

Appellate Division Enjoins COAH and State From Seizing Affordable Housing Development Fees from Municipalities

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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 from municipalities. Going forward, the use and disposition of such funds will be decided by New Jersey's 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*.

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, and were required to commit to spend the funds within four years of collection. If they failed to 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 to "commit" to spend funds as COAH could subsequently enact more stringent guidelines, resulting in "committed" funds being seized by the State. Such result would require municipalities to use their own funds to cover project costs and/or raise taxes.

The recent Appellate Division ruling rejected as "unworthy of further discussion in a written opinion" COAH's contention that the 2008 FHA amendments provided sufficient clarity and that no regulations were needed. Rather, the Court concluded that COAH ignored the Legislature's mandate to promulgate rules concerning affordable housing development fees, thus placing New Jersey's municipalities in an uncertain position with respect to their ability to commit collected development fees towards the development of affordable housing. In line with the Supreme Court's March decision and order, the Appellate Division 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.

Published Articles (Cont.)

This decision serves as the most recent example of how New Jersey's courts will proactively address the state's many unresolved affordable housing issues. Our firm will continue to monitor relevant judicial and legislative developments in order to proactively protect and address our clients' needs. Please contact the authors of this Alert, **Meryl A.G. Gonchar** and **Matthew J. Schiller**, with questions regarding the Appellate Division's ruling in this matter or other affordable housing issues.