LAND USE ALERT
AUGUST 2008

HERRICK

New York Office
2 Park Avenue
New York, New York 10016
Phone: (212) 592-1400
Fax: (212) 592-1500

Princeton Office
210 Carnegie Center
Princeton, New Jersey 08540
Phone: (609) 452-3800
Fax: (609) 520-9095

Newark Office
One Gateway Center
Newark, New Jersey 07102
Phone: (973) 274-2000
Fax: (973) 274-2500

www.herrick.com

Statute Changes New Jersey Law on Affordable Housing; Rulemaking Still Needs to Catch Up

Developers take note: New Jersey's governing law on affordable housing has changed for the third time this year, and may be revised yet again.

Recent Amendments

New Jersey's Fair Housing Act now imposes an across-the-board 2.5% affordable-housing tax—called a "development fee"—on the value of all new non-residential projects statewide. The new law also eliminates regional contribution agreements, formerly a regulatory pressure-valve that had helped moderate the cost of building subsidized units.

The amended statute—P.L. 2008, Ch. 46, enacted July 17, 2008—conflicts with administrative rules of the Council on Affordable Housing (COAH), which it had just adopted in June 2008. Those rules, however, were so harshly criticized that when COAH adopted them, it simultaneously proposed revisions. The revised rules were to have been adopted this September, but since the amended statute invalidates many of them, COAH will have to amend and propose its rules yet again to be compliant.

Towns have until December 31, 2008, to adapt their ordinances to comply with the amended Fair Housing Act, but many have asked for extensions because of the confusion.

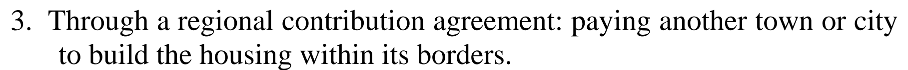
Background

In 1975, the New Jersey Supreme Court ruled that suburban towns must zone land so that a "fair share" of the region's low- and moderate-income housing is built within their borders. In 1983, the court reaffirmed this constitutional obligation, created powerful legal remedies, and asked the legislature to empower COAH to assign each town the exact number of "affordable" housing units it had to build.

Until now, there have been three main ways a town could meet its obligation:

1. Through an inclusionary project: designating land for development at higher densities than would otherwise be permitted, provided the builder donates some of the extra units as affordable.

2. Through municipal construction: building the housing itself, if the town doesn't want the extra density of the market-rate units in an inclusionary project.



3. Through a regional contribution agreement: paying another town or city to build the housing within its borders.

Legal Challenges

The June rules impose financial burdens on inclusionary projects. They make every project in the state an “inclusionary” project, whether or not the developer wants it to be, and remove the incentives that would fund the affordable units.

The new law attempts to address, but does not substantively change, the difficulties with inclusionary developments caused by the June rules. It repeals regional contribution agreements outright. It seeks to fund the only remaining option—municipal construction—with the 2.5% “fee.”

Two provisions of the new law may offer at least some flexibility: the statute empowers COAH to work with developers and towns “to ensure the economic feasibility of an inclusionary development,” and it permits some funding by tax credits of the “affordable” portion of an “inclusionary” project.

What You Should Do

With the law in such flux, a variety of negotiating strategies are open to builders, developers, and owners. Consult with counsel to form the best plan for you.

For more information on these or other land use law matters, please contact Anne Studholme at (973) 274-2538 or astudholme@herrick.com.

Copyright © 2008 Herrick, Feinstein LLP. Land Use Alert is published by Herrick, Feinstein LLP for information purposes only. Nothing contained herein is intended to serve as legal advice or counsel or as an opinion of the firm.

www.herrick.com