New Jersey Council on
Affordable Housing

In re Township)
of Holmdel)

Docket No. COAH-96-801

Opinion

On April 16, 1992 Holmdel Township ("Holmdel"), Monmouth County, submitted a request to the Council on Affordable Housing ("COAH") in accordance with N.J.A.C. 5:91-15 et seq., N.J.A.C. 5:92-18.8 et seq. and N.J.A.C. 5:93-8.8 et seq. to retain development fees collected or imposed prior to December 13, 1990, pursuant to Holmdel Ordinance 84-7 and Ordinance 86-28. On August 31, 1995 COAH issued a COAH Report addressing Holmdel's retention request and the comments of all developers who commented upon Holmdel's retention application. A 14 day comment period was established for all parties affected by the COAH Report. On January 10, 1996, COAH Report II was issued dealing with the comments submitted to the initial COAH Report. Also, on January 10, 1996 at its regularly scheduled meeting the reasoning and conclusions of the COAH Report and the COAH Report II were adopted by COAH as its decision relative to Holmdel Township's April 16, 1992 application to retain development fees collected or imposed prior to December 13, 1990. That decision was memorialized by a COAH Resolution of Memorialization dated February 7, 1996.

On February 26, 1996, Holmdel, through its attorney, filed a Notice of Motion with a Brief and supporting Certification "To Clarify and, To The Extent Necessary, To Reconsider" COAH's decision of January 10, 1996 relative to Holmdel's development fee retention request. The Motion was prompted in part and generally directed toward COAH's decision to transfer to the Office of Administrative Law (OAL) several disputes between Holmdel and various developers affected by Holmdel's retention request. COAH's January 10, 1996 decision transferred to the OAL, disputes between Holmdel and the following four developers: Ortolani, Acquaviva, Highlander and Holmdel Plaza Shopping Center ("Holmdel Plaza").

Holmdel's motion was responded to by attorneys for Acquaviva, who filed a brief and certification in opposition to the motion on March 18, 1996, and Holmdel Plaza, which filed two briefs in opposition dated March 13, 1996 and April 9, 1996. A letter of comment dated March 18, 1996 was submitted by Thomas F. Carol III, Esq., who represents various other developers affected by the Holmdel retention request. On March 27, 1996 a reply brief with certification was filed by Holmdel.

COAH's jurisdiction to entertain this motion has been questioned by Holmdel Plaza and Aquaviva, citing N.J.A.C. 5:91-12.1, which provides in part that

> ...when a matter becomes a contested case, motions shall generally be made to the Office of Administrative Law pursuant to N.J.A.C. 1:1-12.

It is true that Holmdel's motion involves issues relevant to contested cases that have been sent to the OAL for disposition. However, N.J.A.C. 5:91-12.1 states that motions involving a contested case shall "generally" be made to the OAL. This rule does not deprive COAH of jurisdiction to hear the motion, but simply provides a general rule for the efficient administration of contested cases. Therefore, COAH will address Holmdel's motion.

The relief requested in Holmdel's motion to clarify and reconsider COAH's decision with regard to Holmdel's retention of development fees can be separated into three parts: relief involving the graduated set-aside zones, relief involving Holmdel Plaza and an application for a protective order. This opinion will be subdivided into these three categories and will address the requests by Holmdel and the developers' comments, as appropriate to each of the separate topics.

THE GRADUATED SETASIDE ZONES

Holmdel raises three issues with regard to the graduated setaside zones. It first asks COAH to reconsider its determination relative to Holmdel's assertion that the development fees imposed and collected in the graduated setaside zones do not exceed the standards of N.J.A.C. 5:93-8.10(a)and (b). If COAH would reconsider its decision relative to this point, Holmdel claims the need for a hearing with regard to the graduated setaside zones would be eliminated.

Holmdel's claim that its imposed and collected development fees in the graduated setaside zones comply with the standards of N.J.A.C. 5:93-8.10(a) and (b) was addressed at pages 10 and 11 of the COAH Report II. Holmdel, in response to the COAH Report, had submitted a certification and chart that it claimed established that it could have imposed and collected much greater development fees than it did and still be in compliance with the standards of N.J.A.C. 5:93-8.10(a)and (b). However, COAH responded in COAH Report II at pages 10 and 11 that there was not sufficient information accompanying Holmdel's charts, especially with regard to the chart's assumed base density for the graduated setaside zones for COAH to accurately assess Holmdel's contention. The COAH Report II went on to state: "Clearly, however, the proper base density for these zones are the densities approved for future collection by COAH on November 10, 1993. In other words, bonus

fees may be collected pursuant to N.J.A.C. 5:93-8.10(b) for all affordable units built in excess of the uniform 20 percent setaside in the zones".

It is in response to this statement from the COAH Report II that Holmdel in its motion submits a certification and brief establishing that the assumed base density in the chart for its claim that it meets the standards of N.J.A.C. 5:93-8.10(a)and (b)in the graduated setaside zones is a base density of 1.2 dwelling units per acre. This is the base density that was provided by the zoning of the subject properties prior to the establishment of the graduated setaside zones. However, COAH concluded in its January 10, 1996 decision that the proper base density for these zones is the density approved by COAH for the future collection on November 10, 1993, a base density of 4.4 units per acre. To counter this conclusion Holmdel in it motion and certification states that its application to COAH in 1993 for an approval of a base density of 4.4 units in the graduated setaside zones and COAH's subsequent approval of that base density was "a mistake". Holmdel provides no factual basis for this assertion, however.

Holmdel's second point with regard to the graduated setaside zones is that a prior decision of COAH concerning Middletown Township's application for the retention of development fees provides precedent for a COAH decision allowing Holmdel to treat the fees established in the graduated setaside zones as the equivalent to the internal rate of subsidization in compliance with N.J.A.C. 5:93-8.10(c). Holmdel claims that COAH's January 10 decision regarding the graduated setaside zones conflicts with its prior decision in Middletown Township. This claim was previously raised by Holmdel in response to the COAH Report and was addressed in the COAH Report II at pages 11 and 12, which stated that "...the Middletown and Holmdel decisions pertaining to COAH's interpretation of N.J.A.C. 5:93-8.10 are identical." COAH arrived at this conclusion because the developer in Middletown and the developers in Holmdel have argued that they have signed developer agreements under duress. The portion of COAH's Middletown report quoted by Holmdel as conflicting with COAH's decision relative to Holmdel, states that if the development agreement signed by the developer in Middletown had not been the product of duress, the payment of the fee set out in the ordinance and incorporated into the developer agreement would be considered by COAH as equivalent to the internal rate of subsidization and would, thereby, comply with the requirements of N.J.A.C. 5:93-8.10(c). However, such was not the case in Middletown because the developer alleged duress. It is not the case in Holmdel because the developers have alleged duress and also have alleged that the fees were in excess of the benefit. Therefore, the two COAH decisions do not conflict.

Holmdel's third request with regard to the graduated setaside zone is an application to COAH to "...make sure its decision is not interpreted to preclude the Administrative Law

Judge from concluding that the comparable offsetting benefit test is satisfied if the Court finds that the incentives to pay a fee created by the ordinance were sufficient to induce them to select a 20 percent set-aside option involving a fee over the corresponding set-aside without a fee." This application involves the provision of N.J.A.C. 5:93-8.10(d) which states that no voluntary agreement "may provide for voluntary developer fee without also providing for comparable off-setting incentive." Developers have alleged that Holmdel did not provide such a comparable off-setting incentive in its developer agreements or ordinance, as well as also arguing that the developer agreements were not voluntary.

With regard to Holmdel's three requests involving the graduated set aside zones, COAH does not believe that it is at this time necessary or wise to reconsider its January 10 decision prior to the ordered fact finding hearing at the OAL. Holmdel in its motion has essentially reiterated arguments it has made previously to COAH in response to the COAH Report; arguments which have been addressed in the COAH Report II and incorporated into COAH's January 10 decision. COAH has decided and, based upon Holmdel's motion and the developers' responses to that motion, affirms its decision that there are outstanding material factual issues relative to the graduated setaside zones that must be determined by a hearing at the OAL. While COAH may sympathize with Holmdel's desire not to go through the expense of an OAL hearing, there are outstanding material issues of fact that require the establishment of a record in an adversarial setting. For example, Holmdel states in its motion that its 1993 application to COAH for approval of an ordinance providing for the future collection of development fees which incorporated a base density of 4.4 units per acre in the graduated setaside zones was "a mistake". This assertion raises material factual issues which must be further developed at the OAL in conjunction with the developers' outstanding claims of duress, which are also clearly material to COAH's determination and, therefore, necessitate a fact finding hearing at the OAL.

With regard to Holmdel's third point, COAH does not intend to in any way limit the Administrative Law Judge in his or her conduct of the hearings in this matter. COAH forwarded these matters to the OAL so that a full and complete factual record may be established to support a final determination in this matter. As such, COAH expects that all parties will be able to fully develop a factual record to support their positions. COAH's transfer does not preclude the Administrative Law Judge from any initial conclusions that are based upon the factual record, once it has been established.

HOLMDEL PLAZA

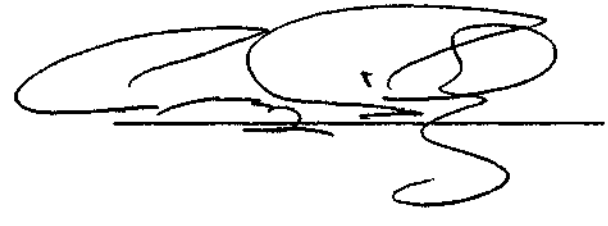
Holmdel's motion brief, reply brief and certifications state that the fees paid by Holmdel Plaza pursuant to the bonus option in the non-residential zone do not "...exceed the benefit

secured pursuant to the bonus option in that zone" and that, therefore, there is no need for an OAL hearing relative to Holmdel Plaza. Holmdel Plaza has contested Holmdel's assertions that the fees it paid are justified by the benefits it secured. A reading of Holmdel's and Holmdel Plaza's papers submitted in conjunction with the motion establishes that there are outstanding factual disputes between Holmdel and Holmdel Plaza that are material to COAH's decision. Only a factual hearing at the OAL can resolve the material factual disputes between these two parties. Therefore, COAH affirms its decision to transfer this dispute to the OAL for the establishment of a full and complete factual record.

PROTECTIVE ORDER

Holmdel has also moved before COAH for a protective order "similar to those used by the courts" so that "COAH does not place Holmdel in a position where it has to institute suit to secure the monies to which it is ultimately entitled." An example of a protective order is attached to Holmdel's brief in support of its motion. The protective order was issued on June 22, 1992 in the case of Ortolani v. Township of Holmdel, Superior Court, Law Division, Docket No. MON-L-3604-92. This order, which enjoined Holmdel from the prospective collection of development fees from Ortolani pending further decision by the Court, also directed that "...Ortolani shall pay to the Clerk of the Superior Court of New Jersey, pursuant to R. 4:57-2(a), a sum of money equal to 2.2% of the sales price of any market dwelling unit at the Fox Chase building projects...".

Holmdel does not provide any statutory or rule citation that establishes COAH's ability to issue the requested protective order. COAH has never in the past issued such a protective order. The Fair Housing Act does not provide for the issuance of protective orders, nor do its rules. It is not in COAH's power to order the developers here to pay development fees that may be due to Holmdel to the Clerk of the Superior Court. Nor does COAH have any mechanism in place whereby it may accept and hold in escrow development fees from the developers. Therefore, because there is no basis in the Fair Housing Act or COAH's rules for the issuance of such a protective order, Holmdel's application for a protective order must be denied.



Date: May 3, 1996