

# DIMENSIONS

## APPELLATE DIVISION INTERVENTION CONCERNING MUNICIPAL AFFORDABLE HOUSING DEVELOPMENT FEES PRESENTS OPPORTUNITIES FOR DEVELOPERS

By: Meryl A.G. Gonchar, Esq. and Matthew J. Schiller, Esq.

On April 9, 2015, the New Jersey Appellate Division in In Re Failure of the Council on Affordable Housing to Adopt Trust Fund Commitment Regulations enjoined the Council on Affordable Housing (COAH) and New Jersey's executive branch from seizing affordable housing development fees collected by municipalities. Going forward, the use and disposition of such funds will be decided by courts on a case-by-case basis, subject to the timelines and parameters set forth in the New Jersey Supreme Court's March 2015 decision in In re Adoption of N.J.A.C. 5:96 & 5:97. As the balance of municipal affordable housing trust funds in New Jersey currently exceeds **\$168,000,000**, increased judicial oversight of affordable housing development presents a unique, immediate opportunity for developers and land owners to partner with municipalities seeking to address and "commit" their available affordable housing trust funds.

In 2008, amendments to the Fair Housing Act (FHA) enabled COAH to authorize municipalities that petitioned for substantive certification to impose and collect affordable housing development fees from developers of residential properties. Municipalities, however, could not spend or "commit" to spend collected funds without first obtaining COAH's approval. Moreover, municipalities were required to commit to spend the funds within four years of collection. If municipalities failed to

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do so, the funds were to be transferred to the New Jersey Affordable Housing Trust Fund, where they could be subject to transfer to the State.

The 2008 FHA amendments mandated that COAH promulgate regulations regarding the establishment, administration and enforcement of the expenditure of affordable housing development fees. However, COAH failed to take administrative action concerning those fees, creating uncertainty for municipalities as to how and when the funds were "committed" for expenditure and therefore ineligible for transfer to the Affordable Housing Trust Fund and the State. Without regulations, municipalities feared committing to spend funds as COAH could subsequently enact more stringent guidelines, resulting in "committed" funds being seized by the State and forcing municipalities to use/

raise their own funds to cover project costs to which the funds had been allocated. As a result, many New Jersey municipalities accumulated significant affordable housing trust fund balances without committing to their expenditure and/or use.

The recent Appellate Division ruling rejected COAH's contention that the 2008 FHA amendments provided sufficient clarity and that no regulations were needed as "unworthy of further discussion in a written opinion." Rather, the Court concluded that COAH ignored the Legislature's mandate to promulgate rules concerning affordable housing development fees, which placed municipalities in an uncertain position with respect to their ability to commit collected affordable housing trust funds towards the development of affordable housing. In line with the Supreme Court's March decision and order, the Court concluded that COAH's failure to act necessitates judicial intervention to resolve fee disputes and decide the use and disposition of affordable housing development fees going forward.

According to municipal data reported to COAH, as of May 18, 2015, 38 municipalities have affordable housing trust fund balances in excess of \$1,000,000, of which 18 have balances greater than \$2,000,000. An additional 8 municipalities have

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### About the Authors:

Meryl A.G. Gonchar and Matthew J. Schiller are partners in the Woodbridge office of Greenbaum, Rowe, Smith & Davis LLP ([www.greenbaumlaw.com](http://www.greenbaumlaw.com)).

Ms. Gonchar is co-Chair of the firm's Redevelopment & Land Use Department. Her practice encompasses all aspects of land use, zoning and related litigation. She can be reached at 732-476-2690 (direct) or [mgonchar@greenbaumlaw.com](mailto:mgonchar@greenbaumlaw.com).

Mr. Schiller is a member of the firm's Real Estate Department. His practice encompasses a wide range of commercial real estate transactional and litigation matters. He can be reached at 732-476-2396 (direct) or [mschiller@greenbaumlaw.com](mailto:mschiller@greenbaumlaw.com).

## APPELLATE DIVISION INTERVENTION

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trust fund balances slightly under \$1,000,000. Municipalities reporting the five largest affordable housing trust fund balances are: (1) Monroe Township (Middlesex County), which has a reported balance of \$13,119,800.21; (2) Marlboro Township (Monmouth County), which has a reported balance of \$6,544,729.87; (3) Mount Laurel Township (Burlington County), which has a reported balance of \$5,564,206.03; (4) Edison Township (Middlesex County), which has a reported balance of \$4,104,746.75; and (5) Hillsborough Township (Somerset County), which has a reported balance of \$3,564,704.87.

In Re Failure of the Council on Affordable Housing to Adopt Trust Fund Commitment Regulations is the most recent example of the New Jersey judiciary's newfound willingness to proactively address the state's many unresolved affordable housing issues. The extent to which a municipality already may have committed affordable housing trust fund balances to developments or property acquisitions must be reviewed on an individual municipal basis. However, given the numbers reported to COAH, it appears likely that significant funds may remain available. Municipalities will become subject to significant judicial scrutiny as they seek judicial confirmation of their Mt. Laurel compliance. Accordingly, many may be receptive to new development proposals and consideration of vacant land for sale within their borders that will yield affordable housing through the use of their available affordable housing trust funds. Developers and land owners therefore have a unique, immediate opportunity to pursue partnerships with municipalities to obtain judicial approval for developments that will include subsidized affordable housing elements.

## TOWNS, BUILDERS GEARING UP

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remedy claims), possible intervention, and similar questions. These decisions will sometimes vary depending upon the circumstances surrounding different municipalities. The obvious goals of builders in such proceedings will include defeating (or minimizing) any municipal claims for immunity from builder's remedy suits, along with the ultimate acquisition of favorable rezonings. Similarly, builders and their counsel must decide the strategy to be employed as to towns that do not file DJ cases within the 30 day window.

### Conclusion

NJBA and Hill Wallack LLP, as NJBA's Land Use Counsel, will be working together in the weeks and months ahead to track municipal DJ filings and otherwise provide information concerning the upcoming flurry of Mount Laurel proceedings. This next chapter of Mount Laurel compliance provides considerable opportunities to builders wishing to seek favorable rezonings and provide much-needed affordable housing.

## IDENTITY THEFT

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better than nothing. A broad form Cyber Risk policy contains such coverage as security breach remediation and notification expense, credit monitory expense, crisis response management expense, regulatory defense expense, business interruption and loss of profits, program and data restoration expense, e-commerce extortion threat, forensic technology expense to discover the source of the breach and patch the hole, and third party liability coverage for lawsuits that arise from the breach of personal data. Broad coverage policies typically start around \$5,000.

Whichever policy type you choose, make sure you choose one. The exposure to loss is too great for businesses to self-insure.

## OWNING VERSUS RENTING

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statistics from Meyers Research shows that Cumberland County had the highest existing home affordability ratio in March 2015 while Morris County had the lowest. It is interesting to note that both Cumberland County and Gloucester County rank in the top-3 to buy or rent in the state.

	Most Affordable to Rent	Most Affordable to Own
1	Cape May County	Cumberland County
2	Cumberland County	Gloucester County
3	Gloucester County	Somerset County
	Least Affordable to Rent	Least Affordable to Own
1	Hunterdon County	Morris County
2	Middlesex County	Union County
3	Somerset County	Bergen County

In conclusion, market conditions do make it a very favorable time to be a homebuyer, even if personal economic conditions do not. The rental market will still see elevated levels of demand although increased supply and a transition from renters to homebuyers will help rents stabilize. The cost of renting has risen far quicker than the cost to purchase a home over the past several years. With improving economic conditions and a more favorable lending environment, homebuyers are well-positioned to take advantage of historically low mortgage rates before they start to steadily rise as the year goes on.

## WARRANTY BIGGEST CHALLENGE

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plumb when the repairs are complete.

Your warranty provider understands that you are truly professional builders. When we have to deal with this significant structural problem, we know you have done your due diligence throughout the construction process and you will be able to provide us with the important data we need to ensure a fair evaluation of the claim and an adequate repair when required.

*\* Please note: Each warranty provider may not follow the exact process identified in this article for evaluating and repairing CMU foundation walls.*