



Affordable Housing Background & Frequently Asked Questions

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The questions and answers below are an attempt to provide a simple explanation of a highly complicated issue. The goal of this information is to explain the history and current state of affordable housing obligations in the State of New Jersey and in the Township of Verona. This is not intended to be a comprehensive explanation of the affordable housing issue. We hope that this overview will assist Verona residents in understanding the issues currently facing the Mayor and Council and their efforts to address them.

Terminology

Many terms have a specialized meaning in the discussion of this topic, as follows:

- **affordable housing** - habitable shelter that can be rented (or purchased with mortgage financing) at a periodic cost that does not exceed a specified percentage of the household income. The periodic cost may include not only the rent or monthly mortgage payment but also utilities or in the case of a purchase, costs for real estate taxes, casualty and mortgage insurance and homeowner's association charges. Affordability depends upon household income and in this context the household income must qualify as low or moderate.
- **COAH** - The Council on Affordable Housing - A state agency created to determine each municipality's low and moderate housing obligation and whether the municipality is meeting that obligation.
- **exclusionary zoning** - municipal use of the zoning power to exclude persons based on socioeconomic status. Exclusionary zoning will commonly refer to requirements, such as minimum lot sizes, which have the effect of increasing the cost of housing so that it is beyond the means of lower income households.
- **household** - the person or group of persons residing in a dwelling unit. (The term "family" is not used because there is no requirement that household members be related by blood or marriage.)
- **inclusionary development** - a development which includes an affordable housing component
- **intervenor** - A private property owner who joins in the lawsuit that will determine a municipality's fair share obligation.
- **low income** - a household with an annual income equal to or less than 50% of the county's median income for a household of that size, as determined by the United States Department of Housing and Urban Development (HUD)
- **moderate income** - a household with an annual income equal between 50% and 80% of the county's median income for a household of that size, as determined by HUD
- **special master** - A professional planner or attorney appointed by a court to aid the court in determining how a municipality should meet its low and moderate income housing obligation.

- **vacant land adjustment** – When a municipality can demonstrate a lack of suitable land for development of housing, it may request that its obligation to provide for low and moderate income housing be reduced.

Why does a community have to build affordable housing?

In 1975, the New Jersey Supreme Court ruled in *Southern Burlington County N.A.A.C.P. v. Mount Laurel Township* (commonly called Mount Laurel I) that municipalities have an obligation, under New Jersey's constitution, to enact zoning regulations that create a realistic opportunity for the development of the municipality's fair share of affordable housing. The "Mount Laurel Doctrine" essentially states that a community cannot zone in such a way to exclude low- and moderate-income households (i.e. have exclusionary zoning).

Examples of such "exclusionary zoning" include:

- Single-family zoning with large minimum lot size requirements.
- Minimum house size requirements which drive up the cost of housing construction and consequently, housing prices.
- Prohibition of multi-family housing.
- Limitation on number of bedrooms in multi-family dwellings to limit household sizes.
- Prohibition of mobile homes.
- Over-zoning for non-residential uses.

What is COAH?

COAH was the New Jersey Council on Affordable Housing which was established under the Fair Housing Act of 1985, the legislative response to the Mt. Laurel II decision. COAH created rules and procedures for communities to follow to satisfy their constitutional obligation to build affordable housing. The regulations that have been issued by COAH have been divided into "rounds." Round One covered the time period from 1987 to 1993. Round Two covered the period from 1993 through 1999. Round Three was originally intended to pick up more or less where Round Two left off. Under all of these regulations, towns were given the option of either:

- 1) filing affordable housing plans with COAH (who would review for compliance), or
- 2) doing nothing and risking a "builder's remedy lawsuit" (which is explained later).

If a community filed an affordable housing plan with COAH that was deemed complete and satisfactory, the municipality would receive what is called "Substantive Certification." Substantive Certification provided towns with a period of immunity from builder's remedy lawsuits. Verona filed an affordable housing plan in 1995 for Round Two and received Substantive Certification. Verona filed its Round Three plan but it was never certified because, through no fault of the Township's, COAH stopped issuing Substantive Certifications in 2010. As a result, Verona has not received Substantive Certification for Round Three.

On February 9, 2010, Governor Chris Christie suspended COAH and appointed a committee in preparation to dismantle it. The Supreme Court ruled that it was not within his power "to abolish independent agencies that were created by legislative action." It also ordered COAH to come up with new regulations regarding the development of affordable housing. In October 2014 the

COAH Board failed to meet the deadline set by the Supreme Court for establishing new Third Round guidelines, when the Board voted 3-3, to adopt the proposal.

What is high density housing?

Under COAH's rules, the minimum density for inclusionary development is eight units to the acre for for-sale developments and ten units to the acre for rental developments. Keep in mind, however, that these are minimums. A court appointed special master may recommend, or the Court may order, densities far in excess of these numbers. Inclusionary developments in nearby towns and throughout the State are currently being proposed at 20 to 30 units per acre.

What changed in March of 2015?

COAH – a State agency – has for years failed to establish legally valid rules and numeric obligations for affordable housing since the Round Two regulations expired in 1999. There have been years of court battles between the competing interests, including affordable housing advocates, the real estate developers' lobby, municipalities and COAH itself, over how the rules should be formulated and the methodology by which the local obligations should be established. However, in March of 2015, the Supreme Court, after ordering COAH numerous times to establish legally acceptable rules, determined, in essence, that COAH had stopped doing its job. The March 2015 Order therefore stripped COAH of any of its administrative powers and returned to the lower courts (Superior Court) the responsibility of determining the methods, affordable housing obligations, and each municipality's compliance with its constitutional obligation to provide for the development of affordable housing.

What are the practical implications of the March 2015 Order?

As a result of the March 2015 Order, towns are now required to individually petition the Superior Court for approval of their housing plans, which proceedings are known as declaratory judgment actions. Right now, Verona is one of 280+/- communities with pending declaratory judgment actions in the State. Builders, developers and other interested parties ("Intervenors") may intervene in these proceedings. Intervenors typically take the position: 1) that the municipality has failed to zone for the creation of enough affordable housing, and/or 2) that the intervenor owns a specific site that the town should allow for development of affordable housing. This is what has happened in Verona. It is important to note that the only reason Verona has been permitted to file its declaratory judgment action is because Verona was pro-active in seeking Substantive Certification from COAH for Rounds Two and Three. The Court has appointed Elizabeth McKenzie as Verona's Special Master. Ms. McKenzie is a professional planner who has represented both municipalities and developers in the past and has been appointed as a special master numerous times. The court process is ongoing, and Verona currently has immunity against builder's remedy lawsuits. This immunity should be extended as long as Verona continues working in good faith with the Special Master, negotiating and/or mediating with Fair Share Housing Center and other intervenors (including developers and property owners), and ultimately drafting and approving a compliant Housing Element and Fair Share Plan. Had Verona not participated in the COAH process in prior years and demonstrated good faith in meeting or exceeding its affordable housing obligations, it would have been precluded from filing a declaratory judgment action and would already be at the mercy of builder's remedy lawsuits.

What is Verona's present affordable housing obligation?

In 2008, when COAH was still functioning, Verona's affordable housing obligation, as calculated by COAH, was 27 units for Round 2, which has been satisfied

Since the Supreme Court decision in 2015, numerous new sets of numbers for affordable housing have been promulgated for every town in the State of New Jersey. The Fair Share Housing Center ("FSHC"), a group that advocates for the construction of affordable units and also an intervening party in the Township's pending Declaratory Judgment action, believes that Verona has an obligation of 327 units for Round Three, which they calculate to include the 15-year "Gap" period from 1999 through 2014, as well as the 10-year "prospective" period of 2015-2025. Econsult, who represents numerous municipalities, calculated the Township's Round Three obligation to be 20 units. There is also a third set of numbers being developed by Richard Reading, who has been appointed as a "Numbers Master" for multiple counties. Reading calculates Verona's number to be 123 units. The battle over whose numbers will be accepted by the courts is presently being fought in virtually every county in New Jersey.

It should be noted that these obligations cited above are for affordable units only. Based upon an 80%/20% market/affordable ratio for inclusionary development, as the Township typically insists on for affordable housing inclusionary development, these numbers could mean that the Township would have to zone for the creation of anywhere from 100 to 1635 total units in the community. If the ratio was instead 85%/15% (which is more typical statewide), the range could be between 134 and 2,180 units, if all of the units were constructed as part of inclusionary developments. This is the primary reason why the Township is being pro-active in seeking proposals from developers that will have the smallest overall impact on the Township.

Verona has complied with prior round rules and has produced a significant amount of affordable housing. Why should we be required to build more?

While the Township has historically been proactive in creating affordable housing, the courts have determined that the constitutional obligation to provide for the development of affordable housing is a continuing obligation. For each "round" of affordable housing rules, the Statewide "need" is apportioned to municipalities based on a number of factors, including ratable base, undeveloped land, and projected population growth. While the Township satisfied its obligations under Round One and Round Two, we are currently in Round Three. It is nearly inevitable that there will eventually be a Round Four as well. However, compliance with each round is what gives the municipality a period of immunity against builder's remedy lawsuits. While compliance with a large obligation may force some difficult choices, the impact to the municipality for non-compliance can be far worse, as many municipalities have seen.

What is a builder's remedy lawsuit and how does it function?

A builder's remedy lawsuit is a process created under the Mt. Laurel Doctrine which allows a developer to file a lawsuit when it believes a community is practicing exclusionary zoning or has not provided its fair share of affordable housing. The developer then proposes to construct housing at a higher density than is otherwise permitted on its property, which development must include a "substantial" affordable housing component. If the court determines that the community's zoning is exclusionary or that the town has failed to meet its obligations, the court can order the town to permit the developer's "solution". The "builder's remedy" granted by the court in response to the town's failure to meet its constitutional obligations is to permit the

developer to construct higher density housing on its property. This court-imposed “remedy” could be completely inconsistent with the surrounding zoning and land uses. This could result in a high-density apartment complex, of 20 to 30 units per acre, located in the middle of a low-density residential zone or wedged between two functioning office buildings. Essentially, the municipality loses local control over its own zoning ordinances. It is in the Township’s best interests to avoid even the possibility of this scenario.

How did a town defend against a builder’s remedy lawsuit in the past?

When COAH had jurisdiction to review municipal affordable housing plans, a town would be immune from builder’s remedy litigation if it availed itself of the administrative review process established by COAH for review of the town’s affordable housing plan. Verona filed affordable housing plans in both Round Two and Three. However, COAH did not complete its review of the Round Three plan. When Verona’s Round Two plan was approved by COAH, the Township received immunity from builder’s remedy lawsuits. Thus, developers could not file builder’s remedy lawsuits, but would instead have to approach the Township to seek approval for development, which could include a rezoning request or a variance application.

What are the odds that a municipality can defend a builder’s remedy lawsuit successfully?

Once a court determines that a municipality has not satisfied its constitutional obligations concerning the development of affordable housing, it is nearly impossible to “win” a subsequent builder’s remedy lawsuit. At that point in time, the municipality is really looking only at damage control. The municipality loses the presumption of validity of its zoning ordinances, and as a practical matter, the case proceeds with the underlying premise that the municipality is improperly trying to prevent the development of affordable housing. As a result, courts are almost always willing to grant the developer the right to construct multi-family housing that will almost certainly be worse for the municipality in terms of density, height, bulk standards, setbacks, etc. In addition, that development will almost certainly include an inclusionary set-aside of between 15% and 20%. Furthermore, these decisions will be made by a judge and a court-appointed master, who has no vested interest in Verona or its residents’ local concerns. In addition, the town will likely have to pay for the special master, as well as the developer’s attorney’s fees. The Township wants to be in control of the community’s destiny, so negotiation with builders or developers that we can work with to create reasonable housing developments is often a better alternative than having a court-appointed master tell us what we have to do, where it will be built and how many units a property will be developed with.

How does the Township protect itself in the future from a Builder’s Remedy lawsuit?

The only way any community can be protected from a Builder’s Remedy lawsuit is to submit a Housing Element and Fair Share Plan to the Court that complies with the required obligations and receives a Judgment of Compliance/Repose from the Court. This replaces the previously granted Substantive Certification, which was issued by COAH. In addition, as part of this process, it may be beneficial for the Township to “lock up” settlements with certain property owners (including specifically any intervenors), with the approval of the Special Master. Negotiating and reaching settlements with intervenors and other prospective developers will help to insulate these properties from development plans with high densities far beyond those previously approved in Verona. Once the Township receives approval of its Housing Element, a Judgement of Compliance/Repose should be granted through 2025, during which the Township

would be “immune” from any Builder’s Remedy lawsuits so long as Verona continues to comply with its Housing Plan.

Does the Township have any “intervenor” in its Declaratory Judgment Action and what is the Township doing to address their claims?

Currently, there are three intervenors in the case filed by Verona, Poekel Properties, LLC, Spectrum 360, LLC and Bobcar Corporation (aka Kruvant). As intervenors, these three property owners have special status in the context of the Township’s Declaratory Judgment Action, and the Special Master has advised that the Township is required to negotiate with them concerning potential development of their sites.

Bobcar Corporation owns two vacant parcels of land; and Lot 3.01 in Lot 1201. One is located at 111 Mount Prospect Avenue (Lot 83 in Block 501) contains 14.29 acres of land. The other is located at 25 Commerce Court (Lot 3.01 in Block 1201) contains 11.618 acres of land.

Poekel Properties, LLC owns Lots 17 and 18 in Block 2301, with an address of 860 Bloomfield Avenue. The lots are adjacent to one another with one being vacant while the other contains a commercial building.

Spectrum 360, LLC owns Lot 4 of Block 303, with an address of One Sunset Avenue, Verona. The site contains a total of 8 acres, with 5.5 acres being located in Verona while the remaining 2.5 acres are in Montclair. The site is currently developed with the Academy 360 Lower School.

Fair Share Housing Center, while not an intervenor, also has special status in the context of negotiations, and reaching a settlement on the Township’s affordable housing obligation and its housing element and fair share plan will likely require mediation and negotiation with FSHC. Eventually, the plan is to reach a global settlement with the intervenors and FSHC that can be recommended by the Special Master and approved by the Court.

In a potential Builder’s Remedy lawsuit, would a court consider economic impact to the community, including the impact on its schools?

Yes and no. Courts do not consider the economic impact to a municipality whether the impact is on schools or other municipal services, such as police and fire. However, the municipality’s infrastructure capacity, as well as its vacant and developable land, are often considered at one point or another in the process.

What else is on the horizon?

Something else to keep in mind is that the United States Department of Housing and Urban Development in 2015 adopted a rule entitled “Affirmatively Furthering Fair Housing.” The enforcement of this rule, which is tied to certain grants and other programs operated by HUD (including CDBG grants), will require municipalities to analyze historical housing discrimination in the municipality, develop a plan to ameliorate the effects of such discrimination, and to provide continuing reporting to HUD concerning the municipality’s efforts to diversify its housing on such factors as race, color, religion, sex, disability, familial status or national origin. Failure to comply with the AFFH rules may result in Federal oversight of local ordinances and rules and regulations – a prospect that may make State-mandated affordable housing rules seem tame by comparison.

What's the relationship between affordable housing lawsuits and our current Municipal zoning code including aspects such as steep slope, parking and density? In the event Verona does not agree to a settlement with all of the intervenors, it will lose its immunity from a builder's remedy lawsuit. In that event, the court would determine what Verona's "fair share" number is. If the Township had not met its obligation, Verona's zoning ordinances would not apply to inclusionary development and the court would determine what limitations would apply.

Can affordable housing trump environmental regulations set forth by state agencies or federal agencies such as the department of environmental protection or the environmental protection agency? If a builder was successful in a builder's remedy lawsuit, only the Township's zoning ordinances do not apply. All other state and federal laws, rules and regulations would still need to be complied with.

What is the Township doing to be proactive in this process and control its own destiny?

The Court decisions, legislation and regulations discussed above are the unfortunate reality that the Township has to live with. Absent a Constitutional Amendment or other dramatic legislative change, the Township is forced to operate within the confines of the Mt. Laurel Doctrine as it has been interpreted by the Courts and implemented by the Legislature. The Township's affordable housing obligations are not going to just go away. This is why it is critically important for Township officials, with productive input from residents, to pro-actively seek to:

- 1) foster responsible residential development in the community;
- 2) protect the Township from builder's remedy lawsuits and other penalties; and
- 3) support the retention and growth of the commercial sector where possible.

The Township is evaluating all available options to preserve the character of Verona. This includes seeking a vacant land adjustment due to a lack of vacant and developable land in the Township. Township officials have been meeting with various property owners, especially those with vacant or underutilized buildings, concerning potential development proposals to find solutions that will responsibly guide future development in town.

The Township is also investigating a variety of mechanisms to create affordable units that will help satisfy the Township's constitutional obligation to provide for affordable housing, while responsibly limiting the total number of new residential units that are required. Building or approving assisted living facilities and group homes, extending existing deed restrictions, and sponsoring/subsidizing 100% affordable developments are but a few of the mechanisms available to the Township. All of these options are on the table and are being actively pursued to the extent that they are in the best interests of Verona.

Verona, like the majority of suburban New Jersey municipalities, is confronted with the practical reality of having to find appropriate locations and plan for affordable housing. The courts have ruled that it is Verona's responsibility to provide a realistic opportunity for the construction of housing for low- and moderate-income households. With this obligation comes the requirement to permit residential development beyond what we may have ideally envisioned for our community.