

RESOLUTION 2015-170

RESOLUTION OF THE TOWNSHIP OF BARNEGAT, COUNTY OF OCEAN, (1) AUTHORIZING THE FILING OF A DECLARATORY JUDGMENT ACTION AND A MOTION FOR TEMPORARY IMMUNITY, (2) AUTHORIZING THE ALLOCATION OF MONIES TO RETAIN DR. ROBERT W. BURCHELL TO PROPOSE A SENSIBLE APPROACH TO ROUND 3 ALLOCATIONS, AND (3) DELCARING ITS INTENT TO FULLY COMPLY WITH ITS CURRENT AND FUTURE MOUNT LAUREL OBLIGATIONS AND TO SERVE AS THE "CATALYST FOR CHANGE" TO RENDER ANY MOUNT LAUREL LAWSUITS AS "UNECESSARY LITIGATION"

WHEREAS, in So. Burlington County N.A.A.C.P. v. Tp. of Mount Laurel, 92 N.J. 158, 279-80 (1983) ("Mount Laurel II"), the New Jersey Supreme Court ruled, subject to several other limitations, that in order for a plaintiff to be entitled to a builder's remedy, it must "succeed in litigation;" and

WHEREAS, in Toll Bros. Inc. v. Tp. of W. Windsor, 173 N.J. 502, 507 (2002), the Supreme Court ruled that in order for a developer to succeed in litigation, it must not only prove that the municipality failed to create a realistic opportunity to satisfy its affordable housing obligation, but also must be the "catalyst for change;" and

WHEREAS, on September 26, 2013, the Supreme Court released In re Adoption of N.J.A.C. 5:96 & 5:97 by N.J. Council on Affordable Housing, 215 N.J. 578 (2013) which invalidated the Round 3 regulations adopted in 2008 by the New Jersey Council on Affordable Housing ("COAH"); and

WHEREAS, on March 14, 2014, the Supreme Court issued an order directing COAH to propose new Round 3 regulations on or before May 1, 2014 and to adopt them by October 22, 2014; and

WHEREAS, the March 14, 2014 Order further provided that, if COAH failed to meet these deadlines, the Court would entertain a Motion in Aid of Litigant's Rights which could include an application for the right, on a case-by-case basis, to file a builder's remedy suit against a municipality under COAH's jurisdiction, such as the Township; and

WHEREAS, on April 30, 2014, in accordance with the March 14, 2014 Order, COAH proposed Round 3 regulations and published them in the New Jersey Register on June 2, 2014; and

WHEREAS, pursuant to these proposed regulations, COAH assigned the Township a fair share of 956 units, consisting of a zero unit rehabilitation obligation, a 776 unit unmet prior round obligation, which can be reduced to 537 units (half of which would need to be addressed in by 2024) if rental bonuses and a Compliance Bonus are applied, and a 419 unit prospective Round 3 obligation; and

WHEREAS, more specifically, under the COAH 2014 proposed regulations, the Township would need to satisfy a 688-unit obligation by 2024; and

WHEREAS, COAH accepted public comments on the proposed Round 3 regulations until August 1, 2014, and indeed received roughly 3,000 comments; and

WHEREAS, on October 20, 2014, the COAH board met to consider adopting the proposed regulations; and

WHEREAS, the COAH board reached a 3-3 deadlock and therefore did not adopt the proposed regulations; and

WHEREAS, COAH therefore failed to meet the Supreme Court's October 22, 2014 deadline; and

WHEREAS, on October 31, 2014, Fair Share Housing Center ("FSHC") filed a Motion In Aid of Litigant's Rights urging the Supreme Court, among other things, to direct trial judges -- instead of COAH -- to establish standards with which municipalities must comply; and

WHEREAS, FSHC's motion included an alternative fair share calculation for each municipality, which it subsequently modified through a report of its expert, Dr. David Kinsey, FAICP, dated April 16, 2015, further highlighting the uncertainty of the framework with which municipalities must ultimately comply because there are no standards with which to comply; and

WHEREAS, pursuant to alternative calculations furnished by FSHC in April of 2015, the Township would have an obligation of 1,261 units consisting of a zero unit rehabilitation obligation, a 329 unit prior round obligation, and a 932 unit Round 3 obligation; and

WHEREAS, COAH's failure to adopt the proposed regulations has left the Township in a continuing state of limbo despite its unwavering commitment to constitutional compliance without the need for litigation; and

WHEREAS, on March 10, 2015, the Supreme Court issued a decision entitled In the Matter of the Adoption of N.J.A.C. 5:96 and 5:97 by the New Jersey Council on Affordable Housing, 221 N.J. 1 (2015), in which it (1) found that COAH had violated its March 14, 2014 Order by failing to adopt new Round 3 regulations by October 22, 2014, (2) held that, without new Round 3 regulations, COAH could not process petitions for substantive certification for the 314 municipalities currently under COAH's jurisdiction, (3) directed trial courts to assume COAH's functions, (4) authorized municipalities under COAH's jurisdiction to file a Declaratory Judgment Action along with a motion for Temporary Immunity by July 8, 2015, or risk exposure to exclusionary zoning lawsuits and (5) ruled that municipalities would have five months to prepare and file a Housing Element and Fair Share Plan with a trial court for review; and

WHEREAS, trial courts must now (1) calculate the "fair share" obligations for Round 3 and establish the standards with which municipalities must satisfy these obligations; and (2)

process declaratory judgment actions filed by municipalities seeking approval of an affordable housing plan based upon the new judicially established standards; and

WHEREAS, the Supreme Court stated that municipalities bear no responsibility for COAH's inexcusable failure to adopt Round 3 regulations, and emphasized the desirability of municipalities complying voluntarily consistent with case law that reaches back for decades; and

WHEREAS, at this juncture, the Township's Round 3 obligation is unsettled; and

WHEREAS, even under the standard that FSHC advocated before the Supreme Court, which would require a municipality to prove that it satisfied its prior round obligation and made progress towards Round 3 in order to be entitled to immunity, Barnegat should be entitled to immunity because it has satisfied its 329-unit prior round responsibility and generated a 106 unit surplus towards Round 3; and

WHEREAS, regardless of whatever its obligation is ultimately assigned, the Township remains committed to comply voluntarily with its obligations; and

WHEREAS, given all that Barnegat has done to house low and moderate income households and its commitment to comply with any future obligation once that obligation is determined, it would be particularly unfair for the Township to suffer exposure to any additional exclusionary zoning lawsuits; and

WHEREAS, the Township brought itself under COAH's jurisdiction because all three branches of government preferred COAH's administrative process to resolve disputes over affordable housing matters rather than litigation (see N.J.S.A. 52:27D-303); and

WHEREAS, the Township wishes to be in a position to complete its efforts to comply voluntarily once its obligations are defined; and

WHEREAS, accordingly, the Township wishes to follow the path provided by the Supreme Court and by bringing a declaratory relief action and simultaneously bringing a motion for immunity so that the Township can complete its efforts to comply voluntarily with whatever standards the trial judge may determine are appropriate; and

WHEREAS, the Township herein intends to make its intentions inescapably clear to the public and all concerned.

NOW, THEREFORE, BE IT RESOLVED as follows:

1. The Township formally stipulates that, given all the uncertainty in the law, it is entirely possible that it may not be in compliance with its affordable housing obligations once those obligations are defined.

2. The Township hereby reaffirms its commitment to satisfy its affordable housing obligations, however they may ultimately be defined, voluntarily and in the absence of any Mount Laurel lawsuits.

3. The Township hereby authorizes and directs its special Mount Laurel counsel in accordance with the Supreme Court opinion to file a declaratory relief action between June 8, 2015 and July 8, 2015 and to file simultaneously a motion seeking temporary immunity while the Court reviews the Township's 2009 Housing Element and Fair Share Plan as will be amended and resubmitted to the Court within the five month period articulated by the Supreme Court.

4. The Township directs its legal and planning professionals in accordance with the Supreme Court's opinion to seek a judicial determination of its Round 3 obligations and to take all reasonable and necessary action to enable Barnegat and its Planning Board to satisfy those obligations expeditiously.

5. The Township hereby joins with other similarly situated municipalities and authorizes the allocation of funds so that it can retain Dr. Robert W. Burchell to develop a more sensible and lawful approach to Round 3 allocations than the one advocated by FSHC and the Township shall share the cost of the expert with other participating municipalities, and authorizes special Mount Laurel counsel to enter into a Shared Services agreement, if necessary to secure Dr. Burchell, subject to review and approval of the Township's attorney.

6. This Resolution shall take effect immediately.

BE IT FURTHER RESOLVED that a certified copy of this Resolution be forwarded to the following:

- (a) Honorable Susan McCabe, Mayor;
- (b) David Breeden, Administrator;
- (c) Jeffrey Surenian, Esquire;
- (d) Planning Board Chairman;
- (e) Stacey Cole, Affordable Housing Liaison;
- (f) Mike McKenna, Esq.;
- (g) John Hess, P.E., P.P., C.M.E.;
- (h) Sean Kean, Esq.; and
- (i) Jerry J. Dasti, Esq.

CERTIFICATION

I, Michele Rivers, Municipal Clerk, of the Township of Barnegat, County of Ocean, State of New Jersey do hereby certify that the foregoing Resolution was duly adopted by the Township Committee at their regular meeting held on the 8th day of June 2015, a quorum being present and voting in the majority.

Michele Rivers, RMC
Municipal Clerk