

## Real Estate Title Insurance & *Construction Law*

### Breathing Life Into Age-Restricted Housing

New legislation provides an opportunity to convert projects into market-rate housing

By Daniel V. Madrid and Henry L. Kent-Smith

Last summer, former Governor Jon Corzine signed into law the “Age Restricted Conversion Bill” (N.J.S.A. 45:22A-46.3) in an attempt to reduce the existing overstock of age-restricted housing and increase the potential stock of affordably priced workforce housing. The conversion bill creates a mechanism for developers of approved age-restricted projects to convert these projects into developments with no age restriction. In exchange for the conversion, the bill requires the developer to set aside 20 percent of the units in the converted development as affordable housing units in accordance with the Council on Affordable Housing (“COAH”) regulations. The bill was intended to spur economic activity by allowing residential developers to reduce the oversaturated inventory of age-restricted housing while simultaneously providing municipalities with a tool to address their affordable housing obliga-

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Although the bill was championed by many real estate development lobbying groups, it faced strong opposition from municipalities across the state. The municipalities argued that the bill’s passage usurped local planning power and would ultimately result in an influx of school-age children and corresponding demands on already limited resources. In spite of this opposition, the conversion bill was passed. This article discusses the key components of the conversion bill and the effect that the bill has had on New Jersey’s residential real estate market. The article also explores the implications of providing COAH housing as part of the converted development, particularly in light of the uncertainty associated with COAH Third Round regulations.

#### Project Qualifications

In spite of municipal concerns, several provisions of the conversion bill effectively limit the scope of age-restricted projects that can qualify for conversion. To qualify for conversion, the bill requires that the developer must have obtained

preliminary or final approval for construction of the project prior to July 2, 2009, the bill’s effective date. Additionally, the developer of an age-restricted project may not have sold or collected a deposit for the sale of any of the project’s dwelling units. Furthermore, the project must meet the Department of Community Affairs’s Residential Site Improvement Standards parking requirements for the proposed converted development. The developer must also show that the project has access to an adequate water supply and sanitary sewer system to meet the needs of the project’s residents. In the event that the developer cannot meet the parking, water or sewer standards, the developer may reduce the amount of proposed units, as needed, to comply with these requirements.

#### Procedures for Conversion

Upon determining that a project meets these qualifications, developers must then follow the procedures set forth in the bill to apply for the conversion. Jurisdiction over the application is vested in the land use board that originally approved the

age-restricted project. The bill provides that applications for conversions shall be considered as permitted uses in the zoning districts in which they are located. Accordingly, applicants will not be required to meet the use variance proofs under N.J.S.A. 40:55D-70 in conjunction with a conversion application regardless of whether the reviewing board is a planning board or zoning board of adjustment. As an additional incentive for developers, the bill states that municipalities may not assess fees for applications for conversion. However, developers will be responsible for paying escrow fees associated with the review of the application by the municipality's planning and engineering professionals.

The application must establish that the project qualifies for conversion. Additionally, the applicant must affirmatively demonstrate that the conversion can be granted without substantial detriment to the public good and without substantial impairment to the intent and purpose of the zone plan and zoning ordinance. The bill provides the applicant with some limited flexibility on the project's layout by allowing applicants to reasonably revise the layout of approved site plans to accommodate additional parking, changes in amenities, reductions in units and similar changes. However, these changes may not be used to increase the approved floor area ratio and square footage under the original approving resolution.

The bill sets an expedited schedule for review of applications for conversion. The reviewing board has 30 days from the submission of the application to issue a written determination of completeness. If the reviewing board fails to issue the completion determination within this timeframe, the bill provides that the application for conversion will automatically be deemed complete. The reviewing board then has 60 days from the completion determination to issue a decision. If the board fails to issue a decision within this timeframe, the bill states that the conversion is automatically approved. Finally, the reviewing board is required to issue a memorializing resolution within 45 days

of the date of the meeting at which the decision was made.

The bill provides an additional enforcement mechanism to assure that applications are given prompt and fair consideration. The bill gives an applicant that is denied conversion the right to summarily appeal the determination to the court within 30 days of the applicant's receipt of the resolution. The court will consider plans and reports, copies of transcripts and any other materials submitted in support of the application to determine whether the reviewing board's decision was reasonable. Should the court determine that the application for conversion was unreasonably denied, the court may issue an order instructing the board to approve the converted development and may further impose any reasonable conditions that it deems necessary.

#### **An Engine for the Generation of Affordable Housing**

The bill creates a number of incentives to encourage municipalities to consider approving an application for conversion. First, the bill states that any affordable housing unit generated through a converted project shall automatically become part of a municipal fair share plan (if applicable) and shall be eligible for credits to meet the municipality's affordable housing obligation. The bill further provides that COAH-compliant affordable housing units created through a converted development do not generate any additional fair-share affordable housing obligation for the municipality.

Invariably, disputes will arise regarding the conversion of an age-restricted community to one providing a 20 percent COAH set aside. Structure type for affordable units (duplex, triplex, multiunit) is a central concern for developers facing conversion, as this issue affects unit per square foot costs. Unit location and age-appropriate amenities also weigh into the conversion calculations.

#### **The Conversion Bill Revisited**

In theory, the conversion bill provides

a significant economic stimulus to reinvigorate a struggling residential market. For developers, the bill creates a quick and efficient process to allow developers to convert the significant glut of age-restricted housing that resulted from aggressive development in the middle of this decade. While the conversion bill has resulted in several municipalities approving modifications of prior active adult communities to "inclusionary" market-rate projects, the effectiveness of the bill is somewhat in question.

Developers continue to face significant obstacles that prevent them from taking advantage of the bill. Credit markets remain extremely tight, especially with regard to the financing of residential development. On the consumer end, the demand for residential housing is still constricted by stricter underwriting standards for mortgage lending. Additionally, developers remain wary of the conversion process. Although the bill provides developers with economic incentives to pursue conversion and procedural protections if they are wrongly denied, control of the process remains with municipalities. Without municipal cooperation, developers could face extensive legal costs to obtain an approval for conversion.

Recent proposals associated with COAH and the Third Round Growth Share leave a significant incentive for conversion with an uncertain future. The New Jersey legislature has introduced proposals to eliminate COAH and the "growth share" methodology. If COAH Third Round Growth Share is eliminated, the conversion bill will penalize developers by requiring a set aside for housing that may no longer be required by COAH or wanted by a municipality.

Although the conversion bill provides developers with a significant tool to reinvigorate the economy, the New Jersey development market has not seen the significant uptake in activity initially expected. With a new administration in place and continued uncertainty in the financial markets, the conversion bill's true impact may not be apparent until the spring thaw and a corresponding thaw of the capital markets. ■