

RANDOLPH MOUNTAIN INDUSTRIAL)
COMPLEX)
VS.)
THE PLANNING BOARD OF THE)
TOWNSHIP OF RANDOLPH, and THE)
TOWNSHIP OF RANDOLPH)

NEW JERSEY
COUNCIL ON AFFORDABLE HOUSING

OPINION

DOCKET NUMBER: COAH 94-616

Randolph Township ("Randolph" or "the Township") was a court transfer town and received substantive certification from the Council on Affordable Housing ("COAH" or "the Council") on March 7, 1988. Randolph had a 1987 to 1993 pre-credited need of 452 units. As part of its certification, Randolph received 142 units of credit, for a final fair share of 310 units, of which 89 units is the Township's rehabilitation obligation with a balance of 221 units of new construction.

Randolph Mountain Industrial Complex ("Randolph Mountain"), is the owner of a site zoned for inclusionary development as part of Randolph's Fair Share Plan. Randolph Mountain made a motion based on its claim that the Township failed to comply with the terms of a mediation agreement entered into between Randolph Mountain and the Township, which was incorporated into the Township's Fair Share Plan. As a result of this failure to comply, Randolph Mountain claims that Randolph is in violation of its substantive certification and requests the following relief from the Council: revoking the Council's grant of substantive certification to Randolph Township's fair share plan; providing Randolph Mountain with a "builder's remedy" allowing Randolph Mountain to develop the property in accordance with the agreement entered into with the Township as part of its substantive certification; restraining the Township from applying the provisions of its recently adopted land development ordinance which, according to Randolph Mountain, contains provisions which are inconsistent with the Township's Fair Share Ordinance and in violation of the conditions of substantive certification; and requiring that Randolph Township approve what Randolph Mountain contends is an amendment to its original site plan approval.

The Council heard oral argument on Randolph Mountain's motion at its meeting of October 5, 1994 and requested that the parties attempt to negotiate a settlement to this matter. However, the parties were unable to do so. Also, in February, 1994 Randolph applied for interim substantive certification pursuant to N.J.A.C. 5:91-14. The Council delayed action on that application pending the outcome of Randolph Mountain's motion. The Council is acting on Randolph's request for interim substantive certification in conjunction with this decision on Randolph Mountain's motion, as explained below.

HISTORY OF THIS MATTER

On June 23, 1987 Randolph Township entered into a mediation agreement with Randolph Mountain. Paragraph 2 of the agreement stated:

Provided that the development conforms with the requirements of the Fair Share Ordinance appended to the Township's Housing Element and Fair Share Plan, ("Fair Share Ordinance"), the Applicant shall be permitted to construct 276 units on said 40 acres of which 55 units will be low and moderate income units, 27 of the units to be available to low income families and 28 of the units to be available to moderate income families.

The agreement further stated in paragraph 4 that Randolph Mountain would comply with all requirements set forth in the fair share ordinance of the Township, but that the planning board would be able to grant waivers in nine specific enumerated areas such as the number of units per structure, building lengths, set back requirements, the size of parking stalls and the steepness of road grades up to 15% on internal roads. Paragraph 8 of the mediated agreement stated:

All other requirements of the proposed Fair Share Ordinance and all other ordinances of the Township of Randolph shall govern the development of this project.

In the COAH report dated September 22, 1987 regarding Randolph's Housing Element and Fair Share Plan, the Randolph Mountain site was described on page 3 as follows:

This parcel is located adjacent to a light industrial park. This site is impacted by fresh-water wetlands, flood hazard areas and steep slopes. The developer of this site objected to the Randolph plan because it prohibited development above the 600 foot elevation point of the site. During mediation, the Township agreed to provide relief from this agreement, if necessary, in order to permit the developer to construct 55 low and moderate income units as part of a 20% set aside.

This report was circulated to all parties, who had a chance to comment on the report. The report was not challenged by the Township and this particular statement with regard to the Randolph Mountain site was not contradicted by the Township.

COAH granted substantive certification to Randolph Township on March 7, 1988. The COAH report was attached to the substantive certification resolution as Appendix B. With regard to the Randolph Mountain site, the grant of substantive certification stated in paragraph 2:

In the event that the property owner of record, or its agents, designees, assigns or any other person or entity who may develop the site, designated site #5 in the COAH report, which is attached hereto as Appendix B incorporated by reference herein, develops the property and such development incorporated by reference does not yield 55 affordable housing units, Randolph shall zone sufficient sites to accommodate the increment between the units actually constructed and those required to be constructed. ... Randolph shall notify COAH in writing of the progress of the development of site #5 within one year of the date of this resolution and every year after.

The grant of substantive certification ended with the following statement:

BE IT FURTHER RESOLVED that any changes in the facts upon which this certification is based, or any deviations from the terms and conditions of this certification, which affects Randolph Township's ability to provide for the realistic opportunity for its fair share of low and moderate income housing and which Randolph Township fails to remedy may render this certification null and void. ...

Randolph Township enacted an ordinance consistent with COAH's grant of substantive certification. Pursuant to its mediated agreement with Randolph Mountain, Randolph included the Randolph Mountain site in the R5 affordable housing zone, which allowed for development consistent with the mediation agreement, the COAH report and the substantive certification resolution. There is no mention of a steep slope provision in this ordinance. However, there is a statement consistent with the mediated agreement that road grades of up to 15% on internal private roads may be permitted in the R5 zone and that in no event shall road grades exceed 15%. Also, with regard to drainage on the sites the ordinance provides that storm water management shall be provided in accordance with the existing provisions of Township ordinances and policy.

On June 12, 1989 Randolph Mountain received site plan approval from the Randolph Township planning board for a development of 232 residential units, including 48 low and moderate

income housing units. Finding of Fact No. 24 of the resolution states:

24. Applicant has submitted testimony that it has received wetlands approvals and permits as required by the Army Corp. of Engineers as pertains to the proposed development. Applicant has also represented that it has submitted application to the New Jersey Department of Environmental Protection for a stream encroachment permit.

At paragraph 10 of the resolution, is the following finding:

10. Applicants' architect has testified, and the Board hereby concurs, that the construction of 276 multi-family residential units as originally proposed for the subject site is not feasible due to the presence of steep slopes, wetlands and various requirements of the Ordinances of the Township of Randolph.

Other paragraphs in the resolution that pertain to the presence of steep slopes and wetlands on the site are Findings of Fact No. 7, 13 and 14. The resolution comprehensively deals with the presence of steep slopes and wetlands on the site and approves the development proposed by Randolph Mountain fully acknowledging these environmental constraints. In fact, numerous waivers to provisions of Randolph's ordinances are included in the resolution in response to the presence of steep slopes and wetlands on the Randolph Mountain tract. There is no indication in the resolution or in any of the other papers submitted to the Council that Randolph Mountain was permitted to go above the 600 ft. contour line in order to achieve the desired number of units on its site.

The steep slope ordinance in existence in Randolph Township on June 12, 1989, Ordinance 33-38.1 et seq., was written in very general language. The Ordinance required that any proposed development containing slopes in excess of 15% be evaluated by the Randolph Planning Department in order to minimize any adverse impact of the development. The ordinance required the submission of an "administrative site plan" which would be reviewed by the Planning Department. Section 33-38.6 of the Ordinance required that the administrative site plan not be approved unless provisions were made to prevent excessive erosion or unstable conditions. Buildings that were to be built could not impede the flow of surface waters and had to be of "sound engineering design." Adequate protective measures were also required to be provided for downstream properties. Roads, drives and parking areas had to be designed so that "excessive erosion" or "hazardous circulation" conditions would not be created. Clearly, the ordinance was very broadly drafted and the standards used by the ordinance to judge the administrative site plans were equally general.

Because of the reduction from 55 to 48 affordable units to be provided on the Randolph Mountain site, as well as because of other alterations to the specifics of its certified fair share plan, Randolph received from the Council on December 5, 1990 an amendment to its fair share plan which accepted that the Randolph Mountain site would yield 48 units of affordable housing and added new components to the plan to offset the loss of the Randolph Mountain affordable units.

Sometime between 1989 and 1993, the DEPE delineated the on-site wetlands on the Randolph Mountain tract. The result of this analysis was that the wetlands were much larger than had been anticipated in 1989 and, therefore, the development for which Randolph Mountain had been granted preliminary and final site plan approval by Randolph Township was unbuildable. Therefore, on November 1, 1993 Randolph Mountain applied to amend the site plan approval to provide for the construction of 165 units of housing, including 140 market units and 25 low and moderate income units. The Randolph Planning Board, after two nights of testimony, concluded on May 23, 1994 that Randolph Mountain's application did not constitute an amendment to the 1989 approval but required substantial changes in the approval and, therefore, required a new application.

A consequence of this decision was that Randolph Township required its new steep slope ordinance, which was adopted in 1994 and which creates far more significant restrictions on the Randolph Mountain property than the prior steep slope ordinance, to be applicable to any new application for site plan approval by Randolph Mountain. The new steep slope ordinance, Ordinance 15-44.1 et seq., requires all slopes in excess of 10% to be evaluated pursuant to a site plan review. The ordinance establishes a maximum surface disturbance that may be caused by construction in areas of slopes 10% or greater. For example no more than 20% disturbance of steep slope areas is allowable in areas with slopes between 10% and 14.99%. No disturbance is allowable in slope areas of 25% or greater. The application of this steep slope criteria to Randolph Mountain's new proposed site plan would, according to Randolph Mountain, make it impossible to yield the 165 units with 25 low and moderate income units requested in its November 1993 site plan application. As a consequence of Randolph Township's actions with regard to its new proposed site plan, Randolph Mountain filed this motion with COAH in April 1994, which was then amended on May 2, 1994.

Finally, it should also be noted that Randolph Township's grant of substantive certification has expired and that the Township has filed for interim substantive certification. COAH is acting on the interim substantive certification request in conjunction with this decision on Randolph Mountain's motion. It is therefore expected that Randolph Township will be petitioning for substantive certification of its new cumulative obligation by March 6, 1995.

THE MOTION

Randolph Mountain initially moved before COAH on April 8, 1994 and subsequently amended its motion on May 2, 1994. Randolph Mountain sought the following relief in its motions:

1. Revoking the substantive certification granted by the Council to Randolph Township.
2. Providing Randolph Mountain with a "builder's remedy" because of Randolph Township's failure to comply with its mediated agreement with Randolph Mountain and the terms of substantive certification.
3. Restraining the application of Randolph Township's current land development ordinance to the site plan amendment application filed by Randolph Mountain on June 12, 1989 before the Randolph Planning Board.
4. Approving the amendment to the site plan as requested by the Randolph Mountain.

Randolph Mountain's motion was based upon certifications by its attorney, Robert A. Maren, Esq. In his first certification dated April 8, Maren recited the history of Randolph Mountain's participation in COAH's process. He attached a copy of the mediated agreement as well as a copy of a Randolph Township's fair share ordinance and the resolution of the Randolph Planning Board dated June 12, 1989 granting preliminary and final site plan approval to Randolph Mountain. Maren stated that if the present land development ordinance with its steep slope provisions were applied to the Randolph Mountain property, "development of the property in accordance with the COAH agreement ... will be impossible". He claimed that COAH has the jurisdiction to restrain the Randolph Planning Board from application of the land use ordinance and asks COAH to do so. In his second certification Maren claimed that the Township's intent not to comply with its commitments to Randolph Mountain is based on the Township's desire to purchase the property through "The Trust for Public Lands" and that this desire has motivated the Mayor and Council of Randolph to not act on a tree removal permit submitted by Randolph Mountain in May 1993. He based Randolph Mountain's request for a "builder's remedy" on Randolph's manifest intent not to comply with its housing element or fair share plan relative to the Randolph Mountain site.

The Township responded to Randolph Mountain's motion with a letter brief dated May 27, 1994 and with an attached affidavit of Richard Gulick, planning director of Randolph Township. It is the Township's position that Randolph Mountain's November 1993 application before the Planning Board was so substantially different from its approved 1989 plan that it would constitute a new application. Changes in the plan were evident in the following areas: building and road lay outs, drainage schemes, storm water

management plan, the number of both market and Mt. Laurel units, density changes, parking changes, and the amount of wetlands and open space. The Township noted that the Planning Board decision was made after two nights of testimony which concluded on May 23, 1994 and that at the hearing, Randolph Mountain "inexplicably ... failed to advance evidence sufficient to meet its burden of proof with respect to the new application falling short of evidential requirements. Nor did [Randolph Mountain] seek any variances or waivers."

The Township argued that the mediated agreement entered into between Randolph Mountain and the Township did not provide that the Township should insulate Randolph Mountain from changes in its land use ordinances other than those articulated in the agreement. For this the Township relied upon Paragraph 8 of the mediated agreement, which stated that:

8. All other requirements of the proposed Fair Share Ordinance and all other ordinances of the Township of Randolph shall govern the development of this project.

The Township claimed that it did not breach any of its duties as articulated in the mediated agreement, fair share ordinance or COAH's grant of substantive certification. Rather, the Township accused Randolph Mountain of seeking to evade its responsibilities by mounting an unmeritorious attack on the Township. The Township claimed that Maren's allegations regarding the Township's desire that the Randolph Mountain tract be purchased through the Trust for Public Land was "without basis in evidence". Finally, the Township claimed that COAH does not have the authority to impose a builder's remedy.

Richard Gulick, in his affidavit attached to the Township's letter brief, claimed that the agreement between Randolph Mountain and the Township mandated a 20% affordable housing set aside for the Randolph Mountain tract. He noted that the initial number included in the housing element and fair share plan for the site was 276 units with a set-aside of 55 low and moderate income units and that the number of units approved by the Township in 1989 was for 232 units with 48 of them low and moderate income units. There was a bonus rental credit of 8 units attributed to the rental component of the project. However, the current application before the Planning Board by Randolph Mountain for 165 units, with 25 units of low and moderate income housing represented only a 15% set aside, which Gulick claimed violated the mediated agreement. Gulick listed the numerous changes that the 1993 site plan amendment would make in the 1989 approved site plan and concluded that the Randolph Mountain application must be treated as a new application. Finally, Gulick suggested that the Council's proper concern should be "toward the development of affordable housing within Townships and not adjudicating lawsuits challenging routine local planning board decisions."

Attached to Gulick's affidavit was a legal opinion addressed to the Randolph Planning Board by the law firm of McGimpsey and Cafferty, which was the legal opinion upon which the Planning Board based its decision that the Randolph Mountain application should be treated as a new application, rather than as an amendment of its 1989 site plan approval. The opinion relied upon two cases, Lake Shore Estates v. Denville Township, 255 N.J. Super. 580 (App. Div. 1991) and Macedonian Orthodox Church v. The Planning Board of the Township of Randolph, 269 N.J. Super. 562 (App. Div. 1994) as the basis for its conclusion that the proper test with which to judge whether an application should be treated as an amendment or a new application is whether the application presents "substantial changes". In the Lake Shore Estates case the substantial change that required a new proposal was an addition of 28 acres to the original proposal. In the Macedonian Church case, the substantial changes that required a new application involved the Church's request to construct an all-purpose building. The prior approval had permitted a 5,000 square foot recreation hall and the new building included a 12,800 square foot community hall that was proposed to be located in a different spot on the site than the original one and that required increased parking. The advise concludes that "It is not a question of whether the changes are good or bad, the courts have clearly said that it simply mattered whether the changes are substantial". The Planning Board was advised that if the proposed changes affect fundamental elements of site plan review, then the Board should classify the changes as substantial and conclude that plan is a new one. If the changes do not affect the fundamental elements of site plan review, then they should classify the plan as an amendment.

On August 15, 1994, Maren responded to the Township's letter brief and certification. He objected to Gulick's conclusion that the mediation agreement and the substantive certification resolution required a 20% set aside on the Randolph Mountain site. He disputed Gulick's suggestion that the petitioner's application for an amended site plan violated the mediated agreement or represented a refusal by Randolph Mountain to comply with its contractual obligations. Maren stated

No one disputes that the site plan as approved cannot be built due to increased wetlands upon the site. Any impossibility to perform arises not from petitioner's discretion but from physical constraints arising subsequent to site plan approval and the zoning and development restrictions imposed by the Township.

He later stated that the conditions giving rise to the amended site plan application "cannot be considered anything but an 'Act of God'".

Maren claimed that no one anticipated that the wetlands delineation would change as significantly as it did from the original site plan approved in 1989. The increased wetlands

reduced the amount of land available for the proposed development and prohibited Randolph Mountain from complying with the specific terms of the mediated agreement as to the amount of affordable housing to be developed on the site. Maren argued that the amended site plan changes were not "substantial" as contemplated in the Macedonian Church or Lake Shore Estates cases because the new site plan application reflects a reduction in the density of the proposed development and a reduction in the negative impacts which result from the development of the tract. For example, the amount of open space would be increased in the new site plan application by approximately 45%, road-ways would be reduced by approximately 31%, parking spaces would be reduced by approximately 24%, and the number of buildings reduced by approximately 23%.

Maren claimed that the effect of the new land use ordinance on the amended site plan is "devastating": It could not be approved without numerous variances. He claimed that the provisions of paragraph 8 of the mediated agreement cited by Randolph Township "do not abrogate the statutory immunity from zoning changes provided by the MLUL at N.J.S.A. 40:55D-49 and 52, but rather insulate petitioner from zoning changes after the granting of preliminary and final site plan approval. That protection extended up through June 1994 in accordance with N.J.S.A. 40:55D-52(a). The new land use ordinance was adopted by Randolph in February 1994.

Maren stated that the basis for his request for a "builders remedy" was that the Planning Board was attempting to thwart the production of affordable housing through its denial of Randolph Mountain's site plan amendment. Finally, Maren claimed that the Township received the benefits of Randolph Mountain's mediated agreement, i.e. substantive certification "without accepting the burdens, that is, the actual construction of low and moderate income housing." He cited the Township's representation in mediation with respect to development above the 600 ft. contour line as a way to allow Randolph Mountain to construct the specified number of low and moderate income units contemplated in the mediated agreement. Based upon all of the above, Maren requested the Council to exercise its jurisdiction and afford Randolph Mountain a "builder's remedy".

DISCUSSION

At oral argument on October 5, 1994, members of the Council suggested to Randolph Mountain and to the Township that a possible way to resolve this dispute would be to build the units of low and moderate income housing which Randolph Mountain wished to create in its amended site plan application to Randolph's fair share plan as family rental housing and thereby receive a two for one rental bonus credit. See N.J.A.C. 5:93-5.13(d)1. In fact, the Council recommended that Randolph Mountain consider building 28 low and moderate income rental units that would be credited as 56 units. This would meet and exceed by one unit the number of low and moderate income units that was originally to be zoned on the

Randolph Mountain tract. The Township and Randolph Mountain failed to agree to such a compromise.

In its motion, Randolph Mountain requests four alternative types of relief: 1) revocation of Randolph Township's grant of substantive certification; 2) the granting of a builder's remedy to Randolph Mountain; 3) restraint of the application of the current land development ordinance to the Randolph Mountain site; and 4) approval of the amendment to Randolph Mountain's site plan. The basis for each of these requests is that Randolph Township has in some way failed to live up to the terms of either the mediated agreement with Randolph Mountain or COAH's grant of substantive certification. However, as the above history demonstrates, the major cause of Randolph Mountain's 1993 application before the Randolph Township Planning Board and, ultimately, before this Council is the fact that the wetland delineations on the Randolph Mountain site have increased beyond anything anticipated during the negotiation of the mediated agreement in 1988, COAH's grant of substantive certification or the granting to Randolph Mountain of final site plan approval in 1989. Randolph Mountain's attorney, for example, has characterized the increase in wetlands as "an Act of God" which precludes development of the project as contemplated in 1989.

Randolph Township, in fact, complied with its mediated agreement and with the terms of its substantive certification when it granted site plan approval to Randolph Mountain in 1989. However, there are two areas where Randolph Township today can be seen as violating its grant of substantive certification. One is in the enactment in 1994 of its new land use ordinance without COAH's foreknowledge or approval. The other area involves Randolph's promise during mediation to go above the 600 foot contour line, if necessary, to achieve the inclusionary project contemplated during the 1988 mediation. However, it is understood by the Council that neither of these would be an issue if the wetland delineation on the site had not increased.

Randolph's 1994 land use ordinance dramatically altered the treatment of steep slopes within the Township. Its impact on the Randolph Mountain site, according to Randolph Mountain's attorney, is "devastating". COAH takes the position that this new land use ordinance and its steep slope provisions cannot be applied to the Randolph Mountain site because in its grant of substantive certification COAH required Randolph to not deviate from the terms of substantive certification in any way that would adversely affect the affordable housing to be produced in the inclusionary sites in its fair share plan.

COAH's grant of substantive certification to Randolph ended with the following statement:

BE IT FURTHER RESOLVED that any changes in the facts upon which this certification is based, or any deviations from the terms and

conditions of this certification, which affects Randolph Township's ability to provide for the realistic opportunity for its fair share of low and moderate income housing and which Randolph Township fails to remedy may render this certification null and void. ...

Randolph's 1994 land use ordinance is the type of change or deviation contemplated in this paragraph. Randolph did not inform the Council of its new ordinance or the impact of this ordinance upon the inclusionary sites in its fair share plan prior to the passage of the ordinance. It was only upon the filing of this motion that COAH became aware of the ordinance. However, Randolph will be given an opportunity to remedy any adverse effect the 1994 ordinance might have on the Randolph Mountain site.

In the mediated agreement, Randolph Mountain and the Township agreed in paragraph 8 that "All of the requirements of the proposed fair share ordinance and all other ordinances of the Township of Randolph shall govern the development of this project". "All other ordinances" would include the land use ordinance in effect in 1989. Therefore, COAH will order Randolph Township to insulate Randolph Mountain from the application of the 1994 land use ordinance, based upon both the mediated agreement and the clear terms of COAH's substantial certification resolution, insofar as the 1994 ordinance limits the creation of the affordable housing contemplated for the Randolph Mountain site in Randolph's certified fair share plan.

Randolph Mountain further argues that its 1993 application before the Randolph Planning Board is really an amendment to its site plan approval and is not a new application. If it is an amendment, Randolph Mountain argues, the effect of the 1994 land use ordinance would not bear upon the project. Randolph Township argues that the "substantial change" test of the Macedonian Church and Lake Shore Estates cases dictates that Randolph Mountain's application is really a new application and therefore the new land use ordinance should apply. A reading of those cases convinces the Council that Randolph Township is correct in its reading of the cases.

The changes requested by Randolph Mountain are substantial and vary a great deal from the site plan that was approved in 1989. In fact, virtually every aspect of the site plan approved in 1989 is altered. The fact that the changes result in a decreased density and a decreased impact upon the site do not change this conclusion, as Randolph Mountain urges that it should. This is because the changes are so substantial. In the MLUL at N.J.S.A. 40:55D-45.6, a provision that admittedly only applies to a general development plan, a reduction in the number of residential units by no more than 15% or in the amount of non-residential floor space by no more than 15% does not violate the terms of a general development plan once it has been approved by the planning board. However, any reduction beyond 15% is subject

to the approval of the planning board. This provision is analogous to the situation presented by Randolph Mountain. The reduction in the number of units requested by Randolph Mountain is far beyond 15%. Therefore, the conclusion of the Randolph Township Planning Board that a new application is required is a reasonable one. If a new application is required, then the application of the currently existing land-development ordinance would normally follow. However, as stated above, COAH here holds that the 1994 land use ordinance cannot be applied to the Randolph Mountain site to bar the creation of the affordable housing contemplated in the Council's grant of substantive certification.

Now that the wetlands on its site have increased so dramatically, Randolph Mountain points to the Township's agreement to go above the 600 foot level during mediation in 1988. Randolph Mountain believes that the Township's refusal in 1993 with regard to Randolph Mountain's site plan amendment application to allow the developer to go above 600 feet is evidence of Randolph Township's breach of COAH's grant of substantive certification. However, it is reasonable for the Council to assume that the Township's agreement in mediation to go above the 600 foot line "if necessary" was predicated upon the mutual understanding of the Township and Randolph Mountain in 1988 with regard to the size of the wetlands on the site. Randolph Mountain now claims that in order to achieve an inclusionary development such as the one contemplated in the original grant of substantive certification, land above 600 foot contour line must be zoned R-5, since the wetlands have increased so dramatically since 1988. However, the Township states in its response to Randolph's Mountain's motion that at the two days of hearings on Randolph Mountain's amended site plan application, the developer "inexplicably" did not ask for any waivers or variances as part of its application. If this is true, it is then not clear whether Randolph Mountain did in fact ask the Township to go above the 600 foot contour line with regard to its application, since this would require a waiver or variance. Nor is it clear to the Council how far above the 600 foot line Randolph Mountain wishes to go or whether Randolph Township would grant the waivers or variances with regard to the 600 foot line necessary to now achieve the affordable housing originally planned for the site. Therefore, the record needs to be more fully developed on this issue.

Randolph Mountain also asks that COAH grant it a "builder's remedy" because of the failure of the Township to comply with the mediated agreement. However, a reading of the record in this matter demonstrates that Randolph Township has materially complied with the mediated agreement with Randolph Mountain in that it granted final site plan approval in 1989. Therefore, a builder's remedy is not appropriate. Nor is it clear what kind of a builder's remedy Randolph Mountain is requesting. The increased wetlands delineation, it admits, makes the achievement of its 1989 site plan impossible. And, the 1993 amended site plan may or may not be approvable under either the old or new land use ordinances. Randolph Mountain has stated that it is not approvable under the terms of the 1994 land use ordinance without major

variances, which it has not to date requested from Randolph. Nor has there been a showing before COAH that it is approvable under the terms of the old steep slope ordinance.

At oral argument before the Council, Randolph Mountain presented two site plans. One was the site plan which received final approval in 1989. This plan included 232 residential units, including 48 low and moderate income housing units. The second plan presented to the Council was the amended site plan presented to the Randolph Planning Board in November 1993. This site plan was created in response to the increased wetlands and included 140 market units with 25 low and moderate income units. This second site plan was rejected by the Randolph Planning Board because it was not an amendment, but was rather a new application. As such, it would have to conform to the new steep slope provisions of Randolph's 1994 land use ordinance. Randolph Mountain in its motion has requested this Council to order Randolph Township to approve this amended site plan. However, even with the Council's decision that the 1994 steep slope ordinance should not limit development of affordable housing on the site, there has been no demonstration before the Council that the prior steep slope ordinance, the one in existence in 1989, would permit either the development of the originally mediated 55 units or the amended site plan proposed by Randolph Mountain in 1993. A site suitability hearing may therefore be necessary before the Council can finally resolve this matter.

Randolph Township's approach to Randolph Mountain's 1993 site plan application was that the new land use ordinance would have to apply and, therefore, made no findings as to whether the proposed site plan could be accommodated within the terms of the prior steep slope ordinance. Therefore, this Council does not have sufficient information to determine whether Randolph Mountain's amended site plan conforms to the requirements of the old steep slope ordinance. Similarly, there has been virtually no demonstration to this Council of the suitability of the site to accommodate the new amended site plan. Because COAH can not rule as to the suitability of the 1993 site plan under even the 1989 steep slope criteria, further proofs will have to be presented.

Randolph Township has requested interim substantive certification from the Council, and the Council is granting that certification contemporaneously with this motion decision. Therefore, Randolph Township must file a new fair share plan by March 6, 1994. N.J.A.C. 5:93-5.11(b) will apply to the Randolph Mountain site with regard to the new fair share plan. This regulation states in part:

Sites zoned for inclusionary development in addressing the 1987-1993 housing obligation shall retain such zoning if: 1) the site was subject to an agreement pursuant to the Council's mediation process or part of a

negotiated settlement in court;... [Emphasis supplied]

However, the Randolph Mountain tract will clearly not be able to retain the zoning used to address the 1987 to 1993 housing obligation because of the new wetlands delineation.

Further, N.J.A.C. 5:93-5.11(c) states:

A municipality seeking to amend its plan to replace or delete a site used in addressing the 1987-1993 housing obligation shall follow the procedures set forth in N.J.A.C. 5:91-13.

N.J.A.C. 5:93-5.11(d) states:

A developer seeking an amendment to the density requirements of an inclusionary site shall follow the procedure set forth in N.J.A.C. 5:91-13. In submitting such requests, the developer shall demonstrate: (1) An ability to construct low and moderate income units within a defined period of time; and (2) A plan to address the low and moderate income units required of the site as a condition of substantive certification.

Both of these provisions* are available to the town and to the developer, respectively, with regard to the inclusion of the Randolph Mountain site in Randolph's new fair share plan.

The current Randolph Mountain motion before the Council does not meet the requirements of 5.11(d) in that there is no demonstration in the application currently before the Council of an ability to construct low and moderate income units within a defined period of time or a plan to address the 48 low and moderate income units required of the site, in the current Randolph fair share plan. This is because Randolph Mountain has not established the suitability of the amended site plan under the 1989 criteria.

The Decision

Based upon the above discussion and the Council's contemporaneous grant of interim substantive certification to Randolph Township, the Council directs Randolph Township to submit to the Council by March 6, 1994 a fair share plan which includes the Randolph Mountain site.

* It should also be noted that N.J.A.C. 5:93-5.3 and N.J.A.C. 93:5-6 also present criteria which must be addressed by Randolph Township relative to this use of the Randolph Mountain site to meet the cumulative 1987-1999 obligation.

The Council hereby grants Randolph Mountain objector status to the Randolph fair share plan, based upon its motions before the Council. As a result of these motions, the Council hereby directs the Township and Randolph Mountain to engage in mediation before a Council-appointed mediator for 60 days in an attempt to resolve their dispute relative to the site's capacity to provide at least the 48 low and moderate income units, as previously certified, under the ordinances in place at the time of COAH's grant of substantive certification. This mediation period will begin as soon as possible and will proceed at the same time as Randolph is submitting its new fair share plan and while the Council's normal procedures relative to that submission are ongoing. By accelerating mediation relative to the Randolph Mountain site, the Council hopes to more quickly achieve a resolution as to the role this site will play in Randolph's fair share plan.

One of the ground rules of the mediation, as discussed above, is that the requirements of Randolph's 1994 land use ordinance and its steep slope criteria may not be used to bar development of the previously certified affordable housing on the Randolph Mountain site. Therefore, the criteria of Randolph's land use ordinances from 1989 will in general apply.

If the parties fail to agree in mediation as to how the Randolph Mountain site may be included in Randolph's fair share plan to yield at least 48 units of affordable housing, the matter will be sent to the Office of Administrative Law (OAL) as a contested case for a determination as to the suitability of the site to provide at least 48 units of low and moderate income housing under the Council's standards using Randolph's land use ordinances in existence in 1989. The OAL hearing will also be used to resolve the issue as to whether Randolph Mountain may be permitted to go above the 600 foot contour line, based upon Randolph's representations in 1988 during mediation, as incorporated into the Council's grant of substantive certification. The Council will be guided by the OAL site suitability recommendations with regard to the ultimate inclusion of Randolph Mountain's site in Randolph's 1987-1999 fair share plan, if the parties are not able to reach agreement in mediation as to the issues currently in dispute.

All other relief requested by Randolph Mountain is hereby denied at this time.

Deanne R. Biale
Acting Chair

DATED: 2/1/95