

## REAL ESTATE

# ALERT

## NJ SUPREME COURT INVALIDATES COAH'S AFFORDABLE HOUSING GROWTH SHARE METHODOLOGY

By: Henry Kent-Smith

In a 3-2 decision, the New Jersey Supreme Court reaffirmed the fundamental principles of the *Mount Laurel* Doctrine in a narrowly constructed opinion grounded on its interpretation of the Fair Housing Act. N.J.S.A 52:27D-301 *et seq.* The Court upheld Judge Stephen Skillman's Appellate Division opinion *In Re: Adoption of N.J.A.C. 5:96 and 5:97*, 416 N.J. Super. 462 on the narrowest grounds possible. The Court held that the Fair Housing Act (Act) did not authorize the Council on Affordable Housing (COAH) to deviate from the Act's requirements for determining and allocating municipal affordable housing obligations on a regional basis pursuant to N.J.S.A. 52:27D-301 *et seq.*

Under COAH's third round formula, statewide affordable housing was calculated on a statewide basis. This statewide need projection was then allocated to each municipality. The Supreme Court found this allocation methodology violated the Fair Housing Act's focus on the calculation and allocation of **regional affordable housing need**.

As important, the Supreme Court upheld the Appellate Division remedy requiring that COAH recalculate municipal affordable housing obligations based upon the prior round methodology used to for the 1987-1993 first round and the 1994-1999 second round.

### So What Happens Now?

The Court's decision affirms Judge Skillman's remedy and requires COAH to recalculate third round municipal obligations based upon the prior round

methodology. COAH must also adopt procedural and substantive rules. These new rules will define how the third round obligation may be satisfied, what credits may be taken, what bonuses may be awarded and how each municipality is to prepare its housing element and fair share plan. COAH must complete and adopt these new rules within five months of the date of the Court's Order, or by the end of February 2014. It will be interesting to see whether COAH reconstitutes itself and undertakes this task, since COAH has only met once in the last two and a half years.

### Will the Legislature Respond?

The other open question is whether the legislature accepts the Court's invitation to modify the Fair Housing Act in order to permit some form of growth share. The Supreme Court opinion observes that a comprehensive amendment to the Fair Housing Act is a necessary precondition to adoption of a growth share formula.

However, what is problematic in this holding is properly identified by Justice Helen Hoens in her dissent. By leaving complete discretion to the Legislature as to modification to the Fair Housing Act, relative to the allocation of affordable housing need, there is no "constitutional backstop" by which the Legislature's authority is restrained by the requirements of the constitutional obligation. Therefore, the likely outcome of this decision will be years of more litigation, if the Legislature enacts amendments to the Fair Housing Act, or the maintenance of the prior round formula for this third round cycle.

For more questions or more information, please contact Henry L. Kent-Smith at 609.896.4584 or hkent-smith@foxrothschild.com, or any member of the Real Estate Practice.



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