

## **KING OF KINGS REZONING**

### **Summary of current RC-1 zoning provisions:**

The RC-1 Zone is one of three zones within the Borough which are primarily distinguished from all other residential zones by the additional option to develop the property as a “cluster” development. A “cluster” option allows for the development of property by subdivision on smaller lots than ordinarily required provided that a minimum of 20% of the lot area (also at least two acres) be maintained as “open space” either by turning the property over to the Borough or by establishing a property owners association to manage the property. The three zones where this is permitted are known as the RC-1, RC-2 and RC-3 zones. These three zones are distinguished from each other by the minimum lot sizes for each unit in a cluster development and bulk requirements which reflect the different minimum lot sizes. The minimum lot size is 15,000 square feet for the RC-1 Zone, 10,000 square feet for the RC-2 Zone, and a size that meets the requirement of a maximum of four dwelling units per acre in the areas to be developed in the RC-3 Zone. In addition, the cluster option only allows for single family houses in the RC-1 and RC-2 zones while townhouses are an additional option in the RC-3 zone. Cluster development is a “conditional use” in each of these zones. This means that if any of the conditions provided for in the ordinance are not met the property can not be developed using the cluster option without a use variance.

### **Property within the RC-1 Zone:**

The King of Kings property is the only tract within the RC-1 Zone. The existing cluster option in the RC-1 zone requires a minimum tract size of eight acres and the King of Kings property is seven and seven tenths of an acre. This means that while the zone has a cluster option there are no properties in the zone which could utilize the option.

### **Proposed Ordinance**

The proposed ordinance would eliminate the RC-1 Zone and create a new residential zone designed to incorporate an affordable housing element and provide for the increased density needed to feasibly incorporate affordable housing on this site while still maintaining some control over the use of the environmentally sensitive slopes located on the site. A new designation, R-AH2, would apply to the zone reflecting the affordable housing component to the zone.

## **Origin of the Ordinance**

Earlier this year representatives of Hornrock Developers came to a Council meeting with a request that the Council consider the rezoning of the King of Kings property. The Council had some concerns with the original proposal put forward by the Developer and directed the Administration and Borough Professionals to review the proposal and make recommendations concerning a possible rezoning. After months of study and review the Council, after consultation with Borough professionals, developer representatives, and surrounding neighbors and other members of the public, provided direction to Borough Planner Paul Phillips to draft an ordinance to rezone the property. Mr. Phillips was directed to design a zone for the property which would accommodate a maximum of forty units, of which six would qualify as restricted affordable housing units, while preserving steep slope protection to the maximum extent feasible while avoiding the need to place units immediately adjacent to existing properties. This direction came based on the conclusion that this was the most restrictive zoning which would achieve the desired outcome of reasonable development and avoidance of potential litigation. The details in the ordinance reflect Mr. Phillip's attempts to protect the environmental features of the property while yielding the number of units needed to feasibly develop the property.

## **Is the proposed ordinance an example of "spot zoning" ?**

This ordinance applies to only one parcel of property (as does the existing ordinance) and is very specifically drafted to address conditions on the property. It is clearly "spot zoning". New Jersey courts have, however, recognized that "spot zoning" is often necessary in order to provide affordable housing and have specifically permitted individual zoning on lots by municipalities for the purpose of providing affordable housing.

## **How does this draft ordinance relate to the Boroughs affordable housing obligations?**

The draft ordinance creates a zone where development will require an affordable housing set aside. It is anticipated that the affordable housing created in this zone will substantially meet the Boroughs anticipated need.

One of the great frustrations municipalities have experienced with the current status of affordable housing regulations is the complete failure of the various branches of State government to responsibly provide any direction. No municipality can determine at this time how many affordable housing units it is obligated to facilitate. It is impossible for a municipality to determine its "fair share" obligation because that requires a determination of the "prospective need" for units on a State and regional basis which can only be developed on a State and regional basis. Mountain Lakes participated in COAH during the period in which the agency functioned and obtained certification for its earlier fair share plans. Mountain Lakes did not submit plans during the period in which COAH was unable to establish rules and guidelines that could sustain judicial challenges.

The New Jersey Supreme Court on March 10, 2015 essentially invalidated the existing affordable housing enforcement mechanism administered by COAH. In the Matter of the Adoption of N.J.A.C. 5:96 and 5:97 by the New Jersey Council on Affordable Housing, 221 N.J. 1 (2015). The Supreme Court determined that due to the inability of COAH to act the Courts would create a mechanism to judicially permit an avenue for low- and moderate-income New Jersey citizens, and entities acting on their behalf, to challenge any municipality that is believed not to have developed a housing element and ordinances that bring the town into compliance with its fair share of regional present and prospective need for affordable housing. The Court, of course, was no better able than COAH to provide direction to municipalities and merely determined that obligations would be determined judicially without giving direction as to precisely how the courts were going to determine those obligations other than recognizing that thirty years ago the courts had found a way to determine obligations.

The Supreme Courts reentry into the affordable housing morass has created an environment where developers believe they have opportunities to use the judicial process to obtain land use approvals on residential properties with densities that would ordinarily not been available. The King of Kings developer is certainly aware of the current legal landscape and presented the Council with a draft complaint.

### **Is the Borough vulnerable to a “builders remedy” lawsuit?**

The Borough is vulnerable to a “builders remedy” lawsuit by a developer interested in developing this parcel. We are vulnerable because we have little available land for the development of affordable housing and do not have an existing fair share plan to insulate us from a potential lawsuit. The King of Kings property is one of the only vacant parcels in the community where significant residential development is possible. It is presently zoned for the lowest residential density in the community and the existing cluster option is not even an option because of the lot size. The property is currently zoned in a manner which discourages the development of affordable housing. The property is unlikely to be developed with affordable housing without a change to the zoning ordinance.

### **Why is the Borough concerned about a builders remedy ?**

The biggest concern about a potential “builders remedy” lawsuit is that the Borough loses control of what happens on this site. The court will appoint a special master who will work with the developer and the Borough to create a project which will facilitate the development of significant affordable housing. It is likely a court will entertain a remedy that would generate significant density well in excess of anything currently being proposed. The Planning Board and the Council will receive their marching orders from the court with the input of the special master and will have little impact on the development of the site. Once litigation is commenced it is also likely that third party interveners such as a non-profit “fair housing” advocacy group will decide to become involved meaning that a negotiated solution with the developer may not even resolve the issue. The cost to the Borough of defending and participating in this process is difficult to budget for and will be significant.

### **Why don't we develop a fair share plan now to prevent a builders remedy ?**

We should develop a fair share plan and the Council has authorized the Borough Planner to work on a plan. To finalize a plan, however, we will need to know what our affordable housing obligation turns out to be. We have joined a group of municipalities who have jointly hired an expert for the purpose of formulating the statewide obligations, but this is still being developed and even when it is finalized will be part of a court process which likely will take time to eventually reach a conclusion. Our Planner will likely recommend proceeding with a fair share plan once we have this experts opinion which is currently expected in late December. In order to develop a fair share plan that would qualify for judicial approval, however, consideration of the Kings of Kings parcel would likely be necessary. Since the King of Kings parcel is one of the few remaining larger open tracts we can also assume it will need to be set aside for inclusionary development in order to develop a credible plan.

If we filed a "declaratory judgment" action seeking an approval of a plan without the inclusion of the King of Kings site we can be certain that Hornrock (and probably the Fair Share Housing advocacy group) would litigate the propriety of our plan and we would end up before a special master who would determine the validity of our plan and likely find that the King of Kings site needed to be included.

If we decide to wait until we can develop a fair share plan before we move on an ordinance to rezone the King of Kings parcel we will likely face a builders remedy lawsuit. It will probably not make sense to pursue a fair share plan while a builders remedy is pending.

### **Why does the draft ordinance require a 15% rather than 20% affordable housing set aside?**

The short answer is that in order to obtain a 20% affordable housing set aside the overall density would likely need to be increased. It is true that the 20% set aside number has been used in draft regulations, litigated developments, and is referenced in our zoning ordinance. This set aside, however, is used in regulations and court cases when the permitted density is greater than proposed in this ordinance. The draft provisions attempt to balance density, slope protection, and affordable housing. The Planners opinion was that if the Borough wanted to have some slope protection and less density it would need to reduce the affordable housing set aside. The current Borough zoning ordinance requires a 20% set aside on all new construction, but offers no density bonus or incentive for the inclusion of affordable housing. Under the judicially rejected "growth share" model this made some sense, but under the current "prospective need" analysis this ordinance provision would likely be viewed as a disincentive to the development of affordable housing and ruled invalid.

### **What is the process now that the ordinance has been introduced ?**

After introduction the ordinance was referred to the Planning Board which has 35 days to provide the Council with its review for consistency with the Master Plan. Obviously, at this time the proposed ordinance is not consistent with the Master Plan. Additionally, an amendment to the Master Plan to specifically address the change to the zoning on this property was prepared by Mr. Phillips and presented to the Board in conjunction with the ordinance. The Board has the option of proceeding with an amendment to the Master Plan or opting not to do so and just providing the consistency review. The Council can adopt or decline to adopt the ordinance with, or without, the amendment to the Master Plan. There are special procedural requirements at the Council level in the event the ordinance is inconsistent with the Master Plan.