

**SUPERIOR COURT OF NJ, APPELLATE DIVISION
OCTOBER 8, 2010
IN THE MATTER OF THE ADOPTION OF N.J.A.C. 5:96 AND
5:97 BY THE NJ COUNCIL ON AFFORDABLE HOUSING**

**SOMERSET COUNTY PLANNING BOARD
DRAFT EXECUTIVE BRIEFING OVERVIEW**

Background Information: On Friday, October 8, 2010, the Appellate Court invalidated substantial portions of the third round rules of the NJ Council on Affordable Housing (COAH), adopted under the Fair Housing Act. Most significantly, the Court ruled that the “Growth Share” approach for determining a municipality’s fair share of the need for affordable housing generated by jobs and residential growth from 1999 through 2018 as specified in the revised rules adopted on October 20, 2008 is invalid due to the Supreme Court’s Mount Laurel II doctrine. The Court remanded to COAH to determine prospective need by means of a methodology similar to the methodologies used in the prior round rules using the most up-to-date data available, and adopt new third round rules within five months (By March 8, 2011). The Court did not issue a blanket stay of proceedings before COAH or in the Courts pending completion of the remand to COAH. However, any municipality or interested party may apply for individual stays to COAH or the Court in which a Mount Laurel case is pending.

This opinion addressed 22 different appeals challenging the third round rules which were consolidated, and oral argument was heard before the Appellate Division on December 1, 2009. Within 10 days of October 8th, any of the parties involved with this suit can petition the New Jersey Supreme Court for a certification of this decision. The Supreme Court, at its discretion, shall decide whether or not to hear any appeals, which will take several months to resolve.

Somerset County Planning Board Recommendations: Nineteen of the Somerset County’s 21 municipalities have adopted Housing Elements and Fair Share Plans in accordance with COAH’s third round rules. Six municipalities have been granted third round Substantive Certification from COAH to date. The County applauds these efforts, and the significant amount of resources, expertise and public involvement these plans represent. Municipalities are encouraged to continue to cooperate with COAH in achieving third round substantive certification. The provision of an adequate supply of affordable housing is vital to quality of life, economic vitality and community sustainability. The County Planning Board is very optimistic that much of the work already accomplished by its municipalities will remain valid, and encourages COAH to assist them in making the future required modifications/amendments to their adopted Plans in a timely, efficient and cost effective manner. The County Planning Board will continue to support our municipalities’ efforts to provide housing affordable housing opportunities for their residents and labor force. The key Court findings are included below, and will be discussed further at the Planning Chair’s Forum to be held **Tuesday, November 9, 2010** at 7:45 A.M. in the first floor conference room of the County’s 40 North Bridge Street facility.

1. **Comments regarding proposed Bill S-1:** Although the proposed bill would abolish COAH, “the bill would preserve the effectiveness, at least on a temporary basis, of the rules and regulations adopted by COAH before its abolition, including the revised third round rules challenged in these appeals”. “Therefore, there is no reason to delay the issuance of this opinion pending possible

enactment of proposed legislation that could diminish the significance of, but would not moot, these appeals”. (A-5382-07T3, pp. 7)

2. **Invalidation of “Growth Share Methodology for allocating “Prospective Need”**: The Court concluded the Growth Share method can be valid only if COAH has data from which it can reasonably conclude that the allocation formula can result in satisfaction of “statewide need”, and “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” (pp. 19). The Court concluded that COAH must adopt revised third round rules for determining prospective need using a method similar to the previously approved first and second round methodology to prevent further delays.
3. **Court is bound by decisions of the Supreme Court**: The Court “recognizes that more than 27 years have elapsed since the Court’s decision in Mount Laurel II. It may be that the time has arrived for reconsideration of the part of Mount Laurel II that appears to militate against the use of any growth share methodology for determining a municipality’s affordable housing obligations. However, this Court has no authority to undertake such reconsideration; we are bound by the decisions of our Supreme Court” (pp. 29).
4. **Invalidation of the use of third round “Statewide and Regional Prospective Need**: The Court concluded that there must be a new determination, made by COAH, of overall statewide and regional prospective need based on a methodology similar to the methodologies used in the first and second round rules using up-to-date data. The prior calculation cannot be used because it is integral to the growth share method and the data utilized was also determined to be unreliable for various reasons.
5. **Invalidation of rule that allows the location and funding source of municipally-sponsored affordable housing projects to be unspecified in certified plans**: the Court found COAH’s justification is dependent upon the “growth share” methodology for determining prospective need, which has been deemed invalid. The Court observed this provision is designed to limit municipal expenditure (pp.33). The Court requires COAH to either eliminate or modify those parts of the third round rules in conformity with this opinion (pp. 71).
6. **Invalidation of parts of the revised third round rules that do not provide sufficient incentives for developers to construct inclusionary development**: The Court has determined that the inclusion in the third round rules of presumptive minimum gross densities and presumptive maximum set-asides that do not appear to create a realistic opportunity for the construction of affordable housing in most circumstances, and consequently would require frequent resort to a waiver procedure, do not provide such workable “bright line standards”(pp. 41). Therefore, the Court concluded the revised third round rule incentives are invalid. The Court cited today’s unfavorable economic climate, and noted the Massachusetts model is not comparable to NJ because it requires units to only be affordable to moderate, not low income households although incentives vary by “planning area”. The Court requires COAH to either eliminate or modify this part of the third round rules in conformity with this opinion (pp. 71).

7. **Invalidation of Rental Bonus Credits for “Prior Round” obligations:** The revised third round rule amendments adopted in October 2008 eliminated the requirement that an affordable rental unit must have actually been created within the substantive certification period for a municipality to be entitled to a rental bonus. The Court decided municipalities should not get bonus credits for units that have not been constructed more than a decade after the expiration of the prior round periods. The Court requires COAH to either eliminate or modify this part of the third round rules in conformity with this opinion (pp. 71).
8. **Third round rule provisions authorizing Smart Growth and Redevelopment Bonus Credits upheld:** Bonus credits have been upheld by the Court in other circumstances. The purpose of these bonus credits are to encourage construction of affordable housing in areas designated as most desirable for development according to the State Plan and to encourage construction of affordable housing as part of any redevelopment plan. The Court emphasized that The Fair Housing Act directs COAH to give appropriate weight to implementation of the State Plan; therefore this part of the rules was deemed valid (pp. 48).
9. **Invalidation of Compliance Bonuses:** Since the prerequisite for the award of a bonus under this rule is not a form of development that promotes an important public policy, and compliant municipalities already receive “credits” for their efforts, the double credit for compliance was invalidated by the Court. The Court requires COAH to either eliminate or modify this part of the third round rules in conformity with this opinion (pp. 71).
10. **Third round determination of Prior Round Affordable Housing Obligations upheld:** COAH’s decision to impose the same prior round obligations it had established as the second round obligations in 1993 was deemed valid by the Court, because it did not provide for any increase for “greater than projected growth” during the second round or any reduction for filtering and secondary sources for which the use of “the most recent and reliable data available to the agency” would have been required (pp. 51). The Court also decided to extend deference to this matter to COAH as indicated by the Supreme Court with regard to determination of municipal obligations (pp. 53).
11. **COAH’s determination not to reallocate Present Need for affordable housing in urban municipalities to other municipalities upheld:** Despite the reassessment of the magnitude of present need, the Court affirmed the validity of the third round rules that does not reallocate any of that need. However, the Court does comment on the substantial amount of present need in urban municipalities and whether it is appropriate to assign any prospective need to urban municipalities.
12. **Argument that third round rules improperly require expenditure of municipal revenues to satisfy affordable housing obligations rejected:** The Court concluded that any incidental impacts of inclusionary housing developments upon municipal finances does not constitute a mandated expenditure of municipal revenues prohibited by the fair Housing Act. The use of other mechanisms for addressing affordable housing obligations involving municipal expenditures, such as municipally sponsored projects, is voluntary. Furthermore, municipalities can seek adjustments on the basis of lack of infrastructure (pp. 60).

13. **Arguments that the third round rules were not adopted in conformity with Administrative Procedure Act rejected:** the Court determined that COAH's socio-economic statement accompanying the proposed revised third round rules satisfied the notice purpose of the Act (pp. 66).
14. **Argument regarding definition of "Prior Round Obligation" rejected:** The argument by the 20 Town Coalition was found to be too abstract and hypothetical by the Court.
15. **Egg Harbor's challenge to the validity of interpretation of the "1,000 Unit Cap" on affordable housing obligations:** The Court decided the validity of this aspect of the rule is not ripe for determination at this time.
16. **Credits for Publically-Financed Affordable Housing Projects:** The Court suggested that COAH clarify this policy during the course of the remand ordered by this opinion (pp. 69).
17. **Requests for relief in pending Law Division actions rejected:** The Court acknowledges that several appellants seek relief that goes beyond a determination of the validity of the revised third round rules and this relief should be sought in the pending Law Division actions.
18. **Request to divest COAH of responsibility for adopting third round rules and to appoint a master rejected:** The Court determined there is no basis to conclude that COAH failed to make a good faith effort to adopt third round rules in conformity with the prior court opinion. Furthermore, the mandate for this opinion for COAH's adoption of new revised third round rules is to determine prospective need by means of a methodology similar to the methodologies used in the prior round rules within 5 months, without the assistance of a master or army of outside consultants (pp. 70).