

Published Articles

New Jersey Trial Court Decision on Affordable Housing Sets Obligations for Municipalities with Statewide Implications

Steven Firkser

Greenbaum, Rowe, Smith & Davis LLP Client Alert

March 13, 2018

In a long-awaited decision, the trial court in Mercer County, New Jersey issued a comprehensive opinion on March 8, 2018 addressing the methodology for establishing the municipal obligations to provide opportunities for development of affordable housing (also known as a “Mount Laurel” obligation). In a 217 page opinion, Superior Court Judge Mary C. Jacobson determined the fair share housing obligations of Princeton and West Windsor Township, ordering that Princeton provide 753 affordable housing units and West Windsor provide 1500 affordable units.

The Court acknowledged the technical complexities involved in developing a methodology to calculate numerical affordable housing needs. During the trial, which consumed more than forty trial days and produced a record with approximately 300 exhibits, the Court reviewed innumerable charts, years of demographic data and conflicting statistical analyses presented by experts retained by housing advocates, private developers and municipalities. The Court viewed each expert with a “healthy skepticism” and also relied on its own independent expert, who selected and modified the alternatives advocated by each expert, occasionally selecting different component options that the Court found more convincing.

The Court’s decision examined the record “with acknowledged imprecision, but a commitment to achieving reasonable results.” The Court noted that the municipalities’ approach was based on development reasonably likely to occur, while the housing advocates’ theme was adherence as much as possible to past practices of the Council on Affordable Housing (COAH). While the Court adopted many of the factors identified by the municipal expert, for the most part it sought to adhere to

Attorneys

Steven Firkser

Published Articles (Cont.)

prior COAH standards and approaches rather than undertake new policy decisions, even in cases where such policies would utilize clearly more accurate data. This approach would appear to be consistent with the general direction mandated by the New Jersey Supreme Court in its 2015 decision.

The Court considered two elements for the new construction obligation. The first was the prospective need for housing between 2015–2025, on which the Court decided a middle ground between the numbers advocated by the municipalities and the numbers presented by housing advocates. The Court determined the total prospective need for New Jersey to be 85,382 housing units, which was more than three times higher than the municipal expert’s assessment and 55% lower than the housing advocate’s expert assessment.

In addition, the Court determined the present need for housing during the gap years of 1999–2015, and was faced with the opinions of competing experts who had shifted their positions over the years. The Court noted the complexities, uncertainties, and the need to choose between imperfect alternatives, and struggled to fashion an acceptable alternative that would result in a fair and reasonable estimate. The Court did not accept any single complete methodology proposed by the experts, instead combining the most convincing aspects of each model. The Court determined the total gap period need for New Jersey to be 74,248 units – approximately two times higher than the municipal calculation and half of the housing advocates’ calculation. The Court’s determination was also higher than the calculations of the Court’s own expert.

The Court also issued rulings on specific issues that may impact decisions by other courts. Its decision rejected the concept of ‘filtering’ as an adjustment to housing obligations, which produced significant adjustments to the total obligations, and determined that a cap upon the total new construction obligation of 20% of the total number of housing units in a town would apply to the entire 1999 – 2025 period, rather than having two separate caps. The decision applying the 20% cap for the entire 26 year period differs from previous decisions applying a separate cap for the 1999–2015 gap period.

The Court’s decision acknowledged its necessary imprecision and will likely lead to appeals, but the Court asserted its attempt at a fair and reasonable approach in considering all the expert opinions that will likely carry considerable weight with other trial courts. Municipalities in other counties will face a hard choice in whether to accept the Court’s approach rather than incur further fees in litigation. If the municipalities follow the path of approximately 200 other municipalities and proceed to settlement, they will be faced with housing obligation estimates that are more than twice the amounts proposed by their experts, and will need to address those obligations.

The determination of the numerical obligations is not the final analysis, and the municipalities will have the opportunity to present their compliance plans and designate properties with opportunities to develop and construct sufficient affordable housing to satisfy each municipality’s obligation. In preparing compliance plans, municipalities may apply bonus credits and adjustments to reduce the actual number of units that need to be constructed. Adjustments for unavailability of vacant land and lack of sewer service and other utilities are often utilized to reduce the obligation, but the municipalities will need to work off

Published Articles (Cont.)

the higher numbers determined by the court's analysis.

As this decision now presents municipalities with a greater obligation than they had been advocating, at approximately 50% of the numbers pressed by housing advocates, there are opportunities for developers to propose projects that can satisfy the higher municipal obligations. Developers who are willing to include affordable units in an inclusionary development (generally 15% - 20% of the total units set aside for affordable housing) can assist the municipalities in meeting their obligations. Further, when municipalities present their housing plans, interested developers will also have the opportunity to contest the validity of those plans and seek to include their properties with an affordable housing component.

Please contact the author of this Alert, **Steven Firkser**, with any questions regarding affordable housing requirements or other issues related to land use in New Jersey.