

GET READY TO RUMBLE: FOURTH ROUND AFFORDABLE HOUSING IS AROUND THE CORNER

By Donna M. Jennings, Esq. and Anthony J. Zarillo III, Esq.

New Jersey is in the midst of an affordable housing crisis. According to the National Low Income Housing Coalition, the State, as of 2021, maintains a 224,531 rental unit deficit for extremely low income families and a 297,635 rental unit deficit for individuals and families at or below the 50% area median income.[1] In an attempt to quell that storm, the State Legislature has taken action. The General Assembly recently passed Bill A4, which proposes to make significant changes to the affordable housing process for the upcoming Fourth Round. On July 1, 2025, the Fourth Round of affordable housing obligations for regions and municipalities throughout the State is set to begin and will last until 2035.[2]

Under the current Third Round, the question of how much affordable housing a municipality must provide has been the subject of much debate and uncertainty, leading to delays in construction and costly litigation for developers and municipalities alike. Bill A4 proposes to make sweeping changes to how affordable housing requirements are adopted and the process used to enforce each municipality's constitutionally-mandated obligation to provide a realistic opportunity for affordable housing development to their residents. Among other objectives, the new Bill proposes to implement a strict timeframe by which affordable housing obligations will be set, adopted, and initially enforced. In anticipation of the new Bill and the upcoming Fourth Round, developers would be best served to be preparing now, so that they can hit the ground running when the bell rings on July 1, 2025.

In 1987, the New Jersey Supreme Court penned Mount Laurel I, a decision which affirmed the principle that each of New Jersey's 500-plus municipalities in the State are constitutionally obligated to provide affordable housing to their residents.[3] In the thirty-plus years since Mount Laurel I, efforts have been made by both branches of state government to implement a model of consistent enforcement and to accurately determine how

many affordable units each municipality within the State is required to provide at a given time. The Court has issued several subsequent opinions that have expanded the Mount Laurel progeny, and the Legislature has also taken action.

Following, Mount Laurel II, the Legislature passed the Fair Housing Act in 1985 in an attempt to shift the primary enforcement mechanism of Mount Laurel compliance to the newly established Council on Affordable Housing (COAH).[4] COAH was tasked, in part, with "assigning and determining municipal affordable housing obligations in that body"



in intervals which would last for a period of years.[5] At first, said intervals, or "Rounds" as they are more colloquially known, would run for six years, and later that time was expanded to ten year cycles.[6]

In 2015, the Court decided Mount Laurel IV following COAH's failure to set satisfactory regulations that complied with the Mount Laurel Doctrine for the Third Round, which commenced in 1999.[7] In part, Mount Laurel IV, found that COAH had been, in effect, rendered inoperative. In so holding, the Court suspended the exhaustion of administrative remedies requirement, effectively removing COAH from the process and returning enforcement of affordable housing obligations

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to the courts.[8] Under that framework, municipalities would be able to receive compliance certification from a court via a judgment of repose which would provide temporary immunity from Builder's Remedy actions—which impose court-ordered rezonings for specific pieces of property to provide additional opportunities to develop affordable housing to aid a municipality in curing its affordable housing deficit. That process has remained the status quo since Mount Laurel IV.

At present, the Third Round is set to expire next year in 2025. With that in mind, the Legislature has crafted iterations of new proposed legislation that sets the stage for the next chapter in the Mount Laurel saga. On February 12, 2024, the Assembly passed Assembly Bill A-4, a comprehensive legislative package that seeks to make substantial improvements to affordable housing.[9] Currently, the Bill has made its way to the Senate after being approved by the Senate Budget and Appropriations Committee on March 11, 2024.[10] The Bill will now be referred to the Senate where it will hopefully be codified into law.

If adopted, the Bill will formally abolish COAH and set forth a new procedure for municipalities to follow to ensure their compliance with their constitutional obligation to provide affordable housing to New Jerseyans across the State.[11] Taking the place of COAH will be a new program which splits responsibilities between the Department of Community Affairs (“DCA”) and the Administrative Office of the Courts (“AOC”).[12] In essence, DCA will be tasked with formulating the Regional and Municipal-level obligations.[13] AOC, in turn, will be tasked with enforcement of any disputes that arise.[14] The Administrative Director of the Courts is responsible for appointing members of the Affordable Housing Dispute Resolution program, which is tasked with resolving disputes that involve the Fair Share Housing Act.[15] The Affordable Housing Dispute Resolution program will be made up of current and former Mount Laurel judges, or other experts if not enough judges are appointed.[16] The

2018 Judge Jacobson Decision, In the Matter of the Application of the Municipality of Princeton, will guide the DCA calculation of respective affordable housing need.[17]

Developers and municipalities should take note of the significant aspects of the Bill. One of which involves the calculation of bonus credits. Although rental bonus credits will be eliminated, and the use of bonus credits to satisfy prospective need is capped at 25%, the Bill expands on the availability of bonus credits, including the addition of a one unit for one unit credit for each ownership or rental unit that is converted from a market rate unit to a low or moderate income unit.[18]

In addition, developers should keep a keen eye on the Fourth Round timeline, which will be streamlined if A4 is codified. On the earlier of seven months after the Bill's adoption or December 1, 2024, DCA will announce the affordable needs for each region and municipality, and the municipality must adopt via binding resolution their affordable unit number by January 31, 2025.[19] After an obligation is set, an interested party may challenge the municipality's calculation until February 28, 2025.[20] If there are no challenges brought, the municipality maintains immunity from Builder's Remedy litigation.[21] Then, by June 30, 2025, a Housing Element and Fair Share Plan must be adopted, endorsed, and filed with the Affordable Housing Dispute Resolution Program, which may be challenged until August 31, 2025.[22]

Perhaps most importantly, the Bill incentivizes municipalities to not only initially comply with this new expedited procedure but to maintain compliance throughout the entire duration of the Fourth Round. As opposed to currently where a municipality may simply not comply, and sit on its hands in the hope that their non-compliance is never brought to light via a Builder's Remedy action, the new Bill permits additional challenges to be brought midway through the certification period.[23] Further, municipalities will not be able to evade any existing Third Round non-

compliance because the extent of any prior compliance or lack thereof is factored into the Fourth Round.[24] Notably, Bill A4 is subject to further amendment as it makes its way through the legislative process. However, were it to be codified into law, Bill A4 will give affordable housing a much needed face lift that attempts to remedy a framework that has floundered for two decades due to the virtual non-existence of COAH. Irrespective of Bill A4's fate, the time is now for municipalities and developers to buckle their chinstraps so that they are ready to rumble once the Fourth Round begins.

References:

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