

B A N I S C H

A S S O C I A T E S , I N C .

Planning and Design

December 31, 2015

Honorable Jamie S. Perri, J.S.C.
Monmouth County Courthouse
71 Monmouth Park, 2nd Floor
P.O. Box 1266
Freehold, NJ 07728

RE: In the Matter of the Township of Manalapan, Docket No. MON-L-2518-15
Review of Municipal Plan Summary and Continued Immunity

Dear Judge Perri:

Introduction

Pursuant to paragraph 4 of Omnibus Order #4, what follows is a brief review of the municipal housing plan summary, which was crafted in this vicinage as a tool to help the Court evaluate whether to extend municipal immunity from builder remedy lawsuits. The scope of this review is limited, since there is no measuring stick for constitutional compliance at this time. As a result, my findings address the appropriateness of extending immunity both generally, as outlined by the Supreme Court in Mt. Laurel IV, and more specifically, based on a review of the plan summary. Additionally, the comments of Interveners are briefly summarized and addressed in this report.

Standard of Review

In re N.J.A.C. 5:96 and 5:97, 221 N.J. (2015) decided by the Supreme Court on March 10, 2015, determined that the delay in pursuing affordable housing due to a dysfunctional COAH would no longer be tolerated and dissolved the FHA's exhaustion of administrative remedies requirement, returning to the trial courts the responsibility for determining whether municipal land use regulations afford the "opportunity for producing a fair share of regional present and prospective need for housing low- and moderate-income families." Mt. Laurel IV, 221 N.J. at 3-4.

The scope of enforcement litigation authorized by the Supreme Court was limited to challenges to constitutional compliance.

Only constitutional compliance actions may proceed initially as against a town with substantive certification from COAH. *No builder's remedy shall be authorized to proceed against any such town unless a court determines that the substantive*

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certification that was granted is invalid, *no constitutionally compliance supplementing plan is developed and approved by the court after reasonable opportunity to do so*, and the court determines that exclusionary zoning actions, including actions for a builder's remedy, are appropriate and may proceed in a given case. Id. at 26-27.

Exclusionary zoning and builder's remedy actions are not permitted until the trial court assesses the fair share plan, finds it constitutionally non-compliant and the municipality thereafter fails to timely supplement the plan to correct the deficiencies. Mt. Laurel IV, supra, 221 N.J. at 28, 33. When the Supreme Court endorsed the award of limited grants of immunity under the parameters established in In re COAH, it presumed that the Court will exercise its sound discretion when determining whether municipalities are exercising good faith. Mount Laurel IV held that, as part of the court's review of a third round HPE&FSP,

“. . .we authorize . . .a court to provide a town whose plan is under review immunity from subsequently filed challenges during the court's review proceedings, *even if supplementation of the plan is required during the proceedings.*" Id. at 24. "[T]he trial court may enter temporary periods of immunity prohibiting exclusionary zoning actions from proceeding pending the court's determination of the municipality's presumptive compliance with its affordable housing obligation." Id. at 28. (italics added)

The Court established a procedure whereby municipalities could obtain temporary immunity from builder's remedy litigation while the courts established the fair share obligations and standards for municipal compliance and the municipalities formulated revised housing plans in response thereto. Favoring voluntary compliance, the Court directed the use of processes similar to those previously available through COAH, including conciliation, mediation, and when necessary, special masters. The Court also made clear that municipalities should be given sufficient opportunity to prepare and subsequently supplement fair share plans submitted to the Court.

Our approach in this transition is to have courts provide a substitute for the substantive certification process that COAH would have provided for towns that had sought its protective jurisdiction. And as part of the court's review, we also authorize, as more fully set forth hereinafter, a court to provide a town whose plan is under review immunity from subsequently filed challenges during the court's review proceedings, *even if supplementation of the plan is required during the proceedings.* Id. at 23-24. (italics added)

While Mt. Laurel IV was not intended to be punitive to municipalities and the Supreme Court did not hold municipalities accountable for the inability of the Council on Affordable Housing ("COAH") to perform its administrative duties, the Court made clear that its goal was to provide an avenue of prompt constitutional compliance:

[T]he process established is not intended to punish the Townships represented before this Court, or those that are not represented but which are also in a position of unfortunate uncertainty due to COAH's failure to maintain the

viability of the administrative remedy. *Our goal is to establish an avenue by which townships can demonstrate their constitutional compliance to the courts through submission of a housing plan and use of processes.* 221 NJ at 23.

With regard to the above-referenced “processes”, the Supreme Court cited section 316 of the Fair Housing Act (FHA), which calls for submission of a housing plan element and fair share plan “within *five months* from the date of transfer, or *promulgation of criteria and guidelines* by (COAH)...*whichever occurs later.*” Id. at 27-28. As the Court is aware, the fair share numbers and the criteria and guidelines governing their satisfaction are yet to be established. Nonetheless, this timeframe offers some insight into the amount of time the Supreme Court felt appropriate for municipal submissions of housing plan elements and fair share plans. Considering that the Court specifically referenced section 316 in Mount Laurel IV, it appears clear that the Court intended that towns be given the opportunity to develop a compliant plan *after* they know their fair share obligations and the criteria and guidelines that must be satisfied.

Based on the foregoing, there is a logical presumption that every town that filed a declaratory judgment action, pledging to the Court its intent to develop a constitutionally-compliant plan, should be provided the opportunity to do so, once it has all the required information. By this reasoning, it would appear logical that every town that filed a declaratory judgment action, and that subsequently has performed as required by orders of the Court, should be entitled to continued immunity.

Nonetheless, Mt. Laurel IV does not offer any assurance of extensions of immunity when a municipality is not acting in good faith or abuses the process, as noted in Mt. Laurel IV:

We repose such flexibility in the *Mount Laurel*-designated judges in the vicinages, to whom all *Mount Laurel* compliance-related matters will be assigned post-order, and trust those courts to assiduously assess whether immunity, once granted, should be withdrawn if a particular town abuses the process for obtaining a judicial declaration of constitutional compliance. Review of immunity orders therefore should occur with periodic regularity and on notice. 221 N.J. 1, 26.

Review of Municipal Plan Summary

Recognizing that municipal fair share obligations and the criteria and guidelines needed to assess constitutional compliance were not available and would not be for some time, at the request of Judge Perri, Court Masters in the Monmouth Vicinage developed the “municipal plan summary forms” or “matrix” forms as an interim tool to assess the specific projects, policies or regulations that a municipality would include in its municipal fair share plan. These forms were created in response to the Supreme Court’s mandate for prompt voluntary compliance, to permit municipalities to demonstrate good faith by identifying past, ongoing and proposed compliance mechanisms without having to prepare multiple versions of a full-blown HE/FSP.

My review of the municipal summary is not intended to evaluate the plan for quantitative sufficiency, since that is not possible at this time. Rather, it is intended to provide an understanding of the nature and scope of municipal efforts to date and to assist the Court in determining whether the municipality is making a good faith effort to identify specific projects and proposals that can address the constitutional obligation when it is ultimately known. Where interveners or other interested parties have submitted comment as provided for in the Orders of the Court, their comments have been summarized briefly herein.

Two (2) complete municipal plan summaries were timely submitted detailing the required information. The following municipal fair share obligations were cited in the December 14, 2015 housing plan summary:

Component of Need	Municipal Obligation	Source
Present Need	126	2010 Census
1987-1999 Prior Round	706	N.J.A.C. 5:99
1999-2025 Prospective Need	649	Reading

Completed and proposed compliance mechanisms directed at addressing the 1987-2015 municipal fair share obligation include:

Component of Need	Mechanism	Affordable units
1987-1999 Prior Round	Inclusionary zoning, RCAs alternative living, rental bonus	706 completed
1999-2015		
2015-2025 Prospective Need	Inclusionary zoning, 100% affordable, alternative living, rental bonus	682(80 completed)

Comparing the fair share obligations and estimates with actual affordable housing production and proposed inclusionary zoning, supportive and special needs housing and two (2) 100% affordable projects indicates that Manalapan can meet and exceed its affordable housing obligations.

Areas of Concern

Mount Laurel IV directed trial courts charged with the review of constitutional compliance “...to assiduously address whether immunity, once granted, should be withdrawn if a particular town abuses the process for obtaining a judicial declaration of constitutional compliance.” 221 N.J. at 1, 26. The Supreme Court also called for an “individual assessment” to evaluate steps taken to meet the fair share obligation and changing conditions affecting need.

The evaluation of whether a municipality is providing a realistic opportunity for construction of affordable housing depends upon whether municipal compliance mechanisms are likely to produce affordable units. This preliminary review is intended to highlight areas of potential concern and where the municipality should explore alternative compliance approaches.

Richard Hoff asserts on behalf of Defendants/Interveners Highview Homes, LLC, Countryside Developers, Inc. and K. Hovnanian Shore Acquisitions that the Township submission is defective. While Mr. Hoff did not review the Township's December 14th submission, his November 13, 2015 letter responded to the originally submitted plan summary forms, and found fault with the submission as follows:

1. *Reliance on the invalidated June 2014 included in N.J.A.C. 5:99 is improper and not in good faith.*

The use of the Reading calculations for the December submission, as directed by the Court in CMO #4, addresses this issue.

2. *The reliance on 100% affordable housing projects and the lack of inclusionary development is troubling.*

The municipality has discretion in selecting the type(s) of compliance mechanisms of its choosing to fashion a plan that achieves constitutional compliance. At the same time, this process cannot tolerate unrealistic proposals that are unlikely to bring forth affordable housing. Among the third round components in this plan are two (2) 100% affordable projects, prompting the need to assess the likelihood of their eventual funding. According to the 2015 Qualified Allocation Plan adopted by the New Jersey Housing and Mortgage Finance Agency (NJHMFA) on July 2, 2015, the ranking of projects under the ranking criteria established under N.J.A.C. 5:80-33.15 through 33.18 determines their eligibility for the 9% Low Income Housing Tax Credits that make these projects possible. According to N.J.A.C. 5:80-33.14 (Scoring and ranking):

- (a) Because of the limited amount of credits and the high volume of applications to NJHMFA, only a fraction of the projects that apply typically receive credits. In addition to meeting the eligibility criteria described at N.J.A.C. 5:80-33.12, *applications that fail to satisfy a minimum of 65 percent of the maximum score under the ranking criteria established under N.J.A.C. 5:80-33.15 through 33.18 shall be declared ineligible to obtain a reservation of tax credits.* (italics added)

Where 100% affordable projects propose the use of tax credits, NJHMFA will only consider applications for projects that rank sufficiently high (at least 65 percent of the maximum score) to receive tax credits. In the latest round of tax credit allocations, nearly all successful applications scored 100% or very close to it. To help determine the likelihood of success of 100% affordable projects, municipalities could be required to score the proposed project(s) to assure that at least the 65% threshold is met and the project therefore has a theoretical chance of being funded.

The Fair Share Housing Center, the prevailing party in Mount Laurel IV, has submitted comments regarding the housing plan summary. While FSHC did not review the Township's December 14th submission, Kevin Walsh's email of November 13, 2015

responded to the originally submitted plan summary forms, and found fault with the submission as follows:

1. *The municipality's reliance on the unadopted methodology included in N.J.A.C. 5:99 constitutes bad faith.*

The use of the Reading calculations for the December submission, as directed by the Court in CMO #4, addresses this issue.

2. *The municipality submitted an incomplete summary form. Much of the form is empty.*

The December submission contained sufficient information for this review.

3. *The municipality does not come close to meeting its Third Round obligation. It is short hundreds of units based on its proposed Third Round obligation of 845 units.*

While only 80 completed units are credited toward the third round, the other proposed components of the plan will fully address the 649-unit Reading post-1999 interim need assignment

4. *The municipality does not appear to have satisfied its very low income, very low income family or very low income rental requirements.*

The housing plan summary submissions are intended to demonstrate the existing and proposed compliance elements a municipality intends to use in its fair share plan. The fine tuning required to meet very low income and other COAH requirements should be made in the HE/FSP to be submitted to the Court for constitutional compliance review.

5. *The Knob Hill development has only moderate-income units. It therefore cannot receive COAH credit because creditable developments are required to include 50% low-income units.*

If this is true, Manalapan should explain the circumstances of this arrangement and how the missing low-income units will be provided.

6. *The municipality should demonstrate that the 322 RCA units that were transferred resulted in creditworthy affordable homes being developed or rehabilitated in the receiving municipalities. If that cannot be demonstrated, the municipality cannot receive credit.*

The responsibility for completing the rehabilitation of these units lies with the receiving municipality. If FSHC believes that the RCA funds were not properly utilized, details should be provided.

7. *The municipality wrongly calculates rental bonus credit*

The basis for this claim is not explained and this does not appear to be accurate.

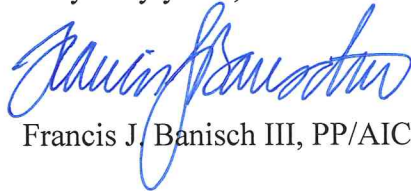
Summary

Manalapan received substantive certification from COAH on July 15, 2010 and has put forth in the plan summary what appears to be a good faith effort to craft a constitutionally compliant plan, to the extent that can be done at this time.

Confirming the likelihood of funding for the 100% affordable projects through the scoring process to the extent possible will help to make these a credible component in the fair share plan. In the event these projects will not rank sufficiently for funding, alternative proposals, including additional inclusionary developments, should be considered.

I would be pleased to address any concerns or questions Your Honor may have regarding this report.

Very truly yours,



Francis J. Banisch III, PP/AICP

cc: Andrew Bayer, Esq. (via email)
Richard Hoff, Esq. (via email)
Jeffrey Kantowitz, Esq. (via email)
John Sarto, Esq. (via email)
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