

Municipalities May Seek COAH Help to Craft Ordinances That Shield Against Builder's Remedy, Comply with Standards & Avoid Lengthy COAH Certification Process

(Special to the NJ Planner)

By Robert Reid,
Professional Planner



Rob Reid

When it comes to affordable housing, there appears to be more misinformation than information. A lot of confusion starts with understanding the Council on Affordable Housing (COAH). Simply, its purpose, by law, is to offer guidance and assistance to municipalities with their affordable housing constitutional obligations.

Counter to popular conception, COAH is not an

enforcement agency and cannot require municipalities to construct affordable housing.

COAH was created by the Fair Housing Act of 1985, in response to the NJ State Supreme Court rulings on two cases known as the Mount Laurel decisions.

The first, rendered in 1975, was Southern Burlington County NAACP v. Township of Mt. Laurel, 67 N.J. 151 (aka, *Mt. Laurel I*). The second, South Burlington County NAACP v. Township of Mt. Laurel, 92 N.J. 158 (aka, *Mount Laurel II*), came eight years later, with the Courts consolidating a number of suits and offering more substance to its earlier ruling.

In Mount Laurel I, the court determined that as a constitutional obligation, municipalities must create zoning and land regulations that allow low and moderate income housing. The Mt. Laurel II decision, expanded the first and established a mandate that each municipality must create a fair share and realistic opportunity for low and moderate income housing, generally through land use and zoning powers. Within the decision, the court also provided guidance in determining a municipality's fair share and approved the "builder's remedy" that could be used against non-compliant municipalities.

On July 2, 1985, the Fair Housing Act (FHA) created COAH as the voluntary administrative alternative to the Courts. The Act stipulated that while the process is voluntary, not participating with COAH leaves municipalities at risk of a "builder's remedy lawsuit." A successful builder's lawsuit could mean a harsh outcome from the courts.

To gain protection from a builder's remedy action, municipalities first file the housing element, of the local master plan, as per the Municipal Land Use Law (Chap 291 1975, NJSA, 40:55d-28), and a fair share plan. These documents must demonstrate a realistic opportunity for low and moderate income housing and resolve any obligation directly related to residential and non-residential market rate development.

Within two years, municipalities must seek COAH's substantive certification (approval) of such plans, or lose protection. COAH then reviews, requests revisions and possibly mediates objections from interested parties before granting or denying substantive certification. Certification, though granted for a ten-year period, can be withdrawn if a municipality cannot assure the continuing realistic opportunity for its fair share housing obligation. (COAH's web: <http://www.nj.gov/dca/affiliates/coah/index.html>).

(Continued on page 2)

THE NEW JERSEY PLANNING OFFICIALS The Association of Planning Boards & Zoning Boards of Adjustment Founded 1938

The *New Jersey Planner* is the official membership publication of The New Jersey Planning Officials Inc., published six times a year for over 9,000 local planning and zoning board members, elected officials, and professionals. Membership inquiries invited. Founded in November 1938, NJPO is non-profit 501(c)3 tax-exempt organization and, since 1939, an affiliate of the NJ State League of Municipalities.

P.O. Box 7113
Watchung, NJ 07060
908-412-9592; FAX 908-753-5123
E-mail: njpo@njpo.org
World Wide Web: <http://njpo.org>

President: Terence Maguire
Vice President: William Neville
Treasurer: Gail Glashoff
General Counsel: Michael Kates, Esq.
Executive Director: Joseph E. Doyle
Frank Reysen, Jr. - Contributing Editor

The opinions expressed in "The New Jersey Planner" are not those of New Jersey Planning Officials. Rather, they reflect the opinions of the authors themselves. Articles or information appropriate for The Planner should be submitted to the address listed above. Summaries of court decisions are intended only to guide and inform, not to serve as legally reliable interpretations of court opinions. Readers are urged to consult the full text of court decisions and rely upon legal counsel for interpretation.

The New Jersey

Planner NJPO



Participating in the COAH process is an option, but for any number of reasons, municipalities are not flocking to COAH to seek help.

The COAH process can be costly and time consuming and does not fully guarantee complete protection from a "builder's remedies" lawsuit.

The difficulty is that COAH, to follow the court's mandate and the Fair Housing Act, since 1987 has adopted three rounds of rules and regulations to ensure that municipalities meet their constitutional obligation. Municipalities are asked to submit plans for each round.

According to the COAH website approximately 161 of the 566 municipalities were certified in the First Round, 1987-1993 and approximately 245 in the Second Round, 1995-2004. As of September 17, 2009, 255 municipalities had submitted affordable housing plans for Third Round review by COAH for possible Certification. (*Note: Numbers are for each round and are not cumulative figures.*)

While each "round" imposed more requirements upon municipalities, the latest, the "third round" has raised a storm of controversy, pitting COAH against municipalities and the court.

In 2006 and early 2007 (390 NJ Super. 1,914 A.2d 348) the Appellate Division of the Superior Court reviewed the Third Round substantive and procedural rules and identified mechanisms for municipalities to use in fulfilling their affordable housing obligation. Specifically, the Court determined that the ultimate responsibility for establishing a real estate environment conducive to creating affordable housing rests with the municipal land use ordinances.

Therefore, municipalities must offer development incentives that generate a realistic opportunity for developers to produce new housing. In that affordable housing is deemed an appropriate public interest, governments must identify means at their disposal to actively encourage greater production, such as offering density bonuses, easing construction related requirements, and/or providing financial subsidies.

At this time there are actually only 35 municipalities "Certified" by COAH (in the Third Round), this is only 6% of all the municipalities in New Jersey. The limited participation reflects the confusion of continuing changes in the rules and the uncertainty of pending lawsuits.

According to the NJ State League of Municipalities, an estimated 253 of New Jersey's 566 municipalities have pledged funds to challenge the latest COAH Rules. On January 5, 2009 the League filed a brief with the Appellate Division challenging the Third Round Regulations adopted by COAH effective June 2, 2008, revised October 20, 2008.

It appears that legal challenges, along with changes to COAH's rules, will require continued modifications to any submitted COAH Plan.

Even though providing affordable housing is a constitutional obligation and participation in COAH's

process is voluntary, one question is inevitable.

Should we participate with the COAH process and give COAH jurisdiction over our municipality?

Or is there another way to "do the right thing," and spare the municipality this hassle? Perhaps, the answer is a Land Development Ordinance.

Municipalities that do not participate with COAH, can choose to lower the risk of a builder's remedy lawsuit through a local Land Development Ordinance that demonstrates a community's realistic opportunity for the development of affordable housing.

COAH Rules are used as guidelines. COAH's website has current affordable housing projections to the year 2018.

Consider that every community wants economic growth or at least economic sustainability. A key way to increase and/or maintain commercial ratables is through a workforce enjoying affordable housing located within a reasonable distance of the workplace.

Closely review the current land development ordinance and existing land use patterns. Map out sewer service areas, as approved by the State — a must. Confirm the capacity of sewerage treatment facilities. Municipalities with limited sewer service areas, or do not have any public sewer facilities, cannot satisfy the need for affordable housing. Therefore, request expanded sewer service from the State to allow for the increased density.

Then, take steps for and take positive action on what is needed to make a successful Land Development Ordinance :

1. Find where higher density make sense. Locations near mass transit with walkable pedestrian access are the most successful developments. They reduce need for automobiles, roadway costs and traffic congestion. They also create a sense of place, and a sense of community.

2. Zone specific sites and/or districts for new private sector residential developments. Within that zone, developers would build a market-rate project that includes a fixed percentage of units that would maintain 30-year affordability for low and moderate income households.

3. A base density without the inclusion of affordable housing should be provided along with a density bonus — an incentive to encourage developers to provide affordable units in their plans.

4. Include municipally sponsored construction using for-profit or nonprofit builders,

5. Purchase existing units for sale or rent to eligible householders,

6. Promote the creation of accessory apartments within existing structures,

7. Initiate a buy-down program and the provision of alternative or congregate living arrangements including group homes for the physically handicapped or developmentally disabled.

8. Allow affordable housing in residential zones in

(Continued on page 3)

addition to business districts. Most municipalities have a mixture of low, medium and high density residential zoning districts.

Example: In an R-1 zone with a 20,000 sq. ft. building lot minimum, an R-2 zone with minimum of 15,000 sq. ft., and an R-3 zone that requires a 10,000 sq. ft. minimum, a density bonus can be offered to a developer to allow R-2 density in the R-1 zone and/ or R-3 density in the R-2 zone with the inclusion of affordable housing.

9. Consider transition areas that allow medium densities between existing low density and high density areas.

10. Rethink some single family zones and add density by permitting two family dwellings.

11. Include performance zoning standards, such as, larger setbacks for two-family dwellings with the requirement that only one front door face the front yard; or that two-family dwellings must appear as single-family dwellings. The compatibility of existing land uses should always be considered.

12. Work with the regional Habitat for Humanity. A few Atlantic County municipalities conveyed buildable lots to Habitat for Humanity–Atlantic County with the requirement that they construct a home that meets COAH's standards. This great benefit provides for affordable housing units without added market rate density.

A serious concern if towns fail to act is that the State, as a consequence, will mandate housing projects as it sees fit. Already, the legislature has mandated several uses in the MLUL to counter the “Not In My Back Yard” syndrome. Currently the law permits community residences (group homes) for developmentally disabled, victims of domestic violence, sufferers of head injuries, terminally ill patients, and supervised apartment-living for up to 15 people.

If over time, municipalities do not voluntarily provide for realistic opportunities for affordable housing within their land development ordinances, the State may consider amending the Municipal Land Use Law to mandate

affordable housing projects.

You know your community. You can decide what is best. The Master Plan and developmental ordinances can help direct the town's vision. You can direct the process or be directed by the process.

Municipalities are not obligated to provide or construct units. However, they can “*do the right thing*” and craft a land development ordinance that demonstrates that there is a realistic opportunity for affordable housing — with or without COAH certification.

If a municipality chooses to prepare and adopt an affordable housing ordinance, it's best to start by reaching out to the COAH staff in the Department of Community Affairs, for guidance, whether, or not substantive certification is the objective.

Or if the municipality moves alone, it must always reflect upon the Council on Affordable Housing (COAH) Mission Statement:

“To facilitate the production of sound, affordable housing for low and moderate income households by providing the most effective process to municipalities, housing providers, nonprofit and for profit developers to address a constitutional obligation within the framework of sound, comprehensive planning.”

Robert Reid is a Licensed Professional Planner, certified by the American Institute of Certified Planners (AICP) with over 30 years of experience in the planning field. He is a member of the NJPO Board of Counselors and Absecon City Planning Board Planner for over 12 years. President and Founding Trustee of the Absecon Business & Commercial Development Corp. Inc. (Not for Profit Corp.) Played significant role in raising over \$32,000. for the erection of Absecon's Downtown Clock and Plaza 1998-1999. President - Absecon Historical Society. Author of “Absecon Timeline” and “A Place Called Absecon.” Played significant role in donation of Howlett Hall to City of Absecon for Historical Society to use as an historical museum. President - Habitat for Humanity - Atlantic County. Contacts: phone: (609) 569-9000; e-mail: abseconplanner@comcast.net; web: <http://www.reidassociates.us.com>