

In a three to two decision today in In re Adoption of N.J.A.C. 5:96 & 5:97 by N.J Council on Affordable Housing (A-90 to 94-10) (067126), the New Jersey Supreme Court upheld the Appellate Division's decision, but not its reasoning, overturning the Third Round Rules of the Council on Affordable Housing ("COAH") and invalidating the non-residential and residential growth share methodology of those rules. COAH has five months to adopt Third Round Rules that use the non-growth share methodology of the Round 1 and Round 2 Rules.

Thus, for now, there will be no residential or non-residential growth share, but the Supreme Court left the option open for the Legislature to amend the Fair Housing Act ("FHA") to permit some form of growth share approach to meet the requirement of the New Jersey Constitution that every municipality provide a realistic opportunity for the construction of its fair share of the present and prospective regional need for low and moderate income housing. However, unless the Legislature amends the FHA, COAH cannot adopt rules that implement a growth share methodology or a implement rules that are materially different from the First and Second Round Rules.

Specifically, the Supreme Court held that two aspects of the Third Round Rules violate the FHA. First, the Third Round Rules determine the prospective need for affordable housing on a Statewide basis, rather than on a regional basis, as the FHA requires. Second, the Third Round Rules do not satisfy the FHA requirement that they provide definitive, quantitative affordable housing obligations which must be fulfilled within fixed periods of time.

Nevertheless, the Supreme Court also held that the method used to meet the municipal affordable housing obligation set forth in Southern Burlington County NAACP v. Twp. of Mount Laurel, 92 N.J. 158 (1983 ("Mount Laurel II")), the FHA and the First and Second Round Rules is not Constitutionally required. The Court invited the Legislature to amend the FHA to provide alternative methods to satisfy the municipal affordable housing obligation. It seems that, under the Court's decision, some kind of growth share methodology would be constitutionally permissible if implemented through an amendment of the FHA. What is unclear is whether or not such a growth share methodology would have to determine the prospective need for affordable housing on a regional rather than a statewide basis and whether or not such a growth share methodology would have to be provide definitive affordable housing targets that a municipality would have to meet regardless of how much it grows.