COUNCIL ON AFFORDABLE HOUSING
DOCKET NO. COAH 88-110

IN RE BOROUGH OF ROSELAND; MOTION FOR SCARCE RESOURCE RESTRAINTS BY BELLEMEAD DEVELOPMENT CORP.

Civil Action

OPINION

Following the institution of Mt. Laurel litigation, the Borough of Roseland was transferred to the Council on Affordable Housing (Council) on October 25, 1985. Subsequently, Roseland filed with the Council a final housing element and fair share plan designed to meet its obligation of providing 165 units of lower income housing. Roseland has now completed the mediation and review process, and is awaiting final Council action on its plan. At all times, Roseland's plan has included zoning for an inclusionary development of a site in Roseland known as "Eagle Rock" and owned by Bellemead Development Corporation (Bellemead).

The present motion was filed with the Council by Bellemead on June 8, 1988. In the motion, Bellemead requests the following relief: first, an interim order restraining any approval of, or consent to, any permit for the discharge of sewage into the Borough of Caldwell Wastewater Sewage System, until the amount of available capacity in the system is ascertained; second, an order directing that a determination of such capacity be made; and third, issuance of a scarce resource restraint on allocation of sewer

capacity in Caldwell, and an order granting priority for any remaining capacity to Bellemead for use in providing lower income units.* Papers in opposition to the motion were filed by the Boroughs of Caldwell (June 24, 1988), and Roseland (June 30, 1988), and Prudential Insurance Company of America (Prudential) (June 30, 1988). The matter was then adjourned in order to permit filing of a response by the New Jersey Department of Environmental Protection (DEP). DEP filed a letter in opposition to the motion on September 9, 1988. No responses to DEP's letter were filed with the Council.

The factual background of this matter, as relevant to the issues presented by Bellemead's motion, are not contested. Roseland has no municipal sewer treatment facility, and thus contracts with Caldwell to provide this service. Caldwell operates a facility that processes sewage for five area municipalities. In the late 1970's several parties owning property in Roseland entered into contracts with Caldwell (which were approved by DEP) in an attempt to obtain additional capacity. Pursuant to the agreements, three parties (Bellemead, Prudential and ADP) conducted an infiltration-inflow program, designed to increase capacity by removing ground water infiltrating the Caldwell system. The parties received 1 gallon per day (gpd) of capacity for each two gallons removed from the system. Letters from Caldwell to DEP indicate

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* Bellemead is not requesting that the Council lift the sewer ban imposed by DEP, as some parties have contended. Such action is clearly outside the Council's statutory authority.

that Bellemead has at the present time 19,409 gpd of remaining capacity, while Prudential has 30,050 gpd.

On November 11, 1979 DEP imposed a sewer ban on Caldwell. The ban required Caldwell to upgrade its facility treatment level by July 1, 1988, and imposed interim levels on treatment. In a consent order dated March 31, 1988 DEP found that Caldwell could not meet the treatment levels previously required, and set a new schedule for upgrading by April 15, 1991. The consent order continues the sewer ban in force, as well as the interim treatment levels. The existence of the sewer ban means that no party may tie into the Caldwell sewer lines and obtain a "wet" permit allowing sewage to be transmitted for processing. However, DEP has recently issued a "dry" permit to Prudential, authorizing it to construct sewer lines to its site in Roseland (Prudential will not be able to utilize the tie-in, however, until the sewer ban it lifted; until that time it must use a DEP approved cycle-let system). DEP records indicate that no additional capacity is presently available, and thus no further "dry" permits will be issued.

Prudential has previously received site plan approval from Roseland to utilize its property within Roseland for an office building. Prudential has also received approval by Caldwell of its CP-1 sewer extension permit for the project. As noted above, DEP recently granted Prudential a "dry" permit for the site. Thus, Prudential needs only a building permit from Roseland in order to begin construction. Bellemead's application for the Eagle Rock site is apparently now pending before the Roseland Planning Board.

As noted above, Bellemead has filed the present motion with the Council seeking "scarce resource" restraints.* The Council's authority to award such relief in appropriate circumstances is clear. In Hills Dev. Co. v. Bernards Tp. In Somerset Cty., 103 N.J. 1 (1986) the Supreme Court upheld the validity of the Fair Housing Act, N.J.S.A. 52:27D-301 et seq. The Court went on to say that

> we have concluded that the 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 Mount Laurel obligation. Id. at 61.

The court specifically mentioned sewer capacity as an example of the type of infrastructure subject to the Council's scarce resource power. Ibid. The imposition of such restraints is designed "to protect and assure the municipality's future ability to comply with a Mount Laurel obligation." Id. at 63.

The issuance of scarce resource restraints prevents a municipality that has petitioned for substantive certification from dissipating resources that may be necessary for meeting its obligation. During the period of Council review of the plan, no allocation of the particular resource in question may be made by the municipality without Council approval. At the conclusion of the

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* Bellemead also asked the Council for a determination as to what capacity presently remains in the Caldwell facility to be allocated. As a result of the unchallenged information provided to the Council by DEP (and discussed in detail above) it is clear that no further capacity remains to be allocated at this time.

Council's mediation and review process, the municipality may be required, as a condition of receiving certification, to utilize previously unallocated resources for lower income housing, as per the approved housing plan. The Council has taken such action in a number of cases.

However, in the present motion Bellemead is not asking the Council to restrain allocation of resources by a municipality petitioning for certification. In fact, the municipality before the Council for certification (Roseland), does not have a municipal sewer authority. Instead, Bellemead is requesting that the Council act to impose a scarce resource restraint on a neighboring municipality (Caldwell) that is a provider of services to Roseland. Most importantly, Bellemead asks that the Council "prioritize" it by ordering Caldwell to provide it with sewer capacity.

The Council has previously addressed a similar issue in the case of In re Warren Township Motion for Imposition of Conditions on Substantive Certification, March 7, 1988. In that case, the contiguous municipalities of Warren and Green Brook were both before the Council for certification. Warren had adequate sewer capacity through its municipal authority; Green Brook had no available capacity. A developer in Green Brook, whose site was included in Green Brook's housing plan as a site for an inclusionary development, requested that the Council order that Warren provide sewer capacity to the developer's Green Brook site as a condition of Warren receiving certification. It was undisputed that the site in Green Brook had no sewer; that Warren was the "logical" provider of

capacity to the site; and that Warren had sufficient capacity available. However, Warren refused to provide capacity, claiming that it had no obligation, and that it wished to reserve the capacity for its own residents. The Council determined that it would not "condition" Warren's certification on its agreement to provide sewer to Green Brook. The Council's decision was predicated on its conclusion that Warren had met its Mt. Laurel obligation by formulating a plan that met its own fair share. It was not required to provide infrastructure to aid a neighboring community in order to receive certification. Thus, the Council denied the developer's motion.

The remaining issue was whether, in the context of the Council's review of Green Brook's plan, Warren could be forced to provide sewer to the Green Brook site. The Council noted that the case presented a troubling issue; and that the regional need for lower income housing was potentially being frustrated by one municipality's unwillingness to provide necessary infrastructure to a second municipality. However, the Council concluded that it was not authorized to order one municipality to provide infrastructure to a neighboring municipality to aid in meeting a Mt. Laurel obligation. The Council noted that the Superior Court had previously suggested that in such cases a judicial remedy might be appropriate, citing Urban League of Essex County v. Mahwah, 207 N.J. Super. 169, 258-259 (Law Div. 1984), and suggested that the issue was properly cognizable in the Superior Court. The Council added that Green Brook could still obtain certification (despite

the lack of sewer capacity) by way of a durational adjustment pursuant to N.J.A.C. 5:92-8.1 et seq.

This reasoning is equally applicable to the present case. The Council's scarce resource power is premised on its review of a municipal petition for substantive certification. Pursuant to that authority, the Council may restrain a petitioning municipality's use of certain resources, and insure that they be allocated so as to give a priority to lower income housing. The Council indicated in Warren, however, that it feels its authority under the Act does not extend to issuing such restraints against a municipality that is not before it. As noted, Caldwell is not presently before the Council. To grant Bellemead's motion, the Council would have to assume jurisdiction over Caldwell, and then determine how it should best allocate remaining sewer capacity among its clients (most of whom are not before the Council). As indicated in Warren, the Council has concluded that, under these circumstances, it is not the appropriate forum for the resolution of these disputes.

It should also be noted that Bellemead has previously contracted with Caldwell for sewer capacity; and that the parties apparently agree as to the amount of capacity reserved for Bellemead pursuant to that contract. Thus, the real issue may be that Caldwell simply has no capacity to offer at this time (due to DEP restraints). When Caldwell regains capacity, there may be no dispute over Bellemead's status.

For all of the above reasons, the Council will order that Bellemead's motion for scarce resource restraints and a prioritization will be denied.

COUNCIL ON AFFORDABLE HOUSING

By: _____
James L. Logue, III
Chairman

Dated: October 17, 1988