

may be essential to the satisfaction of defendant Holmdel Township's fair share under the Mt. Laurel doctrine*.

On March 21, 1986 plaintiff moved before the Superior Court of New Jersey, Law Division, Monmouth/Ocean County, Eugene D. Serpentelli, A.J.S.C., for an interim order preventing further allocation of water resources in Holmdel Township, on the ground that it constituted a scarce resource. On May 22, 1986 the court issued an Order Granting Temporary Restraints Pending Action by the Affordable Housing Council. Specifically, this order forbids the Township of Holmdel, Holmdel Township Planning Board, and Shorelands Water Company, Inc.,** from committing any unallocated water capacity in Shorelands franchise area that was not previously granted preliminary or final approval or under prior contract; and further restrains any new commitment or preliminary approval for unallocated water unless such approval provides for a 20% Mount Laurel set aside or receives court approval. Exceptions are made for proposals to utilize ten or less units of single family equivalent service, and for expansion at a school and first aid building. Finally, the order provides that within 30 days plaintiff Palmer Square, Ltd. should make application to the Council for scarce resource restraints, and that at such time as the Council is able to act on said application, that the court order shall expire. By

* This case was transferred to the Council as per the Supreme Court's decision in The Hills Development Company v. Bernards Township, 103 N.J. 1, 56 (1986).

** The Holmdel Township Planning Board and the Shorelands Water Company, Inc., were joined as parties by Judge Serpentelli for the limited purpose of the motion for scarce resources restraints.

order dated June 16, 1986, Judge Serpentelli exempted from the scope of his prior order a skilled and intermediate health care facility proposed for approval by Bayshore Health Care Center, Inc. In sum, plaintiffs now seek entry of an order by the Council continuing restraints on any allocation of water capacity.

In The Hills Development Company v. Bernards Township, 103 N.J. 1 (1986), the New Jersey Supreme Court clearly determined that the Council on Affordable Housing is empowered to order preservation of scarce resources necessary to satisfy a municipalities Mt. Laurel obligation. The Court held that:

[T]he Council has the power to require, as a condition of its exercise of jurisdiction on an application for substantive certification, that the applying municipality take appropriate measures to preserve 'scarce resources,' namely those resources that will probably be essential to the satisfaction of its Mt. Laurel obligation. Id. at 61.

The Council has incorporated this authority within its procedural regulations, N.J.A.C. 5:91-11.1, and has established a motion practice to consider applications for the exercise of such authority. N.J.A.C. 5:91-13.1 et seq.

In granting such relief, the Court directed the Council to consider whether "further development or use of [the facilities in question] is likely to have a substantial adverse impact on the ability of the municipality to provide lower income housing in the future." Hills, supra at 62. Further the Court noted that restraints or conditions should only be imposed after a "thorough analysis" of the record to determine what conditions would be "appropriate". In this respect, the Court determined that:

'Appropriate' refers not simply to the desirability of preserving a particular resource, but to the practicality of doing so, the power to do so, the cost of so doing, and the ability to enforce the condition. Ibid.

The conditions imposed:

[S]hould be designed not for the protection of any builder, but for the protection of the municipality, pending the outcome of the Council proceedings, to provide the realistic opportunity for lower income housing, as it may be required to do in the near future. Ibid.

The authority is thus similar in intent to the traditional power of the Courts to grant injunctive relief in order to preserve the status quo, and to prevent irreparable harm pending the opportunity for a full analysis of the situation. See, e.g. Crowe v. DeGioia, 90 N.J. 126, 132 (1982). In sum, the Council must determine whether it is necessary and practical to exercise an extraordinary power to preserve the status quo pending the outcome of a final determination.

The first issue before the Council in determining whether to impose restraints in the present case is whether water capacity constitutes a scarce resource; in other words, the Council must determine how much of Shoreland's unallocated water capacity will be required to meet Holmdel's probable fair share housing obligation. Thus, the Council must first ascertain Holmdel's 1987-1993 pre-credited need for construction of new units.

Holmdel's pre-credited, unadjusted need is 777. See: Council on Affordable Housing; Municipal Present, Prospective and Pre-credited Need Estimates, May 22, 1986; see also N.J.A.C. 5:92-1 et seq. for computation. This fair share estimate of total need consists of the sum of indigenous need, reallocated present need

and prospective need. N.J.A.C. 5:92-5.1. However, because Holmdel's present and prospective fair share need exceeds 20% of its housing stock, it is entitled to a "drastic alteration" reduction of 135, leaving a pre-credited need of 642. N.J.A.C. 5:92-7.1. This total need is then modified due to demolition, filtering, conversion and spontaneous rehabilitation.

Indigenous need is defined as those deficient housing units occupied by low and moderate income households within a municipality. N.J.A.C. 5:92-1.3. The regulations estimate that some portion of this indigenous need will be spontaneously rehabilitated by low and moderate income households independent of any public action. N.J.A.C. 5:92-5.11. These numbers should thus be subtracted from indigenous need in order to determine how much of the municipality's pre-credited need obligation should be addressed by way of a rehabilitation program. In the present case, Holmdel may rehabilitate a total of 16 units, leaving 626 to be addressed through the creation of new units.

It is, of course, possible that Holmdel may alter its pre-credited need in a number of ways. This may be done upon completion of a housing survey, N.J.A.C. 5:92-5.2(b); by use of available credits, N.J.A.C. 5:92-6; or through the adjustment process, N.J.A.C. 5:92-8. Holmdel may also enter into a Regional Contribution Agreement, as per N.J.A.C. 5:92-11.1. Finally, it may act to deal with its new construction component by methods other than zoning for appropriate densities at a 20% set-aside. However, it would be inappropriate at this stage for the Council to presume such action by Holmdel. For purposes of this motion, the Council

must assume that Holmdel will require sufficient water capacity for a least 3130 New Housing units, in order to satisfactorily address the 626 new construction component of its pre-credited need.

The record before the Council indicates that Shorelands has at present an unallocated water capacity sufficient to accommodate, at a maximum, 300 residential single family units for its Holmdel franchise area.* Further no evidence has been presented to the Council which indicates an alternative source of water available for aid in enabling Holmdel to accommodate its fair share. Finally, the Council notes that the record is undisputed that a recent application by Shorelands to divert more water from the aquifer has been denied by DEP. Thus, it is clear that Holmdel has insufficient unallocated water capacity at present to address its Mt. Laurel obligation, and that such water capacity constitutes a scarce resource.

The second question that must be answered by the Council is whether, given the existence of water capacity as a scarce resource (and thus the "desirability" of restraints), the imposition of restraints is "appropriate," as outlined in the Hills decision and set forth above. Hills, 103 N.J. at 62. As noted, in

* The Council received two distinct estimates on Shorelands remaining unallocated water capacity. Palmer first represented to the Council that Shorelands remaining capacity would cover 300 single family units. However, the affidavit of Michael Walsh, Shoreland's General Manager, indicates that the capacity will actually cover adequately only 176 single family units. It is not necessary for the Council to find, as a matter of fact, which projection is correct, as both numbers are patently inadequate to cover Holmdel's pre-credited need, even at higher inclusionary development densities.

making this determination the Council will also refer to those standards traditionally relied upon by the judiciary in determining applications for injunctive relief.

The Council is fully satisfied that it is empowered to grant the relief requested. As set forth above, it is clear that the Council has the authority to act to protect scarce resources. Further, the protection of necessary water capacity is just as clearly the type of "source resource" envisioned by the Court:

In some municipalities it is clear that only one tract or several tracts are usable for lower income housing, and if they are developed, the municipality as a practical matter will not be able to satisfy its Mount Laurel obligation. In other municipalities there may be sewerage capacity that, if used, will prevent future lower income housing, or transportation facilities, or water lines, or any one of innumerable public improvements that are necessary for the support of housing but are limited in supply. Id. at 61 (emphasis added).

The Council is further convinced that it is practical to require Holmdel to preserve its scarce water capacity, and that the cost of doing so would not be unduly burdensome to Holmdel. As noted, restraints are necessary to prevent irreparable harm - the possibility that all of Holmdel's remaining unallocated water capacity will be used up without any allocation towards its Mt. Laurel obligation. On the other hand, the duration of the restraint imposed is relatively short, expiring upon the determination of the Council to grant substantive certification. Further, it will not affect existing, allocated water capacity, and is subject to exceptions and exemptions, as set forth in detail below. Finally, should the facts or circumstances which underlie this record change, and further water capacity became available, or

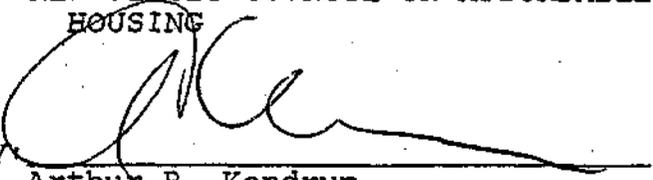
other arrangements are made by Holmdel to satisfy its obligations, the terms of this order may be modified by the Council.

Therefore, for the reasons set forth at length above, the Council on Affordable Housing will require that Holmdel Township, the Holmdel Township Planning Board, and Shorelands be restrained from allocating any further water capacity to any applicant in Shorelands franchise area, who has not already received preliminary or final approval, or received a contract or commitment for water capacity. Further, the Council will require that Shorelands not approve new commitments in its franchise area in Holmdel Township, unless the applicant has received prior approval by the Holmdel Township Planning Board. The Council will also require that the Holmdel Township Planning Board refrain from granting new approvals for water capacity in Shorelands franchise area, unless the application provides for an inclusionary development with a 20% mandatory Mt. Laurel set aside; or the application is for two or less units of single family equivalent service. These restraints shall not apply to the applications by the first ^{AD} and building, school, and Bayshore Health-Care Center, ~~exempted~~ from the scope of Judge Serpentelli's prior orders.

The Council has entered an appropriate order embodying these decisions.

NEW JERSEY COUNCIL ON AFFORDABLE
HOUSING

By


Arthur R. Kondrup
Chairman

DATED: 12/1/86