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Long-Awaited Decision Sets New Jersey Methodology for Municipal Affordable Housing Obligations

On March 8, Judge Mary Jacobson issued her long-awaited affordable housing decision in Mercer County on the methodology for calculating statewide and municipal affordable housing obligations. The decision also set the numbers for the Mercer County towns that did not settle their litigation, Princeton and West Windsor (Municipalities). The 217-page decision meticulously went through the various (approximately two dozen) components of calculating affordable housing need and the expert testimony on each component on behalf of the Municipalities, Fair Share Housing Center (FSHC), the New Jersey Builders Association (NJBA) and the court-appointed special master, Richard Reading. In general, the decision is a positive result for developers that are intervenor-defendants or interested parties in other affordable housing litigation throughout the state. However, it will take some time to analyze this decision and its application to other towns in calculating municipal affordable housing obligations.

If nothing else, the decision is positive, as it should shake loose the affordable housing litigation in other counties that have stalled while towns, special masters and the courts waited for the Mercer County decision. With respect to the substance of the decision, the court determined that the overall statewide affordable housing need is 159,630 units. That is more than double the number the Municipalities projected (63,070 units) and about half of what FSHC projected (339,673 units). The court's statewide need projection is also higher than the approximately 115,000 units projected by Reading, the special master. As anticipated on this polarizing issue, neither side "won," and the court found a happy medium. As for Princeton and West Windsor, the court determined their new-construction affordable housing obligation to be 753 units and 1,500 units, respectively. This includes the obligation from the "gap period" (1999 to 2015) and prospective need obligation. Though not referenced in the decision, the below chart compares the court's municipal projection with the projections made by the Municipalities and FSHC in prior reports submitted to the court.

Town	Municipalities #	Fair Share #	Court #
Princeton	457	1,495	753
West Windsor	285	2,288	1,500

Though the decision is a giant step forward with respect to the remaining affordable housing litigation throughout the state, attorneys and planners will need time to fully analyze the decision and data relied upon by the court in order to apply the court's methodology in other towns. In its analysis, the court broke down the approximately two dozen components for calculating municipal affordable housing obligations. The court clearly struggled at times with the Supreme Court's mandate to follow the prior round Council on Affordable Housing regulations as closely as possible. Those regulations were from the 1990s; in some instances, better or more reliable data sources exist today, and in other instances, the data sources from the 1990s no longer exist.

With respect to every component and data source, the court walked through each expert's position and analysis and essentially created its own methodology by taking different aspects from each expert's methodology. Therefore, one cannot simply take the percentage difference between the court's number for West Windsor and FSHC's projected number and apply that percentage to other municipal obligations projected by FSHC. The methodology used by the court will need to be pieced together in order to apply it to other towns.

An example of this difficulty in applying the court's decision to other towns is "filtering." Both the Municipalities and FSHC experts used the concept of filtering as a basis to move obligations up and down. The Municipalities argued for downward filtering, which is the concept that housing becomes affordable when middle- or upper-income households vacate a home (almost like a trickle-down theory). This obviously lowered affordable housing need. On the other hand, FSHC argued for upward filtering, which is the concept that formerly affordable units rise in value and out of affordability. This increased affordable housing need. The court rejected using either filtering concept in calculating municipal obligations.

Filtering had a varying impact on FSHC's projected obligations for towns throughout the state. In some areas, it was a large component of its projected obligation; in others, it was very small. Thus, some towns could see a significant reduction of FSHC's projected number and some may see only a small change.

This alert is only a brief summary of the decision. All parties involved in affordable housing litigation in New Jersey will take time to digest this case and determine, strategically, how best to proceed. The hope is that the decision will force towns that have delayed the process to seriously consider settlement and a resolution. If we have learned nothing else from the Middlesex, Ocean and Mercer county litigations, it is that some towns will not settle until they have a trial date in sight.

Day Pitney will provide future updates as the impact of this decision takes shape moving forward. Those with questions or concerns should feel free to contact any of the attorneys in the Day Pitney Real Estate group.

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