

AFFORDABLE HOUSING IN NEW JERSEY

In its landmark 1975 decision referred to now as “Mount Laurel I”, the New Jersey Supreme Court ruled that developing municipalities have a constitutional obligation to provide a realistic opportunity for the construction of low and moderate income housing. In its 1983 “Mount Laurel II” decision, the Supreme Court extended the obligation to all municipalities and created an incentive, subject to various limitations, for private developers and advocates to enforce the “Mount Laurel doctrine” by bringing exclusionary zoning lawsuits (otherwise known as “builder’s remedy”) against municipalities which are not in compliance. A typical exclusionary zoning lawsuit entails a developer seeking high density housing, of which 20% of the units are affordable, on a particular site

In 1985, the Legislature enacted the **Fair Housing Act** in response to the Mount Laurel court decisions. The FHA created the Council on Affordable Housing (COAH) as the administrative alternative to the Courts. The FHA also charged COAH with the responsibility to (i) establish housing regions, (ii) estimate low and moderate income housing needs, (iii) establish criteria and guidelines for municipalities to determine and address their fair share numbers, and (iv) to review and process municipal petitions for approvals of their housing elements and fair share plans.

COAH released its **first round** affordable housing obligations in 1986 for the time period 1987 to 1993. These were superseded by the 1994 COAH regulations which recalculated a portion of the 1987-1993 affordable housing obligation for each municipality and computed the additional municipal affordable housing need from 1993 to 1999; this is known as the **second round**. This 12-year cumulative period from 1987 through 1999 is referred to as the “**prior round**.” During this time, COAH assigned affordable housing obligations to each municipality, adopted rules for how municipalities can satisfy their obligation, and they reviewed and approved housing elements and fair share plans with those approvals referred to as substantive certification.

On December 20, 2004, COAH’s first version of the **third round** rules became effective. At that time the third round was defined as the period from 1999 to 2014, condensed into an affordable housing delivery period from 2004 through 2014. The third round rules marked a significant departure from the methodology utilized in COAH’s two prior rounds. Previously, COAH assigned an affordable housing obligation as an absolute number to each municipality. These third round rules implemented a “**growth share**” approach that linked the production of affordable housing with future residential and non-residential development within a municipality.

However, in a unanimous decision in January 2007, the Appellate Court invalidated key aspects of COAH’s third round rules. The Court ordered COAH to propose and adopt amendments to its rules to address the deficiencies identified by the Court. In response to the 2007 decision, COAH revised its third round rules in 2008. These new rules continued to largely rely on a “growth share” approach for determining municipal third round affordable housing obligations. At this time the third round was defined as the period from 1999 to 2018, condensed into an affordable housing delivery period from 2008 through 2018.

In 2010 the Appellate Court invalidated COAH’s third round growth share methodology and portions of COAH’s regulations. The Court directed COAH to abandon the growth share approach and to revise its third round methodology and regulations by March 8, 2011 using a methodology substantially similar to COAH’s first and second round methodologies.

Subsequent delays in COAH's rule preparation and ensuing litigation led to the NJ Supreme Court in 2014 setting forth a schedule for adoption of COAH's rules. Although ordered by the NJ Supreme Court to adopt revised new rules on or before October 22, 2014, the Council on Affordable Housing ("COAH") deadlocked 3-3 at its October 20, 2014 meeting and failed to adopt new rules. Not only did COAH's failure to adopt the proposed regulations violate the Supreme Court's Order, but now all New Jersey municipalities were left in a state of limbo despite voluntary compliance.

Following COAH's inaction, in October, 2014, the Fair Share Housing Center (FSHC) filed a Motion in Aid of Litigant's Rights urging the Supreme Court, among other things, to direct all trial judges, instead of COAH, to establish standards with which municipalities must comply. **On March 10, 2015 the Supreme Court issued a ruling. This long-awaited decision provided a new direction for how New Jersey municipalities are to comply with the constitutional requirement to provide their fair share of affordable housing. The Supreme Court transferred responsibility to review and approve housing elements and fair share plans from COAH to designated "Mount Laurel" trial judges of the Superior Court.** The implication of this is that municipalities could no longer wait for COAH to adopt third round rules before preparing new third round housing plans and municipalities must apply to Court, instead of COAH, if they wish to be protected from exclusionary zoning lawsuits. **The Mount Laurel judges, with the assistance of an appointed Special Master to the Court, are required to determine municipal affordable housing obligations and review municipal plans much in the same manner as COAH previously did.** The decision also recognized that a municipality must file a Declaratory Judgment action, no later than July 8, 2015 and submit an amended or supplemental Housing Element and Fair Share Plan to the Court by November 8, 2015. More recently, the Appellate Division ruled that the third round shall be defined as the period from 1999 to 2025, condensed into an affordable housing delivery period from 2015 through 2025, therefore, requiring that 26 years of affordable housing need be addressed in a 10-year compliance period.

Consistent with the 2015 Supreme Court decision, on July 8, 2015, the Township filed a Motion and Declaratory Judgment action seeking the entry of an Order maintaining temporary immunity thereby rendering all exclusionary zoning lawsuits unnecessary while the third round obligation is determined and the Township prepared a housing element and fair share plan. Moorestown joined a consortium of other participating municipalities statewide which sought to hire an expert and develop its own planning report utilizing its own methodology. At this point in the process, municipalities may seek a trial to determine the third round obligation or they may enter into a settlement agreement with the FSHC that identifies a third round affordable housing obligation. Any settlement agreement with the FSHC must be reviewed and approved by Superior Court in a Fairness Hearing. A housing element and fair share plan, regardless of whether it is pursuant to a settlement agreement, must be reviewed and approved by Superior Court in a Compliance Hearing. Those towns whose plans are approved by the Court will receive a Judgment of Repose, the court-equivalent of COAH's substantive certification.

