

**PRESENTATION REGARDING COAH'S RULES  
AND THEIR IMPLICATIONS FOR ABERDEEN TOWNSHIP**

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JOINT MEETING OF TOWNSHIP COUNCIL & PLANNING BOARD  
September 2, 2008**

**A. PURPOSE OF PRESENTATION**

The overall purpose of this presentation to the Township Council, the Planning Board and to the public is to report factual information regarding COAH's new rules and their implication for Aberdeen Township.

At the outset, municipal officials and municipal staff members have had meetings to analyze COAH's new and proposed rules in order to determine the best course of action to safeguard the quality of life and other interests of the citizens of Aberdeen Township.

To date, no decisions have been concluded regarding the course of action that should be taken, but a number of options are being considered and will be reported upon during subsequent public meetings.

Again the overall purpose of this presentation is to report factual information regarding COAH's new rules and their implications for Aberdeen Township. Written copies of this presentation will be distributed to members of the Township Council and Planning Board at the end of this meeting and will be made available to anyone else who desires a copy from either the Township Clerk or the Planning Board Secretary starting tomorrow in this municipal building.

**B. BRIEF CHARACTERIZATION OF ABERDEEN TOWNSHIP**

The Township of Aberdeen is a predominantly residential community of medium density with concentrations of commercial development along State Highway Routes 34 and 35 and Lower Main Street (County Route 516). There is very little remaining vacant land which is capable of being developed.

An integral part of Aberdeen Township is the variety of natural features situated amidst the developed portions of the Township. The natural features contained within the Township include steep topographic slopes, marshes, wetlands, flood plains, lakes, creeks, streams, coastal shore line and woodlands, all of which are habitats for various flora and fauna. Additionally, the Township's geological formations and soil characteristics present important considerations for land development and land preservation.

The information documented in the Township Master Plan clearly indicates that most of the vacant lands remaining in Aberdeen Township are constrained by steep slopes, 100-year flood plains and/or freshwater wetlands.

**C. COAH'S ADOPTED/PROPOSED NEW RULES**

1. On May 6, 2008, COAH adopted new rules, although many municipalities and developers in the State filed comments in objection to the rules.
2. Also on May 6th, COAH proposed a number of amendments to the rules it adopted on the same day, and municipalities have been told by COAH to consider the proposed rule amendments as if they were adopted.
3. It is my opinion, which I believe is shared by the Aberdeen municipal officials and staff, that COAH's adopted/proposed new rules, including certain specific provisions, but most definitely when all of the provisions of the rules are assessed in aggregate:
  - a. Are impractical;
  - b. Are punitive to municipalities and private land developers alike;
  - c. Are arbitrary and capricious since they are premised upon faulty and unverifiable data;
  - d. Will effectively discourage municipal alliances with private developers;
  - e. Will negatively impact the State's economy; and
  - f. Will be a burden to taxpayers, since the rules will result in substantial increases in the real property tax burden in direct contravention with the "Fair Housing Act" which prohibits COAH from forcing municipalities "to raise or expend municipal revenues to provide low and moderate income housing." (N.J.S.A. 52:27D-311 d.)
4. The adopted/proposed new rules include the "growth share" approach for the calculation of the number of affordable units calculated by COAH to be obligated to a municipality.
  - a. For residential development, the calculation is based upon 1 affordable unit for every 4 market-rate units (the prior rules were 1 affordable unit for every 8 market-rate units.

- b. For nonresidential development, the calculation is based upon 1 affordable unit for every 16 jobs (the prior rules were 1 affordable unit for every 25 jobs).
5. One might think that the COAH rules allow municipalities to somewhat control their affordable housing obligation by managing the overall number of market-rate units and the number of jobs created from new nonresidential development; however, this is not the case.
- a. COAH's rules contain projections for both residential unit growth and job growth from January 1, 2004 through December 31, 2018.
  - b. Even though these projections are unsubstantiated and may be wrong, COAH's rules state that the projections are presumptively accurate and that the number of affordable units resulting from the projections are the minimum number of affordable units that must be satisfactorily addressed in a "Housing Plan Element & Fair Share Plan" to be adopted by each of the State's municipalities by the end of this calendar year, December 31, 2008.
6. To make matters even worse, on July 17, 2008, Governor Corzine signed P.L.2008, c.46, which put municipalities in even a more difficult situation.
- a. The new legislation has eliminated the possibility for a suburban or rural municipality, such as Aberdeen Township, to enter into a "Regional Contribution Agreement" (RCA) with an urban municipality for up to 50% of its affordable housing obligation, and pay the urban municipality a sum of money for them to construct needed affordable housing units within its bounds.
  - b. The new legislation also sets a development fee for nonresidential development at a rate of 2.5% of the equalized assessed value of the development and forbids a municipality from charging, in connection with nonresidential construction, any other fee, notwithstanding COAH's rules.
  - c. The good news is that municipalities that have COAH's authorization to collect residential development fees, because they are attempting to adhere to COAH's rules, will be permitted to retain the nonresidential development fees; all other municipalities will be required to remit the nonresidential development fees to the State Treasurer to be used for affordable housing purposes.

- d. In any case, it should be noted that the new legislation maintains COAH's requirement that the number of "growth share" affordable units obligated to the municipality because of the nonresidential development must still be added to the municipality's affordable housing obligation.
7. The end result of COAH's rules and the recent legislation is that most municipalities have been mandated to provide a very high number of affordable housing units with very limited options to do so.
- a. In the past, "inclusionary" residential developments were the basic method used by municipalities, in cooperation with developers, to provide affordable housing units.
  - b. An "inclusionary" development requires a developer to include a minimum amount of affordable housing units within their developments.
8. However, COAH's rules effectively discourage these municipal alliances with private developers to provide affordable housing.
- a. More specifically, and as previously mentioned, COAH's proposed rules require one (1) affordable unit for every four (4) market-rate units.
  - b. As a result, any residential 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 calculated by COAH, the municipality will be increasing its affordable housing obligation above the initially mandated number of required affordable units.
9. Most problematic is the fact that with an "inclusionary" development with a set-aside of affordable units, the municipality can practically do nothing more than require most developers to provide affordable units only equivalent to the number of affordable units generated by the development itself.
- a. More particularly, 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.

- b. Therefore, the only way a municipality could require more affordable units in the development would be to require a set-aside of affordable units above 20%.
  - c. However, as noted in the following passage from the 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."
  - d. Therefore, municipalities ordinarily cannot reasonably require developers to set aside more than 20% of the units within an "inclusionary" residential development as affordable units. Conversely, developers most often will find it financially difficult to provide more than a 20% set-aside.
10. Although COAH's rules and the recently adopted bills by the State legislature are impractical and punitive to municipalities and private land developers alike, we should not lose sight of the fact that affordable housing units are needed in the State and will provide housing opportunities for a relatively large number of the work force households in New Jersey, including many professional people.
- a. Although COAH uses the terms of "low" and "moderate" income when describing the households eligible to occupy affordable housing units, the term "work force" households is probably more on point.
  - b. More specifically, in accordance with the published "2008 Regional Income Limits", a 1-person household occupying a "moderate" income affordable housing unit can earn up to \$47,357 in Monmouth County, a 2-person household can earn up to \$54,122, a 3-person household can earn up to \$60,888 and a 4-person household can earn up to \$67,653.
  - c. For "low" income affordable housing units, a 1-person household can earn up to \$29,598, a 2-person household can earn up to \$33,826, a 3-person household can earn up to \$38,055 and a 4-person household can earn up to \$42,283.
  - d. Therefore, it must be remembered that COAH households are not poor, but often cannot afford to purchase or rent market-rate housing units in the State.

D. **ABERDEEN TOWNSHIP'S COAH MANDATED AFFORDABLE HOUSING OBLIGATION**

COAH's new/proposed rules require that a municipality address three (3) components of its affordable housing obligation, including the "Rehabilitation Share", the "Prior Round Obligation" and the "Growth Share" obligation.

**Rehabilitation Component**

1. Aberdeen Township has been assigned a 31 unit rehabilitation share obligation; the rehabilitation share is the number of unspecified housing units in the Township as of April 1, 2000 which have a physical deficiency such as problematic plumbing, heating or septic systems and which are occupied by eligible COAH households.
2. It is suggested that the Township address its rehabilitation share obligation via a Monmouth County program.

**Prior Round Obligation**

1. Aberdeen Township's 1987-1999 affordable housing obligation was calculated in 1993 to be a total of 293 affordable units, including a "Rehabilitation Component" of 23 units and a "New Construction Component" of 270 units.
2. However, as indicated in an October 3, 2005 report, COAH previously granted Aberdeen Township a vacant land adjustment pursuant to N.J.A.C. 5:93-4.2, reducing the Township's "New Construction Component" from 270 to 228 units.
3. Unfortunately, COAH's newly adopted rules do not honor the prior vacant land adjustment and, therefore, Aberdeen Township's prior round obligation is 270 affordable housing units.

**Growth Share Obligation & Total New Construction Obligation**

1. Aberdeen Township's presumptive growth share affordable housing obligation totals 170 affordable units, including 49 units calculated from projected residential unit growth and 120.94 units calculated from projected nonresidential job growth.
2. Therefore, adding the prior round and growth share obligations together, Aberdeen Township's total housing obligation for new affordable housing units is 440 units (i.e., 270 du "prior round" + 170 du "growth share").

3. The affordable housing obligation is for the time period between January 1, 2004 and December 31, 2018 and Aberdeen Township, as well as every other municipality in the State, currently is required to submit an adopted "Housing Plan Element & Fair Share Plan" to COAH by the end of this 2008 calendar year addressing its affordable housing obligation.
4. It should be noted and understood that COAH does allow a potential vacant land adjustment, but in accordance with new required methodology; our firm is preparing such an analysis at this time in order to determine whether Aberdeen Township's obligation for the construction of new affordable housing unit is actually less than the 440 number.
5. However, at this time, until the result of the new vacant land adjustment analysis is known, we will continue to assume that Aberdeen Township's cumulative affordable housing obligation for new construction is 440 units.

E. **PROBABILITY OF "BUILDER'S REMEDY" LAWSUITS FOR NON COMPLIANT MUNICIPALITIES**

1. Because COAH's adopted/proposed rules obviously are impractical, are based upon faulty and unverifiable data, are inconsistent with the "Fair Housing Act", are inconsistent with the State Plan and are now the subject of various filed litigations, it is easy to feel that a municipality should do nothing to comply with the rules and that somehow everything will work out in favor of the municipality.
2. However, this thinking is dangerous because right now the adopted/proposed COAH rules are the law and the law requires that each municipality in the State of New Jersey submit a plan to COAH by December 31, 2008 addressing its mandated affordable housing obligation as determined by COAH.
3. The repercussion of not filing a plan to COAH by the end of the calendar year most definitely will be what was dubbed by the New Jersey Supreme Court as a "builder's remedy" lawsuit.
4. Essentially, such a lawsuit is filed by a property owner simply alleging that the municipality has not complied with COAH requirements; it is an easy and relatively inexpensive lawsuit to file.
5. Once filed, the presiding Judge will simply determine whether or not the municipality has or has not complied with COAH requirements, with absolutely no consideration as to the merits of COAH's rules which the Judge rightfully will view as the law of the land.
6. When a municipality is found to be non-compliant, a "Court Master" is appointed by the Judge.

- a. The court appointed master ordinarily is a licensed planner who is familiar with COAH's rules.
  - b. The fees for the court appointed master, currently at the rate of approximately \$200 to \$250 per hour, are paid entirely by the municipality, including time spent by the master with the municipality, the plaintiff, the Judge and any and all other time for analyses and report preparation.
  - c. Should the court master need information to be generated by the municipality, then the municipality also may have to expend money in order to generate the requested information.
  - d. Moreover, the Judge traditionally instructs the master to settle the case so that as little time as necessary is spent by the Judge.
  - c. Essentially, the Judge and the court master will use and enforce COAH's rules and not deviate from them.
7. The municipality is entirely on the defensive and may end up with nothing more than a few affordable units relative to a large increase in the number of market rate units relative to the number of units that could be constructed under the prevailing zoning.
  8. As a result of settlement of the litigation, the municipality will not be determined by the Judge to have met its affordable housing obligation unless the total number of affordable housing units required by COAH has been provided; therefore, additional litigation may occur.

**F. STATUS OF EFFORTS OF ABERDEEN'S OFFICIALS & STAFF**

1. As previously noted, municipal officials and staff members have had meetings to analyze COAH's new and proposed rules in order to determine the best course of action to safeguard the quality of life and other interests of the citizens of Aberdeen Township.
2. A number of different scenarios are being explored regarding the "Housing Plan Element & Fair Share Plan" to be submitted to COAH by the end of 2008, all of which will protect Aberdeen Freehold Township against a "builder's remedy" lawsuit which will negate the ability of the Township to determine what is in its best interests.



3. As background information, based upon the 440 unit affordable housing obligation for Aberdeen Township (i.e., 270 du "prior round" + 170 du "growth share"), COAH's adopted/proposed rules establish the following minimum and maximum requirements:
- a. At least 50% of its 440 unit affordable housing obligation, or 220 units, must be family for-sale or for-rent housing [N.J.A.C. 5:97-3.9].
  - b. At least 25% of its 440 unit affordable housing obligation, or 110 units, must be rental housing units [N.J.A.C. 5:97-3.11(b)], and 50% of the rental units must be family housing [N.J.A.C. 5:97-3.4(b)].
  - c. No more than 25% of its 440 unit affordable housing obligation, or 110 units, can be age-restricted units [N.J.A.C. 5:97-3.11(c) 3.].
  - d. In accordance with the proposed rule amendments, bonus credits for rental units will only be given to the second 25% of units provided; no rental bonuses will be given to the base number of required rental units [i.e., the first 25%] and no rental bonuses will be given to age-restricted housing.
    - 1) Rental bonuses for supportive housing and group home bedrooms will be given at a ratio of 1:25 credits per bedroom.
    - 2) Rental bonuses for family units will be given at a ratio of 2 credits per unit.
4. The following types of COAH sanctioned development options are being considered by the COAH Work Group in order to address the Township's mandated affordable housing obligation:
- a. Accessory Apartments:  
"A self-contained residential dwelling unit with a kitchen, sanitary facilities, sleeping quarters and a private entrance, which is created within an existing home, or through the conversion of an existing accessory structure on the same site, or by an addition to an existing home or accessory building, or by the construction of a new accessory structure on the site."
    - 1) In the case of Aberdeen Township, no more than 44 accessory apartments may be included in the "fair share plan" (i.e., 10% x 440 du = 44 du).

- 2) Accessory apartments will be considered family units.
  - 3) The Township would have to provide a minimum of \$20,000 per unit to subsidize a moderate income accessory apartment or \$25,000 per unit for low income apartments. The subsidy may be used to fund actual construction costs and/or to provide compensation for reduced rental rates.
  - 4) There must be water and sewer infrastructure with sufficient capacity to serve the proposed accessory apartments, which includes adequate septic systems.
  - 5) Aberdeen Township would have to demonstrate to COAH that the housing stock in the Township lends itself to accessory apartments.
  - 6) The units would not need to meet the bedroom size distribution otherwise applicable to family units (i.e., max 20% efficiencies & 1-BR, min 30% 2-BR & min 20% 3-BR), but the ordinance cannot restrict the size of the apartments.
  - 7) The units can be all for low income households or all for moderate income households or any combination thereof.
  - 8) The accessory apartments would have to be deed restricted with 10-year controls on affordability.
- b. Zoning Private Property For Inclusionary Development:  
 "A development containing both affordable units and market-rate units."
- 1) Affordable housing units proposed through inclusionary development shall be provided through zoning that includes a financial incentive to produce the affordable housing, including, but not limited to, increased densities and reduced costs to the developer.
  - 2) Aberdeen Township would have to submit to COAH at the time it petitioned for "Substantive Certification" a fully executed agreement between the Township and the developer.

- 3) It must be noted that at the COAH adopted ratio of 1 affordable unit for every 4 market-rate units, a 20% set-aside affordable units within the development does not provide a net gain of affordable units to be applied against the Township's currently calculated affordable housing obligation.
- 4) The only way to achieve a meaningful number of affordable units would be to dramatically increase the density on the property and require at least a 25% set-aside of affordable units.
- 5) In addition to the increased density, COAH also requires that at least one (1) additional incentive be provided, ordinarily allowing multiple unit residential buildings but also possibly granting relief from regulatory requirements that result in cost reductions to the developer.
- 6) It also should be noted that once a private property is included in a municipality's "fair share plan", the property will not be permitted by COAH to be removed from the plan without the landowner's consent.

c. Municipally Sponsored & 100% Affordable Developments:  
 A development containing 100% affordable units, either age-restricted (i.e., 55 yrs and older) or non age-restricted units (i.e., family units).

- 1) These developments usually are on publicly owned properties.
- 2) The development is constructed via a municipal partnership with a non-profit or other affordable housing provider.
- 3) COAH requires submission of a construction schedule providing for the construction of such developments within two (2) years of the date of "Substantive Certification".

- 4) It should be noted that if COAH's rules are amended as a result of a court order, etc. and a new "fair share plan" is formulated by the Township in accordance with any changes to the rules, the municipally owned land(s) included in the plan could be removed from the plan.

d. Supportive & Special Needs Housing:

"Supportive and special needs housing includes, but is not limited to: residential health care facilities as regulated by the New Jersey Department of Health and Senior Services or DCA; group homes for the developmentally disabled and mentally ill as licensed and/or regulated by the New Jersey Department of Human Services; permanent supportive housing; and supportive shared living housing. Long term health care facilities including nursing homes, and Class A, B, C, D and E boarding homes do not qualify as supportive and special needs housing."

- 1) The unit of credit for group homes and residential health care facilities is the bedroom.
- 2) All of the bedrooms must be affordable to low-income households.
- 3) The facility must serve people 18 years of age and older.
- 4) Aberdeen Township must have control or the ability to control the site(s).
- 5) At the time the Township petitions COAH for "Substantive Certification", there must be an executed agreement with the provider, sponsor or developer, including a schedule for the construction of the housing.

G. NEXT STEPS

1. As previously noted, municipal officials and municipal staff members have not reached any specific conclusions regarding the course of action that it will recommend to be taken, but a number of scenarios are being considered including some or all of the development options previously summarized.

2. We are exploring different potential locations for the affordable housing units including, of course, but not limited to, the designated redevelopment areas (i.e., South River Metals, the Freneau area, Anchor Glass and the Aberdeen/Matawan Train Station).
3. Additional public meetings will be held when the available options come into clearer focus.