Clean Water and Affordable Housing

Why Two Laudable Goals May be Incompatible

by David J. Mairo and Chelsea P. Jasnoff

Development of real property and environmental considerations are, and historically have been, inextricably linked. That is, development of land may be constrained by certain environmental features, often triggering at least one or more environmental permitting regimes. When the New Jersey Supreme Court announced and reaffirmed that municipalities have a constitutional obligation to provide affordable housing in *Mount Laurel I*[1] and *Mount Laurel II*,[2] it was careful to emphasize that environmental considerations must remain significant when implementing that obligation. Specifically, the Court stated in *Mount Laurel I*:

> A municipality has a legitimate interest in insuring that residential development proceeds in an orderly and planned fashion, that the burdens upon municipal services do not increase faster than the practical ability of the municipality to expand the capacity of those services, *and that exceptional environmental and historical features are not simply concreted over.*[3]

In reaffirming and clarifying that constitutional obligation in *Mount Laurel II*, the Supreme Court again reiterated the importance of environmental considerations: "[w]here a particular proposed lower income development will result in substantial environmental degradation, such a development should not be required or encouraged by trial courts' enforcement of the constitutional doctrine."[4] The Court clearly recognized that an obligation to develop and construct a specified amount of housing could not ignore the obligation to protect the environment and availability of adequate natural resources to support development.

If anything, as the collective understanding of society's impacts on the environment has evolved, necessitating greater regulation to protect it, the Court's admonition over

40 years ago against developing without regard to environmental consequences is even more apropos. And with the evolution of constitutional mandates to provide affordable housing, coupled with the recent assumption by the Court to enforce them,[5] the Court has continued to maintain that the

environmental impacts of high-density development commonly associated with affordable housing must not be eroded. Indeed, the New Jersey Appellate Division has held that review of affordable housing compliance plans should involve "consultation with...the [New Jersey Department of Environmental Protection ("DEP")] and State Planning Commission...to determine whether construction of high density housing...would conflict with the regulatory policies those agencies are charged with implementing."[6]

This article explores one area where the affordable housing obligation directly impacts or implicates a critical area of environmental regulation: water quality management planning.

Regulation of Water Quality in New Jersey

The New Jersey Legislature enacted the Water Quality Management Act (WQMA) "to restore and maintain the chemical, physical and biological integrity of the waters of the State, including groundwaters, and the public trust therein."[7] To achieve that goal, the Legislature declared that the state shall be divided into areas, each of which will devise a water quality management plan (WQMP) to ensure the integrity of the waters. To further the Legislature's intent, components of every WQMP shall include: 1) a determination of the treatment works (*i.e.*, wastewater and sewage treatment plants) necessary to meet the anticipated municipal and industrial waste treatment needs in each designated area over a 20-year period; 2) regulations governing construction activities that may cause a discharge of waste or pollution into state waters; and 3) regulations to control the disposition of the waste or pollution.

Currently, there are 12 water quality management planning areas in New Jersey, each with its own WQMP. With respect to the handling of sanitary waste within those areas, the WQMPs designate some as 'sewer service areas,' where sanitary waste is collected and transported to an off-site treatment plant, such as a publicly owned treatment works (POTW), and other areas as requiring 'individual subsurface sewage disposal systems' (commonly known as septic systems). Septic systems collect and treat sanitary waste on site. An integral component of treatment via a septic system is the discharge of liquid effluent into the subsurface and percolation down to the water table.

The Legislature vested the DEP with authority to supervise and oversee area-wide planning, and to promulgate regulations to be used in the preparation of area-wide plans.[8] The rule that is most relevant for purposes of this article is N.J.A.C. 7:15-5.24, hereinafter referred to as the sewer service rule. With few exceptions discussed *infra*, the sewer service rule prohibits area-wide plans from extending sewer service into 'environmentally sensitive areas,' which are defined as being a minimum of 25 contiguous acres in size and possessing one or more defining features, such as: endangered or threatened wildlife species habitat; wetlands; and/or category one waters (as well as their tributaries). A water body's category one designation is based on certain criteria, including its exceptional ecological, water supply, recreational and fisheries resource significance.

The rationale for generally prohibiting sewer service in environmentally sensitive areas is that the presence of sewer service "supports and otherwise encourages development at a density that is inconsistent with protection of these areas."[9] Conversely, individual septic systems are deemed more inherently suitable because their design characteristics require significantly more area to adequately treat the average volume of waste per person, thus necessarily limiting the density of development.[10] For that reason, septic systems are inconsistent with the higher density typically associated with affordable housing. Thus, for practical purposes the availability of adequate sewer service is a prerequisite for development of affordable housing; or, put in a different context, the lack of sewer service is a limiting factor in the ability to construct affordable housing.

In an effort to try and take the issue out of the purview of the DEP, developers challenged the adoption of the sewer service rule, arguing that the rule was a "land use regulation[] that limit[s] density, the authority for which belongs to the municipalities pursuant to the Municipal Land Use Law."[11] The Appellate Division, however, disagreed, and found that any effect the rule may have on limiting development was merely "incidental" to the DEP's goal of protecting water quality. In upholding the rule, the court ultimately concluded that:

> in promulgating the WQMP rules, the DEP struck the proper balance between, on the one hand, a property owner's interest in developing land and, on the other hand, the State's interest in preserving protected species habitat, preserving water quality, protecting the environment, and conserving public sewage resources.[12]

Thus, in upholding the sewer service rule, the court was seemingly well aware of the restrictive effect the sewer service rule could have on development in general.

The Potential for Incompatibility Between the Affordable Housing Obligation and the Sewer Service Rule

When the Legislature enacted the Fair Housing Act (FHA) to implement the constitutional affordable housing obligation announced by the Court in *Mount Laurel I* and *Mount Laurel II*, the Council on Affordable Housing (COAH) was created. A basic tenet of COAH's reg-

ulations requires every site designated for affordable housing to be "available, suitable, developable and approvable."[13] Significantly, in order to be developable, a site must have access to appropriate water and sewer infrastructure.[14] Within that construct, the COAH regulations explicitly recognize that development of affordable housing necessarily requires careful consideration of a municipality's water quality management plans.

The COAH regulations mandate that "[a]ll sites designated for low and moderate income housing shall be consistent with the applicable areawide WQMP (including the wastewater management plan) or be included in an amendment application filed prior to the grant of final substantive certification."[15] However, in situations where a site considered for affordable housing does not have access to sewer service, the COAH regulations provide an off ramp by either allowing a municipality to 'defer' its fair share affordable housing obligation until sewer service is made available,[16] or amend the WQMP to expand the sewer service into an environmentally sensitive area, so long as the amendment complies with and is "developed in accordance with the rules of the DEP."[17]

The sewer service rule also allows for exceptions to the prohibition against sewer service in environmentally sensitive areas; however, none of those exceptions relate to or otherwise address the issue in the context of either affordable housing or development in general. Specifically, the sewer service rule provides that an applicant for a wastewater management plan amendment may rebut the presumption that the environmental data establishes an area as 'environmentally sensitive.' Additionally, under certain circumstances, the sewer service rule allows sewer service to be expanded into an environmentally sensitive area, even where the data underlying the designation is not challenged as being inaccurate. Again, however, no exception speaks to or otherwise references a municipality's affordable housing obligation as the basis for an exception, which suggests a potential incompatibility between the DEP and COAH regulations.

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That apparent incompatibility is highlighted in circumstances where an otherwise developable site is excluded from sewer service because of its proximity to an environmentally sensitive area. In that case, any amendment to the WQMP to allow affordable housing to be built in an environmentally sensitive area, as permitted by the COAH regulations, would essentially require the DEP to violate its own regulations, which in and of itself is prohibited.[18] Thus, because the rule does not provide any explicit exceptions for affordable housing, satisfying the fair share obligations mandated by COAH is particularly challenging for those municipalities with limited options to expand their sewer service.

At first blush, it may seem that a simple way to solve this dilemma is for COAH to revise the definition of 'developable' to either eliminate the requirement for sewer service or include septic systems. However, eliminating the word from the definition does nothing to eliminate the need, just as expanding the definition to include septic systems does nothing to alleviate the inherent limitations such systems pose to high-density development, affordable or otherwise.

Without getting overly technical, the primary way in which the water quality planning rules at N.J.A.C. 7:15–5.25(e) curb development is by imposing limitations on discharges of nitrates to 2.0 mg/L. Nitrates are a primary component and pollutant associated with sanitary waste. The rule provides a rather complicated calculation that factors in average volumes of sanitary waste generated per person or household, as well as the specific characteristics of the environment into which the waste would be discharged, to ensure that sufficient breakdown and dilution is achieved as it passes through the septic system and percolates into the groundwater. Since all of this must occur on site, the greater the volume of waste, the larger the site must be to accommodate it. Suffice it to say, it is not unusual for a single-family house to require an acre or more of land to meet the nitrate discharge limitations, a ratio that is not generally thought of as supporting the viability of affordable housing.

Thus, even if the regulations permitted affordable housing developments to use septic systems for wastewater treatment, development would nevertheless be constrained and municipalities that contain large tracts of environmentally sensitive areas with little to no available sewer service will be at risk of failing to satisfy a fair share affordable housing obligation imposed upon it. Moreover, any such imposition that does not place equal emphasis on protection of the environment runs the risk of satisfying a comparatively short-term goal by sacrificing the long-term need for a reliable

supply of a precious resource—clean water.

Because these conditions are not commonly encountered, one suggestion is that those municipalities for which this quandary exists should be afforded a heightened level of analysis when assessing their fair share affordable housing obligation, as opposed to a one-size-fits-all approach for all municipalities. Presently, because COAH did not adopt regulations to govern what are known as the 'third round'[19] of affordable housing obligations, the courts are now charged with that duty.

Whether and to what extent the Judiciary considers the potential environmental consequences of high-density development associated with affordable housing remains to be seen. It is worthwhile to note, however, that the COAH regulations do give some attention to environmental concerns. For example, N.J.A.C. 5:93-4.2 allows municipalities to exclude from their vacant land inventories certain 'environmentally sensitive' lands. That regulation defines environmentally sensitive areas as areas regulated by the Pinelands Commission, Division of Coastal Resources of the DEP and the Hackensack Meadowlands Development Commission; inland wetlands; flood hazard areas; and sites with slopes in excess of 15 percent.[20] This definition does not encompass all types of lands that may be restricted from sewer service under the sewer service rule. Thus, even in situations where a municipality has excluded certain parcels of vacant land pursuant to N.J.A.C. 5:93-4.2, there may still be sites included in that municipality's land inventory that are not developable due to their inability to support sewer service.

Thus far, the solution for most municipalities has been to construct affordable housing on land where sewer service is already available or could be extended without amending the WQMP. However, for those municipalities that contain large tracts or consist almost entirely of environmentally sensitive areas where the sewer service rule prohibits the expansion of sewer service, it remains to be seen how courts will apply or otherwise resolve COAH's affordable housing obligations. ⚖

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ENDNOTES

1. *S. Burlington Cty. N.A.A.C.P. v. Mount Laurel Twp.*, 67 N.J. 151, 212-13 (1975) (hereinafter *Mt. Laurel I*).
2. *S. Burlington Cty. N.A.A.C.P. v. Mount Laurel Twp.*, 92 N.J. 158, 353 (1983) (hereinafter *Mt. Laurel II*).
3. *Mt. Laurel I*, 67 N.J. at 212-13 (emphasis added).
4. *Mt. Laurel II*, 92 N.J. at 331 at note 68.
5. *In re Adoption of N.J.A.C. 5:96 & 5:97 ex rel. New Jersey Council on Affordable Hous.*, 221 N.J. 1, 29 (2015).
6. *In re Petition for Substantive Certification, Twp. of Southampton, Cty. of Burlington*, 338 N.J. Super. 103, 114 (App. Div. 2001).
7. N.J.S.A. 58:11A-2.
8. N.J.S.A. 58:11A-2; N.J.S.A. 58:11A-9.
9. 47 N.J.R. 2532.
10. 40 N.J.R. 4113.
11. *In re Adoption of N.J.A.C. 7:15-5.24(b)*, 420 N.J. Super. 552, 565 (App. Div. 2011).
12. *Id.* at 579.
13. N.J.A.C. 5:93-5.3(b).
14. N.J.A.C. 5:93-5.3(b).
15. N.J.A.C. 5:93-5.3.
16. N.J.A.C. 5:93-4.3(a).
17. N.J.A.C. 5:93-4.3(a).
18. *See In re CAFRA Permit No. 87-0959-5 Issued to Gateway Assocs.*, 152 N.J. 287, 308 (1997) (administrative agencies must follow their own rules and regulations).
19. Since the enactment of the FHA, COAH has made its determination of each municipality's indigenous housing need and its share of the present and prospective regional low-and moderate-income housing need for two periods, referred to as rounds. The first-round rules, covered the period from 1987 to 1993, and the second-round rules covered the cumulative period from 1987 to 1999. *See In re Six Month Extension of N.J.A.C. 5:91-1 et seq.*, 372 N.J. Super. 61, 73 (App. Div. 2004). COAH never promulgated third-round rules to cover the present period of municipal housing obligations. *See In re Adoption of N.J.A.C. 5:96 & 5:97 ex rel. New Jersey Council on Affordable Hous.*, 221 N.J. 1, 5 (2015) (*Mount Laurel IV*). Thus, pursuant to the Supreme Court's decision in *Mount Laurel IV*, the courts are now tasked with resolving municipalities' constitutional obligation for the current period. *Id.*
20. N.J.A.C. 5:93-4.2(e)(2).