

Justices Give Judiciary Control of Affordable Housing Issues

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Body

The New Jersey Supreme Court on March 10 unanimously ruled that the judiciary is once again in control of determining how many units of low- and moderately-priced housing municipal governments will be responsible for building.

The court, citing the inability of the state Council on Affordable Housing (COAH) to come up with new rules, said low- and moderate-income residents, or entities acting on their behalf, can turn to the courts for relief when they believe a municipality is attempting to avoid its constitutional responsibility to provide for affordable housing.

"We conclude that towns must subject themselves to judicial review for constitutional compliance," Justice Jaynee LaVecchia wrote for the court in *In re Adoption of [N.J.A.C. 5:96 & 5:97](#)* by N.J. Council on Affordable Housing.

COAH was created by the legislature in 1985 as part of the Fair Housing Act, in response to the Supreme Court's Mount Laurel rulings, which said municipalities must provide for housing for low- and moderate-income buyers, and may not enact exclusionary zoning ordinances that effectively bar the building of homes for such buyers.

If municipalities submitted affordable housing plans to COAH, they could avoid litigation until all administrative remedies had been exhausted.

However, COAH has been under court orders to produce new affordable housing rules since 1999. Several proposals were rejected and, in October 2014, COAH failed, in a 3-3 vote, to comply with the latest order to submit a new set of rules by November. COAH has taken no action since then, and the state made it clear during oral arguments in January that no further action, even at the staff level, is being contemplated.

"We thus are in the exceptional situation in which the administrative process has become nonfunctioning, rendering futile the FHA's administrative remedy," LaVecchia said. "The FHA's exhaustion-of-administrative-remedies requirement, which staves off civil actions, is premised on the existence of a functioning agency, not a moribund one.

"Due to COAH's inaction, we agree that there no longer exists a legitimate basis to block access to the courts," she said.

The ruling is a rebuke to Gov. Chris Christie, who has long argued that the courts should not involve themselves in public policy issues, such as housing, and a victory for the Cherry Hill, New Jersey-based Fair Share Housing Center, which has claimed for years that COAH has been shirking its duties by failing to adopt affordable housing regulations.

FSHC Director Kevin Walsh said the rulings will help low- and moderate-income residents who, by virtue of exclusionary zoning rules, cannot live in or near the municipalities in which they work.

"We now have a way to make sure they are not excluded and to ensure there are fair housing opportunities for people who are forced to live far from their jobs," Walsh said in a statement. "The court properly responded to the failure of the state government to implement the law."

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The court delayed its ruling for 120 days in order to allow parties to prepare for the new system, in which cases will be heard by judges who are assigned in each vicinage to hear affordable housing cases.

After the initial 90 days, municipalities will have 30 days to file declaratory judgment actions and ask for immunity from litigation based on their efforts to have affordable housing plans approved by COAH or a judge. Notice of any action must be given to the FSHC first, however.

"No ex parte application ... shall be permitted under any circumstances," LaVecchia said.

A delay in implementing the ruling is necessary so that the new system can start in an "orderly means," she said.

LaVecchia stressed that there is nothing to stop COAH from continuing to attempt to propose and adopt rules and regulations. And, she said, the legislature could once again take action to address the state's affordable housing problem.

Nevertheless, she said, it was necessary for the court to take action in light of COAH's failure to act.

"Parties concerned about municipal compliance with affordable housing obligations are entitled to such access [to the courts], and municipalities that believe they are constitutionally compliant or that are ready and willing to demonstrate such compliance should be able to secure declarations that their housing plans and implementing ordinances are presumptively valid in the event they later must defend against exclusionary zoning litigation," LaVecchia said.

Kevin Roberts, a spokesman for Christie, said in response to the ruling that the governor is urging the legislature to enact measures that mirror an earlier affordable-housing compromise that passed the state Senate in 2010.

Those bills would have replaced COAH with a requirement that developers set aside 10 percent of their units for low- and moderate-income families. Builders would have been allowed to meet the requirement through rehabilitation of older units, construction of new units at a different site or payment of a 2.5 percent fee. Commercial developers would not have been charged a fee, unlike under current COAH rules.

That final version was ultimately vetoed by Christie after it was modified in the Assembly to tie obligations to the percentage of children in the community participating in federal free or reduced-price lunch programs. A total of 71 towns would have been exempted from the proposed guidelines under the Assembly version.

"Today's decision is a call to action to finally finish the job of reforming our affordable housing system so that it is no longer a costly burden to the people of New Jersey and actually encourages sound development," Roberts said.

"Now is the time to finish what we started and move these bills to take the judicial system out of the process of creating a rational process for encouraging the development of affordable housing that is grounded in economic feasibility and land use planning," Roberts said.

The New Jersey State League of Municipalities participated as amicus. Its attorney, Edward Buzak, asked the court in January to urge COAH to continue its work and to not return to the system of so-called "builders' remedies," which are lawsuits filed by developers against towns in order to get their projects approved.

Buzak, of the Buzak Law Group in Montville, New Jersey, said after the ruling was released that its result was not surprising.

"Given the box that the Supreme Court was put in because of COAH's lack of action, the court was left with no alternative other than to do what it did," he said.

Buzak pointed out that the court acknowledged that 314 of the 565 municipalities in the state have plans pending before COAH.

"The court acknowledged and recognized those efforts and said they should be treated differently," he said.

Christie attempted to dismantle COAH two years ago, but that move was rebuffed by the court.

At the October meeting that resulted in the 3-3 vote, COAH was considering rules that would have mandated the construction of 110,000 units of affordable housing statewide over a 10-year period.

Walsh said he was prepared to challenge those proposals as being woefully insufficient, had they been passed.

Instead, following COAH's deadlock, Walsh filed a motion to enforce litigants' rights to have trial judges resume their roles as the arbiters in municipalities' affordable housing obligations.

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