



New Jersey Supreme Court Invalidates COAH's Third Round Rules

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Today, a divided Supreme Court of New Jersey invalidated the affordable housing rules adopted by the Council on Affordable Housing ("COAH") in the case entitled In re Adoption of N.J.A.C. 5:94 and 5:95. The matter came before the Court by petition of COAH for review of the October 8, 2010 decision of the Appellate Division of the New Jersey Superior Court, rejecting a significant portion of COAH's revised affordable housing regulations (the "third round rules") as being inconsistent with the Fair Housing Act ("FHA"), L. 1985, C. 222. The Appellate Division required remand of the third round rules to COAH for redrafting within five months.

The COAH third round rules were designed to establish the responsibilities of municipalities to provide affordable housing during the period from 1999 to 2018. The third round rules adopted a number of significant changes in the methodologies that had been used during the first and second round rules. In particular, COAH proposed a "Growth Share" methodology for assessing prospective need in allocating a municipality's fair share of the region's need for affordable housing. The Appellate Division invalidated COAH's Growth Share methodology. The Supreme Court reviewed the Appellate Division's decision and the majority held that the third round rules are at odds with the FHA and S. Burlington Cnty. NAACP v. Twp. of Mount Laurel, 92 N.J. 158 (1983) ("Mount Laurel II").

Since the FHA is the current framework controlling COAH's regulatory authority, the Court majority found the third round rules to be ultra vires. Specifically, the Court found that the FHA tracks the Mount Laurel II allocation methodology for satisfaction of present and prospective need based on housing region, not obligations formed on a statewide basis. The Court determined that the third round rules were contrary to the policy adopted by the Legislature in the FHA. The Court concluded that COAH is not free to ignore legislative choice through the adoption of the Growth Share methodology. The Court found that the Growth share methodology was so intertwined with the third round rules that that the entire third round rule had to be invalidated. The Court gave COAH five months to adopt new regulations that are consistent with the FHA and the first and second round rules.



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The Court decision recognizes that many decades have passed since Mount Laurel II, resulting in changed circumstances that may provide reasonable bases for considering alternative approaches to the promotion of affordable housing development. The Court clarifies that the judicial remedy is distinct from the constitutional obligation to provide a reasonable opportunity for affordable housing. Therefore, the Legislature could consider alternative remedies that account for the current circumstances and amend the FHA.

The dissent agreed that the Mount Laurel II judicial remedy is not the only constitutionally permissible method for providing affordable housing. However, the dissent expressed the view that the Growth Share methodology is consistent with both Mount Laurel II and the FHA and would have affirmed the third round rules.

For many municipalities, the adoption of rules comparable to the rules for the first two rounds will result in a different affordable housing obligation than existed under the invalidated third round rules. As a result, the Court's decision raises significant questions with regard to the plan of any municipality which received COAH certification under the third round rules. If you are proceeding with residential development in a municipality that received third round certification or if you want to discuss the likely impact of the decision on other municipalities, please contact us to discuss the particular facts related to your proposed development.

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