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Contribution or Taking?

COAH's affordable housing mandates may be unconstitutional

On January 25, the Appellate Division invalidated some, but not all, of the Council on Affordable Housing's Round Three regulations, N.J.A.C. 5:94. *In re Adoption of N.J.A.C. 5:94*, 390 N.J. Super. 1 (App. Div. 2007). The court held that COAH's regulations cannot permit municipalities to shift the burden of providing new affordable housing units onto the development community without providing any corresponding benefits, most commonly density bonuses. *In re N.J.A.C. 5:94* held that such a regulatory scheme violates the *Mount Laurel* doctrine because there was no assurance that such a scheme created a "realistic opportunity" for the development of affordable units. *In re N.J.A.C. 5:94* gave COAH six months to adopt new regulations.

The Appellate Division did not address the more difficult question of whether this regulatory scheme is an unconstitutional regulatory taking. This issue is likely to come right back to the courts. At a March 6, 2007, conference, Susan Bass Levin, the Commissioner of the New Jersey Department of Community Affairs declared that devel-

opers are not required to be given benefits in exchange for providing affordable housing. Apparently, COAH intends to re-adopt a similar regulatory scheme and simply supplement the record to support COAH's assertion that affordable housing mandates without benefits still creates a "realistic opportunity" for the development of affordable housing.

It's already 2007. We are halfway through the Round Three housing cycle, 2000 through 2014, and we still don't have a constitutional regulatory scheme in place. It would be a disservice to New Jersey's low- and moderate-income households if two years from now New Jersey still does not have a constitutional affordable housing regulatory scheme because COAH's re-adopted Round Three regulations were held to be unconstitutional as a regulatory taking.

There is a lack of government money to directly subsidize the construction of affordable housing. Providing affordable housing has largely been accomplished through the New Jersey Supreme Court's enforcement of the New Jersey Constitution, which has its origins in *Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel*, 67 N.J. 151 (1975) and 92 N.J. 158 (1983) ("*Mount Laurel II*"). In *Mount Laurel II*, the New Jersey Supreme Court held that municipalities have an obligation to create a realistic opportunity for the development of safe,

decent housing for their existing indigent poor in substandard housing and their fair share of the region's present and prospective need.

Mount Laurel II never explicitly decided whether a municipality was required to give density bonuses or other corresponding benefits in exchange for a mandatory set aside, but, as implemented by the lower courts, developers were given benefits. See e.g. *Allan-Deane Corp. v. Township of Bedminster*, 205 N.J. Super. 87 (Law Div. 1985).

In 1985, the New Jersey Legislature adopted the Fair Housing Act, N.J.S.A. 52:27D-301, et seq., and created COAH, which was tasked with developing regulations to govern municipal compliance with the *Mount Laurel* doctrine. In practice, COAH essentially required a benefit to be given to a developer in exchange for providing affordable housing. Its Round Two regulations provided for minimum presumptive densities of 6 units to the acre for sales projects with 20 percent of the total units being set aside for affordable housing units, and 10 units to the acre for rental projects with a 15 percent set aside. These presumptive minimums virtually assured that developers would be given an incentive to provide affordable housing for the suburban communities where these *Mount Laurel* issues were mostly contested.

The issue of affordable housing contributions without corresponding benefits was raised in *Holmdel Builders Ass'n v. Township of Holmdel*, 121 N.J. 550 (1990), which held that the Fair Housing Act authorizes COAH to adopt

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regulations permitting municipalities to impose fees on developers to be used for affordable housing purposes. Rather than decide whether a municipality must provide benefits to a developer in order to collect the fee, the *Holmdel* court punted to COAH, which was to create such a regulatory scheme.

In response to *Holmdel*, COAH adopted regulations regarding development fees. Under Rounds One and Two, N.J.A.C. 5:92 and N.J.A.C. 5:93, these fees were 1 percent of the equalized assessed valuation for a nonresidential project and 0.5 percent of the equalized assessed valuation for residential. When COAH adopted the Round Three regulations in December 2004, COAH doubled the fees. A nonresidential developer would pay 2 percent of the equalized assessed valuation and a residential developer would pay 1 percent.

The value of the project could be determined by a standard other than the equalized assessed valuation, but, under any standard, no benefit was required to be given to the developer. If a benefit was granted to a developer, i.e., a density bonus or an increase in the floor area ratio, a municipality could charge 6 percent of the equalized assessed value for the benefit granted for both residential and nonresidential development.

This changed when COAH adopted its Round Three regulations, specifically N.J.A.C. 5:94-4.4, which authorized municipalities to require a much more significant contribution for affordable housing without providing any corresponding benefit. A developer may be required to construct one affordable unit for every 8 market rate units constructed or one affordable unit for every 25 jobs to be created through nonresidential development. Many municipalities attempted to satisfy their future affordable housing obligations by adopting so-called "growth share ordinances" which mimicked the COAH regulation.

In lieu of constructing the affordable housing units, a fee could be "negotiated" between the developer and the municipality. There was no minimum or maximum amount to the in-lieu fee. This regulation, N.J.A.C. 5:94-4.4(c), was invalidated in *In re N.J.A.C. 5:94*.

Even before *In re N.J.A.C. 5:94* was decided, COAH proposed new regulations regarding the amount of in-lieu fees. 39 N.J.R. 137(a) (Jan. 16, 2007). Under these proposed regulations, the amount of the in-lieu fee must be calculated in one of three ways: (1) COAH's default amounts for the housing region, which ranges from \$140,920 to \$171,041 per affordable unit; (2) the amount of buying down an existing market rate unit and making it affordable; and (3) any "alternative valuation methods" subject to COAH's approval.

By using the default option, the New Jersey chapter of the National Association of Industrial and Office Properties has estimated that an in lieu fee of \$160,088 per affordable unit will add \$19.21 per square foot to the cost of an office building. For a 250,000 square foot office building, that is a fee of approximately \$4.8 million.

This is much more than the fee permitted under the development fee regulations. Under a 2 percent development fee ordinance, that same 250,000 square foot office building will be required to pay \$1 million, assuming its equalized assessed value is \$200 per square foot.

Takings law generally permits extensive governmental regulation of land use, but there are limits. There is a regulatory taking: (1) if a regulation results in a physical invasion of real property, even a minor one; (2) if it denies all economical beneficial use of the property; or (3) if it fails the well-known *Penn Central* factors, which considers the economic impact of the regulation on the property owner, its interference with investment expectations and

the character of the regulation. See *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538 (2005).

While there could be an interesting analysis of COAH's regulations under the *Penn Central* factors, there is a fourth category of regulatory takings, which may more easily answer the question. A government may not impose "unconstitutional condition" on a developer. See *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994).

These cases have typically involved the situation where a municipality required a dedication of land as a condition of an approval being granted, but it fairly easy to characterize COAH's scheme of authorizing growth share ordinances as, in effect, the equivalent of a dedication of land. If a municipality required a developer to dedicate 11 percent of its property to the municipality, which would build affordable housing, it would squarely fit the *Dolan* fact pattern. Why would there be a different result merely because the municipality never acquires title to the property and requires the developer to build the affordable units instead.

Under *Dolan*, COAH's regulatory scheme must satisfy a two part inquiry: (1) is there is an essential nexus between the legitimate state interest and the condition; and (2) is there "rough proportionality" between the condition and the impact of the proposed development?

The first prong seems easily satisfied. However, the second question is much more difficult. While there may be a general linkage between new development and a need for affordable housing as discussed in *Holmdel*, it may be a difficult burden for COAH to establish that every eight market rate units or every 25 new jobs create a need for one affordable unit, even under the "rough proportionality" standard imposed in *Dolan*. ■