

## Branchburg Township's Affordable Housing Situation

Prepared By

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*This article is being written and disseminated for Branchburg residents as this is one of the most important issues the Township has faced in many years, perhaps ever, and is one that has the potential to change our community. **WE URGE EVERY RESIDENT TO TAKE THE TIME TO READ THIS ARTICLE.** A special meeting on this matter is scheduled for December 3, 2015 at 7:00 PM in the municipal building to discuss the enormous impact that the State of NJ's affordable housing mandate will have on our community. Residents are invited to attend the meeting, view it on Comcast Channel 27, FiOS 46 or stream it live on the internet (use the "Webcast Meetings" link on [www.branchburg.nj.us](http://www.branchburg.nj.us)).*

*Branchburg Township, like most suburban New Jersey municipalities, is confronted with the issue of Affordable Housing. That is, our responsibility to provide housing for residents of low and moderate income. With this obligation comes the requirement to further develop residential properties, both affordable and "market" priced, beyond what we may have envisioned for our community.*

*What follows is an attempt to simplify and explain the history and current state of affordable housing obligations in New Jersey. What brought us to this point? What issues are before the Township? What are the implications of our possible actions? In no way is this a complete and detailed analysis of the issue that has developed over the past forty years and it cannot be fully explained in a document of this nature. Some sense of the complexity may be seen in the "Affordable Housing Timeline" that is published at the end of this document. The details of the Timeline, and the various court cases and other references mentioned in the Timeline, must be studied by anyone who seeks real understanding of affordable housing issues in New Jersey. Because of ongoing litigation that the affordable housing process has imposed on the Township, no details of the Township's plan can be offered or discussed in this document.*

The affordable housing, or "Mt. Laurel", obligation started with a 1975 constitutional decision by the N.J. Supreme Court (Supreme Court) involving the Township of Mt. Laurel. In 1983, the Supreme Court, displeased with progress under its earlier decision, assigned implementation of affordable housing obligations to the courts. Although the Supreme Court acknowledged that courts are not well equipped to function as an administrative agency, the Supreme Court found that there was no other agency available to take on the task.

Responding to the chaos created by the implementation of the Mt. Laurel decisions by the courts, the State Legislature passed the Fair Housing Act (FHA) in 1985, and the Supreme Court found that the FHA was an appropriate mechanism for implementing affordable housing requirements in 1986. Under the FHA, the N.J. Council on Affordable Housing (COAH) was the State agency established to set rules and administer municipal affordable housing obligations. COAH would establish the rules and procedures for municipalities to follow along with the important factors of how many affordable housing units each town must create during specific time periods, or "rounds", and what methodology towns must use in creating those housing units.

The last approved round of COAH, the second round, began in 1993 and expired in 1999. For this round, the Township was obligated to produce approximately 302 affordable housing units. The Township was compliant with both the first and second rounds of COAH. After the end of the second round, COAH embarked on a series of policy and program changes that would be implemented in the third round of affordable housing. Until these rules were approved, municipalities could not move ahead on their third round affordable housing obligations. Branchburg's obligation under COAH's initial third round rules was approximately 350 additional affordable housing units.

Without going into extensive detail, suffice to say the third round rules that were promulgated by COAH were different from the first and second round rules and ended up being challenged on many fronts. The result was that for most of the following decade there were confusing, changing or no rules/methods at all for towns to follow as they made their plans to comply with third round obligations.

Governor Christie has been an opponent of COAH. He spoke about his desire to dismantle COAH even before becoming governor, saying during his campaign “If I am governor, I will gut COAH and will put an end to it”. Like some others, he blamed the affordable housing mandate as a chief reason for the high taxes in the State.

After his election, the Governor initiated a series of steps to abolish or reduce the role of COAH, including not making appointments to the COAH Board, transferring COAH’s powers to the State Department of Community Affairs and vetoing legislation, in an effort to change both COAH and the affordable housing process. He has offered no alternative plan to address the Mt. Laurel requirements of the Supreme Court.

Frustrated with the lack of movement on third round COAH rules and the Governor’s efforts to dismantle COAH, the Supreme Court issued multiple deadlines for COAH to comply with the requirement to issue constitutionally compliant third round rules. The agency, or what was left of it, at times issued unacceptable rules, but for the most part missed the court imposed deadlines.

In response to a series of demands by advocates for affordable housing, on March 10, 2015 the Supreme Court issued a ruling that became effective June 8, 2015. The ruling requires every town looking to participate in the affordable housing process, and to protect itself from expensive “builders’ remedy” lawsuits, to file with the courts a “Declaratory Judgment” action by July 8, 2015. The “DJ”, as many call it, is a court proceeding that a town initiates that says to the courts that we, the municipality, are preparing to comply with the mandates of affordable housing. A town complies with the court ruling by developing and filing a “constitutionally compliant” housing plan by December 8, 2015 showing the details of how the town intends to comply with its affordable housing requirements. By filing a “DJ” before July 8<sup>th</sup> Branchburg Township was protected from developer lawsuits for a period of at least five months, which may end as early as December 8<sup>th</sup>. The concept being that once the “DJ” is reviewed and approved by the court, the Township would then be further protected from developer lawsuits so long as we fulfill what we submit in a “constitutionally compliant” housing plan approved by the court.

Gaining protection from builders’ lawsuits for the period of June 8 to December 8, 2015, municipalities would presumably have time to develop and file their “constitutionally compliant” housing plan by the December 8<sup>th</sup> deadline. Unlike past COAH affordable housing rounds, the court this time did not provide rules, or methodology, other than some general reference to attempting consistency with the FHA, for towns to use in developing their plans. In past affordable housing rounds, a municipality could get rental bonuses for affordable units. Meaning since rental units were more affordable to low and moderate income families, a town would be provided unit credit, or bonus unit count, against their unit obligation if they developed more rental units as opposed to “for sale” units.

By way of simple example: if a town built 100 rental units, COAH would credit it with 125 units towards its obligation. Its rental bonus would be 25 units. Another methodology example is that under the first and second round rules town “A” could pay town “B” to take on some of town “A’s” affordable housing obligation. These were called Regional Contribution Agreements (RCAs) and typically were done where town “B” was a more urban environment where many argue there exists a larger need for affordable housing. Town “A” would help Town “B” with rehabilitation, while Town “A” was helped in meeting its

obligations. The RCA option was prohibited by the Legislature in 2008.

Former COAH rules set limits on the number of rental bonuses and RCAs a town could do as to ensure that actual units were built in Town "A". Other methodologies existed in prior rounds that are undefined in current court-supervised situation, including the number of affordable housing units a developer must build (at their cost) in relation to the number of market (non-affordable housing) units. In the past the town could assume that for every 10 units a developer built, the town would get 2 affordable housing units, what has been called a "set aside" of 20%. Currently, the Court may require only a set aside of as little as 10% affordable units, 1 affordable unit for every 10 built.

Other rules/methodologies existed that provided an outline of what towns could and could not do when making a plan to meet their affordable housing obligation. Without such rules, every town in the State is seemingly expected to craft a housing plan with no clear idea of what the courts will accept. The courts, it should be noted, have rejected the notion that they should set these rules, stating the purview for this is the effectively dismantled COAH agency.

Having no clear direction, nor help from the Governor, Legislature, or State departments or agencies, New Jersey municipalities, Branchburg included, must now determine what course of action they should take, perhaps as early as December 8<sup>th</sup> or lose protection from the courts for the "builders remedy" lawsuits.

Based upon current analysis done by both the State and a private affordable housing advocate, for the third round, which began in 2000 and ends in 2025, Branchburg will be required to build 1,000 units of affordable housing. The Township currently has approximately 4,857 residential properties and 373 non-residential properties (commercial/industrial).

It is estimated that in order for the Township to build 1,000 affordable housing units, we will have to work with developers to build at least 3,000 new residential units in our community. In arriving at this estimated figure, we have assumed that the Township will minimize the total units to actually be built by building an all-affordable housing complex of approximately 150 units; maximizing the rental bonuses we can get; and working with developers to build the rest as an included part of their overall residential development. Although the current ratio of affordable housing to market units could be as low as 1 to 10, we are hoping that we will get more affordable units from each developer than may be required.

We are unsure of how the courts will allow us to construct a compliant housing plan. We are unsure of the actual number of affordable housing and market units that must be built. We are unsure of the inevitable burden on our budget that building 3,000 units will certainly bring (remember, more residential units = more school age children, more municipal services). One thing that is uniformly agreed upon is that the town will certainly change when units are built. The degree of that change is also unclear.

The Township Committee has been following the COAH situation and affordable housing issues for as long as they have been unfolding. We have repeatedly made and submitted our third round plans, although they have not been approved by COAH because COAH's rules have been invalidated by the Supreme Court and COAH has been prevented from operating effectively. We have done what we can to remain compliant with the Township's affordable housing obligations, as we understand them, and to protect the Township from builders' remedy lawsuits.

The Township Committee now is considering a range of approaches with the two extreme positions being;

- (1) Develop and submit a “constitutionally compliant” affordable housing plan that essentially lays out a blueprint of where and how the Township would like the approximately 3,000 units to be built. Under this scenario, the Township would have substantial control over the locations of development, but it does require the Township to work towards fulfillment of our affordable housing plan. The actual construction of the units may not happen for many years, but the Township would presumably be required to show some levels of construction between now and the end of the third round, now apparently 2025.
- (2) Reject acceptance of the system laid out in the recent court ruling and the need for affordable housing and refuse to submit a “constitutionally compliant” affordable housing plan to the courts. Proponents of this approach might argue that the supposed need for affordable housing is vastly overstated in our area, and that prescribing the construction of 3,000 units would be accepting that we will allow our town to be forever changed. Under this approach, the Township certainly would be the target of numerous “builders’ remedy” lawsuits, which would be costly to defend.

The Branchburg Township Committee continues to wrestle with the unfair issues heaved upon New Jersey municipalities by the courts and the State government as we develop our affordable housing plan. We are seeking to develop a plan that, as best as possible, maintains the current quality of life and culture of our community while also recognizing the inevitability that the building of affordable housing is a mandate that we must plan for and realize in some capacity.

Because of existing challenges from builders and other parties, the Township is not in a position at this time to release a plan to the residents showing our response to affordable housing. As soon as the Township has developed and submitted a plan, it will be released to residents and all parties. We hope you understand our inability to provide such detailed information at this time.

Should you wish to speak with any member of the Governing Body or the Township Administrator, please do not hesitate to visit us at the municipal building, send us an email or call the municipal offices. We will do our best to answer your questions within the limits we must adhere to.

## **AFFORDABLE HOUSING TIMELINE**

Prepared By

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**1975:** So. Burl. Cty. N.A.A.C.P. v. Tp. of Mt. Laurel, 67 N.J. 151 (1975) (**Mount Laurel I**) decided. The N.J. Supreme Court decided that developing municipalities that use the State’s zoning power, given to the State by the N.J. Constitution and delegated by the Legislature to municipalities by the Municipal Land Use Law, must use the zoning power for the general welfare, not just for the welfare of the individual towns. The Court found that the only kind of housing realistically permitted in most towns consisted of relatively high-priced, single-family detached dwellings on sizeable lots.

The Court required towns to act “in the spirit we have suggested, both by appropriate zoning ordinance amendments and whatever additional action encouraging the fulfillment of their fair share of the regional need for low and moderate income housing may be indicated as moral and advisable.” The Court warned that should towns not perform as it expected, further judicial action would be forthcoming.

**1983:** So. Burlington Ct. N.A.A.C.P. v. Mount Laurel Tp., 92 N.J. 158 (1983) (**Mount Laurel II**) decided. Eight years after Mt. Laurel I, the N.J. Supreme Court found that towns were not complying with its Mt. Laurel I requirements, and implemented a court-administered program to require towns to accept their “fair share” of the State’s affordable housing needs. In particular, the Court permitted “builders’ remedy” lawsuits, in which builders are encouraged to sue municipalities to force compliance. The essence of a builder’s remedy is that the builder gets to build more units at higher density in a non-compliant town, in the location where the builder wants, not where the town might want. A portion of the builder’s units is required to be affordable to persons of low and moderate income.

**1983-86:** Mount Laurel II unleashes a flood of over 100 Mount Laurel suits. Branchburg Township is the first to be sued.

**1984:** Judge Serpentelli, the judge assigned to assess many towns’ compliance, including Branchburg’s, addresses the method for determining a municipality’s fair share allocation and holds that Warren Township is obligated to provide 946 dwelling units for the period of 1980 through 1990. AMG v. Warren, 207 N.J. Super. 388 (Law Div. 1984), later partially disapproved by In re Twp. of Warren, 132 N.J. 1 (1993).

**1985:** The New Jersey Fair Housing Act (“FHA”), N.J.S.A., 52:27D-301 et seq., enacted, effective July 2, 1985. The purpose is to replace the court-administered Mt. Laurel system with a new State administrative agency, the Council on Affordable Housing (COAH), intended to be more predictable and efficient.

**February 20, 1986:** Hills Dev. Co. v. Bernards Twp., 103 N.J. 1 (1986)(referred to by some as **Mount Laurel III**) upholds the constitutionality of FHA and orders transfer of most pending builders’ remedy suits to COAH’s jurisdiction.

**August 4, 1986:** COAH adopts First Round Rules addressing affordable housing need for 1987 through 1993. N.J.A.C. 5:92-2 through -5 and Appendix A, 18 N.J.R. 1527-1548 (Aug. 4, 1986). COAH uses a methodology substantially similar to that used by Judge Serpentelli in AMG v. Warren.

**1993:** The Supreme Court invalidates COAH occupancy preference that would have allowed municipalities to set aside 50% of fair share housing for low and moderate income people who live and work in the municipality, and finds a 1000 unit cap on housing inconsistent with FHA. In re Twp. of Warren, 132 N.J. 1 (1993)(partially disapproving of methodology in AMG v. Warren).

**1993:** The Legislature amends the FHA. N.J.S.A. 52:27D-307(e)(generally capping affordable obligations at 1000 units per ten years).

**June 6, 1994:** COAH adopts Second Round Rules, addressing cumulative need for 1987 through 1999. N.J.A.C. 5:93, Appendix A. Effective June 6, 1994 through June 6, 1999.

**May 1999:** COAH readopts second round substantive rules establishing an expiration date of May, 2004. In Re Six Month Extension, infra, 372 N.J. Super. at 74.

**June 6, 1999:** Third Round Rules are due from COAH.

**2004:** New Jersey’s intermediate court, the Appellate Division, characterizes COAH’s delay in enacting Third Round Rules as frustrating the public policies embodied in the Mount Laurel line of cases and warns that it may “free interested parties from the constraints” of the administrative process. In re Six Month Extension of N.J.A.C. 5:91, 372 N.J. Super. 61, 95-96 (App. Div. 2004), certif. denied. 182 N.J. 630 (2005).

**December 20, 2004:** COAH adopts a set of Third Round Rules calculating affordable housing needs from 1999 to 2014 and establishing criteria for meeting the needs between 2004 and 2014. N.J.A.C. 5:94 and 5:95; 36 N.J.R. 5748(a).

**January 25, 2007:** The Appellate Division affirms a portion of COAH's Third Round methodology, but invalidates other aspects of the Third Round Rules, i.e., the "growth share" methodology. In re Adoption of N.J.A.C. 5:94 and 5:95, 390 N.J. Super 1, 86-87 (App. Div.), certif. denied, 192 N.J. 71 (2007).

**January 22, 2008:** COAH proposes a revised set of Third Round Rules, generating over 5000 comments. 40 N.J.R. 237(a)(Jan. 22, 2008); 40 N.J.R. 515(a)(Jan. 22, 2008).

**May 6, 2008:** COAH adopts revised Third Round Rules essentially as proposed. N.J.A.C. 5:96 (procedural rules); N.J.A.C. 5:97 (substantive rules). Rules are published in the June 2, 2008 New Jersey Register. 40 N.J.R. 2690. They calculate the State's affordable housing needs from January 1, 1999 through December 31, 2018.

**July 17, 2008:** Effective this date, amendments to the FHA eliminate Regional Contribution Agreements, N.J.S.A. 52:27D-312, among other changes.

**September 22, 2008:** COAH adopts amendments to the Third Round Rules, effective October 20, 2008.

**February 2010:** Gov. Christie issues Executive Order Number 12 establishing a task force to review existing affordable housing laws, assess COAH's continued existence, and issue a report within 90 days.

**March 19, 2010:** The Task force issues its report and concludes that there should be a new model for affordable housing.

**October 8, 2010:** The Appellate Division concludes that COAH's revised Third Round Rules suffer from "many of the same deficiencies as the original Third Round Rules" and invalidates substantial portions of COAH's second set of Third Round Rules. In re Adoption of N.J.A.C. 5:96 & 5:97, 416 N.J. Super. 462 (App. Div. 2010).

**June 29, 2011:** Gov. Christie issues Reorganization Plan No. 001-2011, which abolishes COAH and transfers its functions to the Department of Community Affairs ("DCA").

**August 1, 2011:** Effective date of order abolishing COAH.

**July 10, 2013:** The Supreme Court holds that the Governor has no authority to abolish COAH. In re Plan for Abolition of Council on Affordable Housing, 214 N.J. 444 (2013).

**September 26, 2013:** The Supreme Court affirms the Appellate Division's invalidation of the Third Round rules and directs COAH to adopt rules by February 26, 2014. In re Adoption of N.J.A.C. 5:96 and 5:97, 215 N.J. 578 (2013).

**February 26, 2014:** COAH moves for an extension of time to promulgate Third Round Rules.

**March 14, 2014:** The Supreme Court grants COAH's motion for an extension for enacting the Third Round Rules and orders that if COAH does not adopt Third Round Rules by November 17, 2014, the Court will entertain applications for relief, including requests to lift the protection provided to municipalities through the Fair Housing Act. In re N.J.A.C. 5:96 and 5:97, 220 N.J. 355 (2014).

**April 30, 2014:** COAH's Board meets and votes to introduce new Third Round Rules.

**June 2, 2014:** Proposed Third Round Rules addressing Statewide affordable housing need from 1999 to 2024, and prospective need from 2014 to 2024, are published in the New Jersey Register. 46 N.J.R. 912(a)-1051 (June 2, 2014).

**October 20, 2014:** COAH members split 3-3 on the adoption of the proposed Third Round Rules, and they are not adopted.

**March 10, 2015:** The Supreme Court sets up declaratory judgment process for evaluating constitutional compliance. In re Adoption of N.J.A.C. 5:96 and 5:97 by N.J. Council on Affordable Housing, 221 N.J. 1 (2015)(sometimes called **Mount Laurel IV**).

**June 8, 2015:** Effective date of Mount Laurel IV.

**July 8, 2015:** Deadline for filing the declaratory judgment actions authorized by Mount Laurel IV.