

MASTER'S REPORT ON ALPINE SETTLEMENT AGREEMENTS WITH
1. FAIR SHARE HOUSING CENTER and
2. SYLCO *et al.*
FOR THE MOUNT LAUREL FAIRNESS HEARING
BOROUGH OF ALPINE
BERGEN COUNTY, NEW JERSEY

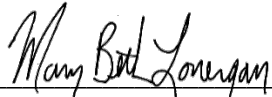
In the Matter of the Borough of Alpine, County of Bergen,
Docket No. BER-L-6286-15
and
Sylco Investments #4, LLC et al. v. Borough of Alpine,
Docket No. BER-L-0293-20

January 18, 2024

Prepared for:

The Honorable Christine A. Farrington, J.S.C.
Superior Court of New Jersey
Bergen County Justice Center
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1.0 INTRODUCTION

This report reviews two Settlement Agreements, one is a Settlement Agreement between the Borough of Alpine, Bergen County (“Borough” or “Alpine”) and Fair Share Housing Center (“FSHC”) (the “FSHC Agreement”) in the Declaratory Judgment (“DJ”) case entitled In the Matter of the Borough of Alpine, County of Bergen, Docket No. BER-L-6286-15; and the other is a Settlement Agreement between the Borough, its Planning Board (collectively the “Municipal Parties”), and F.E. Alpine, Inc.; Sylco Investments #4, LLC; Sylco Investments 854, LLC; 850 Closter Dock Road, LLC; 842 Closter Dock Road, LLC; and Sylco Investments #5, LLC (collectively “Sylco”), which owns property in the Borough (the “Sylco Agreement”), in the litigation entitled Sylco Investments #4, LLC et al. v. Borough of Alpine, Docket No. BER-L-0293-20. In addition, the report reviews Alpine’s fair share determination and preliminary compliance summary as reflected in the terms of the FSHC Agreement. This report has been prepared for the upcoming Fairness Hearing before the Honorable Christine A. Farrington, J.S.C., on January 26, 2024. I am writing in my capacity as Special Master in the above-captioned DJ matter, previously appointed by Court Order of September 21, 2015.

The purpose of the Fairness Hearing is for the Court to determine whether the terms of the contemplated FSHC Agreement and Sylco Agreement (collectively the “Agreements”) are fair and reasonable to the interests of low- and moderate-income households within the region.

Alpine filed its DJ action on July 8, 2015 (amended August 14, 2015), seeking a declaration of its compliance with the Mount Laurel doctrine and the Fair Housing Act (“FHA”) of 1985 at N.J.S.A. 52:27D-301 et seq. Through the declaratory judgment process, the Borough and FSHC engaged in negotiations to settle the litigation, including determination of the Borough’s affordable housing obligation and enumeration of the compliance mechanisms that would satisfy that obligation.

To determine the Borough’s Prior Round obligation, the parties relied on the Borough’s 2000 Judgment of Repose (“JOR”) for its Second Round Housing Element and Fair Share Plan (“HEFSP”). In that matter, the Court had established the Borough’s Second Round obligation at 214, which was adjusted on the basis of the 20% cap pursuant to N.J.A.C. 5:93-2.16 to 108 units. In addition, the Court granted the Borough a Vacant Land Adjustment (“VLA”), resulting in a Second Round Realistic Development Potential (“RDP”) of 32 units and a remaining Unmet Need of 76 units.

In March 2018, as part of ongoing negotiations with FSHC, the Borough updated its Vacant Land Analysis, proposing a Third Round RDP of either 13 or 19 units, depending on whether a C-1 stream buffer was to be included in the analysis of the Borough's Third Round RDP.

In August 2019, Sylco filed a motion to intervene, challenging the exclusion of its properties from the Borough's 2018 Vacant Land Analysis, seeking to have the Borough's immunity from exclusionary zoning litigation terminated, and seeking a rezoning of its properties to enable inclusionary residential development. Sylco's motion was denied, but Sylco was permitted to participate in the Borough's DJ action as an interested party.

In January 2020, Sylco filed a separate complaint, alleging that, while its properties were not available when the Borough's 2000 Second Round HEFSP was adopted, they had since become available, and since Alpine had not met its entire 108-unit Prior Round obligation, the availability of the Sylco properties constituted a "changed circumstance" pursuant to FSHC v. Twp. of Cherry Hill, 173 N.J. 393 (2002) and therefore should compel a recalculation of the Borough's RDP. The complaint sought to have the court compel the Borough to recalculate its Second Round RDP by including the Sylco properties, to address an increased RDP; to adopt inclusionary zoning on the Sylco properties at a substantial density; and to amend its zoning ordinance to permit multi-family housing where appropriate in the Borough. Sylco then sought to have its action consolidated with the Borough's DJ action. Sylco's motion to consolidate was denied.

After extensive negotiations, the Municipal Parties have reached a settlement with Sylco regarding development of its properties to resolve the 2020 litigation, and the Borough and FSHC have reached a separate settlement in the Borough's DJ action. The parties have agreed to present both settlements to the Court to review, recognizing that settlement of litigation including Mount Laurel litigation is favored because it avoids delays and the expense of a trial and results more quickly in the construction of homes for lower-income households.

The FSHC Agreement establishes the Borough's overall three-part fair share obligation, as discussed below, comprising a four-unit Rehabilitation obligation, the previously discussed 214-unit Prior Round obligation, adjusted per the 20% cap to 108 units; and, again after adjustment per the 20% cap, a 122-unit Third Round "Gap" Present Need and Prospective Need obligation. As part of its 2000 JOR, and reiterated in the FSHC Agreement, the Borough received a VLA that established a Second Round RDP of 32 units and a Second Round Unmet Need obligation of 76 units. Per the FSHC Agreement, the Borough is eligible for a Third Round VLA, establishing a Third Round RDP of 32 units and a Third

Round Unmet Need of 90 units. The FSHC Agreement specifies how the Borough will satisfy the Rehabilitation and RDP obligations, along with means that may assist in addressing its combined 166-unit Unmet Need. The FSHC Agreement provides 120 days after entry of a Fairness Order for the Borough to adopt all required compliance documents, including a Third Round HEFSP, Spending Plan, and all ordinances required to implement the terms of the Agreement. This deadline may be extended with Court approval.

The Sylco Agreement permits Sylco to develop its properties with a maximum of 40 non-age-restricted townhomes, including 32 market-rate units and eight (8) affordable units, a 20% affordable housing set-aside (the "Development"). The affordable units are required by the Sylco Agreement to be non-age-restricted rentals. A Concept Plan ("Concept Plan") is attached to the Sylco Agreement that the Agreement indicates has been reviewed by all parties and deemed by all parties to be acceptable, subject to engineering requirements, which have not yet been determined. The Sylco Agreement requires that, within 90 days of Court approval of the Sylco Agreement, the Borough's Planning Board must adopt a Master Plan Amendment, pursuant to the procedures prescribed by the Municipal Land Use Law ("MLUL"), that is consistent with the proposed rezoning ordinance for the site and with the submitted Concept Plan for the Development. Within 120 days of Court approval of the Sylco Agreement, the Borough must introduce the rezoning ordinance for the Sylco properties to enable the Development, the form of which ordinance is provided as an exhibit to the Sylco Agreement and, subsequently, the Borough must take action to adopt shortly after the Planning Board's consistency review.

As will be discussed below, the Sylco Agreement acknowledges the presence of a 2008 deed restriction on a portion of the Sylco property, prohibiting further subdivision of that portion of the property. The Sylco Agreement also notes that in a 2008 Planning Board resolution the applicant would impose a deed restriction on the remainder of the parcel restricting development on it to one single-family dwelling. That restriction was incorporated into a Condition of Approval ("COA") requiring imposition of a deed restriction restricting that portion of the property to development of one single-family home. Subsequent Sylco Court filings, also discussed below, note that such a deed restriction was never recorded.

The Sylco Agreement permits Sylco and the Board to sign a Consent Order for the purpose of modifying, removing, or discharging the deed restriction and the COA, and/or to seek a finding by the Court at the upcoming Fairness Hearing that the Development would not violate the deed restriction or COA. The Sylco Agreement requires the Municipal Parties to support and cooperate with all efforts

to extinguish the deed restriction and COA and/or interpret them as not prohibiting the Development, and the Sylco Agreement itself is conditioned on the Court entering such an order.

Public notice of the January 26th Fairness Hearing was published in accordance with established Mount Laurel case law. The notice properly summarized the salient points of both Agreements, summarized the Borough's fair share obligations and its preliminary compliance efforts, and described the purpose of the Court fairness hearing on January 26, 2024. The notice directed any interested members of the public to the office of the Alpine Borough Clerk, where they could review or request a copy of the Agreements. The notice also acknowledged the existence of the deed restriction and COA, which it said were also available for review at the Borough Clerk's office and stated that Sylco intended to ask the Court to modify, remove and/or discharge both the deed restriction and COA and that Sylco intended to file a motion with the Court requesting the Court rescind the deed restriction and COA. The notice invited any interested party to provide comments on the Agreements. Any such comments were to be filed in writing with the Court, with copies to all interested parties, no later than December 18, 2023. All objections were required to provide a statement as to each aspect of the Settlement Agreement(s) contested; the basis for each objection; copies of all expert reports or studies relied upon; and a list of any witnesses the objector proposed to call at the hearing. Any objector witness testimony at the hearing was required to be accompanied by an expert report, provided to all parties by the December 18, 2023 deadline.

On November 29, 2023, Sylco filed with the Court under the Borough's DJ action docket a motion (the "Sylco Motion") requesting that the COA limiting use of Lot 25.01 to one single-family dwelling be excised and the deed restriction against further subdivision of Lot 25.01 also be excised, or, in the alternative, that the Court confirm that the deed restriction will not preclude construction of the Development. The Court issued a case management order, dated December 15, 2023, establishing January 26, 2024 as the return date of the Sylco Motion, with parties to the DJ action permitted to file opposition or replies, if any, within the time prescribed by the Court Rules, and directing that non-parties to the DJ action "that may have concern regarding the subject matter of the motion shall submit their concern for consideration at the time of the Fairness Hearing in accordance with the time and procedure established by the Notice of Fairness Hearing previously provided, published and served by the Borough of Alpine."

On January 2, 2024, Camelia B. Grymes, Esq., representing two homeowners (the "Homeowners") in the Demarest portion of the Estates at Alpine development, which development includes Lot 25.01 in Alpine, and which is part of the proposed Sylco Development, submitted a brief opposing both the

Sylco Agreement and the Sylco Motion to rescind the COA and terminate the deed restriction. The brief was filed under both Sylco's 2020 complaint docket and the Borough's 2015 DJ action docket, where the Sylco Motion was filed, although the Homeowners are not parties to the DJ action. Although filed after the objection deadline, the Homeowners' objections are discussed in Section 6.0 below. I am not aware of any other comments or objections submitted by the December 18, 2023 deadline.

As discussed in detail below, this report recommends Court approval of both the FSHC and Sylco Settlement Agreements with Alpine Borough, subject to the Court's action or finding regarding the Sylco Agreement that the deed restriction and COA may be modified, eliminated, removed, or discharged, or through the Court's interpretation that the Sylco Development may proceed ahead finding that the Development would not violate the deed restriction or that the COA would not inhibit the Development and, also, subject to the enumerated conditions herein regarding both agreements.

2.0 BACKGROUND

The Borough adopted a Second Round HEFSP on June 9, 2000, which it revised on September 1, 2000 ("2000 HEFSP"), that created a realistic opportunity for the creation of 32 affordable units. In a series of orders, the Court found that the 2000 HEFSP addressed the Borough's affordable housing obligations, and the Borough received a Judgment of Compliance and Repose. In December 2005, responsive to Third Round rules promulgated by the Council on Affordable Housing ("COAH"), the Borough prepared a Third Round HEFSP ("2005 HEFSP") and petitioned COAH for substantive certification. In December 2008, in response to updated COAH Third Round rules, the Borough adopted an updated Third Round HEFSP ("2008 HEFSP") that created a realistic opportunity for the development of six (6) affordable units, and petitioned COAH for substantive certification.

While COAH was reviewing the Borough's 2008 HEFSP, a series of residential teardowns and rebuilds in the Borough triggered an additional growth share obligation under then-existing rules. In response, in May 2010, the Borough adopted a revised Third Round HEFSP ("2010 HEFSP") that created a realistic opportunity for the development of 13 affordable units, and re-petitioned COAH for substantive certification. COAH did not complete its review of the Borough's 2010 petition prior to the Appellate Division subsequently invalidating COAH's 'growth share' rules in a decision later affirmed by the Supreme Court.

On March 10, 2015, the New Jersey Supreme Court issued a ruling on FSHC's Motion in Aid of Litigant's Rights (In re Adoption of N.J.A.C. 5:96 and 5:97 by N.J. Council on Affordable Housing, 221

N.J. 578 [2015]) (known as “Mount Laurel IV”). Providing a new direction for New Jersey municipalities in their effort to comply with the constitutional requirement to provide their fair share of affordable housing, the Court transferred responsibility for review and approval of housing elements and fair share plans from COAH to designated Mount Laurel trial judges. The Court established the Third Round declaratory judgment process, laid out a deadline by which municipalities were to petition the Court for approval of their fair share plans, and afforded protection in the form of temporary immunity from Builder Remedy lawsuits during a municipality’s development of a compliant Third Round HEFSP. However, the Supreme Court did not establish municipal obligations, or the methodology by which those obligations were to be determined.

In a March 8, 2018 ruling on two Mercer County municipalities’ affordable housing obligations, the Honorable Mary C. Jacobson, A.J.S.C., tackled the absence of municipal fair share obligations. Her decision laid out a methodology for calculating such obligations that ultimately became a template used as guidance in many municipal DJ actions statewide, including by the parties in the Borough’s DJ action in determining the Borough’s new affordable housing need. Those obligations and the mechanisms by which they are to be satisfied are memorialized in the FSHC Agreement. The Borough’s affordable housing compliance mechanisms include Sylco’s proposed inclusionary development, the particulars of which are memorialized in the Sylco Agreement. Those agreements are the subject of this fairness review.

3.0 THE CONTEXT FOR REVIEW

Before addressing the details of each Agreement, I would like to acknowledge the parties’ significant efforts in reaching settlements in these matters. Settlement of litigation, especially Mount Laurel litigation is clearly preferable to ongoing builder’s remedy or other Mount Laurel disputes.

Among the most prominent advantages to settlement is that it creates a more civil atmosphere for continued interactions among the parties. Cooperative working relationships increase the likelihood that FSHC, Sylco, the Borough and the Borough’s Planning Board will be able to continue to resolve any differences during the compliance period without resorting to Court action. Settlements also typically facilitate the local compliance process and thereby expedite the delivery of affordable housing.

Both settlement agreements must be evaluated according to guidelines established by the Court in two principal cases: Morris County Fair Housing Council v. Boonton Twp. 197 N.J. Super. 359, 369-71 (Law Div. 1984) and East/West Venture v. Borough of Fort Lee, 286 N.J. Super. 311 (App. Div. 1996). These

cases require agreements in Mount Laurel litigation to be subject to a Fairness Hearing. The scope of the Fairness Hearing was determined by the Appellate Division in a decision that upheld the hearing process conducted by then-Assignment Judge Peter Ciolino in East/West Venture, a case in which Philip Caton, PP, FAICP, had served as Special Master. In its 1996 decision, the Appellate Court ruled that a settlement between a builder plaintiff and municipal defendant in a Mount Laurel case may be approved by the Trial Court after a hearing that establishes that the settlement “adequately protects the interest of lower-income persons on whose behalf the affordable units proposed by the settlement are to be built” 286 N.J. Super. 311, 329 (App. Div. 1996). The Appellate Court provided specific factors for trial courts to consider in making fairness determinations. These same factors, as modified for relevance in a case with a settlement between an intervenor (FSHC) and a municipality, and a developer challenger (Sylco) and a municipality will also be detailed in a subsequent section of this report.

While the Court invalidated COAH’s last two attempts to promulgate Third Round rules, the Second Round rules (N.J.A.C. 5:93) are still largely intact. In fact, these Second Round rules, and parts of the Third Round rules (N.J.A.C. 5:97) upheld by the NJ Supreme Court, have been relied upon by the courts in numerous fairness/compliance hearings to evaluate settlement agreements, in order to promote a uniformity of approach in the interpretation of the Mount Laurel doctrine. This is consistent with both legislative and judicial directives. The FHA states:

“The interest of all citizens, including low and moderate income families in need of affordable housing, would be best served by a comprehensive planning and implementation response to this constitutional obligation.” (N.J.S.A. 52:27D-302(c))

Furthermore, the NJ Supreme Court, in its decision in The Hills Development Co. v. Town of Bernards, 103 N.J. 1 (1986) (known as “Mount Laurel III”) upheld the constitutionality of the FHA, and stated,

“Instead of varying and potentially inconsistent definitions of total need, regions, regional need, and fair share that can result from the case-by-case determinations of courts involved in isolated litigation, an overall plan for the entire state is envisioned, with definitions and standards that will have the kind of consistency that can result only when full responsibility and power are given to a single entity.” (103 N.J. at 25)

Lastly, in the decision, the Supreme Court also stated that to the extent that Mount Laurel cases remained before the courts,

"...any such proceedings before a court should conform whenever possible to the decisions, criteria and guidelines of the Council." (103 N.J. at 63)

I have been guided by these principles of uniformity and consistency in my review of the Agreements.

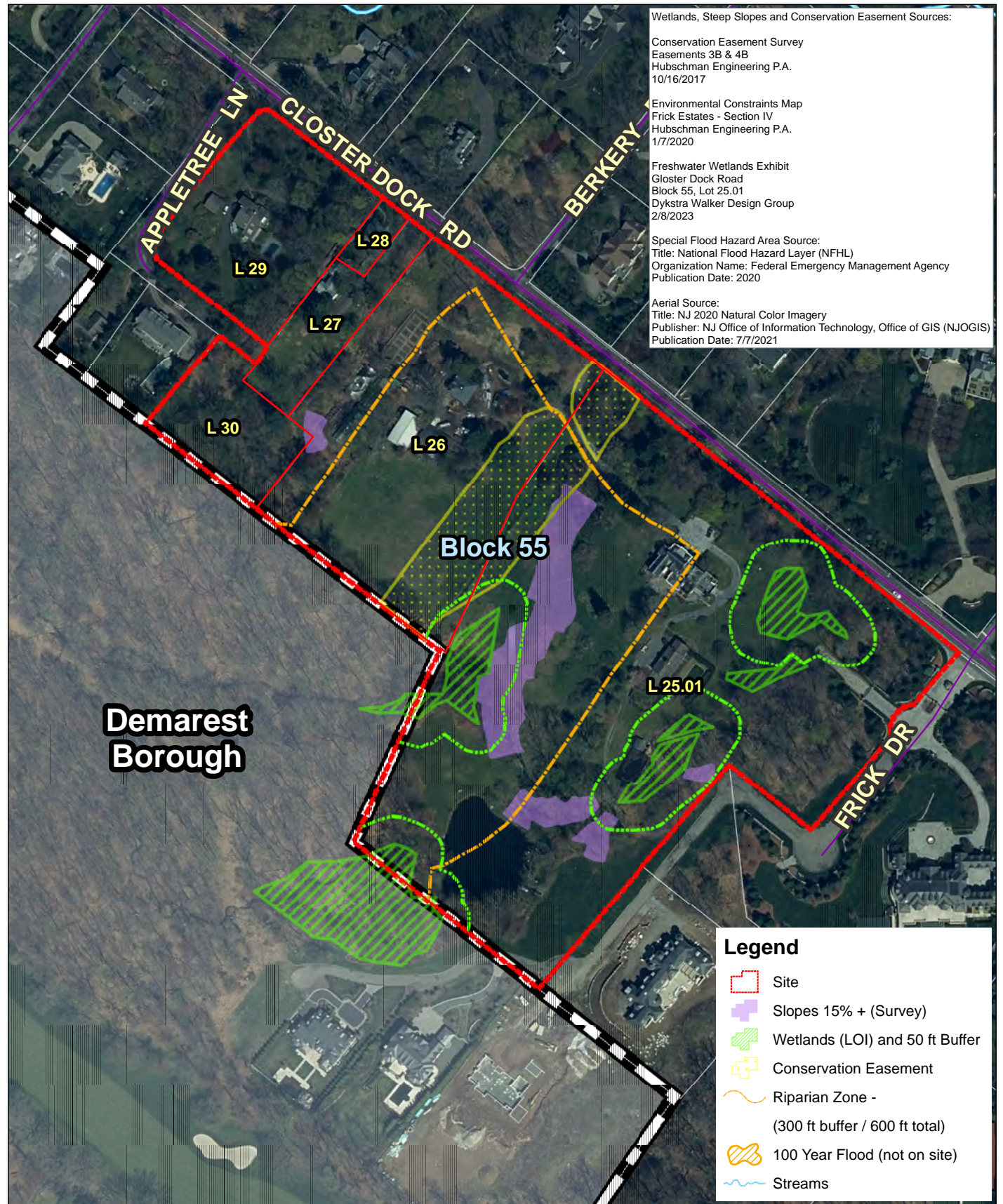
4.0 THE SYLCO SETTLEMENT AGREEMENT AND SYLCO MOTION

I have reviewed the Sylco Settlement Agreement in the context of the required fairness analysis more fully described below. The Sylco Agreement was executed by Managing Member Richard J. Kurtz for Sylco on October 27, 2023, and by Mayor Paul H. Tomasko for the Borough and Board Chairwoman Catherine Parilla for the Borough Planning Board, both on November 1, 2023. The agreement has been submitted to the Court and is on file in the Borough offices for public review.

The purpose of the Sylco Agreement is to resolve the litigation between Sylco and the Borough through the adoption of a rezoning ordinance for the Sylco properties that will enable Sylco's proposed development, the form of which ordinance is provided as an exhibit to the Sylco Agreement. The Sylco Agreement requires Sylco to develop the property consistent with the proposed ordinance and with the submitted Concept Plan, and not to seek any variances from the ordinance related to use or density, the total number of units and the number that are to be affordable and market-rate, the location of the buildings that will house the units or the height and number of stories specified in the ordinance. Additionally, the Sylco Agreement requires Sylco to support the Borough's HEFSP, which will include the Development, and not to oppose the Borough's petition for a Judgment of Compliance and Repose in its DJ action. Finally, as noted above, the Sylco Agreement addresses previous conditions of approval and a previously imposed deed restriction on a portion of the Sylco property.

The Sylco Agreement requires Sylco to seek approvals to develop its property (Block 55, Lots 25.01, 26, 27, 28, 29, and 30) totaling approximately 22.6 acres located generally on Closter Dock Road between Frick Drive and Apple Tree Lane with 40 non-age-restricted townhomes, of which 32 may be market-rate and eight (8) must be family affordable rental units, comprising one (1) one-bedroom unit, five (5) two-bedroom units, and two (2) three-bedroom units (see aerial Sylco site map and Sylco's concept plan below). Of the eight (8) affordable units, the Sylco Agreement requires two (2) to be very low-income units and two (2) to be low-income units; four (4) may be moderate-income units.

As part of the future Planning Board site plan review, the Borough's Administrative Agent shall approve the specific income/bedroom distribution per UHAC requirements at N.J.A.C. 5:80-26.3 (Ongoing Condition of Monitoring).



Wetlands, Steep Slopes and Conservation Easement Sources:

Conservation Easement Survey
Easements 3B & 4B
Hubschman Engineering P.A.
10/16/2017

Environmental Constraints Map
Frick Estates - Section IV
Hubschman Engineering P.A.
1/7/2020

Freshwater Wetlands Exhibit
Closter Dock Road
Block 55, Lot 25.01
Dykstra Walker Design Group
2/8/2023

Special Flood Hazard Area Source:
Title: National Flood Hazard Layer (NFHL)
Organization Name: Federal Emergency Management Agency
Publication Date: 2020

Aerial Source:
Title: NJ 2020 Natural Color Imagery
Publisher: NJ Office of Information Technology, Office of GIS (NJOGIS)
Publication Date: 7/7/2021

Legend

- Site
- Slopes 15% + (Survey)
- Wetlands (LOI) and 50 ft Buffer
- Conservation Easement
- Riparian Zone -
(300 ft buffer / 600 ft total)
- 100 Year Flood (not on site)
- Streams



Affordable Housing Site - Sylco

Per Sylco Survey and Sylco Concept Plan
Block 55 - Lots 25.01 & 26-30

LOCATION:
Alpine Borough, Bergen County, NJ

DATE:
January 2024

The Sylco Agreement requires the Borough Planning Board, within 90 days of entry of an Order approving the Agreement, to adopt a Master Plan Amendment, consistent with the procedures prescribed by the MLUL, to permit the Development.

No later than 90 days after entry of an Order approving the Sylco Agreement, the Borough Planning Board must adopt a Master Plan Amendment to permit the Sylco development as contemplated by the proposed rezoning ordinance and Concept Plan (Condition 1).

To permit the Development, the Sylco Agreement also requires the Borough to adopt an ordinance in substantially the form provided in an attachment to the Agreement, rezoning the Sylco properties to enable Sylco to submit a development application substantially in conformance with the Concept Plan without the need to seek variances, exceptions, or waivers except as may be necessitated by the engineering of the Development. As will be discussed further below, among its other provisions, the proposed ordinance exempts Sylco from §185-3.(D)(2)(d) of the Borough's Soil Fill and Soil Removal requirements, which requires proposed grading to be no more than 10 feet in deviation from the present grade on lots two acres or larger and no more than five feet in deviation from the present grades on lots less than two acres in area. The ordinance also exempts Sylco from §185-3.(D)(2)(f) of the Soil Fill and Soil Removal requirements, only insofar as the proposed slopes and lateral supports not exceeding one foot vertical to four feet horizontal are determined to be inapplicable to development in the zone. (The remainder of that section, which prohibits any slopes from redirecting or concentrating stormwater runoff onto adjacent properties, remains applicable.) The proposed ordinance deems as inapplicable to development in the zone §185-3.D.(2)(m) of the Soil Fill and Soil Removal requirements, which require developer-provided topographical maps to show the location(s), type(s), and size(s) of all existing trees over nine inches caliper within the area(s) of disturbance, but requires Sylco to obtain a Tree Removal Permit pursuant to §205 of the Borough code, and to comply with all requirements of that section. Finally, the proposed ordinance notes the presence of an existing previously disturbed steep-slope area and the not naturally occurring developed nature of this zone district, and deems the regulations in §220-3.E of the Borough Code, the Steep Slope Ordinance, to be inapplicable to the proposed development in the zone.

The Sylco Agreement requires the Borough to introduce the ordinance no later than 120 days after entry of an order approving the Sylco Agreement, then for the Planning Board to provide a consistency review within 35 days of introduction, and for a public hearing to adopt the rezoning to be conducted at the first Governing Body meeting after the Planning Board has issued its recommendation or after 35 days have elapsed from when the ordinance was referred to the Planning Board, whichever is sooner.

All parties have reviewed the draft ordinance and Concept Plan and acknowledge that they are consistent with the purpose and intent of the Sylco Agreement. The parties have agreed that if there is any inconsistency between the unit counts and zoning controls set forth in the ordinance versus the Concept Plan, the terms of the ordinance are to prevail.

No later than 120 days after entry of an Order approving the Sylco Agreement, the Borough must introduce an ordinance, substantially in the form attached to the Sylco Agreement, to rezone the Sylco property; must refer the ordinance to the Planning Board for consistency review, which the Planning Board must provide within 35 days of the date of referral; and must adopt the ordinance after a public hearing no later than 35 days after the Planning Board issues its review and recommendation (Condition 2).

The Sylco Agreement acknowledges that “the aesthetic appearance and appeal of the Development from the adjoining streets and properties, including specifically all facades, number of units, footprint and height of the buildings, constitute significant areas of concern for the Borough and the neighborhood.” Accordingly, the Agreement requires any application to the Planning Board to be consistent with the submitted Concept Plan and ordinance, except for any *de minimis* variances or waivers resulting from engineering requirements as discussed below.

The Agreement permits any of the parties to propose modifications to the plan that is submitted for approval, but only if necessitated by engineering requirements. The Municipal Parties acknowledge and agree that any such *de minimis* changes will not require the consent or approval of the Municipal Parties provided they result from site conditions unknown at the time of signing of the Agreement, and they comply with the terms of the ordinance. That notwithstanding, no modifications or variances may alter the proposed use for the property, the total number of units to be constructed, the general location, layout, and height of the buildings, the total number of affordable units required to be provided, or the required phasing schedule for construction of the affordable units.

The construction phasing schedule in the Sylco Agreement requires that a certificate of occupancy (“c.o.”) for the first affordable unit be issued prior to the issuance of a c.o. for the ninth market-rate unit (25% of market-rate units + 1); c.o.s for the second through fourth affordable units (total of 50% of the affordable units) must be issued prior to the issuance of a c.o. for the 16th market-rate unit (50% of market-rate units); c.o.s for the fifth and sixth affordable units (total of 75% of affordable units) must be issued prior to the issuance of a c.o. for the 24th market-rate unit (75% of market-rate units); and

c.o.s for the remaining two affordable units must be issued prior to the issuance of a c.o. for the 28th market-rate unit (90% of market-rate units).

The Agreement requires the Borough Planning Board to process Sylco's application for the Development within the time periods set forth in the MLUL. Pursuant to N.J.A.C. 5:93-10.1, Sylco may request special meetings to facilitate expedited processing of its application, which the Planning Board must schedule. The Agreement prohibits the Borough and the Planning Board from imposing any procedural or substantive requirement that would be inconsistent with or violate the requirements of N.J.A.C. 5:93-10 et seq. Any requests by the Planning Board for reports is governed by the standards and procedures set forth in N.J.A.C. 5:93-10.3; however, if Sylco seeks permits that require state Department of Environmental Protection ("DEP") approval of its stormwater management plan or flood hazard area plan, neither the Borough nor Planning Board may make any independent assessment of said plan(s), but must condition any development approvals on DEP approval.

The Agreement stipulates that it is Sylco's responsibility to secure any required outside agency approvals, and Sylco must provide the Borough with copies of any such applications for approval at the time they are submitted. The Municipal Parties agree to support and cooperate with Sylco's efforts to secure all outside agency approvals, permits, or other authorization that may be necessary for the construction of the Development, including approvals from DEP under the Freshwater Wetlands Protection Act, Flood Hazard Area Control Act, and Water Quality Management Planning program; the County of Bergen and its agencies; and the Bergen County Utilities Authority. The Agreement requires the Municipal Parties to execute any required documents in support of any application for outside agency approval.

The Sylco Agreement requires the affordable units to be subject to a deed restriction (the "Affordability Controls") of at least 30 years, until the Borough elects to release the Affordability Controls, and requires the units to be subject to all the requirements of the Uniform Housing Affordability Controls ("UHAC") at N.J.A.C. 5:80-26.1 et seq., with the exception that, as required by statute and the terms of the Sylco Agreement, 13% of all affordable units created must be affordable to households earning 30% or less of regional median income. Sylco must provide for review by the Borough and its counsel a draft deed restriction, which must be in accordance with forms provided by UHAC or COAH. Sylco is required by the Agreement to identify the location of the affordable units in the Development, including providing floor plans depicting such locations and identifying the unit numbers of all affordable units in the Development. Sylco is also required to retain the services of the Administrative

Agent approved and appointed by the Borough for affirmative marketing and administration of the affordable units, which marketing and administration will be at Sylco's sole cost and expense.

As discussed in more detail below, the Sylco lots are not currently in the Borough's Sewer Service Area, although the adjacent lots to the southeast across Frick Drive and the adjacent lots to the south in Demarest are in a Sewer Service Area. With regard to Sylco's application to the DEP for amendment of the applicable Water Quality Management Plan ("WQMP"), the Agreement requires the Municipal Parties to provide Sylco with a letter confirming the Municipal Parties' support for the construction of the Development and that, pursuant to the Sylco Agreement, the zoning applicable to the Sylco property will be amended to accommodate construction of the Development, and thus to satisfy a portion of the Borough's affordable housing obligation. Additionally, the Agreement requires the Municipal Parties to timely provide to Sylco upon request a letter or resolution to be submitted to DEP in support of the WQMP amendment, confirming the Development's consistency with the applicable zoning for the property as will be implemented pursuant to the Sylco Agreement, and to provide Sylco with a written statement of consent in a form of a resolution by the governing body stating that the Borough concurs with, and does not object to, such proposed WQMP amendment related to the Development.

The Agreement stipulates that it is also Sylco's responsibility to extend existing public water and sanitary sewer facilities to the development at Sylco's sole cost and expense. The Agreement prohibits both the Borough and Planning Board from requiring Sylco, or successor organization, to construct or pay for any municipal off-tract improvements other than those provided for by N.J.S.A. 40:55D-42.

The Sylco Agreement acknowledges that Sylco is aware of the 2008 deed restriction on a portion of the Sylco property prohibiting further subdivision of that portion of the property and is aware of the 2008 Planning Board COA requiring imposition of a deed restriction on the remainder of a portion of the Sylco property to one single-family dwelling. In the Agreement the parties acknowledge that the COA imposed in the resolution is different from the condition reflected in the minutes for the 2008 Planning Board meeting. Subsequent Sylco Court filings note that no deed restriction limiting development to one single-family home was ever recorded.

Via the Sylco Agreement, the Borough consents to Sylco and the Planning Board being granted limited joinder status in the Borough's DJ action by signing a Consent Order, a form of which is attached to the Sylco Agreement, solely for the purpose of modifying, removing, or discharging the deed restriction and COA. The Sylco Agreement requires the Municipal Parties to consent to, agree with,

and endorse the discharge of the deed restriction and/or the COA, and/or, at Sylco's sole election, a finding by the Court that the development contemplated by the Sylco Agreement does not violate the deed restriction or COA. The Agreement prohibits the Municipal Parties from taking any action or supporting any action taken by third parties opposing this application and are required to defend and uphold the validity of the Sylco Agreement and any actions taken in furtherance of it.

The Sylco Agreement is contingent on the Court entering an order in the Borough's DJ action that modifies, removes, or discharges the deed restriction and COA and/or finds that the Development would not violate the deed restriction and COA, as discussed further below.

The Sylco Agreement also requires Sylco to support the Borough's application to the Court for approval of the FSHC Agreement, provided it includes the rezoning of Sylco's properties as discussed above, and to support the Borough's requests for approval of its HEFSP and for entry of a Judgment of Compliance and Repose in its DJ matter.

If the Court approves the Sylco Agreement at the conclusion of the upcoming Fairness Hearing, and if no appeal is filed, the Sylco Agreement requires Sylco and the Borough to file a Joint Stipulation of Dismissal with prejudice in the Sylco litigation (Docket no. BER-L-0293-20). Should the Court decline to approve the Sylco Agreement, the parties have agreed to attempt to modify its terms in a manner that addresses the Court's concerns. If the parties are unable to do so within 45 days after the Court's denial of approval, either Sylco or the Borough may, by written notice to all other parties, terminate the Sylco Agreement.

As noted above, on November 29, 2023, Sylco filed with the Court under the Borough's 2015 DJ action a motion requesting that the COA and the deed restriction discussed above be modified, vacated, terminated, or, in the alternative, that the Court confirm that the deed restriction and COA will not preclude construction of the Development. The motion summarized the history of the property, noting that in January 2007, the Alpine Planning Board approved a subdivision that included a stipulation by the applicant, F.E. Alpine, one of the parties in Sylco's motion to intervene, that there would be no further subdivision of Block 55, lots 22.01, 23.01, and 24.01 (lot 25.01 was not included in the stipulation). The Board memorialized its grant of final subdivision of the property in May 2008, and the meeting minutes indicate the requisite deed restrictions had been prepared and were ready for signature.

Despite it not being required as part of any condition of approval, in July 2008 the Borough recorded a deed restriction for Lot 25.01, signed by the Planning Board's chairwoman and recording secretary,

that prohibited the current owner or any future owner from subdividing the property into additional lots “at any time in the present or in the future.” It is that deed restriction that Sylco is now requesting be excised.

Later in 2008, F.E. Alpine sought amended subdivision approval. The Planning Board minutes¹ from a hearing on September 23, 2008 reflect that the Board again requested that the property be deed-restricted against future subdivision. The minutes quote some conversation between the Mayor and the applicant that indicated that the previous “no further subdivision” provision did not apply to lot 25.01, and the Mayor asked if that lot could be included, to which minutes indicate the applicant agreed. Although the July 2008 deed restriction against future subdivision of Lot 25.01 had in fact already been recorded, the conditions of approval as read at the September 23, 2008 meeting included a requirement to deed-restrict lot 25.01 from further subdivision.

On October 28, 2008, when the Board voted on the resolution of approval for the F.E. Alpine application heard September 23, 2008, the condition as read at the hearing regarding restricting Lot 25.01 from further subdivision was not included. Rather, the resolution imposed a condition (the COA) that the Sylco Motion says was never discussed or agreed to, requiring a recorded deed restriction limiting the use of Lot 25.01 to one dwelling. While this COA was memorialized in the resolution, no deed restriction was ever recorded, and Sylco says the Borough never required F.E. Alpine to comply with it.

The Sylco Motion argues that the COA as set forth in the October 28, 2008 resolution is unlawful and should be vacated, noting it does not reflect the hearing minutes’ version of what was discussed; that it was imposed unlawfully after the fact since the Planning Board never discussed it or voted on it and F.E. Alpine never consented to it; that there is no provision in the deed restriction that its purpose was to protect the public, the Board, or any other party; that it is not in the public interest; that it does not further any legitimate objective of the Borough’s zoning ordinance; that this attempt by the Planning Board to regulate what may be developed on a particular piece of property as part of site plan or subdivision review is unlawful; that no deed restriction including any such use restriction was ever recorded, and in fact the Borough never intended to require recording of this deed restriction; that it restricts land that is otherwise available, suitable, developable, and approvable for the construction of

¹ A footnote in Sylco’s letter brief indicates recordings of these meetings had been destroyed, thus requiring all parties to rely on meeting minutes. All relevant meeting minutes were provided as part of the motion.

affordable units pursuant to N.J.A.C. 5:93-5.3, and that to leave the COA in place has the effect of making the property unavailable for construction of affordable housing.

The Sylco Motion also requests that the Court excise the recorded deed restriction prohibiting further subdivision of Lot 25.01, or, since the proposed Development requires site plan, but not subdivision, approval, that the Court confirm that the deed restriction does not impair the Development on the property contemplated by both Settlement Agreements. The motion notes that the restriction can be removed either by the Alpine Planning Board or the Court, and requests that the Court remove the restriction now to eliminate any doubt about whether the property is available pursuant to N.J.A.C. 5:93-5.3. In the alternative, even though both the Borough and the Planning Board have agreed in the Sylco Agreement to rescind the deed restriction and do not oppose the Sylco Motion, the motion requests that, should the Court choose not to rescind the deed restriction, the Court should determine that the language in the deed restriction does not limit Sylco's ability to develop the property in the manner contemplated by both Settlement Agreements.

Most recently, the Court issued a case management order, dated December 15, 2023, establishing January 26, 2024, as the return date of the Sylco Motion, with parties to the DJ action permitted to file opposition or replies, if any, within the time prescribed by the Court Rules and requiring non-parties to the DJ action "that may have concern regarding the subject matter of the motion shall submit their concern for consideration at the time of the Fairness Hearing in accordance with the time and procedure established by the Notice of Fairness Hearing previously provided, published and served by the Borough of Alpine."

5.0 THE SETTLEMENT AGREEMENT WITH FSHC; PRELIMINARY COMPLIANCE REVIEW

I have also reviewed the proposed Settlement Agreement between FSHC and the Borough of Alpine in the context of the required fairness analysis as more fully described below in section 7.0 of this report. The Agreement, dated October 18, 2023, was signed by Adam M. Gordon, Esq., for FSHC and executed on November 1, 2023 by Mayor Tomasko for the Borough. The FSHC Agreement sets November 1, 2023 as the effective date of the Agreement.

Under the Settlement Agreement, FSHC and Alpine agree that the Borough's fair share affordable housing obligation for the period from 1987 to July 1, 2025 is as follows:

- Third Round Rehabilitation obligation (per Jacobson decision): 4 units
- Prior Round obligation (pursuant to N.J.A.C. 5:93): 214 units, adjusted via a 20% cap to 108.

- Third Round obligation (1999-2025): 122 units, per Jacobson decision, as adjusted via a 20% cap. Includes the “gap” present need (1999-2015) and prospective need (2015-2025).

FSHC and the Borough agree to these obligations and accept the Third Round obligation of 122 units solely for the purposes of settlement, without prejudice to the parties’ ability to challenge the Third Round number during any proceedings involving subsequent rounds of affordable housing calculations after July 1, 2025.

Rehabilitation Share

Pursuant to the FSHC Agreement, to satisfy its four-unit Rehabilitation obligation, the Borough will participate in the Bergen County Home Improvement Program, which is administered using Community Development Block Grant (“CDBG”) funds. Income-eligible homeowners in almost all Bergen County municipalities, including Alpine, are automatically eligible to apply for these funds. Due to the small rental component of the Borough’s housing stock, the FSHC Agreement does not require the Borough to establish and support a local rental rehabilitation program.

Prior Round Obligation; Vacant Land Adjustment

As noted above, the Borough’s Prior Round obligation of 214 units was adjusted by the Court in 2000 to 108 units based on the 20% cap. The Borough was granted a JOR on December 8, 2000, for its Prior Round HEFSP, in which the Borough received a VLA pursuant to COAH’s regulations at N.J.A.C. 5:93-4.2, that resulted in a Prior Round RDP of 32 units and an Unmet Need of 76 units. A copy of one page of Mr. Caton’s Second Round Master’s Compliance Report, dated June 23, 2000, summarizing the Borough’s VLA, has been provided as an exhibit to the FHSC Agreement, The Borough has met its 32-unit Prior Round RDP with the following two compliance mechanisms, both of which were approved by the Court as part of the Borough’s 2000 JOR:

Alpine Borough Prior Round Compliance Mechanisms			
Prior Round RDP = 32 Units			
Compliance Mechanism	Units	Rental Bonuses	Total Credits
Regional Contribution Agreement (RCA)			
Borough of Fairview	16		16
100% Affordable – Completed			
Municipal Site – affordable family rentals	8	8	16
Total	24	8	32

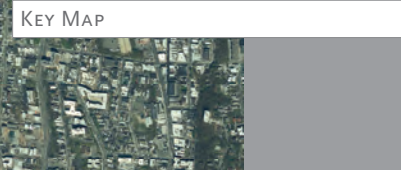


Wetlands Source:
 Wetlands (from Land Use/Land Cover 2015 Update), Edition 1/28/2019
 Publisher: NJ Department of Environmental Protection (NJDEP)
 Division of Information Technology (DOIT),
 Bureau of Geographic Information System (BGIS)

Special Flood Hazard Area Source:
 Title: National Flood Hazard Layer (NFHL)
 Organization Name: Federal Emergency Management Agency
 Publication Date: 2020

Steep Slopes Source:
 Steep Slopes calculated from:
 New Jersey 10 Foot Resolution LiDAR (Light Detection and Ranging)
 Derived Digital Elevation Model (DEM), Non-Hydro-Flattened
 Originator: New Jersey Department of Environmental Protection
 Publication Date: 10/2019

Aerial Source:
 Title: NJ 2020 Natural Color Imagery
 Publisher: NJ Office of Information Technology, Office of GIS (NJOGIS)
 Publication Date: 7/7/2021



Clarke Caton Hintz ● ● ■
 Architecture
 Planning
 Landscape Architecture

Affordable Housing Sites

LOCATION:
 Alpine Borough, Bergen County, NJ

DATE:
 January 2024

Regional Contribution Agreement: The Borough's December 2000 JOR includes Court approval of the Borough's October 2000 agreement to transfer 16 units of its Prior Round obligation to the Borough of Fairview via a payment of not less than \$20,000 per unit.

As part of its Third Round HEFSP, the Borough must provide documentation of the transfer of \$320,000 to the Borough of Fairview in satisfaction of its RCA Obligation (Condition 3).

Municipal Site: Subsequent to the Borough's 2000 JOR, the location of the proposed municipally-sponsored, affordable family rental units was transferred to the Municipal Site at Block 39, Lot 2.01 and 2.02 and the eight (8) affordable family rental units were completed. Although the Borough's 2008 HEFSP notes these units were administered by the Bergen County Housing Authority, other information stated that the units were administered by a former Borough attorney. A deed restriction of at least 30 years for the units was recorded in 2009.

The Borough must provide a copy of a c.o. for the eight (8) existing affordable family rental units on the Municipal Site, must indicate in its HEFSP which experienced and qualified Administrative Agent administers the units per UHAC regulations, and must verify with information from the qualified Administrative Agent and then confirm in the HEFSP the income-bedroom distribution of the existing family affordable rental units (Condition 4).

Third Round Obligation; Vacant Land Adjustment

For purposes of settlement, the parties have agreed to a Third Round obligation of 122 after adjustment pursuant to the 20% cap and have further agreed the Borough is entitled to a VLA of this obligation, resulting in a Third Round RDP of 32 units and a Third Round Unmet Need of 90 units. A copy of a one-page chart listing the sites generating the Borough's Third Round RDP has been provided as an attachment to the FSHC Settlement Agreement.

As an appendix to its HEFSP, the Borough must include full details of its Vacant Land Analysis as required by N.J.A.C. 5:93-4.2, including:

- **A table sorted by block/lot of all sites reviewed, with ownership information, gross and net acreage, which reason under N.J.A.C. 5:93-4.2(e) relied on for any sites eliminated, the presumptive density and total potential units (one column) for sites included, and the number of affordable units being assigned to each included site. The affordable units column should be totaled. Each site should be assigned a number, which should be used to designate it on the Borough's associated aerial map(s).**

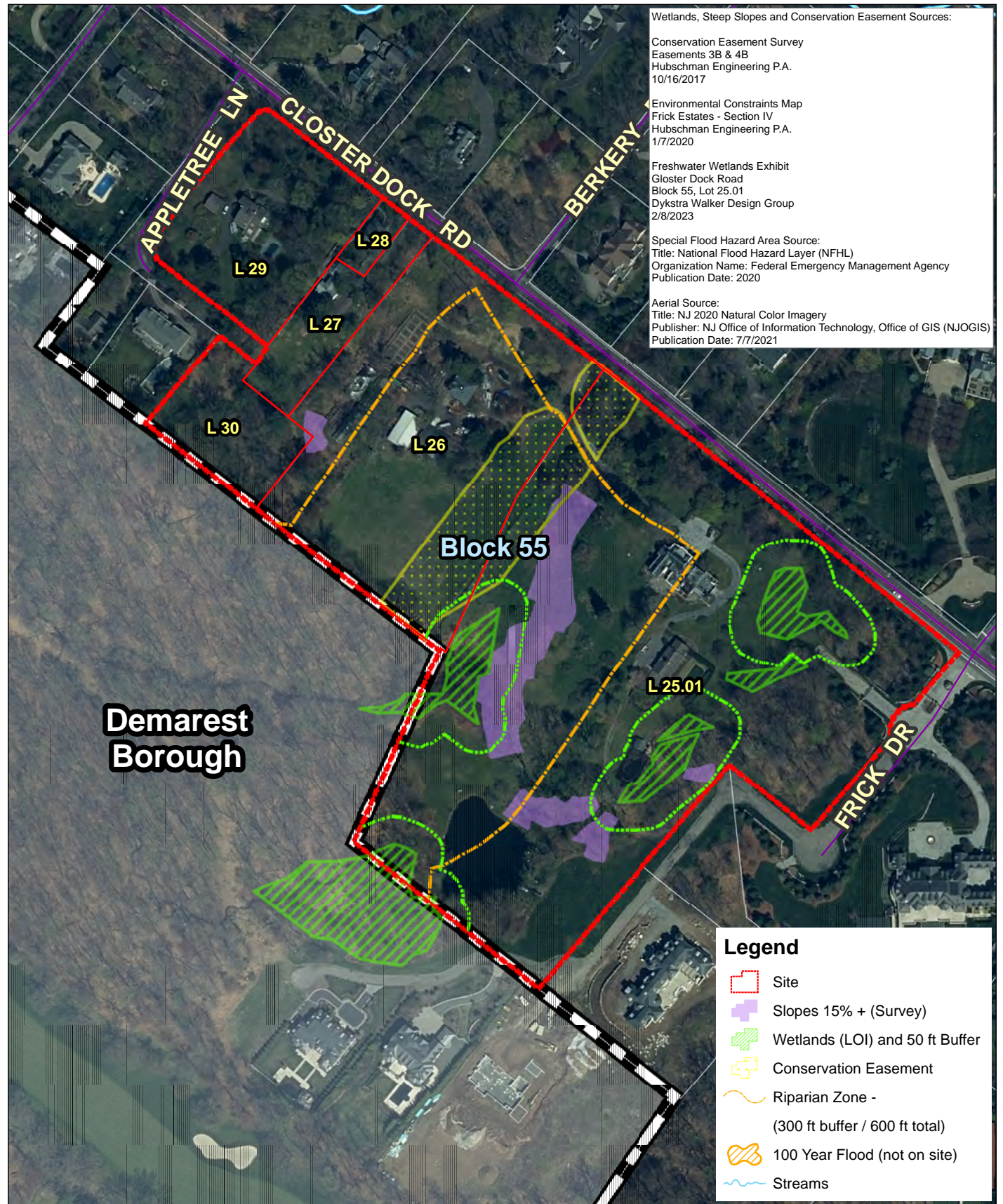
- An aerial map showing existing land use by parcel.
- An aerial map or maps showing all streets and lots, all environmental constraints, all sites considered, identifying them by the site number from the table discussed above, and which sites are included, and which are excluded from contributing to the Borough's RDP. (All Condition 5).

The Borough proposes to satisfy its 32-unit Third Round RDP via the following compliance mechanisms:

Alpine Borough Third Round Compliance Mechanisms Third Round RDP = 32 Units			
Compliance Mechanism	Units	Rental Bonuses	Total Credits
Inclusionary Development – Proposed			
Sylco Development - affordable family rentals	8	8, max	16
100% Affordable – Proposed			
Municipal Site Expansion – affordable supportive rental bedrooms	14	capped	14
Accessory Apartment Program – Proposed			
Proposed affordable family rentals	4	capped	4
Total	26	8	34
Surplus (34 credits/reductions – 32-unit RDP)			2

Sylco Development (Block 55/Lots 25.01, 26, 27, 28, 29 and 30; Closter Dock Road): The lots comprising the Sylco Development site total approximately 22.5 acres. Pursuant to the Sylco Agreement discussed above, the Development will total 40 residential units with an on-site affordable housing set-aside of 20%, or eight (8) affordable housing units. The Sylco Agreement stipulates that the affordable units will be family rentals, thus allowing the Borough to claim the maximum eight (8) associated Third Round rental bonuses.

The Sylco property is located on the western side of the Borough, along Demarest Borough's northeast border. It is roughly rectangular in shape, bordered by Closter Dock Road, a county road, along its northeastern edge, Appletree Lane to its northwest, and Frick Drive to its southeast (see aerial Sylco site map and Sylco's concept plan below). Tax records show that all lots are owned by one of the Sylco-related entities listed on this report.



Wetlands, Steep Slopes and Conservation Easement Sources:

Conservation Easement Survey
Easements 3B & 4B
Hubschman Engineering P.A.
10/16/2017

Environmental Constraints Map
Frick Estates - Section IV
Hubschman Engineering P.A.
1/7/2020

Freshwater Wetlands Exhibit
Closter Dock Road
Block 55, Lot 25.01
Dykstra Walker Design Group
2/8/2023

Special Flood Hazard Area Source:
Title: National Flood Hazard Layer (NFHL)
Organization Name: Federal Emergency Management Agency
Publication Date: 2020

Aerial Source:
Title: NJ 2020 Natural Color Imagery
Publisher: NJ Office of Information Technology, Office of GIS (NJOGIS)
Publication Date: 7/7/2021

Legend

- Site
- Slopes 15% + (Survey)
- Wetlands (LOI) and 50 ft Buffer
- Conservation Easement
- Riparian Zone -
(300 ft buffer / 600 ft total)
- 100 Year Flood (not on site)
- Streams



Affordable Housing Site - Sylco

Per Sylco Survey and Sylco Concept Plan
Block 55 - Lots 25.01 & 26-30

LOCATION:
Alpine Borough, Bergen County, NJ

DATE:
January 2024

As discussed above, there is a recorded deed restriction prohibiting further subdivision, and a 2008 Planning Board COA requiring Lot 25.01 to be used only for a single-family dwelling. As discussed below, Sylco has filed a motion requesting the Court remove these restrictions, noting in particular that enforcement of the COA makes part of the property unavailable for the development of affordable housing as required by N.J.A.C. 5:93-5.3. There are legal issues that must be resolved by the Court in order for the Sylco Development to be deemed “available” as that term is defined by COAH at N.J.A.C. 5:93-1.3 as “a site with clear title, free of encumbrances which preclude development for low and moderate income housing.”

There are single-family detached homes on the property, as well as a nursery/agricultural operation. It is in Planning Area 1 (PA1) of the State Development and Redevelopment Plan (“State Plan”), where infill development and the production of affordable housing are encouraged. It is currently zoned R-1, permitting single-family residences on lots of at least 40,000 square feet. The property will be rezoned to permit Sylco’s contemplated inclusionary development and an amendment to the Borough’s Master Plan must be adopted consistent with the rezoning. The R-1 zone extends to the lots across Closter Dock Road and on either side of the property, and the property backs up to lots in Demarest Borough that are either vacant and wooded or have single-family dwellings on them. There is a commercial center nearby in Closter, to the west of the site. Approximately three-quarters of a mile to the southeast, where Closter Dock Road meets Route 9W, is the bus stop for Rockland Coaches, which offers weekday commuter service to and from New York City.

Per DEP mapping, there are no FEMA special flood hazard areas on the property, and no environmental contamination. As discussed above, the proposed rezoning ordinance for the site notes that the steep slopes that are present are constructed rather than naturally occurring. A county road-widening easement runs along the northeastern border of Lot 25.01, where it fronts on Closter Dock Road. A 2020 survey of the properties prepared for Sylco by Hubschman Engineering, P.A., shows a constructed pond at the south end of Lot 25.01 covering slightly more than half an acre, as well as scattered wetlands totaling slightly more than a quarter of an acre on lots 25.01 and 26. Scattered steep-slope areas on lot 25.01, 26 and 30 total slightly more than one acre. Two streams marked State Open Waters (“SOW”) are indicated, both of which run approximately north-south along the eastern and western sides of Lot 25.01. The eastern stream flows into the pond at the pond’s northeastern edge, and a stream flows out from the pond’s southwestern edge to the edge of the property. A 2020 survey for the project done by architectural firm Zampolin & Associates shows 50-foot transition areas around all but one of the wetlands areas and a 300-foot riparian zone to either side of the western SOW. There

are existing structures within the riparian zone that Sylco's engineer, Mark Gimigliano, PE, of Dykstra Walker Design Group, has indicated will be removed.

As discussed in greater detail below, the riparian zone is recorded in a 2018 Conservation Easement between F.E. Alpine and DEP, which also includes a conservation easement (most of which is within the bounds of the riparian zone). The wetlands, over some of which construction is proposed, are recorded in a 2022 deed restriction on Lot 25.01. A March 2023 DEP letter verifying the delineation of the riparian zone indicates that, while the zone is not within a flood hazard area or regulated floodway, "altering land cover or topography in a flood hazard area, as well as clearing, cutting and/or removing vegetation within a riparian zone, is regulated by the Flood Hazard Area Control Act rules, and may be prohibited or restricted in some cases. A flood hazard area permit is required prior to undertaking any regulated activity within a flood hazard area or riparian zone described at N.J.A.C. 7:13-2.4." Thus, Sylco will need DEP approvals for any changes to the riparian zone, which Mr. Gimigliano and Sylco's attorney, Daniel L. Steinhagen, Esq., have both acknowledged. Mr. Steinhagen has indicated in telephone conversations with our office that the wetland with no transition area is constructed; a second is isolated and ordinary; and Sylco will propose a transition area averaging plan for the third. He also indicated that Sylco intends to remove several structures within the riparian zone, and that any encroachment of the proposed Development into the edges of the riparian zone will be less in area, and farther away from the SOW, than what is being removed. Thus, Mr. Steinhagen indicated that Mr. Gimigliano has a high level of confidence that DEP will approve all necessary permits for the proposed Development (and as now certified to by Mr. Gimigliano as part of a Sylco's recent January 16, 2017 court filing.)

Based on the Sylco site's gross acreage of approximately 22.5 acres, the 40 total units proposed for the inclusionary development represent a gross density of 1.8 units per acre, substantially less than the COAH regulation minimum of six units per acre customary for inclusionary development in a VLA municipality (see N.J.A.C. 5:93-5.6(b)1). However, our office has calculated that combined, the current constraints discussed above and documented on Sylco's 2020 survey and the 2023 Concept Plan reduce the developable area of the site to approximately 11.32 acres, for a net density of 3.53 units per acre, still less than the minimum density of six units per acre customary for inclusionary development but more in keeping with some inclusionary developments historically approved by both COAH and in Superior Court matters involving VLA towns. Importantly, Sylco will be providing a 20% affordable housing setaside as required in VLA matters per COAH's regulations and typical in Court VLA matters as well.

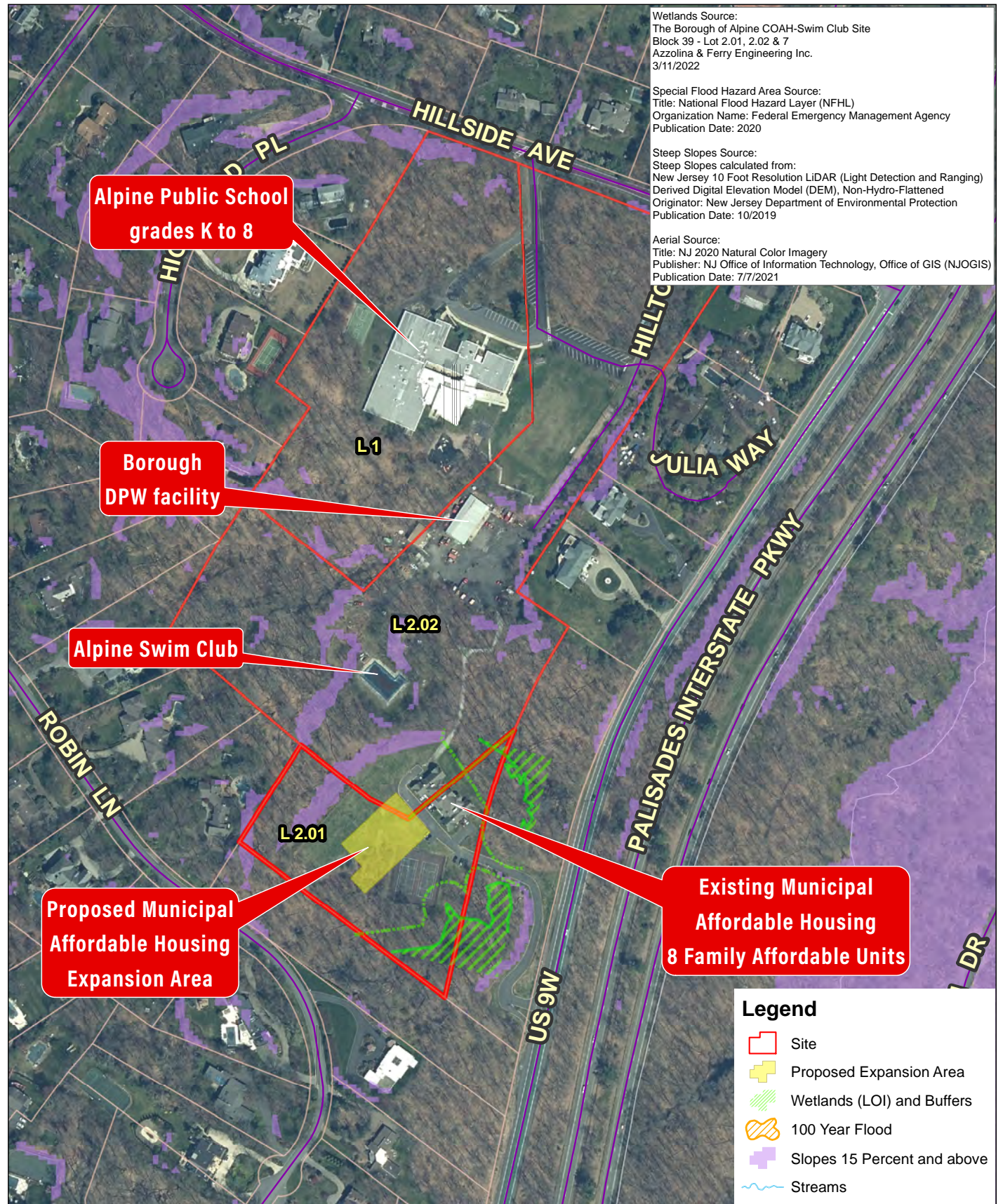
There is also a 300-foot buffer to a C-1 stream to the north of Closter Dock Road that covers a small part of Lot 29 along its frontage on Closter Dock Road. However, because there are multiple structures on the north side of Closter Dock Road within the buffer area and a curbed roadway between the stream and the Sylco site, Mr. Steinhagen noted and Mr. Gimigliano has confirmed that this buffer area can be viewed not as a flood hazard area but as a riparian zone, which is not included in COAH's list of environmental constraints that might render a site unsuitable for production of affordable housing, and Sylco's representatives are confident that DEP will permit the development on Lot 29 as depicted in the Concept Plan.

The Sylco site is within the Veolia (f/k/a SUEZ) public water service area, and there is an existing public water line in Closter Dock Road along the site's entire frontage. The Sylco Agreement requires Sylco to extend existing public water service to the site at its sole cost and expense. As noted above, the Sylco site is not currently within the Borough's Sewer Service Area, and Sylco has applied to the DEP for an amendment to the applicable WQMP, which the Sylco Agreement requires the Municipal Parties to support.

Sylco's Engineer shall present testimony at the Fairness Hearing regarding the representations as to anticipated DEP approvals of the amendment to the applicable WQMP to include the Sylco site in the sewer service area, and of the anticipated DEP approvals of various riparian, wetlands, etc., environmental permits (Condition 6).

Municipal Site Expansion (Block 39/Lot 2.01; Route 9W): As noted above, the Borough previously developed eight (8) family affordable rental housing units on municipal land (Block 39/Lots 2.01 and 2.02) as part of its Prior Round affordable housing plan. The Borough proposes to expand the development on this municipal site (see attached aerial map below) with new affordable rental supportive housing units containing a total of 14 bedrooms. The Borough has entered into an agreement with BC UW/Madeline Housing Partners, LLC ("BC UW") to develop and administer the new affordable supportive bedrooms.

The Borough of Alpine owns Block 39, Lots 1, 2.01, and 2.02, with primary access off Hillside Avenue at the north end of the lots. The Alpine Public School, a public K-8 school, is situated on Lot 1. Further south on Lot 2.02 are the Borough's DPW facility and the outdoor pool and facilities belonging to the Alpine Swim & Racquet Club. Southeast of that, straddling the line between Lot 2.02 and Lot 2.01, are the existing eight (8) municipal family affordable apartments.



Wetlands Source:
 The Borough of Alpine COAH-Swim Club Site
 Block 39 - Lot 2.01, 2.02 & 7
 Azzolina & Ferry Engineering Inc.
 3/11/2022

Special Flood Hazard Area Source:
 Title: National Flood Hazard Layer (NFHL)
 Organization Name: Federal Emergency Management Agency
 Publication Date: 2020

Steep Slopes Source:
 Steep Slopes calculated from:
 New Jersey 10 Foot Resolution LiDAR (Light Detection and Ranging)
 Derived Digital Elevation Model (DEM), Non-Hydro-Flattened
 Originator: New Jersey Department of Environmental Protection
 Publication Date: 10/2019

Aerial Source:
 Title: NJ 2020 Natural Color Imagery
 Publisher: NJ Office of Information Technology, Office of GIS (NJOGIS)
 Publication Date: 7/7/2021

Legend

- Site
- Proposed Expansion Area
- Wetlands (LOI) and Buffers
- 100 Year Flood
- Slopes 15 Percent and above
- Streams



Clarke Caton Hintz ● ● ■
 Architecture
 Planning
 Landscape Architecture

Affordable Housing Expansion Municipal Site

Block 39 - Lot 2.01 + (Lots 1 & 2.02)

LOCATION:
 Alpine Borough, Bergen County, NJ

DATE:
 January 2024

All three lots that comprise this municipal tract are zoned P, Public Zone. The P Zone is described in the Borough Code as lands owned and used for public purposes on a permanent basis by municipal, county and state governments and agencies. No specific requirements are established for the P Zone as to height and bulk standards for buildings and related requirements, but any development plan must be submitted to the Planning Board for an advisory review.

According to the 2008 tax map, Lot 2.01² is approximately two (2) acres, irregular in shape. Surrounding the lot to the south and west is residential development in the R-AA Zone, permitting single-family dwellings on lots of at least 65,340 square feet. To the east of the municipal tract is Block 39, Lot 7, comprising a 200-foot buffer along the western edge of Route 9W. Lot 7 is zoned B, Buffer Zone, designating public or private natural or conservation areas. It is anticipated that the existing access road from Route 9W across Lot 7 serving the existing affordable housing units on Lots 2.01 and 2.02 will also serve the proposed 14 affordable supportive bedrooms as part of the expansion of the municipal affordable housing site on Lot 2.01 in the general location near the existing tennis courts, which is to the south and across the access road from the existing 8 affordable family rental units.

The site is in the State Plan's PA 1 where the provision of affordable housing is encouraged. There is a steep slope in the northwest part of the lot, but not in a location that would impede the proposed development. There are no flood hazard areas on the site. However, in the southeast corner of the site there are surveyed wetlands and a transition area delineated as part of a 2022 report from Borough Engineer Perry E. Frenzel, PE PP, of Azzolina & Feury Engineering, Inc., regarding the feasibility of expanding the site's existing septic system. A concept sketch provided by BC UW for the expansion preliminarily indicates the new units will be located southwest of the current building, near the location of the current tennis courts. The concept sketch acknowledges the wetlands buffer and indicates that the proposed expansion would not encroach on it.

In 2022, the Borough executed an agreement with BC UW to transfer land to BC UW for construction of 12 bedrooms of permanent supportive housing for individuals with developmental disabilities. The date of the agreement and the block and lot number of the lands to be transferred were not specified. The agreement requires the property to be deed-restricted in perpetuity as housing for individuals with developmental disabilities. The BC UW agreement is contingent on the Borough receiving a final, unappealable JOR in its DJ matter, and provides for closing on the land transfer to take place after

² DEP's GeoWeb mapping does not show a Lot 2.01 as part of Block 39, and TaxMaps does not list it in a search. However, a 2008 Borough tax map does show a Lot 2.01 at the southernmost end of Lot 2, and the state's MOD IV tax data describes it as part of Lot 2.

entry of the JOR. The agreement requires BCUW to secure financing within one year of execution of the agreement, building permits to be secured within 18 months of execution, and construction to be completed within 12 months of securing building permits, which deadline may be extended for delays beyond BCUW's control. The Borough must adopt a spending plan that provides for full reimbursement to BCUW of all costs and fees associated with the project. The agreement permits a municipal residency preference.

When it is available, the Borough must provide a copy of the deed of transfer of Lot 2.01 to BCUW (Ongoing Condition of Monitoring).

Within 30 days of entry of an Order approving the Settlement Agreements, the Borough must provide an updated agreement with BCUW that requires BCUW to construct 14 special-needs bedrooms, and that removes the municipal residency preference or includes a letter from BCUW's attorney referencing the state Department of Developmental Disabilities' permission to utilize such a municipal residency preference (Condition 7).

The FSHC Agreement includes an acknowledgement by the parties that this property does not currently have access to public water and sewer service, and the original eight (8) affordable family units were developed utilizing a well and septic system. The parties acknowledge in the FSHC Agreement that the current well and septic system either have sufficient capacity or can and will be expanded to serve the additional 14 bedrooms of affordable rental supportive housing. In the event DEP determines that either the well or the septic system is unable to handle the additional 14 bedrooms, the Borough agrees that it will be required to provide for any shortfall on a different site, to be identified no later than 120 days from the issuance of a final unappealable decision of DEP.

A 2022 report from Borough Engineer Frenzel indicated the existing septic system was functioning well and recommended upgrading the system with the addition of electric pumps for more efficient dispersion of wastewater, which would allow the accommodation of an additional 12 bedrooms.

Within 30 days of entry of an Order approving the FSHC Agreement, the Borough must provide an updated report from the Borough Engineer indicating whether the proposed upgrades to the existing septic system will support a total of 14 bedrooms (Condition 8).

Within 30 days of entry of an Order approving the FSHC Agreement, the Borough must provide information from the Borough Engineer indicating whether the existing well, as is or with upgrades, will support water service for a total of 14 bedrooms (Condition 9).

The Borough must provide information on the process and timing for submitting any required applications to DEP for expansion of the existing septic system and well, including who will submit the application, whether new testing will be required, when it will be submitted, and when a determination for the septic system/well is expected (Condition 10).

The Borough must provide our office and FSHC with DEP's determination on the septic and well applications within 15 days of receipt (Condition 11).

The FSHC Agreement notes that, in accordance with N.J.A.C. 5:93-5.5, evidence must be provided of adequate and stable funding for any non-inclusionary affordable housing development, and required that, within 60 days of execution of the FSHC Agreement, or by December 31, 2023, BCUW was to provide a pro forma of total development costs and total sources of funds, including documentation of funding available to the Borough and/or BCUW, and any applications for third-party funding that are still pending. BCUW has indicated that its schedule is slightly delayed due to a change in service provider for the units, but that a pro forma will be provided as soon as the square footage of the proposed expansion has been calculated.

Within 30 days of entry of an Order approving the FSHC Agreement, the Borough must provide a pro forma from BCUW detailing total development costs and total sources of funds and must provide documentation of funding available to the Borough and/or BCUW, and of any pending third-party funding applications (Condition 12).

The FSHC Agreement also requires, as part of the Borough's HEFSP, submission of a construction or implementation schedule for the project that addresses each step in the development process: site plan preparation, granting of municipal approvals, applications for third-party permits and approvals, selection of a contractor, and construction. The schedule must provide for construction to begin by March 31, 2025. The Borough must also indicate the entity responsible for overseeing and monitoring all development activity on the project.

As an appendix to its HEFSP, the Borough must include the updated, executed agreement with BCUW, the pro forma discussed above, and an implementation schedule for construction of the 14 supportive housing bedrooms on the Expanded Municipal Site that, pursuant to the FSHC Agreement, provides for construction to begin by March 31, 2025 (Condition 13).

In the event that, for any reason including lack of funding, BCUW cannot begin construction by March 31, 2025, the FSHC Agreement permits the Borough in its sole discretion to either:

- i. Within 30 days of the March 31, 2025 deadline, amend its HEFSP, subject to the review and comment by FSHC and the Special Master and review and approval by the Court, to include valid compliance mechanisms that do not rely upon securing outside funding and will provide a realistic opportunity for additional affordable rental supportive affordable housing units containing a total of 14 bedrooms; OR
- ii. Bond or take other necessary action to provide funding for the proposed project.

Should the Borough have created a realistic opportunity for additional eligible affordable units, bedrooms, or credits not referred to in the FSHC Agreement (collectively “Unanticipated Units”), the FSHC Agreement permits the Borough to reduce its obligation to provide 14 bedrooms of additional rental supportive affordable housing units at the Municipal Site by the number of Unanticipated Units. The Unanticipated Units that replace any or all of the 14 additional bedrooms of supportive affordable housing proposed for the Municipal Site must be in compliance with all terms of the FSHC Agreement, as further discussed below.

Affordable Accessory Apartment Program: The FSHC Agreement requires the Borough to establish an accessory apartment program for at least four (4) family affordable rental units. Each accessory apartment would be eligible for a subsidy of up to \$70,000 (a total of \$280,000) to assist in the conversion or creation of the affordable accessory apartment. The FSHC Agreement requires the program to remain in effect through July 1, 2025, and to proceed with any units that are in progress or for which discussions have been initiated by that date. Any remaining shortfall as of July 1, 2025, is to be addressed in the Fourth Round without utilizing the affordable accessory apartment program, and the FSHC Agreement stipulates that any affordable housing obligation of the Borough in the 10-year Fourth Round period would not be satisfied through an accessory apartment program.

The Borough must submit for review and then must introduce and adopt an ordinance establishing an affordable accessory apartment program (Condition 14).

The Borough must provide an authorizing resolution and executed agreement with a qualified and experienced Administrative Agent for establishment and administration of the Borough's affordable accessory apartment program (see Condition 24, below).

The experienced Administrative Agent must provide an operating manual for administration of the program, a draft of which must be provided for review (Condition 15).

Age-Restricted Cap

The FSHC Agreement stipulates that the Borough agrees to comply with an age-restricted cap of 25% of all units developed or planned in the Borough to meet its cumulative Prior Round and Third Round obligations. The Borough provided no age-restricted units to satisfy its Prior Round RDP and is proposing no age-restricted units to meet its Third Round RDP.

Income and Bedroom Distribution

The FSHC Agreement requires all units addressing the Borough's Third Round RDP and combined Unmet Need to comply with the required bedroom distribution, and to be governed by the income distribution requirements of UHAC at N.J.A.C. 5:80-26.1, with the exception that, instead of 10% of all affordable rental units being available to households earning less than 35% of area median income, 13% of all affordable units in each bedroom distribution, regardless of tenure, will be available to very low-income households earning 30% or less of area median income. The basic parameters of the required income and bedroom distribution of the Sylco Development is discussed above and, once the details are determined during site plan review, the specific income/bedroom details must comply with UHAC requirements. In addition, the FSHC Agreement requires the Borough to comply with these requirements for all affordable housing units constructed as a result of any development approved pursuant to any of the Unmet Need mechanisms discussed below.

Rental, Family Rental, and Family Requirements

The FSHC Agreement requires that at least 25% of the Third Round RDP and the combined Unmet Need be met through rental units, at least half of rental units be available to families, and at least half of all units addressing the Borough's Third Round RDP and Unmet need be available to families. The Borough's Third Round RDP of 32 generates an obligation of at least eight (8) rental units ($32 \times 0.25 = 8$), at least four (4) of which must be available to families, and an obligation of at least 12 total units available to families ($32 - 8 \text{ bonuses} = 24 \times 0.5 = 12$). The Sylco Development satisfies the rental and family rental requirements, providing eight (8) family affordable rental units and the eight (8) affordable family units at the Sylco Development and the proposed four-unit affordable accessory apartment program preliminarily satisfy the existing 12-unit family requirement based on the 32-unit Third Round RDP. In addition, the FSHC Agreement requires the Borough to ensure that at least 25% of all affordable housing units constructed as a result of any development approved pursuant to any of the Unmet Need mechanisms discussed below will be rental units, with at least half of those rental units available to families, as well as half of all affordable units available to families.

Very Low-Income Requirement

The FSHC Agreement notes that 13% of all affordable units approved and constructed after July 1, 2008, are required to be very low-income units, defined as being affordable to households earning 30% or less of regional median income. Of those units, half must be available to families. The FSHC Agreement sets forth specifically how the Borough's very low-income requirement is calculated and how it will be met, as follows:

Compliance Mechanism	Total Affordable Units	Total Very Low-Income Units Proposed	Very Low-Income Unit Type
Sylco	8	2	Family
Municipal Site Expansion (bedrooms)	14	14	Special Needs
Accessory Apartment Program	4	0	
Unmet Need site(s) (FSHC #12, see below)	15	2	Family
Total	41	18	
Min. VLI Units Required/ Proposed		5 req. (0.13 x 41)/ 18 proposed	
Min. Family VLI Units Required/ Proposed		3 req. (0.5 x 5 VLI, round up)/4 prop.	

The FSHC Agreement stipulates that the Borough must require 13% of all affordable housing units developed in any future inclusionary or 100% affordable development be affordable to very low-income households. With the exception of the Sylco site and the expanded municipal site, the FSHC Agreement permits the Borough, at its discretion, to round the very low-income obligation for a specific development up or down, as long as not less than 13% of all affordable units approved and constructed after July 1, 2008, are restricted for very low-income households.

Unmet Need

The Borough's combined Prior Round and Third Round obligations of 108 units and 122 units, less its 32-unit Prior Round RDP and 32-unit Third Round RDP, results in a combined Unmet Need of 166 units. The FSHC Agreement indicates the parties have agreed this Unmet Need will be addressed through the following mechanisms:

- **Surplus Credits:** Alpine may apply to its Unmet Need the two (2) surplus credits anticipated from addressing its 32-unit Third Round RDP with the 34 total credits/rental bonuses generated by the proposed Third Round RDP compliance mechanisms.

- Radio/Telecommunications Tower Site (Block 80, Lots 10 and 11): Alpine has agreed to adopt overlay zoning on these two lots, permitting the development of 35 total residential units and requiring a 20% set-aside of seven (7) affordable units. These lots, comprising a total of approximately eight (8) acres, are long rectangular lots extending northwest from Route 9W, with minimal frontage on Route 9W. Lot 10 includes the communications tower, and has an access road from Route 9W. As agreed to by the Borough and FSHC, a concept plan for the proposed development (attached to the FSHC Agreement) shows the proposed location for any such potential development and shows a 50-foot buffer between Route 9W and the development. Both lots are zoned R-A, permitting single-family dwellings on lots of at least 87,120 square feet. The lot immediately to the northeast is vacant, under the same ownership as Lots 10 and 11. To the northwest is vacant land owned by Bergen County, zoned P, Public Zone, and to the southwest are single-family homes. The parties contemplate that only the front portion of the property, closest to Route 9W, will be developed, and no residential uses or parking would be developed within the fall zone of the radio/communications tower, which is expected to remain on the site. Although the rear portion of both lots that houses the radio/communications tower is in State Plan PA1, where infill development is encouraged, the front portion of both lots is in State Plan Planning Area 8 (PA8), Parks and Natural Areas. Borough Planner Joseph Burgis, PP, AICP, of Burgis Associates, indicated in telephone conversations with our office that he believes the PA8 designation is a mapping error, since the designation also appears to cover all or part of several single-family lots to the northwest of the radio/telecommunications tower lots. Mr. Burgis noted that it is possible to have the State Plan policy map amended to change this designation or correct the mapping error as applicable; however, either the State Planning Commission or a state agency must request the amendment, or the Borough may request it as part of cross-acceptance. Otherwise, the property owner must request an amendment.

The Borough must initiate the process of requesting an amendment to the State Plan policy map to correct or re-designate Block 80, Lots 10 and 11 as PA1 (Condition 16) and must provide quarterly progress reports to FSHC and the Special Master beginning 90 days after entry of an Order approving the FSHC Agreement (Ongoing Condition of Monitoring).

The FSHC Agreement acknowledges that this site does not have public water or sewer service and is not in a sewer service area. Per the FSHC Agreement, the Borough agrees to permit public sewer and water to be run to this site, and to assist any developer of the site to procure

public sewer and water. The parties also acknowledge that the site could be developed with on-site wastewater treatment, either through a package treatment facility or a septic system, and the Borough agrees to assist developer of the site in securing the infrastructure necessary to construct the 35 units, including but not limited to expanding the Sewer Service Area, endorsing all applications to the DEP to provide water and/or sewer capacity to the site, seeking support for and cooperating with any necessary county amendment to the wastewater management plan, and cooperating with neighboring municipalities to provide necessary sanitary sewer and public water service, and/or supporting the development of on-site wells and package treatment or septic systems. The Borough agrees to support a developer in the event it is necessary to secure sewer and/or public water capacity for the site via litigation with a neighboring municipality. However, the FSHC Agreement specifically states that the Borough is not required to expend funds beyond paying its own professionals and staff, to achieve the results set forth above.

The Borough must submit the overlay ordinance for the Radio Tower site for review and then must introduce and adopt the ordinance within 120 days after entry of an Order approving the FSHC Agreement (Condition 17).

- Mandatory Borough-Wide Affordable Housing Set-aside Ordinance: The Borough agrees to adopt an ordinance requiring a mandatory affordable housing set-aside of 20% for all new multi-family residential development of five (5) units or more that become permissible through either a use variance, a density variance increasing the permissible density at the site, a rezoning permitting multi-family residential housing where not previously permitted, or a new or amended redevelopment or rehabilitation plan. The provisions of the mandatory set-aside ordinance will not apply to residential expansions, additions, renovations, replacement, or any other type of residential development that does not result in a net increase in the number of dwellings of five (5) units or more. The form of this ordinance will be finalized through collaboration between FSHC, the Borough and the Special Master. Neither this ordinance nor the FSHC Settlement Agreement gives any developer the right to such rezoning, variance, or other relief, or establish any obligation on the part of the Borough to grant such rezoning, variance, or other relief.

The Borough must provide for review and then must introduce and then adopt the mandatory set-aside ordinance, which may be included in an amended Affordable Housing Ordinance as discussed below (Condition 18).

- Paragraph #12 of the FSHC Agreement - Unmet Need Sites: Per Paragraph #12 of the FSHC Agreement, the parties to the Agreement also acknowledge that other sites could generate additional inclusionary development with future sewer service tie-in to assist in satisfying the Borough's Unmet Need. The Agreement sets forth the approach via which the parties will address any potential additional development, and the Agreement anticipates that such potential additional development could generate an aggregate of 15 affordable units in one or more inclusionary developments that would include market-rate units and an on-site affordable housing set-aside, on any site except the Sylco site discussed above, that meets the conditions set forth in Paragraph #12, some of which include:
 - A minimum five-acre tract;
 - Within an existing sewer service area or within 500 linear feet of an existing sewer service area or the municipal border;
 - A minimum lot width at street line and at setback line of 250 feet on the following county roads: Hillside Avenue or Anderson Avenue;
 - A height not to exceed 42 feet and 3 stories;
 - A minimum front yard setback of 75 feet from Hillside Avenue or Anderson Avenue;
 - A maximum density of 6 dwelling units per acre;
 - A minimum perimeter landscape buffer of 25 feet.

Paragraph #12 of the FSHC Agreement spells out the process whereby a qualifying site may be offered and approved, which process it requires to be spelled out in any final JOR in this matter. The process requires any developer proposing a project per Paragraph #12 to notify the Borough, the Special Master, and FSHC and provide for review a detailed concept plan. If the Borough, FSHC and Special Master agree the proposal is compliant and viable, the Borough must draft for review a comprehensive ordinance reflecting the development proposal and consistent with the requirements detailed above. Once all parties have reviewed the ordinance and conferred to resolve any disagreements, the Borough must introduce the ordinance. The Borough is permitted to limit all such developments to a total of 75 residential units, and the ordinance for any such development must require a 20% on-site affordable housing set-aside. The FSHC Agreement sets forth time periods by which each step in this process must be completed and, should the Borough not introduce the ordinance in a timely manner, permits FSHC to bring a motion to enforce litigants' rights. In that instance, the FSHC Agreement stipulates that the trial court will be the final arbiter of the zoning ordinance and the parties to the FSHC Agreement expressly waive any further challenge to that ordinance and agree to

support and defend its adoption and implementation against any third-party challenge in any court review, including any appellate review.

Because any very low-income units from any sites that could produce affordable units pursuant to Paragraph #12 of the FSHC Agreement are required by the FSHC Agreement to be family units, any rezoning ordinance drafted for any such site must require that the affordable units produced be family units (Ongoing Condition).

The Borough agrees to support any efforts of the developer of a proposed site to procure sewer and/or water to the site, including but not limited to endorsing all applications to the DEP or its agent, cooperating with any necessary county amendment of its wastewater management plan, cooperating with neighboring municipalities and with any Developer effort to secure water and/or sewer service from neighboring municipalities via litigation, and/or supporting the development of on-site package treatment or septic. These Borough obligations terminate on July 1, 2025, although the Borough must continue its involvement in any pending project or funding applications that were commenced prior to July 1, 2025.

Additional FSHC Agreement Requirements

In the FSHC Agreement, the Borough also agrees that:

- All affordable units created will comply with the requirements of UHAC regarding bedroom distribution, affordability controls, and affirmative marketing, with the exception that, in lieu of the 10% of affordable units in rental projects being required to be at 35% of median income, 13% of the affordable units in such projects shall be required to be affordable to very low-income households at 30% or less of median income per the FHA. As part of the process of adoption and endorsement of its HEFSP, the Borough agrees to adopt and/or update appropriate implementing ordinances in conformance with all applicable laws to ensure this provision is satisfied.
- All newly constructed units are to be adaptable in conformance with P.L. 2005, c.350/N.J.S.A. 52:27D-311a and -311b and all other applicable law.
- Third Round rental bonuses will be applied in accordance with N.J.A.C. 5:93-5.15(d).
- The Borough agrees to use the AHPNJ regional income limits attached to the FSHC Agreement as an exhibit, and to follow the process set forth in Paragraph 16 of the FSHC Agreement by which it may calculate annual increases in income and asset limits. The Agreement indicates the Borough will request that the Court enter an order implementing the

terms of Paragraph 16 of the FSHC Agreement, and the Borough agrees to include those terms in its Affordable Housing Ordinance.

HEFSP; Affordable Housing Ordinance; Spending Plan

The FSHC Agreement requires that, within 120 days of entry of an order approving the Agreement, the Borough must adopt and endorse an HEFSP, adopt the zoning ordinances discussed above, and amend its Affordable Housing Ordinance, to implement the compliance plan and terms of the Sylco Agreement and the FSHC Agreement.

Within 120 days of entry of a Court order approving the FSHC Agreement, the Borough must adopt and endorse an HEFSP in accordance with the Sylco Agreement, the FSHC Agreement, and the applicable conditions in this report (Condition 19).

Within 120 days of entry of a Court order approving the FSHC Agreement, the Borough must adopt the zoning ordinances discussed above, and must amend its Affordable Housing Ordinance to implement the terms of the Agreement. The amended ordinance may include the mandatory set-aside provisions discussed above (Condition 20).

The FSHC Agreement requires the Borough to prepare a Spending Plan, which must first be provided to FSHC and the Special Master for review. The Borough may request that the Court find the expenditures of funds contemplated under the Spending Plan approved by the Court constitute a “commitment” for expenditure pursuant to N.J.S.A. 52:27D-329.2 and -329.3, with the four-year time period for expenditures beginning 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).

Within 120 days of an order approving the FSHC Agreement, the Borough must provide for review and then approve a Spending Plan. If the Borough allocates trust funds for the \$90,000 FSHC payment, it should be shown in the Spending Plan as an administrative payment in accordance with COAH's 20% administrative cap (Condition 21).

Affirmative Marketing Plan

The FSHC Agreement requires the Borough to prepare or update its Affirmative Marketing Plan as part of its HEFSP to include a number of community and regional organizations that must be notified per UHAC when affordable units are available including FSHC. The Borough has also agreed to

require all developers and any other entities retained to do affirmative marketing to notify these organizations. In addition, the FSHC agreement requires all affordable units being affirmatively marketed to be listed on the State Housing Resource Center ("HRC") website at <https://njhrc.gov>.

Within 120 days of an order approving the Agreement, the Borough must provide for review and then adopt an Affirmative Marketing Plan that includes required notification of the named entities in term #15 of the FSHC Agreement (Condition 22).

Municipal Housing Liaison; Affordable Housing Administrative Agent

By resolution, the Borough must appoint a full-time or part-time employee of the Borough as the Borough's Municipal Housing Liaison.

The Borough must provide an adopted resolution appointing a municipal employee to the position of Municipal Housing Liaison (Condition 23).

The Sylco Agreement requires Sylco to execute an agreement with the experienced and qualified Administrative Agent retained by the Borough to administer the eight (8) family affordable rental units to be developed on the Sylco site, for which Sylco will pay the associated fees. In addition, as discussed above, the Borough must retain the services of an Administrative Agent to administer any affordable units generated pursuant to the Unmet Need provisions as required by the FSHC Agreement, for which the developer of the units will pay the associated fees, and to establish, market, and administer its affordable accessory apartment program.

The Borough must execute an agreement with an experienced and qualified Administrative Agent to administer any affordable units generated pursuant to the FSHC Agreement, and to establish and administer its affordable accessory apartment program (Condition 24), and must provide the executed agreement between that Administrative Agent and Sylco for affirmative marketing and administration of the Sylco affordable units, to be done at Sylco's cost and expense (Ongoing Condition of Monitoring).

Monitoring Requirements

The FSHC Agreement requires that, on the first anniversary of the Court's approval of the Spending Plan, and on every anniversary thereafter through July 1, 2025, the Borough will provide annual reporting of trust fund activity to DCA, COAH, or Local Government Services, or other entity designated by the State, with a copy provided to FSHC and posted on the municipal website. 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.

The Agreement requires that, on the first anniversary of the execution of the FSHC Agreement, which is November 1, 2024, and on every anniversary thereafter through the end of the FSHC Agreement, the Borough will provide annual reporting on the status of all affordable housing activity within the Borough, through posting on the municipal website, with a copy provided to FSHC.

On July 1, 2024, the Agreement requires the Borough to post on its municipal website, with a copy provided to FSHC, a status report as to its satisfaction of its very low-income requirements, including the family very low-income housing, per N.J.S.A. 52:27D-329.1. The posting must invite any interested party to submit comments to the municipality and FSHC as to whether the municipality has complied with its very low-income housing obligation under the terms of the FSHC Agreement.

Finally, the FSHC Agreement notes the parties have agreed that the midpoint review report required pursuant to N.J.S.A. 52:27D-313 will be due on July 1, 2024. On that date, the Borough must post on its municipal website, with a copy provided to FSHC, a status report as to its implementation of the HEFSP and an analysis of whether any unbuilt sites or unfulfilled mechanisms continue to present a realistic opportunity, whether there are changed circumstances that necessitate an adjustment of the Borough's Third Round RDP, and whether any mechanisms of Unmet Need should be revised or supplemented. Such posting shall invite any interested party to submit comments to the Borough, with a copy to FSHC, regarding whether any sites no longer present a realistic opportunity and should be replaced. Any interested party may by motion request a hearing before the court regarding these issues. The parties acknowledge that the compliance process for the FHSC Agreement will still be ongoing when this report is due.

6.0 THE HOMEOWNERS' OBJECTIONS

In 2021, three homeowners in the Demarest portion of the Estates at Alpine development on lots adjacent to Block 55, Lot 25.01 in Alpine (part of the proposed Sylco Development) filed a motion seeking permission to intervene in Sylco's 2020 action against the Borough. On November 19, 2021, the Court denied the motion to intervene as untimely. Separately, homeowners of the Estates have filed suit against F.E. Alpine, its principal Richard Kurtz, and the Borough under Docket no. BER-L-3455-21, alleging that the proposed zoning on the Sylco property would violate terms of the Restated

Declaration of Covenants and Restrictions for the Estates at Alpine, which include Lot 25.01, on which the objectors relied in purchasing their properties. That action is still pending.

On January 2, 2024, Camelia B. Grymes, Esq., on behalf of two of the homeowners (the "Homeowners"), submitted a brief in opposition to the Sylco Agreement and the Sylco Motion. On January 16, 2024, Daniel Steinhagen, Esq., on behalf of Sylco, submitted a reply brief to the Homeowners' opposition. The Homeowners' objections, along with Sylco's reply, are summarized below, with my review in italics.

Homeowners' Objection: The Estates at Alpine was marketed as a single-family home community, and purchasers relied on that representation. The brief cites an amended Declaration of Covenants and Restrictions, filed as part of the certificate of incorporation of the Estates at Alpine Homeowners Association, which noted the developer's intent was either to sell the lots or construct a community of single-family homes on them. The brief also includes excerpts of marketing materials for the community that promise single-family homes. While the brief acknowledges that these representations are not legally actionable, it argues that purchasers who relied on this representation now face the possibility of increased costs to which they did not consent and a loss in the value of their homes due to the prospect of townhomes and affordable units being constructed nearby. This alleged breach of contract is also the subject of the separate *Sauma et al. v. Kurtz et al.*, action under Docket no. BER-L-3455-21. The brief notes that the Homeowners have, as permitted by the Amended Declaration, exercised their right to contest F.E. Alpine's alleged violations of the Amended Declaration in court wherein Court approval of the Sylco Agreement could be inconsistent with a potential ruling in this related case at Docket no. BER-L-3455-21.

Sylco Response: The Court should not consider the Homeowners' arguments pertaining to breach of contract, because the scope of the Fairness Hearing is limited to a determination of whether the Settlement Agreement is fair and reasonable to low- and moderate-income households, and breach-of-contract issues are extraneous to that. The Homeowners should pursue any breach-of-contract claims in their existing separate action, where they are germane. However, no aspect of the proposed inclusionary development of the Sylco Property utilizes any of the existing Estates at Alpine Homeowners' Association's roads, drainage infrastructure, landscaping or other improvements.

Master's Review: *I have no comments on the alleged breach of contract that is part of the Homeowners' litigation before the Court in a separate matter. As noted, it does not appear there will be any direct increased vehicular or stormwater management costs from the proposed Sylco Development on the existing private road*

or stormwater basin(s) currently serving the Estates at Alpine. There is no proposed vehicular connection between the proposed Sylco inclusionary development and the Estates at Alpine market development as suggested in the homeowners' objections, thus, there will be no increased vehicular traffic on the private road system of the Estates at Alpine. Also, Mr. Gimigliano has confirmed in a certification attached to Sylco's reply brief that no stormwater flow will be directed from the Sylco site into the Estates at Alpine's existing stormwater detention basin located on Lot 25.01. The entire proposed Sylco Development will also be a community of single-family homes, albeit attached single-family homes, as opposed to detached single family homes in the Estates.

Homeowners' Objection: F.E. Alpine must adhere to all restrictions of record. This requirement cannot be altered without a majority of the votes of all owners at a duly constituted meeting of the Homeowners Association, which F.E. Alpine has not secured, and adherence to all restrictions renders the proposed Sylco development not a realistic opportunity for the development of affordable housing. The Homeowners' brief acknowledges the existence of the deed restriction and COA discussed above and objects to any action to excise them, but the brief additionally highlights a provision in the 2008 deed subjecting Lot 25.01 to various easements and a "Wetlands Transition Area Limit Line." These restrictions, some of which are not mentioned in the Sylco Agreement, include:

- A condition of approval in a May 2008 Planning Board resolution required the deed conveying Lot 25.01 to F.E. Alpine, as well as all other deeds and easements for the Estates at Alpine development, to include a reference to the Estates at Alpine and to the proposed Homeowners Association, since the Homeowners Association would be responsible for maintenance of common areas and public improvements such as streets and stormwater management. These references are included in the deed conveying Lot 25.01 to F.E. Alpine, and the brief argues that the deed and the condition in the Planning Board approval both condition ownership and development of Lot 25.01 on compliance with the terms and conditions of the Amended Declaration for the Homeowners Association.
- A DEP Conservation Easement, recorded by Sylco Investments in 2018, establishing a conservation easement in the northwestern portion of Lot 25.01 and a 300-foot riparian zone on either side of the SOW stream that runs roughly north-south along the western boundary of Lot 25.01. (These constraints are discussed above.) The brief indicates that the recorded Conservation Easement includes an agreement for riparian zone compensation and suggests this is the product of a Stipulation of Settlement between the DEP and F.E. Alpine that permits F.E. Alpine to construct four (4) single-family homes on four (4) lots on the Demarest side of the development in exchange for provision of stream buffers, conservation areas, replantings, and water quality treatments in and around the Estates at Alpine. The Homeowners' brief includes in an exhibit both the DEP Easement and the Stipulation of Settlement, and asserts that, based on the Sylco Concept

Plan, the contemplated construction on Lot 25.01 will widen the road running through the northwest corner of the conservation easement beyond what is authorized, one of the buildings in the Concept Plan is situated on top of two of the wetlands areas and parking encroaches on a third, and the contemplated construction will encroach into the eastern edge of the riparian zone. The brief says the parties have presented no changed circumstances that would justify the alleged abrogation of this Conservation Easement. It also highlights the preamble to the Conservation Easement, which notes the importance of riparian zones to the public at large, thus giving the Homeowners standing to challenge the apparent abrogation of the Conservation Easement as both members of the Homeowners Association and as members of the public.

- A DEP restriction recorded by F.E. Alpine in 2023 confirms the boundaries of the riparian zone. The brief indicates the restriction does not include any indication that DEP has consented to the incursions into the riparian zone depicted in the Concept Plan, and notes the Borough prohibits by ordinance any major development in a riparian zone without DEP authorization.
- A second DEP restriction recorded by F.E. Alpine in 2023 that applies to several freshwater wetland areas and associated 50-foot transition areas across Lot 25.01. The brief claims the development as proposed in the Concept Plan “will eviscerate at least two freshwater wetlands” and “strips [Lot 25.01’s] wetlands and vegetation of its protection,” and says that a municipality’s affordable-housing plans must exist “in harmony” with State environmental regulations, thus the Court cannot order construction of the proposed development without DEP review and approval.

Sylco Response: Sylco’s planner, Paul Grygiel, PP, of Phillips, Preiss, Grygiel, Leheny and Hughes, LLC, notes in a certification attached to Sylco’s reply to the Homeowners’ objections that the presence of environmental constraints does not mean the property is not “approvable” or “suitable” per N.J.A.C. 5:93-1.3 and N.J.A.C. 5:93-4, and that the Sylco property is not encumbered by any title, deed restriction, or other hindrance that would preclude its development for affordable housing. Sylco is aware of the environmental constraints, has studied them, and Mr. Gimigliano has done significant preparatory work for this development, including numerous pre-application meetings and correspondence with DEP staff as well as on-site inspections by DEP staff during the fall of 2022. Mr. Gimigliano represents in his certification that there are regulatory provisions that are directly applicable to each regulated activity that Sylco proposes, and he has a “high” level of confidence that the necessary permits, both for flood hazard area and fresh water wetlands, will be issued to allow the Sylco Property to be developed in accordance with the Concept Plan attached to the Settlement Agreement. Mr. Gimigliano also expects the DEP to approve a *de minimis* modification to the existing Conservation Easement concerning the riparian buffer on Lots 25.01 and 26, and notes that, because the SOW at the center of

that riparian buffer does not have a drainage area in excess of 50 acres, the 300-foot riparian zone is not a regulated flood hazard area.

Securing an amendment to the WQMP is a precondition for land use regulatory approval by the DEP for the other permits that are needed. Sylco anticipates the amendment will be approved by fall 2024. Approvals from other governmental agencies are always a condition of site plan approval, so the fact that Sylco intends to obtain these approvals before even submitting a site plan application ensures the creation of affordable housing.

Master's Review: *I have no comments on the legality of the various Homeowners Association/DEP restrictions/issues raised regarding Lot 25.01 in the Homeowners' litigation that are before the court in other matter(s) and that are repeated in the Homeowners' filed objections. However, as discussed throughout this report, for the Court to find that the proposed Sylco inclusionary development presents a realistic opportunity for the production of affordable housing as presented in the Sylco Agreement and FSHC Agreement, it appears that the Court would have to enter an order that modifies, removes, or discharges the deed restriction and COA and/or finds that the Sylco Development would not violate the deed restriction. I anticipate that Mr. Gimigliano will testify on his opinion that DEP will approve all of Sylco's permit applications, which would then negate the Homeowners' objections regarding wetlands/wetland transition areas, lessening the existing encroachments in the Conservation Easement area and Riparian zone, etc. It is very common in Mount Laurel matters such as this that a court may rule to find that a proposed inclusionary development is available, suitable, developable and approvable per N.J.A.C. 5:93-5.3 in light of stated future requirements/steps in an agreement such as the Sylco Agreement's requirements for the site's future inclusion in a master plan and for its rezoning prior to DEP's approvals of required permits, prior to local Planning Board review of a site plan consistent with the Sylco Concept Plan, and prior to all customary outside agency development approvals. COAH's definition of "approvable" at N.J.A.C. 5:93-1.3 clearly anticipates that "[a] site may be approvable although not currently zoned for low and moderate income housing."*

As set forth herein, I acknowledge that there are legal issues that must be resolved by the Court in order for the Sylco Development to be deemed "available" as that term is defined by COAH as "a site with clear title, free of encumbrances which preclude development for low and moderate income housing." Conditioned on the Court's findings and/or rulings that the Sylco site is or will be available per court decision, this report concludes with a recommendation that the Court find that the Borough's Agreements with both Sylco and with FSHC are fair to the protected class for the reasons set forth herein.

Homeowners' Objection: There is no evidence that DEP will issue the needed permits to widen the roadway in the conservation easement or build over the wetland parcels and within the riparian zone. The brief notes that F.E. Alpine currently has applications pending for various permits pertaining to

the environmental constraints on the property, to which it says the Homeowners and other area residents have submitted extensive written objections. Without permits, the brief argues, the Sylco Agreement does not represent a “reasonable” opportunity for the construction of affordable housing.

Sylco Response: With regard to the conservation easement, the deeds stipulate that Sylco and the DEP can modify the terms of the easement in the future. With regard to the deed restrictions for the freshwater wetland areas and the riparian zone, as discussed at length above, while DEP permitting approvals will be required, Sylco’s engineer is confident that all required permits will be granted. Neither deed restriction prohibits the use of, or restricts the availability of, the Sylco Property for inclusionary housing.

Master’s Review: *Sylco acknowledges it must secure all outside agency approvals, including all required DEP approvals. With regard to the DEP approvals, the amendment to the area-wide WQMP must be adopted first, after which Sylco has indicated it will resubmit all required DEP permit applications. As discussed above, Sylco stipulates that it has formulated plans to address any DEP concerns with construction over wetlands areas on Lot 25.01 and encroachment into the riparian zone on Lots 25.01 and 26, and Mr. Gimigliano certified that he has a high degree of confidence that DEP will accept Sylco’s plans, and all required permits will be granted. Again, contingency on such outside agency approvals (including DEP’s) is not at all unusual in either Court fairness hearing proceedings including in this Alpine DJ matter as well as in municipal planning board site plan reviews.*

Homeowners’ Objection: The fact that the steep slopes on the lot are not natural but constructed is immaterial; disturbance of them will have the same effect regardless, and thus the proposed rezoning ordinance, which exempts Sylco from several provisions of the Borough’s Steep Slopes and Tree Ordinances as discussed above, violates both ordinances.

Sylco Response: Although the Homeowners acknowledge that the Court may not address planning and zoning issues at a Fairness Hearing, they are asking the Court to do just that. In its opinion in East/West Venture, the Appellate Division noted that it is inappropriate to consider the substantive validity of a zoning ordinance that is not yet adopted. Challenges to the adoption of a zoning ordinance to implement a settlement would be permitted “in the normal course,” and such challenges should be consolidated into the affordable housing action and decided before entry of final judgment.

Master’s Review: *As noted in the proposed Sylco rezoning ordinance, these constructed steep slope areas are already disturbed and natural landscaping and vegetation have been removed, thus it is not possible for Sylco to preserve them in their original state. Mr. Gimigliano will testify that more existing disturbance in the*

riparian zone on lots 25.01 and 26 will be restored than new disturbance imposed, and that he is confident DEP will approve the required permits to encroach into the edges of the riparian zone.

Homeowners' Objection: The Sylco development will impose additional costs on Estates at Alpine homeowners to which they have not consented. Members of the Homeowners Association are responsible for maintenance of the community's common areas, and a condition of approval included in the October 28, 2008, Planning Board resolution of approval made clear that F.E. Alpine would at no point request that the Borough assume responsibility for any internal roadways (a justification for granting variances to impervious coverage limits). The brief argues that a) the costs to maintain these roadways will increase given the increase in the number of residents using them; and b) the increased number of users increases the likelihood of an accident, for which the Homeowners Association would be responsible. The brief points out that the Amended Declaration prohibits any "agreement, document, amendment, or supplement which ... materially increases the financial obligations of the Owners" from being made without members' prior consent, and states that the Homeowners do not consent to these anticipated increases in financial obligation.

Sylco Response: As noted above, no aspect of the proposed development of the Sylco Property will utilize any of the existing Homeowners' Association's roads, drainage infrastructure, landscaping or other improvements. The Homeowners should address any claims of purported impact to their homes where they are appropriate (i.e., in a hearing before the Alpine Planning Board, when Sylco seeks site plan approval).

Master's Review: *The objectors have provided no financial analysis to support this objection. There is no evidence in the Concept Plan that any of the internal infrastructure that currently serves the Estates will see increased use or cost as a result of the Sylco Development. To the contrary, Mr. Gimigliano indicates the proposed Development will not have any access to Frick Drive from Lot 25.01, thus there will be no additional vehicular traffic on internal roadways from the proposed Sylco Development. In addition, Mr. Gimigliano has confirmed that no stormwater runoff from the proposed Sylco Development will be directed to the existing Estates' stormwater basin on Lot 25.01. Thus, the on-site infrastructure that currently serves the Estates will not be used by residents of the proposed Sylco Development and will not be affected in any way by it.*

Homeowners' Objection: The proposed rezoning ordinance for the Sylco properties fails to advance several purposes of the MLUL and is not consistent with the Borough's Master Plan. The brief quotes excerpts from the Borough's 2002 Master Plan and 2020 Master Plan Reexamination Report to highlight the stated importance of preserving the Borough's natural features through such regulatory

measures as steep slope and tree preservation ordinances, from some provisions of both of which the proposed rezoning ordinance exempts the Sylco development as discussed above; and the importance of preserving and protecting the residential character and existing density of the community by limiting intensities of use to the levels and locations prescribed in the Master Plan. The brief also quotes the purposes of the MLUL it contends the zoning ordinance violates, including ensuring development in one municipality does not conflict with that of neighboring municipalities, the county, or the State; promotion of appropriate population densities and concentrations that will contribute to well-being and preserve the environment; conservation of the environment, open space and valuable natural resources; and providing municipalities the flexibility to offer alternatives to traditional development where appropriate in areas where growth can best be accommodated and natural resources can be preserved. The brief argues that because the Sylco Agreement is premised on adoption of the proposed rezoning ordinance, and because the proposed ordinance, while promoting the worthy goal of developing affordable housing, fails to advance several purposes of the MLUL and is inconsistent with the Borough's Master Plan and thus should not be adopted, the Sylco Agreement should be rejected.

Sylco Response: If an ordinance advances one purpose of the MLUL but does not advance another, it will be upheld. As detailed in Mr. Grygiel's certification, the proposed rezoning of the Sylco Property advances multiple purposes of zoning, including advancement of the general welfare by providing needed affordable units; securing safety from flooding by leaving approximately three-quarters of the Sylco site without impervious cover and providing stormwater management infrastructure compliant with the latest DEP regulations; providing sufficient light, air and open space through appropriate setbacks and building separations and by leaving much of the site as open space; ensuring that development in Alpine does not conflict with development in adjacent municipalities such as Demarest and Closter (noting that Sylco is also developing an inclusionary townhome project in Demarest, adjacent to the Sylco site in Alpine); promotion of appropriate population densities by developing at a gross density of less than two (2) units per acre, typical of lower-density suburbs such as Alpine; providing sufficient space in an appropriate location for a variety of residential uses, in particular by increasing the diversity of Alpine's housing stock, to meet the needs of New Jersey's citizens; and promoting a desirable visual environment through specific requirements for design of the development and for open space – all of which are listed as purposes of zoning set forth in N.J.S.A. 40:55D-2. If even one of these is correct, the proposed ordinance will advance the purposes of zoning.

A Mount Laurel settlement frequently includes an agreement to rezone a particular piece of property to permit development of a substantial number of affordable housing units because the current zoning

regime does not allow it. The Sylco Agreement, and the rezoning ordinance it contemplates, are no different than many other rezonings approved around the State that permit the construction of a substantial number of affordable housing units on properties that would otherwise be undevelopable “due to zoning regulations that have, oftentimes, proven to effectuate exclusionary outcomes.”

*Master's Review: The rezoning ordinance is not required to advance **all** purposes of the MLUL; some purposes would not be applicable. Thus, the Homeowners' claim that the ordinance “fails to advance” several purposes is immaterial. The proposed ordinance does not violate any of the provisions of the MLUL. Lot 25.01 is in State Plan PA1 the goals of which are to “[p]rovide for much of the state's future redevelopment; revitalize cities and towns; promote growth in compact forms; stabilize older suburbs; redesign areas of sprawl; and protect the character of existing stable communities.”³ Sylco's proposed Development is consistent with these goals. The on-site affordable housing set-aside of 20%, that is referred to in the Homeowners' objection as inadequate, is the COAH/Superior Court standard in inclusionary zoning specifically for municipalities that receive a VLA, as Alpine has, and which also satisfies the MLUL requirement to provide for affordable housing. As to the contention that the ordinance fails to provide the municipality the flexibility to offer alternatives to traditional residential development, the single-family dwellings proposed by Sylco are to be attached, rather than 40 separate single-family detached dwellings. The higher density over a smaller area helps reduce sprawl and preserve more open space and valuable natural resources than separate, detached single-family dwellings would – exactly the opposite of what the objectors claim. At the same time, when viewed through a Mount Laurel lens, the proposed development is low-density single-family development; at 1.8 per gross acre; or just 3.5 units per net acre, it is still lower in density than the typical COAH or Court minimum of 6 units per acre for inclusionary development (or the even higher minimum density for rental inclusionary developments). Thus, the proposed Sylco ordinance does provide the Borough with the flexibility to accommodate an inclusionary development and provide affordable housing while at the same time maintaining the low-density, single-family character of the surrounding area.*

As to the incompatibility with the Borough's Master Plan discussed in the Homeowners' objection, the Sylco Agreement requires the Borough, within 90 days of Court approval of the Agreement, to adopt an amendment to the Master Plan consistent with the proposed rezoning ordinance and to include the site in an adopted/endorsed HEFSP (a required master plan element) within 120 days.

³ New Jersey State Development and Redevelopment Plan, 2003: <https://nj.gov/state/planning/assets/docs/2001-state-plan/stateplano301oid.pdf>.

7.0 THE FAIRNESS ANALYSIS

The Settlement Agreements between the Borough and Sylco and the Borough and FSHC must be subjected to the fairness analysis embodied in the East/West Venture case referenced above. Also, it is worth noting, as the Court did in Morris County Fair Housing Council v. Boonton Township 197 N.J. Super, that "...it may be assumed that generally a public interest organization will only approve a settlement which it conceives to be in the best interest of the people it represents." FSHC was involved in all aspects of this case including the determination of the Borough's fair share. FSHC is a public interest advocacy organization in New Jersey devoted to promoting the production of affordable housing. Consequently, FSHC's endorsement of both Settlement Agreements is a compelling indication that it believes the Agreements are fair and reasonable to the protected class.

Under the East/West Venture case, the Court established criteria for evaluating the fairness of settlements between municipalities and builder plaintiffs in exclusionary zoning cases. By contrast, these settlements involve a municipality, a developer, and a public interest organization. Consequently, the East/West Venture fairness criteria must be adapted to serve the analysis of these settlements.

First, the number and rationale for the affordable housing units to be provided must be considered by evaluating them per Court-upheld compliance regulations. In this case, the parties in the FSHC Agreement have agreed for purposes of settlement to stipulate to the Borough's obligations per COAH's Prior Round regulations, the Court's Prior Round RDP calculation and as determined via Judge Jacobson's Third Round methodology trial discussed above, which results in a Rehabilitation Share of four (4); a Prior Round obligation of 108 units after adjustment via a 20% cap per N.J.A.C. 5:93-2.16; and a Third Round obligation of 122 units, also after adjustment via a 20% cap. The Prior Round obligation has been further adjusted to an RDP of 32 units, through a Prior Round VLA previously approved by the Court, and the Borough seeks Court approval of a Third Round VLA per COAH regulations at N.J.A.C. 5:93-4.2, resulting in a Third Round RDP of 32 units as agreed to by the parties in the FSHC Agreement, and a combined Unmet Need obligation across both rounds of 166. In calculating the fair share, FSHC and the Borough relied on COAH's regulations for the Prior Round and relied on a recognized Third Round court-approved methodology used by a number of experts and trial court judges throughout the state and adjusted the resulting obligations via the permissible 20% cap as well as a VLA and RDP determination in both rounds. The absolute Third Round fair share number is of lesser importance than the municipal compliance plan's prospects for delivering affordable housing successfully in VLA municipalities like Alpine, which are entitled to a Prior Round

and Third Round fair share adjustment due to limited developable, vacant land with access to public water and public sewer.

Additionally, the Sylco Agreement provides for the production of eight (8) affordable family rental units, which is 20% of the total proposed inclusionary development, a set-aside historically required for vacant land adjustment towns per COAH's court-upheld regulations, and which is specifically higher than the 15% setaside required for rental inclusionary developments in non-VLA municipalities.

The FSHC Agreement provides that if a decision of a court, or a determination by an administrative agency responsible for implementing the FHA, or an action by the NJ Legislature, would result in a calculation of an obligation for the Borough for the period 1999-2025 that would be lower by more than 10% than the obligation established in the FSHC Agreement, the Borough may seek to reduce its obligation accordingly. Should the Borough prevail, it will still be obligated to adopt an HEFSP that conforms to the terms of the FSHC Agreement and to implement all compliance mechanisms included in the FSHC Agreement and may carry over any resulting extra credits to future rounds in conformance with then-applicable law.

Second, under the fairness analysis, any other contributions made by the municipality, FSHC, or Sylco must be considered. Through settlement, the parties are able to avoid the delays and the expense of a trial, which allows Sylco, the Borough and its Planning Board to focus on ensuring timely delivery of the proposed affordable units and addressing the Borough's fair share obligation.

In addition, both Settlement Agreements provide specific actions each of the parties must take to implement the Agreements' provisions, including the following:

- The Borough must timely adopt a Master Plan amendment that is consistent with the proposed rezoning ordinance and with the submitted Development Concept Plan for the Sylco site and must rezone the Sylco properties for the proposed inclusionary development. The form of ordinance has been provided as part of the Sylco Agreement, and only *de minimis* modifications to it, to accommodate engineering requirements, may be made. No changes may be made regarding use of the property, maximum density, or the location and layout of buildings as set forth in the Concept Plan provided, nor may any changes be made to the total number of units or the required affordable set-aside. The parties must defend the rezoning ordinance against any third-party challenges.

- The Borough must adopt or amend all necessary documents to implement the terms of the FSHC Agreement, including an HEFSP, Spending Plan, Affordable Housing Ordinance, Affirmative Marketing Plan, etc., within 120 days of an Order approving the Agreement.
- The Planning Board must review Sylco's development plans within a prescribed timeframe, with special meetings if necessary, to facilitate the Development.
- Sylco has applied to DEP for inclusion of its properties in an amended WQMP and must also at its sole cost and expense extend any required public water or sewer infrastructure to serve the proposed Development. The Borough is required to support these efforts.
- The parties are required to cooperate to ensure that the deed restriction and COA are modified, removed, or discharged, or, as Sylco elected, to seek a Court finding that the proposed Development does not violate the deed restriction and/or COA.
- Sylco is required to support the Borough's application for Court approval of the FSHC Agreement and its requests to obtain a JOR in its DJ action.
- To create additional opportunities for development of affordable housing, the Borough is required to adopt an inclusionary overlay ordinance on the radio tower site in the Borough; and is required to adopt mandatory Borough-wide affordable housing set-aside provisions, both of which will require a 20% on-site affordable housing set-aside.
- The FSHC Agreement acknowledges that opportunities may arise for the provision of Unanticipated Units, not contemplated in any of the Unmet Need mechanisms, and requires any such units to comply with all applicable UHAC, COAH, and FHA requirements.
- The Borough is required to support any applications for public water or sewer service to any sites, whether they are included in the FSHC Agreement or are Unanticipated Sites, which will provide affordable units.
- For the expansion of the Municipal Site, the Borough is required to demonstrate adequate and stable funding, and to provide an implementation timeline that requires construction to start by March 31, 2025. Should BCUW not be able to start construction by that date due to lack of funding, the Borough must either find an alternate site that does not require third-party funding or bond to fund the BCUW project. Should DEP determine that the current well and septic system cannot accommodate the additional 14 bedrooms contemplated, the Borough must timely identify an alternative site for provision of those units.
- The Borough is required to establish and fund a four-unit affordable accessory apartment program and to keep it in place through the end of the Third Round on July 1, 2025, and to retain an experienced Administrative Agent to administer it.

These provisions will help ensure that no untoward delays will hinder the timely provision of sufficient affordable units and bonuses to satisfy the Borough's Third Round RDP. These provisions generally, and the requirement for Sylco and the Borough to work together to excise the deed restriction and COA in particular through court action, will foster additional opportunities for production of affordable units, require the Borough to capture those opportunities as they may arise, and provide a process for ensuring that all such opportunities are evaluated and implemented appropriately.

Lastly, the Court is to consider any other components of the Agreements that contribute to the municipality's satisfaction of its Mount Laurel obligation. The FSHC Agreement includes a number of provisions that facilitate the Borough's satisfaction of its fair share responsibilities, including the requirement that 13% of all affordable units approved and constructed after July 1, 2008, be affordable to very low-income households earning 30% or less of regional median income; that at least 50% of all affordable units developed to satisfy the Borough's Third Round RDP or combined Unmet Need (inclusive of the 13% very low-income units) be affordable to households earning 50% or less of regional median income; that at least 25% of units developed are to be rental units, with at least half of those available to families; and that no more than 25% of units developed may be age-restricted affordable units. Affordable units in inclusionary developments must be phased in accordance with N.J.A.C. 5:93-5.6(d) and must be affirmatively marketed. Deed restrictions on affordable units in the Borough must remain in place for at least 30 years, until the Borough in its sole discretion takes action to extend or release the unit from its controls.

The FSHC Agreement also prescribes the process by which the Borough is to update regional income limits and calculate increases in regional income limits in order to determine eligibility for affordable units.

I recommend the Court include a provision in any Order approving the FSHC Agreement specifically approving the AHPNJ income limits and implementing the mechanism for the calculation of increases as set forth in Term #16 of the FSHC Agreement (Recommended Fairness Order Term).

The FSHC Agreement sets November 1, 2024 as the date by which the Borough must file its annual affordable housing unit monitoring reports, July 1, 2024 as the date by which the Borough must file its Midpoint Review Report and Very Low-Income Monitoring Report and requires the filing of annual trust fund monitoring reports on each anniversary of the Court's entry of an order approving its Spending Plan.

If a binding legal determination would lower the Borough's Third Round obligation by more than 10%, the Borough is still obligated to adopt and implement an HEFSP that conforms to all the terms of the FSHC Agreement, including adopting any site-specific zoning. Any units generated above the number required to satisfy the reduced obligation may be carried over to a future round in accordance with then-applicable regulations.

These represent specific measures in both Agreements intended to ensure that the Borough fulfills all provisions of the Agreements, thereby contributing to the satisfaction of the Borough's Mount Laurel obligation.

8.0 CONCLUSIONS AND RECOMMENDATIONS

Based on my review above including the review of the Homeowners' Objections, I find that the Settlement Agreement between FSHC and the Borough of Alpine is fundamentally fair to the interests of low- and moderate-income households in the region. In addition, subject to the Court's finding/ruling that the Sylco Development is 'available,' I find that the Settlement Agreement between Sylco and the Borough of Alpine is also fundamentally fair to the interests of low- and moderate-income households in the region.

I would recommend that Your Honor approve both Agreements, conditioned on the Court's action or finding either that the deed restriction and COA may be modified, eliminated, removed, discharged, etc., or that the Sylco inclusionary development may proceed ahead and would not violate the terms of either the deed restriction or COA. It is my belief that the Court's removal of these restrictions or finding that the Sylco Development will not violate the deed restriction/COA, is necessary to enable the Sylco inclusionary development, and leaving them in place will specifically inhibit such inclusionary development and call into question the realistic opportunity for the production of affordable housing in both Agreements.

Also, notwithstanding the required documentation for inclusion in the Borough's Third Round HEFSP as detailed in the FSHC Agreement as well as in the Sylco Agreement, I recommend that Your Honor approve the Borough's fair share determination and preliminarily approve the Borough's Third Round RDP determination and the Third Round compliance mechanisms set forth in the FSHC Agreement as providing a realistic opportunity for the Borough to address its RDP and to provide Unmet Need means to assist in addressing its constitutional obligations. The Court may wish to include the conditions noted herein in a Fairness Order approving both Settlement Agreements. Per

the FSHC Agreement, the Borough has 120 days to adopt and then to endorse its HEFSP, spending plan and general implementing ordinances.

I would be happy to answer any questions that Your Honor or the parties may have either prior to or at the upcoming Fairness Hearing.