

COAH Round Three Regulations Summary

January 23, 2008

This summary is to provide information on recent developments in the law. This summary, however, should not be relied on for legal advice in any particular matter.

New Jersey municipalities may be able to impose new fees on new, non-residential development ranging from \$25.53 to \$32.00 per square foot for office space, \$15.50 to \$19.43 per square foot for retail space, \$13.68 to \$17.14 per square foot for warehouse space, and \$10.94 to \$13.71 per square foot for industrial space. In addition, New Jersey municipalities may be able to impose a fee ranging from \$32,423 to \$40,635 per market rate residential unit. Municipalities may be able to impose other requirements on developers and may be required to offer compensatory benefits to developers, which are not easy to quantify.

The funds raised by and other obligations imposed by the municipalities are to be used to provide for affordable housing as part of a statewide regulatory scheme administered by a state agency, the Council on Affordable Housing (“COAH”), as mandated by the New Jersey Supreme Court. In 2004, COAH adopted new affordable housing regulations, known as the original Round Three regulations, which governed the municipal affordable housing obligation from 2000 to 2014. In January 2007, the Appellate Division invalidated many of COAH’s original Round Three regulations, and, in response to that decision, COAH released new regulations on December 17, 2007, which will be formally proposed on January 22, 2008. These revised Round Three regulations are scheduled to be adopted by June 2008, a deadline imposed by the Appellate Division.

It is vital for developers and municipalities to be aware of these issues now, because the comment period on the regulations ends on March 22, 2008. Furthermore, it is unclear whether municipalities may impose these obligations on developers before the regulations are formally adopted. A municipality has a legitimate reason to do so. As with the original Round Three regulations, the revised Round Three regulations impose an affordable housing obligation on a municipality based on a function of the development experienced in the municipality since January 1, 2004. The revised Round Three regulations have different ratios and will result in a higher affordable housing obligation for the municipality. By waiting for the regulations to be formally adopted, it may be too late for municipalities, who may incur a significant affordable housing obligation waiting for the regulations to be adopted.

This summary of the revised Round Three regulations is designed to give the interested reader a general understanding of the regulatory scheme and highlights some differences from the original Round Three regulations. The summary is in three parts: (I) what is the municipal affordable housing obligation and how is it determined; (II)

what techniques are available for a municipality to meet that obligation and what are the implications for the private sector; and (III) what happens next and what further steps are necessary before the revised regulations are adopted?

I. What is the Municipal Obligation and How is it Determined?

A. Municipalities have to provide a realistic opportunity for lower income households to reside within their boundaries, and that obligation has three components: (i) rehabilitation obligation; (ii) prior round obligation; and (iii) growth share obligation.

- Rehabilitation Obligation. A municipality's rehabilitation obligation is the amount of substandard units existing within the municipality as determined by the Census data. The revised Round Three regulations increase some municipalities' rehabilitation obligation, as calculated in the original Round Three regulations. The methods to comply with the rehabilitation obligation are not substantially changed either and are not discussed herein.
- Prior Round Obligation: A municipality's prior round obligation is the amount of the municipality's "new construction" obligation as calculated by COAH in June 1994 when its Round Two regulations were adopted. The options available to a municipality to address the prior round obligation are set forth in Part II of this memorandum.
 - Vacant Land Adjustments. A municipality may adjust its prior round obligation, if there is not enough vacant land to meet its obligation. If a municipality was previously awarded such an adjustment, COAH will probably continue to honor that vacant land adjustment. However, even if a municipality has little or no land available, it may be required to develop a plan to address its entire prior round obligation, through a variety of techniques, including redevelopment.
- Growth Share Obligation. The growth share obligation is based upon the amount of development projected or actually experienced within the municipality from 2004 to 2014, subject to exceptions not set forth in this memorandum:
 - Residential. For every 4 market rate residential units developed within the municipality after January 1, 2004, the municipality will incur a 1 unit affordable housing unit obligation (the "**4:1 ratio**"). Under the original Round Three regulations, it was a ratio of 1 affordable housing unit for every 8 market rate units.
 - Non-Residential. For every 16 jobs to be generated through non-residential development after January 1, 2004, the municipality will incur a 1 unit affordable housing obligation (the "**16:1 ratio**"). Under the original Round Three regulations, it was a ratio of 1 affordable

housing unit for every 25 jobs. COAH also changed the amount of square footage of non-residential development generating a job. Therefore, a one unit affordable housing obligation is generated by, among other uses, every **5,714 square feet of office space**, every **9,412 square feet of retail space**, every **10,667 square feet of warehouse space** and every **13,333 square feet of industrial space**.

- **Projected Growth Share**. A municipality will have to plan for the affordable housing to be developed according to the household and jobs projected to be generated between January 1, 2004 and January 1, 2018 subject to the adjustment of household and employment growth projections and the actual growth share. The projections for each municipality are set forth in N.J.A.C. 5:94, Appendix F.
- **Adjustment of Household and Employment Growth Projections**. A municipality may make a downward adjustment to its projected growth share obligation by undergoing an analysis of the amount of vacant land available and the amount of development it projects it will experience between 2004 and 2018. This downward adjustment is similar to the vacant land adjustment for the prior round obligation.
- **Actual Growth Share**. If the municipality experiences more growth than projected, the municipality will be required to address the growth share obligation calculated as a function of the development actually experienced between 2004 and 2018.

B. **Other Obligations, Limitations and Bonuses**.

- **Rentals**.
 - At least 25% of the prior round obligation and growth share obligation must be addressed through the development of rental units.
 - At least 50% of the rental obligation must be addressed through family housing.
 - A municipality is entitled to 2 credits for each non-age restricted, rental unit addressing its prior round rental obligation. A municipality is entitled to 1.33 credits for each age-restricted rental unit addressing its prior round obligation. A municipality is entitled to only 1 credit for each rental unit in excess of its prior round obligation.
 - A municipality is entitled to 2 credits for each family or supportive housing unit, except for supportive and special needs housing, rental unit in excess to its growth share rental obligation.

- Household Income Requirements.
 - Half of the prior round obligation and growth share obligation must be addressed through the development of units affordable to low income households, i.e. 50% of the region’s median income, and the remaining half must be affordable to moderate income households, i.e. 80% households. The affordability requirements are subject to a complex regulatory scheme known as the Uniform Housing Affordability Controls, N.J.A.C. 5:80, which are not discussed in this summary.
 - A municipality is entitled to two credits for each affordable housing unit addressing the growth share obligation, which is deed restricted for very low income households, i.e. 30% of the region’s median income.
- Family Housing. 50% of a municipality’s growth share obligation must be addressed through family housing, i.e. units available to the general public.
- Age-Restricted Housing. No more than 25% of a municipality’s prior round obligation and growth share obligation may be addressed through age-restricted housing.

C. Regional Contribution Agreements (“RCAs”). Municipalities may transfer away up to 50% of their prior round obligation and growth share obligation via an RCA.

- The minimum amount to transfer an RCA has increased and varies from \$67,000 per unit to \$80,000 per unit depending on the housing region. The amount may be reduced, if resolutions of intent or a signed agreement were adopted by both the sending and receiving municipalities before December 17, 2007.
- There is legislation pending which may eliminate the ability of municipality’s to transfer away their obligation via RCAs.

II. Addressing the Obligation and Impact on the Development Community

A. Developer Contributions. A municipality may require that a developer make one or more of the following contributions for affordable housing: (1) the onsite development of affordable housing; (2) a “payment in lieu” of developing affordable housing; and (3) a development fee.

B. Onsite Affordable Housing. A municipality can require a developer¹ to construct affordable housing onsite, but the municipality must offer “**sufficient incentives**”

¹ Based on discussions with COAH staff, COAH intended that only developers of mixed use developments and residential development could be required to develop affordable housing units onsite. However, this is not entirely clear from the language of the revised Round Three regulations, specifically N.J.A.C. 5:94-6.4.

including a “**financial incentive.**” It is unclear of what is a “sufficient incentive” but the regulations mention increasing densities and reducing costs, such as the following:

- Density. COAH shall generally accept one of the following as a sufficient incentive for a residential development:
 - The municipality may provide for an increase in density of one market rate unit for every affordable housing unit. The bonus market rate unit will not generate a growth share obligation (the “**1:1 ratio**”). This will increase the housing yield by 20%. Therefore, a residential developer may be required to build one affordable housing unit for every 5 market rate units, a **16.7% set aside.**
 - The municipality may agree to a density and/or FAR and the affordable housing component with a developer. This seems to be the kind of standardless “negotiation” that the Appellate Division Decision invalidated pertaining to the payment in lieu fees permitted to be collected in the original Round Three regulations.
 - For sales projects, the municipality may provide a density of at least 4 units per acre for a 15% set aside, 5 units per acre for a 17.5% set aside, and 6 units per acre for a 20% set aside but only if the zoning was in effect at the time of the effective date of the Round Three regulations.
 - For rental projects, the municipality may provide: (1) a density of at least 10 units per acre with a 15% set aside but only if the zoning was in effect at the time of the effective date of the Round Three regulations; or (2) a density of at least 10 units to the acre with a density bonus greater than the 1:1 ratio for sales projects.
 - Additional Incentives. This is a non-exhaustive list of possibilities, including relief in parking standards, relief from regulatory requirements that result in cost reductions, waived or reduced fees, among others. While COAH lists many options, it is unclear what exactly will be required.
 - Appeals. A developer has the right to appeal a zoning scheme if there is not a sufficient incentive, but there are no procedures and substantive requirements to review the incentive scheme.
- C. Payments in Lieu. Municipalities may permit developers to make a payment in lieu of constructing the affordable housing onsite. A municipality must still offer incentives, but they may be reduced from the ones provided for the onsite contribution of affordable housing.

- The amount of the payment varies based on the housing region from a minimum amount of approximately \$146,000 per affordable unit to a maximum amount of approximately \$183,000 per affordable unit.
- A residential developer making a payment in lieu may only be entitled to a density bonus of 0.5 market rate units per affordable unit. Therefore, assuming that 4.5 market rate units will subsidize the affordable unit, the cost of a payment in lieu ranges from **\$32,423 per market rate unit** to **\$40,635 per market rate unit** depending on the part of the State where the development is located.
- It is difficult to calculate the subsidy required for a non-residential developer making a payment in lieu, because the non-residential developer may be entitled to a bonus to its floor area ratio. Assuming that there has been no increase to floor area ratio and depending on the location of the development in the State, the contribution for:
 - office space will be from **\$25.53 to \$32.00 per square foot**;
 - retail space will be from **\$15.50 to \$19.43 per square foot**;
 - warehouse space will be from **\$13.68 to \$17.14 per square foot**; and
 - industrial space will be from **\$10.94 to \$13.71 per square foot**.
- Non-Residential Development May Become Exempted from Payments in Lieu. COAH indicates that it will support legislation to prevent municipalities from imposing payment in lieu fees on non-residential developments and limit a non-residential developer's contribution to the development fee.

D. Development Fees. A municipality may require a developer to pay a development fee based upon a percentage of the equalized assessed value ("EAV") of the development:

- Residential Development. For residential developments, a municipality may either charge a flat fee of **1.5%** of EAV for all residential development, or charge a fee based on a sliding scale whereby the more inexpensive homes would only pay fee of 0.5% of EAV and the most expensive homes would pay **2.0%** of EAV.
- Non-residential Development. A municipality may charge a **3.0%** as a development fee on non-residential development.
- Variations. A municipality may charge a fee of 6.0% of EAV for the added value to a development if a municipality grants a density variance or a variance to increase the floor area ratio.

III. What Happens Next?

The proposed new regulations have created considerable controversy. Municipalities are objecting to the projected growth share obligations set forth in Appendix F as being too high and object to being required to increase densities or provide other compensating benefits to developers. Developers contend that municipalities may be able to avoid their obligations through the various adjustments available and argue that the new regulations do not provide sufficient incentive for them to build any inclusionary housing. Housing advocacy groups have indicated dissatisfaction with the total number identified by COAH as well as the mechanisms to meet the numbers.

COAH has scheduled a series of public meetings for the end of January and the beginning of February 2008. The comment period on the revised Round Three regulations expire on March 22, 2008. COAH will then have to digest and respond to those comments. The court-imposed deadline to adopt the regulations is June 2008, and this deadline has already been extended by a year.

It is unclear what will happen if COAH decides to substantially revise the regulations. It will need to re-propose and undergo another comment period, which will once again delay the adoption of the regulations. Regardless, the regulations will likely be challenged by the municipalities, the developers, and/or housing advocacy groups, which will only bring greater delay and uncertainty to development in New Jersey.