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Overview, Background and Recommendations – Senate Bill No. 1

OVERVIEW

The Somerset County Planning Board supports the efforts of NJ State Legislators to streamline and simplify the process for municipal compliance with the State Supreme Court's mandate that every municipality in the State provide its fair share of low-and moderate-income housing opportunities. The County Planning Board is pleased to provide you with the following recommendations that we believe will substantially improve proposed Bill S-1, which were developed in coordination with our 21 municipalities and local stakeholder groups. The County Planning Board also recommends additional time and opportunities for public review and comment on this complex and important issue be provided to assure that a comprehensive, balanced, successful reform process is achieved.

New Jersey's history of court intervention in affordable housing and legislative responses spans over 30 years. The County Planning Board believes the lessons learned from this long experience should form the basis of legislative reform. Despite concerns that many aspects of the process are not working, New Jersey's success in producing affordable housing makes it an exemplary model for the rest of the nation. Affordable housing production is such a critical issue for the State's long term economic recovery that it's imperative that the legislature "get it right", and avoid the potential for protracted litigation, more confusion and uncertainty at the local level, and further delays in the production of affordable housing.

The County Planning Board recommends the following elements serve as the foundation of affordable housing reform in New Jersey:

- Move the COAH Office to within the State Planning Commission to strengthen coordination between the affordable housing and state planning processes.
- Increase equity and fairness by requiring all municipalities to adopt Master Plan Housing Elements and update them every six years.
- Recognize the enormous expense and effort already invested by some municipalities in addressing affordable housing requirements by giving them the option of obtaining COAH certification for previously filed housing elements and fair share plans.
- Expand the definition of affordable housing to recognize existing non-deeded affordable housing units in many working class communities
- Re-instate the use of RCAs where there are demonstrated housing rehabilitation needs and good access to jobs and transportation; and assure the appropriate expenditure of funds.
- Reduce reliance on sprawl-inducing inclusionary development. Provide incentives that promote inclusionary redevelopment, municipally-sponsored 100% affordable housing, group homes and other supportive housing.

BACKGROUND

DCA Transition Team Report: Last month, the Governor released the "Final Report of the Transition Team Subcommittee on the Department of Community Affairs and its Agencies and Affiliates", dated January 5,

2010. Proposed Bill S1 reflects a number of the recommendations included in this report. The Report contains recommendations for immediate action regarding the NJ Council on Affordable Housing (COAH):

- Propose new legislation to amend the Fair Housing Act that:
 1. *Eliminate the obligation to retroactively satisfy perceived prior need;*
 2. *Eliminate the growth share methodology of calculated need;*
 3. Expand the definition of qualifying affordable housing to include non-deed restricted properties that are government subsidized or other properties from the existing housing stock that have a rational basis for being treated as affordable;
 4. *Allow municipalities greater flexibility in satisfying need through an emphasis on rehabilitation of existing housing or allowing the renewed use of RCAs;*
 5. Insure that municipalities are not obligated to expend their own resources to satisfy need to the extend possible; and
 6. Restrain the role of the agency to a municipal assistance program rather than a policy making enterprise.
- Issue a 90-day freeze on all new regulations, on new certifications and on all pending mediations (so that municipalities could cease spending money on plans that will likely need to be revised again once new legislation and/or regulations are adopted.)
- Create a Panel to consider policy and make specific recommendations
- Seek a stay in all pending litigation challenging the Third Round Rules
- Consider changes in COAH's Leadership
- Re-direct Staffing

The Appellate Division: In December 2009, the Appellate Division of the Superior Court heard arguments from parties challenging components of COAH's Third Round Rules. Whether or not the Court strikes down the growth share formula, and any remedy the Court may prescribe will have significant impacts on any COAH reform efforts.

Executive Order 12: Governor Christie signed Executive Order 12 on February 10, 2010 which prevents COAH from taking action on affordable housing plans for 90 days, and establishes a five-member task force appointed by the Governor, to review the effectiveness of the Fair Housing Act and COAH Rules. The taskforce is required to provide a report within 90 days that includes recommendations on determining municipal affordable housing obligations; modifications to the housing regions of the state; incorporation of the concept of "workforce" housing; identification of mechanisms for supporting housing rehabilitation; and , addresses cost saving measures for developers.

Affordable Housing in Somerset County: Historically, Somerset County has been a leader in addressing the State's affordable housing requirements. Of its 21 municipalities, 17 received round 2 substantive certification and 15 have filed third round housing elements and fair share plans with COAH. Nearly 4,000 new affordable units have been built through inclusionary development, municipally-supported 100% affordable housing projects; and many existing units have been rehabilitated and group homes provided. The County's municipalities are very individual and unique. Each of them have tailored their fair share plans to complement the character of their communities, reflect their land use priorities, and maximize available resources and partnership opportunities. Their efforts to provide a variety of affordable housing choices must be supported by allowing municipalities the flexibility they need to identify solutions that work.

Demand for affordable housing continues to grow as documented by the Somerset County Coalition on Affordable Housing and other providers. The shortage of affordable housing statewide has contributed to households overextending themselves financially to pay for housing, adding to the record-level foreclosure rates that characterize this recession. The benefits of providing affordable housing are broadly recognized by

community and business leaders in Somerset County; yet they also recognize that COAH's third round obligations are unrealistic and overstated for many municipalities, thereby making them difficult to achieve. There is broad support for improving the system of providing affordable housing in the state among the County's community and business leaders. The associated cost burden on tax payers must be reduced, and the planning, administrative processes must be simplified and made more cost-effective.

SOMERSET COUNTY RECOMMENDATIONS: PROPOSED BILL S-1

Senator Lesniak introduced this bill on 1-19-10, which makes significant changes to the Fair Housing Act and abolishes the Council on Affordable Housing. The Senator's Economic Growth Committee held a hearing on February 1, 2010, and a second hearing was held February 8th. A vote on the Bill by the full Senate is scheduled for March 8, 2010.

The following is a summary of the major changes proposed in the various sections of the Bill, followed by the County Planning Board's comments and recommendations which are shown in bold italic:

Section 1: Amends the Fair Housing Act, P.L. 1985,c.222 (C.52:27D-301 et al.), by Abolishing the Council on Affordable Housing, and transfers its powers, functions and duties to the State Planning Commission (SPC), as well as makes available to the SPC appropriations and other moneys previously provided to the COAH.

Recommendations: The transfer of responsibility to the SPC is appropriate in order to assure a uniform set of projections and coordinated land use planning approach is applied through the State Development and Redevelopment Plan, Plan Endorsement process and when determining and addressing affordable housing need.

It is imperative that the SPC receive adequate resources to administer the program, including necessary staffing levels and specialized training. Organizational changes to the State Planning Commission are warranted so that this function can be carried out in a cost effective and timely manner, without impacting its ability to carry out its core mission of interagency coordination.

The composition of the State Planning Commission may also need to be refined to include additional municipal and county representation, which will enhance the Commission's ability to provide leadership and guidance to municipalities.

Section 2: Amends MLUL, P.L. 1975, c.291 (C40:55-28) by making Housing Elements a required component of Municipal Master Plans

Recommendations: It would be appropriate and more equitable if all municipalities statewide are required to adopt master plan housing elements, and to be engaged in the provision of affordable housing, where they have a prospective need.

Municipalities that have been proactively participating in the COAH process by adopting Round 1, 2 and 3 housing elements and fair share plans, and that decide these plans remain appropriate, should have the option of continuing to utilize and implement these plans. If their housing elements and fair share plans have been certified by COAH, or are progressing through the COAH certification process, municipalities should be given the option to complete the process and proceed with implementation of COAH certified plans so that they can benefit from the significant investments they have already. The legal protections COAH substantive certification provides should be extended for these municipalities.

Municipalities should have access to state funding resources and be provided with technical support, templates, electronic submission venues and other tools that will streamline the completion of Housing Elements and reduce the cost burden on tax payers. Standards for preparing Housing Elements must be established by SPC and proven to work

Section 3: Amends the State Planning Act, P.L. 1985, c.398 (C52:18A-199) by changing the schedule for revising and re-adopting the State Development Plan to every six years.

Recommendation: A six-year update schedule that coincides with the municipal master plan reexamination/update schedule is appropriate. Coordination with the state rule update and re-adoption process is also encouraged.

Section 4: Amends the Fair Housing Act, P.L. 1985, c.222 (C.52:27D-302)

- eliminates municipal use of phasing schedules for meeting Fair Share Obligations;
- allows the use of RCAs as a temporary solution for creating affordable housing;

Recommendations: Phasing of Housing Element implementation should be permitted in order to provide the flexibility needed to respond to changes in the economy.

The County supports permanently reinstating the use of RCAs for affordable housing rehabilitation, provided the RCA funds are used strictly for this purpose, and the units are located in areas that have appropriate access to jobs and transportation. The SPC must establish effective monitoring processes to assure RCA funds are spent appropriately. Sharing of credits toward meeting affordable housing obligations of both the sending and receiving municipality is needed to recognize the community services, infrastructure and utility capacity that must be provided by the receiving municipality to sustain the long-term needs of residents associated with affordable housing created as a result of RCAs and to encourage more communities to participate as receiving municipalities.

The bill should include provisions that encourage the utilization of trust funds collected by municipalities that have met their affordable housing obligations.

Section 5: Substitutes references to COAH with the State Planning Commission and gives responsibility for determining prospective need to municipalities.

Recommendations: The SPC must simplify and define standards and methods for determining prospective need, which are applied consistently by all municipalities.

Sections 6 & 7: Substitutes references to COAH with the State Planning Commission

Recommendations: Concur

Section 8: Substitutes references to COAH with the State Planning Commission

Recommendations: Concur

Section 9: Requires municipal use of census tract data for inventorying housing stock, and requiring municipalities to reexamine and amend its housing element every 6 years

Recommendations: Concur

Section 10: Emphasizes inclusionary zoning ordinances as one of several techniques that can be used by municipalities for providing for their fair share; adds municipal acquisition of State surplus property for affordable housing purposes; allows the use of funds from any source for housing rehabilitation; eliminates the use of rental units in community residences for disabled as a technique for addressing need; eliminates references to State issuance of substantive certification of housing elements; and specifies that “the NJ Economic Development Authority, upon application of a municipality and a developer, may approve reduced affordable housing set-asides”.

Recommendation: *The bill places too much emphasis on inclusionary development. Inclusionary development should not be considered the primary mechanism for addressing affordable housing obligations. Rather, municipalities must be given greater control and flexibility to choose mechanisms for addressing their affordable housing obligations that are consistent with the character, resources and opportunities unique to each municipality. Affordable housing must be redefined to include existing affordable units that already exist as part of the housing stock, whether constructed before or after 1980, and whether or not they are deed restricted. The SPC should provide standards and methods for identifying pre-existing affordable housing within communities. Municipalities should be able to count Section 8 rental vouchers used in their communities toward their affordable housing obligations. Bonus credits should be provided for municipally-sponsored housing to acknowledge the added financial burden these projects have on tax payers, and to reward communities for using this mechanism to achieve the goals of the State Plan, the Highland Regional Master Plan, endorsed plans and infrastructure, utility and environmental sustainability. Incentives that encourage inclusionary “redevelopment” should be provided.*

Credit toward municipal housing obligations should be permitted for the provision of affordable rental housing for persons with disabilities and special needs, to encourage development of this type of housing, given the acute shortages statewide.

The last paragraph of Section 10 ((11)i) should be revised to specify that the State Planning Commission, with financial input provided by the NJ Economic Development Authority, may approve increased densities and other incentives to ensure the economic feasibility of inclusionary projects. The Bill should specify that the SPC may approve lowering of affordable housing set-asides for inclusionary projects only after all incentive opportunities have been exhausted.

Section 11 and 12: Allows temporary use of RCAs under certain circumstances

Recommendation: *RCAs should be made a permanent option for addressing need in the rules, provided sending and receiving municipalities can demonstrate certain criteria are met in accordance with the recommendations associated with Section 4 above. In addition, it is critical that monitoring of the expenditure of RCA funds to make sure they are used for their intended purpose is essential to assure affordable housing goals are met, as well as assure the program’s credibility and improve the accountability of the program for the benefit of the tax payers of the State.*

Section 13: Definitions added for inclusionary development, variety and choice of housing & workforce housing.

Recommendation: *An “inclusionary redevelopment” definition should be added to this section. Application of inclusionary ordinances to redevelopment sites that specify a variety of incentives including density bonuses should be encouraged by this bill. This section should be amended to include the definition of “existing affordable housing stock” (housing affordable to low and moderate income households that already comprise the municipality’s housing stock, regardless of when it was built or whether or not it is deed restricted).*

The definitions of Section 8 rental housing vouchers that can be used to meet municipal housing obligations should be added also.

Workforce Housing should be excluded from this section. This concept does not comply with court decisions and detracts from the core mission of the State Fair Housing Act. According to the proposed bill, workforce housing would substitute for affordable housing and a large proportion of affordable housing need will remain unaddressed.

Section 14: Assigns the SPC the responsibility for administering the Fair Housing Act, including determination of housing regions, promulgation of guidelines and criteria for housing elements prepared in accordance with MLUL and for reviewing municipal compliance ordinances; and development of standards and guidelines for inclusionary ordinances.

Recommendations: The State Planning Commission should follow the Administrative Procedures Act to assure all stakeholders have a say in the rule-making process. The SPC should also be responsible for providing standards (i.e. how the number of existing affordable housing units that comprise the municipal housing stock should be determined), a template for preparing Housing Elements, a standard method for determining perspective need including projection period and six year-re-examination guidelines for certifying Housing Plans remain valid and for updating prospective need . Based on the January 2007 appellate court decision that says municipalities cannot determine their affordable housing need by themselves, the SPC's responsibilities should be expanded to include verification of municipally-determined affordable housing obligations.

Section 15: Prohibits the assignment of a specific number of units required by municipalities attributable to prospective need by the SPC. This number would be determined by the municipality.

This section should require the SCP to perform housing region-specific analyses to determine the baseline percentage of housing affordable to low and moderate income that must be achieved by municipalities within each housing region. The baseline percentages of affordable units that must be set-aside for low versus moderate income households of various sizes should be based on the characteristics and composition of income eligible households specific to each housing region. Theses analyses should be updated on a six-year schedule and the results provided to municipalities.

A reasonably degree of flexibility with regard to inclusionary zoning set-asides for affordable housing must be provided, so that municipalities can establish appropriate set-asides in their inclusionary development and redevelopment ordinances necessary to assure that, when combined with other proposed mechanisms, the municipality's affordable housing obligations are met.

As part of the 6-year Master Plan Re-examination and Update process, the municipalities should make adjustments to their prospective need based on affordable housing created during the plan's timeframe and an analysis of the affordable housing composition of the existing housing stock, relative to the updated region-wide baseline of total housing stock that should be affordable to low and moderate income households provided by the SPC. Guidelines that allow municipalities to phase the implementation of their fair share plans must be developed so that they can reach the regional affordable housing baseline without causing financial hardship or exceeding available utility and community service capacity.

Section 16: Allows municipalities that have adopted housing elements and completed general reexamination of their master plans to adopt an ordinance determining that it has complied with its obligation pursuant to the Fair Housing Act. Requires development of a model ordinance by the SPC for this purpose. Specifies that a

determination of compliance shall be based upon a municipality's existing housing stock, census data, and historical compliance with COAH regulations. A rebuttable presumption of validity is attached to the ordinance. Any person may file an objection to a municipal compliance ordinance with the SPC. Action taken by the SPC is final agency decision subject to review by the Appellate Division of the Superior Court.

Recommendation: Where Counties have achieved Plan Endorsement, they should have the option of providing a review and endorsement of Municipal Housing Elements and associated ordinances to assure the they are consistent with countywide projections, and that the mechanisms used for addressing affordable housing need are consistent with regional smart growth and sustainability goals. This process should be designed to add another layer of protection from builders remedy lawsuits for municipalities.

The municipal compliance ordinance should also be based on the current proportion of the municipality's housing stock that meets the affordable housing definition, the municipality's surplus or deficit relative to the baseline established for the region, as well as the unique combination of mechanisms selected by the municipality for addressing prospective need.

Section 17: Municipalities that have **not** adopted a compliance ordinance must adopt Inclusionary Ordinances requiring one out of every five units proposed for construction is reserved for low, moderate or workforce housing. Small projects resulting in fractional units are permitted to make a payment in lieu of construction into a municipal trust fund. The Bill authorizes the use of direct economic incentives including density bonuses, streamlined review and permitting, fee waivers, alternate design standards for affordable units, off-site construction of affordable units; and payment of fee in lieu of construction by developers for a portion of the units into municipal trust fund. Allows inclusionary requirements to be imposed on redevelopment and rehabilitation projects.

Recommendation: Municipalities should have the flexibility to establish, through its inclusionary ordinance, an appropriate affordable housing set-aside (rather than the one affordable unit for every 5 market-rate units as proposed) which is uniquely tailored to meeting its affordable housing obligations. The SPC should perform analyses to define appropriate, housing region specific benchmark set-aside standards for use by municipalities. The ordinances should identify inclusionary development and redevelopment area locations that are consistent with the State Plan and specify the incentives to be provided. Municipalities should be given flexibility with regard to the inclusion of additional incentives.

Municipalities that choose to use mechanisms other than inclusionary zoning to address their affordable housing obligations must be protected from law suits filed by developers that are pursuing inclusionary development projects in their communities. .

Section 18: Requires 25 percent of affordable units to be low income, 25 percent to be moderate income, and 25 percent to be workforce housing units, wherein workforce housing may be reserved for households that have at least one member who works or resides in the municipality, or within a 10 mile radius.

Recommendation: The requirement that 25 percent of affordable units be reserved for workforce housing affordable to households with incomes that are 80% - 120% of median should be eliminated consistent with the Section 13 recommendations above. In order to increase affordable housing opportunities in close proximity to employment, and affordable housing opportunities for retired citizens and families to remain in their home towns, municipalities should have the option of reserving at least 25 percent of newly created affordable housing for households that have at least one member who works or resides in the municipality. This approach is consistent with the State Plan and principles of sustainability.

Section 19: prohibits restrictions on subsequent resale prices of workforce housing

Recommendation: This provision should be omitted.

Section 20: If development is proposed in municipalities that have not adopted inclusionary ordinances, the board of adjustment or planning board shall consider the project to be an inherently beneficial use, and a variance or conditional use should be approved provided the project is without substantial detriment to the public good and will not substantially impair the intent and purpose of the zone plan/ordinance.

Recommendation: Municipalities that have addressed their affordable housing obligations using other mechanisms and are better served by the other mechanisms should not be forced to adopt inclusionary ordinances to achieve this level of protection. This provision undermines the sound comprehensive planning basis of the Municipal Master Plan, and protection from builders remedy lawsuits for municipalities that have invested significant resources to reach compliance with the State's affordable housing requirements. It allows developers to circumvent municipal master plans and zoning ordinances, including those that have been endorsed by the State Planning Commission, conform to the Highlands Regional Master Plan, etc. It allows developers to trump municipal efforts to achieve sustainability and protect and enhance the municipality's community character and balance land uses.

Section 21: A municipality and developer may jointly apply to the Economic Development Authority for a site-specific adjustment to the affordable housing set-aside if it is believed the project would not otherwise be economically feasible. A pro-forma must be provided detailing the project plan and financial analysis, including yield required for financing and to secure a mortgage and documenting the effect of the ordinance on the project's financial viability. NJEDA shall review the application and provide a written response within 90 days to the municipal board of adjustment. NJEDA may consult with other agencies when making its determination, and may include a suggested site-specific adjustment (i.e. density, set-asides, etc). No less than a 10% affordable set-aside is permitted. The decision may be appealed by any party through the Superior Court. NJEDA is to adopt rules and regulations to implement these provisions.

Recommendation: The final decision regarding adjustments to incentives such as density bonuses for making inclusionary development in undeveloped areas fiscally viable, and decisions regarding adjustments to incentives and lowering of set-asides to make inclusionary redevelopment projects viable should rest with the State Planning Commission, not the Economic Development Authority, consistent with the recommendation in Section 10 above.

Section 22: Provides that the court shall grant repose from exclusionary zoning lawsuits to municipalities that adopt and implement inclusionary zoning ordinances

Recommendation: The Courts should be required to grant repose from exclusionary law suits for municipalities that have adopted compliance ordinances as well. Municipalities should not be punished for using mechanisms other than inclusionary zoning to address their housing obligations (i.e. 100% municipally-sponsored affordable housing development and redevelopment, affordable rental group homes for people with disabilities and Section-8 rental housing vouchers), especially since by using these other mechanisms may be more consistent with the State Plan, Highlands Plan, and the principles and smart growth and sustainability.

Section 23: Municipalities shall not be liable for any unmet housing obligations based on regulations promulgated by COAH.

Recommendations: A solution that rewards municipalities for their past performance in creating affordable housing and complying with the State's affordable housing requirements is needed. Credits for units previously developed by municipalities that participated in the COAH process should be granted.

Coordination of EO 12 and S-1:

Recommendations: Both Executive Order 12 and Proposed S-1 address reforms to the way affordable housing need is addressed in New Jersey, and both initiatives are moving forward within the same timeline. It is strongly recommended that the Senate and Assembly sponsors of this Bill and the chair of the new task force are in direct contact and coordinate their efforts to the greatest degree possible. The taskforce should utilize fact-finding meetings and interviews with stakeholders to assist it in accomplishing its responsibilities.