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New Jersey's Affordable Housing Determinations Are (Finally) Nearing Completion

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Since 2015, the New Jersey courts have been undertaking the determination of affordable housing obligations in the state's 565 municipalities. This past year saw significant developments in this process that should finally lead to the construction of residential projects with affordable housing components throughout the state.

The courts assumed control over affordable housing determinations after the New Jersey Supreme Court decided in March 2015 that the Council on Affordable Housing (COAH) had failed in its responsibilities to adopt regulations defining municipalities' obligations to ensure the construction of housing for low and moderate-income families. As a result, more than 375 municipalities filed declaratory judgment actions in 2015 seeking to establish - and the trial courts appointed special masters to assist in determining - the municipal obligations for affordable housing, which are also referred to as "Mount Laurel" obligations.

In the trial court proceedings, the municipalities and housing advocates retained experts to determine the appropriate number of units to serve the housing needs that accumulated between 1999 - 2015, the "gap period" during which COAH failed to adopt and implement rules that could survive legal challenge, as well as the prospective need for housing for the period from 2015 - 2025. The numbers produced by those experts were widely disparate, and a court determination was needed to fix the obligations. Along the way, a number of municipalities settled their obligations in order to avoid the uncertainty and cost of trial.

Last March, Judge Mary C. Jacobson in Mercer County issued a comprehensive decision following a 40-day trial to determine the fair share housing obligations for Princeton and West Windsor Township. Judge Jacobson acknowledged the complexities and uncertainties

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involved in developing a methodology to calculate numerical affordable housing needs, and reviewed the alternatives advocated by the experts for the municipalities and housing advocates. She also relied on an independent court expert, Richard Reading, to assist her in fashioning a fair and reasonable estimate. Judge Jacobson struggled with the alternatives advocated by each expert, and combined the most convincing aspects of each model.

The court ultimately determined that the total housing need for the period from 1999 - 2015 for New Jersey was 74,248 units, which was approximately two times higher than the calculations of the municipal expert and half of the housing advocates' calculation. The total prospective need for New Jersey for the period from 2015 - 2025 was 85,382 housing units, which was more than three times higher than the municipal expert's assessment and 55% lower than the housing advocates' expert assessment.

Judge Jacobson's decision is not bulletproof and can still be appealed, but the court presented a fair and reasonable approach in considering all the expert opinions. The decision has provided a foundation to determine the low and moderate-income housing needs in all municipalities in the state that has carried considerable weight with the other trial courts.

Richard Reading, also appointed as a special master in other counties, has provided reports for other counties setting forth the municipal obligations. Numerous towns have utilized the updated numbers to formalize settlements with housing advocates rather than engage in a lengthy trial in which the courts would most likely follow Judge Jacobson's methodology and conclusions. The courts have also aggressively persuaded the parties to reach a resolution through agreement rather than trials.

As a result, more than 250 municipalities have entered settlements with the leading housing advocate, Fair Share Housing Center, as well as with developers who have intervened, leaving only a handful of cases in each county that require resolution. The courts are pressuring the parties to enter settlements in these remaining cases, and nearly all should be resolved this year by settlement or trial.

For cases that are not resolved, the municipalities will have to address the numbers determined by the court's analysis. These cases are likely to involve issues related to realistic development potential in the municipality, and to consider constraints on development such as the unavailability of vacant land, environmental conditions, and lack of sewer service and other utilities. Municipalities can also seek to apply bonus credits and adjustments to reduce the actual number of units that need to be constructed. In cases awaiting trial, there may still be an opportunity for property owners willing to provide affordable housing on their properties to present those alternatives to the court.

For municipalities entering settlements, developers may also have an opportunity to participate. The determination of the numerical obligations is not the final analysis, and the municipalities have to demonstrate their compliance in meeting their obligations. This has provided opportunities for developers to suggest redevelopment of existing properties such as vacant retail centers and office parks for housing construction. 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

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will also have the opportunity to contest the validity of those plans and seek to include their properties with an affordable housing component.

The resolution of pending court cases by settlement or trial does not end the municipal obligations for affordable housing, as the municipalities must enact ordinances and approve developments that satisfy the obligations in the settlements. Towns that renege on these obligations act at their peril. In one recent case, East Brunswick sought to obstruct one of the developments approved in its settlement agreement, compliance plan and judgment of repose. When the developer was proceeding to obtain approvals, the Mayor and Township sought to amend its ordinance permitting the residential development without seeking court approval. The trial court issued an injunctive order preventing the Township from amending the ordinance, restrained the Mayor from any participation in the Planning Board's consideration of the application, and appointed a special master to oversee the development application. The court also warned that if the Township had any further violations of the compliance judgment, the court would consider an application to enjoin all further development in the Township and have the special master oversee all applications for approvals in the Township.

The courts will remain the forum for resolving affordable housing issues for the foreseeable future. While the Supreme Court hoped for a legislative solution to address the affordable housing obligations, efforts in the legislature have stalled, leaving the courts as the only means to resolve the municipal obligations through 2025. The state has another six years to provide a solution for the next round beginning in 2025.