

Update

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Growth Share Ordinances Produce Sticker Shock

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The Council on Affordable Housing (COAH) adopted its “third round rules” in July 2004, and municipalities are now delivering the “knock-out punch” to both residential and commercial developers. The third round rules adopted a growth share approach to affordable housing. The concept is found in the Mount Laurel decision, which provides that growing municipalities have a responsibility to house the poor who arrive in pursuit of employment. It is interesting to note just how much has changed since the Mount Laurel decision including that the so-called “poor” in New Jersey are now middle class families with incomes in the \$80,000 range.

COAH was attempting to adopt rules that would provide a realistic opportunity for affordable housing, not litigation. The growth share ordinances now being adopted by municipalities under such rules may, however, leave developers with no choice but to litigate.

Typical growth share ordinances require residential developers to either construct affordable housing on site or make a payment in lieu of construction. In theory, the payments in lieu of construction would be utilized within the municipality to support other affordable housing activities.

Many municipalities have adopted “growth share” affordable housing ordinances that

require huge payments in lieu of construction, the highest of which comes with a price tag of \$450,000 per unit.

All non-residential development is also required to contribute to affordable housing through a payment in lieu of construction, which payment is calculated by using the square footage of the project and “Appendix E” to COAH’s Rules and Regulations. According to Appendix E, a developer building a retail store, strip mall, shop, or gas station would “generate” affordable housing units at the rate of one unit per 25,000 square feet. Thus, a developer of a 50,000 square foot retail strip center could be required to make a payment in lieu of construction in excess of \$900,000. This payment could be in addition to the two percent of the equalized assessed value for the non-residential development under a municipal development fee ordinance. Similarly, a residential developer constructing a project consisting of less than eight units would be required to pay a proportionate share of the payment in lieu of construction. For example, a residential developer with a four-unit project in a municipality that has adopted a growth share ordinance containing a high payment in lieu of construction could be required to pay a 4/8 share, or a payment in excess of \$225,000.

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Growth Share Ordinances Produce Sticker Shock (*Continued*)

Growth share ordinances requiring such excessive payments are likely to have a chilling effect on non-residential development and, once again, increase the cost of new housing. The main factor contributing to such high payments is the inclusion of land costs in the pro forma for construction costs, which is used to calculate the

payment in lieu of construction. Growth share ordinances are reasonably new, and it is only a matter of time before developers are forced to challenge the legality of such impositions/exactions. In the meantime, developers should be aware of this significant added cost of development.

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Please direct any questions about the contents of this issue, or about a specific fact situation to any of our Real Estate/Transactional attorneys:

Frank J. Petrino	609.989.5029	fpetrino@sternslaw.com
David M. Roskos	609.989.5018	droskos@sternslaw.com
Vincent J. Paluzzi	609.989.5033	vpaluzzi@sternslaw.com
Brian J. Mulligan	609.989.5038	bmulligan@sternslaw.com
Bernadette Fallows Davidson	609.989.5006	bdavidson@sternslaw.com
Kathleen M. DalCortivo	609.989.5016	kdalcortivo@sternslaw.com
Edgar Alden Dunham IV	609.989.5021	edunham@sternslaw.com
Jennifer L. Cordes	609.989.5027	jcordes@sternslaw.com
Jason T. Stypinski	609.989.5054	jstypinski@sternslaw.com
Kelly C. Scheese	609.989.5005	kscheese@sternslaw.com



Sterns & Weinroth
A Professional Corporation
Counselors at Law

50 West State Street
Trenton, NJ 08608
609.392.2100
www.sternslaw.com