Analysis and Opinion - Morris Plains' Multifamily Housing Developments Since 2009

Morris Plains could have met its Affordable Housing multifamily housing requirements with fewer market rate units.

New Jersey's "Mt. Laurel doctrine" legislation mandates Affordable Housing ("AH") requirements for each town. The doctrine's "Builder's Remedy" lawsuit provision is powerful. The lawsuit must be decided on the conditions present on the date the suit is filed. If a town does not have all its AH requirements, it will likely lose. Upon losing, the town's zoning and other regulations are nullified. Commercial property can become residential property. Building heights, densities and set-backs are nullified. And, the losing town must pay for the builder's legal costs, the court-appointed Special Master's costs, and its own legal costs.

Since 2009, 1039 multi-residential housing units have been built or approved for construction in Morris Plains as a result of three actual and one threatened Builder's Remedy lawsuits and the Boro's construction of Davenport Village's 56-unit AH facility. I estimate this will increase the Boro's 2009 population of about 5,500 by one third. The Boro has spent at least $680,000 on its and the Special Master's legal costs. I believe the Boro reimbursed the builders for their legal costs by allowing them more market rate units since there is no record of any such payment or agreement.

The first Builder's Remedy lawsuit was in 2009 by ACP Morris Plains for the development now known as Coventry Parc on Littleton Rd. ACP originally sued to build 270 AH units on this 4.8-acre parcel. The Boro allowed ACP to build 70 market rate units and no AH units. In lieu of AH units, ACP paid the Boro $525,000.

The ACP lawsuit was tracked but not joined by the Fair Share Housing Center ("FSHC"), the state's powerful pro-AH lobby funded by builders. In my opinion, Morris Plains zero-AH agreement with ACP kicked sand in the face of the FSHC and caused builders throughout the state to learn that Morris Plains was a sitting duck for more Builder's Remedy lawsuits. Sure enough, in 2013 M&M at Morris Plains (Tabor Rd) filed such a suit. The FSHC joined the M&M lawsuit to make sure Morris Plains complied fully. The Boro's attempt to rush construction of Devenport Village to have it included in the M&M lawsuit's calculations even though it was built after the date of the suit's filing failed. After six years of litigation, the Boro agreed to let M&M build 434 units of which 73 are AH.

At the time of the ACP and M&M lawsuits, Morris Plains' AH obligation was 144 units of which the Boro had 71 and needed 73 more. If the Boro told ACP to build 73 AH units instead of 270 and they did, Morris Plains would have been in full compliance with its then existing AH obligation. A M&M lawsuit would have no AH legal basis.

Or, if the Boro had ACP build 13 AH units out of its 70 units, a typical ratio, and then immediately started building Davenport Village, the Boro would have been only two units short of its then-existing 144 AH unit obligation, the FSHC and Special Master would not have seen the Boro as defying its AH obligations, and a M&M Builder's Remedy lawsuit would have had little AH legal justification.

When in compliance with AH obligations, zoning and building codes remain in place and multi-residential unit densities can be kept to 10 units per acre as the JMF settlement demonstrated (281 units on 28 acres on American Rd). Instead, the Boro ended up with densities of 13-17 units per buildable acre with Coventry Parc, M&M and Signature Place (Johnson Rd).

Signature Place got the benefit of a Builder's Remedy lawsuit – 14 units per acre and 5.6 market rate units per AH units without a lawsuit. Had the Boro waited until the JMF's lawsuit was settled, Signature Place could have been kept to 10 units per acre or about 50 units less than the Boro allowed.

In 2013, after the ACP settlement and the M&M lawsuit was filed, as a member of Morris Plains Council, I asked the Mayor and Councilmembers how many AH units we had. No one answered. They did not know. At the next meeting, they came back with a non-expert generous estimate that M&M's experts got the Special Master to cut almost in half. Then the Boro hired experts who helped get the final number up to 71. They should have hired an expert to determine how many units they had back in 2009.

Around 2014-2015, NJ towns including Morris Plains had their AH requirements significantly increased to reflect job growth and other factors from 1999 onward. It was against this new requirement that the other projects mentioned here had their AH units applied to.

It is my opinion that Morris Plains' defiance of the AH law in its ACP (Coventry Parc) settlement set the Boro up for more lawsuits and significantly more multifamily units then it might have had as well cause the Boro significant legal expenses.

November 2019
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