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New Jersey Supreme Court Expands Municipal Affordable Housing Obligation in Latest Ruling

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In a decision clarifying the obligations of municipalities to meet their constitutional obligation to provide affordable housing, the New Jersey Supreme Court ruled yesterday that municipalities must include households formed between the years of 1999 and 2015 in their calculations of current housing needs.

This issue arose because of the long delay in adopting regulations for the current Third Round for affordable housing obligations. Since the *Mount Laurel* decisions were first adopted more than thirty years ago, municipalities in New Jersey have had to comply with three rounds of obligations to provide affordable housing. These obligations were covered in two prior rounds that covered housing obligations from 1987–1993 and 1993–1999. Since 1999, however, municipalities have been awaiting a determination of their obligations for the third round.

The Council on Affordable Housing (COAH) failed to provide third round rules that complied with the New Jersey Constitution, and in a 2015 decision, the Supreme Court required the trial courts in each county to determine the third round obligation for each constituent municipality. Following the pattern of the two prior rounds, municipalities would have to satisfy three distinct obligations to provide affordable housing: (1) a prior unmet need for housing that was not constructed as of 1999, (2) a present need to cover deficient housing units as of 2015, and (3) a prospective need to cover housing needs over the next ten years (2015–2025). Because the present need determination in 2015 was 16 years later than contemplated under prior housing rounds, there was an issue as to the inclusion of housing needs that arose during the ‘gap period’ between 1999 and 2015. Housing advocates had argued that the ‘gap period’ had to be included by a separate calculation for municipal compliance, while municipalities argued that the present need (as of 2015) would capture

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Published Articles (Cont.)

the current housing needs.

The Supreme Court's decision strikes a middle ground, requiring the trial courts to use an expanded category of present need in order to capture pent-up affordable housing needs of low- and moderate-income households created during the gap period by applying an analytic approach and not merely a census. The ruling requires the trial court's present need analysis to include, in addition to a determination of overcrowded and deficient housing units, an analytic component that addresses the affordable housing needs of low- and moderate-income households created since 1999. The recalculated obligation should not include households that are no longer income-eligible, deceased persons, or households already captured through the historic practice of assessing deficient housing units within the municipality.

The affordable housing obligation for each municipality must ultimately be determined through settlements with housing advocates or by trial court determinations after consideration of expert reports. A trial is currently underway in Mercer County to address these precise issues, and that should provide further clarity with respect to municipal obligations.

More than 90 municipalities have already entered into settlements to fix their affordable housing requirements. It does not appear that these settlements may be reopened to address the present need identified in this week's opinion. The general consensus is that the ruling will result in an increase in the calculation of need, but factually this will be addressed on a municipality-by-municipality basis. As municipalities may need to increase their present need obligations to capture additional households created between 1999 and 2015, this could provide an opportunity for developers who can offer affordable housing developments to assist the municipalities in meeting their obligations.

Please contact the authors of this Alert, **John H. Hague** and **Steven Firkser**, if you have questions regarding the Supreme Court decision or would like additional information about affordable housing obligations in New Jersey.