



In 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 municipality's 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 the Council must determine is whether land is indeed a "scarce resource" in Passaic. After reviewing all briefs, certifications and documents submitted, including Passaic's draft housing element which Passaic submitted to the Council pursuant to N.J.A.C. 5:91-1.1 et seq. and which is a public document, the Council is satisfied that land is a "scarce resource" in Passaic.

Passaic has a precredited need number of 198. See: Council on Affordable Housing; Municipal Present, Prospective and Precredited Need Estimates, May 22, 1986; See also N.J.A.C. 5:92-1 et seq. However, the Draft Housing Element which Passaic submitted to the Council indicates that Passaic has adjusted this precredited need number down to zero. The reason for this adjustment is that Passaic contends that once it factors out the 3% open space it is permitted by N.J.A.C. 5:92-8.3, it then has no remaining vacant developable land.

Pursuant to the Council's request, Passaic did submit a map which identifies the vacant parcels of land in the Township. While this map does not adequately identify whether the parcel is developable, it does indicate that there is a scarcity of vacant land in Passaic. This map coupled with Passaic's Draft Housing Plan indicates that land is scarce in Passaic.

Passaic's position is that at most no more than 3% of the vacant land in Passaic is developable. At this time, the Council will not make

any judgment as to the legitimacy of Passaic's adjustments; however, Passaic's Draft Housing Element raises serious questions as to whether there is sufficient vacant developable land in Passaic to satisfy its fair share obligation of 198. By virtue of the Draft Housing Plan, Passaic agrees with Meadowview and admits that developable land is indeed a scarce resource in Passaic.

Based upon the foregoing, the Council is convinced that developable land is a "scarce resource" in Passaic. The Council now must decide whether restraints are appropriate.

The Council is convinced that it is empowered to grant the relief requested and impose restraints on the development of vacant land in Passaic. In fact, this case presents the exact situation the Supreme Court contemplated when it declared that the Council had the authority to preserve scarce resources. The Supreme Court in the Hills decision stated:

In some municipalities it is clear that only 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.

The Council is further convinced that it is practical to require Passaic to preserve its scarce vacant developable land, and that the cost of doing so would not be unduly burdensome to Passaic. This is especially true since Passaic contends that it has no vacant developable land anyway. As noted, restraints are necessary to prevent irreparable harm - the possibility that any vacant developable land which Passaic may have will be developed for purposes other than Mt. Laurel housing. On the other hand, the duration of the restraints is relatively short, expiring upon the Council's determination to grant substantive certification.

For the reasons set forth at length above, the Council on Affordable Housing will restrain Passaic Township, its Planning Board or anyone acting on its behalf from issuing any approvals for development of any vacant parcels of land. Should the facts or circumstances which induced the Council to enter the Order change, the terms of this Order may be modified by the Council.

The Council has entered an appropriate Order embodying this decision.

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Arthur R. Kondrup  
Chairman

Dated: \_\_\_\_\_