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BOROUGH OF EMERSON

Emerson Affordable Housing (COAH) Update And Redevelopment

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Overview

Emerson, like the majority of suburban New Jersey municipalities, is confronted with the issue of planning for and finding appropriate locations for Affordable Housing. The courts have ruled that it is Emerson's (and every other municipalities) responsibility to provide housing for residents of low and moderate income. With this obligation comes the requirement to further develop residential properties, both affordable and "market" priced, beyond what we may have envisioned for our community.

This paper is an attempt to provide a simple explanation for a complicated issue and to relate that issue to the Borough's efforts at Redevelopment of its Central Business District. Its goal is to also explain the history and current state of affordable housing obligations in New Jersey. What brought Emerson and our sister municipalities to this point? What issues are before the Borough? What are the implications of the Borough's possible actions? This is not a complete or detailed explanation of an issue that has developed over the past forty years. Affordable Housing or COAH cannot be fully explained in a document of this nature. Some sense of the complexity that the current and past Governing Bodies have grappled with and deliberated over is in the "Affordable Housing Timeline" that is at the end of this paper. The details of the Timeline, the various court cases as well as other references mentioned in the Timeline, must be studied to obtain a true understanding of Affordable Housing issues in New Jersey. Because of ongoing litigation that the Affordable Housing process has imposed on the Borough, no details of the Borough's plan can be offered or discussed in this paper.

"THE FAMILY TOWN"

History of Affordable Housing in New Jersey

The Affordable Housing, or "Mt. Laurel", obligation began with a 1975 constitutional decision by the New Jersey Supreme Court (Supreme Court) involving the Township of Mt. Laurel. Eight years later in 1983, the Supreme Court was unhappy with the lack of progress under its earlier decision. The Supreme Court assigned implementation of Affordable Housing obligations to the courts. Although the Supreme Court acknowledged that courts were not well equipped to function as an administrative agency, the Supreme Court found that there was no other agency available to take on the task.

In 1985 the State Legislature adopted the Fair Housing Act (FHA) as a response to the chaos created by the Courts implementation of the Mt. Laurel decision. The Supreme Court found that the FHA was an appropriate mechanism for implementing Affordable Housing requirements. Under the FHA, the New Jersey Council on Affordable Housing (COAH) was the State agency established to develop rules and administer municipal affordable housing obligations. COAH would establish the rules and procedures for municipalities to follow. COAH also enumerated other important factors such as how many affordable housing units each municipality must provide a realistic opportunity for the construction during specific time periods, or "rounds". COAH also created the methodology municipalities must use in creating those realistic opportunities for the creation of affordable housing units.

The second round began in 1993 and expired in 1999. This was the last approved round of COAH. For this last round, Emerson was obligated to provide the opportunity to build 84 Affordable Housing units. The Borough was compliant with both the first and second rounds of COAH by adopting an acceptable housing plan. After the expiration of the second round, COAH embarked on a series of policy and program changes that would be implemented in the third round of Affordable Housing development. Until these rules were approved, municipalities could not move ahead with implementation of their third round Affordable Housing obligations. Emerson's potential obligation under COAH's initial third round rules was approximately 350 additional Affordable Housing units.

Without going into extensive detail, the third round COAH rules were different from the first and second round rules. The third round rules were challenged by many municipalities and organizations. For most of the first decade of this century there were confusing, changing or no rules/methods at all for municipalities to follow as they attempted to comply with the third round obligations.

Governor Christie has been an opponent of COAH. When campaigning for Governor he stated, "If I am Governor, I will gut COAH and will put an end to it". Like some others, he believed that the Affordable Housing mandate was and is a significant reason for the high taxes in the State.

After his election, Governor Christie initiated a series of steps to reduce and ultimately abolish COAH. The goal was to change both COAH and the Affordable Housing process. This included not making appointments to the COAH Board, transferring COAH's powers to the State Department of Community Affairs (DCA) and vetoing legislation. No alternative plans to address the 1975 and 1983 Mt. Laurel requirements of the Supreme Court decisions were offered.

The Supreme Court was frustrated with the lack of movement on the third round COAH rules as well as the Governor's efforts to dismantle COAH. Thus, the Supreme Court issued multiple deadlines for COAH to comply with the requirement to issue constitutionally compliant third round rules. The Supreme Court found that COAH at times issued unacceptable rules, but for the most part missed the imposed deadlines.

In response to a lawsuit by advocates for Affordable Housing, on March 10, 2015 the New Jersey Supreme Court issued a ruling that became effective June 8, 2015. The ruling required every municipality participating in the Affordable Housing process that sought to seek protection from expensive "builders' remedy" lawsuits to file a "Declaratory Judgment action" by July 8, 2015. The "DJ action", as many call it, is a court proceeding that a municipality initiates. It says to the courts that we, the municipality, are preparing to comply with the mandates of Affordable Housing. A municipality is deemed compliant with the court ruling if it developed and filed a "constitutionally compliant" housing plan by December 8, 2015. This plan was required to show the details of how the municipality intended to comply with its Affordable Housing requirements. By filing a "DJ action" before July 8, 2015, Emerson was protected from developer lawsuits for a period of at least five months, which ended December 8, 2015.

Emerson's Compliance Efforts

Emerson has complied with all court imposed mandates; the Borough's protection against developer's lawsuits has been extended through December 8, 2016. The concept is that once the Borough's housing plan is reviewed and approved by the court, the Borough would then be further protected from developer lawsuits so long as Emerson fulfills what was submitted in our "constitutionally compliant" housing plan approved by the court.

The protection offered from builders' lawsuits for the period of June 8 to December 8, 2015, (and ultimately extended to January 31, 2016) also allowed municipalities time to develop and file their "constitutionally compliant" housing plan by the December 8th, 2016 deadline. Past COAH Affordable Housing rounds provided rules, or a methodology for municipalities to use in developing their plans. In 2015, the Supreme Court provided no guidance. Previous Affordable Housing rounds had provided municipalities with rental bonuses for Affordable Housing units. The reasoning was that because rental units were more affordable to low and moderate income families, a municipality would be provided unit credit, or a bonus unit count, against their unit obligation if they developed more rental units as opposed to "for sale" units.

As an example: if a municipality built or caused to be built 100 affordable rental units, COAH would credit it with 125 units towards its obligation. Its rental bonus would be 25 units. Another methodology example is that under the first and second round rules, municipality "A" could pay municipality "B" to take on some of municipality "A's" Affordable Housing obligation. These were called Regional Contribution Agreements (RCAs). Typically, they were done where municipality "B" was a more urban environment where many argue there exists a larger need for Affordable Housing. Municipality "A" would help Municipality "B" with rehabilitation. The RCA also allowed Municipality "A" to meet its obligations. However, the RCA option was eliminated by the Legislature in 2008.

Previous COAH rules set limits on the number of rental bonuses and RCAs a municipality could agree to so as to ensure that actual units were built in Municipality "A". Other methodologies were also used in prior rounds that are undefined in the current court-supervised process. This includes the number of Affordable Housing units a developer must build (at their cost) in relation to the number of market (non-affordable housing) units. In the past the municipality could assume that for every 10 units a developer built, the municipality would receive 2 Affordable Housing units, what has been called a "set aside" of 20%.

Redevelopment Efforts to Become Compliant

Despite being known as "the Family Town", throughout the years, the Borough has not served all of its residents well with regard to our housing stock. In fact, in 2000, the Borough was sued by a developer who sought to construct multifamily housing in the downtown. In a decision dated October 19, 2001, Judge Harris wrote "**Emerson, New Jersey persists as a bastion of exclusionary zoning. It has steadfastly resisted taking affirmative steps to provide realistic opportunities for affordable housing within its borders....The New Jersey Constitution shall not be permitted to merely remain a vague rumor in Emerson**". The court required the Borough to adopt an ordinance which requires that in every newly constructed project of over 5 units, there must be 20% of affordable units constructed. **The court also ruled that new, multifamily structures could be as high as 60 feet.** The full decision can be accessed here: <http://tinyurl.com/o9pdzwx>

Eventually, the Borough did react to this decision, which resulted in the formulation of the plan to bring multifamily housing to our downtown. The court had threatened to vacate all of Emerson's zoning laws unless the Borough took action. Thus, the Borough needed to provide a "realistic opportunity for affordable housing within its borders". Otherwise, the Borough could again be sued by a developer seeking to add high density structures to the Borough.

Redevelopment is an entirely different issue but was initiated in response to that lawsuit. Subsequent to that court's decision, the governing body moved forward to declare the downtown a redevelopment zone, which was successfully done in the early 2000's leading to the 2006 Redevelopment Plan. The Plan is on the Borough's website and can be accessed here: <http://tinyurl.com/qaygvr2> That Plan called for higher density housing in the downtown, where it is contemplated that one and two bedroom apartments will be constructed. There is a definitive study by a Rutgers professor which indicates that in such structures, there will be a minimum number of school age children. That study can be accessed here: <http://tinyurl.com/phyu2vf>

Conflicting Rules and Unclear Municipal Obligations

Several other rules/methodologies existed that provided an outline of what municipalities could and could not do when making a plan to meet their Affordable Housing obligation. Without these rules, every municipality in the State could be expected to craft a housing plan with no clear idea of what the courts will accept. The courts have rejected the notion that they should set these rules, stating the purview for this is the effectively dismantled COAH agency.

Without clear direction or assistance from the Governor, Legislature, or our State departments and agencies, New Jersey municipalities, Emerson included, had to determine what course of action should be taken by December 8, 2015 (and now December 8, 2016) or lose protection from the courts from "builders remedy" lawsuits.

A recent analysis was completed by both the State and a private Affordable Housing advocate as part of the pending DJ action. The analysis was submitted for the third round, which began in 2000 and will end in 2025. Based on this analysis, if the advocate's position is adopted, Emerson could be required to provide a realistic opportunity for construction of 454 units of Affordable Housing.

The Borough currently has approximately 2,417 residential properties and 373 non-residential properties (commercial/industrial). In order for the Borough to provide for 454 Affordable Housing units, we will have to zone for and accept at least 2,270 new residential units (2,270 times .20) in our community. That would mean that our housing stock would almost double, with a substantial increase in our population. This estimated figure assumes that the Borough will minimize the total units to be built by accommodating an all-Affordable Housing complex of approximately 150 units; maximizing the available rental bonuses while working with developers to build the rest as an included part of their overall residential development.

Emerson is unsure of how the courts will allow us to construct a compliant housing plan. Our own expert is proposing a third round realistic obligation number of 163 affordable units, which, when added to our present unmet need from Rounds 1 and 2 and after considering available bonuses for construction of rental housing, places our number at approximately 180 new affordable units. In order for the Borough to provide for 180 Affordable Housing units, it will have no choice but to zone for and accept at least 900 new residential units ($900 \times .20 = 180$) in our community.

Given this vast disparity in the experts' opinions, Emerson is unsure of the actual number of Affordable Housing and market units that must be built. Emerson is unsure of the inevitable strain on our community that meeting a unit obligation of 2,270 as proposed by the Fair Share Housing Council, or 900 units or some amount in between will bring. This many more new residential units would require additional municipal services. The extent and cost of the additional municipal services cannot yet be determined. One thing that is uniformly agreed upon is that the Borough will certainly change when units are built. The degree of that change is also unclear.

The Governing Body has been monitoring the COAH situation and Affordable Housing issues for as long as they have been unfolding. Emerson completed and submitted our third round plans. They have not been approved by COAH because COAH's rules have been invalidated by the Supreme Court. The Borough has done what we can to remain compliant with our Affordable Housing obligations, as we understand them. With the advice and assistance of our Planner, Borough Attorney and others, Emerson has done all that it can to protect itself from builders' remedy lawsuits.

The Borough's Limited Options

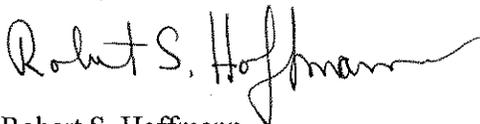
The Governing Body is now considering a range of approaches with the two extreme positions being;

- (1) Develop and submit a "constitutionally compliant" affordable housing plan and adopt revised zoning ordinances that essentially lays out a blueprint of where and how the Borough could provide a realistic opportunity for construction of anywhere from approximately 2,270 to 900 market rate units. Under this scenario, the Borough would have substantial control over the locations of development, but it does require the Borough to actually construct the affordable housing units. While the actual construction of the units may not happen for some time, the Borough would presumably be required to show some level of construction between now and the end of the third round, which could end in the year 2025. It could not reject a developer's plan for multi-family housing where the developer is agreeing to provide affordable housing units as long as that application complied with Emerson's contemplated zoning code amendments.
- (2) Reject acceptance of the system laid out in the recent court ruling and the need for affordable housing and refuse to submit a "constitutionally compliant" affordable housing plan to the courts. Proponents of this approach might argue that the supposed need for affordable housing is vastly overstated in our area, and that prescribing the construction of 2,270 units, or even 900, would be accepting that we will allow our Borough to be forever changed. Under this approach, the Borough certainly would be the target of numerous "builders' remedy" lawsuits, which would be costly to defend. Moreover, the Borough would have little to no control over the location, unit density or bulk standards (height, parking or setback requirements for court approved/ordered developments).

The Governing Body continues to wrestle with this troubling issue dropped upon New Jersey municipalities by the courts and the State government. The Borough seeks to develop a plan that maintains the current quality of life for our community while also recognizing the inevitability that providing a realistic opportunity for construction of Affordable Housing units is a mandate that must be planned for and realized in some capacity.

As soon as the Borough has received approval from the courts for the plan submitted, it will be released to residents and all parties. We will do our best to answer your questions within the limits placed upon us by the Courts.

Sincerely,



Robert S. Hoffmann
Borough Administrator

AFFORDABLE HOUSING TIMELINE

Prepared By

Mark S. Anderson, Branchburg Township Attorney
Used with Permission of the Township of Branchburg

1975: So. Burl. Cty. N.A.A.C.P. v. Tp. of Mt. Laurel, 67 N.J. 151 (1975) (**Mount Laurel I**) decided. The N.J. Supreme Court decided that developing municipalities that use the State's zoning power, given to the State by the N.J. Constitution and delegated by the Legislature to municipalities by the Municipal Land Use Law, must use the zoning power for the general welfare, not just for the welfare of the individual towns. The Court found that the only kind of housing realistically permitted in most towns consisted of relatively high-priced, single-family detached dwellings on sizeable lots.

The Court required towns to act "in the spirit we have suggested, both by appropriate zoning ordinance amendments and whatever additional action encouraging the fulfillment of their fair share of the regional need for low and moderate income housing may be indicated as moral and advisable." The Court warned that should towns not perform as it expected, further judicial action would be forthcoming.

1983: So. Burlington Ct. N.A.A.C.P. v. Mount Laurel Tp., 92 N.J. 158 (1983) (**Mount Laurel II**) decided. Eight years after Mt. Laurel I, the N.J. Supreme Court found that towns were not complying with its Mt. Laurel I requirements, and implemented a court-administered program to require towns to accept their "fair share" of the State's affordable housing needs. In particular, the Court permitted "builders' remedy" lawsuits, in which builders are encouraged to sue municipalities to force compliance.

The essence of a builder's remedy is that the builder gets to build more units at higher density in a non-compliant town, in the location where the builder wants, not where the town might want. A portion of the builder's units is required to be affordable to persons of low and moderate income.

1983-86: Mount Laurel II unleashes a flood of over 100 Mount Laurel suits. Branchburg Township is the first to be sued.

1984: Judge Serpentelli, the judge assigned to assess many towns' compliance, including Branchburg's, addresses the method for determining a municipality's fair share allocation and holds that Warren Township is obligated to provide 946 dwelling units for the period of 1980 through 1990. AMG v. Warren, 207 N.J. Super. 388 (Law Div. 1984), later partially disapproved by In re Twp. of Warren, 132 N.J. 1 (1993).

1985: The New Jersey Fair Housing Act ("FHA"), N.J.S.A., 52:27D-301 et seq., enacted, effective July 2, 1985. The purpose is to replace the court-administered Mt. Laurel system with a new State administrative agency, the Council on Affordable Housing (COAH), intended to be more predictable and efficient.

February 20, 1986: Hills Dev. Co. v. Bernards Twp., 103 N.J. 1 (1986)(referred to by some as **Mount Laurel III**) upholds the constitutionality of FHA and orders transfer of most pending builders' remedy suits to COAH's jurisdiction.

August 4, 1986: COAH adopts First Round Rules addressing affordable housing need for 1987 through 1993. N.J.A.C. 5:92-2 through -5 and Appendix A, 18 N.J.R. 1527-1548 (Aug. 4, 1986). COAH uses a methodology substantially similar to that used by Judge Serpentelli in AMG v. Warren.

1993: The Supreme Court invalidates COAH occupancy preference that would have allowed municipalities to set aside 50% of fair share housing for low and moderate income people who live and work in the municipality, and finds a 1000 unit cap on housing inconsistent with FHA. In re Twp. of Warren, 132 N.J. 1 (1993)(partially disapproving of methodology in AMG v. Warren).

1993: The Legislature amends the FHA. N.J.S.A. 52:27D-307(e)(generally capping affordable obligations at 1000 units per ten years).

June 6, 1994: COAH adopts Second Round Rules, addressing cumulative need for 1987 through 1999. N.J.A.C. 5:93, Appendix A. Effective June 6, 1994 through June 6, 1999.

May 1999: COAH readopts second round substantive rules establishing an expiration date of May, 2004. In Re Six Month Extension, infra, 372 N.J. Super. at 74.

June 6, 1999: Third Round Rules are due from COAH.

2004: New Jersey's intermediate court, the Appellate Division, characterizes COAH's delay in enacting Third Round Rules as frustrating the public policies embodied in the Mount Laurel line of cases and warns that it may "free interested parties from the constraints" of the administrative process.

In re Six Month Extension of N.J.A.C. 5:91, 372 N.J. Super. 61, 95-96 (App. Div. 2004), certif. denied. 182 N.J. 630 (2005).

December 20, 2004: COAH adopts a set of Third Round Rules calculating affordable housing needs from 1999 to 2014 and establishing criteria for meeting the needs between 2004 and 2014. N.J.A.C. 5:94 and 5:95; 36 N.J.R. 5748(a).

January 25, 2007: The Appellate Division affirms a portion of COAH's Third Round methodology, but invalidates other aspects of the Third Round Rules, i.e., the "growth share" methodology. In re Adoption of N.J.A.C. 5:94 and 5:95, 390 N.J. Super 1, 86-87 (App. Div.), certif. denied, 192 N.J. 71 (2007).

January 22, 2008: COAH proposes a revised set of Third Round Rules, generating over 5000 comments. 40 N.J.R. 237(a)(Jan. 22, 2008); 40 N.J.R. 515(a)(Jan. 22, 2008).

May 6, 2008: COAH adopts revised Third Round Rules essentially as proposed. N.J.A.C. 5:96 (procedural rules); N.J.A.C. 5:97 (substantive rules). Rules are published in the June 2, 2008 New Jersey Register. 40 N.J.R. 2690. They calculate the State's affordable housing needs from January 1, 1999 through December 31, 2018.

July 17, 2008: Effective this date, amendments to the FHA eliminate Regional Contribution Agreements, N.J.S.A. 52:27D-312, among other changes.

September 22, 2008: COAH adopts amendments to the Third Round Rules, effective October 20, 2008.

February 2010: Gov. Christie issues Executive Order Number 12 establishing a task force to review existing affordable housing laws, assess COAH's continued existence, and issue a report within 90 days.

March 19, 2010: The Task force issues its report and concludes that there should be a new model for affordable housing.

October 8, 2010: The Appellate Division concludes that COAH's revised Third Round Rules suffer from "many of the same deficiencies as the original Third Round Rules" and invalidates substantial portions of COAH's second set of Third Round Rules. In re Adoption of N.J.A.C. 5:96 & 5:97, 416 N.J. Super. 462 (App. Div. 2010).

June 29, 2011: Gov. Christie issues Reorganization Plan No. 001-2011, which abolishes COAH and transfers its functions to the Department of Community Affairs ("DCA").

August 1, 2011: Effective date of order abolishing COAH.

July 10, 2013: The Supreme Court holds that the Governor has no authority to abolish COAH. In re Plan for Abolition of Council on Affordable Housing, 214 N.J. 444 (2013).

September 26, 2013: The Supreme Court affirms the Appellate Division's invalidation of the Third Round rules and directs COAH to adopt rules by February 26, 2014. In re Adoption of N.J.A.C. 5:96 and 5:97, 215 N.J. 578 (2013).

February 26, 2014: COAH moves for an extension of time to promulgate Third Round Rules.

March 14, 2014: The Supreme Court grants COAH's motion for an extension for enacting the Third Round Rules and orders that if COAH does not adopt Third Round Rules by November 17, 2014, the Court will entertain applications for relief, including requests to lift the protection provided to municipalities through the Fair Housing Act. In re N.J.A.C. 5:96 and 5:97, 220 N.J. 355 (2014).

April 30, 2014: COAH's Board meets and votes to introduce new Third Round Rules.

June 2, 2014: Proposed Third Round Rules addressing Statewide affordable housing need from 1999 to 2024, and prospective need from 2014 to 2024, are published in the New Jersey Register. 46 N.J.R. 912(a)-1051 (June 2, 2014).

October 20, 2014: COAH members split 3-3 on the adoption of the proposed Third Round Rules, and they are not adopted.

March 10, 2015: The Supreme Court sets up declaratory judgment process for evaluating constitutional compliance. In re Adoption of N.J.A.C. 5:96 and 5:97 by N.J. Council on Affordable Housing, 221 N.J. 1 (2015)(sometimes called **Mount Laurel IV**).

June 8, 2015: Effective date of Mount Laurel IV.

July 8, 2015: Deadline for filing the declaratory judgment actions authorized by Mount Laurel IV.