COUNCIL ON AFFORDABLE HOUSING
DOCKET NO. COAH 89-90-200(e)
COAH 89-200(d)

IN RE CLINTON TOWNSHIP/REQUEST)
FOR RECONSIDERATION OF COAH
DENIAL OF SCARCE RESOURCE )
EXEMPTIONS
)

This case involves two requests for reconsideration of prior COAH decisions denying requests for exemptions from a COAH scarce resource restraint. For the reasons set forth below, it is COAH's determination that the requests for reconsideration should be denied.

Clinton Township is presently participating in the COAH administrative mediation and review process, following a petition for substantive certification of the Township's housing element and fair share plan. In a decision dated January 19, 1988 COAH imposed a scarce resource restraint as to Clinton. Specifically, COAH restrained the allocation of sewer capacity by the Township. This action was taken pursuant to COAH's authority as set forth in Hills Dev. Co. v. Bernards Tp., 103 N.J. 1, 61 (1986). No party presently disputes this authority.

In its decision, COAH noted that Clinton clearly had insufficient capacity to provide for its Mt. Laurel obligation (potentially 880 low and moderate income units). COAH added that Clinton had no sanitary sewage treatment plant, but did have a contract for 150,000 gallons per day with the adjacent Town of

Clinton, to be used in the Annandale section of the Township. Of that figure, 133,000 gpd had been previously allocated to existing lots to permit them to convert from septic systems, for health reasons; 1,400 gpd was reserved for other lots that might similarly have to convert; 7,350 gpd was reserved (and partially allocated) for vacant lots; and 7,600 gpd was unreserved and unallocated. COAH elected to restrain any allocation of the unreserved and unallocated 7,600 gpd, and that portion of the 7,350 gpd that was similarly unreserved and unallocated.

Subsequently, two property owners within the Annandale area (Foxfire-Hummel Homes, Inc. and Greyrock Investors) filed motions with COAH seeking exemptions from the restraint. COAH denied the motions (by resolutions dated July 17, 1989 as to both parties), and noted that, as Clinton had not yet received substantive certification,, and as the situation as to the availability of sewer capacity within Clinton remained unchanged, such capacity still represented a scarce resource, potentially needed in order to meet a portion of the Township's Mt. Laurel obligation.

Both parties have now filed requests seeking COAH reconsideration of its decisions. Neither party is alleging a change in circumstances. However, they both argue that COAH's issuance of a sewer restraint amounts to a taking of their property for which compensation is owed, to be calculated from the date of COAH's initial imposition of the scarce resource restraint.

COAH disagrees with the movants' assertion that the present scarce resource restraint constitutes a taking. First, cases

such as Sudler v. Environ. Disposal Corp., 219 N.J. Super. 52 (App. Div. 1987) have recognized that, where sewerage capacity is scarce, decisions must be made as to how the available capacity will be allocated. In such situations capacity simply cannot be provided to all possible applicants. As long as the decision on allocation is reasonable, then it should be sustained. Certainly, it was not anticipated that every single party who cannot be accommodated with such capacity has suffered a taking for which compensation is required.

In the present case, COAH's decision is manifestly reasonable. As noted above, COAH's authority to issue such restraints is unquestioned. COAH takes such action in order to preserve scarce resources "that will probably be essential to the satisfaction of [a municipality's] Mt. Laurel obligation." Hills, supra, 103 N.J. at 61. This power has been codified in COAH's procedural regulations. N.J.A.C. 5:91-11.1. Imposition of a scarce resource restraint thus preserves a municipality's ability to meet its constitutional obligation to provide for its fair share of low and moderate income housing during the period of COAH review of the municipal housing plan.

Further, as set forth at length in COAH's original January 19, 1988 decision, sewer capacity clearly represents a scarce resource in Clinton Township. COAH determined that Clinton will require (at a minimum) 64,000 gpd of capacity in order to meet its obligation; COAH is presently restraining allocation of under 15,000 gpd, which represents the only remaining capacity. The

movants have argued that the capacity is only available for use within the Annandale section of the Township, and that the site owned by Bi-County Development of Clinton, Inc., (which is presently included in Clinton's housing plan as the major site for Mt. Laurel housing) is not even located within that area, and cannot be serviced by that capacity. However, this argument misses the crucial point. COAH imposes a scarce resource restraint during the pendency of its mediation and review process, during which period a final municipal plan has yet to be approved by COAH. Until that approval (in the form of substantive certification) COAH will not know how a municipality will meet its obligation. This is especially important in the present case, where the suitability of the Bi-County site is being challenged before the OAL. It is possible that the Bi-County site may be deleted from the plan in whole or in part, and that the Annandale sewer capacity may still prove essential to Clinton's housing plan. COAH's decision to maintain the restraint is thus certainly reasonable.

Second, even if the restraint of sewer capacity could constitute a taking, it is COAH's determination that the present case does not present such an instance. As stated by the Appellate Division in the recent case of Tocco v. New Jersey Council on Affordable Housing, A-6301-88T2, July 3, 1990, the imposition for a reasonable time period of a restraint for public interest reasons does not constitute a temporary taking of a landowner's property. Absent "extraordinary delay," such actions pursuant to the police power and resulting in a decrease in the value of property are in-

cidents of ownership. The Tocco Court cited a number of cases upholding similar restraints. The Court then affirmed COAH's imposition of a scarce land restraint as to the Township of Cherry Hill. As in the present case, the restraint was imposed by COAH to preserve a scarce resource during the mediation and review process.

COAH believes that the length of the restraint in the present case cannot be characterized as extraordinary, given the particular circumstances of the Clinton mediation and review. The case has been marked by a number of issues that have necessitated either COAH or judicial decisions, and which have inevitably prolonged the process. Initially, a dispute arose over the proper plan for mediation and review; Clinton submitted two different plans, and COAH was required (after oral argument) to issue a decision setting forth the parameters for municipal amendment of a plan and determining which Clinton plan would be reviewed. Following a lengthy mediation, the parties reached an impasse over the suitability of the Bi-County site. COAH then transferred that issue to the OAL. However, the OAL process was twice delayed: first, as the result of motions filed by several parties contesting the scope of the issues transferred to the OAL, and second, by an attempt by a third party to gain access to the OAL process (which necessitated two separate resolutions by the Appellate Division). Finally, the issues actually transferred to the OAL are complex, and the OAL has been required to schedule the matter for numerous hearing days over an extended time period. Thus, while the restraint has continued

for over two years, it has been necessitated by the particular facts of the case.

Thus, it is COAH's determination that the requests for reconsideration must be denied. Sewer capacity still constitutes a scarce resource within Clinton, just as much as when COAH initially issued the restraint at issue. Hopefully, COAH will soon be in a position to grant or deny substantive certification to Clinton, thus resolving the matter once and for all.

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By: Terrence Reiss

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