FAIR SHARE
HOUSING CENTER

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October 28, 2022

Hon. Stephan C. Hansbury, J.S.C.
Morris County Courthouse
Washington & Court Streets
P.O. Box 910, 3rd Floor
Morristown, New Jersey 07963

Re: In Re Borough of Chatham,
Docket No.: MRS-L-1906-15

Dear Judge Hansbury:

Fair Share Housing Center is in receipt of the letter from Borough counsel to Your Honor, dated October 19, 2022 ("October Letter"), and the documents attached thereto, which purports to address the concerns of the Special Master as set forth in his report, dated October 3, 2022 (the "Report"). FSHC respectfully submits this letter in response to the Borough's submissions.

In reviewing the status, timing and feasibility of the Borough's 15-unit BCUW Proposal, the Special Master's Report noted several concerns with the BCUW Proposal and recommendations that the Borough make the following revisions:

> Recommendation No. 1: The provision in Section 8.12 of the Borough's Redevelopment Agreement with BCUW ("Redeveloper's Agreement") that provides that "The Affordable Housing Requirements shall be fulfilled in compliance with the regulations set forth at N.J.A.C. 19:3, 19:4 and 19.5," which pertain to regulations of the New Jersey Meadowlands Commission, should be deleted and replaced with applicable Uniform Housing Affordability Controls ("UHAC") previsions.
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> Recommendation No. 2: The Preliminary Project Timeline should be revised to provide "a full two to three-month period" for site plan hearings and approval, as opposed to one month as set forth in the Borough's Proposal.

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> Recommendation No. 3: While not a recommendation, per se, the Special Master noted that a construction commencement date of January 2024 "seem[s] ambitious, given the frozen ground conditions at that time of year."
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> Recommendation No. 4: The Borough should identify the source of additional funds should the $6 million bond prove inadequate to cover any shortfall.

The latest revisions submitted by the Borough in response to the Report purport to address the above-referenced concerns and recommendations of the Special Master. In truth, not only does the Borough neglect to satisfy all of the recommendations, but the revised submissions raise even more questions and concerns concerning the viability of the Borough's Proposal.

Initially presumed by the Special Master to have been "a typo requiring correction," the Special Master specifically recommends that references to regulations pertaining to the Meadowlands Commission are inapplicable and should be deleted and replaced with UHAC provisions. Nonetheless, Section 8.12 of the revised Redeveloper's Agreement continues to provide that the affordable housing requirements shall be fulfilled in compliance with regulations for the Meadowlands Commission, N.J.A.C. 19:3-19:5, but now also provides that "[t]he Affordable Housing Requirements shall be fulfilled in compliance with the regulations set forth at N.J.A.C. 5:80-26.1 et. seq. … including the recording of The Affordable Housing Restrictions, pursuant to N.J.A.C. 5:80-26.5." To be sure, Chatham is not in the Meadowlands and regulations pertaining to land use in the Hackensack Meadowlands District have no application to redevelopment in Chatham Borough. As such, the references to N.J.A.C. 19:3-19:5 are concerning as it is unclear how these regulations impact the deed restrictions for the proposed units or what the Borough intends to achieve by referencing seemingly inapplicable regulatory provisions. Pursuant to the New Jersey Fair Housing Act, N.J.S.A. 52:27D-301 et. seq. ("FHA"), and UHAC, N.J.A.C. 5:80-26.1 et. seq., the affordability controls for the proposed units must comply with UHAC and all references to regulations for the Meadowlands Commission should be deleted.

In addition, the Borough has not complied with the Special Master's recommendation that it identify additional funding sources should the $6 million bond prove inadequate to cover a shortfall. Instead of simply designating a funding source, the Borough submitted yet another opinion memorandum by the Borough's finance consultant, Robert Powell. Mr. Powell's latest memorandum, dated October 19 2022, opines that the $6 million bond "far exceeds any realistic shortfall the developer might encounter." This opinion stems, in part, from Mr. Powell's opinion that several funding sources, namely the proposed mortgage loan of $983,897 and $3,000,000 from NJ Department of Community Affairs Affordable Housing Fund ("DCA Fund") "are quite credible and feasible." Specifically, Mr. Powell states that the proposed $3,000,000 from the DCA Fund, the largest source of funding for the BCUW Proposal, is feasible because the 15-unit Proposal "fits squarely within the eligibility standards for the funding" for this program.

Mr. Powell's opinion evidences a surprising lack of understanding of the funding process for affordable housing in New Jersey — especially notable because he entirely misconstrues the funding available for the greatest source of funds in the Borough's BCUW Proposal. Mr. Powell inappropriately conflates the Affordable Housing Production Fund at New Jersey Housing and Mortgage Finance Agency ("HMFA") (which did receive the $305 million infusion of federal funds that he references) with the DCA Affordable Housing Trust Fund (which did not). See HMFA Affordable Housing Production Fund ("AHPF") Program Guidelines attached hereto as Exhibit A. Importantly, the BCUW development is not a likely candidate for AHPF funding. The purpose of the AHPF is to provide gap financing on housing projects utilizing 4% tax credits and Tax-Exempt Bond Financing from the HMFA. Indeed, only projects that use those other sources of housing funding are eligible. Exhibit A at ¶2. Thus, it must be used in conjunction with 4% tax credit financing, financing that BCUW is not seeking, as evidenced by the pro forma Mr. Powell attaches to his report. Moreover, the only eligible projects for AHPF funding are those that set aside at minimum five units of housing as supportive housing, which this project does not have and would not be consistent with the requirement in the parties' settlement agreement that the affordable housing at Post Office must be family rental housing. Exhibit A at ¶3. The agency's guidelines further declare that an AHPF Program loan "shall only be used in conjunction with traditional HMFA financing" and "any permanent debt must be in the form of an HMFA-provided permanent mortgage loan." Exhibit A at ¶¶7, 9. The additional funding sources listed in the pro forma are not conducive with the AHPF as they are not traditional HMFA financing sources.

The second funding source that Mr. Powell appear to reference is the Department of Community Affairs Affordable Housing Trust Fund, which is indeed designed to fund smaller projects such as the BCUW project. However, that fund has not received any infusion of federal funds. In contrast, that fund is dependent on a portion of the state realty transfer tax which derives from home sales. N.J.S.A. 46:15-8(d); N.J.S.A 52:27D-320. The amount of funds available fluctuates depending on the strength of the home sales market, which is obviously a more speculative calculation than a program that has a firm appropriation of hundreds of millions of dollars of federal funds. The 2022 budget bill passed by the Legislature does not appropriate any federal funds to this fund, though it does appropriate significant funds from this trust fund to other uses that are not sources of funding for the BCUW project. See L. 2022, c. 49 (FY 2022-23 Budget Bill approved June 30, 2022) (e.g. $38.5 million appropriated from Affordable Housing Trust Fund to support State Rental Assistance Program rental vouchers). The only funds that would be available from the Affordable Housing Trust Fund under current statute are whatever is left in the fund after these specific legislative appropriations are deducted, which again is a function of how strong the home sales market will be over the next year. Because Mr. Powell is relying on the supposition that hundreds of millions of dollars in federal funds would be available to fund the BCUW project, which is erroneous as a matter of law, his opinion as to the feasibility of the funding simply is not accurate.

With respect to the adequacy of the $6 million bond, given the fluctuations in interest rates over the last several years and the impact on the costs related to construction and redevelopment, Mr. Powell's opinion that the bond is sufficient is meaningless in the event that funding from the highly competitive and speculative funding sources — of which the largest by far is the funding source that Mr. Powell apparently does not understand — is not secured and the costs for the Proposal exceed the Borough's $6 million bond.

As noted by the Supreme Court of New Jersey nearly forty years ago, "[t]he obligation is to invite a realistic opportunity for housing, not litigation. We have learned from experience, however, that unless a strong additional hand is used, *Mount Laurel* will not result in housing, but in paper, process, witnesses, trials and appeals." S. Burlington Cty. NAACP v. Mount Laurel, 92 N.J. 158, 199 (1983). Here, the Borough has made submission after submission to the court in support of an inferior, delayed alternative to the inclusionary development required at Post Office Plaza – pushing the provision of affordable housing at the site to March 2025, just three months shy of the end of the Third Round under an unrealistic best case scenario. See N.J.A.C. 5:97-1.4 (defining "realistic opportunity" as "a reasonable likelihood that the affordable housing in a municipality's Housing Element and Fair Share Plan will actually be constructed or provided during the 10-year period of certification based upon careful analysis of the elements in the municipality's plan, including the financial feasibility of each proposed mechanism and the suitability of specific sites"). The flurry of submissions from the Borough and its reliance on the "expert" opinion of a financial consultant that clearly misunderstands the funding process for the most important source of funds for the project, further undermines FSHC's confidence that the housing will be built prior to the end of this round on June 30, 2025. The BCUW Proposal is not realistic if the units cannot be built with reasonable likelihood in the third round and if the BCUW development is not realistic, then it cannot act as an acceptable alternative mechanism to an inclusionary development that has a realistic opportunity of being constructed in the current round.

In the event that the Court permits the BCUW Proposal to proceed despite FSHC's objections, FSHC submits that, as recommended by the Special Master, Chatham should be required to identify sources of additional funding should the $6 million bond prove insufficient and references to "N.J.A.C. 19:3, 19.4 and 19:5" and regulations of the New Jersey Commission, in Section 8.12 of the Redeveloper's Agreement should be deleted. In addition, the Court should order the Borough to report regularly to the Court, Special Master and FSHC on the status of the application/financing process and its compliance; to utilize special meetings where doing so would expedite the hearing process; and to reserve the right to file further application to the court to enforce the Brough's timeline.

For the reasons stated, FSHC still cannot, in good conscience, consent to the BCUW Proposal as an alternative mechanism to the inclusionary development provided for in the First Amendment.

We thank Your Honor for your time and consideration of this submission.

Respectfully,

/s/ Rachel N. Lokken
Rachel N. Lokken, Esq.

c: Craig M. Gianetti, Esq.
Jonathan E. Drill, Esq.
Joseph H. Burgis, PP, AICP

EXHIBIT A

NEW JERSEY HOUSING AND MORTGAGE FINANCE AGENCY

Affordable Housing Production Fund (AHPF) Program Guidelines

Adopted: September 22, 2022

Program Overview: The New Jersey fiscal year 2023 budget (P.L. 2022, c.49) appropriates $305,000,000 from the State's "Coronavirus State Fiscal Recovery Fund" allocation, established pursuant to the federal "American Rescue Plan Act of 2021," Pub. L. 117-2, to the Affordable Housing Production Fund (AHPF). Through a Memorandum of Understanding with the Department of Community Affairs, Division of Disaster Recovery and Mitigation, the New Jersey Housing and Mortgage Finance Agency (HMFA) will utilize the AHPF funds to provide subsidy financing for projects that are 100-percent affordable and are included in an approved Mount Laurel Fair Share Settlement Agreement. The AHPF is expected to increase the number of affordable housing units to be financed by 2025 by more than 3,300 units.

Application Submission Process: Applications will be accepted on a rolling basis and approval will be determined based on a project having demonstrated that it meets all eligibility criteria and has secured firm commitments from all other financing sources.

1. Eligible Applicants	Private for-profit and nonprofit housing developers and public housing authorities capable of developing and managing multifamily housing developments.
2. Eligible Projects	The subsidy will be made available for gap financing on housing projects that utilize the 4% Low-Income Housing Tax Credit (4% LIHTC) Program and Tax-Exempt Bond Financing from HMFA. AHPF Program funds may not be utilized in conjunction with conduit financing. To be eligible for funding, 100 percent of the residential units in the project must be restricted for occupancy by individuals whose income is 60 percent or less of Area Median Income (AMI) and the project must be approved as part of a Fair Share Settlement Agreement. In accordance with U.S. Department of the Treasury Coronavirus State and Local Fiscal Recovery Funds (SLFRF) regulations, funds must be obligated by December 31, 2024, and must be expended by December 31, 2026.

3. Eligible Types of Projects	Eligible projects must be new construction and/or gut rehabilitation projects that meet each of the following criteria: • Projects must set aside at least five units or five percent of the total project units, whichever is greater, as supportive housing units as defined at N.J.A.C. 5:80-33.2. • Projects are required to submit the documentation set forth at N.J.A.C. 5:80-33.12(c)14; • Affordability controls must remain in place for 45 years — a 30-year compliance period and a 15-year extended use period. This restriction will be enforceable by HMFA and future tenants via a deed of easement and restrictive covenant, which shall be recorded by HMFA pursuant to State law at the latter of the carryover allocation described at N.J.A.C. 5:80-33.24(a)1 or acquisition of the property; • The applicant waives the right to request termination of the extended use period through the qualified contract (QC) process under Sections 42(h)(6)(E), (F), and (I) of the Internal Revenue Code. This waiver will be included in the extended use agreement described at N.J.A.C. 5:80-33.29; and • Projects must have a Certified Minority and/or Women Business Enterprise (certified M/WBE) with at least a 20 percent interest in the general partner/managing member or pledge to expend a sum equaling at least 20 percent of construction cost on contractors, subcontractors, and material suppliers which are certified M/WBEs as defined at N.J.A.C. 5:80-33.2.
4. Types of Rental Housing	Family projects and Senior projects are eligible projects.
5. Subsidy Loan Amounts/Maximum Award	AHPF Program maximum award is $150,000 per unit, not to exceed $8,000,000 per project. Standard HMFA Underwriting Guidelines, as set forth in the Multifamily Rental Financing Program Underwriting Guidelines Policy, will apply.

6. Types of Available Funding	AHPF Program loans will be provided to projects in the form of the following types of loans: (1) construction loans; (2) construction loans that convert to permanent financing; and (3) permanent-only loans. Applicants are advised that projects using AHPF Program dollars in construction financing must comply with New Jersey State Prevailing Wage Rates. Projects must comply with the federal requirements of the SLFRF funds.
7. HMFA Mortgage Required	Any permanent debt must be in the form of an HMFA-provided permanent mortgage loan. The maximum mortgage supportable shall be obtained.
8. Financing Term	Unless otherwise authorized, the estimated financing term of an AHPF Program loan shall be coterminous with HMFA mortgage financing and/or the LIHTC requirement, whichever is/are applicable.
9. Security, Collateral, and Lien Status	An AHPF Program loan shall only be used in conjunction with traditional HMFA financing and shall take a subordinate position behind other HMFA financing.
10. Eligibility for Sales Tax Exemption	Pursuant to N.J.S.A. 55:14K-34 and N.J.S.A.54:32B-8.22: Sales of materials or supplies to housing sponsors utilizing HMFA construction financing are eligible for exemption from New Jersey State sales tax. Sales of materials or supplies to contractors for the purpose of erecting housing projects which have received HMFA construction financing and other local, state, or federal subsidies are eligible for exemption from New Jersey State sales tax. For the purpose of this exemption, the project must have a governmental subsidy other than the AHPF Program subsidy loan.
11. Mortgage Interest Rate	AHPF Program loans provided during construction shall be at a zero percent interest rate. AHPF Program loans provided during permanent financing shall be at a one percent interest rate compounded annually.

12. Cash Flow Repayments	Repayment of an AHPF Program subsidy loan for any project shall be made annually and shall be equal to 25 percent of available cash flow remaining after the payment of operating expenses, required reserves, amortized mortgage debt service, and at the earlier of 10 years or the payment of the deferred developer's fee.
13. Debt Service Coverage Ratio	Projected cash flow repayments of AHPF Project loans shall **not** be included when calculating the debt service coverage ratio for multifamily mortgage financing and/or for LIHTCs. However, in all cases, the maximum mortgage supportable at a minimum of 1.15 debt service ratio must be obtained before AHPF Program loan amounts will be determined.
14. Other Underwriting	Projects funded by AHPF Program loans shall be considered to be HMFA multifamily and/or tax credit projects and must meet the requirements of the HMFA Multifamily Underwriting Guidelines and/or the LIHTC program, as applicable.
15. Energy Efficiencies and Green Building Standards	Projects funded by AHPF Program subsidy funds must meet the certification requirements of the U.S. Department of Energy's Zero Energy Ready Home Program, which is administered at the State level by the New Jersey Board of Public Utilities' Office of Clean Energy.
16. Target Areas:	Projects must be sited within the State of New Jersey.

Note: These guidelines may be amended from time to time. Please refer to HMFA's website for the current version of these guidelines.