

Township of Denville

Affordable Housing Update

Facts & Frequently-Asked Questions

Q: Why are the courts in control of determining Denville's Affordable Housing Obligation?

A: COAH (Council on Affordable Housing), an agency in the New Jersey Department of Community Affairs, has failed to establish legally valid rules and numeric obligations for affordable housing since the second round of regulations expired in 1999. There have been years of court battles between the competing interests, affordable housing advocates, the real estate developers' lobby, municipalities and COAH itself over how the rules should be formulated and the methodology by which the local obligations should be established. In March of 2015, the Supreme Court, after numerous orders that COAH establish legally acceptable rules, took back jurisdiction over all affordable housing issues and returned to the county trial courts the responsibilities of determining methodology, affordable housing obligations and compliance with the constitutional obligations of providing affordable housing. This order stripped COAH of any of its administrative powers and forced participating towns into a situation where they have to attempt to determine their own obligations from scratch. This process is ongoing and will likely continue through trial and appeals courts for years to come.

Q. Is Denville required to participate in the process?

A. No, but the failure to participate and comply with the directive of the courts will result in Denville's Substantive Certification issued by COAH while it was still functioning being revoked, which will subject our Township to Builder's Remedy lawsuits (further explained below). Builder's Remedy lawsuits would undoubtedly result in much larger developments in our community in which Denville will have virtually no local control.

Q. Who is Denville's Adversary in Court?

A. There are five "interveners" in the Denville court action. These interveners are all property owners/developers in the Township who have presented plans to the court on how they can assist Denville meet its affordable housing obligation. At the present time, the Township is working collaboratively with two of these five interveners to assist in meeting our ultimate affordable housing obligation.

In addition, Fair Share Housing Center, a 501(c)3 organization out of Cherry Hill, New Jersey was designated by the Supreme Court as an "interested party" in all Declaratory Judgment Actions that were filed in the Superior Court of New Jersey in all 21 counties of the state. According to their website, Fair Share Housing Center (FSHC) is "the only public interest organization entirely devoted to defending the housing rights of New Jersey's poor through enforcement of the Mount Laurel Doctrine, the landmark decision that prohibits economic discrimination through exclusionary zoning and requires all towns to provide their "fair share" of their region's need for affordable housing."

Q: What is Denville’s obligation for affordable housing and its plan for fulfilling it?

A: Only obligations for the first and second rounds of COAH regulations are actually established at this point. In the first and second round, Denville was assigned a combined obligation of 325 affordable units. Throughout the years, the Township has taken a very proactive approach to satisfying its affordable housing obligation. We enter the current round with credits for a total of 358 affordable housing units, a surplus of 33 units. Furthermore, as part of our *Preliminary Housing Element and Fair Share Plan*, the Township is receiving an additional 28 affordable housing credits from the Estling Village Project that was completed in early-2016 (15 affordable units with 13 bonus credits because it is a rental facility).

The aforementioned *Preliminary Housing Element and Fair Share Plan* was a document requested by the court to be submitted in March 2016. The court requested the document be prepared based upon the Township’s expert’s analysis of our obligation, which was at that time an additional 112 units for the current round. Based upon our expert’s report, the Township identified a list of properties to satisfy the 112 unit prospective obligation to year 2025.

However, it is important to note that FSHC had submitted their experts report indicating that Denville’s obligation should be 1,313 affordable units. Their numbers have subsequently increased since then.

Q. When do we expect the courts to determine our obligation?

A. There are numerous different, complicated formulas and methodologies that have been advanced by the competing interests to establish the affordable housing obligation for Denville and all of the 565 municipalities in the State of New Jersey. Generally speaking, the court will establish the statewide and regional housing need, and then to determine where that need exists and how to distribute the obligation. Chances are that the courts will not necessarily agree on all aspects of these issues, thereby requiring appellate and likely the Supreme Court to finalize the matter, years down the road. Unfortunately, towns such as Denville are going to be required to proceed with development projects in the meantime and then "back into" their final 3rd round obligations and associated housing plans once the court decisions are finalized. Failure to do so and cooperate fully during the process will likely result in the Township losing its immunity from Builder’s Remedy lawsuits.

Q: What is a Builder’s Remedy lawsuit and how does it function?

A: A builder’s remedy is a court-imposed judgment in favor of a litigant (typically a developer or other profit-making entity) in which the court requires a municipality to rezone the developer’s property to allow for high density development (at least 6 units to the acre) provided that a substantial portion of the units to be constructed are reserved for or set-aside for low and moderate income households. The additional market units that are allowed through the higher density development are intended to create an additional profit to the developer who will use some of those profits to subsidize the low and moderate income units that the developer must now construct as part of its development. A developer is entitled to a builder’s remedy if (1) it succeeds in proving that the municipality has not satisfied its constitutional affordable housing obligation (Mount Laurel obligation); (2) it proposes a project with a substantial amount of affordable housing, and (3) the site is suitable, i.e. the municipality fails to meet its burden of proving that the site is environmentally constrained or construction of the project would represent bad planning. *Toll Bros. v. Twp. Of West Windsor*, 334 NJ Super. 109 (App.Div.2000)

A successful developer in a builder’s remedy suit is entitled to a court ordered zoning designation, including all aspects of zoning such as density, setbacks, building heights, lot coverage, green area, etc. Municipalities in builder’s remedy lawsuits may be held liable for developers’ attorney’s fees and costs of suit, the fees of a special master appointed by the court to assist in developing the zoning scheme on the affected property, the costs of any infrastructure improvements, such as sewer and water system upgrades and road improvements. When a builder’s remedy is granted against a municipality, the town and its planning and zoning boards lose all control over the zoning of the subject property, which is left to the special master, who only reports to the court.

Q: How does a municipality win a builder's remedy lawsuit?

A: A municipality can win a builder's remedy lawsuit by proving that it has satisfied its Mount Laurel obligation voluntarily by adopting zoning that provides a realistic opportunity for the construction of the municipality's fair share of the region's affordable housing needs. Denville is part of a four county region comprised of Morris, Union, Essex and Warren counties.

Barring that defense, it is not an overstatement to say that over the course of judicial history since the builder's remedy was created by the New Jersey Supreme Court in 1983 (Mount Laurel II), it is nearly impossible to find a New Jersey municipality that prevailed in a builder's remedy lawsuit. Like being in quicksand, the more you fight, the deeper you sink. When a builder's remedy is granted, the municipality is left paying its own attorney's and other professionals' fees, the fees of the court appointed Special Master, as well as, in many cases, the attorney's fees of the developer and all infrastructure improvements such as sewer and water system upgrades and road improvements, required by the court imposed development plan. The municipality also loses virtually all zoning and development regulation control, including density, height, setbacks, landscaping. These decisions are made by an outside party who could live in Hunterdon or Middlesex or Ocean County and could have limited or no knowledge of Denville.

Q. Why can't the Township object to allowing new housing to be built based upon the impact such housing will have on our local school system and on traffic congestion?

A. Although the Township of Denville and the Denville Board of Education share these exact same concerns with respect to the adverse impact development will have on our schools and traffic, almost unbelievably the State of New Jersey and courts do not consider nor do they allow us to consider these factors when calculating our affordable housing obligation. Infrastructure such as water and sewer capacity can be considered by the court; however, the local water system and regional sewerage authority which processes Denville's sewage are able to accommodate additional development as demonstrated as part of the annual permitting process with the NJDEP.

Q: Why can't the Township just zone its vacant land for single family homes and make a developer comply with that zoning?

A: According to the New Jersey Constitution and the Fair Housing Act, legally there is no way the Township can require this. It is called "per se exclusionary" zoning by numerous court decisions and legislative enactments over the past 40 years. See e.g. *South Burlington NAACP v. Mt. Laurel*, 92 NJ 158, 310(1983) (Mount Laurel II); *Oakwood at Madison v. Madison*, 72 NJ 481 (1977); *Toll Brothers v. West Windsor*, 303 NJ Super. 518 (Law Div. 1996); 334 NJ Super. 37 (App.Div.2000); 173 NJ 502(2002). All of these court decisions, all settled Supreme Court precedent, reinforce the proposition that single family zoning on minimum lot sizes are "per se exclusionary" and subject to a builder's remedy. The Township also cannot legally require that dwelling units be sold, rather than rented, any more than it can tell you to sell or rent your property.

Q: How do we protect the Township from a Builder Remedy Lawsuits?

A: The only way any community can be protected from a Builder Remedy Lawsuit is to submit a *Housing Element and Fair Share Plan* that complies with the required obligations and received a Judgment of Compliance/Repose from the Court. This replaces the previously granted Substantive Certification, which was granted by COAH. As long as the Township is complying with its Housing Element and Fair Share Plan, the Township will be "immune" from Builder Remedy. The Township of Denville has received Substantive Certification for its prior round obligations and remains immune so long as it proceeds with its Declaratory Judgment Action in good faith and comes up with a constitutionally compliant *Housing Element and Fair Share Plan*.

Q. Has the Township made attempts to notify the public of these proceedings?

A. Since early-2016, the Township has conducted numerous public meetings on this topic and has made every attempt to notify the community of these meetings via social media (Facebook), the Township website and traditional news media outlets. Some of the meetings where the topic was discussed include:

2016:

March 22 – Joint Meeting with the Township Planning Board to adopt the *Preliminary Housing Element and Fair Share Plan* as requested by the courts.

September 13 – Presentation on Redmond Press Redevelopment Project.

2017:

April 11 – Township Affordable Housing Attorney Edward Buzak made Public Presentation regarding the history and current situation with respect to COAH and Affordable Housing in the State and Denville Specifically.

June 20 – Executive Session only Declaratory Judgment

July 11 – Glenmont Commons Presentation with Introduction by Township Affordable Housing Attorney Edward Buzak

September 12 – Toll Brothers Presentation

Minutes, including audio recordings of the above meetings are available at the following link on the Township website: http://www.denvillenj.org/township_council_agendas_and_minutes.php

Furthermore, as stated on the front page of the most recent edition of the Hub Times:

“The biggest issue facing our community is the current litigation related to Denville’s affordable housing obligation thru 2025. Due to the inexcusable inaction of our State-level officials, the matter of determining each municipality’s obligation has been placed in the court system. Fair Share Housing Center, who is our adversary in the lawsuit is proposing a new obligation for Denville in excess of 1,000 affordable units (in addition to 5,000 market rate units) over the next 10 years. The Township has put together a talented professional team to combat these claims. In fact, our scientifically based calculation propose an obligation to the courts for Denville as being only a fraction of the obligation being proposed by the FSHC. To maintain our protection from builder’s remedy lawsuit, which would result in development that would undoubtedly change the character of our community, Denville is participating in the process in good faith. I [we] need to prepare the community that there will be residential development in the coming years; however, your municipal officials and our professionals are going to do our absolute best to ensure it is smart development with the least possible impact on the quality of life in our community.”

Q. What can a local resident do to help?

A. There are numerous bills and even constitutional amendments that have been proposed at the State-level to provide much needed clarity and relief to the process.

The following are a list of some of these proposed bills and proposed constitutional amendments that have been sponsored by our local District 26th State legislators that we feel would be beneficial to Denville based upon the current situation:

- **A4667 Establishes "Affordable Housing Obligation Study Commission;**
- **S3081 Establishes "Affordable Housing Obligation Study Commission;**
- **A5025 Requires COAH to administer affordable housing obligations of municipalities based on statewide obligation;**
- **A5027 Requires COAH to calculate affordable housing obligations on Statewide basis;**
- **A5028 Establishes additional factors for municipal adjustment used in calculating fair share affordable housing obligations; provides population-based cap for these obligations;**
- **A5029 Prohibits affordable housing obligation exemptions for urban aid municipalities;**
- **ACR249 Proposes amendment to New Jersey Constitution to prohibit exclusionary zoning and clarify municipal obligations regarding affordable housing construction; and**
- **ACR250 Proposes constitutional amendment to require State-wide calculation of affordable housing obligation.**

Local residents are encouraged to contact state officials and encourage the passage of the above bills. The following is a link to the contact information for the Leadership of State Senate and Assembly:

<http://www.njleg.state.nj.us/members/leadership.asp>