

# New Jersey Law Journal

VOL. CLXXXVIII- NO.6 – INDEX 465

MAY 7, 2007

ESTABLISHED 1878

## Local Government & *Public Finance Law*

### Waiting Game

**Fair housing decision creates uncertainty in the short run for municipalities and developers**

**By Michael A. Pane Jr.  
and Craig M. Gianetti**

**I**t was rumored earlier this year that Britney Spears, in response to her soon-to-be-ex's threat to have her tested for illegal drugs as part of a custody hearing, decided to shave her head to avoid such a test. It appears that an Appellate Division court has decided to do the same thing to the third round regulations of Council on Affordable Housing (COAH), leaving municipal officials, developers and those who represent them standing around waiting to see what grows back.

Since the *Mount Laurel I* and *II* decisions and the adoption of the Fair Housing Act, which created COAH, municipalities' affordable housing obligations have been broken down into

---

*Pane is an officer and shareholder with Giordano Halleran & Ciesla of Middletown. Gianetti is an associate in the firm's land use and development department.*

cycles, the first and second round affordable housing cycles having run from 1986 to 1999. The affordable housing obligation for municipalities were assigned by COAH based upon a complex formula. After considerable delay following the expiration of the second round, COAH adopted the third round COAH regulations, N.J.A.C. 5:94-1 et seq., which revamped the entire means of determining a municipality's affordable housing obligation.

The third round regulations broke down a municipality's affordable housing obligation into three components: a rehabilitation obligation; a prior round obligation; and growth share obligation. The rehabilitation obligation and prior round obligation were based upon the municipality's unmet second round obligation, updated pursuant to the 2000 census. The growth share obligation represented a substantial departure from the prior round cycles in that the new methodology permitted municipalities to calculate their own affordable housing obligation based upon its residential

and nonresidential growth from 2004 to 2014. It required municipalities to provide one affordable housing unit for every eight market rate units constructed between 2004 and 2014 and to provide one affordable housing unit for every 25 jobs created by nonresidential development.

On January 25 the Appellate Division published its decision on various challenges to the COAH third round regulations in *In re Adoption Of N.J.A.C. 5:94 and 5:95 By New Jersey Council On Affordable Housing*, 390 N.J. Super. 1 (App. Div. 2007). The Appellate Division invalidated the present growth share methodology used by COAH for determining the municipal prospective affordable housing obligations, as well as certain other provisions in the new regulations. The court has put a stay on all issues relating to substantive certification before COAH and on all builder's remedy suits against a municipality whose application for substantive certification is affected by the decision. Lastly, the court has directed COAH to adopt new regulations in conformance with the decision within six months of the decision.

In the decision, the court invalidated certain provisions of COAH's third round regulations aside from the growth-share methodology used to determine a municipality's affordable housing obligation, including the ability

of municipalities to adopt an ordinance that passed on to a developer the growth share obligation that a proposed residential or nonresidential development generates, known as "growth share ordinances" or "pass-through ordinances." These ordinances required that, either in a particular zone or throughout the entire township, every residential or nonresidential developer provide for the affordable housing obligation generated from its development. The developer would provide the affordable housing through on-site construction or off-site construction within the township, or by making a payment-in-lieu-of construction. The payment was to be negotiated between the municipality and the developer, though many municipalities had ordinances that set a fixed number per affordable unit.

The court reasoned that such ordinances are invalid as they obligate developer's to provide for affordable housing without providing a compensatory benefit, such as a density bonus. The court stated that such a provision, which would work to frustrate development and deter growth, was violative of the *Mount Laurel* doctrine.

It should be noted that the court invalidated the COAH regulation that permitted municipalities to adopt such growth share ordinances or pass-through ordinances; it did not analyze or invalidate any particular growth share ordinance. Many municipalities have such an ordinance in place in varying form. Therefore, until such a growth share ordinance is challenged and invalidated, the ordinance remains in effect.

To add to the confusion, the Appellate Division has recently issued a stay as to the invalidation of any municipal growth share ordinance in effect at the time of the decision and declared that any growth share ordinance should be tested on a case-by-case basis after COAH promulgates new rules. In addition, COAH petitioned the Supreme Court, challenging the portion of the decision that may be read as to require any growth share ordinance to provide some form of benefit to a developer that

is required to provide affordable housing.

This Appellate Division decision has left many open questions. The question being asked by many municipal officials and developers around the State of New Jersey is: "What do we do now?"

The temptation on the part of many elected local government officials, particularly those who campaigned on an "open space preservation" and "restrict new development" platform, as many do, will be to delay any approvals or issuance of any permits for as long as possible. This undoubtedly will occur in many municipalities and result in needless litigation. The growth share ordinances that have been adopted by many municipalities throughout the state may or may not be invalid based upon this Appellate Division decision; however, any such challenge cannot occur until after COAH promulgates new rules. Each municipality should review its ordinances in light of this decision to determine if immediate changes should be made, with the understanding that additional changes may be needed depending upon the new regulations produced by COAH, as well as the result of additional pending appeals. Drastic changes may not be required, depending upon the existing text of the ordinance. Further, municipalities have to decide how they are going to enforce their growth share ordinances — which, based upon the Appellate Division decision would probably be invalid — while COAH drafts and prepares new rules.

The questions facing developers will depend upon where in the approval they are. Any pending subdivision application is going to be subject to the present growth share ordinance or any change in the ordinance prior to approval under *Manalapan Realty, L.P. v. Township Committee of Tp. of Manalapan*, 140 N.J. 366 (1995). Some developers may decide to wait until the new COAH rules are adopted as, pursuant to the Appellate Division decision, the developer is entitled to some form of benefit for providing affordable housing. However, the delay could be indefinite depending on

what COAH adopts or the result of COAH's appeal to the Supreme Court.

Pending applications may proceed forward and result in approvals that are conditioned upon factors that may not be readily determined at the time of a memorializing resolution. Specifically, the condition of approval might impose a condition of construction of onsite units in accordance with the obligation of the municipality without specifying the number of units, or upon a contribution in accordance with whatever ordinance is applicable at the time building permits and/or certificates of occupancy are obtained. In any such case of a pending application, the developer and the municipality should work together to determine a balanced solution given the current circumstances.

The question that will face more developers is the situation that a developer has final approval for a residential development in which the developer was obligated to provide for the affordable housing obligation generated from the development pursuant to a growth share ordinance. Presuming that the 45-day appeal period under R. 4:69-6 of the final approval has expired, a developer would be precluded from appealing its own approval, even if it wanted to do so. Of course, every situation should be handled on a case-by-case basis, depending upon the history of the project, the relationship between the developer and municipal officials as well as financial and political considerations. There are two particular scenarios that may occur: 1) the developer proposed a residential development and had to set aside a certain number of affordable units based upon the growth share methodology (one affordable unit for every eight market-rate units); or 2) the developer proposed a residential or nonresidential development and made a payment-in-lieu-of construction for the affordable housing obligation generated from its development (one affordable unit for every eight market-rate units or 25 jobs created from nonresidential development).

The first scenario is where the developer has final approval for a residential

development that has a certain number of affordable units set aside based upon a growth share ordinance. For instance, the developer proposed a residential development consisting of 45 units, of which five had to be deed restricted for affordable housing. Even if the developer has not filed an appeal of its approval or the ordinance adoption within the 45-day appeal period, the developer may still challenge the growth share ordinance after COAH adopts new rules based upon a constitutional challenge, so that the court should still permit the appeal as it would technically involved a constitutional question: it violates the *Mount Laurel* doctrine and New Jersey Constitution. Courts may permit the extension of the appeal period when the challenge involves a constitutional issue. *Cohen v. Thoft*, 318 N.J. Super. 338 (App. Div. 2004).

A late challenge could also be mounted in the second scenario where the developer has final approval and made (or is required to make) a payment-in-lieu-of construction for the affordable housing obligation generated from its development. In the event such a suit is successful, the developer would be entitled to a partial refund or relieved of some of the obligation to pay. However, the developer should wait for COAH to adopt the new rules, thereby obtaining a more accurate picture of the

number of affordable units to be provided for the project. Also, prior to the Appellate Division decision, COAH has promulgated draft rules that provide standards for determining the amount of a payment-in-lieu, which presently does not exist.

Another path the developer could follow would be to file an application for an amended site plan or subdivision approval after COAH adopts the new rules. In the first scenario, the application could be only to change the number of affordable units provided or increase the number of market rate units, depending upon the substance of the new COAH rules. In the second scenario, the application would be to relieve the applicant from making the contribution if specified in the resolution or change the amount of the contribution. Such an application in either scenario should serve to preserve a developer's rights, and also serve as a method of opening dialogue with the municipality to negotiate a resolution to the matter.

If the developer is not progressing with the municipality in resolving this matter, the developer should force the municipal board to vote on the application for the amended approval; if approval is denied, the developer could then take an appeal. This course of action may provide the developer some leverage in negotiations because the

developer is able to have the municipality's growth share ordinance challenged in court. It also provides the developer latitude in that it may be able to still proceed with its site plan or subdivision approval as the original approval is still valid. The result from the appeal of the denial may not change the layout or design of the site (depending upon the nature of the amended application); therefore, the developer could proceed with site work and development under the final approval while the amended approval is in litigation, even if municipal officials prove to be difficult to work with while proceeding with construction pursuant to the original approval.

What is important at this juncture is that municipal officials must recognize that there will be a retreat in some areas covered by the third round regulations, the likely result of which will be somewhat advantageous to developers. The unfortunate side effect of this decision is that it creates a tremendous amount of uncertainty in the short run for both municipal officials and developers. Hopefully, after six months of rehab, it will be a condition that COAH can help cure. In the mean time, it will take some creative cooperation between municipal officials and developers to bridge the gap. ■