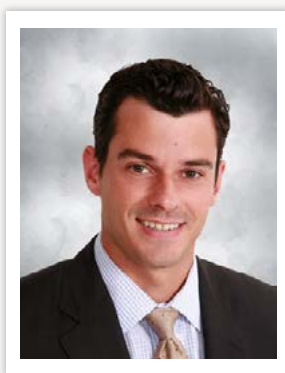


Michael J. Gross



John A. Sarto

Legal/Legislative

by Michael J. Gross, Esq. and John A. Sarto, Esq.
 Michael J. Gross is a Partner & Chair, and Mr. Sarto is an Associate of Giordano, Halleran & Ciesla, P.C.

AFFORDABLE HOUSING'S OBLIGATIONS AND OPPORTUNITIES

You may have recently read about New Jersey's affordable housing litigation or a proposed affordable housing development in the news. Presently, many municipalities are in the process of preparing housing elements and fair share plans that they hope to have approved by the courts pursuant to the New Jersey Supreme Court's 2015 Mount Laurel IV decision. Some municipalities have reached settlements on their third round obligations and fair share plans and have court approved settlement agreements. Meanwhile, the gubernatorial candidates have presented an array of proposals that could change how affordable housing obligations are determined and/or how municipal compliance is achieved. Whatever the future has in store it is safe to assume that developers will play a significant role in the production of affordable housing.

By way of background, in New Jersey a municipality's power to zone carries a constitutional obligation to create a realistic opportunity to produce its fair share of the regional present and prospective need for low and moderate income housing. This requirement is commonly referred to as a municipality's Mount Laurel obligation and is named after the New Jersey Supreme Court's Mount Laurel cases.

The Legislature enacted the Fair Housing Act of 1985 N.J.S.A. 52:27D-301 et seq. ("FHA") to assist municipalities to comply with the obligation, and created an administrative agency, the Council on Affordable Housing ("COAH"). COAH's responsibilities included

periodically assigning and determining a definitive affordable housing obligation for each municipality, and providing rules by which a municipality's proposed affordable housing plan, housing element, and implementing ordinances could satisfy its obligation.

Under the FHA towns are free to remain in the courts to resolve disputes over their Mount Laurel obligation. However, the FHA prefers COAH's optional administrative alternative to litigating compliance through civil exclusionary zoning litigation. Compliance through the administrative process provided a municipality with the benefit of a period of immunity from civil lawsuits, as well as the presumption of validity of its zoning ordinance in any exclusionary zoning litigation.

COAH adopted rules for three different affordable housing cycles or rounds. After the expiration of the second round in 1999 COAH adopted third round rules which were judicially invalidated. Despite the Court's directive COAH failed to timely adopt valid third round rules. The role of determining municipal compliance was returned to the courts by the Mount Laurel IV decision. Mount Laurel IV established procedures for a participating municipality to voluntarily comply with its third round affordable housing obligation by filing a declaratory action in the Superior Court seeking approval of its fair share housing plan addressing the third round affordable housing obligation. The third round spans from 1999-2025 and the municipal obligation includes the need arising during the

"gap" period from 1999-2015 as set forth in a decision issued by the New Jersey Supreme Court in January 2017.

In the wake of Mount Laurel IV many municipalities filed declaratory actions, many of which are still pending today. The process established by Mount Laurel IV permits those property owners or others interested in constructing residential development with an affordable housing component to participate in the process by (1) joining in the litigation on a motion to the court seeking intervention, or (2) by identifying themselves as an "interested party." Both intervenors and interested parties are provided with the opportunity to comment on the municipality's proposed housing plan and third round compliance mechanisms, however, intervenors in the litigation are provided with additional benefits including the right to file motions, attend mediations, and appeal decisions of the court.

Developers have used their standing as intervenors and interested parties to work with municipalities and demonstrate how their development proposal can help the municipality comply

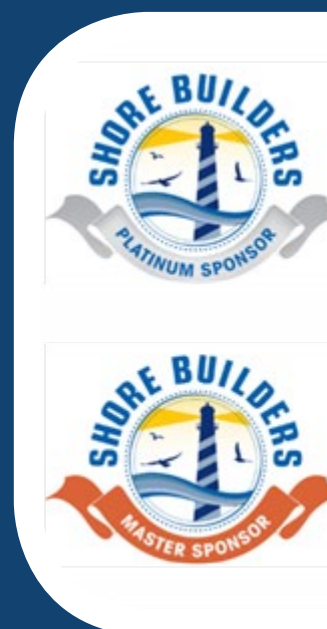
with its third round affordable housing obligation. In this process, the developer seeks to have its site included within the municipal housing plan, presumably requesting agreement to permit development at a greater density than would ordinarily be achieved through the existing zoning on the property. In return for including the developer's site in the housing plan the municipality is able to claim credits against its Mount Laurel obligation. As mentioned, a number of towns have already settled their declaratory actions by entering into agreement with the Fair Share Housing Center and intervenors, and have obtained court approval of the agreements and third round housing plans.

In addition to seeking inclusion in municipal third round housing plans developers and property owners must navigate and comply with the existing statutory and municipal affordable housing regulations that pertain to their sites. There are a number of issues that regularly present themselves including: the applicability and amount of municipal affordable housing development fees; the applicability and amount of affordable housing

fees associated with non-residential development; municipal ordinances requiring construction of affordable units; the form and duration of deed restrictions; and, permitted rent and sales prices of affordable units, to name a few. If you or your client's have any questions about affordable housing obligations you should consult with an attorney.

Giordano, Halleran & Ciesla, P.C. counsels clients on all aspects of residential and commercial real estate acquisition, financing and development, including affordable housing matters. John A. Sarto, Esq., is an attorney in the Real Estate, Land Use & Development Practice Area whose practice focuses on affordable housing issues and obtaining development entitlements.

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