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OFFICE OF POLICY PLANNING AND SCIENCE

COASTAL MANAGEMENT OFFICE

Coastal Zone Management Rules

Mainland Coastal Centers

Adopted Amendments: N.J.A.C. 7:7E-5.2 and 5B.6 and 7:7E Appendix 4

Proposed: May 15, 2006 at 38 N.J.R. 1921(a)

Adopted: _____, by Lisa P. Jackson, Commissioner, Department of
Environmental Protection

Filed:

Authority: N.J.S.A. 13:19-1 et seq.

DEP Docket Number: 02-06-04/586

Effective Date:

Expiration Date: January 7, 2008

The Department is adopting amendments to the Coastal Zone Management rules, N.J.A.C. 7:7E, that were proposed in response to prior public comment received on the amendments and new rules adopted effective February 6, 2006 that re-established certain mainland coastal centers (see 38 N.J.R. 928(c)). Comments on the prior adopted rules indicated that the additional limitations placed on re-established mainland coastal centers at N.J.A.C. 7:7E-5B.6(e) and (g) would not allow affordable housing projects to meet the impervious cover limits and vegetative cover requirements of the rule. Further, they indicated that the rules would substantially affect the ability of municipalities to address their low and moderate income housing obligations.

The amendments adopted herein relax the impervious cover limits and vegetative cover percentages for proposed development consisting entirely of affordable housing in limited circumstances. First, the development must be proposed in a mainland coastal center or in an expired coastal center located in a municipality that, prior to October 15, 2005, held a pre-petition meeting with the Office of Smart Growth in accordance with N.J.A.C. 5:85-7.3. Second, the impervious cover limits and vegetative cover percentages of the mainland coastal center would apply only to proposed developments consisting of

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100 percent affordable housing. If the proposed development satisfies these two conditions, the impervious cover limits and vegetative cover percentages applicable to mainland coastal centers would apply to portions of the development within the boundary of the mainland center, regardless of whether any portion of the proposed development was located within one of the six environmentally sensitive areas or a portion of the proposed development was located outside of the coastal center boundary.

Summary of Hearing Officer's Recommendation and Agency Response:

A public hearing was conducted on June 6, 2006, at Richard Stockton College of New Jersey, Townsend Residential Life Center Multi Purpose Room, Jimmy Leeds Road, Pomona New Jersey. Ruth Ehinger, Manager of the Department's Coastal Management Office, served as the hearing officer. Three members of the public provided oral comments. After reviewing the testimony given at the public hearing and written comments received during the comment period, Ms. Ehinger recommended that the Department adopt the amendments as proposed.

The public hearing record is available for inspection in accordance with applicable law by contacting:

New Jersey Department of Environmental Protection
Office of Legal Affairs
Attn: Docket Number 02-06-04/586
P.O. Box 402
Trenton, New Jersey 08625-0402.

Summary of Public Comments and Agency Responses:

The following persons submitted written comments and/or made oral comments at the public hearing:

1. James Castaldo, Lakewood Housing Authority
2. Paul Chrystie, Coalition for Affordable Housing and the Environment
3. Tim Dillingham, American Littoral Society
4. Helen Henderson, Save Barnegat Bay

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5. Rabbi Shmuel Lefkowitz, NJ Hand

The submitted comments and the Department's responses are summarized below. The number(s) in parentheses after each comment identifies the respective commenter(s) listed above.

1. COMMENT: Under the New Jersey Constitution as construed by Mt. Laurel I and Mt. Laurel II, the Fair Housing Act and the regulations of the Council on Affordable Housing, municipalities have the obligation to create safe, decent housing that is affordable to low and moderate income households to satisfy their fair share of the regional housing needs.

The proposed amendments are a well-reasoned response to the concerns raised by the public and affected municipalities. In adopting the rules re-establishing certain coastal centers, the Department acknowledged that the limitations placed on re-established coastal centers containing certain environmentally sensitive areas would prevent many affordable housing developments from meeting the impervious cover limits and vegetative cover percentages under the rules. The proposed amendments accommodate the need to provide affordable housing opportunities to low and moderate income families without sacrificing environmental protection.

The commenter commends the Department for its efforts to balance the interests of environmental protection and the provision of affordable housing opportunities for families in need. (5)

2. COMMENT: The commenter supports the rulemaking to relax the impervious cover limits and vegetative cover percentages for proposed developments consisting entirely of affordable housing. (1)

RESPONSE TO COMMENTS 1 AND 2: The Department acknowledges these comments in support of this rule.

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3. COMMENT: Would the portion of a development proposed to be located outside of the coastal center boundary receive the impervious cover limit and vegetative cover percentage of the mainland coastal center? Similarly, would the portion of a development proposed within one of the six environmentally sensitive areas receive the impervious cover limit and vegetative cover percentage of the mainland coastal center?

While there are a lot of merits to affordable housing development, they are no less environmentally damaging when they receive high impervious cover limits. The clipping of the six environmentally sensitive areas from the mainland coastal center was intended to prevent intensive development within these sensitive areas and preserve existing forested areas. (4)

RESPONSE: The Department agrees that protection of the environment is paramount and has structured the rules to assure that environmentally sensitive features are adequately protected. The adoption of these amendments does not change that. Prior to the adoption of these amendments, if a portion of a proposed affordable housing development would be within any of the six environmentally sensitive areas or a portion of the proposed development would be outside of the boundary of the mainland coastal center, the proposed development would be precluded from utilizing the impervious cover limit applicable to the center within which it was contained. The amendments adopted at this time provide that, only for developments consisting of 100 percent affordable housing in qualifying municipalities, the presence of one of these six environmentally sensitive features on portions of the site planned for development or the fact that a portion of the planned development crosses the center boundary will not preclude the affordable housing development from using the center's impervious cover limits in those areas within the center. However, the amendments do not allow any increase in development of the area outside the center boundary nor do they weaken the Special area rules applicable to development in the environmentally sensitive features. The impervious cover limits and vegetative cover percentages appropriate to the Coastal Planning Area outside the center boundary would apply to those portions of the development outside the center boundary. The center impervious cover limits and

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vegetative cover percentages also would not apply to wetlands in accordance with N.J.A.C. 7:7E-5.3(d). Moreover, the amendments do not affect the Special Area and Resource rules which contain standards for the most sensitive natural resources of the coastal zone. Any proposed development, including the affordable housing developments subject to these amendments, must satisfy all Special Area and Resource rules, such as wetlands, endangered and threatened species habitat, and water quality rules. This requirement ensures that the affordable housing development is designed in a manner protective of these coastal resources.

4. COMMENT: The commenter appreciates that the Department is seeking to facilitate the provision of affordable housing and to restrict the relaxation of impervious cover limits and vegetative cover requirements solely to those developments that include no market rate housing. However, the Department's good intentions notwithstanding, the commenter strongly urges the Department to completely withdraw this proposal.

The rule promotes poor municipal planning. While affordable housing is a critical component of any smart growth strategy, there are municipal officials who view affordable housing as an undesirable land use. Given the opportunity, as this rule will provide, to locate "desirable" uses in CAFRA centers and "undesirable" affordable housing outside of those centers, it is possible that some municipal officials will choose to locate those uses in that way. Such decision-making is poor planning and should not be supported by the Department's rules.

Affordable housing works best when it is integrated into a community. As drafted, these rules promote the segregation of affordable housing away from the greater community. Doing so not only isolates the residents of the affordable housing from the benefits of center-based development, it also stigmatizes those residents as different from the community-at-large. (2)

5. COMMENT: Many New Jerseyans have long labored under the misconception that creating affordable housing results in greater environmental degradation than other development. While the opposite is true, the misconception persists nonetheless.

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Implementation of the proposed rule will lend credence to this mistaken view and will undermine support for affordable housing and will ultimately reduce the number of affordable units created in New Jersey.

For these reasons, the commenter believes that the proposed rules would undermine both environmental protection and affordable housing goals. (2)

RESPONSE TO COMMENTS 4 AND 5: These amendments were proposed in response to prior public comment received on rules that re-established certain mainland coastal centers that expired February 7, 2005 (see 38 N.J.R. 928(c)). Several commenters indicated that the additional limitations placed on the re-established centers would not allow their affordable housing developments to comply with the impervious cover limits and vegetative cover percentages of the rule. Commenters also indicated that their projects are in various stages of the municipal and State permitting process and that the limitations placed on development proposed within re-established mainland centers would not allow these projects to move forward. Concern was also expressed that the adopted rules would substantially affect the ability of municipalities to address their low and moderate income housing obligations. While other projects not mentioned by commenters on these amendments may benefit from this adoption, the Department does not believe it to be overbroad, nor to result in poor planning or segregation of affordable housing. The Department agrees that affordable housing is best when integrated into a community. Because of this belief, the amendments apply only to affordable housing developments that are located in areas which are currently undergoing comprehensive planning through the State Planning process and are proposed in locations that have been the focus of center-based development since coastal centers were first adopted in February 2000. Further, the amendments, which will allow affordable housing developments to use higher impervious cover, will have the effect of encouraging integration of these developments within centers or recently expired centers, where the services and transportation necessary to make them sustainable is more likely to be located. Accordingly, rather than encouraging officials to locate affordable housing outside of centers, the adopted amendments actually have the opposite effect. While the

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amendments do not take the place of comprehensive planning on the local level, including integration of affordable housing, the Department believes that they provide necessary relief to encourage appropriate affordable housing development in the limited time period of transition from coastal centers to CAFRA centers.

While the adopted amendments relax the impervious cover limits and vegetative cover percentages for 100 percent affordable housing developments in municipalities conducting comprehensive planning while continuing to protect coastal resources, because they are of limited duration and scope and do not affect the continued applicability of the Special area and Resource rules, they do not unduly compromise the protection of coastal resources. As stated in response to comment 3 above, the amendments do not affect the Special Area and Resource rules which contain standards for the most sensitive natural resources in the coastal zone. Any development subject to the Coastal Zone Management rules, including developments consisting entirely of affordable housing, must satisfy all Special Area and Resource rules, such as wetlands, endangered and threatened species habitat and water quality rules. The amendments do not relax the protections afforded to these environmentally sensitive areas. The amendments relax only N.J.A.C. 7:7E-5B.6(g) which provides that, if a proposed development is located within one of the six environmentally sensitive areas, the impervious cover limits and vegetative cover percentages of the mainland coastal center do not apply. In such case, the impervious cover limits and vegetative cover percentages of the Coastal Planning Area apply.

6. COMMENT: The Department appears to be trying to exempt a small number of projects that are already proceeding through the pipeline. In doing so, the Department is opening a loophole that will apply throughout the CAFRA area. The commenter believes that any affordable housing benefits that might be gained by moving these existing projects forward will be overshadowed by the potential adverse environmental impact of similar projects, not yet contemplated, that might make future use of the relaxed standards. A site-specific adjustment might be appropriate if a municipality is able to demonstrate that the type of development envisioned by this proposal is the only means

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of satisfying its Mount Laurel obligations. However, concerns about the impact of existing CAFRA standards on one or two potential developments do not justify such a broad relaxation of those standards. (2)

7. COMMENT: The proposed amendments establish arbitrary and capricious differential standards for regulation of developments with similar impacts. The Coastal Area Facility Review Act (CAFRA) and the Coastal Zone Management rules provide a specific definition of “development” for the purposes of defining regulatory jurisdiction and the application of the rules. This definition does not distinguish between “affordable housing” developments and other housing or commercial types of development because, regardless of end use, these types of development activities share similar impacts and consequences. The proposed amendments waive environmental protection standards through the reduction of impervious coverage allowances within centers where specific environmentally sensitive resources are present, for affordable housing developments without providing any basis for this waiver. Further, the rule does not provide any argument or justification that such projects will be different in their potential environmental impacts from non-affordable housing development in the same location. While CAFRA calls for a balanced land use framework in the coastal area, it does not allow for treating similar developments with similar impacts in the same location differently; a development is a development. (3)

RESPONSE TO COMMENTS 6 AND 7: In balancing the need for affordable housing with the strict application of the impervious cover limits during the brief time period between the effective date of these amendments and March 15, 2007, the date mainland coastal centers expire, the Department has determined that these affordable housing measures are appropriate and are sufficiently protective of the environment. The Department recognizes that municipalities are obligated to provide a specific number of affordable housing units. Forty units of affordable housing in a development that is 100 percent affordable provides the same impact in satisfying the municipality’s obligation as a 200 unit development that contains forty affordable units. By requiring that the

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proposed project be 100 percent affordable housing, the number of affordable units will be maximized without creating the need to construct a large number of market rate units. Accordingly, the 100 percent affordable housing developments in the centers will generate less overall environmental impacts than developments that need market rate units. Rather than provide a broad relaxation of the impervious cover requirements, the adopted amendments provide limited relief to a limited number of developments satisfying a significant need. As mainland coastal centers expire March 15, 2007 (see N.J.A.C. 7:7E-5B.6(c)), and that date is also the date by which applications under adopted N.J.A.C. 7:7E-5B.6(h) must be complete for final review in order for the development to qualify for the less stringent impervious cover requirements, the Department believes that the adopted amendments provide an appropriate accommodation for affordable housing development in the limited time period of transition from coastal centers to CAFRA centers while continuing to provide for protection of the environment.

8. COMMENT: The rules will not guarantee the outcome of meeting affordable housing obligations which is the basis asserted for waiving necessary environmental protections. The proposed amendments assert that the relaxation of environmental standards would allow these projects to be built in order to satisfy the municipality's affordable housing obligations. However, the rule provides no test to evaluate that rationale; in other words, there is no demonstration required as a prerequisite to waiving environmental standards that the resulting project will satisfy a municipality's affordable housing obligations. While a project taking advantage of the exemption may contribute toward that requirement, without a clear demonstration of the project's necessity to meeting the larger obligation it is possible that the municipality may need to build further projects on sites within the center that don't require the exemption. This clearly indicates that the goal of meeting the municipality's affordable housing obligations could be met without sacrificing environmental protection. The amendments as currently proposed do not provide such a safeguard. Absent demonstrated proof from the affected

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municipalities that they have no other way to satisfy their Mount Laurel obligations, a couple of potential developments do not justify a broad waiver. (3)

RESPONSE: Although the affordable housing projects that may be approved at a higher impervious cover limit under these amendments may not be sufficiently sized to meet a municipality's affordable housing obligation in its entirety, these 100 percent affordable housing projects will certainly contribute toward meeting that obligation in a manner that will maximize the number of affordable housing units while minimizing overall environmental impacts that would otherwise be present if the municipality's affordable housing obligation was satisfied through construction of housing that included only a small percentage of affordable housing units. Further, the affordable housing developments will provide a housing opportunity for those who might not otherwise be able to find good, affordable housing in the municipality in an area of town most likely to offer necessary services and transportation opportunities.

9. COMMENT: The proposed amendments establish an arbitrary and capricious differential standard for establishing which municipalities are considered to be conducting comprehensive planning and "actively engaged" with the State Planning Commission as the basis for qualifying for the exemption from the environmental protection standards.

The proposed amendments at N.J.A.C. 7:7E-5B.6(h) establish that the affordable housing exemption may be sought in "an expired coastal center located in a municipality that, prior to October 15, 2005, held a pre-petition meeting with the Office of Smart Growth..." This standard responds to the Department's assertion that the provision will apply "only in municipalities that are currently engaged in the plan endorsement process."

However, under the 2006 adoption, the Department established at N.J.A.C. 7:7E-5B.6(c), that a municipality engaged in the plan endorsement process is a municipality that submitted a petition for plan endorsement to the State Planning Commission and the petition was deemed complete by the Office of Smart Growth prior to March 15, 2006.

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Those coastal centers that did not meet this requirement are considered expired, and applicants for CAFRA permits within their now historical boundaries cannot seek to build at impervious coverage's assigned to coastal centers.

The Department, under N.J.A.C. 7:7E-5B.6(c), established a clear and unambiguous policy on which municipalities were continuing to engage and participate in the comprehensive planning processes of the State Planning Act.

Under this proposal, the Department is changing the criteria of N.J.A.C. 7:7E-5B.6(c) by allowing developers of affordable housing projects to seek exemption of the established environmental protection standards on the basis of having held a pre-petition meeting with the Office of Smart Growth prior to October 15, 2005. The Department's own policy, as applied to all other types of development similarly situated, rejects that standard as sufficient to demonstrate continuing engagement in the planning process by a municipality. It is clear and accepted that many of the municipalities which did not meet the deadline established by N.J.A.C. 7:7E-5B.6(c)1 have no intention of pursuing plan endorsement and reestablishment of the coastal center or final CAFRA center designation. Therefore, the Department is arbitrarily extending parts of the regulations and policies related to coastal centers (the higher impervious coverage limits) to applicants seeking to build affordable housing projects in instances, where there are no plans or indications that the municipalities will complete the required planning processes associated with plan endorsement or that there will ever be a recognized center established, contrary to its own justifications for the affordable housing exemptions. In fact, the Department is undercutting that coordination by allowing developers to gain a "benefit" of more intensive development with less protective environmental standards in towns which have terminated their involvement in the State Planning process. The initial pre-petition meeting is insufficient as a standard for active engagement, as evidenced by the Department's own rejection of it in earlier rules. (3)

RESPONSE: These amendments balance the need for affordable housing with environmental protection. They recognize the importance of affordable housing to the citizens of New Jersey, further the Supreme Court's ruling in the Mount Laurel decisions,

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and support the Governor's commitment of creating and preserving 100,000 affordable housing units in the next 10 years. The amendments adopted herein reflect the Department's commitment to ensuring coordination between the Coastal Zone Management rules and the State Planning process. Providing a limited exception for certain 100 percent affordable housing developments is consistent with the State Plan itself, which provides that affordable housing developments are best located in centers where services and transportation are readily available to residents. (See Statewide Goal #6 of the State Development and Redevelopment Plan).

10. COMMENT: These amendments will not accommodate affordable housing developments and protect coastal resources. The Department states that, because the proposed amendments do not alter the Special Area and Resource rules, they will continue to protect environmental resources in centers. This assertion runs contrary to the February 6, 2006 adoption that established regulations removing six environmentally sensitive resources under N.J.A.C. 7:7E-5B.6(e) from the higher center-related impervious cover allowances (see 38 N.J.R. 928(c)). Under this proposal, the Department indicates that it is seeking to create an exemption to accommodate affordable housing developments that have obtained funding, are in various stages of design, and were to be located in coastal centers. While current policies pertaining to special areas and resources will continue, the exemption for affordable housing will allow more intensive development to be located on parcels containing these resources, as opposed to restricting development under the current rule. This clearly sets a different standard with broad implications for environmental protection. By allowing a few projects which were not sufficiently developed to qualify for the exemption established for all other development in various stages of design at the time of the 2006 amendments, the amendments could significantly undermine the increased protection provided to the environmentally sensitive resources within coastal centers in 2006. The fact that affordable housing developments could not qualify for the exemption established for all other developments indicates that they were or are in the early stages of project development. This raises the possibility that the few projects, which are the motivating

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rationale for this rulemaking, could be relocated to other sites within the centers where they might be constructed without the need to diminish or relax necessary environmental protection standards. (3)

RESPONSE: The amendments relax only N.J.A.C. 7:7E-5B.6(g) which provides that if a proposed development is located within one of the six environmentally sensitive areas listed at N.J.A.C. 7:7E-5B.6(e), the impervious cover limits and vegetative cover percentages of the mainland coastal center do not apply, rather the impervious cover limits and vegetative cover percentages of the underlying Coastal Planning Area apply. The Department will continue to protect environmentally sensitive areas through the application of the Coastal Zone Management rules' Special area, Use and Resource rules (N.J.A.C. 7:7E-3, 7 and 8). Given the application of these standards and the limited duration and scope of this rule, the Department has determined that the rule is appropriate.

Federal Standards Statement

Executive Order No. 27 (1994) and N.J.S.A. 52:14B-1 et seq. require that State agencies which adopt, readopt or amend State regulations that exceed Federal standards or requirements include in the rulemaking document a comparison with Federal law.

The Federal Coastal Zone Management Act (16 U.S.C. 1450 et seq.) was signed into law on October 27, 1972. The Act does not set specific regulatory standards for development in the coastal zone; rather, it provides broad guidelines for states developing coastal management programs. These guidelines are found at 15 C.F.R. Part 923. The guidelines do not specifically address the review standards that should be applied to new coastal development in order to preserve and protect coastal resources and to concentrate the pattern of coastal development. They simply provide a planning and management process, without establishing development standards for development in the coastal area. Therefore, the Department has concluded that the adopted amendments do not exceed any Federal standards or requirements.

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Full text of the adoption follows (additions to proposal indicated in boldface with asterisks ***thus***; deletions from proposal indicated in brackets with asterisks *[thus]*):

(No change from proposal.)