

Legal & Legislative Update

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COAH RULEMAKING

COAH published revised draft third round rules on January 22, 2008. The public comment period expires on March 22, 2008 and SBACNJ encourages affected members to submit comments. The rules in their final form are expected to be adopted sometime in June of 2008.

Under the original third round rules, the third round cycle was calculated from 2004 to 2014, which was the period in which municipalities had to project their growth and provide affordable housing. The third round cycle has now been extended to 2018. Therefore, inevitably municipal growth share obligations will be higher as the period in which growth is counted is extended for an additional four years. Under the proposal, COAH rather than municipalities will project growth.

Several key proposed changes that could impact developers include: new growth share ratios of 1 affordable unit among 5 units (or 1 affordable unit for every 4 market rate units) and 1 affordable unit for every 16 jobs; affordable housing need calculated at 115,000, an increase from 52,000; the payment-in-lieu-of-construction amounts are set based upon housing regions, with an average of \$161,000 per affordable unit; Regional Contribution Agreement amounts increased from \$35,000 per unit to between \$67,000 and \$80,000 per unit (by COAH Region); municipalities are permitted to increase development fees for new construction from 1% of equalized assessed value (EAV) to 1 ½% of EAV for residential development and from 2% of EAV to 3% of EAV for non-residential development; the municipality must provide a compensatory benefit to developers that provide affordable housing or are required to provide affordable housing, including one additional market unit for every affordable unit constructed for residential development.

The proposal maintains bonus credits for rental units in excess of the municipal 25% obligation, with a reduced for age-restricted rentals. At least 50% of the rental obligation has to be family rentals. Bonus credits are granted for very-low-income units. The age-restricted cap was returned to 25% of the total obligation. In redevelopment areas, municipalities can claim credit for affordable units built as part of a redevelopment plan, but COAH will not give credit for affordable units built via a redevelopment plan if eminent domain is proposed.

For municipalities that previously submitted third round plans, towns currently under COAH's jurisdiction would be required to submit revised third round plans between four and seven months after the effective date of the regulations, based on county.

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MOUNT LAUREL ACTIONS

Oceanport Holding LLC v. Oceanport

This case involved a proposed affordable housing development at an existing marina site. The application required a zoning change. Oceanport Holding notified the Planning Board that it would submit an application for site plan approval if the property were rezoned, but the Board recommended against the rezoning.

Plaintiff filed suit seeking a declaration that Oceanport's ordinance was invalid because it failed to provide for the municipality's fair share of affordable housing and a "builder's remedy". The trial court dismissed the complaint on the grounds that plaintiff failed to negotiate in good faith with the municipality to obtain rezoning prior to filing suit.

The Appellate Division reversed holding that the requirement under Mount Laurel to attempt to obtain relief without litigation "is relevant only to a developer's entitlement to a builder's remedy." It is not a precondition to a Mount Laurel action. Since the trial court dismissed the Mount Laurel action on the factual issue of whether the plaintiff negotiated prior to bringing suit, the dismissal was premature. The factual issue of good faith negotiations should have been deferred until the remedy stage after the constitutional question of the Mount Laurel action was decided. It is during the remedy stage that entitlement to a builder's remedy should be considered.

The decision confirms the ability of a plaintiff-developer "to pursue an action simply to vindicate the Mount Laurel right without seeking a builder's remedy" and to prosecute a Mount Laurel claim even where it is unable to satisfy the requirements for a builder's remedy.

PUBLIC ACCESS RULES

On December 17, 2007, DEP adopted amendments to its Coastal Public Access Rules. The rule requires coastal developments provide onsite, permanent, unobstructed public access to tidal waters and their shores, including visual and physical access. Perpendicular access and linear access must be provided in most cases. The rule requires single family homes and duplexes to provide public access adjacent to the Atlantic Ocean, Sandy Hook and Raritan or Delaware Bay if the site includes a beach or if beach and dune maintenance is proposed. Certain deed restriction requirements are also applicable. DEP simultaneously published notice of amendments to the newly-adopted Public Access rule that would allow for modification of linear public access along tidal waters at marinas, super highways and for homeland security, and that would modify parking mitigation requirements for public roadways. The written comment period is set to close February 15, 2008.

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