

MASON, GRIFFIN & PIERSON

A PROFESSIONAL CORPORATION
COUNSELLORS AT LAW

MEMORANDUM

To: Mayor and Council of the Municipality of Princeton

From: Kevin A. Van Hise, Esq. 
Special Counsel for Affordable Housing

Date: March 1, 2021

Re: Municipal Affordable Housing Set-Aside Ordinance

As you are aware, at the February 10, 2021 SPRAB meeting, during a review of Palmer Square's new proposed mixed-use project at Griggs Corner, it was revealed that the development will not be providing an on-site affordable housing set-aside despite the inclusion of eight residential units within the project. That fact led to a discussion during the meeting about the municipal-wide affordable housing set-aside ordinance enacted last year as part of the affordable housing settlement in Princeton's Declaratory Judgment Action (I/M/O the Application of the Municipality of Princeton in Mercer County, Docket No. MER-L-1550-15). That public discussion has understandably caused significant consternation because of fears that the former Borough's set-aside ordinance was eliminated, that the municipality does not actually have a set-aside ordinance, and that there are "loop holes" in the ordinance. Rumors and conspiracy theories have been exacerbated in news reports and on social media based upon incomplete facts and inaccuracies that continue to be spread. Summarily, the Borough's ordinance had only met with limited success in its thirty year span, had its own "loophole" built into the ordinance, and most importantly, was not in accordance with current legal requirements. As such, at the insistence of, and in conjunction with Fair Share Housing Center,

MASON, GRIFFIN & PIERSON

A PROFESSIONAL CORPORATION
COUNSELLORS AT LAW

March 1, 2021

Page 2

an updated mandatory set-aside ordinance was agreed upon that brought Princeton's set-aside ordinance into compliance with legal requirements and expanded that ordinance over the entirety of the municipality. The settlement agreement (with the new set-aside ordinance requirement) and resulting ordinance were done in conjunction with Fair Share Housing Center, were reviewed by the Special Master, and were approved by the Court. While it was not anticipated by the parties that a developer would be able to take advantage of a unique set of circumstances or "gap" between Princeton's Zoning Code and the updated set-aside ordinance, it is important to note that the language of the updated ordinance was deliberative and required to bring the ordinance into compliance with current legal requirements.¹ Please permit this memorandum to provide you with the background and actual facts about the ordinance and set-aside requirement.

A. Mandatory Set-Aside Requirement.

As an initial matter, despite some of the (incorrect) assertions in the public, please be assured that Princeton does in fact have a municipal-wide mandatory affordable housing set-aside ordinance in place. As required by the December 18, 2019 settlement agreement with Fair Share Housing

¹ In 2018, during the pendency of settlement negotiations with Fair Share Housing Center, municipal Planner Lee Solow, PP, retired. Thus, the institutional knowledge and planning input that normally accompanies such an ordinance amendment were not available with this provision. Despite review of the settlement agreement and the proposed ordinance by the Governing Body, municipal staff and professionals, the Affordable Housing Board, and even Fair Share Housing Center and the Special Master, the possibility that a potential development project or projects could be exempt from an affordable housing set-aside was simply not known. While such knowledge would not have changed the need to update the ordinance and bring it in compliance with current law, an awareness of the potential gaps would have enabled additional planning efforts to mitigate and/or close any potential issues such as what has occurred with the present application.

MASON, GRIFFIN & PIERSON

A PROFESSIONAL CORPORATION
COUNSELLORS AT LAW

March 1, 2021

Page 3

Center, which was reviewed and approved by both the Special Master and Court, by Ordinance No. 2020-15, adopted June 29, 2020, Princeton enacted a municipal-wide mandatory set-aside requirement. Specifically, Section 5 of the Ordinance, amending Chapter 10B "Land Use," Article XII "Affordable Housing" of the Municipal Code, provides, in relevant part:

Section 10B-336 Municipality-wide Mandatory Set-Aside

1. A multi-family development providing a minimum of five (5) new housing units at a density of six (6) or more units per acre, created through a municipal rezoning permitting multi-family residential housing where not previously permitted; a use variance; a density variance increasing the permissible density at the site; or a new or amended redevelopment plan or rehabilitation plan, is required to include in the development a minimum affordable housing set-aside of 20%, except as noted below:
 - a. This section shall not apply to student housing as defined in Article I, Section 10B-2, above.
 - b. This provision shall not apply to sites zoned for inclusionary residential development or for which an inclusionary residential redevelopment plan has been adopted consistent with the Municipality's Court-approved Housing Plan Element and Fair Share Plan adopted in accordance with the settlement agreement with Fair Share Housing Center, which sites shall comply with the applicable adopted zoning.
2. In the event the number of affordable housing units to be provided includes a fraction, the number shall be rounded up if the fractional amount is 0.5 or greater and rounded down if the fractional amount is less than 0.5. The developer shall provide a payment in lieu of constructing affordable units for the fraction of a unit less than 0.5. If the number of market-rate units permitted includes a fraction, the number shall be rounded down.

This language is different than what was in the Borough's original set-aside ordinance, but it needed to be as will be explained below.

MASON, GRIFFIN & PIERSON

A PROFESSIONAL CORPORATION
COUNSELLORS AT LAW

March 1, 2021

Page 4

B. Requirement to Update the Borough's Overlay Ordinance.

Section 10B-336 of Ordinance No. 2020-15 replaced the [former] Borough's Affordable Housing Overlay Ordinance. This was necessary to bring the Borough's ordinance into compliance with current legal requirements and to expand it to the entire [consolidated] municipality. A brief history and understanding of the Borough's ordinance are required to understand why this was necessary.

The Borough's set-aside ordinance was enacted in 1990 as a requirement of the October 9, 1990 Consent Order for Final Judgment and Judgment of Repose in resolution of the Borough's Second Round Mount Laurel affordable housing action. In its Judgment, the court found that the "Borough is a fully developed community, with extremely limited areas of vacant land within its borders" and as such, the Borough received a vacant land adjustment recognizing that the "unavailability of vacant developable land in the Borough effectively constrains production of new housing in the Borough."² As a condition of the Court's approval of the Borough's compliance plan and the granting of a Judgment of Repose, the Borough was required to "adopt an affordable housing overlay zoning ordinance to assure that, as land becomes available, a realistic opportunity is created for the construction of low and moderate income housing." The Borough did so (Ord. No. 90-32,

² The Borough's Second Round obligation was 323 units. To satisfy its obligation, the Borough received 88 prior cycle credits and implemented a plan to create 12 new affordable housing units during the round. The Court also recognized that the Borough did not have sufficient land to satisfy the remainder of its obligation and the Borough received a "vacant land adjustment" essentially converting the 223 unit deficit to an "unmet need" obligation that would be addressed and reduced over time by the overlay ordinance.

MASON, GRIFFIN & PIERSON

A PROFESSIONAL CORPORATION
COUNSELLORS AT LAW

March 1, 2021

Page 5

§1). The Borough's 1990 Judgment of Repose was extended by the Court on October 16, 1996 and again on October 11, 2002. As noted in the October 7, 2002 report of the Court's Special Master,

The Affordable Housing Overlay Zone is a mechanism intended to address the obvious scarcity of vacant land resources in the Borough. Essentially, whenever development or redevelopment is proposed that will result in the construction of five (5) or more dwelling units, the developer is required to provide a set-aside of affordable housing or to make an "in lieu of" cash contribution toward the Borough's affordable housing program.

Specifically, Section 17A-202.1 of the Borough Code provided:

Sec. 17A-202.1. Affordable Housing Overlay Zone.

- (a) Neither the regional planning board nor the board of adjustment shall approve an application for development in any zoning district for a multiple dwelling or joint occupancy building with five or more dwelling units unless either:
 - (1) 20% of the units are set aside for low and moderate income households, according to the Substantive Rules of the New Jersey Council on Affordable Housing, N.J.A.C. 5:93, and the Borough of Princeton's Affordable Controls (borough Code, sections 16-78 through 95), or
 - (2) The developer makes a cash contribution to the borough's Trust Fund for Affordable Housing (see borough Code sections 16-69 through 73), in lieu of actual construction of the required low and moderate income units, in an amount, determined by the mayor and borough council, that is sufficient to create the equivalent number of new units of low and moderate income housing.

Thus, under the requirements of the Borough's ordinance, a developer of multi-family housing providing five or more units was required to provide a 20% set-aside, or provide for an in-lieu contribution to the Borough's affordable housing trust fund. Although the ordinance was commonly referred to as the "20% set-aside ordinance," it actually provided a developer with the option either to produce the affordable housing unit(s) on site or essentially to purchase its way out of the

MASON, GRIFFIN & PIERSON

A PROFESSIONAL CORPORATION
COUNSELLORS AT LAW

March 1, 2021

Page 6

obligation by making payment of an in-lieu contribution established by the Borough. Between 1990 and 2020, the Borough's ordinance produced a total of 15 affordable housing units. Those credits were applied towards the Borough's 223 unit vacant land adjustment.

With the filing of Princeton's affordable housing Declaratory Judgment action in 2015, accounting for the Borough's unmet need obligation became a major component of the case and the settlement negotiations with Fair Share Housing Center. With the assistance of the Court's Special Master, Christine Cofone Herbert, PP/AICP, and the Court appointed mediator, the Honorable Philip S. Carchman, J.A.D. (ret.), the parties agreed that the unmet need obligation would not be converted to a new construction obligation (which would have increased Princeton's new unit obligation from 753 to 976), but to facilitate efforts to close that unmet need obligation, the Borough's overlay ordinance would be updated to meet current legal requirements (required to be followed as a result of the Supreme Court's Mount Laurel IV³ decision); the ordinance would be expanded to the entirety of Princeton (with units produced by the ordinance in the lands of the former Borough to be credited towards the outstanding unmet need obligation and units produced in the former Township to be applied towards the new/future round obligation); and Princeton would create area specific overlays within the former Borough to further incentivize redevelopment with both market rate and affordable housing units.

³ In re Adoption of N.J.A.C. 5:96 & 5:97 by the New Jersey Council on Affordable Housing, 221 N.J. 1 (2015).

MASON, GRIFFIN & PIERSON

A PROFESSIONAL CORPORATION
COUNSELLORS AT LAW

March 1, 2021

Page 7

While initial discussions between the parties did contemplate whether or not the Borough's overlay ordinance would or could remain, it was noted by Fair Share that the Borough's overlay ordinance predated the requirements of COAH's second round rules at N.J.A.C. 5:93. Although the ordinance had not previously been challenged, the fact that it did not comply with the rules was important because in Mount Laurel IV, the Supreme Court directed the courts to apply COAH's prior round rules in evaluating municipal compliance mechanisms, and the caselaw in the intervening years since enactment of the Borough's ordinance had clarified the requirements necessary for validly imposing inclusionary set-asides in proposed developments.

As you are aware, the Mount Laurel doctrine is predicated on the fact that affordable housing is a municipal obligation. Zoning for inclusionary development is one way a municipality can meet its obligation to provide a realistic opportunity for the production of affordable housing.⁴ Because the obligation is a municipal obligation, the courts have made it clear that private developers must be incentivized, or in other words, provided with "compensatory benefits," in order to require them to provide affordable housing units. An inclusionary ordinance that fails to do so could be found to constitute an impermissible takings or be invalidated as arbitrary, capricious and unreasonable. Specifically, as the Court noted in In re Adoption of N.J.A.C. 5:96 and 5:97, 416 N.J. Super. 462, 488 (2010):

⁴ A mandatory set-aside ordinance is an inclusionary zoning ordinance. Other compliance mechanisms include municipally sponsored projects, special needs housing, market-to-affordable programs, etc...

MASON, GRIFFIN & PIERSON

A PROFESSIONAL CORPORATION
COUNSELLORS AT LAW

March 1, 2021

Page 8

We conclude that the *Mount Laurel* doctrine, as articulated in Mount Laurel II⁵ and Toll Bros.⁶, and as codified by the FHA, requires municipalities to provide incentives to developers to construct affordable housing. **Land use ordinances requiring all developers to provide some affordable housing conflict with the essence of the *Mount Laurel* doctrine**, which requires that municipal land use ordinances create a realistic opportunity. [Emphasis added].

See also Fair Share Housing Center vs. Zoning Bd. of the City of Hoboken, 441 N.J. Super. 483, 506-507 (App. Div. 2015), noting that COAH's rules provided that inclusionary developments contain a 20% set-aside at a gross density of six units per acre, and absent providing incentives, a deviation from the presumptive requirement is not permitted. The typical way to incentivize the production of affordable housing is to provide a density bonus to the developer.

As to the Borough's ordinance in particular, the ordinance did not comply with N.J.A.C. 5:93-5.6(b)(1) which requires "a minimum gross density of six (6) units per acre with a 20 percent set-aside." [This requirement is included in Ordinance 2020-15]. Considering the passage of time and the limited success of the ordinance, the need for a density bonus in order to produce low and moderate income housing needed to be complied with. These issues were especially important as the ordinance was being expanded to cover the entirety of the consolidated municipality. Although the underlying zoning requirements may provide for densities at or above the six units per acre, the set-aside overlay did not comply with the "compensatory benefit" requirements. Beyond those factors, the ordinance permitted a developer to essentially purchase its way out of the on-site

⁵ Southern Burlington County NAACP vs. Twp. of Mount Laurel, 92, N.J. 158 (1983).

⁶ Toll Bros. vs. Twp. of West Windsor, 173 N.J. 502 (2002).

MASON, GRIFFIN & PIERSON

A PROFESSIONAL CORPORATION
COUNSELLORS AT LAW

March 1, 2021

Page 9

obligation by making a contribution-in-lieu. As established, the ordinance more closely resembled the "growth share" provisions of COAH's third round rules, which were ultimately invalidated by the courts.⁷ Thus, to bring the ordinance into compliance with COAH's rules, existing case law, and similar ordinances approved by the courts elsewhere in the State, Fair Share proposed the language that is now set forth in the settlement agreement, which requires an affordable housing set-aside of 20% for new multi-family development of five or more units that are developed at a density of six or more units per acre, **which become permissible through: a use variance; a density variance increasing permissible density; a rezoning or a new or amended redevelopment plan or a new or amended rehabilitation plan** [emphasis added]. These mechanisms - rezoning, use or density variances, etc. - are considered "compensatory benefits" to a developer in return for setting aside 20% of the proposed units as affordable. This language tracks current legal requirements and eliminates an impermissible "takings" claim that could be asserted if the municipality required a mandatory set-aside *without* providing a corresponding compensatory benefit for the set-aside unit(s). The language of the settlement agreement, which was approved by the Court, was then codified as Section 10B-336 within Section 5 of Ordinance No. 2020-15.⁸

⁷ Conceptually, this made sense because the overlay ordinance was originally enacted merely to capture affordable housing opportunities as the Borough redeveloped or "grew" by mandating a straight set-aside or contribution-in-lieu payment. That concept basically became the foundational underpinning of COAH's attempted shift to the "growth share" methodology in the third round rules. However, as is by now well known, the growth share methodology adopted by COAH was invalidated by the courts.

⁸ Before enactment, proposed Ordinance 2020-15 was reviewed by the Affordable Housing Board on June 4, 2020. By memorandum report dated June 11, 2020, the Board raised two issues with the

MASON, GRIFFIN & PIERSON

A PROFESSIONAL CORPORATION
COUNSELLORS AT LAW

March 1, 2021

Page 10

C. Shift to Incentivized Development By Area-Specific Overlays.

During the analysis of prior round efforts in the Declaratory Judgment action, it was noted that the Borough's overlay ordinance had only met with limited success. As noted above, in the thirty year period that the ordinance was in effect (1990 through 2020), it produced a total of only 15 affordable housing units. While the ordinance may have had some altruistic roots, it is important to recognize that its enactment was done specifically to address the Borough's second round, 223-unit unmet need obligation and was a specific condition of the Court's 1990 grant of a Judgment of Repose. As a tool to reduce the Borough's unmet need obligation, the mandatory set-aside was not particularly effective. This reflects the fact that incentivizing development and working with developers by effectuating a rezoning, enactment of a redevelopment plan, or providing variance relief, are far more effective tools in facilitating redevelopment, which can and does ultimately result in a greater production of new affordable housing opportunities.

With that fact in mind, Fair Share and Princeton sought effective ways to produce better opportunities to facilitate redevelopment in the former Borough that would result in more affordable housing opportunities and a greater reduction in the unmet obligation. Thus, during the negotiations,

ordinance, requesting that it be updated (a) to correct the membership information for the Board, and (b) that it modify the training requirements provision for the Municipal Housing Liaison. (The Board also requested changes to the Affirmative Marketing Plan that was reviewed at the same meeting.) The Board's comments were incorporated into the final draft and Ordinance 2020-15 was introduced at Council's June 15, 2020 meeting. On June 18, 2020, the Planning Board reviewed the ordinance and found it to be consistent with the Municipal Master Plan. Following the public hearing on the ordinance, it was then adopted by Council at its June 29, 2020 meeting.

MASON, GRIFFIN & PIERSON

A PROFESSIONAL CORPORATION
COUNSELLORS AT LAW

March 1, 2021

Page 11

with input from the Mayor and Council, Fair Share Housing Center, Judge Carchman, and ultimately members of the public, Princeton enacted area-specific overlays within the former Borough to incentivize inclusionary and mixed use redevelopment with a required affordable housing set-aside. (See Ordinance No. 2020-17, adopted July 13, 2020). Additionally, within the former Township, Princeton incentivized inclusionary development in the Northern S-2 corridor (Ordinance No. 2020-18, adopted July 13, 2020), which was done as part of the settlement agreement but for which no third-round credits were claimed (any affordable units generated will be used for future round credits). Since enactment of these overlays, municipal staff has already received several inquiries from developers about potential new redevelopment projects that if developed, will result in the production of multiple affordable housing opportunities. For instance, already three conceptual projects have been proposed that could result in over 12 new affordable housing units. As the overlay ordinances were enacted only six months ago, they are already proving to be far more effective in facilitating incentivized redevelopment and fulfilling Princeton's affordable housing goals than the previously imposed straight set-aside provision.

D. Impact of Current Ordinance.

As explained above, the current set-aside ordinance was a key component of Princeton's affordable housing settlement and is in compliance with the settlement agreement and legal requirements. The ordinance, along with Princeton's other compliance mechanisms, will result in the significant production of affordable housing units within the municipality. However, the "Griggs

MASON, GRIFFIN & PIERSON

A PROFESSIONAL CORPORATION
COUNSELLORS AT LAW

March 1, 2021

Page 12

Corner" project highlighted the fact that there may be a few sites within the municipality that could develop as of right, with five or more units, under pre-existing zoning that would not require a mandatory on-site affordable housing set-aside.⁹ While Princeton seeks to maximize the creation of actual inclusionary units, the Planning Department anticipates such exempt projects are likely to be very few in number. Importantly, it is also essential to recognize that even if a developer (such as Palmer Square) is not required to produce an on-site affordable housing set-aside, that project is not relieved of an affordable housing obligation; rather, the developer is required to satisfy its obligation by payment of an affordable housing development fee: 2.5% of the equalized assessed value of the non-residential development and 1.5% of the equalized assessed value of the residential development.¹⁰ Such fees can be used by Princeton for any permitted affordable housing activity as detailed in the municipal Spending Plan, including use for producing new affordable housing units and/or towards debt service obligations for the municipally sponsored projects.

E. Recommendations.

As set forth below, it is recommended that a planning study be undertaken to evaluate any further sites that could develop without providing an affordable housing set aside. While the

⁹ According to staff, in addition to the Griggs Corner site, it is anticipated that there could be a few additional sites that could potentially be developed under existing as-of-right zoning. However, existing Floor Area Ratio ("FAR") limitations serve as a significant deterrent to the demolition of existing structures because it is generally not financially viable to demolish existing structures and replace them with new structures under the more stringent FAR requirements currently in place. Griggs Corner was unique in that as a parking lot, it did not have pre-existing FAR improvements greater than permitted limitations.

¹⁰ Section 10B-358, *et seq.* of the Princeton Code.

MASON, GRIFFIN & PIERSON

A PROFESSIONAL CORPORATION
COUNSELLORS AT LAW

March 1, 2021

Page 13

ordinance meets the necessary legal requirements, a planning analysis is necessary to determine what other sites, if any, are likely to develop outside of the mandatory set-aside provisions of Ordinance 2020-15.

F. Conclusion.

I trust that this memorandum has provided the background necessary to understand Princeton's affordable housing set-aside ordinance and correct the misperceptions and inaccuracies currently circulating among the public. As always, should you have any questions or need any further information, please let me know.

cc: Marc Dashield, Municipal Administrator
Delores Williams, RMC, Municipal Clerk
Michael LaPlace, PP/AICP, Planning Director
Derek Bridger, Zoning Officer
Deanna Stockton, P.E., Engineer
Maureen Fullaway, Affordable Housing Manager
Michael Sullivan, ASLA, AICP, Affordable Housing Planning Consultant
Trishka Cecil, Esq., Municipal Attorney