

## Court Rejects New Jersey Municipality's Attempt to Unilaterally Extend Affordable Deed Restrictions on Condominium Units

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In a recent opinion, *Society Hill at Piscataway Condo. Ass'n v. Township of Piscataway*, Middlesex County Superior Court Judge Douglas Wolfson ruled that municipalities could not unilaterally extend certain expiring deed restrictions encumbering affordable housing units if those restrictions did not explicitly empower the municipality to do so.

The Society Hill at Piscataway Condominium was developed more than thirty years ago following protracted Mt. Laurel litigation, which resulted in the rezoning of several properties throughout Middlesex County to accommodate affordable housing development. As part of the settlement of the litigation, Society Hill sought site plan approval to build an inclusionary development containing 109 low- and moderate-income units. As a condition of the site plan approval, an Affordable Housing Plan was adopted which, by its terms, was to expire thirty years from its execution. The Plan required that the Association's master deed and each of the unit deeds to the 109 units contain restrictions prohibiting the owner from selling or leasing the unit to a purchaser or tenant whose income exceeded the threshold necessary to qualify for low- and moderate-income housing as set by the State. The settlement was memorialized by the Court and, as a consequence, Piscataway received credit for the 109 deed-restricted units against its fair share obligation since that time.

On July 17, 1989, the Council on Affordable Housing (COAH) adopted its first recapture regulation, which prevented the purchaser of a deed-restricted unit from reaping a windfall after the expiration of the deed restrictions. In 2001, COAH adopted the Uniform Housing Affordability Controls (UHAC), which provided in pertinent part that "[a] municipality shall have the right to determine that the most desirable means of

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promoting an adequate supply of low- and moderate-income housing is to prohibit the exercise of the repayment option and maintain controls on lower income housing units sold within the municipality beyond the period required by N.J.A.C. 5:93-9.2.”

On December 8, 2012, nearly thirty years after the first affordable housing units were constructed and sold, Piscataway adopted an ordinance that purported to extend the deed restrictions on the 109 deed-restricted units in Society Hill through June 7, 2045. Piscataway asserted that the ordinance was adopted pursuant to the UHAC and N.J.S.A. 5:97-6.14(a), which permits a municipality to extend such restrictions to address its growth share obligation.

Society Hill and five of its members sued Piscataway, claiming that the extension was unlawful, that it violated their legal rights, and that it constituted a cloud on their respective titles. The Township argued that its power vested in the UHAC and in the “state’s strong constitutional and public policy imperatives, which compel municipalities to provide their respective fair share of affordable housing.” With respect to the UHAC, the Township claimed that the power contained therein for municipalities to unilaterally extend the restrictions applied retroactively because, when read as a whole, the Plan “reserved” the Township’s right to amend or modify the covenants unilaterally. The Court disagreed, finding no express language in the Plan, the Master Deed or in any of the individual deed restrictions which permitted the Township to unilaterally modify the restrictions.

The Court found that “it is plain that the UHAC regulations were designed to implement the Fair Housing Act [N.J.S.A. 52:27D-301 to -329] by assuring that low- and moderate-income units *created under the Act* are occupied by low- and moderate-income households for an appropriate period of time. . . . As contemplated by COAH, municipalities were clearly empowered to impose deed restrictions, but only on *newly constructed* low and moderate income units subject to the FHA.” As all the deed-restricted units within Society Hill were constructed and approved prior to July 17, 1989 (the date of the first recapture regulation adopted by COAH), the Court refused to allow the unilateral modification power created by the UHAC to apply retroactively to deed restrictions. Even had the restrictions come into play after 1989, the Court found that N.J.A.C. 5:80-26.5(a)(2) prohibited a municipality’s ability to extend the affordability controls for any “unit that, prior to December 20, 2004, received substantive certification from COAH, was part of a judgment of compliance from a court of competent jurisdiction or became subject to a grant agreement or other contract with either the State or a political subdivision thereof[.]” N.J.A.C. 5:80-26.5(a)(2).

As a result of this case, the first to construe the UHAC provisions that appear to authorize the unilateral extension of affordability controls, municipalities should think twice before unilaterally extending the affordability controls on deed restrictions set to expire shortly unless such restrictions explicitly empower the municipality to do so.

This decision is not only important to municipalities and the owners of deed-restricted units whose deed restrictions are set to expire; it is also important to those common interest communities whose membership includes the owners of such deed-restricted units. Following this case, associations in

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developments containing affordable units with restrictions set to expire should consider taking a leadership role in defending against a municipality's attempt to unilaterally extend those restrictions.

If you are a board member or manager of an association, a property owner, or a municipal administrator looking for guidance in the wake of this decision, please contact the author of this Alert, **Steven G. Mlenak**.