

July 11, 2016

**Re: Important Affordable Housing Ruling on “Gap” Issue**

Dear Mayor,

Today, the Appellate Division ruled that municipal affordable housing obligations do not include a separate and distinct “gap period” calculation. This gives the appellant Barnegat Township, and indeed all municipalities, a significant victory as they work through the court ordered process to establish their affordable housing obligations. A copy of this decision can be found [here](#). In Re Declaratory Judgment Actions Filed by Various Municipalities, County of Ocean, Pursuant to the Supreme Court’s Decision in In Re Adoption of N.J.A.C. 5:96, Docket No. A-3323-15T1 (N.J. App. Div. 2016).

In February, an Ocean County Superior Court Judge included a distinct “gap period” analysis retroactively over an additional 16 year period, separate and apart from the normal 10 year present and prospective need. This “gap issue” arises out of COAH’s inability to promulgate third round regulations from 1999 to the present or make any final determination as to state and regional housing need, as well as constant litigation by certain groups. The effect of this new obligation on municipalities would have likely resulted in arbitrary determinations and inflated local, regional and statewide need to numbers that municipalities could not realistically meet. Additionally, such retrospective determinations raised serious analytical problems because “gap” households may no longer exist and/or could be double counted as present need.

This decision clarifies the plain language of the Fair Housing Act (FHA). Municipal affordable housing obligations consist of present and prospective need, in addition to any prior round unmet obligations. Today, the court held:

Applying the plain language of the FHA, the guidelines and principles established by In re N.J.A.C. 5:96 II [March 10, 2015 order], and respecting the separation of powers doctrine, we conclude that the judge erroneously imposed a requirement that a municipality undertake a new, "separate and discrete" gap-period calculation – in addition to unmet prior round obligations, present, and prospective needs – to establish a municipality's fair share affordable housing obligation. Slip. op. at 30-31.

Thus, the Appellate Division decision clarifies that the municipal housing share number is not to be calculated and expanded to include this additional "Gap" period. We commend Barnegat Township for challenging the lower Court’s ruling as well as Jeff Surenian, Esq. who argued the case for the Township, Jon Drill, Esq., who argued on behalf of the “municipal consortium” and Edward Buzak, Esq., who argued on behalf of the League.

It is likely that this decision will be appealed to the New Jersey Supreme Court. We will continue to keep you updated on this issue.

If you have any questions on this issue please contact Ed Purcell Esq. at (609) 695-3481 x. 137 or [epurcell@njslom.org](mailto:epurcell@njslom.org) or Michael Cerra at (609) 695-3481 x. 12 or [mcerra@njslom.org](mailto:mcerra@njslom.org).

Sincerely,

Michael J. Darcy, CAE Executive  
Director