

March 27, 2015

RE: NJ Supreme Court Decision on Affordable Housing

Dear Mayor:

On Tuesday, March 10th the New Jersey Supreme Court issued an order in response to a motion in aid of litigant's rights, filed by the Fair Share Housing Corporation (FSHC), to strip municipalities of the administrative protections afforded by the Fair Housing Act (FHA). The League provided a summary of the Court's ruling in a Dear Mayor letter issued that same day (<http://nj-njslom.civicplus.com/ArchiveCenter/ViewFile/Item/376>)

The purpose of this letter is to provide a broader analysis of the order. This letter is not intended to offer legal advice. We would urge you to review it and the decision (<http://nj-njslom.civicplus.com/ArchiveCenter/ViewFile/Item/376>) with your attorney and planners.

The March 10th Court order will, after 120 days, effectively eliminate the administrative process, overseen by COAH, through which municipalities could be deemed compliant with their Mt. Laurel obligations. Barring action by COAH to adopt rules or action taken by the State Legislature, the effect of this order will be that the courts will be the only forum to make these determinations.

However, the League was successful in convincing the Court that municipalities should not be punished for COAH's inaction. The Court's order will not become effective until June 8th, 90 days after the order was issued. Additionally, the Court has provided for a 30 day window after June 8th, during which many municipalities will be able to file declaratory judgment actions in Superior Court to obtain, in practical effect, a judicial version of the substantive certification that they had either received or applied for under N.J.S.A. 52:27D-313.

The Court distinguished two categories of municipalities: 1) "certified municipalities," meaning towns substantively certified by COAH under the previous, though invalidated, third round rules; and 2) "participating municipalities," meaning towns which had participated in the process for, but had not yet received, substantive certification.

Certified Municipalities

These are towns which applied for, and received, substantive certification from COAH based on their invalidated third round rules. It is estimated that there are approximately 60 certified municipalities.

In regards to certified municipalities, the March 10th order provides that: 1) during the thirty day window certified municipalities may file for a declaratory judgment to obtain a judicial form of substantive certification and may simultaneously or thereafter seek temporary immunity from the filing of third party or builder's remedy actions; 2) in performing their review, judges should give special consideration to certified municipalities; and 3) if a certified municipality does not seek a declaratory judgment a third party can file their own constitutional compliance proceeding but courts will not allow builders remedy actions against such a town until it fails to produce a constitutionally compliant plan.

Because these towns received their substantive certifications under rules that were later determined to be invalid, the Court held that “additional review of such towns’ housing plans will be necessary” and that some “supplementation of a plan may be necessary to ensure to the court’s satisfaction that the town has provided a realistic opportunity for its fair share of present and prospective regional affordable housing need in keeping with prior rounds’ methodologies. In re N.J.A.C. 5:96 & 5:97, supra, ___ N.J. ___ (slip op at 34)

The Court directs judges to give special consideration to certified municipalities when reviewing for constitutional compliance. While these towns would no longer be afforded the presumption of validity they otherwise would enjoy as a result of having substantive certification, the Court reasoned that, “these towns deserve an advantage in the judicial review” that will take place and that “implemented ordinances should not be lightly disturbed unless necessary; [and] supplemental actions to secure compliance [may be the] preferred course.” Id. at 35.

Participating Municipalities

These are municipalities which filed petitions for substantive certification based on COAH’s third round regulations but were not yet approved. There are approximately 300 participating municipalities in New Jersey.

In regards to participating municipalities, the March 10th order provides that: 1) during the thirty day window participating municipalities, like certified municipalities, may file for a declaratory judgment and obtain a judicial form of substantive certification; 2) towns that file a declaratory judgment will have a 5-month period to develop their compliance plans and judges have the discretion to grant immunity to a municipality while it takes steps to enact a valid affordable housing plan; and 3) that judges should look favorably on towns that took actual steps towards adopting an affordable housing plan, as opposed to towns that may have participated in the COAH process but not taken any such steps. However, unlike certified towns, the judges were not given any special instructions by the Court to defer to participating municipalities’ affordable housing plans. Id. at 39.

It is also worth noting that the Court urges judges to make a “preliminary judicial determination of the present and prospective need [as it] will assist in assessing the good faith and legitimacy of the town’s plan...” Id. at 39. The content of what should be in the plan, however, is not defined in the decision.

The Court makes clear that, if a town chooses to not pursue a declaratory judgment within the 30 day window, courts will not easily grant them 5 months of immunity. [Id.]

Further, it is not clear whether the additional five months of immunity commences upon the end of the 90 period following March 10th, after the 30 day window after June 8th or upon the municipality filing a declaratory judgement action with the Superior Court.

Notice

Municipalities that wish to file declaratory judgment actions during the 30 day window period, must provide “notice and [an] opportunity to be heard to FSHC and interested parties.” Id. at 31 . The Court further defined “interested parties” as presumptively including, at a minimum, “the entities on the service list in this matter.” Id. at 31.

Most likely the Court intended the service list of the motion itself and not the service list associated with the case in general which included various amici. At a minimum then notice must be sent to the Council on Affordable Housing (COAH), the Fair Share Housing Center, the New Jersey Builders Association and the League of Municipalities.

Methodology/Regional Need

The Court's order does not provide or adopt any one methodology for determining regional need, instead leaving that issue up to the 15 Mount Laurel judges who will be hearing these cases.

While the Court was very clear that it did not want the judiciary to become a replacement for COAH, it provided judges with some guidelines. Among them are that "previous methodologies employed in the first and second round rules should be used to establish present and prospective statewide and regional affordable housing need. Id. at 41. And also that prior round obligations must still be fulfilled. Id. at 42.

Additionally, it is clear that the Court foresees the participation by other groups as being helpful to the courts in determining statewide need. Indeed, the Court states that "[courts] will be assisted in rendering its preliminary [regional need] determination by the fact that all initial and succeeding applications will be on notice to FSHC and other interested parties. Id. at 40.

The League will continue to advise you on all related developments.

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Very truly yours,

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