

As Fourth Round of Affordable Housing Obligations Nears, Municipalities Should Plan Accordingly

As we approach the close of the “Third Round” of affordable housing obligation what does the upcoming “Fourth Round” look like for New Jersey’s municipalities? For the period 2004-2015, three separate iterations of Third Round rulemaking by the New Jersey Council of Affordable Housing (COAH) were struck down by the courts.

This ultimately led to the transfer of jurisdiction over affordable housing from COAH to the courts on March 10, 2015, by the New Jersey Supreme Court in the Mount Laurel IV decision entitled *In re: Adoption of N.J.A.C. 5:96 and 5:97* by New Jersey Council on Affordable Housing, 221 N.J. 1 (2015). The New Jersey Supreme Court then directed municipalities to file Declaratory Judgment actions with the courts in order to seek a determination of their Third Round affordable housing obligations and approval of their Fair Share plans for meeting those obligations.

According to the Fair Share Housing Center, 342 towns have filed declaratory judgment actions since 2015 in response to Mount Laurel IV. In Mount Laurel IV, the Supreme Court granted Fair Share Housing Center (FSHC) intervenor status as a matter of right in all declaratory judgment actions involving Third Round affordable housing. Presently, according to Fair Share Housing Center, only two towns that filed lawsuits in 2015 have not settled: South Brunswick (Middlesex County) and Alpine (Bergen County). Therefore, 340 municipal Fair Share Plans have been approved. What is next for affordable housing? How will compliance in the next “round” be achieved by municipalities?

Compliance & Repose Immunities

The Third Round covered the period from 1999 to July 1, 2025. As a result, municipalities that have court-approved Third Round plans enjoy Final Judgments of Compliance and Repose, and immunity from Mount Laurel litigation, until July 1, 2025. This includes immunity from Builder’s Remedy lawsuits, “constitutional compliance actions,” and any other challenges brought under Mount Laurel principles. To extend



those immunities, towns will need to prepare and seek approvals of Fourth Round plans.

As for the methodology for determining a municipality’s Fourth Round affordable housing obligation, it should be more straightforward than it was in the Third Round. As set forth in the Fair Housing Act, the Fourth Round will include a 10-year period from July 1, 2025, to July 1, 2035 (N.J.S.A. 52:27D-307(c)(1)). The Third Round encompassed a 26-year period (1999 to July 1, 2025), including the “gap period” from 1999 to 2015, when COAH was ineffective in promulgating Third Round rules. There was significant litigation over this

gap period. One of the issues litigated was whether a municipality had any affordable housing obligation during the gap period due to COAH's inability to promulgate valid Third Round rules. In the case now known as Mount Laurel V, the Supreme Court answered in the affirmative, declaring that municipalities do have an affordable housing obligation

Having cases handled by Superior Court Judges in the vicinage in which the municipality is situated has significant advantages.

during that Third Round gap period (In re Declaratory Judgment Actions Filed By Various Municipalities, 227 N.J. 508 (2017) ("Mount Laurel V").

In preparing for Fourth Round obligations, municipalities should look to anticipated growth during that 10-year period. In addition, New Jersey now has the benefit of a 41-day methodology trial conducted by the Honorable Mary Jacobson, A.J.S.C. (retired). The result of that trial provided a method for calculating a town's Third Round numbers. That methodology will likely be followed in the Fourth Round.

With the Fourth Round a little over two years away, New Jersey municipalities should take several measures to prepare for their continued compliance with this constitutionally mandated obligation to provide affordable housing.

First, look at the current Third Round Plan and 2020 Midpoint Review to determine which sites still provide a realistic opportunity for low- and moderate-income housing, and for which compliance mechanisms still

provide a realistic opportunity. A good example is Mount Laurel Township, which settled its Third Round obligation by including a "market to affordable" program. A market to affordable program involves a municipality purchasing market rate units, then deed restricting them for 30 years for low- or moderate-income owners. Proactively, Mount

Laurel Township determined that with rising housing prices, the program would be difficult to accomplish, and likely cost prohibitive. As a result, Mount Laurel amended its Third Round Plan by identifying an inclusionary senior housing project, and a 100% affordable tax credit housing project, to replace the market-to-affordable program.



Affordable Housing Insight and Experience Our Clients Can Trust

McManimon, Scotland & Baumann, LLC has a long history of representing its clients in affordable housing development, both public and private clients alike. The firm has vast expertise in a variety of financing programs used to develop capital stacks, including, among other sources, HUD's Rental Demonstration Program (RAD), Section 18 disposition (Section 18), RAD/Section 18 blends, streamline voluntary conversions, low-income housing tax credits, New Jersey Housing and Mortgage Finance Agency construction and permanent lending, FHLBNY AHP grants, and conventional lending.

In recognition of this experience, firm member Bakari G. Lee was recently appointed to the Affordable Housing Advisory Council of the Federal Home Loan Bank of New York (FHLBNY) and participates in the formulation of FHLBNY's affordable housing finance policy and regularly serves as a speaker at various affordable housing conferences.

For more information, contact **Bakari Lee** at blee@msbnj.com.



NEWARK ROSELAND TRENTON NEW YORK 973.622.1800 msbnj.com

Second, be proactive in seeking future opportunities for affordable housing projects. While it remains to be seen what the affordable housing numbers will be in the Fourth Round, a reasonable assumption is that a similar methodology will be applied. Some fortunate municipalities will enter the Fourth Round with housing credits carried over from the Third Round.

The current state budget appropriates approximately \$305 million for an “affordable housing production fund.” This is the largest amount ever appropriated in the state budget.

Third, many municipalities will need to address not only the Fourth Round obligation but also satisfy any shortfall resulting from units planned in the Third Round, but not built or constructed. Many factors, including new NJ Department of Environmental Protection (NJDEP) rules involving storm water management, impact the development potential of many sites, reducing the number of units they can yield. Therefore, municipalities should be looking to reposition any approved but not built sites. Most municipalities will need to identify opportunities at new sites which are not in the current plan.

Even though legislation has been proposed, COAH will most likely not return in a reconstituted form. This means that there will be no administrative mechanism for a municipality to receive approval of the Fourth Round number and an Affordable Housing Plan. Having cases handled by Superior Court Judges in the vicinage in which the municipality is situated has significant

Funding Sources for Affordable Housing

Finally, there are significant funding sources for affordable housing. As a result, towns can get a jump start on the Fourth Round. The current state budget appropriates approximately \$305 million for an “affordable housing production fund.” This is the largest amount ever appropriated in the state budget. The state is promulgating the rules on how the funds will be awarded and administered. This guidance should be in effect by the time this article is published.

In addition, a second large funding source is the State Affordable Housing Trust Fund, which is now fully funded. Applications for the money are made through the Department of Community Affairs (DCA). This fund targets smaller projects of 25 units or less. The guidelines and procedures for this funding are also available on the Department of Community Affairs’ website, <https://nj.gov/dca/>.

A further option, the Aspire program available through the New Jersey Economic Development Authority (NJEDA), provides a gap financing tool and supports commercial, mixed use, and residential real estate developments. This program replaced the Economic Redevelopment and Growth Grant (ERG).

Finally, many municipalities will have money left in their Affordable Housing Trust funds, flowing from both existing and continuing non-residential development. The 2.5% fee, calculated on the equalized assessed value of non-residential projects, can offer a healthy infusion of cash to be included in amended Spending Plans for partial satisfaction of Fourth Round obligation.

advantages. These judges have local knowledge that can be helpful in not only determining fair share obligations, but also in identifying Third Round compliance mechanisms that make sense for that community. They are also less bureaucratic than COAH; and decisions by the courts are made in open court, not following closed session conferences from which the public is excluded. Further, it makes practical sense for affordable housing to remain with the courts since there is now a method for calculating a town’s affordable housing obligation which came out of Judge Jacobson’s lengthy methodology trial. The authors are aware of a request on behalf of a number of municipalities directed to Governor Murphy urging him to appoint members to COAH and reconstitute the agency. The authors are not convinced of the merits of such a request.

While there are other strategies available to municipalities as they approach the Fourth Round, given the funding sources currently available, and the

suggestions set forth above, towns can and should begin preparing now. 🇺🇸

Linda A. Galella is Counsel in Parker McCay’s Municipal and Government Law department in the firm’s Mount Laurel office and represents a number of municipalities as Special Counsel in affordable housing matters.

Michael W. Herbert is a Shareholder at Parker McCay, and a member of the Municipal and Government Law department in the firm’s Hamilton (Mercer) office. He has represented municipalities and land use boards for two decades. Parker McCay’s attorneys represent dozens of municipalities, land use boards, utilities authorities, and fire districts throughout the state, and serve as special counsel to numerous public entities.

An Affordable Housing Update from the League and the Planning Officials will be held
Wednesday, Nov. 16 at 9 a.m., room 311.

NJLM Conference • 107th Annual

2022