

BUYER BEWARE: APPELLATE DIVISION AFFIRMS A MUNICIPALITY'S RIGHT TO EXTEND AFFORDABILITY CONTROLS ON ALL RESALE AND/OR RENTAL AFFORDABLE UNITS

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Amidst the ongoing, extensive Fourth Round affordable housing litigation and the implementation of revised Uniform Housing Affordability Controls (“UHAC”) regulations, municipalities continue to be vested with the ability to preserve their previously met affordable housing responsibilities from prior rounds through the implementation and extension of deed restrictions. In the late 1980s, the Council on Affordable Housing (“COAH”), now abolished, vested municipalities with the authority through deed restrictions to require affordability controls on rents and resales of low and moderate income units over a twenty-year period.[1] COAH later adopted specific resale controls, compelling all municipalities to add restrictive covenants to deeds conveyed for newly constructed low and moderate incomes sales units.[2] These deed restrictions could either (1) limit the sale of these units to “qualified low and moderate income household[s] at the controlled unit sales price,” or (2) permit owners to exercise a repayment option and sell to any buyer at market price but provide 95% of the price differential to the municipality.[3] COAH adopted a related provision permitting municipalities to prohibit a property owner’s exercise of the repayment option beyond the twenty-year period if it notified the property owner and adopted a resolution expressing same.[4] Eventually, in 1995, COAH required any new covenants to run for a minimum of thirty years, which currently remains as the minimum control period for sale units under the new UHAC regulations for the Fourth Round.[5]

An example of the implementation and implications of such restrictions unfolded in the recent unpublished Appellate Division decision, Bondarenko v. Township of Mahwah. [6] There, Mahwah Township adopted Ordinance 1294, which required certain low and moderate income sales units to contain deed restrictions maintaining those units as affordable for a minimum period of twenty-five years and incorporated N.J.A.C. 5:92-12.7’s resale restrictions.[7] The Plaintiff purchased the subject property in 2004 by deed containing a deed

restriction designating the unit as affordable and subject to the resale restrictions contained in Ordinance No. 1294, “as amended and/or supplemented, and/or as established by the Township of Mahwah Housing Commission.”[8]

Nearly twenty years later, in 2021, the Township adopted Ordinance 1952, which applied to every deed referencing Ordinance 1294 and maintained the same restrictive measures as Ordinance 1294 but additionally permitted the Township, upon notice and resolution, to preclude sellers of affordable housing units from exercising the repayment option for a renewed period.[9] Pursuant to its authority under both ordinances, the Township adopted a resolution restricting until 2053 the Plaintiff’s ability to exercise the deed’s repayment option upon the sale of the unit.[10]



After the Plaintiff sued the Township seeking to nullify the new restriction, the Law Division granted the Township’s motion for summary judgment, finding the mutually agreed-upon language in the deed “as amended and/or supplemented” reflected that the Plaintiff “agreed to abide by all resale provisions established by the Township in Ordinance 1294 as may be amended,” and the deed therefore envisaged the Township’s “right to extend the restrictions as it did” by establishing Ordinance 1952.[11] As it found it undisputed that Ordinance 1952, equipping the Township with the authority to prevent the Plaintiff from exercising the

repayment option, amended Ordinance 1294, the Law Division upheld the deed restriction and the Township's ability to amend and extend that restriction.[12]

On appeal, the Appellate Division affirmed for substantially the same reasons and agreed that the Law Division correctly analyzed the deed restriction language consonant with principles of contract interpretation, agreeing the court correctly ascertained that the parties intended to be bound by the express contract language which left the Plaintiff open to future affordability control extensions.[13] The Appellate Division determined the Plaintiff was bound to the language to which he agreed, and noted the sale of the Plaintiff's unit had to comply with the deed condition binding the property owner to any additions or amendments to Ordinance 1294. Because an addition/amendment materialized in the form of Ordinance 1952, the Appellate Division concluded Ordinance 1952 was an extension of and modified Ordinance 1294, as permitted and as contemplated by the deed, and the combination of the two "expressly allowed the Township to prohibit the Plaintiff from exercising the repayment option for a set period." [14]

In making its determination, the Appellate Division indicated its decision purported to answer "whether the Township may impose COAH restrictions prospectively on a unit holder who specifically took title with an Ordinance referenced in the deed." [15] Because both courts answered that question affirmatively, this decision serves as current judicial recognition of deed restrictions and extensions of same as an effective way for municipalities to protect and extend temporally their designation of housing units as affordable and sustain their efforts to meet their affordable housing responsibilities.

References:

- [1] N.J.A.C. 5:92-12.;
- [2] N.J.A.C. 5:92-12.1(a).;
- [3] See N.J.A.C. 5:92-12; N.J.A.C. 5:92-12.7(b) (1989).;
- [4] See N.J.A.C. 5:92-12.8.;
- [5] N.J.A.C. 5:93-9.1 to -9.17.;
- [6] No. A-3262-23 2025 WL 3034133 (N.J. Super. Ct. App. Div. Oct. 30, 2025).;
- [7] Id. at 2.;
- [8] Id. at 3.;
- [9] Id. at 4; see also N.J.S.A. 5:92-12.8.;
- [10] Ibid.;
- [11] See id. at 4-5.;
- [12] Id. at 5.;
- [13] Id. at 6.;
- [14] Ibid.;
- [15] Ibid.

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