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## IMPACT OF BILL A500 ON REDEVELOPMENT PLANS

### *A Focused Summary On New Redevelopment Plan Requirements Regarding Affordable Housing And The Statewide Non-residential Development Fee Program*

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#### I. Introduction

With the passage of A500 by the Assembly and the identical Bill S1783 by the Senate (collectively referred to herein as "A500"), is one of the most significant proposed legislative reforms to the Fair Housing Act, N.J.S.A. 52:27D-301 et seq. A500 is presently awaiting the signature of Governor Corzine. While A500 eliminates Regional Contribution Agreements ("RCAs"); establishes a new State Agency entitled the "State Housing Commission"; amends the Fair Housing Act, N.J.S.A. 52:27D-301 et seq., to require municipalities to provide incentives "which shall include increased densities and reduced costs" for inclusionary development, and requires COAH to ensure that thirteen percent (13%) of the municipal affordable obligation are made available for occupancy by very low income households, this summary focuses on the changes A500 will have on redevelopment plans and the collection of non-residential development fees. Additionally, this memorandum briefly discusses A500's creation of the Urban Housing Assistance Program; A500's establishment of the New Jersey Affordable Housing Trust Fund (replacing the Neighborhood Preservation Program); A500's requirements for twenty percent (20%) set asides of affordable housing for residential development in a transit village, on State-owned property and urban transit hubs; and the effective date of A500. This memorandum is not intended to be an exhaustive synopsis of A500, but rather an outline of some of the proposed changes that have been adopted by the Assembly and the Senate.

## II. Impact On Redevelopment Plans

### A. The Words Of The Legislature

While A500 includes many significant changes to the Fair Housing Act, N.J.S.A. 52:27D-301 et seq., when enacted into law, there will also be substantial amendments to the Local Redevelopment and Housing Law, N.J.S.A. 40A:12A-1 et seq. with respect to redevelopment plans. Specifically, in addition to the provisions that exist today, when A500 is adopted into law, redevelopment plans will also be required to include:

- (1) As of the date of the adoption of the resolution finding the area to be in need of redevelopment, an inventory of all housing units affordable to low and moderate income households, as defined pursuant to section 4 of P.L. 1985, c. 222 (C.52:27D-304), that are to be removed as a result of implementation of the redevelopment plan, whether as a result of subsidies or market conditions, listed by affordability level, number of bedrooms, and tenure; and
- (2) A plan for the provision, through new construction or substantial rehabilitation of one comparable, affordable replacement housing unit for each affordable housing unit that has been occupied at any time within the last 18 months, that is subject to affordability controls and that is identified as to be removed as a result of implementation of the redevelopment plan. Displaced residents of housing units provided under any State or federal housing subsidy program or pursuant to the "Fair Housing Act," P.L. 1985, c.222 (C.52:27D-301 et al.), provided they are deemed to be eligible, shall have first priority for those replacement units provided under the plan: provided that any such replacement unit shall not be credited against a prospective municipal obligation under the "Fair Housing Act," P.L. 1989, c. 222 (C.52:27D-301 et al), if the housing unit which is removed and previously been credited toward satisfying the municipal fair share obligation. To the extent reasonable feasible, replacement housing shall be provided within or in close proximity to the redevelopment area. A municipality shall report annually to the Department of Community Affairs on its progress in implementing the plan for provision of comparable, affordable replacement housing required pursuant to this section.

## **B. The Definition Of Low And Moderate Income Households**

Of significance, is the fact that the definition of low and moderate income households, as defined pursuant to the Fair Housing Act, N.J.S.A. 52:27D-304, does not include a requirement of affordability controls (i.e., deed restrictions for thirty years under the Third Round regulations promulgated by COAH or such other affordability controls imposed by prior rounds or federal programs). Rather, the identification in the Redevelopment Plan of the inventory of low and moderate income housing that will be removed as a result of the Redevelopment Plan is based purely on market conditions. This results because the Fair Housing Act defines low and moderate income households as follows:

“Low income housing” means housing affordable according to federal Department of Housing and Urban Development or other recognized standards for home ownership and rental costs and occupied or reserved for occupancy by households with a gross household income equal to 50% or less of the median gross household income for households of the same size within the housing region in which the housing is located.

“Moderate income housing” means housing affordable according to federal Department of housing and Urban Development or other recognized standards for home ownership and rental costs and occupied or reserved for occupancy by households with a gross household income equal to more than 50% but less than 80% of the median gross household income for households of the same size within the housing region in which the housing is located.

N.J.S.A. 52:27D-304.

Therefore, all housing units in the redevelopment area that had a gross household income equal to 80% or less than the median gross household income for households of the same size, within the housing region situated in the area in need of redevelopment as of the date of the adoption of the resolution declaring the area in need of redevelopment, must be inventoried and included in the Redevelopment Plan.

## **C. Inconsistencies With The Language Of A500 As To Redevelopment Plans**

It is also noteworthy that the aforementioned inventory applies only to areas declared in need of redevelopment. Based on the wording by the Legislature, the inventory does not apply to areas in need of rehabilitation. This results because A500 defines “redevelopment area” and “area in need of redevelopment” as the area determined to be in need of redevelopment pursuant to N.J.S.A. 40A:12A-5 and N.J.S.A. 40A:12A-6, but defines “rehabilitation area” and “area in need of

rehabilitation” as the area determined to be in need of rehabilitation pursuant to N.J.S.A. 40A:12A-14. In other words, the Legislature specifically distinguishes the definition of a redevelopment area from the definition of a rehabilitation area and has chosen to apply the requirement of the aforementioned inventory to only redevelopment areas. A500 therefore leads to the incongruous result that affordable housing units that will be displaced as a result of the Redevelopment Plan that are situated outside an area in need of redevelopment, but within an area in need of rehabilitation, need not be included in the inventory.

Of equal significance is the requirement in A500 to plan for the provision of a one to one ratio of comparable replacement units through new construction or substantial rehabilitation of affordable housing units in the Redevelopment Plan. Based on the express wording chosen by the Legislature, A500, as written, also leads to two additional inconsistencies because the inventory is not related to the provision of replacement units on a one to one basis. This results because after the inventory is identified, A500 requires the Redevelopment Plan to include a plan for the provision of affordable replacement housing units on a one to one basis only if: (1) the affordable housing unit to be removed by the implementation of the Redevelopment Plan has been occupied within the last eighteen (18) months; and (2) the affordable housing unit is subject to affordability controls.

The inconsistencies that result, based on a comparison of the required inventory to the requirement to plan for the provision of replacement units, is as follows:

First, A500 requires a plan for the replacement of affordable housing units not identified in the inventory. This results because A500 does not limit the plan for the replacement of affordable housing units to areas in need of redevelopment at the time of the redevelopment area designation (as is required for purposes of the inventory). Rather, as to the plan for the provision of displaced affordable housing, the Legislature refers to affordable housing units that are “to be removed as a result of implementation of the redevelopment plan” (that were occupied at any time within the last 18 months and are subject to affordability controls). Therefore, A500 also requires a plan for the replacement of affordable housing occupied at any time within eighteen (18) months and subject to affordability controls in rehabilitation areas and redevelopment areas when such housing will be removed through the implementation of the Redevelopment Plan. Additionally, A500 does not limit the plan for the replacement of affordability housing units to the date that the Resolution was adopted that declared the area in need of redevelopment (as was required for the inventory), but rather expands the requirement for replacement units to occupancy within the last eighteen (18) months of the adoption of the Redevelopment Plan.

Second, even for units identified in the inventory, A500 does not necessarily require a plan for the replacement all of the units identified therein. This results because no plan for the provision of replacement affordable housing units on a one to one basis need be included in the

Redevelopment Plan, if the units do not have affordability controls or were not occupied within the last eighteen (18) months.

**D. Expansion Of Affordable Housing Inventory May Resolve Inconsistency**

Given the aforementioned inconsistencies that result when comparing the inventory to be identified in the Redevelopment Plan to the plan for the provision of replacement affordable housing units, it may be advisable for the inventory that is to be identified in the Redevelopment Plan include low and moderate income households (as defined by the Fair Housing Act, N.J.S.A. 52:27D-304) situated in areas in need of redevelopment and areas in need of rehabilitation that will be displaced by the Redevelopment Plan, depending upon the facts. While the inventory must list the affordability level, number of bedrooms, and tenure, it may also be helpful to identify the address of the housing unit. Although not required by A500, it may also be helpful for the inventory to identify whether the low and moderate income units have been occupied within the last eighteen (18) months, and whether the units are subject to affordability controls. This additional information, while not required, would allow the inventory to relate to the plan for the provision through new construction or substantial rehabilitation of one comparable, affordable replacement housing unit for each affordable housing unit that has been occupied at any time within the last eighteen (18) months, that is subject to affordability controls and that is identified as to be removed as a result of implementation of the Redevelopment Plan.

**E. Description Of Plan For Replacement Affordable Housing Units**

A500 does not provide any guidance on the description of the plan for replacement housing, other than the replacement housing through new construction or substantial rehabilitation of one comparable affordable replacement unit that has been occupied within the last eighteen months and is subject to affordability controls must be provided within or in close proximity to the redevelopment area, if it was removed as a result of the implementation of the Redevelopment Plan. Questions may therefore arise as to the detail of this description in the redevelopment plan.

**F. Priority System For Replacement Units**

In addition to the aforementioned identification of an inventory and plan for the provision of replacement units, A500 also establishes a priority system for the displaced residents. A500 states:

Displaced residents of housing units provided under any State or federal housing subsidy program, or pursuant to the "Fair Housing Act," P.L. 1985, c. 222 (C:52:27D-301 et al.), provided they are deemed to be eligible, shall have first

priority for those replacement units provided under the plan: provided that any such replacement unit shall not be credited against a prospective municipal obligation under the "Fair Housing Act," P.L. 1985, c.222 (C.52:27D-301 et al.), if the housing unit which is removed had previously been credited toward satisfying the municipal fair share obligation. To the extent reasonably feasible, replacement housing shall be provided within close proximity to the redevelopment area. A municipality shall report annually to the Department of Community Affairs on its progress in implementing the plan for provision of comparable, affordable replacement housing required pursuant to this section.

While A500 does not state that the aforementioned language needs to be included in the Redevelopment Plan, depending upon the facts, it may be helpful if the Redevelopment Plan recites the aforementioned priority system.

## **II. Statewide Non-residential Development Fees**

A500, when executed by the Governor, will create a Statewide non-residential development fee program. The fee is equal to 2.5% of the equalized assessed value of the land and improvements for all new non-residential construction on an unimproved lot or lots or 2.5% of the increase in equalized assessed value of the additions to existing structures to be used for non-residential purposes. The fee is imposed on the developer and must be paid to the State Treasurer. (The developer pays the fee to the municipality instead of the State Treasurer only if the municipality has received COAH approval to use the 2.5% fee for non-residential development in connection with a COAH approved spending plan for the development fees collected. Additionally, if the municipality fails to spend the funds in accordance with its spending plan within four years, the remaining unspent balance reverts to the New Jersey Affordable Housing Trust Fund). The payment by the developer must be made prior to the issuance of a certificate of occupancy. A certificate of occupancy shall not issue until such time the aforementioned fee is paid.

All municipal ordinances that impose a fee for development of affordable housing upon a developer for non-residential portion, including ordinances that were adopted in accordance with COAH regulations, and ordinances that required a payment in-lieu of building as a condition of non-residential development are void and of no effect upon A500 becoming law.

Exemptions apply to certain projects that will not be subject to the aforementioned Statewide Non-residential Development Fee. The exceptions are set forth in detail in A500. A few are listed here and they include parking lots and parking structures, regardless of whether the parking lot or parking structure is constructed in conjunction with a non-residential developer or whether the

parking lot is developed as an independent non-residential development; projects that are located within specifically delineated urban transit hubs; projects located within an eligible municipality (as defined by N.J.S.A. 34:1B-208) when a majority of the project is located within a one-half mile radius of the midpoint of a platform area for alight rail system; projects determined by the New Jersey Transit Corporation to be consistent with a transit village plan developed by a transit village designated by DOT; certain recreational facilities; and certain tax exempt properties.

A specific and detailed procedure is established whereby the construction official responsible for issuing building permits, the tax assessor, and the construction official responsible for the issuance of the final certificate of occupancy are coordinated to ensure that the final certificate of occupancy does not issue without the payment of 2.5% non-residential development fee. Failure of the municipality to adhere to the time frames and procedures may be subject it to penalties imposed by DCA.

On an annual basis, the first \$20 million paid to the State Treasurer from the Statewide Non-residential development fees are to be deposited into a new trust fund that will be known as the "Urban Housing Assistance Fund." All funds received by the State Treasure from the Statewide Non-residential development fee in excess of the annual \$20 million shall be deposited in the New Jersey Affordable Housing Trust Fund.

The effective date of the collection of the Statewide Non-residential development fee is immediately for all projects that have not yet received a certificate of occupancy upon A500 becoming law. The only exception is if at the time of passage into law, an agreement exists with a developer or redeveloper to pay a fee for affordable housing of at least one percent of the equalized assessed value of the improvements which are the subject to the development plan, developer's agreement or redevelopment agreement.

### **III. The Urban Housing Assistance Fund**

A500, when executed by the Governor, will establish the "Urban Housing Assistance Fund." This fund will be appropriated \$20 million annually for the collection of the Statewide Non-residential development fee. In the event that there is a shortfall, the Legislature shall appropriate sufficient funds from the General Fund. The purpose of the Urban Housing Assistance Fund is "to assist certain municipalities in the provision of housing through the rehabilitation of existing buildings or the construction of affordable housing." DCA will be required to promulgate rules and regulations and will develop a five year strategic plan for the program, aimed at developing strategies to assist municipalities in creating rehabilitation programs and other programs aimed at producing safe and decent housing. DCA may award housing rehabilitation grants to municipalities that qualify for state aid for services in accordance with N.J.S.A. 52:27D-178.

**IV. New Jersey Affordable Housing Trust Fund**

A500, when it becomes law, will establish the New Jersey Affordable Housing Trust Fund (formally the Neighborhood Preservation Fund) which will be the repository of all State funds appropriated for affordable housing purposes. A500 states: “Of those monies deposited into the New Jersey Affordable Housing Trust Fund that are derived from municipal development fee trust funds, or from available collections fo Statewide non-residential development fees, a priority for funding shall be established for projects in municipalities that have petitioned the council for substantive certification.” Amounts in this fund shall be applied for the same purposes that existed for the Neighborhood Preservation Fund in designated neighborhoods, which include, but are not limited to:

- (1) Rehabilitation of substandard housing units occupied or to be occupied by low and moderate income households;
- (2) Creation of accessory apartments to be occupied by low and moderate income households;
- (3) Conversion of non-residential space to residential purposes; provided a substantial percentage of the resulting housing units are to be occupied by low and moderate income households;
- (4) Acquisition of real property, demolition and removal of buildings, or construction of new housing that will be occupied by low and moderate income households, or any combination thereof;
- (5) Grants of assistance to eligible municipalities for costs of necessary studies, surveys, plans and permits; engineering, architectural and other technical services; costs of land acquisition and any buildings thereon . . . .
- (6) Assistance to a local housing authority, nonprofit . . . for rehabilitation or restoration of housing units which it administers . . . .
- (7) Other housing programs for low and moderate income housing . . . .

**V. Twenty Percent Set Aside**

A500 provides: “A developer of a project consisting of newly-constructed residential units being financed in whole or in part with State funds, including, but not limited to, transit villages designated by DOT, units constructed on State-owned property, and urban transit hub . . . shall be

required to reserve as least 20% of the residential units constructed for occupancy by low or moderate income households . . . with affordability controls as required by COAH, unless the municipality in which the property is located has received substantive certification from the council and such a reservation is not required under the approved affordable housing plan . . .”

Additionally, “residential units located or to be located within the jurisdiction of any regional planning entity required to adopt a master plan or comprehensive management plan . . . there shall be required to be reserved for occupancy by low- or moderate-income households at least 20 percent of the residential units constructed, to the extent economically feasible.”

## VI. Effective Date

The effective date of A500 is immediately upon its enactment into law. In other words, this should be applied prospectively, rather than retroactively. In Oberhand v. Director, Div. of Taxation, 193 N.J. 558 (2008), the New Jersey Supreme Court held: “To be sure, prospective application of a statute is favored over retroactive application.” Id. at 570. The Court also noted that even if a statute is intended to apply retroactively from express or implied terms in the language of the statute, retroactive effect will not be given if it either violates the Constitution or will cause manifest injustice. Id. at 571. In the present matter, the language of A500 states: “This act shall take effect immediately.” Therefore, there is neither express nor implied intent to apply A500 retroactively. However, it must be noted that the statewide collection of non-residential development fees will immediately apply to all projects that have not yet received a certificate of occupancy, unless there was already in existence a redeveloper or developer agreement imposing at least a one percent (1%) non-residential development fee of the equalized assessed value of the improvements subject to the development plan, developer’s agreement, or redevelopment agreement.

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*This summary focuses on the changes A500 will have on Redevelopment Plans when signed into law and is not intended to be a complete summary of A500 nor is this summary intended to provide legal advice. Specific factual circumstances will need to be presented to Maraziti, Falcon & Healey, L.L.P. prior to the issuance of a legal opinion.*