

Smart Growth Survival Kit

Practical approaches to managing growth



Affordable Housing:

Meeting a Town's Affordable Housing Obligation While Protecting Natural Resources

Note: This element of ANJEC's Smart Growth Survival Kit uses the Council on Affordable Housing (COAH) 1994 regulations, which include the "second round" of fair share numbers. After COAH releases the "third round" affordable housing obligations, as well as revised regulations and standards (expected in 2003), we will revise and reprint this section.



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Background

In New Jersey, municipalities have a constitutional obligation to provide for “suitable and affordable” housing for citizens of low and moderate income. Two NJ Supreme Court decisions, known as Mount Laurel I and II (1975 and 1983), confirmed this obligation. The Supreme Court and the Legislature (in the NJ Fair Housing Act of 1985) made it clear that municipalities must facilitate a range of housing within their borders to create balanced communities in which a continuum of residents from young to old, affluent to blue collar, independent to disabled, have a reasonable opportunity to live and work.

The Fair Housing Act created the Council on Affordable Housing (COAH), to set “fair share” numbers (units of low and moderate income, price-controlled housing) for each municipality, and administer a program to certify municipalities as having met their obligation to plan and provide for that number of fair share units.

The Court also established an enforcement mechanism, known as the builders’ remedy, to ensure that municipalities could not shirk their affordable housing obligation. Simply stated, developers can sue municipalities that do not have a COAH-certified plan and force them to accept construction of at least five times the number of required affordable units. In other words, 20 percent of the units in a particular project must be affordable to low and moderate income households; 80 percent are market-priced. The general theory was that a portion of the profits from the market-rate units would pay for the construction of the affordable units.

In its Mount Laurel decision, the NJ Supreme Court hoped that the threat of large, unwanted developments would motivate municipalities to get right to the task of planning to meet their fair share obligations and petitioning COAH for certification of their plans. Surprisingly, this has not always been the case. The courts have approved only eight builders’ remedy projects since 1985. Nevertheless, developers have

threatened suit and forced a number of municipalities without certified plans to approve enormous, often environmentally unwise and poorly sited housing developments of 500 units or more – often with 10 percent or less of the units affordable.

Largely as a result of these massive developments, generally built against the will of the municipality, many people think that affordable housing is anti-environmental. Rather, municipalities that do not take the necessary steps to create affordable housing and to obtain COAH certification leave themselves vulnerable to unwanted large-scale projects. Many towns have spent far more in court trying unsuccessfully to prevent these developments than they would have spent to meet their obligation, had they planned proactively.

Approaches to Meeting Municipal COAH Obligations

Since its creation, COAH has been learning as it goes. The agency has refined the formula it uses to assess municipalities’ fair share obligations, and has tried to make the program more flexible. As a result communities can now satisfy their COAH obligations by combining new construction with a combination of the techniques.

Since the goal of the Fair Housing Act is to have more housing for low and moderate income families, **new construction** is an essential element of all plans. No municipality wants to have massive amounts of new residential construction forced upon it as a result of the threat of a builders’ remedy lawsuit. In those situations, decisions about the location and extent of the construction are out of a municipality’s hands, and may have significant negative environmental and quality-of-life impacts on the community (the “condos in the cornfield” scenario).

Not all new construction is undesirable. Low and moderate income housing that is suitable and attractive, located where there is adequate infrastructure (including transportation), and not compromising

environmentally sensitive lands can be an asset to a community. A number of NJ towns have decided that municipally sponsored construction of new single and multiple housing units is the best way to fulfill their affordable housing obligations. They decide how much, what kind, and where the housing will be, acquire COAH certification for their plans, arrange financing, acquire land and engage a contractor to carry out the construction. In many cases, towns use a combination of techniques to meet their obligation. For example affordable family rental units are eligible for COAH rental bonuses; a 50-unit development may satisfy 100 units of a municipality's affordable housing obligation. And each bedroom in a group home counts as one affordable unit.

As part of its master plan's housing element, a town can also choose to satisfy part of its COAH obligation through **inclusionary zoning**. This type of zone requires new construction projects to include a minimum number or percentage of low and moderate-income units, including rentals that are integrated with market-rate units. The inclusionary zoning should only be allowed in areas suitable for higher density growth, i.e., adjacent to compatible land uses, with adequate infrastructure and no environmental constraints. If the site is in a State Planning Area 4 or 5 (rural or environmentally sensitive), the affordable housing must be built in a State Planning Commission-designated center.

Inclusionary zoning and projects that result from builders' remedy suits or threats generally result in large numbers of new residential units. All too often simply as a result of their size, these projects result in significant environmental damage and long term increases in local costs for schools, police, and roads. To avoid these negative impacts, a number of towns are putting plans in place where they fulfill their COAH obligation directly, using a combination of techniques including the following.

- Rehabilitation of existing substandard housing stock;

- Creation of accessory apartments, shared senior housing or elder cottage housing;
- Special needs/group homes;
- "Buy downs" of existing housing;
- Bonus credits for family rental units;
- Conversion of unneeded schools or other buildings into residential units;
- Regional Contribution Agreements (RCAs);
- Creation of assisted living residences.

Regional Contribution Agreements (RCAs)

Through a COAH-approved RCA, a "sending" municipality may satisfy up to 50 percent of its obligation by contributing \$25,000 per unit to a COAH-designated "receiving" municipality in its region. The receiving municipality uses the contribution to rehabilitate or create low or moderate-income housing.

Brick Township's Accessory Apartment Program

Under Brick Township's (Ocean) accessory apartment program the township will contribute up to \$15,000 toward the creation of a new, self-contained residential dwelling unit within or attached to an existing home. The unit must have its own kitchen, sanitary facilities, sleeping quarters and a private entrance, and be restricted for a period of 10 years for qualified low or moderate-income households or individuals.

After 10 years, the \$15,000 contribution is forgiven. If the house and accessory unit are sold in less than 10 years, the new owner may continue to make the apartment available as affordable housing, or may repay the \$15,000 and terminate the agreement. COAH limits each town to 10 accessory apartment credits.

Group Homes

Group homes for the mentally and physically disabled have been eligible for generous affordable housing credits since 1990. Rocky Hill (Somerset) and Watchung (Somerset) are among the municipalities that have group homes that earn one COAH credit for each bedroom. In addition, the bedrooms also qualify for rental bonus credits, so that a four-bedroom group home with a disabled resident living in each room may qualify for up to eight COAH credits. According to the Municipal Land Use Law, community residences for the developmentally and physically disabled (group homes) are a permitted use in all residential districts of a municipality. (N.J.A.C. 40:55D-66.1).

Write Down-Buy Down Program

The Township of Roxbury (Morris) is offering \$20,000 to each of up to ten income-eligible households toward the purchase of a market-priced, single family home in the township. The applicants must be within COAH income limits for affordable housing, and must be creditworthy and pre-approved for a mortgage at one of 20 participating banks. The price of the house after the \$20,000 deduction must be no higher than the maximum allowed by COAH for the low or moderate-income level for which the applicant qualifies.

Each unit purchased through the “write down-buy down” program counts as one credit toward the Township’s fair share number of affordable units. The houses in the program are deed-restricted for 30 years, which means that during this period they can be re-sold only as affordable housing, at a restricted price, to income eligible applicants.

Each municipality must craft its own realistic solution based on the town’s particular needs and resources. New Jersey law also permits municipalities that have applied for COAH certification to collect development fees on new construction, and to use the funds to carry out their affordable housing program (N.J.A.C. 5:93-5 and 8). As of June 2001, 142 NJ municipalities had COAH-approved development fee ordinances, with a total of \$126 million collected.

Development Fees

To help towns finance low and moderate-income housing, COAH’s regulations (N.J.A.C. 5:93-8 et seq.) allow towns with certified plans to collect fees on new market-rate development, to offset some or all of the costs of a COAH-certified housing program. A municipality may adopt an ordinance requiring developers to pay a fee of up to one half of one percent (.5 percent of the assessed value of new residential construction, and 1 percent on commercial development. (Residential developments with an affordable housing element are exempt from these development fees.) The funds are deposited into a low and moderate income housing trust fund and disbursed according to a spending plan approved by COAH. Twenty percent may be used for the expenses of preparing the affordable housing plan and administering the affordable housing program. The rest must go toward the costs of creating units through rehabilitation, conversion or construction, in accordance with the town’s affordable housing plan.

COAH's Environmental Policies

COAH has also made some progress in terms of its environmental policies. The Council has a Memorandum of Understanding with the State Planning Commission that recognizes the importance of focusing affordable housing development where infrastructure exists, consistent with the State Development and Redevelopment Plan. COAH requires that towns in Planning Areas 4 and 5 (rural and environmentally-sensitive areas) plan any new affordable housing sites in designated centers to protect the surrounding environs from sprawl development, and encourages the same for Planning Areas 1, 2 and 3 (developed and fringe areas). COAH gives priority to sites with existing sewers and water service over those without existing infrastructure.

COAH calculates a town's fair share number based, in part, on the amount of land that is developable in the municipality. A municipality with limited vacant, developable land can request a "vacant land adjustment" from COAH, and this adjustment may reduce a municipality's fair share number. A municipality can reduce the number of acres available for development by showing how much land it has in each of the following categories.

- Restrictive covenants that run with the land (such as conservation easements);
- Steep slopes over 15 percent if regulated by a local steep slope ordinance;
- Wetlands (as delineated by the State);
- Floodplains (as delineated by the State);
- Sites listed on the NJ Register of Historic Places, plus a "reasonable" buffer area;
- Land that the town plans to purchase within one year for active or passive recreational purposes.

COAH does not, however, exclude land protected by other "critical area" ordinances, such as stream corridor or wellhead protection ordinances. Towns can

keep unwanted builders' remedy developments from those areas only by proactively finding and designating other appropriate areas for affordable housing.

The Importance of Planning

The bottom line on affordable housing and the environment in New Jersey is that municipalities must be willing to meet their fair share and do their homework, or risk some unpleasant consequences. They must understand COAH's regulations and comply with its certification requirements.

The current situation is somewhat complicated because COAH has not yet completed the review of regulations, reassessment of regional housing needs, and assignment of "third round" of fair share numbers for each municipality. The agency is expected to release new numbers as well as major revisions to its regulations and standards sometime in 2003. Until the new regulations and fair share numbers go through the required public comment and review process, municipalities should work with the existing rules and numbers (from the "second round") to address their obligations. Once COAH adopts the new regulations, municipalities will have to readjust their affordable housing plans to meet new standards and obligations.

To make any major changes to a certified plan, the planning board must first adopt the amendment(s), and then the town must endorse the amendment (by resolution) and petition COAH for approval of the amendment. A certified plan is good until the "next round" numbers come out.

Proactive, comprehensive land use planning and a housing plan with COAH certification is the only way to protect a community from massive builders' remedy projects that may degrade the environment and reduce quality of life.

Questions for Environmental Commissions to Explore

1. Find out if the Council on Affordable Housing certified the Housing Element of your community's master plan. Nearly 200 NJ municipalities are currently vulnerable because COAH has not certified their plans. A number of builders repeatedly use this lack of local action to force massive projects on a community. In fact, one law firm lists all the uncertified towns and encourages builders to use their unfulfilled COAH obligations to force high-density projects on these communities. (See www.nj-landuselaw.com/, Offensive Strategies section.)

If COAH has not approved your town's housing plan, petitioning for certification is the only way to keep matters in the hands of the local governing body. A municipality can obtain temporary protection from lawsuits for two years by simply filing its housing element and fair share plan with COAH. To maintain the protection, a town must complete the plan and petition for certification within two years of that filing.

2. Contact COAH (609-292-3000) and speak to the COAH planner responsible for your region. Ask what your town's record is on affordable housing, and if housing units or approvals are in place. Find out what your town can do to develop a plan that suits its needs and meets its COAH obligation.

3. Read the Fair Housing Act regulations. (Available on-line at www.state.nj.us/dca or ask the COAH Office for a copy). Become informed about what must be included in the affordable housing element of the master plan. Learn about the options available to meet your town's obligation without massive new construction (rehabilitation, buy-downs, regional contribution agreements, group homes, senior housing, etc.). Understand the methods of minimizing negative impacts while maximizing the number of credits and units of affordable housing provided.

4. Contact the Community Development and Housing Network (609-393-3752, www.hcdnnj.org) to find out if a non-profit community development corporation is active in your area and might be able to help your town develop affordable units.

5. Learn how COAH requirements may influence your ability to implement local zoning regulations. Review impacts on development density, infrastructure, tax abatements, methods of funding and phasing of development.

6. Take what you learn to your town governing body and planning board and talk to them about it. Explain how important it is to petition for certification of the affordable housing element and how concerned you are about keeping the plans for affordable housing under local control.

7. Read your environmental resource inventory to find out if there are any environmentally sensitive lands that should be excluded from the vacant land inventory. Learn about ordinances that can help to limit the damage to natural resources such as steep slopes. Check out ordinances available through ANJEC's database on our website at www.anjec.org.

8. Find out how the New Jersey State Development and Redevelopment Plan may impact your town and its COAH obligations. Check out the State Plan at www.nj.gov/dca/osg.

A Brief Outline of The COAH Process

A general description of the municipal petition process.

Step 1: Municipality prepares Master Plan Housing Element and Fair Share Plan

Master Plan Housing Element includes:

- Inventory of existing housing stock including number of units available to low and moderate income households and number of substandard housing units with potential for rehabilitation;
- Projection for housing construction including approved developments and probable construction;
- Demographic study on household size, income level, and age;
- Present and future fair share needs and ability to meet the needs;
- Inventory of lands and properties to meet obligation;
- Sewer and water capacity of potential sites;
- Copy of DEP approval and amendments to area wide water quality management plans;
- Copy of most recently adopted master plan;
- Copy of the New Jersey Freshwater Wetlands and USGS Topographical map for each potential site.

Fair Share Plan is an action plan on how the municipality will meet its affordable housing obligation.

Options include:

- Rehabilitation of substandard housing;
- Regional contribution agreements;
- Zoning for inclusionary developments;
- Conversions of schools, other buildings into residential units;
- Group homes;
- Accessory apartments, shared senior housing, elder cottage housing;
- Buy-downs of existing housing;

- Regional Contribution Agreements;
- Assisted living residences.

Step 2: Municipality submits plans and petitions COAH for substantive certification

Municipalities have two years to petition for substantive certification once they have filed their Housing Element and Fair Share Plan with the state. Filing the plans without actually petitioning COAH for substantive certification protects the municipality from exclusionary lawsuits if the municipality petitions for substantive certification within 2 years.

Step 3: 45-day public comment period on petition

If no objections are filed on the petition, COAH either prepares a compliance report or requests additional information that the municipality must provide within 60 days. A municipality may be asked to re-petition if substantial information is still required by COAH.

Step 4: Mediate any objections raised during the public comment period

COAH prepares a premediation report on the case to facilitate the mediation process. Most disputes between a town and an objector are resolved within 90 days. COAH completes a report that summarizes the results. The municipality may be required to amend its petition.

Step 5: COAH certifies, certifies with conditions, or denies petition

Step 6: Municipality adopts an ordinance to support housing requirements

COAH requires municipalities to adopt a fair share housing ordinance including zoning ordinances within 45 days of substantive certification.

Step 7: Implement affordable housing plan

NB: *Municipalities may amend their plans any time after COAH grants certification.*

For Further Information

- Council on Affordable Housing (COAH) – 609-292-3000, www.state.nj.us/dca/coah for a copy of the Fair Housing Act, and regulations governing municipal obligations
- Coalition for Affordable Housing and the Environment – 609-278-5656 for information on state policies, contacts with environmental and housing groups
- Housing and Community Development Network – 609-393-3752, www.hcdmnj.org for information on local non-profits who can help with planning, construction and financing affordable housing projects
- *NJ State Development and Redevelopment Plan* – www.nj.gov/dca/osg for information on how Planning Area designations relate to affordable housing obligations
- Association of NJ Environmental Commissions (ANJEC) – 973-539-7547, www.anjec.org for environmentally sensitive approaches to meeting affordable housing obligations, ordinances to protect environmentally important areas like stream corridors, steep slopes

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ANJEC is a statewide non-profit organization that informs and assists environmental commissions, local officials and interested citizens in preserving and protecting New Jersey's environment.

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