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Courts' procedures coming into focus as New Jersey's affordable housing saga continues

By **Special to NJ.com**

on August 19, 2015 at 11:34 AM, updated August 21, 2015 at 8:46 PM

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Since 1975, New Jersey courts have consistently declared that municipalities have an obligation to provide a reasonable opportunity for development of a variety and **choice of housing for households of all income levels**, otherwise referred to as the "Mount Laurel" doctrine. In 1985, New Jersey -- becoming a model for the nation -- adopted the Fair Housing Act (the "FHA"). The FHA created the Council on Affordable Housing (COAH) and set forth the process for ensuring that municipalities comply with the obligation, as well as a means of municipal immunity from builder's remedy lawsuits filed against recalcitrant municipalities engaged in the practice of exclusionary zoning.

Despite criticism, that process largely functioned until 1999, when COAH failed to adopt constitutionally compliant regulations for the "Third Round" of affordable housing compliance in New Jersey. On March 10, 2015, setting aside the state's "non-functioning" affordable housing process, the New Jersey Supreme Court issued a **ruling removing COAH oversight** and enforcement of the Mount Laurel doctrine and reclaimed those responsibilities for the courts. The ruling was the most significant action in the last 30 years of the Mount Laurel doctrine.

In taking these historical steps, the Supreme Court set forth overarching criteria for establishing affordable housing obligations, but left the details of the process for enforcing and the substance for compliance with the obligations to the 17 Mount Laurel designated judges in New Jersey. For instance, the Supreme Court determined that municipalities could seek temporary immunity for up to five months upon filing a "declaratory judgment" lawsuit on or before July 8, during which time municipalities would submit to the respective courts their fair share affordable housing obligation -- in other words, the number of housing units, as well as a housing element and fair share plan for how the municipality will comply with that obligation for affordable housing.

Since then, hundreds of municipalities have filed with the various courts, seeking immunity from builder's remedy suits and essentially agreeing to submit a constitutionally complaint fair share plan. While each municipality will submit distinctive fair share plans, the process and compliance criteria are expected to eventually create some sort of uniformity between the various Mount Laurel judges.

Accordingly, some judges are taking a wait-and-see position while others are trying to get out ahead of the issue. No judge will determine the criteria for the entire state, but early acting judges will set the benchmark against which subsequent action will be weighed and measured. Although early decisions may be intended to and actually set the criteria, the final word on how these matters are to proceed will likely require a decision from the Appellate Division or Supreme Court before we know exactly how the process and compliance criteria will function.

In the meantime, one early decision has been handed down from Middlesex County Superior Court Judge Douglas K. Wolfson acting on an application from Monroe Township. Being that Judge Wolfson is a well-respected jurist with a **strong land use background**, his decision is certainly instructive even if it may not set the tone for the entire state.

Judge Wolfson reached a number of relevant conclusions at this early stage of the process:

1. A five-month temporary immunity was granted Monroe Township, which actively and in good faith has sought historically to comply with its Mount Laurel obligations.
2. The right for a developer interested in developing affordable housing, as well as the Fair Share Housing Center has the right to intervene. Indeed, Judge Wolfson indicated that any interested party has the opportunity to intervene, but limited intervention to the question of whether the municipality has complied with its constitutional Mount Laurel housing obligation.
3. It was premature to allow site-specific claims (builder's remedy actions) to proceed until such time that the court determines that the municipality's affordable housing plan is noncompliant, but the municipality is "determined to remain so by refusing to timely supplement its plan to correct its perceived deficiencies."
4. Fair Share Housing Center's claims alleging that the township's housing plan was unconstitutional and violated the New Jersey Civil Rights Act were granted, given that these claims were not site-specific.

Interested parties, notably developers and housing advocates, **play an important role** in this process. Indeed, Judge Wolfson welcomed the "potentially useful and critical voices which may have legitimate insights or analyses relevant to the constitutionality of the town's proposed plan." Whether through potential builder's remedy claims by developers and property owners or mediation, negotiation and conciliation, parties may and should consider participation in the process, assuming they have control over property suitable for development as affordable housing, presumably with compensatory benefits to the developer or owner, such as increased density -- in other words, the number of housing units per acre.

Of the 17 Mount Laurel judges, many have reached preliminary conclusions similar to those mandated by Judge Wolfson. Albeit none are published and thus difficult to track, none are known to include wholesale differences from Judge Wolfson's very early decision.

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