



## Recent Developments in New Jersey Affordable Housing

This memo is intended to bring our clients and interested parties up to date on the latest administrative, legislative and judicial developments in the area of affordable housing. This is a dynamic time in Trenton with significant changes being considered in the way Mount Laurel doctrine is interpreted and administered.

### **EXECUTIVE ORDER NO. 12**

On February 9, 2010 Governor Chris Christie signed Executive Order No. 12. This Order established a 5 member Housing Opportunity Task Force which is charged with reviewing the effectiveness of the Fair Housing Act, the Council on Affordable Housing ("COAH") and COAH's regulatory structure in meeting the constitutional obligations under the Mount Laurel doctrine. The Task Force is to be chaired by Marcia Karrow, former Hunterdon County Freeholder and former State Senator (R – 23rd District).

The Executive Order directs the Task Force to consider a wide range of issues including how to determine whether a municipality should have any further affordable housing obligation, whether prior round or retroactive growth are appropriate as part of a fair share methodology, whether COAH's 6 region configuration remains appropriate, how to incorporate "workforce" housing (typically considered housing affordable to those earning 80% to 120% of the regional median income) into the affordable housing concept, and how to incorporate the divergent State projections for housing and employment growth into a methodology considering also the need for open space preservation and environmental protection.

The Task Force report is due within 90 days, or by May 10, 2010. During that time period the Governor has ordered COAH to refrain from continuing to process applications for substantive certification or from otherwise implementing the Third Round rules. This restraint can be lifted at the request of an applicant providing that Acting DCA Commissioner Lori Grifa determines that COAH action is needed to prevent the loss of an affordable housing opportunity.

The Order does not mention municipalities which are under the Superior Court's (rather than COAH's) jurisdiction. Court municipalities should consult legal counsel about their options. The Fair Share Housing Center of Cherry Hill filed a lawsuit in the Appellate Division of the Superior Court immediately after the issuance of the Executive Order challenging the Governor's authority to suspend COAH's operations. A copy of Governor Christie's Executive Order No. 12 may be accessed at the following link:

<http://www.state.nj.us/infobank/circular/eocc12.pdf>

### **NEW JERSEY SENATE BILL NO. 1**

The first bill filed in the State Senate during the legislative session which began last month would provide far-reaching changes for the state's affordable housing laws. Known as Senate No. 1 or "S-1", it is sponsored by Senator Ray Lesniak (D-20 District).

S-1 would abolish the Council on Affordable Housing and completely restructure the State's affordable housing operation. Rather than having a state agency calculate and allocate housing needs to regions and municipalities as was the case under

COAH, the bill would allow each municipality to determine whether it is in compliance with the Mount Laurel doctrine. If so, the municipality would set forth that determination in the Housing Element of its Master Plan.

Those municipalities which do not assert compliance would be required to adopt an inclusionary zoning ordinance. This inclusionary ordinance would require developers to set aside 20 percent of the units in a residential development for low, moderate and workforce housing. These inclusionary ordinances are required to provide indirect economic incentives to make development economically feasible. If a municipality adopts neither the compliance declaration nor the inclusionary zoning ordinance it would leave itself open to an application by an inclusionary developer for a “d” variance under the Municipal Land Use Law in which the application would enjoy “inherently beneficial use” status.

S-1 would transfer any remaining authority of COAH to the State Planning Commission and would require that the State Development and Redevelopment Plan be readopted every 6 years. It would also permit certain Regional Contribution Agreements (“RCA’s”) negotiated prior to the enactment of the Roberts Bill in July of 2008 to be reviewed and approved by the Commission.

The Senate Economic Growth Committee has conducted two hearings on S-1 thus far and Senator Lesniak has indicated his intention to have it voted out of committee, with amendments on March 8, 2010.

The form of S-1 as it was introduced on January 19, 2010 is attached to this email and can be accessed at [http://www.njleg.state.nj.us/2010/Bills/S0500/1\\_11.PDF](http://www.njleg.state.nj.us/2010/Bills/S0500/1_11.PDF)

### THE APPELLATE DIVISION CHALLENGES

On December 4, 2009 an Appellate panel of the Superior Court conducted a hearing on challenges filed by 24 different parties to COAH’s third round

rules. The plaintiffs included the NJ State League of Municipalities, other individual municipalities and groups of municipalities, the Fair Share Housing Center, the NJ Builders Association, and the NJ Chapter of the National Association of Industrial and Office Parks, among others.

During the course of oral argument Judge Stephen Skillman, who presided over the panel, indicated that a decision would likely take longer than 90 days for the Court to release. It is not clear whether the Governor’s Executive Order and the legislative activity cited above will have any impact on the timing or substance of the Appellate Court decision.

### CONCLUSION

As is evident from this report, the way that New Jersey deals with affordable housing is likely to change, perhaps significantly in the coming months. This change may be prompted by administrative, legislative or judicial action or a combination of all three. While it is not possible to predict the outcome at this point, all of the initiatives appear to start from an acknowledgement that the Mount Laurel doctrine is a constitutional obligation which must be addressed. While the recession has made it more difficult to provide affordable housing it has also made the need for such housing more apparent. Hopefully a simpler, less expensive and more effective approach will emerge which can attract widespread support from the many constituencies which have interest in affordable housing.

We will continue to keep you updated on any significant developments on this issue.