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NJ Supreme Court Rules That 'Gap Period' Must Be Included In Municipal Affordable Housing Obligations

On January 18, the Supreme Court of New Jersey in *In re Declaratory Judgment Actions Filed by Various Municipalities, County of Ocean, Pursuant to the Supreme Court's Decision in In re Adoption of N.J.A.C. 5:96, 221 N.J. 1 (2015)* ruled that the housing need for low- and moderate-income families for the period 1999 to 2015 cannot be ignored and must be included in municipal affordable housing obligations.

At issue in *In re Ocean County* was whether the affordable housing need during the time period that the Council on Affordable Housing (COAH) failed to perform its required mission – 1999 to 2015, also known as the "Gap Period" – should be counted in municipal affordable housing obligations, and if so, in what manner that need should be calculated. Last February, an Ocean County Superior Court judge ruled in favor of affordable housing advocates, holding that municipal affordable housing obligations, which historically contained three components (prior-round need, present need and prospective need), had to include the Gap Period as a separate and distinct component of affordable housing obligations. However, that decision was reversed by the Appellate Division in July, holding that the Gap Period could not be a separate component as the New Jersey Fair Housing Act permitted prior-round need, present need and prospective need only in calculating municipal obligations. In a closing paragraph of its decision, the Appellate Division noted that the opinion should not be read as to completely ignore the Gap Period.

In an interesting interpretation of the Appellate Division decision, the Supreme Court affirmed the Appellate Division in holding that the Gap Period need cannot be ignored. The Supreme Court also affirmed and modified the Appellate Division decision to specifically provide that the affordable housing need during the Gap Period be counted as part of "present need." By doing so, the Supreme Court acknowledged that it was modifying the historical COAH definition of "present need," but stated such modification was necessary to ensure that the Gap Period is not improperly ignored and is included as part of a town's affordable housing obligation.

The impact of this decision will be far-reaching throughout the state for the many towns that have not settled with the Fair Share Housing Center. This Supreme Court decision coupled with the prior trial court decisions of Judge Wolfson on methodology – the manner in which affordable housing obligations are calculated – will likely lead to affordable housing obligations higher than desired or expected by municipalities and closer to the Fair Share Housing Center's projections.

The focus will now be on the pending trial involving Mercer County towns and upcoming trials throughout the state that will deal with the specific affordable housing obligations for many towns.

Should you have any questions concerning this decision or the status of the affordable housing litigation in general, please contact Craig M. Gianetti.

Authors



Craig M. Gianetti

Partner

Parsippany, NJ | (973) 966-8053

cgianetti@daypitney.com