

 **THE BUZAK LAW GROUP, LLC**
Attorneys at Law

EDWARD J. BUZAK
(MEMBER OF N.J. & D.C. BAR)
TIENA M. COFONI
JOHN P. MILLER
KELI L. GALLO
(MEMBER OF N.J. & N.Y. BAR)

MONTVILLE OFFICE PARK
150 RIVER ROAD SUITE N-4
MONTVILLE, NEW JERSEY 07045

(973) 335-0600

FAX: (973) 335-1145

E-MAIL: BLG@BUZAKLAWGROUP.COM

EXECUTIVE SUMMARY
NJLM Challenge to COAH Regulations

INTRODUCTION

On January 5, 2009, we filed a 120 page Brief and Appendix with the Appellate Division in support of the League's challenge to the Third Round Regulations adopted by COAH effective June 2, 2008 and as revised effective October 20, 2008. Other institutional appellants challenging the regulations were also required to file their briefs on this date. Those institutional appellants include the New Jersey Builders Association ("NJBA"), the National Association of Industrial and Office Properties ("NAIOP"), and the Fair Share Housing Center ("FSHC"). The other twenty appellants are to file their briefs by February 3, 2009. COAH is to respond to all of these briefs by March 5, 2009 and all appellants will be able to reply to COAH's filing by April 4, 2009. Thereafter, oral argument will be set by the Court.

The legal argument in the Brief revolves around three points. First, the League challenges the underlying support for the growth share methodology and the numbers produced by it. It is important to note that the League does not discard the use of a growth share methodology in its purest form. Instead, the League's position is that essentially all of the underlying assumptions that essentially doubled the projected growth share obligation of municipalities are flawed and inaccurate, thereby violating the constitutional and statutory mandates which govern the operation of COAH. Second, the League challenges the methodology utilized to allocate the growth share obligation to municipalities. Third, the League contends that the implementation of these Third Round Regulations will result in overwhelming financial burdens on the taxpayers in violation of the Fair Housing Act.

FUNDAMENTAL FLAWS OF THE GROWTH SHARE RATIO METHODOLOGY

Initially, the League argues that the requirement that municipalities provide zoning to achieve a predetermined number of affordable units is incompatible with a growth share methodology. The establishment of a "number" creates a self-fulfilling prophecy because, rather

than taking into account existing master plans and zoning ordinances in the 566 municipalities and simply requiring that as development takes place under those existing zoning ordinances a proportionate affordable housing obligation is created, the regulations require that the projections be made reality by compelling municipalities to zone in such a way as to achieve the very projections that COAH has made -- a self-fulfilling prophecy.

In addition, the League analyzes each component of the growth share methodology ratio and identifies a series of fundamental flaws in each component. For example, the numerator in the formula is the 115,666 units of affordable housing that is projected to be needed in the State by 2018. The League's Brief critically analyzes the manner in which that figure was derived and finds a series of errors that have resulted in an exaggerated number. The League undertakes a similar analysis with regard to two separate denominators: (i) market housing growth and (ii) employment growth. The League's Brief identifies flaws in the market housing growth projection utilized by COAH that result in completely inaccurate projections. Finally, with regard to the other separate denominator, employment growth, the Brief points out additional flaws that again produce inaccurate numbers upon which the growth share ratio is based.

The primary focus of the League's position relates to the numerator of the growth share formula -- the 115,666 units. That exaggerated number simply drives up the ratio to meet a need that, in the League's view, will not exist. It is pointed out that the fear that the Court's have had in the past in allowing municipalities to determine their own fate is now misplaced because the satisfaction of a municipality's first and second round obligation levels the playing field as it relates to any past affordable housing obligation created. Utilizing a true growth share in the future where any type of market residential development or non-residential development will produce a concurrent affordable housing obligation that must be satisfied provides no opportunity for a municipality to disregard its constitutional obligation. Thus, a true growth share methodology complies with all constitutional and statutory requirements regarding a municipality's affordable housing obligation.

THE ALLOCATION OF THE OBLIGATION IS FUNDAMENTALLY FLAWED

Here, the League makes three primary points. First, the NJLM contends that the growth share obligations are allocated without **adequate** regard to the State Development and Redevelopment Plan, the Impact of Smart Growth and Open Space Conservation Policy of the State. It is pointed out that although the overall determination of the aggregate amount of vacant land in the State was determined, to some extent, utilizing all of these policies, there is nothing in the materials provided that indicates those same policies were brought down to a municipal level in allocating affordable housing obligations, even if one accepts the facts that an allocation of a specific number should be made (which the League opposes as set forth above).

Second, the League points out that the allocation of these growth share projections are based upon false and inaccurate vacant land analyses and speculative residential and non-residential growth patterns. The League points out that the methodology utilized in allocating

the growth share projections were based virtually entirely upon the previous pattern of development in a municipality which, in many cases, was artificially created by the satisfaction of the previous obligations in the first and second rounds. Incredibly, the methodology looks at historical density and growth patterns to allocate future growth patterns, another self-fulfilling destiny: municipalities are effectively compelled to repeat the mistakes of the past in future development.

Third, it is noted that the allocation of the growth share obligation fails to take into account existing supporting infrastructure. Instead, the regulations anticipate the expenditure of public funds to bring infrastructure to these higher density proposed developments to service the developments that essentially COAH mandates take place in the future. Rather than focusing on placing the growth where infrastructure currently exists, the regulations ignore that concept and instead impose the burden on the municipality to construct or contribute to the construction of adequate infrastructure to support the development that COAH has mandated take place in the municipalities.

IMPLEMENTATION IMPOSES OVERWHELMING FINANCIAL BURDENS ON THE TAXPAYER

The Fair Housing Act is unambiguous in its declaration that a municipality is not required to expend taxpayer dollars to satisfy its constitutional obligation for affordable housing. Despite this unassailable language, the League points out that the implementation of the Third Round Regulations for all intents and purposes will impose a significant financial obligation upon the local taxpayer. The Brief cites to the conclusions in the report of the nonpartisan Office of Legislative Services which suggests that there is an approximate \$2 Billion shortfall in available funding as compared with the obligation established under the Third Round Regulations. The Brief also neutralizes the contention of COAH that there are a variety of other mechanisms available to municipalities that allegedly would not create a financial burden on the taxpayer by pointing out that the only other practical compliance device is an inclusionary development which not only fails to satisfy any prior round obligations but creates a financial burden on the current taxpayers because of the required multiple market units that are needed in order to support the creation of a single affordable unit. It is the burden created by the four market units in a conventional 20% inclusionary development that itself creates a financial burden on the municipality's taxpayers.

CONCLUSION

The Brief concludes with a request that the entirety of the Regulations be invalidated. In short, the League contends that the Regulations as they currently exist are incapable of being modified to meet the constitutional requirements because of the fundamental flaws that exist. Instead, the entire system must be scrapped and a more realistic and workable affordable housing methodology must be established, preferably by the Legislature through a recreation of the Fair

Housing Act that will accommodate the constitutional obligation in the context of an economic, construction, and fiscal world that is substantially different from that which existed when the original methodology was created in 1987 and even when these Third Round Rules were first adopted in 2004.

As always, the League stands ready to assist the Legislature in developing a fair and reasonable methodology that will result in the provision of a reasonable number of affordable housing units throughout the State.

Edward J. Buzak, Esq.
Assistant Counsel, New Jersey State League
of Municipalities

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