THE TOWNSHIP OF MILLSTONE

COUNTY OF MONMOUTH
STATE OF NEW JERSEY

MUNICIPAL BUILDING
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COMMENTS REGARDING COAH's PROPOSED NEW THIRD ROUND SUBSTANTIVE RULES

SUBMITTED TO COAH
BY THE TOWNSHIP OF MILLSTONE
MONMOUTH COUNTY, NEW JERSEY
March 18, 2008

Lucy Voorhoeve, Executive Director
NJ Council on Affordable Housing
101 South Broad Street
Trenton, NJ 08625-0813

Dear Ms. Voorhoeve:

This letter contains Millstone Township's comments regarding COAH's currently proposed "Third Round Substantive Rules". The comments were prepared by Coppola & Coppola Associates in consultation with the officials and staff of the Township.

Millstone Township is a bone-fide rural/farmland municipality which is located entirely within the Rural/Environmentally Sensitive Planning Area (PA-4B) by the currently adopted State Development and Redevelopment Plan. There are no public sewerage and/or water facilities available to service new residential or non-residential developments within the Township.

As indicated in the Township's Master Plan, and in accordance with the State Plan, the following are Millstone Township's "principles" and "policies" for land development:

Principles

1. The rural character of Millstone Township should be maintained.

2. Open space and farmland are essential to maintaining a healthy environment, controlling urban sprawl, and preserving the rural character of Millstone Township and it natural and cultural resources. The Township is uniquely located and serves as the origin for one-quarter of New Jersey's twenty major watershed areas. A Township network of

permanently preserved open spaces and farmland is needed to provide public recreation, to maintain biodiversity, to protect water quality, to control flooding, and to conserve the community's significant scenic, cultural, and natural features.

3. The Township supports the vision of the State Plan for Millstone Township as a rural environmentally sensitive planning area and is committed to the protection of its natural and cultural resources including steep slopes, stream corridors and their associated wetlands and floodplains, forests, agriculture, and areas valuable as scenic, historical, cultural, or recreational resources.

4. The Township recognizes the regional importance of Millstone Township as the convergence zone for central New Jersey watersheds and the need to protect its exceptional high quality water resources.

5. The Township needs to plan for agricultural, residential, commercial, office, light industrial, recreational, and public and quasi public uses to achieve a balance of conservation and beneficial economic development that maintains the rural character of Millstone.

Policies

1. The Township encourages land use and beneficial economic development that is compatible with the maintenance and enhancement of Millstone as a rural environmentally sensitive community.

2. The Township will provide its active support and encourage local participation in State and County farmland and open space preservation programs to preserve as much of Millstone's open space and farmland as possible.

3. The Township will control the location and expansion of infrastructure to conserve the rural character of the Township and discourage the extension of sewer and water service into the municipality.

4. The Township will provide for its fair share of the regional lower income housing need consistent with the State Plan designation of the Township as rural environmentally sensitive planning area, with municipal responsibilities under the Fair Housing Act, and with the rules and regulations of the Council on Affordable Housing.

In achieving its land use planning objectives, Millstone Township recognizes that the Township benefits significantly from its partnership with Monmouth County that has resulted in funding and acquisition of farmland for preservation purposes. At this time, Millstone Township has preserved 712 acres of farmland.

Millstone Township's review of COAH's proposed rules concludes that the rules, including certain provisions of the rules, but most definitely when all of the provisions of the rules are assessed in aggregate, are impractical, are punitive to municipalities and private land developers alike, will negatively impact the State's economy, and will impose substantial burdens on the taxpayers in contradiction to the requirement of the "Fair Housing Act" which prohibits COAH from forcing municipalities "to raise or expend municipal revenues in order to provide low and moderate income housing." (N.J.S.A. 52:27D-311 d.)

UNSUBSTANTIATED POPULATION & JOB PROJECTIONS

The January 25, 2007 Appellate Court Decision concluded that the population and job projections in COAH's prior rules were unsubstantiated and, further, that municipalities should not be allowed to rely on their own projections.

Millstone Township understands that it has a responsibility to provide its "fair share" of the projected regional affordable housing obligation. Millstone Township also understands that municipalities should not be permitted to manipulate the projections in a manner that avoids its "fair share" affordable housing obligation.

However, the currently proposed rules rely on unsubstantiated population and job projections to determine a municipality's minimum "growth share" affordable housing obligation. If COAH's rules are to rely on population and job projections at the municipal level in determining the "fair share" housing obligation of a municipality, shouldn't the projections be as accurate as possible?

The currently proposed methodology ignores the potential inaccuracies in the projections allocating the initial "growth share" obligation to a municipality and yet indicates that "the actual growth obligation shall be based on permanent certificates of occupancy issued within the municipality for market-rate residential units and newly constructed, re-occupied and expanded non-residential development" over the compliance period from January 1, 2004 through December 31, 2017.

The very troubling result of this backward approach is that municipalities must initially adopt a "Housing Plan Element & Fair Share Plan" (HPE&FSP) for an unsubstantiated number of affordable units and then possibly amend its plan a number of times during the compliance period to reflect a more accurate "growth share" obligation.

The proposed rules acknowledge that the population and/or job growth projections may be wrong by stating that "a municipality may utilize its own growth projections to calculate the growth share". However, illogically, the rules then go on to contain the proviso that the projections can only be adjusted upward. If the projections are acknowledged to possibly be wrong, why is there not the ability of a municipality to provide more accurate data at the time the HPE&FSP initially is prepared?

Moreover, since the determination of the actual number of affordable units obligated to a municipality will be in a state of flux over the approximately 10 year compliance period, debate and possible litigation regarding the actual obligation undoubtedly will occur.

Finally, given the Appellate Court Decision's reliance upon the following passage from Judge Serpentelli's 1984 AMG Realty Co. v. Township of Warren Superior Court Decision, COAH's currently proposed methodology is flawed if the information it has used is not reliable and/or if it does not include appropriate checks and balances.

More specifically, Judge Serpentelli wrote the following:

> "Any reasonable methodology must have as its keystone three ingredients: reliable data, as few assumptions as possible, and an internal system of checks and balances. Reliable date refers to the best source available for the information needed and the rejection of data which is suspect. The need to make as few assumptions as possible refers to the desirability of avoiding subjectivity and avoiding any data which requires excessive mathematical extrapolation. An internal system of checks and balances refers to the effort to include all important concepts while not allowing any concept to have a disproportionate impact."

COAH's current methodology is flawed since it is not based on reliable data, assumes that the projections calculated by its consultants are accurate even though no base data has been provided so that anyone can check the calculations, and provides no checks and balances such as COAH's consideration of more accurate municipal data and projections.

Millstone Township submitted an OPRA Request detailing the information not included in COAH's proposed new rules that will enable the Township to check the methodology and possibly indicate to COAH in greater detail why the methodology is flawed. The OPRA Request is attached to this letter.

No rules should be adopted by COAH until that information is provided to Millstone Township and the Township has had a reasonable time to analyze the information and provide additional comments.

INCOMPATIBILITY WITH THE STATE PLAN

The proposed rules were not formulated in consideration of the recommendations of the State Development And Redevelopment Plan and, as a result, COAH's proposed rules and the State Plan are incompatible.

As written on Page 79 of the currently adopted State Plan, the "strategy" for providing adequate housing in New Jersey at a reasonable cost is as follows:

> "Provide adequate housing at a reasonable cost through public/private partnerships that create and maintain a broad choice of attractive, affordable, ecologically designed housing, particularly for those most in need. Create and maintain housing in the Metropolitan and Suburban Planning Areas and in Centers in the Fringe, Rural and Environmentally Sensitive Planning Areas, at densities which support transit and reduce commuting time and costs, and at locations easily accessible, preferably on foot, to employment, retail, services, cultural, civic and recreational opportunities..."

The Metropolitan Planning Area (PA-1) and the Suburban Planning Area (PA-2) are the "growth" areas designated on the State Plan. An earlier State planning document, the "State Development Guide Plan" (SDGP) was used by the Supreme Court in its "Mt. Laurel II" Decision. Regarding the maps in the SDGP, which divided the State into six (6) basic areas including growth, limited growth, agriculture, conservation, pinelands and coastal zones, the Court wrote as follows:

> "By clearly setting forth the state's policy as to where growth should be encouraged and discouraged, these maps effectively serve as a blueprint for the implementation of the *Mount Laurel* doctrine."

The current State Plan directs growth to Planning Areas 1 & 2 and away from Planning Areas 3, 4 & 5 unless the growth occurs within designated "centers". And yet COAH's proposed rules did not consider this long established State policy, first expressed in the original State Plan which was adopted on June 12, 1992.

Instead, COAH's new rules identified developable lands throughout the State without consideration of their planning area designation by the State Plan, so that "developable" lands in the Environmentally Sensitive (PA-5), the Rural/Environmentally Sensitive (PA-4B), the Rural (PA-4) and the Fringe (PA-3) planning areas were given the same weight as developable lands in the Metropolitan (PA-1) and Suburban (PA-2) planning areas.

Therefore, the minimum number of required affordable housing units generated for a given municipality from the population and job projections contained in "Appendix F" was not cross-tabulated against the amount of developable lands in the planning area locations promoted for development by the State Plan.

As a result, municipalities that do not have sufficient lands within Planning Areas 1 & 2 to locate the required affordable housing units will be forced to utilize lands in Planning Areas 3, 4 & 5.

While a number of small-scale affordable housing projects could be accommodated on lands within Planning Areas 3, 4 & 5 in concert with the recommendations of the State Plan via "Supportive & Special Needs Housing" and/or small-scale municipally sponsored developments of 10 or so units, such small numbers of affordable units oftentimes will not satisfy the very high number of affordable units mandated by the proposed new rules.

The single option left for a municipality is to designate a "center" which, as stated on Page 230 of the State Plan, is the "preferred vehicle for accommodating growth." However, the State Plan also recognizes that specific locations for centers may not be appropriate for additional growth; therefore, COAH's rules should not assume that the designation of a center will be appropriate from a land use planning viewpoint in all municipalities.

Most relevant to COAH's new rules creating the need for a municipality to designate a center primarily or solely to provide areas for affordable housing is the following passage on Page 234 of the State Plan, which clearly does not recommend the creation of centers for the primary purpose of satisfying a single interest, such as the provision of affordable housing:

> "The challenge in developing Center guidelines is to achieve a balance between the diverse and often competing interests of a Center's many uses and stakeholders. Centers --- and Center design --- should strive to promote the interest of the community as a whole and optimize State Plan Goals, rather than seeking to maximize any of them. If any single interest (whether affordable housing, or wetlands protection or economic development), no matter how deserving on its own, achieves primacy at the expense of all the others, this most delicate balance is lost and the community as a whole stands to lose."

The inappropriateness of COAH's rules creating the need for a municipality to create a "center" to accommodate affordable housing development to meet its COAH mandated affordable housing obligation is that the new development in the center will create an additional need for affordable housing units, so that the creation of the center may not help the municipality satisfy its currently projected affordable housing obligation.

More specifically, COAH's proposed new rules require a municipality to provide one (1) affordable housing unit for every four (4) new market-rate units and/or for every sixteen (16) newly created jobs. Therefore, the new residential and non-residential development in a newly created center, which development has not been factored by COAH into the projections within "Appendix F" of the proposed new rules, will add to the municipality's "growth share" obligation beyond the current population and job growth projections.

The end result will be the promotion of excessive development in possibly inappropriate locations in Planning Areas 3, 4 & 5.

Is it too much to request that COAH adopt rules which are compatible with the recommendations of the State Plan and do not require municipalities to take actions and adopt "Housing Plan Elements & Fair Share Plan" which are contrary to the State Plan and which do not promote smart growth?

LACK OF COORDINATION WITH NJDEP REGULATIONS

While a relatively small number of affordable units could be accommodated on lands not served by sewage treatment plant facilities in Planning Areas 3, 4 & 5 via "Supportive & Special Needs Housing" and/or small-scale municipally sponsored developments of 10 or so units, many municipalities will not be able to accommodate the very high minimum affordable housing obligations mandated by COAH's proposed new rules without sewage treatment plants in Planning Areas 3, 4 and/or 5.

Currently DEP, in coordination with the recommendations of the State Plan, does not permit new sewage treatment plants within Planning Areas 3, 4 or 5, except within designated "centers".

As previously discussed, and in accordance with the recommendations of the State Plan, "centers" are not necessarily appropriate in every municipality. Therefore, how can municipalities needing to locate substantial affordable housing units on lands in Planning Areas 3, 4 or 5 without center designation be expected to comply with the affordable housing obligations mandated by COAH's proposed new rules?

What is needed is for an exception from DEP to allow a limited number of new sewage treatment plants in Planning Areas 3, 4 & 5 without the necessity for a change in planning area designation or center designation. The exception should be limited to new package treatment plants serving only relatively small developments (i.e., no more than 50 units) of 100% affordable housing units, and with a further restriction that no more than four (4) such treatment plants be permitted.

Without such an exception from DEP rules, and assuming that center designation is not appropriate within all municipalities, many municipalities without any or sufficient sewage treatment facilities will not be able to create a reasonable opportunity for the construction of the affordable housing units required by COAH's proposed new rules.

During recent years there has been a lot of talk at the State level of government promising that the various State departments and agencies will have their rules coordinated so that all affected parties, including municipalities and developers, would not face conflicting rules when attempting to effectuate State mandates and policy objectives.

COAH's proposed new rules, compared to the recommendations of the State Plan and the rules of NJDEP, are the latest and most evident reminder that the State promises of coordinated rules and policies among the State departments and agencies has been nothing more than talk.

COAH should not adopt new rules until it coordinates the rules with the State Planning Commission and the Department of Environmental Protection to assure that the required affordable housing units can be appropriately, practically and reasonably be provided by municipalities without violating other state rules and policies.

DISCOURAGEMENT OF MUNICIPAL ALLIANCES WITH PRIVATE DEVELOPERS

The "Mt. Laurel II" Supreme Court Decision observed that there were two (2) basic ways that municipalities could provide the opportunity for the construction of affordable housing: government subsidies and "inclusionary" housing developments.

More particularly, the Court wrote the following at 260 of the decision:

> "There are two basic types of affirmative measures that a municipality can use to make the opportunity for lower income housing realistic: (1) encouraging or requiring the use of available state and federal housing subsidies, and (2) providing incentives for or requiring private developers to set aside a portion of their developments for lower income housing."

Regarding inclusionary development, the Court wrote the following at 265 of the decision:

> "The most commonly used inclusionary zoning techniques are incentive zoning and mandatory set-asides. The former involves offering economic incentives to a developer through the relaxation of various restrictions of an ordinance (typically density limits) in exchange for the construction of certain amounts of low and moderate income units. The latter, a mandatory set-aside, is basically a requirement that developers include a minimum amount of lower income housing in their projects."

Prior to the adoption of COAH's first "Substantive Rules" in 1986, "inclusionary" developments were the basic method used by municipalities, in cooperation with developers, to provide affordable housing units. COAH's proposed rules will effectively discourage these municipal alliances with private developers to provide affordable housing.

The reason private land developers will not be sought by municipalities to help them satisfy their "fair share" housing obligation is a combination of two (2) provisions of COAH's proposed rules: 1) the "growth share" methodology which computes a municipality's "fair share" affordable housing obligation to the construction of market-rate residential units and the creation of new jobs; and 2) the high number of affordable housing units obligated to a municipality when market-rate units and/or new jobs are created.

COAH's proposed rules require one (1) affordable unit for every four (4) market-rate units or sixteen (16) new jobs. The number of required affordable units resulting from the creation of new jobs is compounded by the high number of jobs per square foot of non-residential development stipulated in "Appendix D" of the proposed new rules.

Nevertheless, any development within a municipality will generate a "growth share" need for affordable housing. Therefore, if a municipality encourages an amount of development which is above the population and job growth projections contained in "Appendix F" of COAH's proposed rules, the municipality will be increasing its affordable housing obligation above the initially mandated number of required affordable units.

Most problematic is the fact that even if the subject development (i.e., above the population and job growth projections contained in "Appendix F") is an "inclusionary" development with a set-aside of affordable units, the municipality can practically do nothing more than require the developer to provided affordable units only equivalent to the number of units generated by the development itself.

Assuming an entirely residential development, the 4:1 ratio of market-rate units to affordable units requires that 20% of the units be affordable in order just to satisfy the affordable housing obligation created by the development itself. And the density of the development is irrelevant to this conclusion.

Therefore, the only way a municipality could provide more affordable units in the development would be to require a set-aside of affordable units above 20%. However, as noted in the following passage from the January 25, 2007 Appellate Division Decision:

> "Experience had shown the Mount Laurel judges that twenty percent was the maximum set-aside that would induce builders to participate in the construction of affordable housing."

Therefore, municipalities cannot reasonably ask developers to set aside more than 20% of the units within an "inclusionary" residential development for occupancy by "low" and "moderate" income households. Conversely, developers will find it financially difficult to provide more than a 20% set-aside.

The end result is that COAH's proposed rules will discourage municipal alliances with private developers in a municipality's effort to satisfy its affordable housing obligation.

Therefore, COAH should consider the following changes to the proposed rules:

1) Exempt from the "growth share" calculations all of the market-rate residential units and the jobs created from non-residential uses within any new "inclusionary" development regardless of the setaside percentage of affordable housing units.

2) Specifically exempt from the "growth share" calculations all market-rate residential units and the jobs created from non-residential uses within any "inclusionary" development approved by a municipality under COAH's prior rules regardless of the setaside percentage of affordable housing units.

3) Modify the jobs per square foot of non-residential development stipulated in "Appendix D" of the proposed rules; as currently proposed, if a municipality requires a payment in lieu from the developer, the caps ranging from $145,903 to $182,859 for a single affordable unit will result in a substantial increase to the construction cost of the development.

For the reasons noted, COAH's proposed rules will have a chilling affect on new residential and non-residential development throughout New Jersey, since the rules provide no incentive for municipalities to encourage new development and the developers will be financially stretched to the limit just to provide the affordable units generated by their developments.

INCOMPATIBILITY WITH THE "FAIR HOUSING ACT"

As previously noted, COAH's proposed rules provide no incentive for municipalities to encourage new development and the developers will be financially stretched to the limit just to provide the affordable units generated by their developments. The alternatives available to municipalities to satisfy their mandated affordable housing obligation are limited and, more often than not, will require the expenditure of public funds.

One option is to provide "Supportive & Special Needs Housing", including "group homes". Another is for the municipality to sponsor "100% affordable housing developments". Both options will require a municipality to acquire lands for the location of the affordable housing, and the dollar amount necessary to acquire the lands may be substantial, depending upon the amount of acreage and the number of sites needed to accommodate the required units.

A third option in COAH's proposed rules is for a municipality to enter into a "Regional Contribution Agreement" (RCA) with a "receiving municipality" in its housing region for the transfer of up to 50% of its prior round and/or "growth share" obligations.

Depending upon the housing region within which the municipality is located, the minimum cost for each unit transferred via an RCA will range between $67,000 and $80,000. Therefore, even if a relatively small number of 25 units were the subject of an RCA, the municipality would have to expend at least $1,675,000 to $2,000,000.

The relatively high "fair share" affordable housing obligations mandated by COAH's proposed rules, the rule's discouragement of municipal alliances with private developers, and the lack of other compliance options that will practically result in a large number of affordable housing units severely limit the options for a municipality to satisfy its affordable housing obligation.

Buying land for "Supportive & Special Needs Housing" and/or "100% affordable housing developments" and a "Regional Contribution Agreement" are the options that ordinarily will have to be included in a municipal "Housing Plan Element & Fair Share Plan" in order for the municipality to satisfy its mandated affordable housing obligation.

These options are expensive and will require many municipalities to bond for the costs and possibly raise property taxes in order to pay off the debt since neither the general fund account or moneys deposited within a municipality's "Housing Trust Fund" will not be sufficient to cover the costs.

In this regard, N.J.S.A. 52:27D-302 h. of the "Fair Housing Act" states the following:

> "The Supreme Court of New Jersey in its Mount Laurel decisions demands that municipal land use regulations affirmatively afford a reasonable opportunity for a variety and choice of housing, including low and moderate income housing, to meet the needs of people desiring to live there. While the provision for the actual construction of that housing by municipalities is not required, they are encouraged by not mandated to expend their own resources to help provide low and moderate income housing."

For reasons previously noted, COAH's proposed new rules effectively mandate that municipalities "expend their own resources to help provide low and moderate income housing." And given the costs that often will be necessary, the expenditure will not be limited to existing financial resources, but often will necessitate the raising of property taxes to pay for the costs incurred and the ongoing debt of bond financing

This result of COAH's proposed new rules is in direct contradiction to N.J.S.A. 52:27D-311 d. of the "Fair Housing Act" which states that "nothing in P.L. 1985, c.222 shall require a municipality to raise or expend municipal revenue in order to provide low and moderate income housing."

Very truly yours,

Nancy Grbelja, Mayor
Township of Millstone

cc: The Honorable Joseph Doria, DCA Commissioner
Millstone Township COAH Work Group Members
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