

***PLANNING REPORT ON THE LITIGATION
SETTLEMENT AGREEMENT OF TMB
PARTNERS, LLC AND THE TOWNSHIP OF
LIVINGSTON***
BLOCK 7001, LOT 1

LIVINGSTON TOWNSHIP
Essex County, New Jersey

Prepared January 20, 2009 for

MILLBURN TOWNSHIP

By

p | p | s | a

Paul Phillips

Paul Phillips, AICP, P.P.

New Jersey License No. 3046

The original of this document has been signed and sealed in accordance with New Jersey Law

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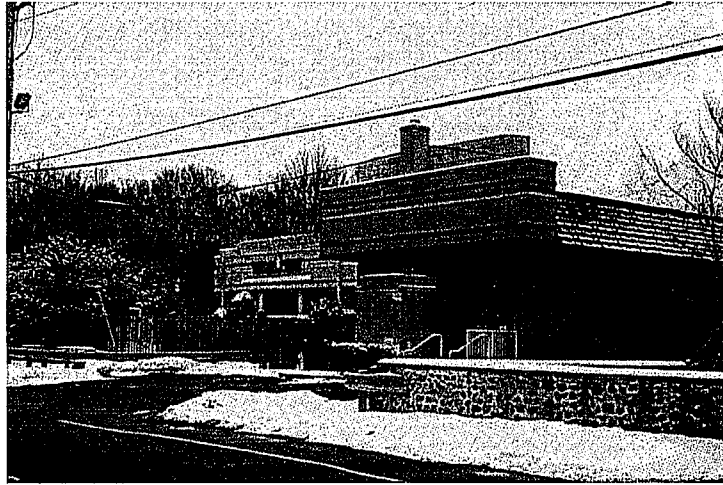
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Introduction

The Township Committee of Millburn Township authorized Phillips Preiss Shapiro Associates to undertake an investigation to evaluate the appropriateness of the proposed rezoning of Block 7001, Lot 1 (hereinafter referred to as the subject property). Such rezoning is proposed as part of a settlement of litigation between TMB Partners and the Township of Livingston. The proposed rezoning located in Livingston Township on the municipal border with the Township of Millburn would permit two four-story mid-rise apartment buildings containing a total of 100 residential units at a gross density of 23.81 units per acre for the intended purpose of providing low and moderate income housing (see Figures 1 &2).



In particular, this report responds to, and in effect rebuts, a report prepared by Elizabeth McKenzie dated January 14, 2009. Ms. McKenzie is the court-appointed Special Master in the referenced litigation. As part of this evaluation, this report examines the proposed development in the context of surrounding land use and zoning patterns, with particular emphasis on density and building heights, and the need to provide adequate setbacks and buffers to protect abutting single-family homes. To that end, this report recognizes a need to cooperatively plan along municipal boundaries—as encouraged within the Municipal Land Use Law (MLUL)—as the majority of the impacts associated with the proposed development will be absorbed by the Township of Millburn.

The planning analysis evaluates requirements of the MLUL as well as COAH's Substantive and Procedural Rules (NJAC 5:97 and NJAC 5:96 et seq.). In particular, the MLUL requires that every zoning ordinance be either substantially consistent with the land use plan element and the housing plan element of the master plan, or designed to effectuate such element. Furthermore, the MLUL requires that ordinances give reasonable consideration to the character of each district and its suitability to particular uses.

Scope of Review

To prepare this report, PPSA undertook the following:

1. Inspected the site and the surrounding area on January 16, 2009;
2. Reviewed the proposed development plans prepared by Casey & Keller Associates;
3. Reviewed the Township of Livingston 2007 Master Plan;
4. Reviewed the Township of Livingston's Zoning Ordinance and Zoning Map;
5. Evaluated the proposal in the context of the MLUL and COAH affordable housing ordinance requirements;
6. Reviewed the proposed zoning ordinance intended to effectuate the above-referenced development plans;
7. Reviewed the Township of Millburn Zoning Ordinance and Zoning Map;
8. Reviewed the Township of Millburn Master Plan;
9. Reviewed the H2M Site Suitability Report prepared for the Township of Livingston on January 7, 2009; and
10. Reviewed the report of Elizabeth C. McKenzie, court-appointed Special Master, dated January 14, 2009.

Proposed Development

This office received two concept plans for the proposed development. The attached Residential Concept Plan proposes:

- 100 apartments within three buildings (a fourth building contains a lobby and no residential units);
- Two 223.5 feet long 65-foot tall four-story buildings containing forty (40) apartments each;
- One three-story apartment building containing twenty (20) apartments;
- A two-story building with a lobby separating the two four-story buildings;
- 197 underground parking spaces and four (4) above ground parking spaces;
- One entrance driveway and two exit driveways from South Orange Avenue;
- A 50-foot stream encroachment buffer to the Canoe Brook; and
- An outdoor pool and hardscape area.

The attached Mixed Use Concept Plan B proposes:

- 100 apartments within two buildings (a third building contains a lobby and no residential units);
- Two 223.5 feet long 65-foot tall four-story buildings containing fifty (50) apartments each;
- A 4,500 square foot (approximate) one-story commercial building (fourth building), with 25 associated off-street parking spaces.
- A two-story building with a lobby separating the two four-story buildings;
- 197 underground parking spaces and four (4) above ground parking spaces (concept plan is unclear regarding differences in parking between the two concept plans);
- One entrance driveway and one exit driveway from South Orange Avenue and one two-way driveway from White Oak Ridge Road;
- A 50-foot stream encroachment buffer to the Canoe Brook; and
- An outdoor pool and hardscape area.

Site Description and Surrounding Land Use and Development

The subject property is located at 650 South Orange Avenue and identified on the Township of Livingston Tax Maps as Block 7001, Lot 1. Figure 3, entitled Existing Land Use identifies existing land uses within and surrounding the subject property. The subject property is bordered to the south and west by single-family development on lots of 20,000 square feet (2.18 units per acre) or greater within the R-4 district in Millburn Township. Properties to the west, southwest and northwest located in Livingston and Millburn Townships contain conservation lands that provide passive open space. Properties to the north contain

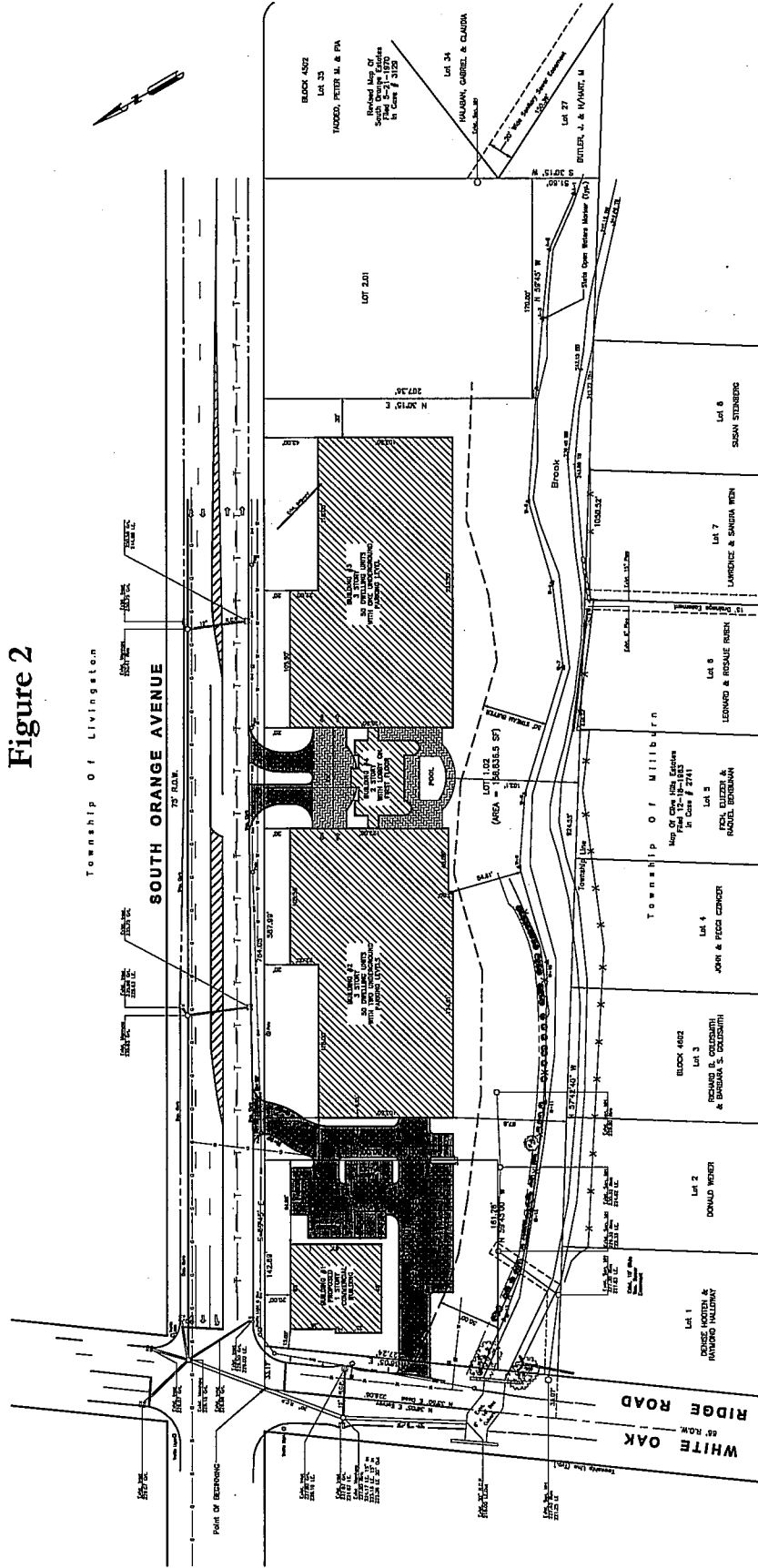


an Exxon gasoline sales and service station and single-family residential properties on lots that are approximately 35,000 square feet in area. The subject property is the first property located outside of designated conservation lands as one travels eastward along South Orange Avenue and is partially located within the 100-year floodplain associated with the Canoe Brook, which traverses the southern property boundary and flows west into the adjoining conservation properties.

Figure 2

Township of Livingston

SOUTH ORANGE AVENUE



SITE DATA AND ZONING ANALYSIS - COMMERCIAL BUILDING

BULK CRITERIA	REQUIRED	PROPOSED
MINIMUM		
LOT AREA	27,213 SF	27,213 SF
STREET SETBACK	20 FT.	20 FT.
PROPERTY LINE SETBACK	15 FT.	15 FT.
PARKING SETBACK FROM BUILDING	20 FT.	44.53 FT.
MINIMUM	5 FT.	5 FT.
MINIMUM	33 %	17.0 %
MINIMUM	50 %	34.0 %
MINIMUM	35 FT.	20 FT.
MINIMUM	1 CAR/200 SQFT - 31 CARS	25 CARS

SITE DATA AND ZONING ANALYSIS - R-50 RESIDENCE DISTRICT

BULK CRITERIA	REQUIRED	PROPOSED
MINIMUM		
TRACT AREA	4.2 AC.	4.273 AC.
STREET SETBACK	25 FT.	20 FT.
PROPERTY LINE SETBACK	20 FT.	20 FT.
PARKING SETBACK FROM BUILDING	5 FT.	50 FT.
MINIMUM	50 FT.	50 FT.
MINIMUM	35 FT.	35 FT.
MINIMUM	23.81 DU/AC OR 100 UNITS	100 UNITS
MINIMUM	50 UNITS	50 UNITS
MINIMUM	33 %	28.8 %
MINIMUM	45 %	41.3 %
MINIMUM	45 FT.	65 FT.

PARKING ANALYSIS:

4 - 1 BEDROOM UNITS X 1.8 = 7.2 SPACES
92 - 2 BEDROOM UNITS X 2.0 = 184 SPACES
4 - 3 BEDROOM UNITS X 2.3 = 9.2 SPACES
TOTAL REQUIRED = 200.4 = 201 SPACES
PROVIDED:
UNDERGROUND PARKING = 197 SPACES
SURFACE PARKING = 4 SPACES
TOTAL PROVIDED = 201 SPACES

- NOTES**
- AS SHOWN ON LOT 1, BLOCK 7001, AS SHOWN ON TOWNSHIP OF LIVINGSTON
 - TOTAL TRACT AREA = 182,311 SF, OR 4.273 AC.
 - LANDSCAPING SHALL BE PERFORMED IN ACCORDANCE WITH THE TOWNSHIP OF LIVINGSTON LANDSCAPING ORDINANCE.
 - UTILITY LOCATIONS SHOWN HEREON ARE APPROXIMATE BASED UPON RECORD DRAWINGS AND FIELD SURVEY. THE LOCATION OF UTILITIES SHALL BE VERIFIED BY THE CONTRACTOR PRIOR TO CONSTRUCTION.
 - THE STATE OPEN SPACES ARE SHOWN HEREON AS DEDICATED BY ENVIRONMENTAL TECHNOLOGY INC., CENTRAL, ILL.

MIXED USE CONCEPT PLAN B
 650-860 SOUTH ORANGE AVENUE
 TAX LOT 1, BLOCK 7001
 TOWNSHIP OF LIVINGSTON
 ESSEX COUNTY, NEW JERSEY

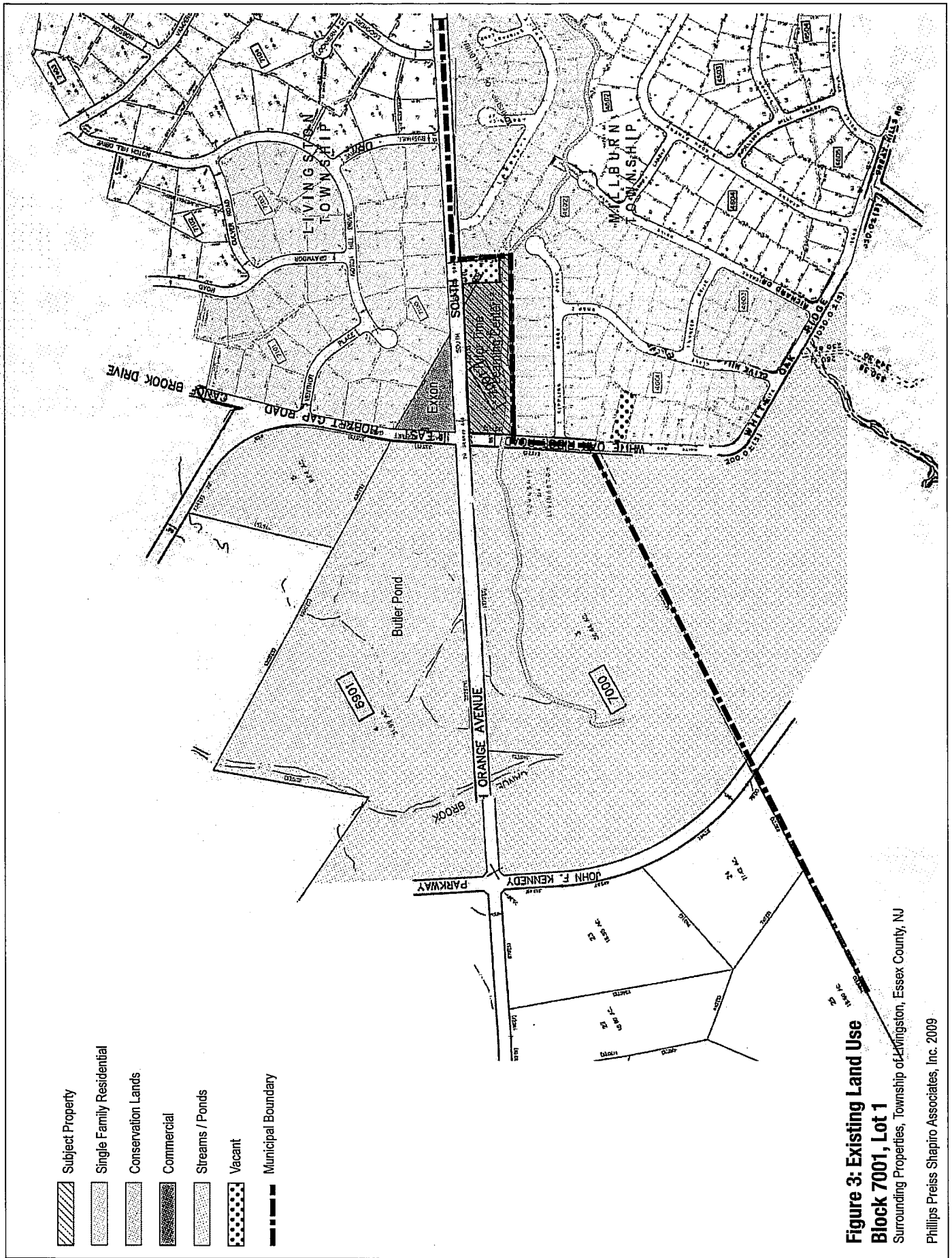
CASEY &

KELLER INCORPORATED
 LICENSED PROFESSIONAL
 CIVIL ENGINEERS
 LAND SURVEYORS
 PLANNERS

208 MAIN ST., 3RD FL., 10TH FLOOR
 NEW JERSEY 07001
 973-379-3200 FAX 973-379-7903

MICHAEL T. LANZAFAMA

DATE	BY	CHKD BY	SCALE
10/03/04	ML	ML	1"=40'
10/03/04	ML	ML	1"=40'



**Figure 3: Existing Land Use
Block 7001, Lot 1**

Surrounding Properties, Township of Livingston, Essex County, NJ

Phillips Preiss Shapiro Associates, Inc. 2009

Existing Zoning

Subject Property and Surrounding Area

According to the Township of Livingston Zoning Map located on the Township of Livingston's Zoning Department web page, the South Orange Avenue corridor near the subject property is located within the Water Conservation Area (WRC), the R-1 Single-family Residential district and the General Business (B-1) district. According to the H2M Report¹, dated January 7, 2009, the subject property is located within the R-1 district, which permits single-family homes on lots having a minimum size of 35,250 square feet which translates to 1.2 dwelling units per acre. This residential classification is consistent with the 2007 Master Plan, which depicts the site within the R-1 land use classification. However, we note that the zoning map located on the Township's website identifies the portion of the site adjacent to the White Oak Ridge Road intersection as being located within the B-1 zone district.

The adjoining WRC district is intended to restrict the development of lands which are environmentally sensitive and lands which are vital to the preservation of regional water supplies. Permitted uses within the WRC district include: utility facilities directly related to the protection, preservation and distribution of regional water supplies; park and outdoor recreation uses of a type which involve essentially unimproved land and only those structures, off-street parking and other improvements that are designed to be incidental to the natural openness of the land; and accessory uses customarily associated with the above uses.

Areas north of the subject property are also zoned Residential – 1, with the exception of the Exxon Gasoline station, which is located within the B-1 district.

Adjoining properties in the Township of Millburn are located within the R-4 district, which permits single-family development on 20,000 square foot lots or 2.18 units per acre (See Figure 4).

Affordable Housing Districts

The Township of Livingston has five (5) districts designed to implement provisions of a previous Mount Laurel settlement agreement approved by the Superior Court. Table 1, on the following pages, compares the permitted principal uses, residential density, minimum building setbacks, maximum building height, maximum number of dwelling units per building, minimum distances between buildings, maximum impervious coverage, and open space and recreation standards of the five (5) existing affordable housing districts to the proposed R-5F district for the subject property.

¹ Site Suitability Report TMB and JKHA Sites, prepared by H2M Associates, dated January 7, 2009

Table 1 – Comparison of Existing Affordable Housing Districts to the Proposed R-5F District

Condition	R-5A	R-5B	R-5C	R-5D	R-5E	R-5F Proposed
Permitted uses	Townhouse (TH) Multi-family	Townhouse (TH) Multi-family	Townhouse (TH) Multi-family	Assisted living Congregate care	Single-family	Multi-family Commercial
Density (gross density – units per acre) (Units per acre exclusive of wetlands and flood hazard areas)	4.3 7.4	6 11	Either 6 or 8 depending upon which side of East Cedar Street	N/A	4.64 (9,375 sq. ft. min. lot size) N/A	23.81 N/A
Minimum tract area (acres)	25	25	Between 2-5 acres	4	N/A	4.2
Minimum building setback (feet)						
Public Streets			50 ⁴	50	40	20/32
Tract boundaries (tract boundaries)	40 ¹	50 ³	40 and 25 for TH	N/A	N/A	20
Internal streets and property lines	20	20	15	40	10	N/A
Rear lot lines	N/A	N/A	N/A	50	35	N/A
Single-family use lot lines				200	N/A	N/A
Parking areas (R = Res., NR = Non-res.)	R = 15, NR = 5	R = 10, NR = 5	R = 10, NR = 5	N/A	N/A	5
Maximum building height	2.5 stories/35 feet	TH – 35 ft. MF – 3.5 stories or 42 feet	TH – 35 ft. MF – 3 stories or 40 feet	2 stories 28 feet ⁵		65 (plus a mansard roof of 8 feet) = 73
TH = Townhouse MF = Multi-family						

¹ (25 feet if adjacent to a nonresidential zone and building wall does not exceed 65 feet in length)

² (Not less than 50 feet if driveway is located between buildings)

³ (55 feet from single-family residential zone boundary)

⁴ (except that a minimum setback of 40 feet is permitted if the building does not exceed 35 feet in height and the building façade does not exceed 65 feet in length)

⁵ (35 feet and three stories is permitted for any portion of the building located more than 250 feet from all lot lines of property developed for single-family use)

PLANNING REPORT ON THE SETTLEMENT AGREEMENT OF TMB PARTNERS AND THE TWP. OF LIVINGSTON

Condition	R-5A	R-5B	R-5C	R-5D	R-5E	R-5F Proposed
Maximum number of dwelling units per building	Townhouses - 6 Multi-family - 16	Townhouses - 6 Multi-family - 16	N/A N/A	125 assisted living bedrooms (units)	N/A	50
Minimum feet between buildings						
Front facing front	65	65	60	N/A	N/A	N/A
Front facing rear	65	65	60	N/A	N/A	N/A
Front facing side	35 ²	35 ²	35	N/A	N/A	35
Rear facing rear	65	65	65	N/A	N/A	N/A
Rear facing side	35 ²	35 ²	25	N/A	N/A	N/A
Side facing side	20	20 ²	20	N/A	N/A	50
Maximum building coverage (%)	15	15	MF = 20 TH = 30	30	Depends on lot size (maximum of 25%)	35
Maximum impervious coverage (%)	30	35	MF = 50 TH = 60	75	N/A	45
Minimum open space and rec. (%)	30	30	N/A	N/A	N/A	N/A

Planning Analysis

1. The proposed standards within the R-5F district are substantially inconsistent with existing zoning in Livingston Township designed to provide affordable housing as part of previous settlement agreements approved by the Superior Court. The following summarizes the magnitude of the proposed differences:
 - The proposed gross density of 23.81 units per acre for the subject property is a minimum of four (4) times greater than permitted in any other existing affordable housing district.
 - The proposed height of 65 feet is a minimum of twenty three (23) feet taller (31 feet taller when including the mansard roof) than other existing affordable housing districts.
 - The permitted number of multi-family units in one building (50) is more than 3.1 times greater than other existing affordable housing districts.
 - Although the site contains environmental constraints, the density in the proposed affordable housing district is only calculated based upon the gross area of the tract. Within other affordable housing districts containing environmentally sensitive areas, net densities are created for the tracts that remove environmentally constrained lands from the density calculation. For the subject property, the density would increase from 23.81 units per acre to approximately 36.2 units per acre upon removing lands located within the 50 foot stream corridor buffer area.
 - Minimum building setbacks are reduced approximately in half from existing affordable housing districts.
 - The proposed permitted building coverage of 35 percent is a 75 percent increase than permitted in existing affordable housing districts which permit multi-family development. A maximum building coverage of 20% is permitted in the R-5C district.
 - Building setbacks to parking areas are reduced to five (5) feet where between ten (10) and fifteen (15) are required in other affordable districts for residential development.
 - The existing R-5D district requires a minimum setback of 200 feet to single-family use lot lines. The proposed district has no requirement, where 87.6 feet is proposed on the concept plan.
 - Two of the existing affordable housing districts require that a minimum of 30% of the tract be reserved for common open space and facilities. No standard is required for the proposed zone or development. We note, while a substantial portion of the site is located within a 50 foot conservation buffer, little to no disturbance of this area is permitted in accordance with NJDEP rules as the buffer area is intended to prevent degradation to the water quality of the Canoe Brook.

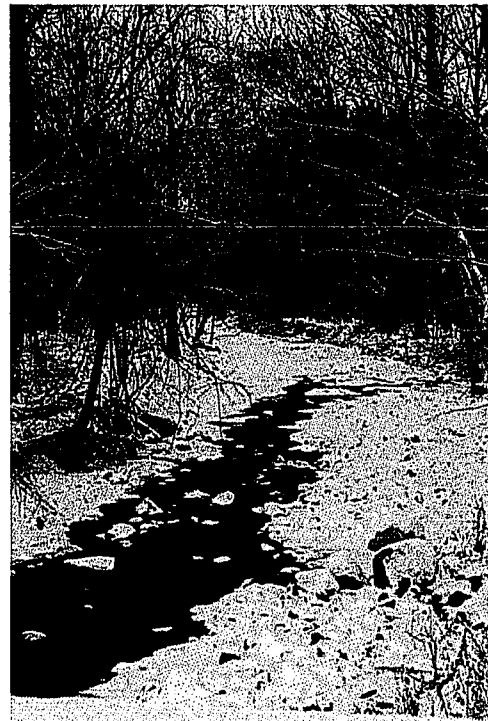
2. The proposed gross density of 23.81 units per acre is 19.8 times greater than the permitted density in the R-1 district in Livingston Township and 10.9 times greater than the permitted residential density in the adjoining R-4 district in Millburn Township. Lands immediately to the west of the subject property in Livingston and Millburn have a residential density of 0 units per acre as they are zoned for conservation purposes.

3. COAH regulation NJAC-5:97-5.6 (e) establishes minimum presumptive densities to provide a reasonable opportunity to create low and moderate income housing. The subject property is located within the Metropolitan Planning Area (PA-1), but serves as a transition property to adjacent properties located in the Environmentally Sensitive Planning Area (PA-5) to the west. NJAC-5:97-5.6 establishes a minimum presumptive density of eight (8) dwelling units per acre for properties located within PA-1, whereas the proposed gross density is three (3) times greater than the minimum established by COAH for this area. Given the immediate proximity of PA-5, a residential density closer to the minimum density established by COAH is appropriate to minimize alteration to the existing character of the area. Existing platting patterns, consistent with existing zoning, resulted in the establishment of densities ranging from 1.2 and 2.18 units per acre in Livingston and Millburn respectively. An increase to eight (8) units per acre would increase the existing permitted residential density on the subject property by a minimum of 6.6 times. Furthermore, COAH rules indicate that an opportunity to provide affordable housing is met when presumptive densities have been adhered to (NJAC 5:97-6.4 (3)). The proposed gross density of 23.81 units per

acre is more consistent with an Urban Center and Workforce Housing Census Tracts based upon COAH rules.

- Livingston recently prepared a new Master Plan in 2007. The Land Use Plan recommends a residential density of 1.2 dwelling units per acre for the subject property. MLUL Section 40:55D-62 enables a municipality to adopt or amend a zoning ordinance after the planning board has adopted the land use plan element and the housing plan element of the master plan. This provision requires that such zoning ordinance or any amendment or revision thereto shall either be substantially consistent with the land use plan element and the housing plan element of the master plan. Section 40:55D-62 further states that the zoning ordinance “shall be drawn with reasonable consideration to the character of each district and its peculiar suitability for particular uses and to encourage the most appropriate use of the land.” The Township and the courts are now considering an increase in density of over twenty (20) times greater than the long-range planning document approved as part of a public hearing by the local planning board (which is also being considered for amendment subject to court approval). The basis for this density increase is inconsistent with the MLUL.

- The proposed gross density includes environmentally constrained areas such as stream encroachment transition areas. This is inconsistent with Livingston’s Master Plan, which recommends for numerous properties within the Land Use Plan element that wetlands and flood hazard areas within sites be preserved as open space and not considered developable land in determining density. This principle of removing environmental constraints on a parcel of land prior to determining density was validated in the ruling of *Rumson Estates v. Fair Haven*, 177 N.J. 338 (2003), which indicated that the MLUL does not preclude a municipality from adopting a zoning ordinance that defines terms differently from the definitions in the MLUL so long as the regulatory effect of the definition is in keeping with the intent of the Act. If the Township’s zoning ordinance definition of density was revised to implement the Township Master Plan, the proposed density on the subject property would increase from 23.81 dwelling units per acre to approximately 36.2 units per acre.



- A 50-foot stream encroachment buffer is shown on the concept plans to protect the Canoe Brook. This planning analysis recognizes that a 50-foot buffer is the “smallest” buffer that may be considered by the NJDEP adjacent to waterways. If the 50-foot buffer is approved by NJDEP, the majority of on-site open space would be unusable for active recreation purposes. Moreover, we note that a portion of the entrance driveway from White Oak Road is located within the 50-foot stream buffer area (See Figure 2). The lack of usable active open space for the ±200 residents who would live at the proposed development is an indication of the overutilization of the site and an indication as to why the site is unsuitable for a proposed gross density of 23.81 units per acre. Furthermore, the planting of an evergreen buffer may not be permitted for unimproved areas of the subject property located within the 50-foot stream buffer area, which would prevent adequate screening of the proposed 223-foot long 73-foot tall buildings to the adjoining single-family homes in Millburn Township.

7. The proposed development is dependent upon the inclusion of one to two levels of below grade parking. The inclusion of below grade parking in single-family residential districts is most unusual. Moreover, we question the wisdom of locating below grade parking adjacent to a stream corridor.
8. COAH rules define a "Suitable site" as a site "that has clear title and is free of encumbrances which preclude development of affordable housing; is adjacent to compatible land uses; has access to appropriate streets, water and sewer infrastructure; can be developed consistent with the Residential Site Improvement Standards and the rules or regulations of all agencies with jurisdiction over the site; and is consistent with the site suitability criteria delineated in N.J.A.C. 5:97-3.13. A site may be deemed suitable although not currently zoned for affordable housing." (emphasis added) As indicated throughout this report, the construction of two (2) 73-foot tall 223 foot long mid-rise apartment buildings adjacent to low density single-family residential neighborhoods, conservation, and environmentally constrained lands constitutes an incompatible land use and does not meet the requirements of N.J.A.C 5:97-3.13. Furthermore, at this time it is unclear whether NJDEP approved the proposed 50-foot stream encroachment buffer as depicted on the concept plans which encompasses over 1.5 acres or over 35% of the 4.27-acre site.
9. The proposed development will negatively impact adjoining single-family residents in Millburn Township. The construction of 100 apartments within 73-foot tall 223-foot long buildings adjacent to single-family homes less than 35 feet in height is too intensive given the existing context and character of the area. In fact, Ms. McKenzie herself acknowledges on page 5 of her report that "the development proposed for the site is fairly intense for the area (approximately 23 units per acre), and it will introduce buildings up to four stories (65 feet) in an area where the predominant building height is 2½ stories." Further, reduced setback and bulk requirements (i.e., as compared to other affordable housing districts in Livingston) are inappropriate given the proposed building heights and the site's proximity to an established single-family residential neighborhood. Finally, the proposed 50-foot stream encroachment buffer renders it difficult if not impossible to construct a suitable buffer within unimproved areas of the site. The inability to create an appropriate landscaped buffer will most negatively impact residents along the Rippling Brook Drive cul-de-sac in Millburn Township (See Figure 3).

Conclusion

The proposed settlement agreement and R-5F zoning for Block 7001, Lot 1 is inconsistent with the MLUL, COAH presumptive densities indicated in 5:97-5.6 (e), and existing land use and zoning patterns in the immediate neighborhood.

The selection of a property on the municipal boundary with Millburn where only residents of Millburn would bear the majority of the negative impacts of buildings that are grossly out of scale with the existing pattern of development is also inconsistent with planning principles identified in MLUL 40:55D-62 and 40-55D-2 (Purpose of the Act).