

TO: MEMBERS OF THE SENATE ECONOMIC GROWTH COMMITTEE

**FROM: THOMAS F. CARROLL, ESQ.
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DATE: JUNE 3, 2010

**RE: S1 (LESNIAK/ BATEMAN/ VAN DREW)
S692 (SARLO/ VAN DREW)**

While the New Jersey Builders Association (NJBA) appreciates the intent of S1 (Lesniak/ Bateman/ Van Drew) in attempting to reform New Jersey's complex and disjointed affordable housing system, it has serious issues with the constitutionality of the proposed legislation.

The NJBA's specific concerns are outlined below.

1. The uncompensated set-aside obligations have previously been found to be unconstitutional. Section 19 of the legislation proposes to compel that all residential developments include a 10% mandatory set-aside of lower income housing, with no density bonuses or any other benefits. This same concept has already been declared unconstitutional by the courts in the Appellate Division's decision invalidating the COAH rules that purported to authorize uncompensated set-asides of approximately 11%. *In the Matter of the Adoption of N.J.A.C. 5:94 and 5:95 by the New Jersey Council on Affordable Housing*, 390 N.J.Super. 1 (App. Div. 2007), *certif. den.* 192 N.J. 72 (2007). The only exception in the legislation's 10% set-aside requirement is for towns that possess substantive certification from COAH (Section 19(h)). Presumably those towns could impose such an uncompensated set-aside if they wish, but would not be required to do so like all other towns.

Thus, towns could leave all of their exclusionary zoning in place, and make their zoning even more exclusionary, with builders being required to sell 10% or more of their homes at a financial loss to lower income households. If the bill were enacted, it is possible that we would see builders in all zones, even 5 acre and 10 acre zones, being required to provide lower income housing. Of even greater concern, Section 19(e) provides that towns can impose additional uncompensated set-aside obligations in certain instances. We find no language in the legislation to provide density bonuses or other compensatory benefits in return for the obligation to provide lower income housing.

Moreover, the legislation gives towns the discretion to require builders to pay money to the town, instead of providing lower income housing. Language in the bill is broad as to this discretion, and as a result does not offer assurances or predictability to the development community. As a result, it is conceivable that towns will simply require lower income housing on-site since there is presumably little motivation for them to do anything else.

The court's entire discussion of the uncompensated set-aside issue in the case of *In the Matter of the Adoption of N.J.A.C. 5:94 and 5:95 by the New Jersey Council on Affordable Housing* appears at pp. 67 to 75 of the court's opinion. The court was unequivocal in striking down uncompensated set-aside obligations:

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We address first whether these provisions are consistent with the Mount Laurel doctrine.

We conclude that any rule that permits municipalities to compel on-site affordable housing or payments in lieu thereof without any compensating benefits violates the fundamental principle of the Mount Laurel doctrine that ordinances create a realistic opportunity for the construction of the region's need for affordable housing.

In addition to concerns about the constitutionality of uncompensated set-aside obligations, we believe that the basis of the bill may be in direct conflict with the *Mt. Laurel* doctrine. The essence of the *Mt. Laurel* doctrine is that towns must remove their exclusionary zoning to the extent necessary to provide for a variety and choice of housing for all people, especially lower income households. The legislation would allow towns to keep all exclusionary zoning in place, and impose even more exclusionary zoning at their discretion, as long as they require builders to sell at least 10% of their homes to lower income households. Again, the *Mt. Laurel* doctrine requires the removal of exclusionary zoning and is a municipal obligation; it does not authorize even more exclusionary zoning, and does not provide for a builder obligation.

2. Failing to match housing need with compliance measures has previously been found to be unconstitutional. The legislation does not identify statewide lower income housing need, or allocate that need to individual municipalities, or ensure that lower income housing production measures meet that need. Indeed, the failure of COAH's "third round" rules to address these bedrock constitutional requirements was another reason those rules were invalidated in the case of *In the Matter of the Adoption of N.J.A.C. 5:94 and 5:95 by the New Jersey Council on Affordable Housing*, discussed above.

3. The legislation provides five ways for towns to be held "inclusionary," all of which appear to be unconstitutional. The net result would be all "inclusionary" towns. We remain concerned that since the legislation provides for a variety of ways for towns to be deemed "inclusionary," few, if any, towns would ever be found to be exclusionary.

The five ways for towns to be found "inclusionary" are as follows: (1) if 7.5% or more of a town's housing stock is "price restricted" (Section 18); (2) if 33% or more of a town's housing stock is single family attached housing, multifamily housing, or mobile homes (Section 18); (3) if 20% or more of a town's "vacant, developable land" (as narrowly defined) is zoned for "workforce" (not lower income) housing (Section 17(b)(2)); (4) if a town adopts zoning ordinances, or even just "Master Plan standards," addressing a number of topics set forth in Section 17(b)(3), in which case a town "may" include some types of incentives; (5) if a town has received "third round" substantive certification from COAH pursuant to the existing regulations that are now the subject of 24 separate appeals (Section 18(c)).

To illustrate our concern, consider the following example. A largely developed town with no lower income housing could rezone 20% of a very small tract of land for "workforce" housing per Section 17(b)(2) and be found under the legislation to be in compliance with its *Mt. Laurel* obligation.

In sum, the five "compliance standards," taken together, raise alarm that true compliance with *Mt. Laurel* obligations will not occur under the legislation.

4. The courts have already held unconstitutional provisions concerning the age restriction and related provisions. COAH regulations that allowed towns to reserve 50% of their lower income units for the age restricted population have been overturned. *In the Matter of the Adoption of N.J.A.C. 5:94*

and 5:95 by the New Jersey Council on Affordable Housing. Nevertheless, the legislation, at Section 19(g), would allow the very same 50% standard that the courts have already invalidated. Further, under that section only 50% of a town's lower income housing stock would have to be housing with kitchens, etc., as to which no preferences can be provided by towns. Thus, up to 50% of a town's obligation could be satisfied by student dormitories, military housing, etc., most of which already exists. This provides little in the way of new housing opportunities.

5. Provisions concerning residency preferences have previously been deemed unconstitutional. The courts have also invalidated local efforts to reserve lower income housing for those who already reside in a municipality, as the essence of the *Mt. Laurel* doctrine is to open up the housing stock of all towns, on a regional basis, to those who cannot presently live there. Section 21 of the legislation appears to be in conflict with those tenets as it provides for a 50% residency preference.

6. The only provision in the legislation dealing with "non-inclusionary towns" would make development applications more difficult in such towns. Section 22 of the legislation provides for what would occur in any towns that were not found to be "inclusionary" in any of the five ways summarized above. While few, if any, towns would not be found inclusionary through one or more of the five "compliance standards" in the legislation, Section 22 would require that all applicants in such towns, even applicants seeking "as-of-right" subdivision or site plan approvals pursuant to existing zoning, would have to satisfy the "negative criteria" in the Municipal Land Use Law variance statute (N.J.S.A. 40:55D-70). Applicants for such approvals do not presently have to overcome that difficult hurdle. The legislation, as drafted, therefore, makes all applications for development more difficult to acquire, even when no variance relief is requested.

Section 22 also provides that use variance applications for inclusionary development can be filed in non-inclusionary towns. However, the Section also defines vacant, developable land in a way that excludes almost all lands. For example, towns could take lands out of consideration for such variance relief simply by designating them for "open space." The definition of vacant developable land would also exclude any proposals found not to be "adjacent with compatible land uses." Consequently, our concern is that towns would have wide latitude to exclude any properties they wished. Further, as for towns that have nothing but exclusionary zoning, no inclusionary proposals could be found to be adjacent to compatible land uses.

7. We believe the legislation would unconstitutionally limit burdens to residential developers. Under the legislation, only residential developers would have compliance burdens. For example, the legislation provides that only residential developers would be compelled to provide lower income housing without any compensatory benefits, and only residential developers would have to pay money for such purposes to towns. Nonresidential developers would have no such obligations.

As noted above, imposing uncompensated obligations against any class of developers is unconstitutional. However, when the legislation selects out residential developers to bear such burdens, and exempts nonresidential developers, it runs the risk of violating equal protection guarantees. The *Mt. Laurel* obligation is tied in large part to the provision of jobs in municipalities, and the overall notion is that affordable housing must also be allowed in such towns. The "constitutional nexus" to impose such burdens on nonresidential developers is far clearer than with residential developers, who do not "cause any need," although neither is truly constitutionally permissible.

In conclusion, while NJBA appreciates the intent of **S1** in attempting to create a system to enable the State to establish an effective affordable housing policy, we do not feel **S1** achieves its intended purposes. Further, we feel that the legislation is plagued by numerous constitutional issues. For these reasons, we ask that you not vote for the legislation in its current form.