

## **Affordable Housing Judicial & Legislative Background**

Providing an opportunity for the construction of affordable housing within developing municipalities was found to be a constitutional obligation by the New Jersey Supreme Court in its landmark 1975 decision now referred to as Mount Laurel I. The Court found that developing municipalities have a constitutional obligation to provide a realistic opportunity for the construction of low- and moderate-income housing.<sup>[1]</sup> In its 1983 Mount Laurel II decision, the Supreme Court extended the obligation to all municipalities. Subject to a number of limitations, Mount Laurel II also gave developers, under appropriate circumstances, the opportunity to secure a “builder’s remedy” in the event of a successful lawsuit.<sup>[2]</sup> A builder’s remedy conveys to a developer, through the Courts, the right to develop what is, typically, a multi-family project on land that was not zoned to permit such a use or at densities desired by the developer at the time of the suit and where a “substantial” percentage of the units are reserved for low- and moderate-income households.

In 1985, the Legislature enacted the Fair Housing Act (“FHA”)<sup>[3]</sup> in response to Mount Laurel II. The FHA created the Council on Affordable Housing (“COAH”) as an administrative alternative to municipal compliance in a court proceeding. The Legislature conferred “primary jurisdiction” on the agency and charged COAH with promulgating regulations: (i), to establish housing regions; (ii), to estimate low- and moderate-income housing needs on a state and regional level; (iii), to set criteria and guidelines for municipalities to determine and address their fair share numbers, and (iv), to create a process for the review and approval of appropriate housing elements and fair share plans. As of 2015, COAH has been declared a moribund agency, which has forced the New Jersey Supreme Court to reactivate a judicial process in the review and approval of affordable housing plans. This document is being created to submit to the judicial process for determining affordable housing allocations and responses and, ultimately, to receive a Third Round Judgment of Compliance and Repose for a 10-year period.

### **COAH’s First and Second Rounds**

COAH created the criteria and guidelines for municipalities to address their respective affordable housing obligation<sup>[4]</sup>, or number of affordable dwellings. Following guidelines established by the U.S. Department of Housing and Urban Development (“HUD”), COAH defined affordable housing as dwellings that could be occupied by households making 80% or less of the regional household income – typically from 38-41% of the total population. COAH originally established a formula for determining municipal affordable housing obligations for the six-year period between 1987 and 1993 (N.J.A.C. 5:92-1 et seq.), which became known as the “First Round.” The First Round rules established an existing need where sub-standard housing was being occupied by low- and moderate-income households (variously known as “present

need” or “Rehabilitation Share”) and future demand to be satisfied with new construction (“prospective need” or “fair share”).

The First Round formula was superseded by COAH regulations in 1994 (N.J.A.C. 5:93-1.1 et seq.). The 1994 regulations recalculated a portion of the 1987-1993 affordable housing obligations for each municipality and computed the additional municipal affordable housing need from 1993 to 1999 using 1990 U.S. Census data. The regulations COAH adopted in 1994 are known as “the Second Round” or 12-year cumulative obligation. In the Third Round, the new construction component from any earlier rounds is called either the prior obligation or “Prior Round.”

### **COAH’s Third Round**

On December 20, 2004, COAH’s first version of the Third Round rules became effective some five years after the end of Second Round in 1999 (N.J.A.C. 5:94-1 and 5:95-1). The FHA had originally required housing rounds to be for a six-year period, but in 2001, this was amended to extend that time period to 10-year intervals. Therefore, the Third Round should have been from 1999 through 2009. However, because of the delay, the Third Round was extended by five (5) years to 2014 and condensed into an affordable housing delivery period of 10 years from January 1, 2004 through January 1, 2014. In other words, 15 years of affordable housing activity was to take place in 10 years.

The Third Round rules marked a significant departure from the methods utilized in COAH’s Prior Rounds. Previously, COAH assigned an affordable housing obligation that included the new construction number for each municipality. These Third Round rules implemented a “growth share” approach that linked the production of affordable housing to future residential and non-residential development within a municipality. Each municipality was required to project the amount of residential and non-residential growth that would occur during the period 2004 through 2014. Municipalities were then required to provide the opportunity of one (1) affordable unit for every eight (8) market-rate housing units developed and one (1) affordable unit for every 25 jobs created. Jobs were not counted directly, but rather by using non-residential building floor area as a substitute for employment. The Township prepared a housing plan based on these rules as will be discussed below.

This set of rules changed, however, when the New Jersey Appellate Court invalidated key elements of the first version of the Third Round rules on January 25, 2007. The Court ordered COAH to propose and adopt amendments to its rules within six months to address the deficiencies identified by the Court. COAH missed this deadline, but eventually issued revised rules effective June 2, 2008 (as well as a further rule revision effective on October 20, 2008). It provided residential development and job projections for the Third Round. The Third Round was expanded again from 2014 out to 2018. COAH retained the growth share approach, but revised its ratios to require one (1) affordable housing unit for every four (4) market-rate housing units developed and one (1) affordable housing unit for every 16 jobs created.

Just as various parties challenged COAH's initial Third Round "growth share" regulations, parties challenged COAH's 2008 revised Third Round "growth share" rules. The Appellate Court issued a decision on October 8, 2010 deciding those challenges (see below).

### **Fair Housing Act Amendments and the New Jersey Economic Stimulus Act**

On July 17, 2008, Governor Corzine signed P.L. 2008, c. 46, which amended the FHA in a number of ways.<sup>[5]</sup> Key provisions of the legislation included the following:

§ Establishing a mandatory statewide 2.5% nonresidential development fee instead of requiring nonresidential developers to provide affordable housing.

§ Eliminating regional contribution agreements ("RCA's") as a means available to municipalities to transfer up to 50% of their required affordable housing to a "receiving" municipality.

§ Adding a requirement that 13% of all affordable housing units be restricted to very low-income households (earning 30% or less of median income).

§ Adding a requirement that municipalities had to commit to spend development fees within four years of the date of collection after its enactment or initially by July 17, 2012.<sup>[6]</sup>

On July 27, 2009, Governor Corzine signed the "NJ Economic Stimulus Act of 2009",<sup>[7]</sup> which instituted a moratorium on the collection of nonresidential affordable housing development fees through July 2010. This moratorium was later extended until July 1, 2013 (P.L. 2011, c. 122). Since the moratorium has now expired, municipalities are obligated to collect the fee of 2.5% of the equalized assessed value of a nonresidential development. Municipalities were always permitted to impose and collect residential affordable housing development fees approved by COAH following a 1990 New Jersey Supreme Court decision.<sup>[8]</sup>

### **Appellate Court's 2010 Decision**

On October 8, 2010, the Appellate Division issued a decision on the legal challenges to the second iteration of COAH regulations<sup>[9]</sup>. The Appellate Division affirmed the COAH regulations that assigned rehabilitation and Prior Round numbers to each municipality, but invalidated the regulations by which the agency allocated affordable housing obligations in the Third Round. Specifically, the Appellate Division ruled that COAH could not allocate obligations through a "growth share" formula and directed COAH to use similar methods to those previously used in the First and Second Rounds. Other highlights of the Appellate Court's decision include:

- § To be credited, municipally-sponsored or 100% affordable housing sites must show site control, site suitability, and a proposed source of funding.
- § COAH's rules did not provide sufficient incentive for the private construction of inclusionary developments (market-rate and affordable units). Clearly defined percentages supported by economic data must be provided. The Court noted that a 20% affordable housing set-aside was typical.
- § The Court invalidated Prior Round rental bonuses for developments that were not built within a reasonable time-frame.
- § Bonuses for smart growth and redevelopment activities were upheld; however, the Court invalidated Third Round compliance bonuses.

The Court upheld its prior ruling on COAH's formula that did not reallocate present need obligation from Urban Aid eligible municipalities to other municipalities in the region. The Court also questioned whether or not Urban Aid municipalities should be assigned an allocation for future growth.

#### **Judicial Activity from 2011 to 2014**

COAH sought a stay from the New Jersey Supreme Court regarding the March 8, 2011 deadline the Appellate Division had imposed in its October 2010 decision for the agency to issue new Third Round housing numbers. The Supreme Court granted COAH's application for a stay on January 18, 2011 and on March 31, 2011, the Court granted petitions and cross-petitions to all of the various challenges to the Appellate Division's 2010 decision. However, the Supreme Court did not hear oral arguments on the various petitions and cross petitions until November 14, 2012.

The New Jersey Supreme Court decided on the appeal by the executive branch of the Appellate Court's decision of March 8, 2012 that disallowed the dissolution of COAH under Governor Christie's Reorganization Plan No. 001-2011. The Supreme Court upheld the lower court's ruling, finding that the governor did not have the power to unilaterally reorganize COAH out of existence. The judges found that such an action requires the passage of new legislation.

On September 26, 2013 the New Jersey Supreme Court upheld the Appellate Court decision in In re Adoption of N.J.A.C. 5:96 and 5:97 by New Jersey Council On Affordable Housing, 215 N.J. 578 (2013), and ordered COAH to prepare the necessary rule revisions. Subsequent delays in COAH's rule preparation and ensuing litigation led to the New Jersey Supreme Court, on March 14, 2014, setting forth a schedule for adoption. COAH approved draft Third Round rules on April 30, 2014. Although ordered by the New Jersey Supreme Court to adopt revised new rules on or before October 22, 2014, COAH deadlocked at its October 20 meeting and failed to adopt the draft rules. An initial motion to table the rule adoption for 60 days to consider amendments also deadlocked and thus also failed.

## **March 2015 New Jersey Supreme Court Decision**

The failure of COAH to adopt new regulations in October/November 2014 as ordered by the New Jersey Supreme Court led one of the litigants – FSHC – to file a Motion In Aid of Litigants’ Rights to compel the government to produce constitutional affordable housing regulations. The New Jersey Supreme Court heard oral arguments on the motion on January 6, 2015. Two months later, on March 10, 2015, the Supreme Court issued its ruling, entitled, In re Adoption of N.J.A.C. 5:96 & 5:97 by N.J. Council on Affordable Housing, now known as Mount Laurel IV.

The 2015 decision provides a new direction for the means by which New Jersey municipalities are to comply with the constitutional requirement to provide their fair share of affordable housing. The Court transferred responsibility to review and approve Housing Elements and Fair Share Plans (e.g., Housing Plans) from COAH to designated Mount Laurel trial judges. The implication of this is that municipalities could no longer wait for COAH to adopt Third Round rules before preparing new Housing Plans and municipalities must now apply to Court, instead of COAH, if they wish to be protected from exclusionary zoning lawsuits. These trial judges review municipal plans much in the same manner as COAH previously did. Those towns whose plans are approved by the Court will receive a Judgment of Compliance and Repose, the judicial-equivalent of COAH’s substantive certification.

The decision established a 90-day transitional period and then a 30-day filing period when municipalities could petition the Superior Court in a Declaratory Judgment action seeking confirmation that their means of addressing affordable housing meets constitutional muster. Municipalities were also permitted to file motions for temporary immunity from builder’s remedy lawsuits. Lambertville filed its Declaratory Judgment action with the Superior Court on July 8, 2015.

The New Jersey Supreme Court indicated in its ruling that Housing Plans are to be drawn up using similar rules as to those in place during the Second Round as well as Third Round housing compliance mechanisms that the justices found constitutional, such as smart growth and redevelopment bonuses and extensions of controls. This document has been drafted using the Supreme Court’s direction in its decision.

## **January 2017 New Jersey Supreme Court Decision**

On January 17, 2017, the New Jersey Supreme Court issued its decision In Re Declaratory Judgment Actions Filed By Various Municipalities, County Of Ocean, Pursuant To The Supreme Court’s Decision In In Re Adoption of N.J.A.C. 5:96, 221 N.J. 1(2015). The Supreme Court found that the “gap period,” defined as the period between the end of the Second Round in 1999 and 2015, generates an affordable housing obligation. This decision requires an expanded definition of the municipal present need obligation to include low- and moderate-income households formed during the gap period that are entitled to their delayed opportunity to seek affordable housing. Present need, or the Rehabilitation Share, has historically been an estimate of low- and moderate-income households living in substandard housing at the beginning of an

affordable housing round. Although some parties argued the gap obligation should be calculated as part of the prospective need, or new construction obligation, the Supreme Court found that such a position is not supported by the Fair Housing Act, which defines prospective need as a projection of new low and moderate income households formed during a future housing cycle.

Accordingly, the municipal affordable housing obligation is now composed of the following four parts: present need (Rehabilitation Share); Prior Round (1987 to 1999, new construction); “gap” present need (1999 to 2015, third round new construction); and prospective need (Third Round, 2015 to 2025, new construction).

### **March 2018 New Jersey Superior Court Decision**

In a March 8, 2018 ruling on two Mercer County municipalities’ affordable housing obligations, Superior Court Assignment Judge Mary Jacobson tackled directly the absence of a statewide set of guidelines for calculating a municipality’s fair share obligation. Her decision laid out a methodology, spelled out in detail along with her reasons for preferring proposed given methodology for each individual component of the complicated multi-step calculation utilized to calculate the need. In the end, the Judge ruled in favor of the municipal expert on several key steps in calculating the need and in favor of the housing advocate’s experts in others, which resulted in a statewide number which was in between the competing experts’ respective calculations. Incorporating estimates of households and wealth, projections of job and population growth, and calculations of acreage available for development, Jacobson’s methodology could be used as a template statewide for determining the need for new affordable housing development.

---

[1] Southern Burlington NAACP v. Twp. of Mt. Laurel, 67 NJ 151 (1975)

[2] Southern Burlington NAACP v. Twp. of Mt. Laurel, 92 NJ 158 (1983)

[3] N.J.S.A. 52:27D-301

[4] Also called a municipality’s “fair share” of affordable housing.

[5] Also known as the “Roberts Bill” after former New Jersey Assembly Speaker Joseph Roberts who sponsored the bill.

[6] This initial deadline was subsequently revised by an Appellate Court decision that extended the deadline until four (4) years after the Superior Court approves the municipal housing plan including the spending plan.

[7] P.L. 2009, c.90.

[8] Holmdel Builders Assn. v. Tp. of Holmdel, 121 N.J. 550, 583 A.2d 277 (1990).

[9] In the Matter of the Adoption of N.J.A.C. 5:96 and 5:97 by the New Jersey Council on Affordable Housing.