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The Applicability of Amended Development Fee Ordinances under the Council on Affordable Housing's Third Round Regulations

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The Council on Affordable Housing ("COAH") issued its Third Round Regulations, N.J.A.C. 5:94, et seq. (the "Third Round Regulations") on December 20, 2004. The Third Round Regulations provide municipalities with a broad range of options for addressing the constitutionally-mandated fair housing obligation. Due to the broad discretion afforded to municipalities, many developers face substantial uncertainty about how the Third Round Regulations affect both existing and proposed projects. You may have already experienced a town's attempt to impose the Third Round Rules on previously approved projects. While the Third Round Regulations raise a host of issues for developers, this letter is intended to provide guidance on one specific issue: whether the Third Round Regulations authorize a municipality to collect additional development fees on approved projects based on amended development fee ordinances.

1. Background to Development Fees.

COAH's regulations authorize a municipality to enact a "development fee" ordinance to provide funding for the municipality's affordable housing obligation. The regulations establish the following procedures:

- **Prerequisites:** A municipality may not impose or collect development fees until it has petitioned COAH for certification and COAH has approved the development fee ordinance or issued a judgment of compliance. Prior to enforcing a development fee ordinance, a municipality must submit the proposed ordinance to COAH for review and approval.

- **Amendment to a previously-approved development fee ordinance:** The Third Round Regulations indicate that if a municipality has received certification under the Second Round Regulations and approval of a related development fee ordinance, it may amend its ordinance by resolution and without additional COAH approval.

- **How the amount is calculated:** The regulations calculate the development fees based upon a percentage of either (1) the equalized assessed value for the residential development, (2) the coverage amount of the homeowner warranty document of a for sale unit, or (3) the appraised value on the document utilized for construction financing for a rental unit, provided no increased density is permitted.

- **Prior cap on development fees:** Under the old regulations, N.J.A.C. 5:93-8.10, residential development fees were capped at a maximum of one half (.5%) of one percent of the calculated amount discussed above.

- **New cap on development fees:** Under N.J.A.C. 5:94-6.6, the new regulations addressing development fees increase the capped amount to one (1%) percent. Accordingly, residential developers could be subjected to an additional one-half (.5%) of one percent increase in development fees despite the fact that a project has received land use approvals, provided, however that the fee can be up to six (6%) percent when a use variance is obtained to permit increased density.

2. The Third Round Rules/Development Fees.

With the Third Round Rules, developers may be confronted with a conflict between the express provisions of Municipal Land Use Law ("MLUL") and COAH's policies and procedures. While the MLUL provides protection from ordinance changes for projects that have received preliminary and/or final approval, it is not yet clear whether approvals protect residential developers from a proposed increase from amended development fee ordinances enacted pursuant to the Third Round Regulations. No court has issued an opinion on this issue and COAH's current position is not consistent with the protection presumably afforded under the MLUL for approved developments.

For preliminary approval under the MLUL, Section 40:55D-49, the statute provides that "the general terms and conditions on which preliminary approval was granted shall not be changed, including but not limited to use requirements; layout and design standards for streets, curbs and sidewalks, lot size, yard dimensions and off-tract improvements; and, in the case of a site plan, any requirements peculiar to site plan approval pursuant to Subsection 29.3 of this Act." The statute indicates, however, that the protections shall not prevent a municipality from modifying by ordinance such general terms and conditions of preliminary approval as they relate to public health and safety. The protections granted by final approval do not contain the "public health and safety" exclusion. The statute states that, "the zoning requirements applicable to the preliminary approval first granted and all other rights conferred upon the developer . . . whether conditionally or otherwise, shall not be changed for a period of two (2) years after the date of final approval."

As noted, the Third Round Regulations permit a town to collect up to one (1%) percent of the equalized assessed value and in many instances will increase the town's affordable housing obligations. As a result, we have experienced certain town's taking an aggressive position on the development fee issue requiring the one (1%) percent fee on all projects. Accordingly, the issue is whether a municipality may legally impose upon developments that have valid preliminary and/or final approvals with existing periods of protection, the one (1%) percent allowed under COAH's new regulations or the one-half of one (.5%) percent under the old regulations. This firm's analysis of the issue indicates that the answer to this question is fact specific and should be addressed on a case-by-case basis.

As of March 2006, COAH's position on this issue appears to be as follows:

- If the resolution of approval or related approval documents indicate a specific percentage for the development fee, a municipality may not impose an additional fee pursuant to an amended development fee ordinance.

- If the resolution of approval contains general language - .e.g. an omnibus clause requiring a developer to comply with all ordinance requirements – the municipality may impose the additional fee pursuant to an amended development fee ordinance.

- If the resolution of approval contains general language, but the developer has paid some of the required development fees under the old ordinance (generally on receipt of building permits), the developer should be protected from an increased fee imposed by the amended ordinance.

It is important to note that COAH's position stated above is not memorialized in any rule or regulation and may in fact be inconsistent with the Third Round Regulations. The Third Round Regulations, and some of the newly-amended development fee ordinances, discuss protection for projects that have already received preliminary or final approval. N.J.A.C. 5:94-6.8 titled "Eligible Exactions, Ineligible Exactions and Exemptions" states, "developments that have received preliminary or final approval prior to the imposition of a municipal development fee **shall be exempt from development fees unless the developer seeks a substantial change in the approval.**" Some of the amended development fee ordinances we have reviewed mirror this language and suggest that municipalities may not impose the additional one-half of one (.5%) percent as authorized by the Third Round Regulations. We believe, at the very least, the language of the regulations and the protections afforded under the MLUL provide a strong basis for a challenge in the event a town seeks to impose the higher fee for projects approved prior to the town's adoption of the new development ordinance, provided that the period of protection for those projects remain unexpired.

Given the uncertainty of the law on this issue and the inconsistent position towns have taken on this issue, various steps should be taken to preserve your rights for pre-existing projects. Please feel free to contact us if you have any projects that may be subject to an increased development fee and we will work with you to best protect your interests.