

AFFORDABLE HOUSING TIMELINE/SUMMARY

Legal Background

In 1975, the Supreme Court of New Jersey in South Burlington County N.A.A.C.P. v Township of Mount Laurel, ruled that the developing municipalities in the State of New Jersey exercising their zoning power, in general, had a constitutional obligation to provide a realistic opportunity for the construction of their fair share of the region's low and moderate income housing needs through the enactment of their land use regulations.

In 1983, the Supreme Court refined that constitutional obligation in South Burlington County N.A.A.C.P. v Township of Mount Laurel, to apply to those municipalities having any portion of their boundaries within the growth area as shown on the State Development Guide Plan. In that case, the Supreme Court also created the "builder's remedy" to encourage builders to commence litigation to vindicate the constitutional rights of low- and moderate-income households in return for having their properties rezoned for high density multi-family housing which contained an affordable housing component (known as an "inclusionary" development). If a builder is successful in his pursuit of its builder's remedy, the prohibition against spot zoning is largely relaxed to allow for the specific property of the developer to be rezoned to permit the construction of an inclusionary development

In 1985, the New Jersey Legislature adopted, and the Governor signed, the Fair Housing Act ("FHA"), which transformed the judicial doctrine which became known as the "Mount Laurel doctrine" into a statutory one. It provided an alternative administrative process in which municipalities could elect to participate in order to establish a Housing Element and Fair Share

Plan (“HEFSP”) that would satisfy its constitutional obligation. It also created an administrative agency known as the Council on Affordable Housing (“COAH”) to develop regulations to define the obligation and establish compliance mechanisms to implement it.

COAH proceeded to adopt regulations for first round obligations applicable from 1987 to 1993 and second round obligations that created a cumulative obligation from 1987 to 1999. The Township’s cumulative prior (first and second) round obligation is 261 units.

COAH first proposed third round substantive and procedural rules in October, 2003. Those rules remained un-adopted and COAH re-proposed both the substantive and procedural third round rules in August of 2004 and adopted the same effective on December 20, 2004. Among other things, these regulations replaced the previously utilized “predictor” methodology (predicting future household growth) with a “growth share” methodology that created the numerical affordable housing obligation based upon actual population and household growth.

The 2004 Regulations were challenged and on January 25, 2007, the Appellate Division invalidated various aspects of those regulations and remanded considerable portions of the rules to COAH with direction to adopt revised rules.

On January 22, 2008, COAH proposed revised third round regulations. On May 6, 2008, COAH adopted the revised third round regulations and advised that the new regulations would be published, thereby becoming effective. Also on May 6, 2008, COAH simultaneously proposed amendments to the revised third round rules it had just adopted. Those amendments were adopted on September 22, 2008.

These amendments were again challenged in an appeal and in 2010, the Appellate Division determined that the growth share methodology utilized to calculate third round obligations was invalid and that COAH should adopt regulations utilizing methodologies similar to the ones

utilized in the first and second rounds, i.e. 1987-1999. This determination was affirmed by the Supreme Court, which directed COAH to adopt new regulations based upon the methodology utilized in the first and second rounds.

COAH proceeded to propose such regulations, but on October 20, 2014, COAH deadlocked with a 3-3 vote and failed to adopt the revised third round regulations.

Due to COAH's failure to adopt the revised regulations and subsequent inaction, Fair Share Housing Center ("FSHC"), an affordable housing advocacy organization that initially challenged the 2004 version of the third round regulations, filed a motion with the New Jersey Supreme Court to enforce litigant's rights and on March 10, 2015 the New Jersey Supreme Court issued its decision and found that the COAH administrative process had become non-functioning and, as a result, returned primary jurisdiction over affordable housing matters to the trial courts.

In doing so, the Supreme Court established a process for municipalities to file a declaratory judgment action with the trial courts seeking to declare their HEFSPs as being constitutionally compliant and seeking similar protections to those that the municipalities would have received if they were proceeding before COAH.

Although the Supreme Court invalidated the growth share methodology, it declined to adopt a specific methodology or formula to calculate the third round affordable housing obligations of the municipalities and instead, left that task to 15 Mount Laurel Judges to determine the affordable housing obligation through 2025 as the result of litigation. It did however, provide some guidance by reiterating its endorsement of the previous methodologies employed in the First and Second round Rules as the template to establish third round affordable housing obligations.

In light of these decisions, the Township of Millburn and its Planner prepared a Housing Element and Fair Share Plan dated April, 2018, entitled "Housing Element and Fair Share Plan,

Township of Millburn, New Jersey” (“HEFSP”) that reflects all affordable housing activities that have occurred in the Township to date, along with the relevant demographic and other data and information, and addresses the manner in which the Township intends to address its affordable housing obligations through July 1, 2025.

After a public hearing on the HEFSP on April 18, 2018, the Planning Board adopted a Resolution entitled “Resolution Adopting the Housing Element and Fair Share Plan as a Component of the Master Plan of the Township of Millburn.”

On April 19, 2018, the Governing Body of the Township of Millburn adopted a Resolution endorsing the Housing Element and Fair Share Plan approved by the Millburn Township Planning Board on April 18, 2018, and authorizing the filing of a Declaratory Judgment Action in the Superior Court and a Motion seeking Temporary Immunity from Third Party Lawsuits. The filing of a declaratory judgment sought to verify and confirm the Township’s full compliance with its constitutional affordable housing obligations.

The Township obtained temporary immunity from builder’s remedy lawsuits after the filing of the Township’s Declaratory Judgment so long as the Township continues to pursue in good faith its Declaratory Judgment action. Such immunity is periodically reviewed by the court and allows the Township to “steer the ship” of the Township’s constitutional compliances rather than to have that direction established by a developer on property in which the developer has an interest. If the Township’s temporary immunity is revoked, the Township will be subject to additional builder’s remedy lawsuits

FSHC is an interested party in all of the declaratory judgment actions in the state seeking a Judgment of Compliance and Repose. Their role is to ensure that the rights of low- and moderate-income households are adequately reflected and protected in the resolution of any litigation which

results in the creation of the realistic opportunity for the construction of affordable housing for that protected class.

If the Township obtains a Judgment of Compliance and Repose, it will be required to implement its approved HEFSP. The Township will then have “immunity” from builder’s remedy lawsuits until July 1, 2025. That “immunity” provides the Township with a presumption of validity that its land use ordinances are constitutionally compliant with its affordable housing obligations and provides a substantial defense to any attempt by a Developer to seek or obtain a rezoning of its property for the production of affordable housing.

Background of Silverman Builders Remedy Lawsuit

In the fall of 2016, a representative of the Silverman Group contacted then Mayor Cheryl Burstein, about the potential for developing property it had acquired at the corner of Chatham and Woodland Roads. Alex McDonald and Mayor Burstein then met with them in order to become acquainted with what they had in mind.

Shortly thereafter, Mayor Burstein requested of the Silverman Group that they make a public presentation to show and describe the conceptual drawings of its plan, which occurred at the January 17, 2017 Township Committee Meeting. Following that presentation, the Township Planner, Paul Phillips, was contacted by a representative of the Silverman Group, who was interested in how the presentation had been received and on February 22nd, Alex McDonald, Paul Phillips and Mayor Burstein met with Richard Keller and Mr. Minnow of the Silverman Group for this purpose. At that meeting, Silverman presented a concept including 82 units.

A further follow-up session occurred on April 7th with Mayor Burstein, Paul Phillips, Alex McDonald and a representative of Silverman, where a reduced size conceptual was depicted. Shortly after that, a Silverman architect met with Paul Phillips and presented another plan of reduced size to 62 units with proposed architectural changes. Silverman sought a zoning amendment which could facilitate its plan. In all gatherings after the January public meeting, the Township's representatives remained non-committal and met solely to receive the information sought to be imparted by Silverman.

Between April, 2017 and January, 2018, no further proposed changes to their plans were offered by Silverman representatives or considered by Township representatives. This led to correspondence from Silverman's Counsel to request a response from the Township as to the earlier discussions and to complain of delay. At the public meeting of January 16, Mayor Burstein announced that the Township was considering its alternatives and thereafter, in February, recommended that the Planning Board be requested to prepare an Area in Need of Redevelopment Study. The Township Committee elected not to implement that approach.

Simultaneously however, the Planning Board was conducting proceedings to consider and adopt a Housing Element and Fair Share Plan in order to amend the Master Plan and provide the basis for the filing of a Declaratory Judgment Action to obtain approval of the Township's compliance with its affordable housing obligations as noted in the above Legal Background section.

On April 16, 2018, Silverman filed the current Builder's Remedy Lawsuit against the Township, three days prior to the Township's filing of its Declaratory Judgment action. The two cases are before Judge Robert Gardner in the Superior Court of New Jersey.

Judge Gardner appointed Frank Banisch, P.P. as Special Master in the Silverman litigation and in the Declaratory Judgment action and referred the case to confidential mediation to be convened by Mr. Banisch. The Township appointed a Mediation Team consisting of the Mayor, a Member of the Township Committee, the Chair of the Planning Board, the Township Planner, the Planning Board Attorney and the Township Attorney. The Mediation Team has participated in several Mediation Sessions chaired by Mr. Banisch from that time, until August 9, 2019, at which time a conceptual agreement was reached as to the nature and extent of the proposed project, and including an affordable housing component. The Mediation Team met with the full Township Committee to review the results of the Mediation. Only the Township Committee can take final action with respect to the Settlement. The principal features of the proposed Settlement are:

- **PROPERTY LOCATION.**

Corner of Woodland Road and Chatham Road; Block 1904, Lots 72-75 (85-87 Woodland Road; 54-58 Chatham Road).

- **PROPERTY SIZE.**

1.56 acres.

- **NUMBER OF UNITS:**

62 units, consisting of 50 market units and 12 affordable housing units (“AHU”).

- **BEDROOM MIX.**

AHU’s: one-bedroom = 2; two-bedroom = 7; three-bedroom = 3)

Market units: One-bedroom = NTE 3; two bedroom = NTE 47. No three-bedroom or larger units.

- **AFFORDABLE RENT STRATIFICATION.**

50% of AHU's available to moderate income households (between 50% and 80% of median regional income);

50% of AHU's available to low income households (less than 50% of regional median income);

13% (2 AHU's) very low income (less than 30% of regional median income).

- **AVAILABILITY OF AFFORDABLE UNITS.**

2 AHU's prior to 14th market C/O;

4 additional AHU's prior to 25th market rate C/O

3 additional AHU's prior to 38th market unit C/O

3 AHU's prior to 45th market rate unit C/O

- **MEDICAL OFFICE SPACE.**

Not to exceed 10,000 square feet for Summit Medical Group.

- **MEDICAL OFFICES.**

Prohibits 24-hour emergency care operation.

- **PARKING.**

Structured parking (no surface parking);

Total spaces = 192 of which 50 will be designated for use by medical offices

- **PHASING.**

Phase I: 10,000 square feet of medical office space fronting on Chatham Road; 35 residential units and associated parking for both medical offices and residential units.

Phase II: Demolition of existing Summit Office Medical Building and the construction of the balance of the residential building and parking.

- **ZONING ORDINANCE AND CONCEPT PLAN.**

Zoning ordinance prepared by Paul Phillips, P.P.. Conceptual plans furnished by the developer Both will be attached to Settlement Agreement.

- **DEVIATION LIMITATION.**

No deviations (variances or waivers/exceptions) permitted for (i) use; (ii) maximum density; (iii) footprint; (iv) aggregate number of units (62); and (v) height and stories. Reasonable *de minimis* other bulk variances may be sought at time of Planning Board application resulting only from detailed final engineering design of the project.

- **COST GENERATIVE FEATURES.**

Developer acknowledges that Ordinance does not contain any cost generative requirements (COAH regulation requirement). Planning Board prohibited from imposing any “cost generative” requirements.

- **TAX APPEALS.**

All tax appeals and Township cross-claims to be dismissed within 30 days of the Court approving the Settlement Agreement at a Fairness Hearing.

- **ENVIRONMENTAL REQUIREMENTS.**

Developer shall comply with any and all permits issued in connection with property remediation and comply with all applicable environmental laws, rules and regulations.

- **FAIRNESS HEARING DATE.**

Parties will jointly request the Court to conduct a Fairness Hearing within 60 days of the execution of the Agreement. Published public notice of that Fairness Hearing is provided, usually 30 days prior to the Hearing.

- **EFFECTIVE DATE.**

The Settlement Agreement will be effective upon approval by the Court at the Fairness Hearing referenced above.

The Township Committee will meet on September 3, at which time a presentation shall be made by Special Master Frank Banisch, Edward J. Buzak, Esq., Millburn Planning Board Attorney, and Paul Phillips, P.P., the Millburn Township Planner. The Settlement is proposed to be effected through the consideration of an Ordinance to adopt an amendment to the Zoning

Ordinance and to approve the Settlement Agreement. If introduced on first reading on the 3rd, it would come up for a hearing on September 17 and consideration of adoption.

If the ordinance is adopted, within a couple of months thereafter, Judge Gardiner will establish the above Fairness Hearing on the Settlement.

If the builder's remedy litigation is not settled, that litigation will proceed to trial. The developer will have to prove that the Township is not complaint with its constitutional affordable housing obligation, that the developer has proposed a development that provides a substantial number of affordable housing units in the context of the size of the proposed development, and that there are no environmental or other constraints on the developer's property that would prevent or preclude the construction of the market and affordable housing units proposed. In such a trial he developer will not be limited to seeking the number of units on which it is willing to settle (62).