

Dr. Theodore Chase, Chairman, Franklin Township Planning Board
Talking Points: Somerset County Planning Chair' Forum, Aug. 5, 2008
[bracketed sections were not presented]

One concept has been central to the fair housing problem since the first Mount Laurel decision, which I believe introduced the term: “realistic opportunity” for low and moderate income housing. The problem is, what in COAH’s eyes is a “realistic opportunity”? They have a definition in 5:97-1.4, p. 18 of the amendment: “‘Realistic opportunity’ means a reasonable likelihood that the affordable housing in a municipality’s Housing Element and Fair Share Plan will actually be constructed or provided during the 10-year period of certification based upon a careful analysis of the elements in the municipality’s plan, including the financial feasibility of each proposed mechanism and the suitability of specific sites as set forth in N.J.A.C. 5:94-3.13”. (5:97-1.4, p. 18) The term is used also in the Fair Housing Act itself, but with not even this much definition.

I have been reading their responses to comments on the January version of the rules to try to get a better idea of what they want. This is time-consuming, better done by a volunteer than a paid planner, but informative about COAH’s thinking.

On p. 68 of the comments, replying to a question about determination of financial feasibility of “realistic opportunity”: “COAH requires municipalities under its jurisdiction to determine whether proposed affordable housing mechanisms provide a realistic opportunity for the creation of that mechanism within the period of substantive certification, and provide substantiation of this opportunity in its petition.” This seems to mean, you had better present good evidence in your petition that what you propose will in fact produce affordable housing in the next ten years, come hell, high water or housing slump. You have to convince them; and it is this sense that they can decide arbitrarily that any mechanism short of a signed agreement with a developer does not present a “realistic opportunity” that most concerns me.

[On p. 200 of the comments, they were asked whether an overlay zone could be used to satisfy either a Realistic Development Potential (where a municipality can meet a *prior* round obligation) or growth share potential. COAH replies: “Therefore, if an overlay zone is placed over a zone where the underlying use is still in operation on the site, the Council would not consider this site to present a realistic opportunity or to be a suitable site to address the affordable housing obligation, including a municipality’s adjusted growth share obligation or RDP, if applicable, unless there is an agreement with the property owner.” They *will* accept zoning for affordable housing “by right”, even if there are existing vacant buildings on the site, providing it is zoned following 5:97-6.4 and is suitable according to 5:97-3.13. (I wonder whether they understand overlay zones, which generally provide an *additional* use for sites. Perhaps they mean it must be zoned *only* for inclusionary housing.) One might ask, what if there are *occupied* buildings on the site? One might divine from this that the *minimum* condition for a “realistic opportunity” through zoning (signed agreements with developers are generally OK) is inclusionary zoning for residential construction, counting only plots which are undeveloped or have vacant buildings, and site suitability according to 3.13.]

On p. 224 of the comments they state: “Proposed N.J.A.C. 5:94-6.4(b)2 and 7 list the criteria to be used by the Council in determining specifically whether affordable units proposed to be produced through the use of zoning presents a realistic opportunity.” (b) 2 is presumptive density, which I’ll also touch on; (b)7 – now 6 – is presumptive minimum density of 12 units/acre for rental units and a maximum set-aside of 20% of the units for low & moderate income tenants, and at least 10% of these affordable for households earning 30% or less of the median income for the COAH region. There must also be at least one other incentive – (b) 4 – and sites “shall be available, approvable, developable and suitable, according to the criteria” in 3.13, which are concerned with access to streets, water and sewer, and state regulations. But I am concerned about the word “available”; what degree of acquiescence by the property owner does it require?

[On the other hand, if you go for a vacant land adjustment, the Council becomes very expansive in defining “areas in the municipality that may develop or redevelop. Examples of such areas include, but are not limited to: a private club owned by its members; publicly owned land; downtown mixed use areas; high density residential areas surrounding the downtown; areas with a large aging housing stock appropriate for accessory apartments; properties that may be subdivided and support additional development; and any parcel(s) **that has the potential to be redeveloped**” (5:97-5.2(c) 6). The last few words are the only change, from “ripe for redevelopment”. It appears that COAH can rebut any application for vacant land adjustment by proposing extensive redevelopment of large parts of a municipality. They presuppose, without using the term because of its political sensitivity, that a municipality can use eminent domain to acquire any site COAH deems appropriate for redevelopment, such as “a private club owned by its members”. In comments (p. 207), about communities which have received a vacant land adjustment: referring to 5:97-5.7, “The purpose of this rule is to capture additional affordable housing opportunities above the adjusted growth share obligation. If the municipality does have a site that may be suitable for redevelopment, the Council may require the municipality to capture affordable housing there.” In other words, forget about getting a growth share adjustment, the Council can just force you to redevelop to provide affordable housing up to your original number by redevelopment.]

My other topic is the presumptive density introduced in 6.4(b) 2: inclusionary zoning in Planning Area 1 shall permit development at 8 units/acre, in PA 2 at 6 units/acre, in sewer service areas outside these planning areas at 4 units/acre, and in PA 3, 4 and 5 outside sewer service areas at a density increase of 40% over existing zoning. In the first three categories the maximum permitted set-aside is 25% affordable, i.e. that is the maximum the zoning can require; outside the sewer service area it is 20%, which is also the minimum. So why would you create inclusionary zoning outside the sewer service area, since a development can only provide the affordable housing it itself requires? In the comments (p. 189), in response to a comment that inclusionary development should be directed entirely to PA 1 and 2, they reply that they have an interagency agreement with the State Planning Agency that “All planning areas can accommodate growth and therefore can accommodate a commensurable affordable housing obligation in a manner consistent with the State Planning Agency.” Presumably if you are a rural, unsewered community concerned mainly with providing affordable housing commen-

surate with future growth, you could zone for inclusion in unsewered growth areas – bearing in mind the DEP’s standards for dilution of nitrates from septic systems. In Franklin we must provide affordable housing required by the growth we have had since 2004 – most of it approved earlier – and we have to find higher per cent affordable developments in PA 1 and 2.

My main comment here is, be very careful where you introduce inclusionary zoning. Suppose you zoned a one-acre zone for inclusion. A developer could buy an existing house on a two-acre lot, demolish it, and erect a 12-unit townhouse development. Remember the added requirements in 6.4(b)4: :”Attached single family housing, clustering and/or lot size averaging shall be permitted in such inclusionary zones located both within and outside of a sewer service area, as necessary to accommodate the additional number of units.” If you permit rental apartments in the zone, the density is 12 units/acre.

To me the bottom line is, don’t do broad-brush inclusionary zoning. Find the sites where you would most like – or least not like – to have affordable housing, where the present owner would be happy to have the site developed, and zone *only those* for inclusionary development. I think COAH expects this: in 5:97-6.4(a), the rules say “Inclusionary zoning may apply to all *or some* zones *or sites* within the municipality” (emphasis added). On p. 267 of the comments, they say “The Council believes that when a community has zoned to accommodate affordable housing, it has done so after identifying sites that are appropriate for affordable housing development that the Housing Element of the Master Plan envisions as an integral part of addressing affordable housing need within the community” Presumably any assertions of “spot zoning” can be rebutted by reference to the need for affordable housing.