

Recent Affordable Housing Updates

It's been a busy Fall for affordable housing advocates – and their adversaries – due to a recent Appellate Division ruling and the release of the recently introduced Assembly Bill (A3447), which was advanced by the Assembly on December 10th, despite significant opposition.

Appellate Court Decision

On October 8, 2010, the Superior Court's Appellate Division issued an opinion in response to 22 appeals challenging the second version of the Third Round Rules, which are promulgated by the New Jersey Council on Affordable Housing (COAH) (N.J.A.C. 5:96 and 5:97). COAH's Third Round regulations were originally invalidated by the Appellate Division in 2007 due to a number of significant changes made between the 1st and 2nd round rules and the third round (i.e. – filtering, growth share approach, lack of compensatory benefits, etc.). As a result, COAH was instructed to modify its rules in conformance with the Appellate Court's mandate. These revised rules were adopted and deemed effective in June of 2008.

In response to the latest Appellate Court decision, which probably should have been issued when these rules were initially revised, portions of COAH's Third Round regulations have been upheld and/or invalidated, as provided in summary below:

Section	Appellate Decision	Explanation	Outcome
The Growth Share Methodology	Invalidated	The Court determined that the Growth Share approach was inconsistent with the Mount Laurel Doctrine and the Fair Housing Act, and also determined that it is not an appropriate methodology for COAH to determine the allocation of Prospective Need using Growth Share.	COAH has five (5) months to revise and adopt Third Round rules utilizing the previously-approved methodology used in Round 1 and 2.
Projected Statewide & Regional Prospective Need	Invalidated	The Court determined that COAH failed to compare its data, used to calculate Prospective Need, with other available data, and that COAH used stale data to determine projections related to housing and job growth.	COAH is directed to re-determine Prospective Need based on methodology used in Round 1 and 2, and to utilize up-to-date information.

<p>Municipally-Sponsored Affordable Housing</p>	<p>Invalidated</p>	<p>The Court determined that Municipally-Sponsored (100% Affordable) Housing mechanism, where specific site detail or supporting documentation was not provided by municipalities - also known as Phantom Sites - are invalid, as the regulations that govern this documentation is based on the validity of Growth Share. Since the Growth Share methodology has been invalidated, so is this particular portion of COAH's Third Round rules.</p>	<p>Municipalities that have chosen this mechanism for compliance, and have not provided such documentation, will have to detail the specific site (block and lot), provide evidence of municipal control of the site, determine suitability of the site, provide evidence of all applicable funding sources and identify the developer in order to receive substantive certification, and subsequent credit for those units.</p>
<p>Compensatory Benefits</p>	<p>Invalidated</p>	<p>The Court determined that the Compensatory Benefits model provides no basis for concluding that the Third Round provides sufficient incentives to construct inclusionary developments at the presumptive minimum densities and maximum set-asides set forth at <u>NJAC 5:97-6.4</u>.</p>	<p>COAH, most likely as part of its general rulemaking process, will have to identify a method for providing "bright line standards" for compensatory benefits to developers of inclusionary housing.</p>
<p>Prior Round Rental Bonuses</p>	<p>Invalidated</p>	<p>The Court determined that the prescribed allowance of Prior Round Rental Bonuses, as amended in October 2008, did not contain a reasonable limitation for the effective period of a rental bonus credit, which was provided in Round 2. Therefore, the rental bonus credit against a prior round obligation, as provided in the Third Round regulations, can continue indefinitely without the proposed affordable rental actually being constructed and was, therefore, invalidated.</p>	<p>If rental bonuses are to be upheld in any future revisions concerning Prior Round obligations, COAH must prescribe a reasonable limitation of those credits in order for them to be presumed valid.</p>
<p>Smart Growth & Redevelopment Bonuses</p>	<p>Upheld</p>	<p>The Court upheld that Smart Growth and Redevelopment Bonus credits, calculated at 1.33 units of credit for each affordable unit built, are valid and are reasonable, as they are designed to further important state policies established by the State Development & Redevelopment Plan (State Plan).</p>	<p>Will remain as promulgated.</p>

Compliance Bonuses	Invalidated	<p>Unlike the Smart Growth & Redevelopment Bonus credits (as well as Rental and Very Low Income Bonus credits), Compliance Bonuses were invalidated because this policy does not promote or advance other important public policies but is solely provided under the circumstance of receiving preliminary or final development approvals and/or execution of a development or redevelopment agreement during the period from December 20, 2004 to June 2, 2008. Therefore, these Compliance Bonus credits were invalidated.</p>	<p>While municipalities will not be punished for complying with the original rules that provided the 2-for-1 Compliance Bonus, those credits will be reduced to a 1-for-1 crediting structure.</p>
Prior Round Obligation Numbers	Upheld	<p>The Court upheld COAH's revisions to the Third Round regulations that did not include obligations based on the 2000 census, which showed that there had been greater household growth during the second round period from 1993 to 1999, than originally projected. Instead COAH continued to impose the same Prior Round obligations it had established in Round 2. The Court denied the argument that COAH should be using the higher Prior Round projections because it had not remanded COAH to do so.</p>	<p>Will remain as promulgated.</p>
Reallocation of Present Need (Urban to Suburban)	Upheld	<p>The Court upheld its original decision to deny the argument that the Present Need in urban municipalities should be reallocated to Suburban municipalities. These arguments were based on the fact that urban municipalities had substantial rehabilitation numbers; whereas, suburban municipalities lacked enough vacant land to produce realistic development potential, and therefore, the urban Present Need unfairly burdens the inner cities and should be reallocated to suburban municipalities to make up for the lack of land available for new</p>	<p>While the Court's original decision was upheld, the Court noted "the magnitude of urban municipalities' obligations for the Present Need for affordable housing due to existing substandard housing creates substantial doubt whether it is appropriate to assign any share of the responsibility for Prospective Need to those municipalities."</p>

		affordable housing construction. According to the Court, the urban need will not be reallocated to suburban municipalities.	
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Other arguments, provided by some of the 22 appellants, were rejected by the Court. This includes that the Third Round rules improperly require the expenditure of municipal revenues to satisfy affordable housing obligations; that the Third Round rules were not adopted in accordance with the Administrative Procedures Act; arguments against the definition of "Prior Round Obligation"; arguments against the interpretation of the 1,000-unit cap; and the argument that the Court should divest COAH of responsibility of adopting the Third Round rules and instead appoint a Special Court Master.

In addition, the Court has suggested that COAH clarify its crediting policy for publicly-financed affordable units.

COAH has five (5) months to revise and adopt new Third Round regulations that are in compliance with the Court's mandate. The Court also declined to issue a blanket stay and provided that any municipality or other interested party may apply for a stay to COAH or the court in which a Mount Laurel case is pending.

Assembly Bill A3447

On December 10th, the Assembly voted in favor of bill A3447 (where S1 is the companion bill), regardless of considerable opposition to the bill. This bill abolishes COAH and transfers the Council's remaining duties to the New Jersey Department of Community Affairs (NJDCOA).

The bill also seeks to define and include the following:

- Municipal obligations for providing affordable housing have been significantly reduced (prior numbers estimated a 115,000-unit Statewide calculation of, while the Assembly Democrats released data estimating the bill requires 56,000 units over the next 10 years);
- Requires municipalities to appoint a licensed planner as a "housing compliance professional" who will certify a municipalities housing element to determine compliance with the proposed legislation;
- The bill eliminates a 2.5 percent fee on Statewide Non-residential Development Fee that was designed to help pay for housing developments but revises the residential fee structure to require that 1.5 percent on any residential development is collected, where those developments don't include housing affordable to low- and middle-income households;
- Seventy-one (71) municipalities would have no affordable housing obligation because more than half of the children in local public schools come from homes with incomes low enough to qualify for free or reduced-price lunches; and
- Municipalities where less than 20% of children qualify for free school lunches would have to ensure that 10% of their housing is affordable to low- and moderate-income households. Municipalities with 20 to 50%, would have to ensure 8% of their housing stock is considered affordable.

Before going to the governor, the bill must be voted upon by the state Senate. Triad will continue to monitor this legislation to determine its impact on municipal obligations and provide regular updates.