AFFORDABLE HOUSING/BUILDER'S REMEDY FACTS AND FREQUENTLY ASKED QUESTIONS

Q: What is a builder's remedy lawsuit and how does it function?

A: A builder's remedy is a court imposed remedy for a litigant who is an individual or profit making entity in which the court requires a municipality to utilize zoning techniques such as mandatory set-asides or density bonuses which provide for the economic viability of a residential development which is not for low and moderate income households. A developer is entitled to a builder's remedy if (1) it succeeds in Mount Laurel litigation; (2) it proposes a project with a substantial amount of affordable housing, and (3) the site is suitable, i.e. the municipality fails to meet its burden of proving that the site is environmentally constrained or construction of the project would represent bad planning. Toll Bros. v. Twp. Of West Windsor, 334 NJ Super. 109 (App.Div.2000) A successful developer in a builder's remedy suit can be entitled to a court ordered zoning designation, including all aspects of zoning such as density, setbacks, building heights, lot coverage, green area, etc. Municipalities in builder's remedy lawsuits may be held liable for developers' attorney's fees and costs of suit, the fees of a special master appointed by the court to assist in developing the zoning scheme on the affected property, the costs of any infrastructure improvements, such as sewer and water system upgrades and road improvements. When a builder's remedy is granted against a municipality, the town and its planning and zoning boards lose all control over the zoning of the subject property, which is left to the special master, who only reports to the court.

Q: Why can't the borough just zone the farm for single family homes and make a developer comply with that zoning?

A: According to the New Jersey Constitution and the Fair Housing Act, legally there is no way the Borough can require this. It is called 'per se exclusionary' zoning by numerous court decisions and legislative enactments over the past 40 years. See e.g. South Burlington NAACP v. Mt. Laurel, 92 NJ 158, 310(1983) (Mount Laurel II); Oakwood at Madison v. Madison, 72 NJ 481 (1977); Toll Brothers v. West Windsor, 303 NJ Super. 518 (Law Div. 1996); 334 NJ Super. 37 (App.Div.2000); 173 NJ 502(2002). All of these court decisions, all settled Supreme Court precedent, reinforce the proposition that single family zoning on minimum lot sizes are 'per se exclusionary' and subject to a builder's remedy. The borough also cannot legally require that dwelling units be sold, rather than rented, any more than it can tell you to sell or rent your property.

Q: How does a municipality win a builder's remedy lawsuit?

A: Over the course of history, it is nearly impossible to find a New Jersey municipality that prevailed in a builder's remedy lawsuit. Like being in quicksand, the more you fight, the deeper you sink. When a builder's remedy is granted, the municipality is left paying the attorneys on both sides of the lawsuit, the court appointed Special Master, as

well as all infrastructure improvements such as sewer and water system upgrades and road improvements, required by the court imposed development plan. The municipality also loses all control of site plan, including density, height, setbacks, landscaping. These decisions are made by an outside party who could live in Hunterdon or Middlesex or Ocean County and has little or no regard for Dumont.

Q: What other area towns have had builder's remedy lawsuits against them?

A: Many neighboring communities of all socio-economic and political compositions have lived through builder's remedy lawsuits. Prior to the Fair Housing Act in 1985, the courts were the lone venue of redress for such actions, and research has shown that not a single reported case was dismissed without some action taken by the municipality to accommodate or re-zone property to allow for multi-family housing. Specifically, in alphabetical order, these Bergen County municipalities, among others, have had builder's remedy suits in the past: Alpine, Demarest, Fair Lawn, Fort Lee, Little Ferry, Mahwah, New Milford, River Vale, Upper Saddle River. There are certainly others, but all were subject to the builder's remedy and either voluntarily or were forced by court order to take action to allow for inclusionary zoning.

Q: Rental apartments pay less in property taxes than single family homes, putting a drain on municipal and school services, right?

A: Studies have shown that one and two bedroom rental apartments generate more revenue for the local municipal government and less children in the schools than single family homes. See Harvard University Joint Center for Housing Studies, Obrinsky and Stein, March, 2007 RR07-14, pp.5-6. There are no studies or scientific data to support the theory that rental property demands more services or costs more to service than it pays in property taxes. This is urban myth, widely accepted, but without factual support. However, it is absolute fact that a single family home with three school aged children paying $10,000 per year in taxes is costing at least three times what it is paying in property tax. **Recently released statistics from the Modern apartment complex in Fort Lee indicate that 450 occupied apartments have generated 12 school children in the local school district.**

Q: Dumont has more than its fair share of affordable housing. Why should we be required to build more?

A: Regardless of how much housing in Dumont is 'affordable' by conventional standards, the term 'Affordable Housing' is a legal term that requires certain restrictions and technical designations to be included in the Borough's inventory. The fact is that even if Dumont were certified compliant with its affordable housing obligations, the D'Angelo's property is not included as available land right now because it is zoned 'P' Park/Public Use and is taxed commercial. This means that a new obligation would arise simply by virtue of the property being developed.

Q: The default zoning designation of the D'Angelo's Farm property is single family RA (7,500 square foot lots), so why should the borough rezone it for rental apartments or anything else?

A: While it is true that the Farm property's default zoning is single family, this is only triggered if an application for development is filed. Since the intended purchaser of the property filed their builder's remedy lawsuit before an application for development was filed, the zoning remains Park/Public Use. As privately owned property, there is no way to legally defend this zoning designation. There is also no way to legally force a development application to be filed with the lawsuit pending.

Q: Why are the courts in control of all of these issues?

A: COAH (Council on Affordable Housing) an agency of the New Jersey Department of Community Affairs has failed to establish legally valid rules and numeric obligations for affordable housing since the second round of regulations expired in 1999. There have been years of court battles between the competing interests, affordable housing advocates, the real estate developers' lobby, municipalities and COAH itself over how the rules should be formulated and the methodology by which the local obligations should be established. In March of 2015, the Supreme Court, after numerous orders that COAH establish legally acceptable rules, took back jurisdiction over all affordable housing issues and returned to the county trial courts the responsibilities of determining methodology, affordable housing obligations, and compliance with the constitutional obligations of providing affordable housing. This order stripped COAH of any of its administrative powers and forced participating towns into a situation where they have to attempt to determine their own obligations from scratch. This process is ongoing and will likely continue through trial and appeals courts for years to come.

Q: What is Dumont's obligation for affordable housing and its plan for fulfilling it?

A: Only obligations for the first and second rounds of COAH regulations are actually established at this point. This means that a final plan cannot be completed at this time. The courts are considering in 15 vicinages around the state, how to compute the 3rd round affordable housing obligations and how to apportion them among the many municipalities. There are numerous different, complicated formulas and methodologies that have been advanced by the competing interests on the issue that the courts will have to decide between to first establish the housing need, and then to determine where that need exists and how to distribute the obligation. Chances are that the courts will not necessarily agree on all aspects of these issues, thereby requiring appellate and likely the Supreme Court to finalize the matter, years down the road. Unfortunately, towns are going to be required to proceed with development projects in the meantime and then 'back into' their final 3rd round obligations and associated housing plans once the rules are finalized.

Q: How do we protect the Borough in the future from a Builder Remedy Lawsuit?

A: The only way any community can be protected from a Builder Remedy Lawsuit is to submit a Housing Element and Fair Share Plan that complies with the required obligations and received a Judgment of Compliance/Repose from the Court. This replaces the previously granted Substantive Certification, which was granted by COAH.

A Judgment of Compliance/Repose should be for a ten-year period, during which the Borough will be “immune” from any future Builder Remedy Lawsuits so long as Dumont is complying with its Housing Plan.

Q: What is an affordable household?

A: In 2015, a one-person household living in Dumont could earn up to $59,095 and be considered “affordable”. Many senior citizens living on fixed incomes fall into this category. A three-person household living in Dumont could earn up to $75,980 and be considered “affordable”.