

NJ Supreme Court Rejects COAH Regulations; Sets 5 Month Deadline for New Affordable Housing Rules

Robert Beckelman

Greenbaum, Rowe, Smith & Davis LLP Client Alert

September 2, 2013

The controversy over affordable housing in New Jersey is back in the spotlight with this week's long-awaited New Jersey Supreme Court decision striking down the "Third Round" regulations adopted by the Council on Affordable Housing (COAH). In a 3-2 decision, the Court ruled that the regulations are invalid because they violate the state's Fair Housing Act (FHA) and exceed COAH's rule-making authority under that Act. The September 26 ruling is welcome news for developers and affordable housing advocates who were opposed to regulations allowing municipalities to avoid their fair share obligation by slowing growth.

Specifically, the Court rejected the highly debated "growth share" concept, by which a municipality's affordable housing fair share obligation is determined by actual growth (i.e. the construction of housing units and the creation of jobs based upon non-residential development within the municipality) rather than a specific municipal obligation based upon the unmet *regional* need for affordable housing.

Given the extensive (over ten year) delay in the implementation of workable COAH regulations since the initial adoption of the third round regulations (which were *already* four years overdue when adopted), the Court's decision requires COAH to adopt new rules based upon the former first and second round methodologies within five months.

In a dissenting opinion, Justice Hoens noted that the invalidity of the growth share methodology found by the majority was repairable and did not call for the complete invalidation of the third round regulations, but instead a remand back to COAH to amend the methodology to comply with the FHA. The majority decision did suggest that some form of growth share methodology may be constitutional and consistent with the FHA, but ruled that such regulations should be authorized by the Legislature.

While we await such legislative action, however, New Jersey's building community is once again in "wait and see" mode. The Legislature had passed a bill in January 2011 that would have abolished COAH and called for a 10% affordable housing requirement for all municipalities across the state. Governor Christie conditionally vetoed that bill, calling for, among other things, revisions requiring 10% of all *new* construction to be affordable. The bill was subsequently withdrawn from consideration.

So what happens next? Will the Legislature be content to go back to the way things were before the "growth share" concept was introduced? Will legislative action be focused on revisiting efforts to revamp the way affordable housing will be allocated among the state's municipalities and administered by the

Published Articles (Cont.)

state? Will Governor Christie move forward with his ongoing campaign to “gut” COAH?

We will continue to track developments on the affordable housing front and keep you advised. In the meantime, please contact the author of this Alert, **Robert Beckelman**, with any questions about affordable housing and this week’s ruling.