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COAH IS HISTORY: STATE'S TOP COURT DECLARES TROUBLED AGENCY 'MORIBUND'

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NJ Supreme Court removes jurisdiction over affordable housing from executive branch in clear victory for housing advocates

Declaring New Jersey's affordable housing process "nonfunctioning," the state Supreme Court on Tuesday removed from the executive branch jurisdiction over low- and moderate-income housing and sent it back to the courts, giving a clear victory to housing advocates.

This significant order comes 40 years after the court's first decision establishing the so-called **Mount Laurel doctrine**, which holds that municipalities must provide their "fair share" of affordable housing, and in some ways turns back the clock to that time period, when individuals, developers, and advocates had to sue to prevent municipalities from blocking this type of housing through zoning laws.

Unless, that is, either the Council on Affordable Housing, which by law is supposed to set housing obligations and approve municipal plans for meeting those obligations, takes action or Gov. Chris Christie and the Legislature can agree to new rules. Several sources said yesterday that neither of those is likely, at least for a while.

"I wouldn't expect the governor to act in any way that is productive," said Sen. Raymond Lesniak (D-Union) and sponsor of a COAH reform bill that Christie vetoed in January 2011. He said he will begin working with other lawmakers on a new housing bill, using the one Christie vetoed as a template.

Christie spokesman Kevin Roberts, in a statement, said the governor wants to fix the process: "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."

The "Supreme Court ruling stripping COAH of its power in the affordable-housing process and transferring it back to the courts is a sad, but necessary, day for New Jersey," said Peter Reinhart, director of the Kislak Real Estate Institute at Monmouth University and a 1993-2004 COAH member. "Since 2004, the process for providing affordable-housing opportunities has been mired in the failure of COAH to abide by the constitutional requirements and the delays caused by litigation in attempting to force COAH to act properly. Today's decision will result in more litigation, but this time the judicial decisions on a town-by-town basis will result in enforceable plans to create affordable housing."

And if municipalities do not comply, they could be forced to allow more housing units at greater density under the "builder's remedy" the Supreme Court allowed under its second Mount Laurel ruling.

Kevin Walsh, who brought the case for the Cherry Hill-based Fair Share Housing Center, said the ruling gives advocates almost everything they had asked for when they argued that COAH was

failing in its duty to ensure that municipalities zone for affordable housing and so that process should return to the courts. While in the early days post-Mount Laurel court cases could drag on, Walsh cited several reasons why the system should work better today.

"The (Supreme Court's) rules are pretty clear," he said. "We're a little more sophisticated in making calculations of need. In the '80s, there was a big learning curve for municipal officials, lawyers and planners. We've closed that curve. Even the private sector and nonprofits have adjusted."

He conceded there are likely to be municipalities that "choose to be obstructionist and hire lawyers and tell them to do anything they can to stall the process." Still, "it's clearly better than the wholesale delay at the statewide level that we have had."

Fair Share and other advocates have argued that COAH's inactions have brought the construction of affordable housing to a virtual standstill and that has hurt tens of thousands of New Jerseyans. The National Income Housing Coalition's annual Out of Reach report ranked the state fourth-most expensive in 2014, finding that the average renter would need to earn about $52,000 a year to afford the typical two-bedroom apartment, with almost six in 10 renters unable to pay their rent without incurring an undue financial burden.

"This decision at least takes everyone out of limbo, a limbo that has existed for at least the last 15 years," said Jeffrey Kantowitz, another attorney who argued for relieving COAH of responsibility for affordable housing rules. "From a strategic point of view, there is a process ... Whether it produces housing or not will depend on what choice towns make, whether developers want to sue, the way the courts manage the cases."

Writing for the unanimous court, Justice Jaynee LaVecchia indicated that there was little doubt of the necessity to strip the administration of affordable housing rules from the "moribund" Council on Affordable Housing, saying "There is no question that COAH failed to comply with this Court's March 2014 Order."

COAH clearly missed a court-imposed November 2014 deadline for adopting new rules. Since its former rules regarding housing obligations expired in 1999, "COAH has failed twice to adopt updated regulations," the decision noted.

The most recent case has followed a long and winding road through the courts, resulting in a September 2013 order by the Supreme Court that COAH adopt by February 2014 new rules substantially similar to the ones that had expired. After further delays, the council eventually held a vote last October on new housing obligations that advocates argued were highly flawed and did not meet the court's requirements and deadlocked 3-3. COAH did not schedule any further meetings to try to compromise and break the tie, and Fair Share asked the Supreme Court to enforce its 2013 order.

"Due to COAH's inaction, we agree that there no longer exists a legitimate basis to block access to the courts," LaVecchia wrote. "Parties concerned about municipal compliance with constitutional affordable housing obligations are entitled to such access, 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."

"I don't think anyone had any doubt the court was going to put the hammer down," said Lori Grifa, a partner at Archer and Greiner and director in their government affairs affiliate, as well as a former community affairs commissioner and COAH chairman in the first two years of the Christie administration. "This upends 25 years of administrative and procedural functions, so it's a pretty good deal. To me, it's a logical decision."

The ruling, which takes effect in 90 days, gives a detailed description of how the new process, meant to be similar to what the FHA had created, is to work. The process is complex and somewhat different depending on whether a municipality had already been approved by COAH --

about 60 communities -- or was working under the council's rules. About a third of municipalities had not submitted to COAH's jurisdiction and were already subject to -- and will continue to be subject to -- a court-ordered builder's remedy if sued for exclusionary zoning practices.

For the first 30 days, from about mid-June until about mid-July, municipalities working with COAH will be able to go to court to seek a ruling that a housing plan that had already received COAH approval or a new plan meets its Mount Laurel obligation. While the court is reviewing a plan, a municipality will have immunity from being sued. If the court deems its plan meets its constitutional obligation, it will continue to enjoy protection. Those that do not, however, will be subject to builder's remedy lawsuits and could be ordered to accept higher-density development -- usually four market rate units for every affordable unit.

"The process established is not intended to punish the towns ... in a position of unfortunate uncertainty due to COAH's failure to maintain the viability of the administrative remedy," LaVecchia wrote. "Our goal is to establish an avenue by which towns can demonstrate their constitutional compliance to the court."

Municipal officials, who opposed Fair Share's request to give the courts jurisdiction over affordable housing again, were grateful for the immunity provision and not overly critical of the decision.

"This is the best possible scenario to come out of this," said Brian Wahler, mayor of Piscataway and president of the New Jersey State League of Municipalities. "It can't be any worse than what we have right now. No one knows what we have right now. It's ironic that the court had to step in again when the governor and the Legislature could have figured this out."

All actions before a court will have to be noticed to Fair Share and other advocates involved in the litigation so they will have the opportunity to participate, including by helping to determine an individual municipality's affordable housing obligation. The decision clearly states that communities must fulfill any prior obligation remaining unbuilt when the 1999 rules expired. It will be up to the courts to determine any obligations from 2000 to the present, and for the next 10 years.

Those numbers could be large, but there's no easy way to count them on a statewide basis. The rules COAH proposed and failed to adopt last year had included a 22,000-unit prior-round obligation, 31,000 new homes and the rehabilitation of 63,000 existing units. But Fair Share contended those rules substantially undercounted the need.

The decision brought a flood of finger-pointing from lawmakers.

"This issue should have never gotten to this point," said Sen. Christopher "Kip" Bateman (R-Somerset). "Senate Republicans have had sensible solutions on the table for years, and it's the Legislature's responsibility to get this done. The Legislature does not have to subject the public to this costly Supreme Court ruling ... These types of policies should not be made by unelected members of New Jersey courts, who without accountability have recently imposed nothing but unaffordable mandates on the major issues in our state, such as housing and education. I urge the Senate president and Assembly speaker to allow a public vote on this sensible reform bill."

Senate President Steve Sweeney (D-Gloucester) was unavailable for comment yesterday. But last week, he met with reporters and editors at NJ Spotlight and said that it was up to the court to rule because the Legislature tried to enact a new system but Christie vetoed it.

"We've shown what our intention is," Sweeney said. "He (Christie) clearly has zero intent of correcting this or addressing this. He has completely ignored the courts. They said, 'Please.' Recently, they said, 'Pretty please.' ... The governor at the end of the day says 'no.'"

Grifa said neither party is blameless, noting the last valid COAH rules expired under a Republican administration and the rules deemed unconstitutional were drafted during Democratic rule. COAH was "really broken when I got there," she said.

Since taking office, Christie has taken a number of actions to try to eliminate COAH, and he did veto in January 2011 an affordable housing-reform bill, calling it worse than "the current failed COAH system." Roberts' statement did not reflect some of the governor's more fiery past complaints about the agency, judicial activism, or the governor's veto.

"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," he said

Grifa said the administration had worked with the Senate on a bill amenable to both, but after the Assembly amended it, "it was really unworkable."

Lesniak said he would work with Assemblyman Jerry Green (D-Union) and chair of the Assembly Housing and Community Development Committee, to try to rework the previous bill that Christie vetoed.

"We have to put our nose to the grindstone, so to speak," he said. "We have to have something before the end of June ... We don't want the Supreme Court drafting legislation, but they will if we don't ... Maybe if the governor realizes he can't get his way now, he will sign it."

Grifa doubts that will happen as a practical matter, at least, noting the process of enacting a balanced state budget is going to be difficult and will take up a significant amount of time for both lawmakers and the administration. And it's an election year, so the Legislature may not hold many serious sessions until after the vote in November.

In the meantime, Walsh is optimistic that the system the court outlined will work.

"I don't read this as an invitation for towns to keep their heads in the sand," he said. "The climate will change very quickly. Housing that is somehow tied to this decision could be in the ground by the end of the year."