

IN RE: SCOTCH PLAINS TOWNSHIP/)
WOODLAND ESTATES)

COUNCIL ON AFFORDABLE HOUSING

OPINION
DOCKET NO. COAH 92-407

This is a motion by the Woodland Estates Partnership ("Woodland"), an owner of property within Scotch Plains Township ("Township") upon which an inclusionary development of 51 units, including 8 low and moderate income units, is to be built. The property is included in Scotch Plains housing element and fair share plan, which was initially granted substantive certification by order of the Council on Affordable Housing ("Council" or "COAH") on May 16, 1990, and which was amended to include the Woodland Estates site on October 2, 1991. This motion was brought by Woodland to compel the Township to comply with the terms of COAH's grant of substantive certification and to zone the Woodland property for the inclusionary development in accord with COAH's substantive certification.

HISTORY OF THIS MATTER

This matter has a lengthy, complicated history, which should be reviewed prior to discussing Woodland's motion. The Township submitted an adopted housing element and fair share plan to the Council on May 7, 1987, which was deemed to be its date of petition for substantive certification. The Township's pre-credited need is 351 units of affordable housing, 58 units of which are indigenous need and 293 units of which are reallocated present need. Throughout the COAH process Scotch Plains has proposed to provide 175 units of its fair share obligation through a regional contribution agreement

and on April 18, 1988 the Council adopted a resolution approving an RCA with the City of Linden. However, the inclusionary component of the fair share plan has had a more tortuous progress and has included two periods of mediation.

At the end of the first mediation period on March 18, 1988 the Woodland Estates site was proposed to be developed for 80 units of housing, 16 of which would be for low and moderate income housing. The second mediation period occurred from March through August 1989 and resulted in a reduction of the Woodland property's proposed development through an agreement between the developer and Scotch Plains to 51 units of housing, 8 of which would be for low and moderate income. However, an adjoining property owner was an objector during the second mediation and the Woodland site was sent to the Office of Administrative Law (OAL) for a hearing as to the site's suitability on October 10, 1989. The City of Plainfield moved before the Council to intervene in the OAL hearing on October 26, 1990 and the Council allowed the intervention. An initial decision of the administrative law judge was issued on July 18, 1991 and held that the Woodland property was suitable for an inclusionary development of 51 units. This initial decision was adopted by the Council as its final decision on October 2, 1991.

However, on February 9, 1990, during the time the OAL hearing was proceeding, the Township moved before the Council to amend its fair share plan and for substantive certification of a new housing element and fair share plan. The motion sought to add another inclusionary site, Lambert's Mills, that when added to the other

sites would produce an excess of affordable units in Scotch Plains. The Council granted conditional substantive certification to Scotch Plains amended housing element and fair share plan on May 16, 1990. The resolution noted that the Woodland Site was at that time the subject of the site suitability hearing at the OAL and conditioned the grant of substantive certification on Scotch Plains' inclusion of the Woodland site in its housing element and fair share plan, if the Woodland site were ultimately found to be suitable. Also, when it granted conditional substantive certification to Scotch Plains the Council granted a durational adjustment pursuant to N.J.A.C. 5:92-8.6 and Scotch Plains was ordered to reserve sufficient sewer gallonage as it became available to provide for all inclusionary units and accompanying market units within the inclusionary developments designated in its housing element and fair share plan in compliance with N.J.A.C. 5:92-8.5(c). Clearly, this durational adjustment applied to the Woodland Estates property when it was included in the Township's housing element and fair share plan by the Council's resolution of October 2, 1991.

The Council's determination that the Woodland site was suitable for an inclusionary development of 51 units was appealed to the Appellate Division by the City of Plainfield on November 15, 1991. That appeal is pending. In its appeal Plainfield contests the suitability of the Woodland site and Plainfield has raised as a major issue concerning the site's suitability the lack of availability of sewer to the site. Both the Rahway Valley Sewer Authority and the Middlesex County Utility Authority, however, can

potentially provide sewer services to the site, but gaining access to either system presents problems to both the developer and Scotch Plains. The Council is defending its decision regarding suitability with regard to sewer access by relying upon the fact that the Council's grant of substantive certification to Scotch Plains contains a durational adjustment pursuant to N.J.A.C. 5:92-8.6, which resolves the sewer matter at least in relation to the determination of the suitability of the site.

THE MOTION

In its order of October 2, 1991 the Council directed the Township to amend its zoning ordinance within 45 days to include the Woodland property in its housing element and fair share plan. On November 16, 1992, Woodland filed a notice of motion with the Council to enforce its substantive certification order and to direct the Township to zone the Woodland property for 51 units of housing. In a certification in support of this motion, Robert H. Kraus, attorney for and a minority partner in Woodland, stated that the Township refused to zone the property until a developer's agreement was signed between Woodland and the Township. Although willing in principal to sign such an agreement, Kraus stated that Woodland would not sign the currently proposed agreement because of the Township's "refusal to identify a solution to sanitary sewer service." Kraus claimed that the property was within the jurisdiction of the Rahway Valley Sewer Authority and that the Township's refusal to identify a solution to the sewer problem had placed Woodland "in limbo."

In response to the Woodland motion Donald T. DiFrancesco, attorney for the Township, filed a certification in opposition to the relief sought by Woodland. DiFrancesco stated that the delay in the Township's zoning of the property was entirely due to Woodland's refusal to enter into the developer's agreement, which contained terms similar to those to which other Mount Laurel developers in Scotch Plains have agreed. ~~Examples~~ Examples of such terms included the following: Woodland would not agree to comply with the Township sanitary sewer connection fee ordinance with respect to its market units; Woodland did not wish to pay electrical fees for low and moderate income units, as other Mount Laurel developers had agreed to do; and Woodland would not agree to the proposed developer's agreement in which the Township agreed to make "reasonable efforts to secure sanitary sewer service for the development." Rather, according to DiFrancesco, Woodland insisted that the Township had an absolute obligation to provide sewer services and had proposed language for the developer's agreement that required the Township to "ensure that the developer can extend its proposed sanitary sewer line into the dry line now located in Short Hills Lane." DiFrancesco claimed that Woodland's proposed language would place a burden on the Township to secure a sanitary sewer easement over private property contiguous to Woodland to provide a connection for Woodland's sewer. DiFrancesco stated that the Township's exercise of condemnation proceedings should be discretionary, and utilized only after the developer attempts to obtain such an easement through appropriate private means. Finally, DiFrancesco stated that he thought the City

of Plainfield should be made to be a party in this matter, because of its objection to the Woodland site's suitability.

A supplemental certification was filed by Kraus in January 1993 in response to the DiFrancesco's certification. Kraus stated that Woodland was particularly at odds with the Township over paragraphs 10 and 11 of the proposed developer's agreement, which he noted ~~was~~ attached to the DeFrancesco certification. Paragraph 10 stated that the Township would take "reasonable steps to obtain adequate sewer capacity for some or all of Developer's property from the Raritan Valley Sewage Authority". Paragraph 11 of the proposed agreement stated that the Township would make reasonable efforts to "provide at its sole expense and at no cost to the developer adequate sewer capacity to service all the units the Developer has a right to construct on Developer's property." Further, the proposed agreement stated that the Township would "continue to make good faith efforts so the sanitary sewer capacity can be made available to the Developer." Woodland objected to these provisions, stated Kraus, because they did not resolve Woodland's problem with regard to sewer access. Rather, Kraus stated that the language in paragraphs 10 and 11 was vague and did not address the unresolved sewer issues such as how sewer access would be provided to the site, what steps would be required to provide access and what would be a reasonable timetable for providing access. These statements were made by Kraus in a letter to the Township dated April 16, 1992 written in response to the proposed developer's agreement. The letter was attached to Kraus' certification.

Also presented to the Council by Woodland was a certification dated January 5, 1993 of Carmin J. DeVito, the engineer for Woodland and husband of the one of its partners. DeVito stated that in order to take advantage of the natural grade of the property it would be "prudent" to split the property and provide for some sanitary sewer capacity through the Rahway Valley Sewer Authority and the remainder through the Plainfield sewer system. He pointed out that there was an existing dry sewer line on Short Hills Lane to which it would be feasible to run a sanitary sewer line from a corner of the Woodland property and through a portion of an adjoining property owned by Mr. and Mrs. C. Saccocci for a distance of approximately 100 feet. The only alternative route to connect sewer from Woodland to Short Hills Lane was, according to DeVito, unrealistic for an inclusionary development because it would require a sewer line of approximately 1400 feet and would involve the construction of a lift station, the cost of which would be prohibitive. DeVito further stated that Woodland had attempted to purchase an easement from the Saccoccis, but that they were not willing to agree to an easement because they were planning to sell their home. DeVito stated that Woodland would be willing to pay all costs if the Township were to condemn the Saccocci property for the sewer easement.

This matter was placed before the Council at its February 1993 monthly meeting and it was referred to a task force for consideration. After that date, members of the Council and COAH staff met with the parties to try to resolve this dispute. However, efforts to negotiate a settlement between the parties were ultimately

unsuccessful and, at the request of the Township, oral argument on this motion was scheduled for the Council's July 7, 1993 meeting. At that meeting Kraus appeared for Woodland, but the Township attorney was not able to appear. A written submission from the Township dated July 15, 1993 was presented to the Council. At the meeting Kraus confirmed the contents of the various certifications, answered ~~questions~~ questions of the Council members and requested the Council to order the Township to condemn a sanitary sewer easement across the Saccocci property so that Woodland might hook up with the Rahway Valley Sewage Authority at the Short Hills Lane location. He informed the Council that Woodland continued to attempt to negotiate with the Saccoccis to purchase either the property or a sewer easement on the property, but that these efforts had been unsuccessful to date. He again stated that Woodland was willing to pay the costs of the condemnation procedure and repeated Woodland's request that the Township zone the property in conformance with the Council's grant of substantive certification.

In its submission dated July 15, 1993 by DiFrancesco the Township restated its position that it was perfectly willing to rezone the Woodland property upon execution of a developer's agreement by all parties. DiFrancesco noted that the major stumbling block to a developer's agreement had been the request by Woodland that the Township condemn an easement on the Saccocci property. It was Scotch Plains' position that Woodland must use private means to obtain a sewer easement directly from the property owner and that the

Township would not undertake condemnation proceedings against one of its citizens.

Scotch Plains also stated that in furtherance of its obligation to pursue legal remedies to obtain sewer capacity from the Plainfield Joint Meeting and the City of Plainfield, it had instituted legal proceedings as far back as 1988 in order to obtain sewer capacity for the Woodland site ~~and~~ other sites in that general locality. The litigation had been active over the last year, a number of communities had joined the litigation, and mediation and settlement conferences were being held on a regular basis because a trial date was set for the fall of 1993.* The Township's position was that it had expended a great deal of time and money in pursuing this litigation against Plainfield, which would hopefully be resolved in by the end of 1993. DeFrancesco requested that the Council postpone any decision with regard to sewer services to Woodland until the conclusion of the litigation of the Township's suit with Plainfield. Finally, he stated that it was entirely unreasonable for the Council to expect the Township to rezone the property without the benefit of a signed developer's agreement, which has been signed by every other Mount Laurel developer in Scotch Plains.

Both parties to the motion appeared together before the Council at its October 6, 1993 meeting. Kraus and DeFrancesco restated their positions and answered questions from the members of

* DeFrancesco also stated that in furtherance of Scotch Plains' Mount Laurel obligation, the Township had also instituted litigation against the Rahway Valley Sewage Authority to obtain necessary sewer capacity to implement its fair share plan. That litigation had been resolved.

the Council. Kraus told the Council that the only relief he requested in his motion was that the Council enforce its grant of substantive certification and order Scotch Plains to zone the Woodland site for inclusionary development. DeFrancesco reported to the Council that the litigation between Scotch Plains and Plainfield had been transferred from the Union County Superior Court to the Office of Dispute Resolution within the Public Advocate's Office for mediation. He thought this transfer would result in a certain amount of delay and that a final resolution of the case would probably not come for about six months. However, he did believe that the procedure would bring about a settlement of the matter because the parties were close to agreement.

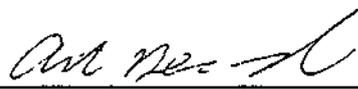
After the presentation of both parties at the October 6 meeting, the Council voted to order the Township of Scotch Plains to zone the subject property in accord with the Council's grant of substantive certification.

THE DECISION

It is the decision of the Council on Affordable Housing that the Township of Scotch Plains comply with the Council's grant of substantive certification dated October 2, 1991 and zone the Woodland site for an inclusionary development of 51 units, including 8 inclusionary units of low and moderate income housing, within the next 45 days. The Mount Laurel doctrine requires municipalities to remove excessive restrictions and exactions from zoning ordinances to foster affordable housing. See Southern Burlington Cty. N.A.A.C.P. vs. Mount Laurel, 92 N.J. 158, 238 to 260 (1983). This

zoning, therefore, should not be contingent upon the signing of a developer's agreement between Woodland and the Township, since the Council's grant of substantive certification requires that the Township zone the property for 51 units of housing, including 8 units of affordable housing. The Woodland site has been determined by the Council to be suitable. The Township agreed to zone the property for affordable housing initially in May 1990, if it were found to be suitable. The property should therefore be zoned to reflect the terms of substantive certification without regard to the proposed developer's agreement or the particulars of the site's access to sewer services, which the Council believes can be worked out by the parties after the zoning is in place.

The Township has also raised an issue with regard to the participation of the City of Plainfield in this motion. The Council does not believe it appropriate that Plainfield participate in this action. Plainfield was granted intervenor status by the Council for the limited purpose of contesting the suitability of the Woodland site. This proceeding has nothing to do with the site's suitability, which is assumed by the Council and all parties. There is, therefore, no reason for Plainfield to participate in this matter.



Arthur Bernard,
Executive Director,
Council on Affordable Housing

Date: November 10, 1993.