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AFFORDABLE HOUSING IN PRIVATE AND PUBLIC REDEVELOPMENT

RESOURCES FOR THOUGHT AND ACTION

- I. Municipal fair share housing obligations and redevelopment—where are we now?
 - A. COAH and the courts—redevelopment and municipal housing obligations
 1. N.J.A.C. 5:95--2004 COAH regulations—growth share exempts redevelopment

In re Adoption of N.J.A.C. 5:94, 390 N.J.Super. 1 (App. Div. 2007)

Regarding redevelopment, we conclude that the rationale offered in response to comments is insufficient to support COAH's decision to exempt redevelopment from a municipality's growth share allocation. As COAH has stated, the growth share "methodology is based on the principle that affordable housing should be provided wherever growth occurs." 36 N.J.R. 5765. Further, growth share "is predicated on the premise that all development provides employment, and, therefore, generates a corresponding need for affordable housing and must, therefore, be included in growth share." Ibid. Individual rules must be consistent with COAH's overall fair share methodology. Twp. of Warren, supra, 132 N.J. at 39, 622 A.2d 1257. The rehabilitation of vacant properties results in real growth, so exclusion of that growth from the growth share equation is not consistent with COAH's overall fair share methodology.

2. N.J.A.C. 5:97--2008 COAH regulations—growth share rewards redevelopment
5:97-3.19 Redevelopment bonus

(a) A municipality may receive 1.33 units of credit for each affordable housing unit addressing its growth share obligation that was or will be created and occupied in the municipality or received preliminary or final approval, after June 6, 1999 that is included in a designated redevelopment area or rehabilitation area pursuant to the Local Redevelopment and Housing Law, N.J.S.A 40A:12A-1 et seq., when:

- 1. The preliminary and/or final approval provides for a minimum set-aside of 15 percent of the total number of units in the development, unless the development meets the criteria of N.J.A.C. 5:97-3.15. In this case, the development shall have a minimum 20 percent affordable housing set-aside, to the extent economically feasible;
- 2. The affordable units are provided on-site;
- 3. At least 50 percent of the affordable units are family units; and
- 4. The development meets the redevelopment criteria pursuant to N.J.A.C. 5:97-6.6.

(b) If the affordable units have not been constructed as of the date of petition, the municipality shall submit evidence of a firm commitment for the construction of the units in conformance with N.J.A.C. 5:94- 3.6(a)3ii.

3. The end of growth share?

In re Adoption of N.J.A.C. 5:96 and N.J.A.C. 5:97 by the New Jersey Council on Affordable Housing, 416 N.J.Super. 462 (App. Div. 2010), petition for certification pending.

4. Growth share resurrected?

B. The Legislature and the Governor

1. A-3447/S-1—municipal housing obligations without sprawl

"Developable land" means any lot or parcel, whether or not the parcel is vacant, or any part of a lot or parcel, having access to sewer service, or that has been determined by the Department of Environmental Protection, pursuant to section 2[21] 202 of P.L. , c. (C.) (pending before the Legislature as this bill), to be legally able to connect to service, having a slope of less than 15 percent, and that is not:

- (1) land that is owned by a local government entity that as of the effective date of P.L. , c. (C.) (pending before the Legislature as this bill), has adopted, prior to the institution of a lawsuit seeking a builder's remedy, a resolution authorizing an execution of agreement that the land be utilized for a public purpose other than housing;

(2) land listed on a master plan of a municipality as being dedicated, by easement or otherwise, for purposes of conservation, park lands, active recreation, or open space and which is owned, leased, licensed, or in any manner operated by a county, municipality or tax-exempt, nonprofit organization including a local board of education, or by more than one municipality by joint agreement pursuant to the "Uniform Shared Services and Consolidation Act," P.L.2007, c.63 (C.40A:65-1 et seq.), for so long as the entity maintains such ownership, lease, license, or operational control of such land;

(3) contiguous with other parcels of land in private ownership which when combined are of a size which would accommodate fewer than five housing units pursuant to the standards of paragraph (1) of subsection c. of section 23 of P.L. , c. (C.) (pending before the Legislature as this bill);

(4) an historic or architecturally important sit² listed on the State Register of Historic Places or National Register of Historic Places unless proposed for historically appropriate conversion or adaptive reuse;

(5) agricultural land for which² development rights have been purchased or restricted by covenant;

(6) environmentally sensitive lands where development is prohibited by any State or federal agency, including prohibitions pursuant to the "Freshwater Wetlands Protection Act," P.L.1987, c.156 (C.13:9B-1 et seq.), the "Pinelands Protection Act," P.L.1979, c.111 (C.13:18A-1 et seq.), the "Coastal Area Facility Review Act," P.L.1973, c.185 (C.13:19-1 et seq.), the "Highlands Water Protection and Planning Act," P.L.2004, c.120 (C.13:20-1 et al.), the federal Clean Water Act, 33 U.S.C. ss.1251 et seq., or the "Hackensack Meadowlands Reclamation and Development Act^{1,1}" P.L.1968, c.404 (C.13:17-1 et seq.).

Developable land shall include existing structures that are appropriate for conversion to or rehabilitation or replacement for housing, including, but not limited to, structures abandoned or underutilized.

B. The Governor's conditional veto message of January 25, 2011

II. Public redevelopment and affordable housing

C.40A:12A-7 Adoption of redevelopment plan.

a. No redevelopment project shall be undertaken or carried out except in accordance with a redevelopment plan adopted by ordinance of the municipal governing body, upon its finding that the specifically delineated project area is located in an area in need of redevelopment or in an area in need of rehabilitation, or in both, according to criteria set forth in section

5 or section 14 of P.L.1992, c.79 (C.40A:12A-5 or 40A:12A-14), as appropriate.

The redevelopment plan shall include an outline for the planning, development, redevelopment, or rehabilitation of the project area sufficient to indicate:

(6) 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.

(7) 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.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 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. A redevelopment plan may include the provision of affordable housing in accordance with the "Fair Housing Act," P.L.1985, c.222 (C.52:27D-301 et al.) and the housing element of the municipal master plan.

III. Private redevelopment and affordable housing

C.52:27D-307 Duties of council.

The council, with respect to any municipality seeking substantive certification, shall require that a minimum percentage of housing units in any residential development resulting from a zoning change made to a previously non-residentially-zoned property, where the change in zoning precedes or follows the application for residential development by no more than 24 months, be reserved for occupancy by low or moderate income households, which percentage shall be determined by the council based on economic feasibility with consideration for the proposed density of development.

C.52:27D-311 Provision of fair share by municipality

h. Whenever affordable housing units are proposed to be provided through an inclusionary development, a municipality shall provide, through its zoning powers, incentives to the developer, which shall include increased densities and reduced costs, in accordance with the regulations of the council and this subsection.

C.52:27D-329.9 Developments, certain, in certain regional planning entities.

a. Notwithstanding any rules of the council to the contrary, for developments consisting of newly-constructed 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 pursuant to statutory law, including the New Jersey Meadowlands Commission pursuant to subsection (i) of section 6 of P.L.1968, c.404 (C.13:17-6), the Pinelands Commission pursuant to section 7 of the "Pinelands Protection Act," P.L.1979, c.111 (C.13:18A-8), the Fort Monmouth Economic Revitalization Planning Authority pursuant to section 5 of P.L.2006, c.16 (C.52:27I-5), or its successor, and the Highlands Water Protection and Planning Council pursuant to section 11 of P.L.2004, c.120 (C.13:20-11), but excluding joint planning boards formed pursuant to section 64 of P.L.1975, c.291 (C.40:55D-77), 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 this is economically feasible.

b. 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 the Department of Transportation, units constructed on State-owned property, and urban transit hubs as defined pursuant to section 2 of P.L.2007, c.346 (C.34:1B-208), shall be required to reserve at least 20 percent of the residential units constructed for occupancy by low or moderate income households, as those terms are defined in section 4 of P.L.1985, c.222 (C.52:27D-304), with affordability controls as required under the rules of the council, 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, or the municipality has been given a judgment of repose or a judgment of compliance by the court, and such a reservation is not required under the approved affordable housing plan.

IV. Exclusionary zoning litigation and redevelopment

1. Failure to seize redevelopment opportunities as opportunities for the creation of affordable as a violation of the constitution

Fair Share Housing v. Cherry Hill, 173 N.J. 393 (2002) (a municipality that lacks sufficient land to satisfy its fair share housing obligation must take advantage of opportunities for private redevelopment to create additional opportunities for affordable housing).

2. Redevelopment as a remedy

Private inclusionary redevelopment as a remedy for municipal violation of fair share housing obligations:

East/West Venture v. Borough of Fort Lee, 286 N.J.Super. 311 (App. Div. 1996);

Tomu Development Co., Inc. v. Borough of Carlstadt, 2005 WL 3018666 (Law Div., November 10, 2005), aff'd, 2008 WL 4057912 (App. Div. 2008), certif. denied, 197 N.J. 474 (2009), cert. denied, _ U.S. __, 130 S.Ct. 70 (2009);

Nuckel v. Little Ferry, BER-L-717-06 (Law Div. March 18, 2008).