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Appellate Division Rules Affordable Housing Obligations Should Not Include Separate Gap Period

In the ongoing saga concerning affordable housing in New Jersey, on July 11, the Appellate Division overturned the Ocean County trial court decision (a decision also followed by trial judges in Middlesex and Mercer counties) that a town's affordable housing obligation has to include the "Gap Period" – the period from 1999 to 2015 when there were no valid Council on Affordable Housing regulations. The Appellate Division ruled that such a "separate and discrete" obligation is not authorized by the *Mount Laurel* doctrine, the New Jersey Fair Housing Act or the Supreme Court's decision in *In re Adoption of N.J.A.C. 5:96 & 5:97 by the New Jersey Council on Affordable Housing*, 221 N.J. 1 (2015) ("Supreme Court Decision"). The Appellate Division held that only prior round need, present need and prospective need are authorized by the law. The ruling, however, did seem to indicate that though the Gap Period could not be considered a "separate and discrete" obligation, it could be factored into calculating present need and prospective need.

The Appellate Division ruling is significant from both legal and practical perspectives. Practically speaking, the ruling is a realization of the fear that despite the Supreme Court Decision (which many hoped would lead to breaking the delay and confusion on affordable housing), the issue of calculating municipal affordable housing obligations; i.e. "methodology", would be tied up in the courts for years to come. We are over a year removed from the Supreme Court Decision, and we still do not have a trial court decision on how to calculate municipal obligations. This Appellate Division ruling makes that more complicated because it will now generate more trial court conferences and possibly delay trials on methodology. The Appellate Division ruling could also go to the Supreme Court, which could lead to trial courts possibly delaying any decision on methodology until the Supreme Court settles the issue on the Gap Period.

Another consideration is the impact on settlements and preliminary "matrix" plans prepared by towns. With respect to a settlement of affordable housing litigation where a town agreed on a number for its obligation but had carve-out language in the event the Appellate Division changed the methodology, will the town seek to rescind the settlement or modify its obligation in that settlement? Further, many towns had to prepare a preliminary matrix plan identifying projects likely to satisfy their anticipated obligation. If a project was identified in the preliminary matrix, is that project at risk of being removed from the plan? The preliminary matrix plan was just that – preliminary – so there was never a guarantee that a project in the preliminary matrix plan would be in the town's final affordable housing plan.

In sum, the specific effects of the Appellate Division ruling will play out over the next month as the trial courts digest the decision and decide how this impacts the scheduling of trials on the issue of methodology, with the wild card being whether the issue goes to the Supreme Court. In the meantime, towns will likely be less willing to settle with developers or make a decision on which projects to include in affordable housing plans.

Whether developers are intervenors in affordable housing litigation, are "interested parties" or are just observing patiently from the sidelines, they should discuss with their counsel the impact this decision will have on their particular development strategy.

For more information on this decision and its impact on the ongoing affordable housing litigation, please contact Craig Gianetti.

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