

UPDATE ON THE LAW:
AFFORDABLE HOUSING LITIGATION

On July 11, 2016, the Superior Court, Appellate Division (the “Court”) issued its decision in the case entitled In Re Declaratory Judgment Actions Filed by Various Municipalities, County of Ocean, Pursuant to the Supreme Court’s Decision in In Re Adoption of N.J.A.C 5:96, 221 N.J. 1 (2015). The decision arose from an appeal filed by the Township of Barnegat from an order entered by the Ocean County designated Mt. Laurel judge who directed the Special Regional Master to include, as a new “separate and discrete” component, an additional calculation of a municipality’s affordable housing need for the period from 1999 to 2015 (referred to in this article as the “Gap Period”). The Judge’s order was based on his conclusion that a municipality’s third round affordable housing obligation is comprised of (1) a “separate and discrete” gap-period obligation; (2) unmet prior round obligations from 1987 to 1999; (3) present need; and (4) prospective need.

The issue which was considered by the Appellate Court was limited to the following:

(W)hether a “separate and discrete” gap-period affordable housing obligation is authorized by (1) the core principles of the Mount Laurel doctrine, as codified in the Fair Housing Act of 1985 (FHA), N.J.S.A. 52:27D-301 to -329; and (2) In re N.J.A.C. 5:96 II.

The Appellate Court focused its consideration on whether the Ocean County Mt. Laurel Judge’s conclusion that the Gap Period obligation was constitutionally mandated was, in fact, legally correct.

The decision of the Appellate Court applied the principles of the Mt. Laurel decision and the plain language of New Jersey’s Fair Housing Act, which specifically defines “prospective need” as a “projection of housing needs based on development and growth which is reasonably likely to occur in a region or a municipality.” N.J.S.A. 52:27D-304(j). The Appellate Court also recognized the Supreme Court’s directive that the lower courts were not to become “alternative administrative decision maker(s)” for policy issues for the third round which remain unresolved by the Council on Affordable Housing (“COAH”). The Appellate Court further cited the Supreme Court’s decision in In re N.J.A.C. 5:96 II, in which the designated Mt. Laurel judges were instructed to assess a municipality’s affordable housing plan to determine if it provided a “realistic opportunity for producing its fair share of the present and prospective need for low-and moderate-income housing.” Based on these considerations, the Appellate Court found that there was no “separate and discrete” affordable housing obligation for the Gap Period. The proper course, as cited by the Appellate Court, is for a municipality to “start with its unfulfilled prior round obligations and then establish its present and prospective need in establishing (its) fair

share Mount Laurel obligation.” The Appellate Court reversed the Ocean County Judge’s decision and remanded the matter to the Ocean County Judge for further proceedings consistent with the decision.

The Appellate Court further stated that any Gap Period obligation was a matter more properly to be determined by either the Legislative or Executive branches of the State, where such matters can be publicly debated. The Court also recognized that there was legislation relating to the Gap Period pending in both the Senate and the Assembly.

The Appellate Court decision has been appealed to the New Jersey Supreme Court by Fair Share Housing Center (“FSHC”). FSHC has also filed an emergent motion with the Supreme Court to “stay” the implementation of the Appellate Court’s decision in Ocean County. The municipal consortium of approximately 230 municipalities has filed its brief to challenge any “stay” and, in the alternative, if the “stay” is granted, that such “stay” apply throughout the State of New Jersey so as to prevent inconsistent rulings by the various lower court judges handling affordable housing lawsuits.

It is also possible that the Legislature will adopt pending legislation which clarifies that the affordable housing need is present and prospective only; meaning there is no Gap Period obligation, consistent with the Appellate Court decision. We have been advised by Senator Bateman, a prime sponsor of S2254, the Senate version of the Gap Period legislation, which he will push to have the bill adopted to preclude the need for the Supreme Court to rule on the validity of the Appellate Court decision. We will keep you updated as events unfold.

Despite all of this legal “wrangling”, the Township of Warren continues to provide affordable housing and is committed to meet the affordable housing needs of its residents.