member has outlined in the statement of reasons set forth in detail in this decision, the legislative objective of a fair, and streamlined mediation process is paramount. Providing towns at this stage with a way of resolving disputes and correcting errors in the DCA calculations is a primary purpose of the statutory framework.

There is no question that Petitioner has pointed out properties incorrectly included by DCA calculations. This is validated by Fair Share Kinsey calculation and Special Adjudicator Banisch.

As stated above, the Program is impressed by the Fair Share Kinsey recalculation that represents a reduction of 72 units below the DCA numbers. This downward reduction is validated by the recommendation of Special Adjudicator Banisch.

Prospective Need is not mandated to be perfect. The Legislature adopted a new Mount Laurel process that values timely resolutions of municipal obligations while favoring the maximization of affordable units and providing towns with a fair process to address DCA errors in their initial calculation.

For all the reasons outlined in this decision, the Program recommends to the Bergen County Mount Laurel Judge a Prospective Need allocation of **255** for Petitioner, the low end of the range recommended by Special Adjudicator Banisch.

At the next stage of the Program, Petitioner can obtain all valid credits and adjustments.

Respectfully submitted, Judge Julio L. Mendez, retired

B A N I S C H
A S S O C I A T E S, I N C.
Planning and Design

April 15, 2025

Hon. Julio Mendez
Affordable Housing Dispute Resolution Program
Richard J. Hughes Justice Complex
PO Box 037
Trenton, NJ 08625

Re: In the Matter of the Application of the Borough of Montvale
Docket # BER-L-750-25

Dear Judge Mendez,

This report has been prepared at your request in my capacity as Special Adjudicator for Montvale in the Affordable Housing Dispute Resolution Program (AHDRP). As required by the Amended Fair Housing Act (FHA) (P.L. 2024, C. 2), the NJ Department of Community Affairs (DCA) developed estimates of municipal affordable housing obligations based on the Jacobson methodology including assumptions about developable lands. Municipalities were afforded the opportunity to either agree with the DCA estimate or develop their own calculation of their affordable housing fair share obligation.

Montvale adopted the binding resolution required by the FHA on January 28, 2025, prior to the January 31, 2025 deadline, agreeing with the DCA estimate of present need (30) but declaring their fourth round affordable housing obligation to be 176 units after correcting the DCA land capacity factor. DCA had estimated the prospective need at 348 affordable units and the Fair Share Housing Center estimated the adjusted need at 276.

The FHA requires that challengers to the municipal estimate of Round 4 prospective need obligation indicate with particularity where they disagree with municipal LCF exclusions. Fair Share Housing Center, which issued a workbook confirming its LCF calculations, challenged some of Montvale's exclusions.

Intervener SHG Montvale MB I, LLC (SHG) filed an Answer to Montvale's complaint, but did not challenge the Borough's exclusions. SHG is a Round Three inclusionary developer that Montvale faults for not completing an agreed third round affordable housing obligation. Montvale approved a settlement where market rate and affordable units were disproportionately allocated to two (2) sites, requiring full construction of both sites. However, the inclusionary development with the lower proportion of affordable units has been constructed at the former Mercedes-Benz site. The "sister" site was required to produce a higher proportion of affordable units at a separate SHG location. The Mercedes site was approved and constructed but the disproportionately high percentage of affordable units at the sister site were never delivered. Curiously, the sister site was, in part, the basis for the SHG challenge before the program.

The New Jersey Builder's Association (NJBA) submitted an objection to the Township's fourth round present need and prospective need calculations on March 27, 2025. NJBA also did not challenge the Borough's exclusions. Rather, the NJBA offered the February 25, 2025 report by Creigh Rahenkamp, PP, detailing methodological concerns set forth in the objection.

Fourth Round Present Need

Montvale accepts the DCA 30-unit fourth round present need obligation.

Fourth Round Prospective Need

The only element of the DCA Report that Montvale challenged is the land capacity factor (LCF), not the calculations related to the income capacity factor and the nonresidential valuation factor. Of the three factors, LCF was the locally variable factor that municipalities frequently challenged based on more accurate data.

The FHA states the LCF shall be *determined by estimating the area of developable land in the municipality's boundaries and regional boundaries that may accommodate development through the use of the "land use / land cover data" most recently published by the Department of Environmental Protection, data from the American Community Survey and Comprehensive Housing Affordability Strategy dataset thereof, MOD-IV Property Tax List data from the Division of Taxation in the Department of the Treasury, and construction permit data from the Department of Community Affairs, and weighing such land based on the planning area type in which such land is located.*

NJBA, SHG, FSHC and Montvale participated in an unsuccessful settlement conference on March 18. Montvale also participated in a session on March 28. The DCA Report identified 37.78 acres in the Borough as developable, resulting in a LCF of 1.91% of Housing Region 1. As noted in the Planning Report of Darlene Green, AICP, PP, Montvale determined that only 0.804 acres should have been included. As a result, the Borough's regional LCF percentage was reduced from 1.91% to 0.04%, resulting in a Round 4 obligation of 176 units for the Borough.

Without identifying any errors in the Borough's exclusions from the DCA calculation of LCF, NJBA has opined that the Borough's correction of the DCA data violates the requirements of the FHA as does the resulting reduction in the Borough's prospective need in the official DCA workbook. However, the FHA provides municipalities with a presumption of validity in their calculation of prospective need, if determined in accordance with the FHA (N.J.SA. 52:27D-304.2.6, 304.2.7).

Fair Share challenged some of the Montvale exclusions, which were discussed on March 18. Fair Share objected to the exclusion of 16.64 acres owned by Veolia at 127 Summit Avenue, on which a water tank is proposed. These lands (DCA ID # 28455 and #28456) are deed restricted to water utility use and are constrained by Category 1 waters and wetland buffers. When water utility companies purchase property for utility purposes, it is typically not for speculation or resale. I deem this exclusion appropriate since the property is deed-restricted for water utility purposes.

Another FSHC-challenged municipal exclusion involved a 2.32-acre polygon (DCA ID #28452) with an hourglass configuration on a municipally-owned parcel (Block 12.01, Lot 10). Lot 10 is municipally owned and partially occupied by improved outdoor recreation areas, including baseball and soccer fields. The polygon in question is triangular in shape and situated behind homes on Hilton Place and Terkuile Rd. The Borough's most recent comprehensive Master Plan (2008) under the heading "Borough Recreation and Open Space" noted that "(I)n addition to the fact that the Borough contains only slightly more than the minimum amount of open space recommended by the NRPA, there are several issues related to the present provision of parks and recreation space in the Borough that should be recognized".

In this regard, the Master Plan cited:

> "- Lack of passive open space in the community accessible to residential areas."
> "- Absence of small neighborhood parks or recreation facilities that are within walking distance of residents and employees."

In light of the foregoing, I conclude that DCA #28452 can be excluded.

Montvale also excluded undeveloped portions of the Montvale Ecumenical Free Church property (DCA #28440) on Grand Avenue, which I did not exclude. As a result, I found that the 16.64 acres of the Veolia parcel and 2.32 acres of Borough property had been properly excluded by Montvale.

When this 18.96 acres is subtracted from the DCA developable acreage total of 37.79, the adjusted LCF acreage total is 18.83 acres. When this acreage is input into the DCA workbook, it recalculates Montvale from 1.9% of the regional LCF to 1.0% of the region's land capacity, with a corresponding obligation of 261.

With regard to the SHG challenge, it did not include objections to the specific exclusions proposed by Montvale. The site-specific concerns expressed by SHG can be appropriately addressed during development of the Housing Element and Fair Share Plan. I recommend that the SHG challenge before the Program be dismissed.

In summary, based on my analysis I recommend that the Round Four obligation for Montvale be set within the range of 255-265 affordable units.

Respectfully,

Frank Banisch, PP, AICP
Special Adjudicator