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Environmental Constraints on 'Fair Share' Development

Before an affordable housing plan is deemed 'reasonable,' environmental concerns must be addressed

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The Fair Housing Act of 1985 created a New Jersey administrative agency referred to as the Council on Affordable Housing. It is more commonly known as COAH.

COAH was established pursuant to the New Jersey Supreme Court cases referred to as the *Mount Laurel* decisions. In those cases, the Court established a constitutional obligation for every one of New Jersey's municipalities to establish a realistic opportunity for the provision of a fair share of low and moderate income housing. This is generally to be accomplished through land use and zoning powers.

The benefit of going through the COAH process is, from the standpoint of a municipality, that it may shield a municipality from the wrath of what has been termed a "developer's lawsuit." Builder's remedies are from a municipal standpoint the least desirable mechanism for achieving compliance with affordable housing obligations.

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The COAH process is entered into by a municipality on a voluntary basis. They do not have to undertake this process. A municipality begins the process by filing a housing element and a fair share plan to establish a realistic opportunity for the provision of a predetermined number of units of affordable low and moderate income housing.

This fair share element is part of the municipal master plan. Only Planning Boards may engage in the adoption of a municipal master plan and the fair share element is part of that function. When a municipality seeks substantive certification of its plan, a municipality remains under COAH's jurisdiction and in so doing remains immune from the dreaded developer's lawsuit.

Following this request for substantive certification, which is a legal way of saying a request for approval of a fair share plan, there is a process wherein COAH and other parties address the plan and a back and forth process may ensue. This process includes COAH, the municipality and other interested parties.

Municipalities may meet a portion of their fair share obligation through rehabilitation of existing units. To provide a realistic opportunity for the construction of new units, municipalities may zone specific sites for residential development by the private sector. In

these cases, developers must agree to build a fixed percentage of affordable units, often 20 percent of the total constructed on the site, for low and moderate income households and to maintain affordability for 30 years. In addition to these mechanisms for achieving low and moderate income housing goals, municipalities may also sponsor construction using for profit or nonprofit builders, purchase existing units for sale or rental to eligible households, engage in regional contribution agreements, create accessory apartments within existing structures and engage in other approved methods.

The key to maintaining COAH certification and immunity from a developer suit is the need to assure that a continuing realistic opportunity exists for the municipality to satisfy its fair share housing obligation. This means that the presumptions advanced in the fair share element originally introduced by the municipality at the beginning of the certification process remain reasonable.

Of the most important factors in determining whether a plan has a continuing realistic opportunity to meet projected goals are environmental impediments and other environmental concerns pertaining to the subject real properties. Thus, it is not the buyer who must beware but the municipality. False or misleading projections may result in

a loss of protection and ultimately a very costly and problematic developer's suit.

Environmental Concerns

The overarching statute that addresses affordable housing in New Jersey is the Fair Housing Act. Besides creating COAH and authorizing the administrative process that is now familiar to municipalities in New Jersey, it also sets forth standards, or goals, for the entire State of New Jersey with regard to fair share obligations.

"Inclusionary Development" is at the core of any program approved by COAH pursuant to this act. Inclusionary Development means residential housing development in which a substantial number of the housing units are provided for reasonable and affordable housing.

Low-income housing means housing that is affordable according to federal Department of Housing and Urban Development standards or other recognized standards for households with a gross income that is half of the median gross income for households of the same size within the same housing region. Moderate income housing, on the other hand, relates to households with a gross household income that is more than 50 percent, but less than 80 percent, of the median gross household income for similarly situated households in the same region.

When a municipality decides to enter this program, it does so through a resolution of participation. This is a resolution adopted by a municipality acknowledging that it has chosen to prepare a fair share plan and housing element in accordance with the act.

The Council has numerous responsibilities. One of its most important responsibilities is to adopt criteria and guidelines for the adjustment of a fair share based upon the amount of vacant and developable land, infrastructure considerations or environmental and historic considerations.

The commissioner is charged with creating a system for ranking projects proposed for meeting fair share obligations. When determining the rank to be

awarded to a particular project, one of the first criteria to be looked at is feasibility. Feasibility includes the physical and financial potential of a particular project necessary to satisfy the amount of fair share need proposed by a municipality.

The requirements of the fair share plan, which is to be adopted by the Planning Board, are set forth in the act. At the very outset, the act provides that a municipal housing element must be designed to achieve the goals of access of affordable housing to meet present and prospective needs with particular attention to moderate income.

And a certification may be issued when it is established that a plan proposed by a municipality is "realistically possible." Once there is substantive certification, validity is rebuttable only by clear and convincing evidence that the program is not realistic.

Substantive Rules Governing the Council on Affordable Housing for the period beginning Dec. 20, 2004, are found at N.J.A.C. 5:94. They provide the exact specifications that will be relied upon in establishing fair share housing obligations. The procedure for doing so is found at N.J.A.C. 5:95.

What Is Realistic?

It is clear that review by COAH and challenges by objectors and unsuccessful developers often focus on the question of what is "realistically possible." An unrealistic projection may rebut a presumption that a municipal plan is reasonable at best, and at worst may subject a municipality to a builder's remedy lawsuit.

The process places a premium on realistic projects. And the easiest way to be unrealistic is to ignore environmental constraints.

Wetlands are certainly a primary concern in assessing whether a proposed project is realistic. In New Jersey, many of the buildable properties have already in fact been built. Of course, New Jersey is one of the most densely populated states in the country.

A potential problem may appear if a municipality or a developer downplays the impacts that wetlands may

have on a particular parcel, thereby overstating a project's ability to support low and moderate housing obligations for a municipality.

In New Jersey, there are coastal wetlands and three kinds of freshwater wetlands. All are regulated. All either cannot support any development, or at best can support very little development.

Coastal wetlands are those wetlands that are generally located in the coastal region and are for the most part regulated by the Army Corps of Engineers. As a general rule, they are not developable. Coastal wetlands can be located fairly far inland as well, in areas such as the New Jersey Meadowlands.

Freshwater wetlands are the wetlands most typically encountered by developers seeking approval for a particular project. In the context of freshwater wetlands, there are wetlands of general resource value, wetlands of intermediate resource value and wetlands of exceptional resource value.

Depending on the resource value, wetlands in New Jersey have a perimeter of buffer protection which is generally referred to as a buffer area. Buffers are peculiar to New Jersey. While wetlands regulated under state law originate under Section 404 of the federal Clean Water Act, there is no federal support that regulates buffers.

As a result, not only are wetlands protected from all or most development, but the amount of buffer area that encapsulates a wetland is protected as well; the buffer amount is determined by the resource value of the wetland. If you ignore wetlands in a fair share, it is unrealistic.

There are exceptions to the general rule that you cannot disturb a wetland in New Jersey. General permits can be issued in certain instances, such as road crossings, certain driveways, certain utilities, certain airport clearings, etc. Obviously in those areas, wetlands can be disturbed to a limited extent. However, when a general permit is inapplicable, an individual freshwater wetland permit is required for development.

There is a particular caveat for wet-

lands that contain threatened or endangered species. In those cases, a commonly employed technique referred to as wetlands buffer averaging, which may expand the extent an area that can be developed, is not available. Thus for a determination that a certain amount of affordable housing on a given parcel is realistic, the amount of endangered species on that parcel must be taken into account.

Stream corridors receive a lot of protection in New Jersey, especially as of late. Parcels of uplands that surround streams that are regarded as "C1" streams have 150 feet of protection on both sides and it is not just a C1 body of water, but also in many instances water that flows into these bodies of water that are protected. When these large buffers exist, before any assessment is made it is important to map and understand their impact on a proposed project with regard to that parcel's ability to support a specified amount of development.

Is the property in some kind of protected area? New Jersey has various super zoning ordinances that further restrict the ability to develop. While a municipal zoning ordinance may be readily amended to authorize development for the satisfaction of a fair share housing obligation, that avenue may not be so readily available in the case of a statewide super zoning ordinance.

The super zoning ordinances in New Jersey are the Pinelands regulations and laws, Highlands regulations and laws, and those regulations that apply to the coastal area development administered through the CAFRA program.

Each of these programs is quite different from one another and a detailed explanation of how they function is certainly beyond the scope of this article. However, there are also many similarities.

All of the acts are designed to provide enhanced protection to subject

properties because, in the case of CAFRA, they are near the coastal areas. In the context of the Highlands Act, they are in that portion of New Jersey that has very delicate environmental features. In the context of the Pinelands Act, the proposed development is in the highly environmentally sensitive, federally protected Pinelands area.

Thus, if a piece of property being considered as part of a fair share proposal is within one of these super zoning areas, then a "realistic" determination warrants taking the features of these regulatory frameworks into account as well.

Stormwater management issues have become quite in vogue in the last several years. One of Gov. James McGreevy's more significant environmental accomplishments was the creation of a profoundly more rigorous stormwater management program in New Jersey that applies to residential housing.

Indeed, many large-scale subdivisions cannot hope to meet these new requirements and often must be scaled back. As stormwater management is affected by soil or topography concerns peculiar to a particular parcel, these factors must be included in a realistic development assessment. It is not a footnote item; it might very well be the fatal item.

Sewerage issues are also very important. Many undeveloped areas are not served by public sewer. When septic systems are the only mechanism available, there is a very real question as to whether dense development will be feasible. These septic systems may be regulated under local law, or may require New Jersey Department of Environmental Protection permitting, depending on certain engineering issues.

In any event, determining what these properties can realistically support requires a sophisticated engineering evaluation of the soils and their abil-

ity to process sanitary waste from a potentially dense development. If that is glossed over or worse yet, overlooked, there is a reasonable probability that any conclusions that have been reached do not satisfy the "realistic" benchmark.

Often where there are septic systems, there are also potable wells. Many parts of New Jersey do not have a great supply of safe groundwater. Indeed, the more difficult to develop parcels often do not readily support potable wells or at least potable wells that are capable of high levels of production. Regardless of household income, everyone has a need to drink water; therefore, it stands to reason that this is a very significant, potentially limiting issue and complete understanding is a prerequisite to the creation of a realistic assessment.

It is impossible to engage in a comprehensive fair share assessment to avoid a builder's remedy lawsuit while at the same time ignoring environmental constraints. Classically, in New Jersey, many have tried to go through the traditional Planning Board or Zoning Board evaluation process while only glossing over significant environmental consideration. It is certainly not uncommon to hear applicant attorneys argue that environmental issues are not properly before those boards. In each instance, they are incorrect.

In any event, when a Planning Board is engaging in the creation of a fair share plan, and when a governing body is seeking approval of that plan through COAH, it must make sure that it understands whether any environmental constraints exist on the properties. These constraints have a direct relationship on the realistic validity of the projections being advanced by a municipality and the ultimate feasibility of the plan being set forth. Unrealistic projections are both legally dangerous and very costly. ■

