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In the Matter of the Adoption of N.J.A.C. 5:96 and 5:97
by the New Jersey Council on Affordable Housing
Docket Number A-5404-07T3
Lead Docket Number A-5382-07T3

Executive Summary
Appeal by Twenty Towns
February 3, 2009

Introduction. On February 3, 2009, our brief and appendix, on behalf of twenty municipalities challenging the COAH regulations, was filed with the Appellate Division of the Superior Court of New Jersey. The twenty municipalities include: Clinton Township, Bethlehem Township, Clinton Town, Readington Township, and Union Township from Hunterdon County; Bedminster Township, Bernards Township, Bernardsville Borough, Bridgewater Township, Montgomery Township, Peapack-Gladstone Borough, Warren Township, and Watchung Borough from Somerset County; Florham Park, Hanover Township, Roxbury Township, and Wharton Borough from Morris County; Roseland Borough from Essex County; Greenwich Township from Warren County; and Millstone Township from Monmouth County. These municipalities have participated in the COAH process, and joined this legal challenge because they have found the most recent adopted regulations to be onerous and unworkable.

Prior to discussing the points raised in the brief, we take this opportunity to express our gratitude to those persons and agencies that assisted in this endeavor. The four county planning departments from Somerset, Hunterdon, Morris and Warren Counties helped evaluate the accuracy of what COAH perceived to be vacant developable land, and produced numerous images illustrating the errors. We appreciate the cooperation and assistance of these county planning departments, and the Board of Freeholders of each one of the four counties. Their participation and review was critical in the analysis we have undertaken. We extend a very special thank you to Steven Balzano of Environmental Strategies, Inc., in Lebanon, New Jersey, for his assistance and hard work from start to finish in providing technical advice, analysis and research on the COAH methodology, and general co-ordination and supervision of all technical issues. We also wish to express our thanks to Frank Banisch, P.P., and the staff at Banisch and Associates in Flemington, New Jersey, for providing GIS assistance, and a planning perspective with reference to the regulations.

Point I - Errors in the Vacant Land Analysis. The challenge begins with a review of the vacant land and build-out analysis that was conducted by COAH. As municipalities, counties, planners, engineers, and others know, a large portion of what COAH was calling vacant developable land was not vacant or developable. COAH relied on outdated 2002 data from NJDEP, which did not consider development or municipal preservation post 2002. The counties, which had just gone through cross-acceptance for the

State Development and Redevelopment Plan had much more current information, which was ignored. Additionally, COAH ignored numerous public comments that pointed out errors in the vacant land study.

At the time of the amended rule adoption, COAH knew, by virtue of a study it had commissioned from the consultant who conducted the vacant land study, that the vacant land study contained significant error. COAH had the consultant prepare a Pilot Study, using Somerset County, to test the accuracy of the vacant land study using property line data. The Pilot Study, dated July 9, 2008, revealed error in the calculation of vacant land, build-out for residential, and build-out of non-residential floor space, which was anywhere from 14.9% to 16.9%. COAH did not make known the existence of the Pilot Study, despite a request for such a document from the New Jersey State League of Municipalities. The document was not considered in connection with the adoption of the amended regulations published on October 20, 2008. In reviewing the document, we found the consultant committed error in the report by comparing the results to the wrong base numbers. Comparing the results of the Pilot Study to the vacant land and build-out contained in the October 20, 2008 Rule Adoption, we found the error was actually 16.2% to 19.8%. These numbers reflect significant, but not the total, error which COAH should have addressed.

The full extent of error in what COAH calls vacant land is exposed by the work of the four counties in showing just what COAH calls vacant land. We included in our submission to the Court 100 images taking COAH's vacant land, and overlaying it as a transparency on top of the underlying aerial imagery. As many municipalities have complained, we found airports, cemeteries, sewer plants, municipal buildings, county facilities, a detention facility, an incinerator, roadway medians and intersections, rear yards of homes, yard areas of commercial development, open space in condominium and cluster developments, all show as vacant land in the COAH study. We estimate the total error to be approximately 60%, using a study conducted by Montgomery Township that was submitted to COAH during the comment period, and by comparing COAH's build-out in the eighty-eight Highlands communities with the Highlands regional build-out.

COAH now admits there is error in the vacant land analysis, and indicates that they never intended affordable housing to be built in cemeteries and roadway medians. Such assertions are untrue, because the contract given to the consultant called for the consultant to identify vacant developable lands where affordable housing could be built. Additionally, COAH defends the error by saying they will work with municipalities and provide adjustments. Such individual adjustments, however, are insufficient to address the systemic errors in the methodology. The vacant land and the build-out analysis was used by COAH to project growth, and to allocate growth to municipalities. The projection of growth was also used by COAH to establish Statewide affordable housing need, and resulted in the computation of growth share ratios for both residential and non-residential space. The unreliable and flawed results in the vacant land and build-out analysis serve to undermine the entire methodology, and such error cannot be cured by individual applications for relief.

We point out that the computation of Statewide need of 115,666 affordable units is not a fixed number. It depends upon projected growth in housing units. If the housing units are over-projected, then the Statewide need is over-projected. Housing advocates have argued that the over-projection of housing, let us say, in the Highlands, means that the Statewide need is being diluted, and those unrealistic

numbers should be reallocated to other municipalities. It is not an issue of dilution. If the growth cannot or will not occur, then the need number is too high as the need is derived from COAH projections of growth.

Point II - Error in Projection of Growth and Allocation of Growth to Municipalities. The second point of challenge is related to the projections of growth and the allocation model, separate and apart from the flaws in the vacant land analysis. We found that just as COAH did not verify the accuracy of the vacant land analysis, COAH did not check the projections of growth, and the allocation of growth to municipalities. We found municipal growth, in many instances, to be over-projected because it was primarily based upon population changes that occurred between 1993 and 2002. One of the problems is that in relying upon such historic growth, many municipalities are now being assigned higher growth share obligations because they complied with prior affordable housing obligations.

COAH relied upon data from the New Jersey Department of Labor and Workforce Development. Specifically, they relied upon projections of growth in both population and employment issued in 2006. However, NJLWD issued new projections in June of 2008, which substantially reduced both projections of employment and population growth. These new projections, which superseded the projections upon which COAH relied, were brought to COAH's attention during the comment period on the amended regulations. The comment was ignored. If the more recent projections from NJLWD were utilized in the methodology, COAH's projected net change in housing from 2004 to 2018 would have been reduced by approximately 88,000 units. Such a reduction would have had an impact upon the Statewide need, and resulted in a reduction of COAH's 115,666 unit need by approximately 30,000 units.

With reference to employment, the new projections from NJLWD would have served to reduce the projected net change in employment for 2004 to 2018 by 233,412 jobs. The error in employment projections is greater than that, however, because COAH arbitrarily reduced the 2004 employment in order to make the 2004-2018 growth appear to be greater than the growth projected by NJLWD. COAH understates the NJLWD reported employment for 2004 by 90,000 jobs, and did so in order to attempt to justify their methodology. If COAH had used the NJLWD reported jobs for 2004, and the more current projections of employment growth, we find COAH's projected growth of 790,465 jobs is more realistically 466,998 jobs, not considering the impact of the most current downturn which took hold in September of 2008.

The error in the employment projections can be shown in other ways. In the June 2, 2008 Rule Adoption, COAH projected there would be an average job increase through 2018 of 51,630 jobs per annum. The projection was made in reliance on NJLWD data, which was predicting only 40,410 jobs per annum. In June of 2008, NJLWD reduced the annual average projection of jobs to 25,410 through 2016. At the same time, COAH increased its projection to 56,462 per annum. Additionally, if we look at the actual jobs reported by NJLWD for 2004 through 2007, we find that the actual job increase in those four years was an average of only 23,946 per annum. Knowing that the projections relied upon were outdated and superseded, COAH forged ahead to adopt numbers they knew were overstated.

Point III - COAH Overstated Affordable Housing Need. COAH's actions had the effect of artificially inflating the Statewide affordable housing need. COAH used what they knew to be a flawed vacant land and build-out analysis to estimate growth potential. COAH also used projections of growth

that were outdated and overstated for both housing and employment in order to assign projections of growth to municipalities, and ignored more current data. Both actions had the effect of arbitrarily overstating the Statewide need for affordable housing. In addition, however, COAH did one more thing which arbitrarily increased the Statewide need number. COAH's consultant found that 47,306 net units would filter down to moderate income levels between 2004 and 2018. COAH arbitrarily reduced the filtering number to 23,626 units. Since filtering serves as a secondary source of supply for housing, the arbitrary reduction in filtering caused the need number to increase. COAH's justification for the increase was that, for some unstated reason, they were not going to consider urban filtering. By reducing filtering, they increased need and made growth share ratios more aggressive for all municipalities, suburban and urban, alike. By properly counting and applying filtering, and by using the more current projections of growth, affordable housing need should have been 53,000 units less than the 115,666; an over-projection of approximately 46%.

As COAH pressed for higher numbers in order to, presumably, satisfy housing advocates, they made the system onerous and unworkable. In Region 6, for example, the projected need for affordable housing is greater than all the projected housing growth to take place between 2004 and 2018. In that region, 115% of all housing projected to be constructed would have to be affordable in order to satisfy the inflated need numbers prepared by COAH. Additionally, there are 39 municipalities where the projected growth share obligation exceeds the total number of market rate and affordable units expected to be constructed in those municipalities; a practical impossibility.

Point IV - COAH Ignored the Direction of the Court. COAH was told by the Court that actual jobs should be counted, and they should not continue to rely upon a chart for job generator calculations to assign affordable housing obligations to municipalities. The words of the Court were essentially ignored, as the consultant was charged with coming up with a revised calculation chart. COAH simply made the conversions in the chart much more aggressive. We tested the accuracy of COAH's chart by reviewing all of the certificates of occupancy for non-residential uses, by category, for the four years between January 1, 2004 and December 31, 2007. The job generator calculations in the regulations would indicate that the State should have created 196,199 jobs, which would result in a growth share obligation of 12,262 affordable units. The actual number of jobs created during that period, as reported by NJLWD, was only 95,782 jobs, which would result in a 5,986 unit affordable housing obligation. The error in the job calculator is greater than 50%.

Point V – The Compliance Mechanisms are Inadequate. We challenge the lack of sufficient compliance mechanisms in the regulations. Facially, it appears there are many compliance techniques. Most, however, are limited in nature. Accessory apartments, for instance, are limited to only ten units or ten percent, while market to affordable programs may not exceed twenty units unless a successful history is shown. The four major compliance mechanisms in the regulations were inclusionary development for residential, inclusionary development for non-residential, regional contribution agreements, and municipal sponsored or 100% affordable construction. Two of those mechanisms, inclusionary development in non-residential construction and regional contribution agreements, were taken away by the Legislature in the adoption of P.L. 2008, c.46 (better known as A-500). The legislation was not sweeping reform of affordable housing provisions, but special interest legislation designed for non-residential developers that wanted to escape the COAH burden, and housing advocates that wanted to do away with regional contribution agreements despite their success.

COAH, itself, took away a third mechanism; inclusionary residential development. In the amended regulations, COAH prohibits the mechanism from being employed unless presumptive densities of eight units per acre in PA-1, six units per acre in PA-2, and four units per acre in PA-3, 4, and 5 sewer areas are given to a developer. Increasing density to reach those presumptive numbers, in exchange for a 20% set aside of affordable units, does nothing for a municipality except satisfy the growth share obligation created by that increased density. Such a mechanism can now no longer be used to address the retroactive growth share obligation back to January 1, 2004, the prospective growth share obligation created through non-residential development, nor the growth share obligation created by residential development which is at lesser densities than COAH's presumptive numbers.

That leaves municipal sponsored or 100% affordable construction. Here, however, there are insufficient funding mechanisms available to bring about any large number of affordable housing units. On the federal level, tax credits are the largest funding mechanism available for production of affordable housing. There are two types of tax credits, nine percent and four percent. The nine percent tax credits are limited and competitive, and 4% tax credits need large subsidies. The Balanced Housing Fund, which is the largest State source of revenue for affordable housing, ran out of money in the middle of 2008 for the balance of the year. As a result, municipalities will be forced to rely upon municipal funding from property taxpayers to employ this compliance mechanism.

Point VI – Financial Impacts. The financial impacts that are being created by COAH are in violation of the Fair Housing Act, because they force municipalities to raise and expend property tax revenue. The rules force municipalities to address an inflated need, and then COAH requires the municipality to adopt resolutions that require appropriation or bonding of funds to meet any shortfall in a compliance program. Not only does this fly directly in the face of the prohibition in the Fair Housing Act that nothing in the Act shall require a municipality to raise or expend municipal revenues in order to provide low and moderate income housing, it also creates a program that has the potential of costing property taxpayers billions of dollars over the next ten years. The regulatory scheme establishes that an average subsidy of $161,095 is required to develop an affordable housing unit, and that 115,666 such units are required. The potential program cost is over $18 Billion. OLS conducted an independent review of the available funding mechanisms, and concluded there would be a shortfall of as much as $2.0 Billion per annum, or $20 Billion over the next ten years. The review indicated that the margin of error could be as high as 50% depending upon credits and other mechanisms. Even assuming that degree of error, however, we are talking about a program which will cost municipalities, and property taxpayers, billions of dollars. The system will have the effect of making the State less affordable. Since 40% of all homes are classified as low and moderate income households, a significant portion of the cost of the program, through increased property taxes, will fall directly upon low and moderate income families. We urge the regulations be set aside, that COAH conduct a proper economic analysis as required by law, and COAH be directed to create a program which is in economic balance.

Point VII – Retroactive Obligations are Unauthorized. COAH has no authority to attempt to create retroactive obligations. COAH has computed need from 1999 through 2018, instead of from the effective date of the adoption of the regulations through 2018. Additionally, COAH creates a retroactive obligation back to January 1, 2004, based on issuance of certificates of occupancy. The statute provides that COAH is to, from time to time, establish present and prospective need. There is no expressed or

implied authority in the statute to create retroactive obligations. If, as some will assert, affordable housing need was not satisfied subsequent to 1999 because COAH failed to adopt regulations until now, the answer lies not in creating some retroactive obligation, but rather recognizing that some of that need may have been taken care of in the normal course of events, and that which was not taken care of still presently exists. The need which presently exists is part of present need, and is reflected in the rehabilitation share. By making the provisions retroactive, COAH, essentially, double counts that retroactive need which is a part of the rehabilitation obligation of municipalities, and includes need that has already been satisfied.

Point VIII – Unreasonable Amendments. We address two points. First, is the change in the regulations that now requires municipalities to present plans covering their entire prior round obligation, as opposed to the 2004 regulations which required submission of compliance mechanisms for only the remaining prior round obligation. This change has the effect of forcing municipalities to prove over and over again their compliance with their affordable housing obligation, and potentially reopens dispute over past compliance mechanisms. The change offers municipalities no true repose for past compliance. Second is the issue regarding the residential units that may be demolished and rebuilt. The Court recognized that COAH properly granted demolition credits for residential units, because a replacement unit did not create any growth. It was simply a replacement. COAH decided not to grant any demolition credits, and instead created a system in which the demolition and replacement of a unit would incur a growth share obligation, whether the demolition was voluntary or the result of a natural disaster. COAH has proposed an amendment to the regulations which addresses part of the problem, but not all. We argue it is irrational, when projecting a growth share obligation based on "net" change in housing units, to impose an obligation based upon "gross" housing units constructed.

Summary - The Degree of Error. We believe the issues raised in the brief are troubling. **Especially troubling is the fact that COAH, based on its own quietly held study, and the ignored updated projections from NJLWD, knew there was substantial error in the methodology when it adopted amended regulations.** We have established the vacant land and build-out analysis is in error by approximately **60%.** This allows for historic growth projections to be unconstrained. We found municipalities that have been compliant with their obligations are assigned higher obligations because of that compliance. By reviewing more current projections of growth for housing and employment, we find that COAH's projections for employment are overstated by about **40%,** and housing projections overstated by about **33%** assuming a proper vacant land and build-out analysis does not restrict it further. In the Highlands communities, the over-projections of growth are anywhere from **40% to 80+%.** The job generator calculations utilized in the regulations, which municipalities are required to use in preparing their compliance plans, is overstated by more than **50%.** Lastly, the Statewide need was overstated by approximately **46%.** These are substantial systemic problems with the regulations and the methodology chosen by COAH. Hopefully, the Court will force the agency to cure the errors, and bring about a more reasonable affordable housing methodology.

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