



March 2007

Court Strikes Down COAH Growth Share Rules

On January 25, 2007, the Appellate Division published the decision -- In the Matter of the Adoption of N.J.A.C. 5:94 and 5:95 by the New Jersey Council on Affordable Housing - - to strike down the Council on Affordable Housing ("COAH") growth share rules. It took COAH over 2 1/2 years to create this new "growth share" approach and it took the Appellate Division 127 pages to explain why the methodology is invalid. So this is not a simple matter.

This Appellate Division decision is very significant in that it invalidates key portions of the COAH growth share methodology and eliminates or reduces municipally-favored options for providing affordable housing such as municipal growth share ordinances. The decision also upholds important concepts such as Regional Contribution Agreements ("RCAs"), bonus credits and the rules regarding vacant land adjustments. A detailed summary of the Court's key holdings follow. As a result of the decision, COAH is required to go back and revisit its underlying methodologies which could result in a significant increase in the amount of affordable housing that must be produced for the period of 1999 to 2014 ("third round fair share").

Any argument over whether the growth share concept survives the Appellate Division's ruling is a matter of semantics. Two of the most critical underpinnings of the growth share rules were invalidated. First, Towns may not simply take existing zoning and superimpose the requirement to construct affordable housing units; a density increase or similar benefit must be provided in return for mandating that affordable housing be constructed on site. This same "compensating benefit" is required in return for financial contributions "in lieu" of constructing affordable housing. Second, towns will only be able to restrict 25%, not 50%, of new affordable housing units for senior citizen occupancy.

The Court has given COAH six months (until July 25, 2007) to revise its rules. In the meantime, pending land development applications must be decided. Each situation requires an individual evaluation. The main issues are:

- Can a town require a developer to build affordable housing pursuant to an ordinance which does not grant a density bonus or a similar compensating benefit in return for the requirement for constructing affordable housing?
- How do you determine if the municipal ordinance offers a compensating benefit and therefore may be constitutional?

- Can developers be required to pay "in lieu" of construction fees if those fees do not conform with the proposed new COAH rules?
- How do you preserve your right to later challenge an affordable housing construction or fee requirement and still obtain approvals?
- How do you protect your development project from a future requirement that increases affordable housing construction or fee requirements?

On February 15, 2007, the Department of Community Affairs issued a press release responding to the Appellate Division's ruling that announced the following: 1. DCA had appealed the part of the ruling requiring that developers be given incentives to build affordable housing in an "inclusionary zone"; 2. DCA requested the Appellate Division grant an immediate stay to the ruling insofar as it put "municipal inclusionary housing ordinances" or "growth share" ordinances at risk; and 3. COAH was moving forward with compliance of the remainder of the ruling.

The following is a point-by-point description of the Appellate Division's decision:

1. Housing Need Calculation Issues

- The Court upheld the provision of the fair share methodology which does not include "cost-burdened poor" as part of the calculation of present housing need. Cost-burdened poor are those households paying more than 30% of their income for rental and related expenses or for owner-occupied housing, more than 50% of their income for housing related expenses.
- The Court upheld COAH's methodological change to identify substandard housing by using only three, rather than the prior seven, surrogates for housing need from census data
- The Court struck down COAH's use of filtering as a secondary source of affordable housing due to COAH's failure to use recent data to determine whether filtering has actually been occurring. If COAH cannot prove the

unlikely proposition that housing became more affordable from 1999 through the present, 59,156 units will be added to the statewide housing need calculation.

2. Fair Share Allocation Issues

- The Court invalidated the growth share methodology because of COAH's failure to determine whether its allocation formula would result in the satisfaction of Statewide affordable housing need. In order to conform to this ruling, the Court required COAH to identify remaining vacant developable land and revise its growth share ratio if necessary, or adopt a different methodology, to assure that 52,000 units (or 111,000, if filtering isn't occurring) of low and moderate income housing can be accommodated on remaining vacant developable land. Similarly, the Court required COAH to limit municipal discretion - - so that towns with substantial vacant land, access to jobs and utilities cannot refuse to grow.
- The Appellate Division indicated that COAH had acknowledged, and that the Court agreed, that the State Planning Commission determination of growth areas in the State Plan are based in large part upon municipal planning documents and thus could be exclusionary.
- The Court upheld COAH's new approach which does not allocate excess present housing need in the inner cities to suburban municipalities.
- The Court invalidated COAH's exclusion of jobs created by redevelopment and rehabilitation of vacant buildings from growth share calculations.

3. Issues Regarding Compliance Mechanisms

- In the most startling of the holdings, the Court found that the COAH rule that permits municipalities to require developers to either construct affordable housing on site or make payments in lieu thereof without providing any compensating benefits violates the Mount Laurel doctrine.
- The Court upheld that payments in lieu of construction of affordable housing must be based upon standards provided by COAH and included in municipal ordinances.
- The Court invalidated the permitted 50% age-restricted housing rule and required that the prior 25% limit be used until new rules are adopted.
- The Court upheld the general authority to allow RCAs.
- The Court upheld the various rules providing for bonus credits.
- The Court upheld the vacant land adjustment rule.

4. Relief Granted

- The Court refused to appoint a special master to assist COAH in coming up with new rules.
- The Court gave COAH six months (until July 25, 2007) to "complete" the rule-making process required by the Appellate Division decision. It stayed all applications pending before COAH for substantive certification as well as builders remedy actions for any municipality affected by the decision.

Archer and Greiner has assembled of team of land use law experts would be pleased to meet with you to discuss your project and the implications of the Appellate Division's COAH decision.

ROBERT W. BUCKNAM, JR. is the Chair of the firm's Land Use, Environmental Permitting and Regulatory Compliance practice. His Haddonfield-based legal practice is concentrated in the area of land use planning, zoning, environmental law, administrative agency permitting and regulatory compliance at all governmental levels, real estate transactions and financing, and related litigation. rbucknam@archerlaw.com or (856) 354-3025.

GULIET D. HIRSCH is a Partner in Archer & Greiner's Flemington office. She concentrates her practice in the area of Land Use Law in the state and federal courts. She has significant experience in exclusionary zoning and COAH applications, land development application appeals, down-zoning challenges, pre-acquisition analyses, land development approvals and other government permits. Ms. Hirsch prepared this advisory. ghirsch@archerlaw.com or (908) 788-4305.

JOHN D. CRANMER is a Partner in the Archer & Greiner Real Estate Department. He concentrates his Haddonfield-based practice in the areas of real estate development, real estate transactions, fair housing law, affordable housing law, land use & environmental permitting, liquor licensing, alcoholic beverage control and construction contracts. jcranmer@archerlaw.com or (856) 616-2686.

GARY S. ROSENSWEIG is a Partner in Archer & Greiner's Princeton Office. He concentrates his practice in the areas of environmental regulation, land use, permitting and compliance. His experience also includes redevelopment projects and condemnation litigation. grosensweig@archerlaw.com or (609) 580-3711.

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