

COAH Adopts New Rules: Growth Share Becomes Reality



by John D. Cranmer, Esquire

On December 20, 2004, the New Jersey Council on Affordable Housing (“COAH”) adopted rules that substantially changed New Jersey’s affordable housing policy. Although COAH promotes these rules as a “municipality-friendly” solution to suburban sprawl and overdevelopment, the rules are likely to result in unexpected bonanzas -- and litigation -- for developers.

Background

Since the New Jersey Supreme Court’s “Mount Laurel” decision, it is axiomatic that all developing municipalities have a responsibility to adopt land-use regulations that provide a realistic opportunity for the construction of housing affordable to low- and moderate-income families. See: Southern Burlington County NAACP v. Township of Mt. Laurel, 67 N.J. 151 (1975). The initial rules, which COAH adopted in 1986, have remained mostly unchanged for approximately 18 years. The council’s new rules are a complete overhaul of the method for estimating and satisfying a municipality’s “fair share” of lower income housing.

Changes In Fair Share

The COAH rules in place from 1986 to 2004 provided a three-part estimate of the fair share at the municipal, regional and state level. The three components included complex methodologies that calculated: (i) indigent need, (ii) reallocated present need, and (iii) prospective need. COAH claims that the fair-share allocation system was complex and unwieldy, and therefore the council

replaced the system with a “growth share” approach. Under the growth-share approach, each municipality’s fair share consists of three components: (1) the previously calculated first- and second-round need (1987 through 1999); (2) a “rehabilitation share” consisting of sub-standard or deteriorated units occupied by lower income households; and (3) the “growth share.” Unlike the prior methodology, which calculated the total number of new lower income housing units needed within the housing region and then allocated a number of lower income units to only those municipalities within a “growth area” under the State Development and Redevelopment Plan, the new growth-share concept requires each municipality that experiences either residential or non-residential growth to provide lower income housing based upon standard ratios.

New Development Opportunities

The new COAH rules change the way a municipality zones and approves development projects. Each certificate of occupancy issued for a residential or non-residential development, from January 1, 2004 through January 1, 2014, will generate a municipal obligation to provide lower income housing. The residential growth ratio requires one lower income housing unit to be produced for every 8 market-rate homes that are constructed. The non-residential ratio requires one lower income unit to be produced for each 25 new jobs generated by new non-residential construction.

For example:

- A 100-unit market-rate housing project will generate a municipal obligation to provide 12.5 (round up to 13) lower income housing units;
- A 200,000-square-foot “big box” retail building will generate a municipal obligation to provide 8 lower income units;
- A 400,000-square-foot office development will generate a municipal obligation to provide 48 lower income units.

The obligation to provide lower income housing is a municipal obligation under the COAH rules. It cannot be transferred to the developer until the municipality has adopted a zoning-ordinance amendment, approved by the council, that requires the developer to construct either the lower income units or to provide a payment “in lieu” of constructing the units on-site. It is likely that municipal ordinances will not be in place until mid-to-late 2006 because the COAH rules just became effective and municipalities have one full year to submit fair-share plans and compliant ordinances to COAH. This delay in implementation provides both an opportunity and a danger to development projects reviewed in the interim because every residential and non-residential Certificate of Occupancy granted from January 1, 2004 until the adoption of the COAH-approved ordinances will generate a need for lower income housing that cannot be imposed upon the property developer. Therefore, a municipal

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debt to COAH will accrue during this period. Developers may satisfy that debt in return for density or intensity bonuses. The danger is that planning boards and zoning boards of adjustment will try to extract lower income housing units or “in lieu” fees for projects under review before the legal authority to do so exists. Developers must resist the urge to take an approval conditioned upon such illegal exactions, because, if litigation ensues, a reviewing court will likely strike down not only the illegal condition but also the approval.

The new COAH rules change how municipalities must calculate and provide for their constitutional obligation to provide lower income housing units. Each municipality's situation is different. Some towns have an affordable housing program that has been approved by COAH or the Court, while other towns have yet to comply. The growth-share approach may affect every residential and non-residential development project. Knowledge of a municipality's affordable-housing obligation is as essential to securing a fair local approval as knowledge of zoning regulations.

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