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## NJ SUPREME COURT VACATES COAH ORDER

By Henry L. Kent-Smith and Thomas D. McCloskey

One week following the Appellate Division's Order mandating that the Council on Affordable Housing (COAH) undertake immediate action to implement the state Supreme Court's prior directive that COAH adopt new regulations within five months from September 26, 2013 ([see our previous alert](#)), the Supreme Court overruled the Appellate Division.

The Supreme Court has now required that COAH adopt proposed regulations for publication no later than May 1, 2014. The court has directed that COAH's proposed regulations be published in the *New Jersey Register* on June 2, 2014. The comment period on those regulations will last 60 days, to August 1, 2014. During the period of public comment, a party may request that COAH conduct a public hearing on the proposed regulations during the comment period. Regardless of the hearing, COAH is to formally adopt its new Third Round Rules on or before October 22, 2014, for publication in the *New Jersey Register* on November 17, 2014. The adopted Third Round Rules transmitted to the Office of Administrative Law (OAL) shall be accompanied by a report prepared by COAH that recites, addresses and summarizes how COAH responded to all comments made during the comment period in accordance with the Administrative Procedure Act.

In the event that COAH fails to meet the November 17, 2014, deadline, "then this Court will entertain applications for relief in the form of a motion in aid of litigant's rights, including but not

limited to a request to lift the protection provided to municipalities through N.J.S.A. 52:27D-313 and, if such a request is granted, actions may be commenced on a case-by-case basis before the Law Division or in the form of 'builders remedy' challenges." The Supreme Court directed that it would retain jurisdiction for the sole purpose of entertaining any and all future applications to enforce the scheduling order entered by the Court on March 14.

The Supreme Court has now provided COAH with a new eight-month time frame within which to adopt conforming regulations, notwithstanding the court's unambiguous September 26, 2013, Order directing COAH to adopt new regulations within five months from the date of that Order (i.e., February 26, 2014). This extension of time was based on a last-minute request made by the Attorney General's Office on behalf of COAH for an extension, based on the DCA Commissioner's statement that COAH is examining the census data and working on new numbers, when the prior round regulations and formula already exist. See N.J.A.C.5:91 and 5:92.

It appears the Supreme Court has abandoned fundamental concepts of stare decisis and prior precedents established in *Mount Laurel I*, *Mount Laurel II* and *Hills Development*. By this decision, the Supreme Court has diminished hope that New Jersey citizens will see the creation of affordable housing in New Jersey in any foreseeable future. Instead, the court's Order sanctions the ongoing municipal practice

of exclusionary zoning, which consumes ever-diminishing land assets and limited infrastructure, limiting affordable housing opportunity in New Jersey.

One last issue: COAH has never been fully reconstituted to its full complement of required stakeholder members since the Appellate Division invalidated the governor's prior attempt to abolish COAH by the governor's 2011 Reorganization Plan. ([see our prior article on this topic](#)). Therefore, a stripped-down COAH Board, without representatives

of the protected class and builders, will be adopting the new Third Round regulations.

If you would like more information regarding the Supreme Court's action and New Jersey's affordable housing laws, please contact Henry Kent-Smith at 609.896.4584 or [hkent-smith@foxrothschild.com](mailto:hkent-smith@foxrothschild.com), Thomas D. McCloskey at 609.896.4578 or [tmccloskey@foxrothschild.com](mailto:tmccloskey@foxrothschild.com) or any member of the firm's Real Estate Practice.



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