March 11, 2015

New Jersey Supreme Court Gives Mount Laurel Back to the Courts

By now, you have likely heard that on March 10, the New Jersey Supreme Court took drastic action in returning enforcement of *Mount Laurel* and Council on Affordable Housing (COAH) matters to the courts based on COAH's failure to promulgate new third-round regulations as required by the Supreme Court's order last year. Below is an outline of and commentary on the new procedure established by the Supreme Court for the lower courts to handle municipal compliance with affordable housing obligations.

As a developer or investor in a project, what does that mean for you? Several months ago while the COAH litigation was pending and proposed regulations were being discussed, we sent an alert to developers and clients advising that then was the time to start strategizing on how to be best positioned when the dust starts to settle on the COAH litigation. As a result, some clients are in the ideal position of having rezoning requests pending at this very moment for projects that provide affordable housing, and it will now be hard for a town to turn the project down in light of the procedure and timing outlined by the Supreme Court in its March 10 decision.

There is still an opportunity for developers and investors to act now for both short- and long-term strategies for potential projects. The strategies and goals will be dependent on several factors including the type of development, which town the development would be located in and, obviously, risk tolerance.

Summary and Comments on Supreme Court Procedure for Affordable Housing Compliance

- There will be a 120-day period during which towns that already have substantive certification from COAH or that have applied to COAH for substantive certification ("COAH Towns") will be allowed to seek declaratory judgment in court that they are in compliance (or will seek to become in compliance) with their affordable housing obligation. During this time, no builder can file a builder's remedy lawsuit against such towns.
    - Once a declaratory judgment is filed, a court may grant temporary immunity from builder's remedy suits for up to five months so the town may supplement or amend its affordable housing plan.
    - Towns that seek declaratory judgment must provide notice to the Fair Share Housing Center.
    - Towns that have never submitted a plan to COAH do not have this protection and can be sued **today** for a builder's remedy, and **yes, those towns still exist**.
- COAH Towns could choose not to seek declaratory judgment during this 120-day period, but rather choose to "wait and see" if a developer sues the town, challenging municipal compliance. At that point, the town could seek to establish compliance as a defense.
- The courts will use COAH's first and second round methodology to calculate **prospective need** as a component of the town's affordable housing obligation. The courts will use COAH's prior-round obligations calculated under its third round rules, because those numbers were specifically upheld by the Appellate Division in 2010.
- A town's compliance will be determined on an individual basis using COAH's previously approved methodology and compliance mechanisms.

- Though the Supreme Court's action is drastic, the one wild card is COAH. COAH can still put a stop to this by adopting, or possibly just proposing, new regulations. If that occurs, the court may transfer everything back to COAH.

Should you have any questions on what this all means for you as a developer or investor and/or need assistance developing a strategy on how best to approach your particular situation, please feel free to contact Craig Gianetti.