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Affordable Housing: The Next Generation

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June 23, 2015

On March 10, setting aside the state's "nonfunctioning" affordable housing process, the New Jersey Supreme Court issued a ruling removing executive branch oversight and enforcement of low- and moderate-income housing and reclaimed those responsibilities for the courts.

The ruling is the most significant action in the last 30 years of the so-called Mount Laurel doctrine, which held that municipalities must provide their "fair share" of affordable housing. We continue to be in the Wild West until the courts sort out various issues, but unlike the past 16 years, during which time there were no valid regulations, at least now we know who the sheriffs are, and they are the Mount Laurel judges in the various vicinages.

In many ways, the recent decision turns back the clock to a time when interested parties were permitted to bring builder's-remedy actions against municipalities engaging in exclusionary zoning. Although generally regarded as unlikely, the Supreme Court continues to invite the Council on Affordable Housing (COAH) to adopt legitimate regulations or the Legislature and governor to adopt valid legislation, either subject to judicial oversight.

History

In 1975, the New Jersey Supreme Court found that municipalities are constitutionally obligated to provide a variety and choice of housing for citizens of all income levels, but the ruling had no teeth and little action was taken in response. Thus, in 1983 the Supreme Court created the "builder's remedy," whereby developers were entitled to rezoning and approval for inclusionary development for municipalities found to have engaged in exclusionary zoning. The Fair Housing Act was enacted to provide alternative means of enforcing the obligation to provide affordable housing and offered municipalities immunity from builder's-remedy suits so long as the municipality obtained "substantive certification" of their affordable housing plan from COAH.

Previous COAH regulations, commonly known as First Round (1987-1993) and Second Round (1993-1999), provided the number of affordable housing units allocated to each municipality, as well as the procedural and substantive requirements for how the allocation was to be met. COAH has not adopted constitutionally compliant regulations since then despite various attempts stricken by the courts or proposed and not adopted. Under existing legislation, Third Round obligations were to have started in 1999 and provided for a 10-year allocation of affordable housing units. With the 16-year delay, the Third Round should apply from 1999 until

2025, a 26-year period of present and unmet need. In addition, municipalities remain subject to unmet prior-round obligations.

The Supreme Court ruling essentially labeled COAH as a "moribund" agency that failed to act in a responsible manner. Courts have taken back responsibility to determine affordable housing allocations and how those obligations are to be met by municipalities. Those obligations can be met via 100 percent affordable housing projects, often undertaken by not-for-profit organizations, with local, state and/or federal grants, loans or tax credits. Alternatively, municipalities can meet their obligations by zoning for inclusionary developments whereby developers set aside a percentage of the new homes for deed-restricted affordable housing.

The Clock Is Ticking: A 30-Day Window for Municipalities

The Supreme Court ruling went into effect on June 8, opening a 30-day window for municipalities to file declaratory judgment actions seeking a determination of their obligation and approval of a compliant plan. The court identifies two types of municipalities and treats them differently. As many as 60 municipalities obtained substantive certification under the invalidated Third Round Rules. Those towns will be required to revise their plans where necessary to comply with allocation to be set by the court. The court presumes those plans to be largely valid, but it is not clear that the court understands the extent that those plans may be wholly out of step, relying for instance on phantom 100 percent affordable housing projects without identifying the land or funding source.

The Mount Laurel judges are expected, per the court, to generously grant immunity from builder's-remedy suits during the period of supplementation, mediation and reconciliation. "Participating" municipalities—those who, at a minimum, filed a resolution of participation with COAH during the existence of the now invalidated Third Round Rules—are given up to five months to submit an affordable housing plan and will be insulated from exclusionary zoning suits during that five-month period and for a brief period thereafter, during which the court will determine municipal compliance.

Municipal Allocation of Unmet Present and Prospective Need

Although the courts have some flexibility based upon the Supreme Court ruling, courts must initially allocate affordable housing obligations to the various municipalities largely relying upon First and Second Round methodologies for municipalities that file a declaratory judgment action. Using those rules, housing advocates have determined that in excess of 170,000 affordable housing units would need to be constructed over the next 10 years to satisfy the unmet need for the period of 1999 through 2025. Those numbers are likely to be challenged by municipalities.

Many municipalities will argue that providing more than 170,000 units of affordable housing is unrealistic and should be adjusted by the Mount Laurel judges. Housing advocates will argue that the low- and moderate-income households of New Jersey have suffered for far too long without realistic opportunities for affordable housing. Moreover, the requirement is to plan and zone for affordable housing. Ultimately, given zoning for affordable housing, the market will decide what actually gets built.

What Happens When a Plan Is Submitted?

Once a municipality submits a housing element and fair-share plan, the courts will decide whether or not the plans are constitutionally compliant—i.e., they provide a reasonable opportunity to develop affordable housing. Interested parties seeking to have their property rezoned for affordable housing are well advised to participate in that process, which may include mediation and reconciliation. No doubt, housing advocates will seek to ensure that the municipal plans provide a reasonable opportunity for affordable housing.

Immediate and Potential Exposure for Municipalities

Of the 565 municipalities in New Jersey, well over 300 of them have previously submitted affordable housing plans to COAH. Interestingly, the Supreme Court did not address the estimated 30 to 60 municipalities that bypassed COAH and submitted itself, typically *ex parte*, to the jurisdiction of the court. However, given that those municipalities are already subject to the court's jurisdiction, those actions are expected to largely continue apace, with notice to all interested parties. Those municipalities that have not participated before COAH or the courts have immediate exposure to exclusionary zoning suits. Similarly, those municipalities that do not choose to file the declaratory judgment actions countenanced by the Supreme Court will similarly be exposed once the 30-day filing window closes.

Where Does That Leave Property Owners and Developers Now?

Perhaps the most critical question for property owners and developers is what they should be doing to respond or react to this game-changing decision. Most interested municipalities are developing affordable plans now and will file during the 30-day window.

Property owners and developers should first identify properties that may be suitable for affordable housing. Second, they should gain control of those properties they do not already own—specifically, developers will want to put the property under contract.

Property owners and developers also need to perform their due diligence on the property to confirm suitability for affordable housing. In other words, does it have the proper infrastructure to support affordable housing, including access to sewer and water? Does the property have environmental constraints that prevent the development of affordable housing? Property owners and developers must be able to substantiate that their properties are suitable for the development of affordable housing.

In addition, municipalities should be put on notice that property owners or developers are interested parties and want to be on the service list and are willing to develop their suitable property for affordable housing. Where the opportunity is afforded, developers and landowners should offer and indeed sit down with municipal officials to propose their site for affordable housing. Thereafter, depending upon the results of those efforts, the owner/developer should participate in the declaratory-judgment actions to be filed to advance their position, either in favor or opposed to the municipal plan.

Conclusion

Despite years of inaction and unconstitutional action by COAH, New Jersey's municipalities are on notice of the need to submit declaratory-judgment actions to establish their affordable housing allocation and obtain court ordered confirmation of their affordable housing plan. Developers and land owners are well advised to advance or protect their rights to develop appropriate property for affordable housing. Although the Supreme Court did not answer many questions and delegated many issues to local Mount Laurel judges, there is now a process that will unfold in the months to come whereby the low- and moderate-income households of New Jersey will be provided the opportunity for housing that is good, clean and affordable to their income levels. For municipalities, land owners and developers, the time to act is now!•

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