

2021 TOP TEN ISSUES AFFECTING REAL ESTATE®

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Affordable Housing: The Same Problems, Only Worse

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Affordable Housing was listed as the #5 issue in the 2020-21 Top Ten Issues Affecting Real Estate® by The Counselors of Real Estate®.

In this era of political divisiveness, there are two things that most can agree on: 1) there is a tremendous need for affordable housing (“AH”) throughout America, and 2) there is a strong “Not in My Back Yard” or NIMBY agenda.

THE NEED FOR AFFORDABLE HOUSING

The tremendous need for AH was well documented in a report published on March 13, 2018, by the National Low-Income Housing Coalition (NLIHC). The report found “a shortage of 7.2 million affordable and available rental homes for extremely low-income renter households whose incomes are less than either the poverty guideline or 30% of their area median income (AMI), whichever is higher.”¹

The study finds there are just 35 affordable and available units for every 100 extremely low income (ELI) renter households nationwide, and that 71% of ELI renter households are severely housing cost-burdened, spending more than half of their income on housing. After paying their rent, these households have insufficient resources left for other necessities like food, medicine,

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transportation, or childcare. They are often one financial setback away from eviction and homelessness. Noteworthy is that the shortage of ELI housing does not account for the 568,000 people who are experiencing homelessness, as the report included only households with an address.²

As Lauren Sandler points out in her recent book entitled *This Is All I Got*, most people in poverty are women,

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specifically women of color, and one in thirty children in America is homeless which amounts to over 2.5 million kids.³

According to the *Urban Wire* (the blog of the Urban Institute) report published on May 27, 2020, “Before the COVID-19 outbreak, the affordability crisis driven by the lack of housing supply was one of the biggest problems facing the US housing market.”⁴

The report finds that prices for homes in the bottom 20th percentile of the distribution (low-price homes) increased 126 percent between January 2000 and December 2019. This is a substantially larger increase than the 87 percent increase for homes in the top 20th percentile of the distribution (high-price homes).⁵ The faster rise in low-price home prices hits low-income homeowners and renters the hardest, specifically those in the bottom quartile of the income distribution. As low-price home prices rise, would-be homebuyers with low incomes have trouble finding affordable homes, so they remain in the rental market, drive up rents, and increase the demand for and price of rental properties. As a result, the cost for both owning and renting has gone up substantially for low-income households, while their income growth has not kept pace with that of high-income households (those in the top quartile of the income distribution).

A closer look at 285 metropolitan statistical areas (MSAs) suggests that rapid employment growth combined with increased supply constraints from zoning and other regulations contributed to this disproportionate price growth for low-price homes. If left unaddressed, these same supply constraints will hamper the ability of low-income households to prosper as we emerge from the crisis and will exacerbate income inequality.

NIMBY

The NIMBY syndrome, a form of institutionalized racism that operated below the surface of public opinion, surfaced in New Jersey in 1972. In a town called Mt. Laurel, the zoning ordinance did not permit townhomes, multi-family housing, and the minimum lot

size for single-family homes was set at 1 to 5 acres. The town’s zoning code essentially excluded the ability of homebuilders to build any AH. This lawsuit was the opening salvo in a battle that has lasted for almost a half-century.

Opposing Sides

On one side were the affordable housing advocates, led by urban Mayors, the Fair Share Housing Center (“FSHC”), and the New Jersey Builders Association (NJBA). On the other side were the NIMBYs, represented by the League of Municipalities representing mostly suburban and rural Mayors whose voting base was strongly anti-AH. It is the “Tale of Two Cities” – where the haves and the have-nots struggle, each side claiming the moral high ground in the fight for social justice. The haves claim they have the right to determine what their community looks like in terms of housing types that will be allowed versus the have-nots who claim you cannot use zoning to restrict where the poor can live. This battle is being waged all across America.

The Battle Begins

The history of the New Jersey Mount Laurel doctrine is the history of a struggle for social justice. It is a battle with 13 rounds over 48 years with each side claiming the moral high ground. Here is the round by round recap:

1972: The opening salvo when the NAACP sued the Town of Mount Laurel over their exclusionary zoning ordinance.

1975: NJ Supreme Court issues an opinion in the Mount Laurel I case ruling that exclusionary zoning violated the NJ Constitution. Appeals immediately are filed.

1983: NJ Supreme Court issues an opinion in the Mount Laurel II case affirming the rulings in Mount Laurel I and provided detailed mechanisms for implementing the doctrine: noteworthy for allowing the builder’s remedy. This remedy allowed a homebuilder who purchased land in a municipality to obtain the zoning approval via a court order allowing the construction of five units to the acre provided 20%

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(1 of the 5 units) was sold to a low-income buyer. The remedy was the means of encouraging private sector actors to enforce the doctrine through mandatory inclusionary development.

1985: In response to intense political pressure resulting from municipal hostility to the Mount Laurel doctrine, and especially builder's remedies, the New Jersey Legislature adopted the NJ Fair Housing Act in 1985. That Act sought to take exclusionary zoning disputes out of the courts through the creation of the Council on Affordable Housing (COAH). The Act placed a *de facto* moratorium on builder's remedy suits and directed COAH to formulate regulations through which towns could bring themselves into compliance with their Mount Laurel obligations. The Act made builder's remedy suits difficult to obtain and gave towns considerable latitude in how to achieve compliance. A highly effective component of the COAH regulations was called Regional Contribution Agreements (RCAs). These RCAs allowed towns to transfer up to 50% of their AH obligation to other communities by sending \$35,000 per AH unit to those communities. The receiving communities were mainly cities in NJ that wanted more AH units for their low- and moderate-income residents and were looking for ways to finance it. Our construction company took advantage of these RCAs by partnering with Community and Faith-Based non-profits as well as for-profit AH Development Companies. In the following years, over 1,000 AH units were built in Jersey City, Newark, Paterson, and Trenton.

1987 to 1993: COAH's "first round" took over a year to get up and running. The process worked fairly well under the "first round regulations."

1993 to 1999: COAH's "second round" was actually 1993-1999 but they made the first and second rounds cumulative. That process also worked fairly well under the "second round regulations."

1999: Due to a political reluctance to have COAH continue to do its job, third round regulations, which were due by the end of 1999, were not adopted on time.

2004: After much litigation, third round rules were

ultimately adopted by COAH in December. COAH started processing some towns' petitions for substantive certification, but those regulations were invalidated on appeal. The "growth share" concept in those regulations was their central flaw as it mandated 10% of all housing developments must be set aside for AH (without regard for need and without any offsetting compensation – like the density bonus that was automatically allowed in builder remedy suits). Following that appeal, COAH then adopted a second iteration of third round regulations. Those regulations were also invalidated because they were just another version of growth share (among other flaws).

2008: Astonishingly, the FSHC lobbied the NJ Legislature to eliminate RCAs and in 2008, an AH Bill called A-500 was passed by the legislature and signed into law. A significant change was the elimination of RCAs despite the fact that RCAs were getting AH units built in great numbers and where they were most needed. FSHC argued that RCAs were concentrating poverty in NJ's cities instead of providing AH opportunities throughout its' suburban and rural communities. (The fallacy in FSHC's argument is that cities have always been where the poor and often immigrant populations start their way up the economic ladder. Most cities have neighborhoods where housing costs are low, where entry-level unskilled jobs are prevalent, and where the mass transit infrastructure provides low-cost access to those jobs.)

2013: COAH then proposed yet another iteration of third round regulations. However, when the time came to vote to adopt these regulations, COAH deadlocked with a 3-3 vote. Thus, no new regulations were adopted, and back into the courts it went.

2015: The matter went back to the NJ Supreme Court on a motion in aid of litigant's rights. On March 15, 2015, that Court released the opinion that has come to be known as the Mount Laurel IV opinion. That opinion declared COAH "moribund" and directed a process through which towns could file declaratory judgment (DJ) cases in the trial courts, basically seeking the same type of approval COAH used to grant when it was

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lawfully operating. The trial courts were also directed to develop standards, including fair share numbers, using COAH's second round regulation standards as a model.

2018: Trial court Judge Mary Jacobson developed standards and fair share numbers in the consolidated Mercer County DJ cases after a 42-day trial. Courts throughout the state began using these fair share numbers (aka Mount Laurel IV) and began routinely granting immunity to compliant towns against builder's remedy suits. In rough numbers, about 340 DJ cases were filed, and all but 40 or so have been settled.

2020: The municipalities that are left are mostly "bad actors", and continued immunity from builder's remedy suits is being seriously challenged in some of those localities. For example, counsel for NJBA and a builder member recently had Judge Farrington in Bergen County terminate the immunity that Englewood Cliffs had and were authorized to file a builder's remedy suit. Judge Farrington has since granted that builder's remedy (600 units with 20% AH), and more builders remedy claims will likely follow in other cases.

NJBA, together with the FSHC, was involved in all of the various suits throughout the decades on behalf of the homebuilding industry. NJBA alone spent \$334,000 between June of 2015 and July of 2017. Over 340 towns participated in this process. The remaining 227 municipalities were either urban aid municipalities (cities that have no AH obligation) or municipalities with no available developable land or no market demand for housing of any type. In many of the builder remedy actions described above NJBA filed as amici alongside the builder so in total, over the last 50 years, tens of millions of dollars have been spent in litigation. How many AH units could have been financed and built in NJ if that money had been invested in housing? Not included in these numbers is the collateral damage, the cost of abandoned projects, unimproved sites, lost jobs, lost tax ratables, and the lost opportunities to provide both market-rate and affordable housing over the last half-century. These costs are incalculable.

So, what have we learned from 50 years of litigation over where, how much, and how New Jersey will finance

housing for its low- and moderate-income citizens?

One "pain point" is obvious. It is that NJ is a "home rule" state meaning most land use approvals are done at the municipal level. Almost all of NJ's 567 municipalities control all land use decisions within their borders, a system that guarantees local opinion trumps regional need. Planning Boards and Zoning Boards of Adjustment ("ZBA") are supposed to be non-partisan "quasi-judicial" interpreters of the zoning ordinance in their town or city. A Planning Board's role is to approve developments that meet the existing zoning code standards. A ZBA is where an applicant goes when seeking to introduce a use that is not permitted within a particular zone, thereby requiring a change in use. The Municipal Land Use Law authorizes a local ZBA to grant a use variance where the burden of proof by the applicant is to demonstrate: (1) "special reasons" exist for the variance (the positive criteria); and (2) the variance can be granted without substantial detriment to the public good and will not substantially impair the intent and purposes of the zone plan and zoning ordinance (the negative criteria).⁶

Because the members of these boards are appointed by the local politicians, they are actually, "quasi-political". In NJ, Planning Boards frequently deny fully compliant applications, and ZBA's deny use change applications (notwithstanding the fact that the applicant met their burden of proof) because they were instructed to deny it by the Mayor after he, or she, received complaints from some politically connected supporter or neighborhood group. The developer can go to court for relief, but that can be an expensive and time-consuming process. Developers often do not have the time, money, or inclination to fight the "establishment", so they walk away rather than buck the political leadership and risk retribution on their next project.

There is a solution to the problem of home rule as it relates to AH. Zoning applications for AH must be taken beyond the purview of municipal control. Interestingly, the seeds of the solution already appear in the Municipal Land Use Law (MLUL). In 2000, the MLUL was amended to provide a new definition

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of “Inherently Beneficial Use” as follows: “a use which is universally considered of value to the community because it fundamentally serves the public good and promotes the general welfare”.⁷ Inherently beneficial uses specifically listed in the legislation include, but are not limited to, hospitals, schools, childcare centers, group homes for the developmentally disabled, and wind, solar or photovoltaic energy facilities. Over the years since adoption, the courts have decided cases wherein a number of inherently beneficial uses were added such as churches and other places of worship, community shelters, senior housing, public utility installations, health care facilities for the elderly, and schools for the developmentally disabled. Unfortunately, court decisions regarding if affordable housing is an “inherently beneficial” use have provided conflicting results, and therefore are not helpful for AH developers who would have relished a more consistent and reliable result. In 2000, if the legislature had gone just one step further when they amended the Municipal Land Use Law to clearly include AH as an “inherently beneficial use”, the battle to produce AH would have been over with AH advocates being the winner, and the floodgates for zoning applications for AH would have been thrown wide open.

Another pain point is the challenge in financing the development of AH because, without a subsidy, AH does not make economic sense. The Federal Department of Housing and Urban Development (“HUD”) provides 4% and 9% tax credits to AH developers. These make good economic sense because they are a one-time up-front subsidy. The downside is that these tax credits are in limited supply and applications to qualify for them are extremely competitive. Additionally, there are inherent barriers to entry as HUD typically only awards these tax credits to AH developers with a long track record and a big balance sheet. HUD also offers Section 8 Housing Vouchers to qualified low-income families. These vouchers are immensely helpful as the tenants can rent any apartment; they like from market-rate rental projects. HUD subsidizes the gap between the amount the low-income family pays (30% of their income) and

the free market rent being charged. The downside is that there is a limited supply of these vouchers, and they are annuitized and therefore an ever-increasing burden on the tax-paying segment of the population, over time.

If a municipality was favorably inclined to expand its supply of AH, it could subsidize it via zoning-based incentives like density, height, or bulk standard bonuses. They also can grant tax abatements, provide free land, grant relief from costly parking requirements, and eliminate permitting and utility connection fees, and other innovative and compensating trade-offs. NJ has explored the re-purposing of under-utilized office and retail sites in suburban and rural areas, referred to as “Stranded assets”, by granting them as-of-right re-zoning to residential use, but this initiative became legislatively bogged down when the AH advocates insisted that such re-zoning must provide for an AH component.

CONCLUSIONS

The severe shortage of affordable housing is the symptom of the problem. Poverty is the real culprit. The three critical needs of people and families are not only a safe and affordable home, but also the ability to develop their talents, obtain vocational or college education and have a support group which creates stable families. So, AH is one important element, but it should be made available with the other core requirements of education and jobs.

Gaining approvals for AH must be made more predictable and faster (classified by the state as an “Inherently Beneficial Use” to circumvent NIMBY-ism). We must expedite the process for adjudicating appeals from zoning approvals that include AH.

We need to expand the kinds of taxpayer-funded one-time front-end subsidy programs for AH and encourage the expansion of existing subsidy programs through HUD, state, and county level sources.

Lastly, we can use the power of zoning to create subsidies necessary for providing more AH and market-rate housing that comes at no additional cost to the taxpayers. •

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ENDNOTES

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