

Affordable Housing in New Jersey: How Did We Get Here and Where Are We Going?

A brief synopsis of the legal developments since the Supreme Court's recognition of a constitutional right to affordable housing in the 1975 Mount Laurel I decision, including the effective abolition of the Council on Affordable Housing (COAH) by the Supreme Court's 2015 Mount Laurel IV decision and the resultant practical impacts on New Jersey municipalities attempting to meet their fair share affordable housing obligations.

Steven K. Warner, Esq.
Ventura, Miesowitz, Keough & Warner, P.C.
783 Springfield Avenue
Summit, New Jersey 07901
swarner@summitlawyers.net

Historical Context

1975 Mount Laurel I

Each municipality has a constitutional obligation to provide affordable housing

1983 Mount Laurel II

Required creation of municipal obligations
Court approves Housing Plans

1985 Fair Housing Act

COAH created to administer FHA

1986-2014 COAH Rule Making

COAH administered the FHA and promulgated first, second and third round rules

Third Round History

2004 - 2013

3rd Round Rules

"Growth share" rules are adopted twice and overturned

2013

Supreme Court Decision

Invalidated methodology
Ordered new rules to be adopted

2014

COAH Fails to Adopt

COAH fails to adopt 3rd round rules

2014

FSHC Motion

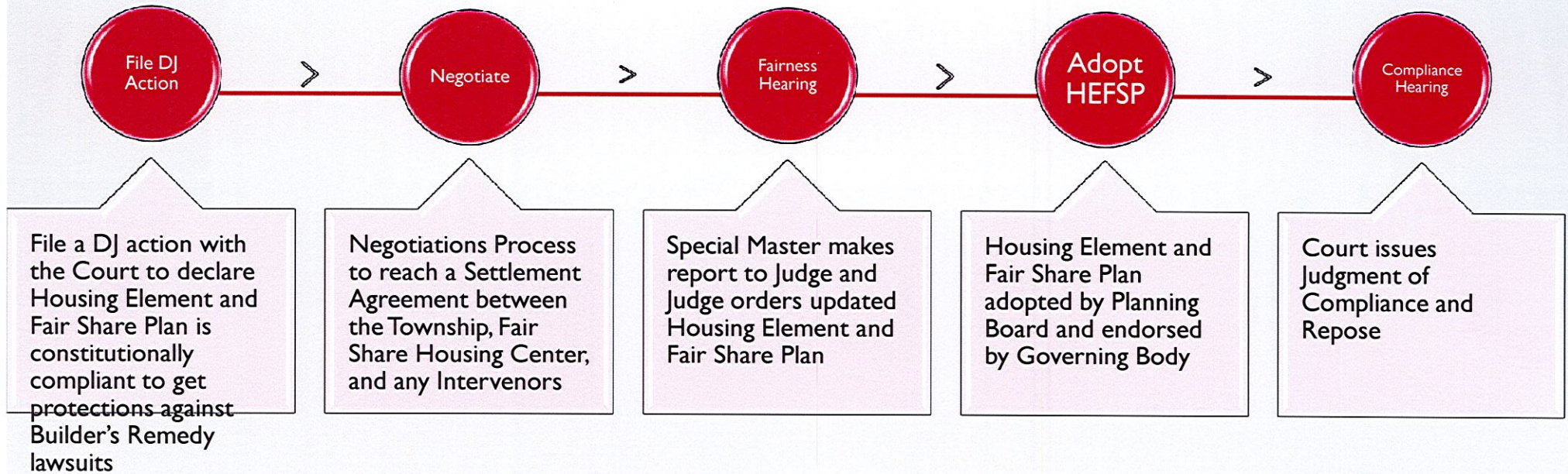
Fair Share Housing Center (FSHC) files motion to compel the State to adopt rules

2015

Mount Laurel IV

Supreme Court transfers approval of housing plans to Courts

Process overseen by Court appointed Special Master (i.e., Mediator) who presented findings to Court



THE COURT PROCESS

The Supreme Court's March 2015 Decision

The Supreme Court dissolved the FHA's exhaustion-of-administrative-remedies requirement and directed the judiciary to resume its role as the forum of first resort for evaluating municipal compliance with Mount Laurel.

A municipality was permitted to file a declaratory judgment (DJ) action if it was either (1) one of the 68 municipalities that received "substantive certification" from COAH before the invalidation of the Third Round Rules, or (2) one of the 314 municipalities that timely filed a petition for such certification with COAH, and thus was considered by the Court to have "participating status." Municipalities were to seek both (1) the judicial equivalent of substantive certification and the accompanying protections provided under the FHA, and (2) a temporary period of immunity prohibiting builder's remedy lawsuits pending a determination of the municipality's presumptive compliance with its affordable housing obligations based upon the plans it submitted to the reviewing court.

The municipal DJ actions and constitutional compliance challenges were directed to the Mount Laurel-designated judges assigned to each of the 15 vicinages. While the Supreme Court was careful to afford the Mount Laurel judges flexibility in their approach to reviewing each municipality's plan for complying with its constitutional affordable housing obligations, the Court nevertheless provided guidance in its decision. First, the Court instructed that previous methodologies employed in the First and Second Round Rules should be used to establish present and prospective statewide and regional affordable housing needs. Second, the Court emphasized that Mount Laurel judges could confidently exercise their discretion to utilize those aspects of the two earlier versions of the Third Round Rules that were validated by the appellate courts, including the allowance of bonus credits for various types of affordable housing units.

The Mercer County 2018 Decision

In the Matter of the Application of the Municipality of Princeton, the trial court in Mercer County issued a comprehensive opinion on March 8, 2018 addressing the methodology for establishing the municipal obligations to provide opportunities for development of affordable housing. In a 217 page opinion, Superior Court Judge Mary C. Jacobson determined the fair share housing obligations of Princeton and West Windsor Township, ordering that Princeton provide 753 affordable housing units and West Windsor provide 1500 affordable units.

While the Court adopted many of the factors identified by the municipal expert, for the most part it sought to adhere to prior COAH standards and approaches rather than undertake new policy decisions, even in cases where such policies would utilize clearly more accurate data. This approach would appear to be consistent with the general direction mandated by the New Jersey Supreme Court in its 2015 decision.

The Court considered two elements for the new construction obligation. The first was the prospective need for housing between 2015-2025, on which the Court decided a middle ground between the numbers advocated by the municipalities and the numbers presented by the Fair Share Housing Center (FSHC) and the New Jersey Builders' Association. The Court determined the total prospective need for New Jersey to be 85,382 affordable housing units, which was more than three times higher than the municipal expert's assessment and 55% lower than the FSHC's expert assessment.

In addition, the Court determined the present need for housing during the “gap years” of 1999-2015. The Court did not accept any single complete methodology proposed by the experts, but instead combined what it found to be the most convincing aspects of each model. The Court determined the total gap period need for New Jersey to be 74,248 units – approximately two times higher than the municipal calculation and half of the FSHC’s calculation. The Court’s determination was also higher than the calculations of the Court’s own expert.

The Court also issued rulings on specific issues that may impact decisions by other courts. Its decision rejected the concept of ‘filtering’ as an adjustment to housing obligations, which produced significant adjustments to the total obligations, and it determined that a cap on the total new construction obligation of 20% of the total number of housing units in a municipality would apply to the entire 1999-2015 period, rather than having two separate caps.

BIOGRAPHY

Steven K. Warner is a Shareholder in the law firm of Ventura, Miesowitz, Keough & Warner, P.C. in Summit, New Jersey. His practice encompasses all facets of zoning and land use law, primarily focusing on the representation of municipalities and municipal land use boards. He currently represents several municipalities and municipal zoning and planning boards throughout Somerset, Union, Hunterdon, and Morris Counties.

Mr. Warner has been recognized as a New Jersey Super Lawyer in the area of zoning and land use on an annual basis since 2011. He is the Secretary of the Land Use Law Section of the New Jersey State Bar Association. Mr. Warner is a Trustee and the Second Vice-President of the Somerset County Bar Association and the Co-Chair of its Continuing Legal Education Committee. He also is an Associate Counsel for the New Jersey Planning Officials (NJPO) and, through the NJPO, he regularly teaches the certification course for new land use board members, as required by the Municipal Land Use Law. Mr. Warner is a frequent lecturer for ICLE and the NJSBA and has published several articles for *The New Jersey Lawyer Magazine* and the *New Jersey Law Journal*.

Mr. Warner received his B.A., *cum laude*, from Clark University and his J.D. from Boston University School of Law, where he won the Best Brief Award in a National Moot Court competition.