

Recent Affordable Housing Developments (*No Pun Intended*)

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As of yesterday, Senator Raymond Lesniak's highly controversial legislation, known as S1, has made considerable progress, as the Senate passed the legislation after its second reading with a 28-3 approval.

Originally, S1 proposed to abolish COAH – the entity that currently has regulatory authority and provides administrative oversight to the production of the State's constitutional obligation to supply affordable housing, and per the "State Agency Transfer Act," transfer their powers, functions and duties to the New Jersey Department of Community Affairs (NJDCA), of which both COAH and the SPC are currently housed.

S1 further proposes the elimination of the statewide calculation of need, otherwise known as Growth Share (which was upheld in the January 22, 2008 Appellate Division decision) and forgives all prior round need, regardless of past participation in COAH's voluntary process. Instead, the legislation states that inclusionary municipalities, defined as having either 1) 7.5% housing stock that is "price restricted;" 2) 33% of housing stock is single-family attached, mobile homes or multiple dwelling units (provided that 50% of this housing is rental housing); or 3) has adopted zoning ordinances that require specific compliance mechanisms or has incorporated certain standards into their Master Plans. These ordinances or Master Plan inclusions do not set thresholds or standards for determining compliance but instead requires 'analyses' of existing housing stock. Those thresholds may or may not be clarified in NJDCA's newly promulgated administrative code.

Should S1 eventually become public law, municipalities will have 60 days from the effective date of that law to apply to NJDCA for a determination, through a 'limited review,' of whether the municipality is an inclusionary municipality, as described above. However, if NJDCA rejects a municipal application for determination as an inclusionary municipality, that municipality can either reapply within the six year planning cycle (which is no longer defined in the legislation and does not coincide with the current COAH planning cycles or the State Plan, which has a 3-year planning cycle), or a municipality can be deemed inclusionary if it adopts an ordinance which reserves 20% of its developable land for workforce housing. As a reference, workforce housing is no longer defined as 80% to 120% of median income. S1 defines workforce housing as all households earning up to 120% of median income. However, municipalities should note that no Federal subsidy will be provided for housing units that are set-aside for households between 80% to 120% median income.

S1's newly proposed language, requires municipalities to institute a 10% low- and moderate-income set-aside for any new "residential development project," which has greater than five (5) units; where a 5% low- and moderate-income set-aside would be required for any "small residential development project," defined as having less than five (5) units. The legislation, however, does not specify whether "inclusionary municipalities" are subject to this "growth share" requirement; however, it would seem that they would be. Only municipalities that have received third round substantive certification by COAH would be exempt from this requirement, provided they continue to comply with and implement their third round Housing Element and Fair Share Plan.

In addition, the aforementioned section requires that municipalities make a reasonable effort to facilitate the economic viability of an inclusionary development by utilizing the applicable provisions currently provided by COAH, which includes compensatory benefits by easing density (i.e. - increased

number of units per acre, reduced minimum building separation requirements, increased Floor Area Ratio (FAR), etc.) and/or non-density (i.e. - relaxed design and development standards, expedited review and permit processing, relaxed parking requirements, etc.) related restrictions or by providing direct and/or indirect fiscal subsidies (i.e. - tax abatements, Economic & Redevelopment Growth Grants – Local Grants, utility hook-up or other impact cost grants, etc.). S1 amends the Municipal Land Use Law (MLUL) to give zoning boards additional power allowing them to assess and determine the economic viability of inclusionary development if questioned by a developer.

All new units would also still be subject the 50/50 low- and moderate-income split. Municipalities would also still be allowed to apply COAH's current compliance mechanisms, which include off-site construction, inclusionary development, payments in lieu of construction, 100% municipally-sponsored development, ECHO units, accessory apartments, market-to-affordable units and assisted living residences. The only major difference in these compliance mechanisms is that 'inclusionary' units can be provided off-site through the rehabilitation of existing substandard units, which is currently not authorized by COAH above a municipality's rehabilitation share. While the reinstatement of RCAs was part of S1's original version, it is no longer a viable compliance mechanism under the final version passed by the Senate (as of June 10, 2010).

While the Uniform Housing Affordability Controls (also known as UHAC) was not repealed by this legislation, S1 addresses deed restrictions by defining a 'price restricted unit' to mean a residential dwelling unit that is price restricted for occupancy by residents of low- or moderate-income; financed through Low Income Housing Tax Credits (LIHTCs); financed through the Neighborhood Revitalization Tax Credit (NRTC) program; RCA rehabilitated units; Community Development Block Grant (CDBG) units; housing units operated by Public Housing Authorities or units receiving project-based assistance under Section 8.

Like the recommendations provided by the Governor and the Housing Opportunities Task Force, the statewide non-residential development fee, as authorized by P.L. 2008, c.46 (also known as A500) would be repealed by the legislation. It also specifically precludes any municipality from enact a non-residential fee. However, it would authorize municipalities to collect a 2.5 % fee of equalized assessed value (EAV) for residential development projects.

While affirmative marketing is still addressed via UHAC, substantial changes in preferential marketing has made its way to the newest version of S1. According to the new language, a municipality is permitted to give an occupancy preference of up to 50% of affordable housing units to households that have at least one member who works and/or resides within that respective municipality. For those units subject to foreclosure, affirmative marketing requirements shall be waived in order to permit those households to remain within their home.

Last, but by no means least, S1 amends the MLUL to allow those non-inclusionary municipalities and their planning boards to grant 'd' variances for affordable housing units under the 'inherently beneficial use' clause. This is not applicable to those municipalities that have adopted ordinances that sets 20% of its developable land aside for workforce housing.

Regardless of the Governor's previous stance on COAH, as well as his Housing Opportunities Task Force, it appears that the Legislative sponsors and Governor Christie's Administration are moving closer to a consensus and working harder to ensure that the Assembly expeditiously passes S1, as proposed.

Therefore, serious and considerable reforms to affordable housing laws may be drastically changed as soon as next month.