

Affordable housing ruling creates opportunity for developers, owners

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On March 10, 2015, setting aside the state's "non-functioning" 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.

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.



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. 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. Third Round obligations were to have started in 1999 and provided for a 10 year allocation of affordable housing units. With a 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 recent Supreme Court ruling 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% 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 Supreme Court ruling goes 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 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



THE AFFORDABLE HOUSING RULING IS THE MOST SIGNIFICANT ACTION IN THE LAST 30 YEARS.

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 appropriate 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. Developers and landowners should offer and, when the opportunity is afforded, 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.

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. For municipalities, land owners and developers, the time to act is now.