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New Jersey Supreme Court Puts Question of Affordable Housing Compliance Back in the Trial Courts

Meryl A.G. Gonchar, Robert Beckelman and Steven Firkser

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On March 10, 2015, in a unanimous (6-0) decision, the New Jersey Supreme Court clarified the procedures for determining affordable housing in the 566 municipalities in the state. The Court's decision in *In re Adoption of N.J.A.C. 5:96 & 5:97* dissolved the administrative remedy for municipal demonstration of compliance with the *Mount Laurel* doctrine, finding it to be futile, and the agency charged with administration of the system to be dysfunctional.

As a result of the long history of inaction by the Council on Affordable Housing (COAH), the Court found "there no longer exists a legitimate basis to block access to the court" for parties concerned with municipal compliance with the constitutional obligation to provide a realistic opportunity for the provision of affordable housing. The Court held that in light of COAH's failure to adopt third round regulations in compliance with prior Supreme Court and Appellate Division rulings, and its apparent lack of intent to do so in the foreseeable future, COAH is no longer functionally capable of addressing these issues.

The Court established a transitional process for moving from administrative to judicial review for the approximately 60 municipalities that have received substantive certification of their third round fair share plans under the invalidated COAH regulations. This process also applies to the more than 300 additional municipalities that submitted fair share plans to COAH under such regulations, without any determination by COAH. The Court stayed the effectiveness of its order for a period of 90 days, also providing an additional 30 day period during which municipalities that have "participated" under the third round rules would be protected against builders' remedy suits. During this period, the municipalities may seek a judgment declaring their plans to be constitutionally compliant with the *Mount Laurel* doctrine. In those

Attorneys

Steven Firkser

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hearings, builders who were excluded from previous affordable housing plans may have the opportunity to present their projects before the court and seek to be included in these towns' plans. After that initial period of court hearings, the remaining municipalities will be subject to builders' remedy actions to pursue the construction of affordable housing.

The Court's express goal is to establish a judicial process that tracks, as closely as possible, procedures under the Fair Housing Act (FHA). The Court set out the process by which actions may proceed following the effective date of the implementing order to allow parties to prepare for the actions they are authorized to pursue. Given the variety of circumstances, the extent of protection and the nature of the relief that will be sought will be dependent upon the municipality's status in the administrative process. The Court also held that the FHA's exhaustion-of-administrative remedies requirement is dissolved expressly to permit resort to the courts, initially, to resolve municipalities' constitutional obligations under the doctrine. No builder's remedy action will be permitted against a town that received third round substantive certification unless the court determines that the approved plan is invalid, and thereafter no constitutionally-compliant plan is developed and approved by the Court. In instances where towns had only "participating" status with COAH, but had not yet received substantive certification, a case or category specific process would be pursued depending upon where each town was in the COAH process and the manner in which the town chose to proceed before the court, if at all.

Consistent with its prior ruling invalidating the third round regulations, the Court indicated that judicial review of municipal compliance with the *Mount Laurel* doctrine would be based upon the methodology utilized in the first and second rounds. The Court noted, however, that since portions of the third round rules had not been held invalid, trial judges would have latitude in assessing municipalities' plans which incorporate those valid provisions of the third round regulations.

Please contact the authors of this Alert, **Meryl A.G. Gonchar**, **Robert Beckelman** and **Steven Firkser**, for additional information.