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# COURT RESUMES JURISDICTION OVER ALL AFFORDABLE HOUSING ISSUES

## Supreme Court Creates a Transitioning Procedure But Declines to Adopt a Methodology

**By: EDWARD J. BUZAK, ESQ.**

By its inability to reach a consensus on October 20, 2014 and by its subsequent inaction for months thereafter, the New Jersey Council on Affordable Housing ("COAH") has surrendered its right and obligation to administer affordable housing matters and left the Supreme Court with little choice but to resume control over that process until COAH can get its act together. In a March 10, 2015 unanimous 6-0 decision (Chief Justice Rabner recused himself), the Supreme Court once again asserted primary jurisdiction over affordable housing matters. Despite the inability of COAH and the Legislature to deal with the issue, the Supreme Court still declared its desire to return jurisdiction to the place where it belongs--the executive branch and the legislative branch, as soon as they act accordingly to establish the constitutional obligation that municipalities have in exercising their zoning power.

Thankfully, the Supreme Court recognized the effort and good faith displayed by almost 400 municipalities that affirmatively sought to voluntarily discharge their constitutional obligations by establishing a procedure which, if implemented, will leave the municipalities in a substantially similar place as they would have been had they proceeded through the COAH process. Unfortunately, the Supreme Court declined to provide the missing link between the procedure they established and the substance of what has to be done. That missing link--the establishment of a methodology to calculate the affordable housing obligations of the municipalities--was left to the 15 Mount Laurel Judges to develop on either a case by case basis or some other global process yet to

be established. All parties who participated in the litigation spawning this decision before the Supreme Court argued for different processes in order to establish that number but, if there was one area of agreement among all the parties, it was that a procedure should be established and a uniform methodology developed which would apply throughout the state. The Supreme Court declined to endorse that one area of agreement among all the adverse parties.

**THE BASICS--TRANSITIONAL PROCESS FROM COAH TO THE COURT.**

In nearly a 50 page decision, the Supreme Court spelled out its rationale for taking the action that it did. What literally screams out in the decision is that the Court would like nothing better than to have COAH do its job so that they once again can extricate themselves from this area. This decision was not as much a seizure of the affordable housing field by the Supreme Court as it was a reluctant assumption of the duties because no one else was doing it. As former Chief Justice Robert Wilentz says in his landmark 1983 Mount Laurel II decision, the Supreme Court does not build housing, but it does enforce the Constitution.

Accompanying its written decision was a four page Order, a copy of which is available on the website of the New Jersey State League of Municipalities, which details the basic transitional steps to shift matters from COAH to the Courts. That process begins with the deferral of the effective date of their Order until June 8, 2015 to allow sufficient time for the 15 Mount Laurel Judges to establish a program to handle the almost 400 Declaratory Judgments ("DJ Actions") that the municipalities will have to file in order to initiate the transfer to the Courts. More specifically, municipalities with either Third Round Substantive Certification under earlier iterations of the Third Round Regulations before they were invalidated, or those with pending Petitions for Substantive Certification before COAH (dubbed "Participating Municipalities") will have up to 30 days from

the effective date of the Order--July 8, 2015--to file their DJ Actions seeking effectively a Judgment of Compliance and Repose--the judicial equivalent to substantive certification under the administrative process. The Supreme Court also gave the Participating Municipalities (and by implication, those with Third Round Substantive Certification) five months to develop their new Housing Element & Fair Share Plan ("HE&FSP") since all of the previous plans of those categories of municipalities were based upon the now invalid growth share methodology. Unfortunately, the four page Order of the Court does not reflect this five month period and the decision only mentions it in the section dealing with the approximately 315 Participating Municipalities, raising the possibility that those municipalities that have already received Third Round Substantive Certification will not be able to take advantage of that five month period. Nevertheless, it is difficult to understand why municipalities that actually received substantive certification under the now invalidated growth share regulations should not have a similar period of time to develop their compliant plan as those that have plans pending before COAH.

Notice of the filing and an opportunity to be heard in each of these DJ Actions is to be given to Fair Share Housing Center ("FSHC"); the New Jersey Builders' Association ("NJBA"); the New Jersey State League of Municipalities ("NJLM"); COAH, and presumptively to every other entity involved in the motion before the Supreme Court that resulted in this decision, which would add to the list five individual municipalities and a developer. While it is understandable that perhaps notice should be given to the four institutional agencies (FSHC, NJBA, NJLM, and COAH), it is surprising that the Supreme Court's decision on this issue would be ambiguous enough to potentially include the five municipalities and the developer who really have no interest institutionally in the filings of nearly 400 municipalities across the state. While the Court required that "notice" be given, they did not go on to explain the form of that notice. Thus, it is unclear as to

whether copies of the DJ Actions are to be sent to these parties or whether simply a short notification of the filing needs to be sent. Those issues may have to be sorted out by the 15 Mount Laurel Judges who have been tasked with handling these cases.

Municipalities can simultaneously or thereafter apply for temporary immunity from any third party action for a defined period of time--the Supreme Court cautioning trial judges that they should be circumspect about granting unlimited immunity or elongating the process to ultimately achieve compliance.

**CONSEQUENCE OF IGNORING THE PROCESS ESTABLISHED.**

If municipalities in either of these two categories (those that received Third Round Substantive Certification, or those that have pending Petitions for Certification before COAH) decline to file their DJ Actions within the 30 day window after the effective date of the Order, i.e. by July 8, 2015, the window opens further to allow third parties to bring lawsuits against those municipalities. Interestingly, however, irrespective of the relief sought by those third parties, i.e. FSHC, NJBA, or other organizational entity with standing, or any private developer, the litigation can only proceed with regard to the constitutional compliance prong, termed in the Order "a constitutional compliance challenge", setting up a kind of involuntary DJ Action. A municipality subject to that involuntary DJ Action could then apply with notice and an opportunity to be heard to the interested parties abovementioned, for temporary periods of immunity prohibiting exclusionary zoning actions from proceeding. Thus, it would appear that there is little different effect between a municipality filing its DJ Action within the 30 day window or declining to do so and then having a third party initiate an action against it. In both instances, the municipality can apply for temporary immunity and the focus of the litigation is to develop a constitutionally compliant plan, not to grant

a builders' remedy. While the explanation of a builders' remedy action is beyond the scope of this article, suffice it to say, that if in a builders' remedy action, the developer succeeds in persuading a court that the municipality is not constitutionally compliant, it then moves to be awarded a builders' remedy, which, if granted, would require the municipality to include the developer's property in its compliance plan, provided that the property is suitable and the developer is providing a substantial number of affordable units in its project. In the case of a municipality that is subject to an involuntary DJ Action, it appears that it would not be exposed to that builders' remedy at all, provided that it can come up with a plan that complies with and fulfills its constitutional obligation without the use of that developer's property. Only if the Court ultimately finds its constitutional compliance "wanting", shall it permit the builders' remedy to proceed.

The endorsement of this type of process by the Supreme Court for those municipalities that had received Third Round Substantive Certification or that are Participating Municipalities is really consistent with the genesis of the builders' remedy in the first place. The builders' remedy lawsuit was a way that the Supreme Court in 1983 in their Mount Laurel II decision proposed for the enforcement of the constitutional obligation that municipalities had in exercising their right to zone. At that time, there was no FSHC and no incentive necessarily for municipalities to confront their constitutional obligation. Thus, the Courts turned to the builders to enforce it, but knew that the builders would only take up the gauntlet if there was something in it for them--a rezoning of their property for high density inclusionary development. Thus, builders became the tool of the Court to enforce the obligation.

Fast forward 30 years since the FHA was adopted and the Supreme Court was considering this case. Rather than widespread non-compliance, there were almost 400 of the 565 municipalities that have taken their obligation seriously and voluntarily went forward to either obtain Third Round

Substantive Certification or apply for it. Those municipalities did not need a builder to trigger their recognition of their constitutional obligation. So, it follows that if one of those municipalities fails to file their DJ Action timely, someone else can do it to jump start the process, but not to hijack it.

**THE MISSING LINK.**

What the Supreme Court declined to do is to provide the missing link--the methodology that a municipality must follow to develop a constitutionally compliant HE&FSP. While perhaps in filing the DJ Action the municipality can refer to its intention to propose a constitutionally compliant plan within the five month window, the challenge that the municipalities will face is to create the methodology by which its compliance will be measured. In other words, before a municipality can propose a compliant plan, it must know the standards that it must meet and the criteria with which it must comply. That methodology had in the past been created by COAH in the First and Second Rounds and in three iterations of the Third Round Regulations. In each case, municipalities knew the goal that they had to achieve in order to have a compliant plan. While there may have been legitimate argument regarding the practicality of the plan or its realism, there was a measuring stick against which the proposed plan could be compared. Currently, there is no such measuring stick and the municipality will first have to figure out its destination before it can evaluate the various routes to that destination.

It is possible that the 15 Mount Laurel Judges, either individually or collectively, will initiate some type of common process to develop a uniform and consistent methodology which would then be applied statewide by all the Judges and, of course, regionally to establish affordable housing obligations for the 565 municipalities thereby establishing the destination that each of those municipalities needs to reach. In that case, the municipalities can then figure out the various routes

to their individual destinations in developing their HE&FSP's. The transitioning of the cases from COAH to the Court is on the radar screen of the Administrative Office of the Courts and apparently they are already beginning to think about the protocol and the various challenges that this decision creates and is beginning to cope with them.

Barring the 15 Judges coming up with such a scheme, municipalities will be left to their own devices. One starting point may be the unadopted COAH Rules, which had proposed a comprehensive methodology that established destinations for each of the 565 municipalities. Despite the fact that COAH did not actually adopt the regulations, but for one vote, those would have been the regulations that municipalities would be working with to establish their compliant plans. Second, those regulations allegedly comply with the Supreme Court's September 26, 2013 decision which outlined the parameters of a valid methodology. Third, much of the criticism of the Third Round Rules focused on the myriad of other components of the Rules in the form of types of housing, bonuses, credits for past activities, and so forth. While clearly FSHC and others challenged the actual underlying methodology completely, many other criticisms focused only on various aspects of it. Finally, it must be recognized that there is no perfect methodology and there is no singular way to either establish the parameters of the constitutional obligation or the manner in which it should be implemented.

If a municipality chooses to not utilize the COAH methodology, it will have to develop some alternate one in order to establish the destination it says it has to reach in order to satisfy its constitutional obligation and subject that methodology to scrutiny in its DJ Action, remembering, that in all of these cases, FSHC and the NJBA, among others, will have the proverbial "seat at the table" to critically examine the methodology utilized by the municipality. It is likely that in all of the cases FSHC and the NJBA will proffer the methodology that was espoused by them in the

motion before the Supreme Court that resulted in the Supreme Court's March 10, 2015 decision. That methodology established numbers for each of the 565 municipalities well in excess of the numbers, both in the aggregate and individually for most municipalities that were produced in the COAH methodology. Because it is likely that those institutional entities will be proposing the same methodology in potentially all of the almost 400 DJ Actions, it behooves the municipalities to likewise attempt to establish a consistent alternate methodology that will satisfy the constitutionally compliant number it develops in each of the HE&FSP's that are submitted.

The creation of the link will in itself likely result in further litigation and judicial challenges, which will continue for years to come. Perhaps the Supreme Court anticipated that and intentionally created that result to illustrate just how chaotic the process will become if COAH does not get its act together or the Legislature does not step up to the plate to modify the FHA to reflect New Jersey and its housing demands in 2015 as opposed to that which existed 30 years ago in 1985 when the FHA was first adopted.

**GUIDELINES PROVIDED BY THE SUPREME COURT.**

While the Supreme Court left municipalities and trial courts to deal with the 800 pound gorilla, they thankfully offered some advice and guidelines as to how to do that. The guidelines actually derived from their earlier 2013 decision invalidating growth share and the related Appellate Division decisions on the various iterations of the Third Round Regulations as previously adopted by COAH. First, the Court broadly reiterated its endorsement of utilizing the previous methodologies employed in the First and Second Round Rules as the template to establish present and prospective Third Round statewide and regional needs. Second, the Supreme Court advised

that the trial court Judges may confidently utilize discretion when assessing the techniques used by the municipality to achieve constitutional compliances, provided that the Judges are persuaded that those techniques will promote for that municipality and the region, the constitutional goal. The Supreme Court identified six specific principals that the trial court (and the municipalities in developing their plans) should follow:

1. Prior round obligations must be fulfilled.
2. Reallocation of excess present need (housing in need of rehabilitation) can be eliminated in any calculation.
3. Credits and/or bonus credits can be given for each low and moderate for sales housing unit whose expiring affordability controls are extended and bonus credits can be given for affordable units available to the very poor (earning 30% or less of median income).
4. Bonus credits of 1.33 for affordable housing in smart growth areas (transit oriented development in Planning Areas 1 or 2 or a designated center) and bonus credits of 1.33 for affordable housing in redevelopment areas and areas in need of rehabilitation can be provided.
5. Cost burdened families are properly excluded from the constitutional obligation which is confined to low and moderate income families.
6. Fewer surrogates can be used to determine substandard housing (3 versus 7 as previously utilized).

These examples were cited by the Supreme Court to guide Mount Laurel designated Judges and municipalities. The Supreme Court urged the trial courts to employ flexibility in assessing a municipality's compliance plan and to just make sure that they do not sanction any expressly disapproved practices from COAH's invalidated Third Round Rules.

**CONCLUSION.**

Given the limited options that the Supreme Court had as a result of COAH's inaction, the proactive municipalities, comprising almost 70% of the municipalities in the state, were awarded with a procedure in which they can obtain substantially similar results as they would have obtained through the administrative process while continuing to be protected from a builders' remedy lawsuit, provided that they proceed in good faith. The Supreme Court's decision to keep the 800 pound gorilla in the room, however, significantly dilutes the effectiveness and efficiency of their solution and, unless the Legislature and/or executive branch steps up to the plate to deal quickly with the 800 pound gorilla, it is possible that it will consume the process itself. Time will tell.

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