

July 25, 2016

## Judge Wolfson Issues First Trial Court Decision on Affordable Housing Obligation Methodology; Sides Substantially With Fair Share Housing Center Expert

In the first trial court decision on the issue of calculating municipal affordable housing obligations in New Jersey, Judge Wolfson in Middlesex County agreed substantially with the methodology used by Fair Share Housing Center's expert, Dr. David Kinsey. As part of his July 21 decision, Judge Wolfson called into question the credibility of the municipal expert, Econsult Solutions. The decision should have a significant impact on the various other affordable housing cases throughout the state, though it is not binding on the other trial courts.

Judge Wolfson's case involved the Township of South Brunswick. In May, Econsult, the Township's expert, projected that the Township has a "prospective need" obligation (2015-2025) of approximately 266 units. Judge Wolfson found South Brunswick's prospective need obligation to be almost six times higher at 1,533 (this does not include the application of any caps, like the 1,000-unit cap). Judge Wolfson found Dr. Kinsey's testimony on methodology to be credible and more in line with the Council on Affordable Housing's (COAH) First Round and Second Round rules. Judge Wolfson found Econsult's methodology contrary to COAH's prior rules and driven more by a "results oriented" approach to keep affordable housing obligations artificially lower.

In addition, Judge Wolfson outlined the "remedy" phase of the trial. Due to South Brunswick's lack of good faith in addressing its affordable housing obligation, Judge Wolfson earlier in the year stripped South Brunswick of temporary immunity from builder's remedy suits. Thereafter, several developers filed builder's remedy suits against the township. However, Judge Wolfson noted in this decision that this case is not a typical builder's remedy lawsuit where a developer is rewarded for bringing a town into compliance with its affordable housing obligation. As such, Judge Wolfson did away with the prior builder's remedy maxim of "first to file, first in line" in determining priority. Rather, the court's grant of a builder's remedy to developers will be based on "equitable considerations," which will include at a minimum (1) the likelihood of actual construction, (2) the availability of infrastructure, (3) the project's proximity to goods and services, (4) regional accessibility, (5) environmental suitability and (6) compatibility with neighboring land uses.

It remains to be seen how this decision will impact other trial judges throughout the state who will be conducting their own trials on calculating affordable housing obligations in the months to come. Judge Wolfson's decision, however, directly called into question the credibility of South Brunswick's expert, Econsult, which is the same expert used by many towns throughout the state.

Day Pitney will continue to provide updates on this issue as the various affordable housing cases continue to proceed across the state. Should you have any questions concerning this decision or the affordable housing litigation in general, please contact Craig M. Gianetti.

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