

Affordable Housing

1. What is Affordable Housing?

In its 1975 *Southern Burlington County NAACP v. Mt. Laurel Twp. (Mount Laurel)* decision, the New Jersey Supreme Court determined that each municipality in NJ has a Constitutional obligation to provide zoning within its borders for housing available to low and moderate-income households (referred to as “affordable housing”) where the housing must be affordable to household that have gross annual incomes within certain income parameters according to the median income for the NJ housing region within which the municipality is designated. Through a series of successive “Mount Laurel” decisions since 1975, the NJ Supreme Court has repeatedly affirmed this municipal zoning requirement.

There are three categories of “affordability” defined for affordable housing, including:

- Moderate income (between 80 and 50 percent of the median income).
- Low income (50 percent or less of median income).
- Very low income (30 percent or less of median income).

Affordable housing eligibility is determined by a household’s gross annual income and whether it falls within affordability limits on a chart ([2021 New Jersey Affordable Housing Regional Income Limits](#)) that identifies eligible household income according to the number of persons that live in a household. The income limits on the chart are derived from US Department of Housing and Urban Development data and updated annually.

By way of example, and according to the most recent income limits set for Region 3 (including Somerset, Middlesex and Hunterdon Counties), a family of three persons earning a gross annual income of \$80,000 would be considered a moderate-income household and eligible to buy or rent a moderate-income affordable housing dwelling unit. This is because that income is 72% of median income for a 3-person household in Region 3 (more than 50% of median, but less than 80% of median).

To qualify as affordable housing, a dwelling unit must be income controlled and remain available to an affordable household for at least 30-years. Affordable housing may be either for-sale or rental housing. It may be available for occupancy to families, the elderly or people with special needs, but municipalities are required to ensure that affordable housing address at least the needs of families and there are certain minimum requirements on the municipality for that.

In 1985, the NJ Legislature enacted the New Jersey Fair Housing Act (FHA) and created a State administrative agency to oversee affordable housing in NJ. The FHA established legal requirements that include a variety of affordable housing mechanisms and mandatory requirements for municipalities to provide their “fair share” of affordable housing. The FHA requires that the municipal plans for affordable housing units provide at least 50% of the affordable dwelling units addressing the fair share obligation to be for low-income households and the remaining 50% of the obligation for moderate-income households. 13% of the affordable units must be available to very low-income households, which count toward the 50%

low-income requirement. Regulations establish a specific bedroom mix for the affordable units consisting of 1, 2, and 3-bedroom units.

The FHA requires that at least 50% of all affordable units provided in the municipality to be available to families and at least 25% of all affordable units to be affordable rental units (rental obligation). At least one-half of the rental obligation must be available to families. The FHA allows up to 25% of the units provided to be age-restricted – that is limited to occupancy by elderly households (persons over 62).

2. What is/was “COAH”?

The FHA established “COAH,” formally known as the New Jersey Council on Affordable Housing as the State administrative agency to prepare affordable housing regulations, calculate affordable obligations, and oversee municipal compliance with Mount Laurel affordable housing obligations. Two sets of COAH-adopted regulations (rules) guided municipal *Mount Laurel* compliance from 1987-1999. However, in 2005, COAH published a third set of rules for the “Third Round” of affordable housing compliance that included a new method to calculate municipal affordable housing obligations. After Court challenges to COAH’s proposed new Third Round *methodology*, and additional attempts by COAH to adopt new rules, the agency failed to adopt “Third Round” regulations in 2014. As a result, the New Jersey Supreme Court determined in 2015 that since COAH ceased to function properly, the courts would resume their role in determining affordable housing issues.

Specifically, the New Jersey Supreme Court 2015 decision also determined that each municipality could file a declaratory judgment with the Superior Court, Law Division, seeking a judgment of *Mount Laurel* compliance . At that point, COAH was sidelined and municipalities could no longer apply to COAH for approval of local affordable housing plans and instead, all municipalities had a choice of either filing declaratory judgment actions with the Superior Court or waiting to be sued by a developer.

[2021 New Jersey Affordable Housing Regional Income Limits](#)

3. What is the Fair Share Housing Center?

The Fair Share Housing Center (FSHC) is an affordable housing advocacy group staffed by lawyers that advocates for housing for low- and moderate-income people. FSHC was party to court challenges to COAH’s rules and it was a party in the New Jersey Supreme Court case that sidelined COAH and determined that the Courts would resume their role in determining affordable housing issues. The Supreme Court granted FSHC "interested party" status in all municipal affordable housing litigation. FSHC was a party to Bernards Township’s settlement agreement of its Third Round *Mount Laurel* obligation; however, Bernards Township negotiated directly with the various developers selected to build affordable housing to satisfy its affordable housing obligation. FSHC remains the primary watchdog in New Jersey over *Mount Laurel* compliance.

<https://fairsharehousing.org/>

4. What happens if the Township does not address its Mount Laurel affordable housing obligations? What is a builder’s remedy?

Any municipality that does not obtain a judgment of compliance and repose from the Superior Court is subject to a lawsuit by one or more developers that is commonly known as the “builder’s remedy”. In those instances, any party with an adequate land reserve to support residential development may seek, and will likely receive, a so-called “builder’s remedy” which is a site specific relief order from the Court which sets aside the local zoning of the developer’s site and orders that it be re-zoned at a substantially higher density than permitted under the local zoning with the requirement that 20% of the units to be built on the site be set aside for affordable housing. For example, if local zoning permits one dwelling unit per acre, a builder’s remedy may involve multiple dwelling units per acre of land, typically at a density of at least 6 to 10 units per acre and at times up to 60 units per acre, depending on where the site is located. This may include a single site or a combination of developed properties that are already developed with residential housing.

A developer that is successful in a builder's remedy suit is entitled to court ordered re-zoning, including all aspects of zoning such as density, setbacks, building heights, lot coverage to build the project. This is most often approved by the Court at significantly higher density than permitted by existing zoning, which could drastically alter the character of a neighborhood where this happens.

To avoid the builder’s remedy lawsuit, the Township choose to file a declaratory judgment action so that it could decide where and how much development would be permitted to address its *Mount Laurel* obligations. Bernards Township remains committed to avoiding the builder’s remedy and proactively addressing affordable housing obligations by choosing options that result in the least disruptive change to the residents of the Township.

5. Why is there so much new housing being built to address the Township’s affordable housing obligations?

Because the Third Round affordable housing obligations were delayed more than 15 years, the obligations the Township had to address span a 25-year time period: 2000-2025. That includes the 15 years the process was delayed by failed COAH rule-making and litigation, and the prospective need for the 10 years from 2015 that the law requires the municipalities to address. The Township’s obligations were ultimately identified, as follows:

Gap Present Need (2000-2015):	435 affordable housing units
Third Round (2015-2025):	438 affordable housing units
Total 2000-2025:	873 affordable housing units

Given the magnitude of the affordable housing obligations assigned, the Township was faced with difficult choices, but the Township formulated a plan that maximized the use of options available under affordable housing rules. To minimize the amount of new housing required to address the cumulative 873 obligation that had to be addressed, the Township formulated a plan

that resulted in a total of total of 657 actual affordable housing units and 217 “bonuses”. Bonuses are permitted under the rules for up to 25% of the obligation on rental housing.

The housing and bonuses that address the obligation are listed below.

1. 206 affordability controls were extended on affordable housing units that already exist in the Township.
2. 108 apartments were constructed for Veterans on the VA campus.
3. 24 existing age-restricted units at Ridge Oak and Sunrise on King George Road were credited against the obligation.
4. 15 bedrooms in four different group homes earned the Township 15 affordable housing credits.
5. Another 19 affordability controls were extended on existing rental apartments and 8 new affordable apartments were constructed at the site of the existing apartments, which earned the Township 4 bonus credits.
6. Two new inclusionary developments including 92 new rental apartments (Dewy Meadow & Mountainview Boulevard) earned the Township an additional 92 units of “bonus credits – 92 units resulted in 184 total credits against the total obligation.
7. An additional 2 new apartments were approved by the Zoning Board that earned one bonus credit.
8. The Township earned an additional 120 units of bonus credits on the projects listed above.

The rules permit the municipality to address the obligation with 100% affordable housing projects, which normally require approximately \$180,000 / unit subsidies and often higher amounts.

The two largest projects are inclusionary projects built by private developers and include 92 units of new affordable housing. The Township selected these projects because they earned the Township an additional 92 units of credit, which in essence resulted in twice the number of affordable housing credits as the number of actual units constructed.

6. What happens in 2025?

Technically, another round (Fourth Round) of affordable housing obligations will have to be addressed in 2025. The Township’s Judgment of Compliance and Repose is effective through July 2025. At that time, the Township will again have to address the municipal Mount Laurel obligations assigned to Bernards Township for the 2025-2035 time period. At this time, the magnitude of that obligation is not known. What is known is that between 1987 and 2025, Bernards Township has been assigned 1,381 units of obligation for that time period, which averages approximately 37 affordable units per year. It can reasonably be expected that the number the Township receives for the 10-year 2025-2035 affordable housing round will be substantial.

7. What options are available to the Township to address the next round (Fourth Round) of affordable housing obligations?

If the NJ Legislature does nothing between now and 2025 to alter the affordable housing requirements in the law, the obligation assigned to the Township can be addressed in accordance with the following parameters:

- 50% must be family units (one-half of the obligation).
- 25% must be rental housing (may be one-half of the family unit obligation).
- 12.5% must be rental housing available to families (one-half of the rental housing obligation).
- 25% of the obligation may be age-restricted units (62-years of age or older (similar to Ridge Oak housing).
- 25% of the obligation may be rental bonus credits (bonuses are earned on a maximum of 25% of the units addressing the obligation).

Difficult growth decisions may again be required once the Fourth Round obligations are assigned.

8. What happens if there is another delay in determining the Fourth Round obligations beyond 2025?

If the calculation of municipal obligations is delayed beyond July 2025, no one can say for sure what will happen; however, if the past is any guide, it is likely that the Township may expect to have with the opportunity to receive extended protection from the builder's remedy from the Court, but such protection would be extended within a defined time limit identified by the Court.

9. Why was it that much of the planning for the Third Round couldn't be discussed publicly?

Because the Third Round required the filing of a Declaratory Judgment action in the Court, it is litigation, and as such protected under the Open Public Meetings Act exception from open session discussion of matters subject to litigation. Confidentiality is important to the outcome of litigation. The practice of confidentiality preserves the integrity of the litigation process and protects the community from unnecessary and unanticipated complications in resolving the litigation. As history shows, Bernards Township has a proven track record of success litigating matters of importance to the community. Confidentiality is one aspect of the litigation process that enables the Township to ensure an outcome that best protects and preserves the quality of life enjoyed in the Township and limits negative impacts to the community.

All litigation is not publicly discussed in open session, it is not limited to *Mount Laurel* litigation. Once the Township has permission of the court to do so, full disclosure and explanation of the settlement terms is disclosed.

10. Besides new construction, are there other affordable housing techniques available to address municipal affordable housing obligations?

Yes, there are several affordable housing techniques that do not require substantial new construction, including:

Market-to-affordable conversions: This technique involves the acquisition of an existing dwelling unit and installing a 30-year affordable housing income controls on occupancy. These include existing single-family detached dwellings, townhomes, condominium housing.

Accessory apartments to existing residential dwelling units. An accessory apartment is a new dwelling unit created within an existing home, or through the conversion of an existing accessory structure on the same site, or by an addition to an existing home or accessory building, or by the construction of a new accessory structure on the same site. (Maximum of 10 units or 10% of the municipal obligation unless the municipality demonstrates success creating more than the maximum number of accessory apartments permitted)

Alternative living arrangements – group homes. This would be a structure or structures in which individuals or households reside and commonly involve conversion of existing dwelling units to provide a congregate living arrangement for people with special needs, or for elderly people. The unit of affordable housing credit in an alternative living arrangement home is the bedroom and are commonly four bedrooms.

Extended controls on existing units. This involves extending the affordability control on existing affordable units. (Bernards Township maximized the use of this technique in the Third Round and has no remaining existing for-sale or rental unit affordability controls available for extension under the Fourth Round).

Overlay zoning. This is a zoning technique that allows for certain areas of the Township to have an added zoning classification to permit residential inclusionary development at a specified density, and is commonly applied to existing developed commercial and mixed use areas. This technique, if used, should be expected to involve change to existing developed areas and may not be suitable in the Township's traditional commercial areas (i.e. Basking Ridge, Liberty Corner), but may be an option to consider as applied to an existing individual developed site, such as an existing shopping center (i.e. Dewy Meadow), or a vacant corporate office building site.

Existing housing converted to affordable housing must be deed restricted with 30-year affordable housing income controls; however, the accessory apartment requires a 10-year affordability control.