



Are you ready? New Jersey Supreme Court sends affordable housing oversight back to trial courts

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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 jurisdiction over low- and moderate-income housing and sent enforcement and oversight back to the trial courts. The ruling is the most significant action in 40 years, when the court originally established 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 individuals, developers, and advocates had to sue to prevent municipalities from blocking approval of zoning for affordable housing development. Although generally regarded as unlikely, the Council on Affordable Housing (COAH) – the executive branch body tasked with setting fair housing obligations and approving municipal plans for meeting those obligations – still has the opportunity, as spelled out in the court’s decision, to reverse their inaction and set new rules.

About the Ruling

Above all else, the new ruling eliminates the requirement for builders and developers to “exhaust the administrative process” through COAH before entering into litigation. The ruling also set a 30-day window, commencing on June 8, 2015, for the roughly 360 municipalities that have appeared before the COAH since 2008 to formulate and submit compliant affordable housing plans to the courts. Those that do not, however, will be subject to builder’s remedy lawsuits and could be ordered by trial courts to accept higher-density development – usually four market rate units for every affordable unit.

Writing for the unanimous court, Justice Jaynee LaVecchia indicated that there was little doubt of the necessity to sidestep COAH in the administration of affordable housing rules, writing “There is no question that COAH failed to comply with this Court’s March 2014 Order.” That March 2014 order was set after the court upheld a 2013 appellate ruling that struck down obligation rules set by the COAH in 2008.

After proposing new rules that drew widespread criticism, COAH stood pat and failed to take action, thereby violating a court-imposed November 2014 deadline for adopting new rules. Since its former rules regarding housing obligations expired in 1999, “COAH has failed twice to adopt updated regulations,” the decision noted.

Who Is Affected?

The decision clearly states that communities must fulfill any prior round obligation remaining unbuilt when the 1999 rules expired. It will be up to the courts to determine any obligations from 2000 to the present, and for the next 10 years, assuming new rules are not agreed upon before the Court’s ruling takes effect.

“The process established is not intended to punish the towns” LaVecchia wrote in the opinion. “Our goal is to establish an avenue by which towns can demonstrate their constitutional compliance to the court.”

Aside from the nearly 400 municipalities who have until July to submit new plans for affordable housing obligations, the court’s ruling presents the greatest opportunity for builders and developers to seek legal remedy through the courts to force compliance.

Are You Prepared to Take Action?

Although the municipalities involved still have some time to submit constitutionally compliant plans, the time to begin working with these municipalities and partner with them to identify suitable and favorable sites for rezoning *is now*. It may be more advantageous for builders to be involved in helping these municipalities devise their plans for compliance than waiting for the courts to intervene. At the very least however, for those municipalities less inclined to engage, this ruling clearly implies that builder's remedies will be available. Regardless, builders and developers should seek advice from legal counsel to review and evaluate the range of legal options and remedies available by this new ruling.

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