Berkeley Heights Township's Current Affordable Housing Status

The History of Affordable Housing Law in NJ

The affordable housing or Mount Laurel doctrine, started with the 1975 decision by the N.J. Supreme Court involving the Township of Mount Laurel ("Mount Laurel I").[1] In Mount Laurel I, the Supreme Court decided that under the State Constitution, each municipality "must, by its land use regulations, make realistically possible the opportunity for an appropriate variety and choice of housing for all categories of people who may desire to live there", including those of low and moderate income. Thus, the Mount Laurel I decision, prohibits municipalities from using zoning powers to prevent the potential for the development of affordable housing.

Displeased with progress under its earlier decision, in 1983, the N.J. Supreme Court released a second Mount Laurel decision ("Mount Laurel II").[2] Because the Legislature had not enacted laws to implement the holding in Mount Laurel I, the Court in Mount Laurel II fashioned a judicial, or what is commonly referred to as a "Builder's Remedy". That remedy created a special process by which builders could file suit for the opportunity to construct housing at much higher densities than a municipality otherwise would allow. In essence, Builder's Remedy lawsuits seek to force towns to meet their affordable housing obligations.

Responding to the chaos created by the implementation of the Mount Laurel decisions and the many Builder's Remedy lawsuits that followed, the State Legislature passed the Fair Housing Act (hereinafter "FHA") in 1985 which the Supreme Court upheld in ("Mount Laurel III").[3]

The FHA created the New Jersey Council on Affordable Housing (hereinafter "COAH"). The FHA required COAH to (1) enact regulations that established the statewide affordable housing need, (2) assign to each municipality an affordable housing obligation for its designated region and (3) identify the techniques available to municipalities to meet its assigned obligation. The FHA included a process for municipalities to obtain Substantive Certification, which, if granted by COAH, would protect municipalities against Builder's Remedy lawsuits or lawsuits from a housing advocate for a defined period of time. The FHA also transferred pending Builder's Remedy litigation to COAH for resolution through an administrative process, and established a process for bringing municipalities into compliance.

To implement the FHA requirements, COAH adopted a series of regulations. Round One regulations were enacted in 1987. Round 2 regulations were adopted by COAH in 1994. Round 3 regulations were supposed to be adopted in 1999 when the Round 2 rules were set to expire, but the Round 3 rules were not adopted by COAH until 2004.

In 2007, the Appellate Division affirmed portions of COAH's Round 3 rules, but invalidated other aspects of them.[4] The opinion remanded the matter to COAH for adoption of new compliant regulations, and gave the agency six months to do so. The Appellate Division granted COAH two extensions, and COAH finally adopted a second set of Round 3 rules in September of 2008.

On October 8, 2010, the Appellate Division concluded that COAH's revised 2008 regulations suffered from many of the same deficiencies as the first set of Round 3 rules, and it once again invalidated

---

[1] So. Burl. Cty. N.A.A.C.P. v. Tp. of Mt. Laurel, 67 N.J. 151 (1975)

[2] So. Burlington Ct. N.A.A.C.P. v. Mount Laurel Tp., 92 N.J. 158 (1983)

[3] Hills Dev. Co. v. Bernards Twp., 103 N.J. 1 (1986)

[4] See In Re Adoption of N.J.A.C. 5:94 & 5:95, 390 N.J. Super. 1 (App. Div. 2007).

substantial portions of the 2008 Round 3 regulations . The Court specifically directed COAH to use a methodology for determining prospective affordable housing needs similar to the methodologies used in the prior rounds.

During this same time period, the Legislature introduced a Bill, which would have radically transformed the affordable housing world. The initial form of the S-1 Bill was supported by Governor Christie. By the time it went through the Assembly, however, a very different bill passed and the Governor conditionally vetoed the Bill. Since that time, there has been no serious attempt to adopt legislation to reform the affordable housing process.

Frustrated with the lack of movement by COAH to adopt updated Round 3 rules, the Supreme Court issued an order on March 14, 2014, which required COAH to adopt new Round 3 regulations by October 22, 2014. COAH proposed the third version of Round 3 regulations on April 30, 2014. Unfortunately, in October of 2014, the COAH Board deadlocked 3-3 when voting to approve the regulations and the rules were not adopted.

In response, on March 10, 2015, the Supreme Court issued a decision entitled ("Mount Laurel IV")[5], in which it (1) found that COAH had violated the March 14, 2014 Order by failing to adopt new Round 3 regulations by October 22, 2014, (2) held that, without new Round 3 regulations, COAH could not process municipalities' petitions for substantive certification, (3) directed trial courts to assume COAH's functions, (4) authorized municipalities under COAH's jurisdiction to file Declaratory Judgment Actions along with a motion for Temporary Immunity by July 8, 2015, or risk exposure to Builder's Remedy lawsuits, and (5) ruled that municipalities would have five months to prepare and file a Housing Element and Fair Share Plan ("Affordable Housing Plan") with a trial court for review.[6]

Almost all of the municipalities that were before COAH when the Supreme Court decided Mount Laurel IV, including Berkeley Heights, filed Declaratory Judgment ("DJ") actions by July 8, 2015. Various parties are contesting the DJ actions filed by each town including Fair Share Housing Center ("FSHC"), which is a public interest group founded in 1975, that, according to its website, is the only "organization entirely devoted to defending the housing rights of New Jersey's poor through the enforcement of the Mount Laurel doctrine".

Since that time, trial judges in 15 different vicinages across the state have gone in different directions as to managing their cases. FSHC's expert issued a report which claimed that most municipalities have astronomically high affordable housing obligations. By way of example, the FHSC expert contends that Berkeley Heights should have 858 new affordable housing units alone. Since affordable housing units in an inclusionary development are typically constructed at a ratio of roughly 5 market rate units to 1 affordable unit, using FSHC's logic this would mean that Berkeley Heights would need to construct 4,290 new units in order to achieve FSHC's alleged affordable housing allocation.

Municipalities, including Berkeley Heights, countered by forming a statewide consortium that

---

[5] In the Matter of the Adoption of N.J.A.C. 5:96 and 5:97 by the New Jersey Council on Affordable Housing, 221 N.J. 1 (2015)

[6] A Declaratory Judgment action is a court proceeding that allows a municipality to get its Housing Plan approved by the court after a Compliance Hearing is held. After that hearing, the court would enter what is called a Judgement of Compliance and Repose, which approves a municipality's Housing Plan and gives that municipality 10 years of protection from Builder's Remedy lawsuits.

hired Econsult Solutions, Inc. ("Econsult") to formulate a different set of affordable housing obligations that the municipalities and Courts could reasonably rely on. Trial judges across the state have relaxed the initial five month deadline to submit a fully adopted and endorsed Housing Plan for approval, and have instead continued immunity while municipalities hand in status updates to the Courts to show what progress they have been making and prove to the Court that they are making a good faith effort to comply.

To date, Berkeley Heights has already had to prove twice that it is acting in good faith, and has another deadline approaching in which it will have to do so once again. At this point in time, issues on affordable housing obligations and compliance standards are currently front and center before all the courts in the state, as the judges try to decide what numbers and standards to assign to the municipalities in their vicinage, before final Affordable Housing Plans are submitted to the courts for approval.

Berkeley Heights' Affordable Housing Compliance History

Berkeley Heights believes that it has been, and will continue to be in compliance with its Mount Laurel obligations. The following summary describes Berkeley Heights' compliance history without compromising the pending DJ action which is currently before the Court.

Historical Compliance

The Township has been voluntarily complying with its Mount Laurel obligations for decades. In 1989, the Court, approved the Township's Affordable Housing Plan which included affordable housing credits located in the Township as well as a Regional Contribution Agreement ("RCA") with the City of Newark, which provided for additional affordable housing credits. The RCA credits were obtained by making certain payments to Newark. Newark then used the funds provided to rehabilitate units located within its borders. The Legislature abolished the use of RCA agreements when it modified the FHA in 2008, but the Township is still entitled to the credits from its older RCA. In 1995, the Court entered an order confirming the Township's credits, and extending the Township's period of protection from Mount Laurel lawsuits.

In 2008, Berkeley Heights submitted its Round 3 Housing Plan to COAH, and petitioned COAH for Round 3 Substantive Certification, which if granted, would have provided a 10 year period of protection from Mount Laurel lawsuits. Unfortunately, due to circumstances beyond the Township's control, the Township's 2008 Round 3 plan was never approved by COAH. The Township remained under COAH's jurisdiction until the Supreme Court issued Mount Laurel IV in March of 2015.

The Township's Current DJ Action

After COAH failed to adopt new Round 3 regulations in late October of 2014, it became clear that trial courts could be taking over for COAH in the very near future. In November of 2014, the Mayor, the Township Council and Township Administrator John Bussiculo realized that it was important to continue to be proactive to ensure the Township would not end up being hit with expensive, time consuming and extremely risky Builder's Remedy lawsuits. Mike Mistretta, P.P., L.L.A. of Harbor Consultants, Inc., was engaged to become the Township's affordable housing planner and Jeffery R. Surenian, LLC, was retained to serve as the Township's affordable housing counsel. The Township also formed a Mount Laurel Subcommittee to assist the Township Council and the Township's Planning Board with all affordable housing issues, and this subcommittee has met several times since it was formed.

Consistent with Mount Laurel IV, On July 2, 2015, the Township filed a DJ action, along with a motion for Temporary Immunity, once again making it clear that it intended to comply voluntarily and in good faith with its Mount Laurel obligations. Two developers (Berkeley Developers, LLC which owns property at 100 Locust Avenue, and Berkeley Heights Developers, LLC, which purportedly has acquired a contractual ownership in the former Kings property on Springfield Avenue), moved to intervene in the Township's action.

Berkeley Developers, LLC proposed a 300 unit multi-family project on the 10.2 acre 100 Locust Avenue site in its motion papers, which would yield a density of 29 units per acre. A 20 percent affordable housing set aside was proposed.

Berkeley Heights Developers, LLC did not specify the number of units in its proposed project in its moving papers, but in a letter dated May 15, 2015 to the Mayor and Township Council, the developer proposed a 180 unit multi-family rental project on the 4.8 acre Kings Shopping Center site, which would yield a density of 37.5 units per acre. A 15 percent affordable housing set aside was proposed.

The first judge assigned to the case, Judge Cassidy, entered an order granting the Township an initial period of immunity until December 7, 2015 and appointing Elizabeth McKenzie, P.P., A.I.C.P. to serve as the Court's Special Master. Judge Cassidy also allowed both developers to intervene in the Township's case.

A third developer, Lockhern Associates, LLC, the owner of the former movie theatre on Springfield Avenue, immediately thereafter moved to intervene in the Township's case. Although Lockhern Associates, LLC did not specify the number of units in its proposed project in its moving papers, in a letter dated May 15th, 2015 to the Mayor and Township Council, the developer proposed a 40 unit multi-family rental project on the .99 acre site, which would yield a density of 40 units per acre. A 15 percent affordable housing set-aside was proposed.

Due to a conflict of interest, Judge Cassidy stepped down and was replaced by Judge Kenny, who allowed Lockhern to intervene in the Township's case. On October 1, 2015 Judge Kenny entered an order requiring the Township to submit a "plan summary" to show that it was proceeding in good faith. The Township turned in its "plan summary" to the Court and the Court Master fir review on October 22, 2015. Two of the three intervenors submitted oppositional letters commenting on the Township's "plan summary", as did FSHC.

In November of 2015, the three developers all asked for mediation with the Township, with the Court Master serving as mediator. Mediation began in December of 2015. As required by the Court, the Township filed a motion to extend its immunity on November 17, 2015. On December 18, 2015 Judge Kenny entered an order extending the Township's immunity until April 4, 2016. The order also set a series of deadlines the Township must meet prior to the April 4th date, including filing a third motion to extend immunity. The Township approved a Memorandum of Understanding ("MOU") with the Berkeley Developers, LLC intervenor during its Council meeting on February 23, 2016. That MOU envisions a 196 unit "age restricted" development (limited to residents ages 55 and older), and a 15 percent set aside for affordable units. Subject to the approval of a settlement agreement, this will allow the Township to focus on the mediations involving the other developer intervenors.

At the same time, the Township planner will continue to work on drafting a new Round 3 Affordable Housing Plan which will eventually be submitted to the Court and the Court Master for review

and approval. Once approved, the Township will have ten years of protection from all Mount Laurel lawsuits, including Builder's Remedy lawsuits.

The Township's Prospective Affordable Housing Obligations

Given the absence of COAH or regulations to guide the process coupled with the Mount Laurel IV decision, it is not currently known what the Township's actual affordable housing obligations will be. The Township's expert believes that our Round 3 obligation including prior round credits is 218. In contrast, FSHC contends that the Township's Round 3 obligation is 858.

There are a host of other possibilities that include the Court's acceptance of (1) the Township's expert's number, (2) FSHC's expert's number, or (3) a number somewhere between the two experts. The Court may also appoint a Special Regional Court Master to calculate the number, or the Court may rely on precedent set by other courts outside of this vicinage.

Regardless of the final Round 3 number, the Township's planner has already prepared what is called a Vacant Land Analysis to determine how many affordable units can actually be constructed in the Township in the next 10 years, since the Township has only limited developable land left. This number is called the Realistic Development Potential ("RDP"). Any remaining obligation beyond the RDP is referred to as the "unmet need." The Township will be required by the Court to fully satisfy its RDP. As to the "unmet need", it will most likely be required to make some sort of effort to satisfy at least part of that obligation as well, although the Township will make legal arguments that it should not have to satisfy its "unmet need" at all. At this point in the litigation, the RDP has not yet been established.

Conclusion

At this point in time we, like most every municipality in the State, are unsure what the Township's final affordable housing obligation numbers will be since there are currently no valid Round 3 COAH regulations in place. The actual number will first have to be determined and assigned to the Township by the Court before the Township and its Planning Board will be able to finalize and adopt a final Round 3 Housing Plan.

Moving forward, the Township and its professionals will seek to develop a Housing Plan that, is in compliance with the law, and to the maximum extent possible, maintains the current quality of life and culture of Berkeley Heights. Should anyone wish to speak with any member of the Governing Body or the Township Administrator, please do not hesitate to visit the municipal building, send an email or call the municipal offices. The Township will do its best to answer your questions recognizing that we are in the midst of litigation and cannot prejudice our case.