

Smart Growth:

Dagger through affordable housing's heart

The New Jersey Supreme Court emphasized in *Mount Laurel II*, 92 N.J. 158, that the goals and policies of affordable housing and environmental protection must co-exist. Affordable housing should not be achieved at the expense of the environment. Likewise, affordable housing should not become the sacrificial lamb of protection of the environment. But the latter is exactly what is occurring — all in the name of Smart Growth.

Implementation of the state's various Smart Growth initiatives, such as the Highlands Act and Smart Growth Law, threaten to be a dagger through the heart of affordable housing. The Department of Environmental Protection's (DEP) Smart Growth mantra is to "promote and accelerate development in urban and suburban areas or other growth areas identified through sound planning."



Several of these initiatives direct development to areas designated for growth under the State Planning Commission's State Development and Redevelopment Plan and policy map. Some municipalities have responded by seeking the redesignation of these areas in the context of the ongoing state plan cross-acceptance process. Should these redesignations be realized, many low- and moderate-income development projects within areas currently designated as suited for growth will be thwarted. For a state with a severe shortage of affordable housing, a growing population and whose greatest percentage of anticipated population increase is foreign immigration, this prospect is alarming.

While the conflict between Smart Growth initiatives and affordable housing exists statewide, these issues collided in an approved affordable housing development, Milligan Farm, to be constructed in Union Township, Hunterdon County.

After reviewing the state's statutes, goals and conflicting policies, this article discusses how the developer in this case obtained a ruling from the Council on Affordable Housing (COAH) that significantly increased the likelihood the affordable housing project will be developed.

Affordable housing

Each suburban municipality in New Jersey's growth areas has an affirmative, judicially enforceable duty to provide sufficient realistic opportunities for the creation of safe, decent housing that's affordable to low- and moderate-income households. The state Supreme Court in *Mount Laurel II* stressed that the location of affordable housing "will continue to depend on sound municipal land use planning." The court recognized such planning would appropriately be guided by planning consistent with the designation of "growth areas" under the State Development Guide Plan, the pre-cursor to the State Plan, since that plan was a "conscious determination by the state ... on how best to plan its future."

The New Jersey State Planning Act, enacted contemporaneously with the Fair Housing Act in response to *Mount Laurel II*, required adoption of the State Plan to provide a balance of conservation and development objectives. The resulting State Plan was developed based on the recognition that designated growth areas would accommodate housing consistent with affordable housing requirements.

COAH's recently promulgated third-round regulations purport to achieve consistency with *Mount Laurel II* by adopting a "growth share" methodology for calculating a municipality's affordable housing obligation.

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The determination of growth share projections are closely tied to State Plan growth projections. Thus, the designation of areas under the State Plan as growth areas is critical to the realization of affordable housing development.

Cross-acceptance

The State Plan categorizes portions of the state by distinct classifications, including "planning areas" and "centers." Planning areas are regions that encompass critical natural and built resources that should be either protected or enhanced to achieve the statute's goals. There are five planning areas. PA1 (metropolitan planning area) and PA2 (suburban planning area) are traditionally considered growth areas, as are "centers."

The State Planning Act calls for the State Plan and map to be revised and updated at least every three years through the cross-acceptance process. The commission released a proposed State Plan and map April 28, 2004 to launch the process. Each county has held one or more informational public meetings and all but one county has prepared a cross-acceptance report. The commission will release a final draft State Plan and map subject to public scrutiny before final action by the commission, projected for March.

Smart Growth initiatives

Within the past several years, there have been several key Smart Growth legislative enactments such as the Highlands Water Protection and Planning Act, the Smart Growth Act and Transfer of Development Rights (TDR) legislation.

The Highlands Act, N.J.S.A. 13:20-1 *et seq.*, establishes a preservation area and planning area of the approximately 860,000-acre Highlands region. Non-exempt "major Highlands developments" located within the roughly 415,000-acre preservation area are required to obtain a Highlands approval from DEP and conform to strict regulatory standards. The act provides that "growth" and "development" consistent with the State Plan and "smart growth strategies" should be encouraged in the planning area "in or adjacent to areas already utilized" for development. The master plan to be established for the region must include a smart growth component that includes a TDR program and that identifies and recommends potential receiving zones in the planning area with capacity for the TDR program, identifies undeveloped areas suitable for growth and identifies potential redevelopment areas.

Discussion and debate over the Smart Growth Act has been considerable. The statute is intended to streamline the permitting process for development in Smart Growth areas, including PA1 and PA2 areas, designated centers or designated growth centers in an endorsed plan, as well as other areas. However, its potential impact is in doubt given Gov. James E. McGreevey's Executive Order 140 and Gov. Richard J. Codey's Executive Order 45 delaying its implementation and proposed legislation to repeal the law.

The TDR Act, N.J.S.A. 40:55D-137 *et seq.*, authorizes municipalities to create TDR programs by ordinance. Generally, this would allow towns to create "receiving zones" within which the density of development could be increased by purchasing development rights for properties within designated "sending zones." The receiving zones should be appropriate and suitable for development and sufficient to accommodate all the development potential of the sending zone.

The potential combination of increased development density through TDR in Highlands planning areas designated for growth and an expedited permitting process is viewed as apocalyptic by development-wary municipalities. Given the voluntary nature of the Highlands Act TDR component, and the numerous unresolved questions about the Smart Growth law, the perceived threat is questionable.

However, many municipalities have sought to use cross-acceptance to redesignate "growth" areas as PA5 "environmentally sensitive" to preclude development. In some cases, this has been a concerted effort. Hunterdon County proposed in its March 2005 final cross-acceptance report to eliminate all its PA2 areas. Intended or not, this will have the effect of impeding affordable housing opportunities in these areas.

Milligan Farm

The conflict between environmental protection and the realization of affordable housing development is exemplified in the case of Milligan

Farm. It is located in a PA2 area that extends along the Route 78/Route 22 corridor and continues east to an adjoining PA1. The site is close to Clinton and existing development, and is adjacent to an interstate highway. The property also is located within the proposed Clinton Area Regional Center. The township's master plan envisions a concentration of growth along the Route 78 corridor.

Milligan Farm is an inclusionary *Mount Laurel* development with 29 homes set aside for low- and moderate-income families. It has been a part of Union Township's housing element and fair share plan approved by COAH since 1988. However, the project has been delayed by litigation associated with various state approvals.

Milligan Farm, like other PA2 areas in Hunterdon County, has been under attack in the ongoing cross-acceptance process. The county's final report proposes redesignation of the site to PA5. The county also proposes to eliminate all PA2 areas. This would jeopardize the viability of the Milligan Farm project and the township's fair share plan. Yet, the township ignored the developer's repeated requests that it take an active role in the cross-acceptance process and oppose the proposed planning area change.

Attempting to ensure construction of this affordable housing project, the developer filed a motion with COAH seeking an order directing the township to actively participate in the cross-acceptance process as an advocate for Milligan Farm. Given its significance as part of the township's fair share plan, the developer contended the municipality has an affirmative obligation to expedite the production of low- and moderate-income housing. The developer further sought a declaration that the township's inaction in the cross-acceptance process has the effect of obstructing the construction of inclusionary development.

Motion granted

COAH granted the motion and directed the township to affirmatively act as an advocate for Milligan Farm in the cross-acceptance process. COAH also found the township has an affirmative obligation to negotiate

on the developer's behalf with DEP to aid in the effort to secure necessary approvals. COAH specifically directed the township to support and attempt to maintain the existing Smart Growth PA2 designation for the property. The township committee submitted a cross-acceptance report to the commission in response to the county's final report, urging the commission not to adopt a State Plan or map inconsistent with the continued designation of Milligan Farm within a PA2 area. Should the property designation be changed to PA5, the township is required to establish a center that includes the property through the Office of Smart Growth plan-endorsement process. As a result, the likely development of this critical component of the township's affordable housing plan was significantly enhanced.

The township has since acquired the property and expressed its intent to construct the affordable housing component of Milligan Farm.

The conflict between environmental protection and affordable housing isn't limited to this case. Hunterdon County also recommends the change of an area within Tewksbury from PA2 to PA4B, notwithstanding numerous Smart Growth characteristics and opposition by the Township Committee based in part on the need to satisfy the township's affordable housing obligation. Similar scenarios are sure to be found statewide.

With the continuing trend of the expansion of environmental restrictions and the elimination of developable land, the goals of environmental protection and affordable housing will increasingly collide. COAH's decision concerning Milligan Farm will not eliminate these conflicts, particularly re-garding new affordable housing sites. But it should help ensure that municipalities that reap the benefits of including an affordable housing site in their first- or second-round plans are required to take action to support those developments and are not permitted to hide behind the cloak of new and ever expanding environmental concerns to avoid their affordable housing requirements.

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