



ZONING & LAND USE PRACTICE

ALERT

COURTS INVALIDATE REGIONAL AFFORDABLE HOUSING GUIDELINES

By Henry L. Kent-Smith

On Feb. 24, 2011, the Appellate Division of the Superior Court of New Jersey invalidated the Council on Affordable Housing (COAH) Regional Affordable Housing Development Program Guidelines (Guidelines). The Guidelines were adopted on Sept. 9, 2009, in response to A-500, the 2008 amendments to the Fair Housing Act that required regional planning entities to identify and coordinate regional affordable housing opportunities with municipalities in accordance with available infrastructure, employment opportunities and public transportation. See *N.J.S.A. 52:27D-329.9(c)(2)*. The Guidelines encompass the following regional planning entities: Meadowlands Commission, Pinelands Commission, Fort Monmouth Planning Authority, Highlands Water Protection and Planning Council and the Casino Reinvestment Development Authority. See *N.J.S.A. 52:27D-329.9(a)*. These regional planning entities encompass 181 of New Jersey's 566 municipalities.

In adopting the Guidelines, COAH did not follow the procedures established by the Administrative Procedure Act concerning the adoption of rules and regulations. COAH instead adopted the Guidelines through an informal process of review and comment in the summer of 2009.

In determining the Guidelines constituted improper rule making—effectively invalidating the Guidelines—the Appellate Division concluded that under the standards announced by the New Jersey Supreme Court in *Metromedia, Inc. v. Director of Division of Taxation*, 97 N.J. 313 (1984), the Guidelines fell within the six factors

the Supreme Court required to be considered as to whether an agency pronouncement is in fact an administrative rule. In evaluating the effect of the Guidelines, the Appellate Division observed that the Guidelines established standards by which 181 municipalities would address their affordable housing obligations, and therefore, clearly constituted “wide coverage encompassing a large segment of the [municipalities] regulated.”

The Guidelines established a legal standard by which a municipality would discharge its affordable housing obligations under the Fair Housing Act. In adopting the amendment to the Fair Housing Act, the legislature clearly considered that COAH would adopt rules and regulations establishing specific standards and conditions for these regional planning entities that would enable municipalities to address their affordable housing obligations. In conclusion, the Appellate Division found the Guidelines satisfied all of the *Metromedia* criteria for determining whether COAH's action constituted an administrative rule and therefore, must be adopted in accordance with the Administrative Procedure Act.

The court rejected COAH's argument the Guidelines constituted an advisory document only and found they dictate regional planning entity approaches and procedures in discharging municipal affordable housing obligations through regional planning cooperation. As a result, the Appellate Division invalidated the Guidelines and remanded the matter to COAH to adopt rules and regulations that would implement *N.J.S.A. 52:27D-329.9*.

The question now is whether COAH will in fact adopt regulations. In the aftermath of the Appellate Division's decision, no regional planning regulatory authority exists that permits municipalities to share affordable housing obligations. As such, municipalities in the Pinelands and Highlands are now confronted with affordable housing obligations still determined by COAH for the Third Round. See *In re: the Adoption of N.J.A.C. 5:96 and 5:97*, 412 N.J. Super. 468 (App. Div. 2010). It will also be interesting to see if COAH actually adopts rules and regulations given

the present uncertainty regarding the future of the *Mt. Laurel* doctrine, the possibility of new legislation and the pending petitions for certificate of *In re: the Adoption of N.J.A.C. 5:96 and 5:97*.

For more information on this Alert please contact Henry L. Kent-Smith at 609.896.4584 or hkent-smith@foxrothschild.com or any member of the firm's Zoning & Land Use Practice.



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