Our Grateful Appreciation to:

AHPNJ General Counsel
David A. Weinstein, Esq.
Archer & Greiner, P.C.

and AHPNJ Sponsors:

GOLD SPONSORS

Archer & Greiner, P.C.

Bisgaier Hoff

Community Grants, Planning & Housing, LLC

Lewis Chester Associates, Inc.

Moderate Income Management Company, Inc.

Piazza & Associates, Inc.

RPM Development Group

SILVER SPONSORS

Clarke Caton Hintz

Community Investment Strategies, Inc.

Ehrlich, Petriello, Gudin & Plaza, P.C.

Jewish Community Housing Corporation of Metropolitan New Jersey

Mason, Griffin & Pierson, P.C.

PNC Bank

Mount Laurel, COAH, and the Constitutional Obligation: What's a Town to do?

By Jerry Muller

Recent court decisions have begun to shed light on New Jersey affordable housing requirements and how they will be administered.

In Re Plan for the Abolition of the Council on Affordable Housing, 214 N.J. 244 (July 10, 2013), resolved the question of whether the Council on Affordable Housing or the Department of Community Affairs itself will formulate and implement the rules governing affordable housing. In 2011, a reorganization plan by Governor Christie to abolish COAH and transfer its functions to D.C.A. went into effect. The Appellate Division invalidated the plan in 2012, and the New Jersey Supreme Court affirmed that decision, ruling that under the New Jersey Reorganization Act the Governor does not have the power to abolish independent agencies in the Executive Branch.

In Re Failure of Council on Affordable Housing to Adopt Trust Fund Regulations will address the attempt by the Christie Administration to take approximately $165,000,000.00 in municipal affordable housing trust fund monies not spent or committed for expenditure within four years of receipt. The League of Municipalities and several municipalities have joined Fair Share Housing Center in that litigation, as has the Affordable Housing Professionals of New Jersey, which has successfully moved to appear as amicus curiae ("friend of the court"). They argue that COAH cannot take trust fund monies without first establishing by rule the manner in which the municipality can commit itself to the expenditure of the monies it holds. The case is fully briefed and is awaiting argument in the Appellate Division. Municipalities have been granted some relief thus far, with Appellate Division and Supreme Court stays barring COAH from taking the moneys, as it sought to do in 2012 and 2013.

In In Re Adoption of N.J.A.C.5:96 & 5:97 by N.J. Council on Affordable Housing, (September 26, 2013), the Supreme Court upheld an Appellate Division decision striking down a number of

Continued on page 9.

Jerry Muller is a partner in the Princeton law firm of Miller Porter & Muller, P.C., where he specializes in land use and civil litigation. He is representing AHPNJ in In Re Failure of Council on Affordable Housing to Adopt Trust Fund Regulations.

What's a Town to do? (continued)

COAH Rules that had been adopted in 2007 after the original 2004 COAH Third Round Rules were invalidated. Those hoping that the Court would re-evaluate the Mount Laurel doctrine found their hopes unfulfilled. Rather than addressing the question of continued vitality of the Mount Laurel doctrine, the Court simply repeated it – the State's municipalities must "afford [ ] a realistic opportunity for the construction of [their] fair share of the present and prospective regional need for low and moderate income housing," quoting Southern Burlington County NAACP v. Township of Mount Laurel, 92 N.J. 158, 205 (1983). The Court ruled that the key set of rules establishing the growth share methodology as the mechanism for calculating fair shares was inconsistent with the Fair Housing Act and the Mount Laurel doctrine it codified in that the methodology did not require firm numbers, since municipalities could generate their own numbers in spite of specific numbers COAH published, and was not region-specific. In order to eliminate the "limbo" municipalities were in, to use the Court's language, the Court affirmed the Appellate Division remedy requiring adoption of new COAH rules within five months incorporating a methodology similar to that used during the First and Second Rounds, which yielded firm fair share numbers for the State's municipalities.

"Those hoping that the Court would re-evaluate the Mount Laurel doctrine found their hopes unfulfilled."

So where are we? COAH is back. The Mount Laurel doctrine is here for the foreseeable future. The growth share methodology is out. Municipal trust fund monies are protected from State expropriation, at least for now. Beyond that, however, not a great deal is clear. Nor will things become clearer by February 26, 2014, the end of the five month period during which COAH is required to adopt new rules. Five months is not realistic, given the amount of time it takes to collect and analyze the data underpinning the rules; craft and publish a set of rules; receive comments back and respond to them; and adopt final rules.

So what, given all the uncertainty, should municipalities be doing at this point? At the very least, they should not be scaling back any fair share plans they have and which, if filed with COAH, are either sitting un-reviewed or, in a few instances, certified. It is doubtful that a court at this point would grant a builder's remedy for the failure of a municipality to satisfy its Third Round obligations, since no one knows that they are. Kushner Hebrew Academy v. Livingston, 2013 N.J. Super. Unpub. LEXIS 2170 (August 30, 2013), an unpublished Appellate Division decision, though, sounds a note of caution. The case was about whether Livingston, which was not before COAH, had satisfied its Second Round obligation, and the Appellate Division upheld a builder's remedy granted by the trial court. The court noted, however, that the trial judge "was correct in concluding that [the plaintiffs] were technically entitled to partial summary judgment that the Township was not in compliance with its current third-round affordable housing obligation." At 37. Inaction has consequences, and municipalities would be well advised to take whatever steps they can to embrace affordable housing opportunities that may appear.

In Re Grant of Substantive Certification to Readington Township, Hunterdon County by the New Jersey Council on Affordable Housing, 2012 N.J. Super. UnPub LEXIS 555 (App. Div. 2012), a second unpublished Appellate Division decision, underscores the point. Readington filed a fair share plan with COAH and was one of the lucky ones to

Continued on page 12.

What's a Town to do? (continued)

receive substantive certification. While the question of the status of certified Third Round plans was not addressed by the Appellate Division or the Supreme Court in the Third Round Rules case, the Readington court took it head on. It stated that an objector's argument that a certified Third Round plan could not be valid since it is based upon invalidated Third Round Rules had merit and noted that "it would be improper to allow Readington to continue to receive the benefits of certification during the remainder of the Third Round period" if its fair share obligation increased. At 33. It did not, however, invalidate the certification because Readington was moving ahead to implement its fair share plan, remanding the matter to COAH for re-evaluation following adoption of new Third Round Rules. There is a real question whether certified Third Round plans will escape the necessity of adjustments if the municipal fair share obligation goes up.

AHPNJ members listen to the lively discussion after Mr. Muller's presentation.

And will it go up? Municipalities thinking that the fair share numbers may go down could be in for a rude surprise. COAH's First Round was from 1987 to 1993, and the Second from 1993 to 1999. The rounds have now been changed to ten years. The Third Round that started in 1999 and will end in 2024 is a 25 year period, and it is hard to believe that for most municipalities fair share numbers for that long a time span are going to be less than they were for the prior rounds or less than those generated using the now-discredited growth share methodology. Municipalities should assume that obligations will be substantial.

Lastly, what should municipalities do about monies in their affordable housing trust funds? The Fair Housing Act provides that such monies cannot be spent unless a spending plan was approved by COAH. Municipalities that have secure COAH approval of their spending plans should implement them to the extent that they have not already done so. Those that do not have approved spending plans are in a more difficult situation. Some municipal attorneys have advised their towns to spend the money on legitimate affordable housing projects that have been laid out in the spending plan, even if not approved. That's a risk, as COAH could always come after the monies, but it seems to be a reasonable one. If it ever came to litigation about the money, municipalities could legitimately argue that they were taking steps to advance affordable housing during a period when, as the Supreme Court put it, they were in limbo. The courts over the last several years have not treated COAH kindly, and there is a reasonable prospect that they will honor municipal efforts to advance affordable housing even without the COAH approved spending plan that, through no fault of the municipalities' own, could not be secured. Large sums of money, I recognize, are at stake, and the prospect that COAH could come after monies that the municipality has already expended is a frightening one. One possibility is to bring an action under the Declaratory Judgment Act, N.J.S.A. 2A:16-50 to 62, seeking a judgment that the municipality may make the expenditure it seeks to make. As with certified fair share plans and builder's remedies, the municipalities that in good faith are trying to increase affordable housing opportunities should be treated well by the courts.

☆