New Jersey State Legislature

OFFICE OF LEGISLATIVE SERVICES
STATE HOUSE ANNEX
PO BOX 068
TRENTON NJ 08625-0068

ALBERT PORRONI
Executive Director
(609) 292-4625

December 20, 2010

Honorable Jerry Green
17 Watchung Ave.
Plainfield, NJ 07060

Dear Assemblyman Green:

You have requested an expedited legal opinion on whether the constitutional infirmities which were identified in previous versions of S-1, prior to its revision on December 10, 2010 by the Assembly Housing and Local Government Committee, have been addressed in the current amended version of the bill, now [2R] SCS for SCS for Senate, No. 1. On December 13, 2010, A-3447 [2R] was combined with the Senate Bill, and passed by the Assembly. For the purposes of this opinion, we will refer to the combined bill as "S-1 [2R]." We conclude that the most recent changes made to S-1 [2R], specifically the replacement of a growth share approach with a methodology that sets forth statutory, quantifiable housing need goals in accordance with census and other available State data, and provides a method to meet those goals that is not totally reliant on inclusionary zoning, but provides for sufficient compensatory zoning benefits when inclusionary zoning is required, adequately address our constitutional concerns as expressed in previous opinions to you.

Our primary concern with the prior version of S-1 as stated on page 3 of our June 29th opinion to you was that ". . . the absence of a nexus between the mandatory inclusionary zoning proposed by the bill and satisfaction of regional and Statewide affordable housing needs would permit a challenge to the sufficiency of the bill under the Mount Laurel doctrine." Our conclusion relied primarily upon the authority of Southern Burlington County N.A.A.C.P. v. Twp. of Mount Laurel, 92 N.J. 158 (1983) ("Mount Laurel II").

We believe that the prior versions of the bill that would have permitted the imposition of fees on a developer without granting the developer offsetting compensating benefits violated the provisions of N.J.S.A. 52:27D-311 of the Fair Housing Act, as well as the holding of the

court in In re Adoption of N.J.A.C. 5:94 & 5:95, 390 N.J.Super. 1 (App. Div. 2007). We noted also that all disputes concerning municipal compliance under the prior version would immediately be directed to the court, thus raising concerns that the statute was a scheme leading to litigation, something prohibited by the court in Mount Laurel II at 199. We concluded that the one-year moratorium on exclusionary zoning lawsuits contained in the prior version of S-1 was likely to be deemed violative of Article VI, Section II, paragraph 3 of the New Jersey Constitution, because the provisions of the bill abolished the review mechanisms under COAH, and would suspend review by the court as well, interfering with its ability to uphold the Constitution. Lastly, we note that the repeal of the "Statewide Non-residential Development Fee Act," (N.J.S.A. 40:55D-8.1 et al.) would likely severely diminish the availability of funds for the rehabilitation of existing housing units in the State, and thus might raise constitutional concerns under the holding of the New Jersey Supreme Court in Holmdel Builders Association v. Township of Holmdel, 121 N.J. 550, 572 (1990), that sufficient set-asides would be available to meet housing needs.

In October of this year, the Appellate Division invalidated the growth share approach utilized by COAH as its methodology, and required it to adopt within five months a similar methodology to the one applicable to the period between 1993 to 1999. In re Adoption of N.J.A.C. 5:96 & 5:97, No.A-5382-07 (App.Div. October 8, 2010) (slip op. at 78). The rules were held to be invalid, in part, because COAH did not demonstrate that it used reliable data showing that ". . . the State as a whole, and . . . each region within the State, [has] sufficient vacant developable land within growth areas to enable the [growth share] ratios to generate enough housing to meet the need[,]. . . " and that without such data, ". . . COAH cannot reasonably assume that its growth share methodology will provide a realistic opportunity to meet the statewide and regional need." Id., slip op. at 18, (citing In re Adoption of N.J.A.C. 5:94 & 5:95, 390 N.J. Super. at 15-16 (App.Div. 2007).

The Appellate Division also concluded that a method allowing municipalities to determine their own fair obligation share might provide an incentive for municipalities to adopt master plans and zoning ordinances that slow or halt growth, in order to minimize their share of opportunities for affordable housing within the housing region. In re Adoption of N.J.A.C. 5:94 & 5:95, 390 N.J. Super. at 55. The court added that any legitimate "countless" set-aside approach would, therefore, be required to place a check on municipal discretion in land use decisions. Id. at 56.

S-1 [2R] was substantially re-written through amendments made by the Assembly Housing and Local Government Committee in December of 2010. S-1 [2R] abolishes the COAH established by the 1985 "Fair Housing Act," and transfers many of COAH's remaining duties to the Department of Community Affairs (department). The department's role in the bill has been substantially altered from a central compliance reviewer to a central record

keeper and data provider. The functions of reviewing housing elements and affordable housing plans for compliance with the "Fair Housing Act" have been placed in the hands of a new position created under the bill, known as a "housing compliance professional." A housing compliance professional will be subject to standards for licensure promulgated by the State Board of Professional Planners (State Board), pursuant to section 30 of the bill. The professional is required to have been actively engaged in the practice of a licensed professional planner for at least eight years, and have substantial experience in the preparation or independent review of affordable housing elements.

Under section 30 of the bill, a municipality may request the State Board to designate a licensed housing compliance professional to conduct a comprehensive and independent review of the municipality's housing element and implementing ordinances. The State Board is required to randomly select a licensed housing compliance professional from the list of licensed housing compliance professionals maintained by the State Board in accordance with the procedures established by the State Board. A municipality is entitled to utilize its development fee trust fund to pay for the reasonable expenses of obtaining the review. If the housing compliance professional certifies the municipal plan as being consistent with the amended "Fair Housing Act," the municipality may file the certified plan and implementing ordinances with the department. The department will post the information on a web site created for such purposes.

In order to meet its compliance threshold, which is the affordable housing need calculated in accordance with section 22 of the bill, a municipality must duly adopt and file a housing element prepared in accordance with N.J.S.A. 52:27D-310 within 60 days of the effective date of the bill. The housing element must be certified by a licensed housing compliance professional. The initial compliance period must demonstrate that 10 percent of the municipality's total housing stock is qualified housing units, defined in section 21 of the bill as "units subject to affordability controls, public housing, and supportive and special needs units." Housing units are deemed qualified housing units only if affordability controls or applicable affordability restrictions expire no sooner than the end of the current compliance period and provided that any qualified units are adaptable for the disabled, in compliance with current law. The compliance period would be for ten years after the effective date of the bill. See section 22e.

There are alternate methods of arriving at the required number of affordable housing units, and thus being deemed "compliant" under the bill. If a municipality does not already have the required number of affordable housing units, all of the methods to reach compliance under the bill will require the certification of a licensed housing compliance professional. The bill sets forth in section 23 specific densities and numbers of housing units required to maintain compliance under several alternate methods, including a requirement to adopt

inclusionary zoning ordinances on developable land sufficient to meet at least 50 percent of the units required to meet the threshold compliance number of units as calculated in accordance with section 22 of the bill. S-1 [2R] requires all municipalities to plan for the rehabilitation of substandard units within their boundaries.

The bill does not provide a period of repose from exclusionary zoning litigation for municipalities which are deemed complaint. In its place, it provides that the certified plans of municipalities, if administered in accordance with the bill, will have a presumption of validity, which may only be overcome by clear and convincing evidence that they do not meet the affordable housing goals, or the provisions of the "Fair Housing Act" as amended. See section 23k.

The constitutional concerns raised in our prior opinions are addressed by the changes to the bill as follows:

S-1 [2R], section 22, contains a formula for calculating affordable housing need that is based in part on a percentage of the number of housing units currently existing in a municipality. This formula is completely divorced from a growth share approach as a method to calculate affordable housing need. Thus, the bill comports with the court's latest decisions that invalidated the growth share methodology, and eliminates our primary concern regarding the use of that methodology as well.

The prohibition on the filing of exclusionary zoning lawsuits has been reduced from one year in the prior bill to eight months following the effective date of the bill, or prior to the ". . . filing by the municipality with the department of a housing element and implementing ordinances that have been duly adopted and certified by a licensed housing compliance professional." Section 29e. Although S-1 [2R] appears to remove jurisdiction from the court in the same manner as the prior version of the bill, the moratorium under S-1 [2R] is of shorter duration and appears to be necessary in order to give municipalities ample time to prepare their housing elements, and licensed housing compliance professionals time to review and certify them.

"Our courts have also recognized the need for 'bright line standards' for determining the obligations of municipalities under the Mount Laurel doctrine." In re Adoption of N.J.A.C. 5:96 & 5:97, No.A-5382-07 (App.Div. October 8, 2010), slip op. at 44, (citing See J.W. Field Co. v. Twp. of Franklin, 204 N.J.Super. 445, 452-53 (Law Div. 1985)). S-1 [2R] provides the standards in statute, rather than by regulation. Should the standards in the statute be challenged, the court is not prohibited by S-1 [2R] from having jurisdiction to review them, since the standards exist separately from any particular municipal obligation or zoning scheme.

Therefore, our concerns about the bill intruding on the court's ability to enforce the dictates of the Constitution have been eliminated.

Our concerns about the sufficiency of the amount of development fees likely to be collected if the "Statewide Non-Residential Development Fee Act" were repealed have been mitigated by the provisions of the bill which provide for standards for inclusionary zoning that must be met by municipalities in order to be deemed complaint under the Act. These include requirements for development fees to be charged whenever affordable housing units are not provided.

S-1 [2R] provides a process for review of housing elements by an independent professional reviewer who will scrutinize them for compliance with the statutory standards established under the bill, and certify them as such when they comply. A presumption of validity attaches to a municipality's certified housing elements that can only be overcome by clear and convincing evidence that it does not meet the standards set forth in the bill. Under the prior versions of the bill, municipalities were permitted to be deemed complaint without such a certification process. While exclusionary zoning lawsuits are permitted to be filed under the current and prior versions of S-1, the likelihood of lawsuits is diminished under S-1 [2R,] because disputes over whether the statutory standards have been met will most likely be settled through the review and certification process provided under the bill.

Therefore, we conclude that the constitutional infirmities raised in our prior legal opinions to you concerning the previous versions of S-1, prior to the December 10, 2010 amendments, in our opinion have been mitigated by the revisions made to the bill, now S-1 [2R].

Very truly yours,

Albert Porroni
Legislative Counsel

By: Joyce W. Murray
Joyce W. Murray
Lead Counsel

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