

**MAY 2008 COAH REGULATIONS SUMMARY**

May 19, 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.*

On May 6, 2008, the Council on Affordable Housing (“COAH”) adopted its substantive regulations (“Regulations”), N.J.A.C. 5:97, in response to In re Adoption of N.J.A.C. 5:94, 390 N.J. Super. 1 (App. Div. 2007), in which the Appellate Division invalidated COAH’s original Round Three Regulations. A memo on the Round Three Regulations can be viewed in an earlier posted “Featured Article” entitled “January 2008 COAH Memo” which can be viewed on [www.redevelopnj.com](http://www.redevelopnj.com).

Despite the Appellate Division’s invalidation of the original Round Three Regulations, COAH has determined that four municipalities<sup>1</sup> may choose to be governed by the original Round Three Regulations, because those municipalities received substantive certification before the Appellate Division issued In re Adoption of N.J.A.C. 5:94 decision.

COAH received thousands of comments to its Regulations and COAH apparently realizes that there are fundamental flaws apparent in its Regulations. Therefore, on May 6, 2008, COAH released proposed amendments (“Amendments”) to those Regulations seeking to rectify some of those flaws. These proposed Amendments trigger another opportunity for members of the public and developers to provide comments to COAH, and any comments to the proposed Amendments must be submitted by **August 15, 2008**.

The significant provisions of the Amendments are summarized as follows:

1. The ratios to determine the growth share obligation will not be changed. Every 4 residential units generate a one unit obligation and every 16 jobs generate a one unit obligation. COAH proposes to change some requirements of the growth share obligation and to exempt some uses from generating a growth share obligation:

(a) Non-residential development classified within the Storage Use Group, such as warehouses, will generate a growth share obligation for every 16,000 square feet of development, instead of every 10,667 square feet.

(b) Parking garages will not generate a growth share obligation.

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<sup>1</sup> These four municipalities are: Buena Borough in Atlantic County, Washington Township in Morris County, Pennsville Township in Salem County and White Township in Warren County.

(c) Some higher education uses, such as dormitories and offices, will generate a growth share obligation. There is a general exemption for all higher education uses in the Regulations.

(d) The demolition of non-residential structures will reduce the municipal non-residential growth share obligation provided the non-residential structures were occupied at least one year before the demolition.

2. COAH will change the incentives to be provided to developers by eliminating the additional bonus residential unit for every affordable unit to be built onsite. In its place, COAH proposes the following presumptive minimum densities and presumptive maximum setasides:

		Minimum Presumptive Density (du per acre)	Maximum Presumptive Setaside
For Sale	Planning Area (“PA”) 1	8	25%
	PA 2 and designated centers	6	25%
	PA 3,4 and 5 (in existing and proposed sewer service area)	4	25%
	PA 3, 4 and 5 (outside a sewer service area)	40% increase over existing zoning	20%
	Urban Centers	22	20%
Rental	General	12	20% <sup>2</sup>
	Urban Centers and Workforce Housing Census Tracts	25	15%

3. COAH will permit municipalities to require non-residential developers to provide affordable housing units onsite or off-site within the municipality. If a municipality requires the affordable housing onsite, the development is treated as a mixed use development, which requires: (a) compliance with the density/set-aside scheme set forth in the above chart; and/or (b) an increase in the floor area ratio. The Amendments

<sup>2</sup> The 20% setaside for a rental development requires at least 10% of the affordable units being affordable to households earning 30% or less of the area median income for the COAH region. Id. at -6.4(b)6.

do not provide clear standards regulating the increase in floor area ratio required to be provided by a municipality to offset the cost of providing affordable housing.

Legislation has been proposed in the Assembly (A500) and the Senate (S1783) to limit the affordable housing contribution to be provided by non-residential developers. Under the proposed legislation, non-residential developers will only be required to make a financial contribution equal to 2.5% of the equalized assessed value of the non-residential development.

4. COAH will continue to permit municipalities to charge the payment-in-lieu fees to non-residential developers, which range from approximately \$146,000 to \$183,000 per affordable unit, as set forth in the Regulations. Under the Amendments, it is unclear whether a developer making a payment-in-lieu contribution will be entitled to any incentive for making the contribution. Furthermore, it is also unclear whether residential developments and mixed use development are to be eligible for the payment-in-lieu option.

5. There are three new types of bonus credits available to municipalities:

(a) Compliance Bonus. A municipality may receive 2 credits for each affordable housing unit, which was included in a development that received preliminary or final approval, or was the subject of an executed redevelopment agreement, between December 20, 2004 and June 2, 2008. In order to qualify for the bonus credit, the municipality must have included the development in its petition for substantive certification to COAH by January 25, 2007.

(b) Smart Growth Bonus. A municipality may receive 1.33 credits for each affordable housing unit addressing its growth share obligation that is included in a Transit Oriented Development in Planning Area 1, 2 or a designated center. In order to receive the partial bonus credit, there must be at least a 20% set aside and at least 50% of the affordable units must be family units.

(c) Redevelopment Bonus. A municipality may receive 1.33 credits for each affordable housing unit addressing its growth share obligation that is included in a redevelopment area. The development must have at least a 15% set aside or, if the project is seeking a transit village designation from the Department of Transportation or another state funded smart growth initiatives, the set aside must be at least 20%.

6. COAH will limit the amount of bonuses a municipality may receive. A municipality may not receive credit for more than one type of affordable housing unit and a municipality may not satisfy more than 25% of its entire growth share obligation through bonus credits.