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## *Council on Affordable Housing Growth Share Rules Become Reality*

On December 20, 2004 the New Jersey Council on Affordable Housing ("COAH") adopted rules, which will substantially change affordable housing policy in this state. Although these rules have been promoted by COAH as a "municipality-friendly" solution to suburban sprawl and overdevelopment, they are likely to result in litigation and unexpected bonanzas for developers.

### **Background**

Although it seemed revolutionary at the time, the central premise of the New Jersey Supreme Court 1978 "Mt. Laurel" decision is now an accepted component of land development law: all developing municipalities have a responsibility under the New Jersey Constitution to adopt land use regulations which provide a realistic opportunity for the construction of housing affordable to low and moderate income families.

*Southern Burlington County NAACP v. Township of Mt. Laurel, 67 N.J. 151 (1975)*. When the Supreme Court strengthened the doctrine in the "Mt. Laurel II" case by declaring that "builder's remedies" would no longer be considered extraordinary relief, the development community responded with an explosion of zoning litigation. This motivated the State Legislature to adopt the *Fair Housing Act*. The *Fair Housing Act* created an administrative agency (COAH) to handle exclusionary zoning disputes. COAH quickly adopted substantive and procedural rules. The rules adopted by COAH in 1986 have remained substantially unchanged for 18 years. The new rules adopted by COAH on December 20, 2004 are a broad overhaul of both the method for estimating "fair share" and the techniques for satisfying the need.

### **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: indigenous need, which is substandard and deteriorated

housing occupied by lower income families; reallocated present need, indigenous need in urban aid municipalities (inner cities) which suburban communities were required to replace; and prospective need, new lower income housing allocated to individual towns within a housing region based upon such factors as vacant developable land and new employment growth. COAH claims that this fair share allocation system was complex and unwieldy and the agency has therefore replaced it with the "growth share" approach. Under the growth share approach, each town's fair share consists of three components: first, the previously calculated first and second round need (1987 through 1999); a "rehabilitation share" consisting of sub-standard or deteriorated units occupied by lower income households in that town; and 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 with a "growth area" under the State Development and Redevelopment Plan, the new growth share concept requires every municipality which experiences either residential or non-residential growth to provide lower income housing based upon standard ratios.

### **Two criticisms illustrate the nature of expected future challenges to the rules.**

- The growth share concept was described as unconstitutional by the New Jersey Supreme Court in the Mt. Laurel II decision: "while it would be simpler in these cases to calculate a municipality's fair share by determining its own probable future population (or some variant thereof), such a method would not be consistent with the constitutional obligation (although it is a factor that could be considered in a fair share calculation in the absence of other proof). Municipal population projections are based on many factors, but in no case that we know of do they include a value judgment that such municipality should bear its fair share of the region's lower income housing

(over)

need. In fact, in most cases, we believe, one of the factors necessarily involved in such municipal population projections is the prior and probable future effect of the municipality's exclusionary zoning." *Southern Burlington County NAACP v. Township of Mt. Laurel*, 92 N.J.158, 257-258 (1983);

- The other innovation of the new rules, that is, the calculation of the "rehabilitation share" raises similar constitutional questions. A basic premise of the *Mt. Laurel* cases is that lower income families living in deteriorated inner city housing should have the opportunity, created through zoning, to move to suburban areas where better housing, jobs and suitable school systems are available. The new rehabilitation share concept would turn this concept on its head by requiring all low income cities ("urban aid cities") to rehabilitate deteriorated housing stock, leaving suburban communities only with the responsibility of fixing their own deteriorated housing units.

### **New Development Opportunities**

The new COAH rules will substantially change the way that municipality's zone and approve development projects. In addition to providing for lower income housing need for the period of 1987 through 1999 as calculated under the old methodology, towns will now have to consider the consequences of both new housing and employment-generating development. Every housing development and non-residential development receiving a certificate of occupancy 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 each 8 market-rate homes that are constructed. The non-residential ratio requires 1 lower income unit to be produced for each 25 new jobs generated by new non-residential construction. By way of illustration:

- A 100 unit market-rate housing project, whether single-family detached, townhouses or rental apartments, will generate a municipal obligation to provide 12.5 (round up to 13) lower income housing units;
- A 200,000 square foot "big box" 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.

This obligation to provide lower income housing is a municipal obligation under the COAH rules, *not* to be transferred to the developer until such time as the town has a zoning ordinance amendment, approved by COAH, which requires the developer to either construct the lower income units or to provide a payment "in lieu" of constructing the units on site. Since the COAH Rules have just become effective and towns are given a full year to submit fair share plans and compliant ordinances to COAH, it is likely that municipal ordinances will not be in place until mid-to-late 2006.

This delay in implementation provides both an opportunity and a danger to development projects reviewed in the interim. The opportunity is this: since every residential and non-residential Certificate of Occupancy granted from January 1, 2004 to adoption of the COAH-approved ordinances will generate a need for lower income housing which can not be imposed upon the property developer, a municipal debt, if you will, will build during this period. Developers can offer to 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 from projects under review before the boards have the legal authority to do so. Developers must resist the urge to take an approval conditioned upon such illegal exactions, since if litigation ensues, a reviewing court will not just strike down the illegal condition-but also the approval.

The new COAH rules substantially change the ways that the towns must calculate and provide for their constitutional obligation to provide lower income housing. Each town's situation is different. Some towns have an affordable housing program, which has been approved by COAH or a Court. Many other towns have taken no action at all to comply. The growth share approach can potentially affect every residential and non-residential development project and knowledge of a town's affordable housing program is now as essential to assuring a fair approval as knowledge of zoning regulations and the State Plan designation of the site.

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