



ZONING & LAND USE PRACTICE

# ALERT

## NJ COURT INVALIDATES COAH'S THIRD ROUND REGULATIONS

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On October 8, 2010, the Appellate Division issued its long-awaited decision regarding the validity of the Council on Affordable Housing's (COAH) rules governing affordable housing production in New Jersey. *In the Matter of the Adoption of N.J.A.C., 5:96 and 5:97* by the New Jersey Council on Affordable Housing invalidates the growth share regulations COAH has used to calculate a municipality's Third Round obligation for the period of 2000 to 2018. The court held the growth share formula still provided an avenue by which a municipality could reduce its affordable housing obligation by suppressing all growth in the municipality. Specifically, the court reiterated a prior conclusion it reached in 2007 that the growth share methodology adopted in the original Third Round rules "was invalid because it allowed a municipality to avoid any substantial responsibility for satisfying its obligations to provide affordable housing by adopting land use regulations that discourage growth." The court upheld the long-standing constitutional principles first enunciated in *Southern Burlington County NAACP v. Mt. Laurel*, finding that allowing exclusionary zoning policies to reduce affordable housing is an anathema to the state constitution.

The court also invalidated particular regulations that are part of COAH's Third Round rules that allowed municipalities to provide unrealistic "housing opportunities." The court nullified rental bonus credits for units addressing First and Second Round obligations not yet built; rules requiring a 25 percent affordable housing set aside without a substantial density bonus; rules

allowing municipalities to propose affordable housing projects without specifying the location of sites or source of funding; and bonuses for compliance from the years 2004 to 2008.

The effect of these rulings will limit municipal affordable housing options to only those options that provide a realistic opportunity for development. Inclusionary development zoning will become the primary basis by which municipalities will meet their affordable housing obligations, given limitations as to municipal funding for 100 percent affordable housing projects. Finally, the court refused to enter a stay of its ruling during the five-month period the court required COAH to formulate new rules. The court will consider stays only on a case-by-case basis.

The implications associated with this decision are substantial. This ruling fundamentally returns New Jersey to the affordable housing regulatory requirements established in the 1987-1999 period and forever puts to rest the concept of growth share. Any client interested in developing residential housing in New Jersey should be aware of the implications of this decision and how the court's ruling will affect residential zoning in the future.

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