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IN THE MATTER OF) COUNCIL ON AFFORDABLE HOUSING
 THE TOWNSHIP OF CHATHAM) DOCKET NO. 95-713

OPINION

The Township of Chatham, Morris county, made a motion to the Council on Affordable Housing (COAH) on November 5, 1995 requesting the imposition of a scarce resource order. The proposed order would require that sewer capacity be reserved for the Giralda Farms Corporate Office Development, a proposed office park which is to be developed by Prudential Insurance Company of America (Prudential). This would effectuate the terms of a developer agreement between the township and Prudential. The agreement includes a developer contribution from Prudential which will fund a proposed eight-unit regional contribution agreement (RCA) and other affordable housing activities in the township. According to Chatham Township, the scarce resource order is necessary to reserve sewer capacity for Prudential's development and guarantee implementation of the township's fair share plan. The motion was supported by Prudential and opposed by Raymon Tublitz, another developer in Chatham. The motion was originally scheduled to be heard in December 1995, but the township on several occasions requested that the motion be postponed until substantive certification action was imminent. Oral argument was ultimately held on the motion at COAH's monthly meeting of December 4, 1996. The motion was denied by COAH at its January 8, 1997 meeting. This decision sets forth the reasons for that denial.

BACKGROUND

Judgment of Repose

Chatham Township received a Judgment of Compliance and Repose on August 20, 1986. In its judgment, the court established the township's fair share obligation at 200 units, all inclusionary. As part of the judgment of repose, the township received credit for 75 units of affordable housing constructed in the Chatham Glen development. To address the remaining obligation, the township rezoned the Giralda Farms site to permit the construction of one million square feet of office space with a requirement for 125 units of low and moderate income housing on a portion of the 165-acre site.

At the time the judgment was entered, the Giralda Farms property was not within an existing sewer service area and treatment capacity was not available. The township and Prudential were to advise the court on progress toward a solution of the sewer issue. If sewer was not available to the Prudential site within

three years of the date of the judgment of repose, the township, Prudential or the court would be able to seek, by motion, to provide an alternative site or sites to address the 125 affordable units.

To implement the provisions of the judgment of repose, the township submitted a wastewater management plan to the New Jersey Department of Environmental Protection (DEP) for approval. The proposed plan included an increase in the capacity of Chatham Township's sewage treatment plant (Water Pollution Control Facility No. 1 or WPC No. 1) from 750,000 gallons per day (gpd) to one million gpd and an expansion of the sewer service area to include the Giralda Farms site. Prudential also entered into an agreement with the township to undertake an inflow and infiltration program on the township's sewer collection system in order to provide increased capacity for affordable housing purposes.

The proposed plan was denied by DEP in September 1989 due, in part, to concerns over its impact on the Great Swamp National Wildlife Refuge. As part of the decision, the Commissioner of DEP issued an administrative order creating the Great Swamp Advisory Committee.

1990 Scarce Resource Order

On August 20, 1990, the Honorable Stephen Skillman, J.S.C., approved a motion by Prudential requesting the imposition of a scarce resource order on the township. Prudential contended that its motion was prompted by its concern that increased sewer capacity resulting from its inflow and infiltration program would be allocated to other developments in the township. Pursuant to the order, Chatham Township was restrained from allocating sewage treatment capacity to any party other than Prudential until sufficient capacity was made available to complete both the affordable housing and office park components of the Giralda Farms development.

The 1990 order also granted intervenor status on matters related to the allocation of sewage capacity to Raymon Tublitz, the New Jersey Conservation Foundation, the Environmental Defense Fund, Arthur Heyl and Heyl Roses, Inc., Helen and Arthur Fenske and DEP. The intervenors were accorded the right to participate in any further court applications concerning the allocation of sewage capacity.

In addition, the township was also directed to reexamine its fair share plan and advise the court on how it intended to comply with its judgment of repose and address its fair share obligation. According to the court, this could include the filing of an amended wastewater management plan to service the Prudential site or finding other sites to meet its obligation. After

conducting its analysis, the township entered into a revised agreement with Prudential to submit a new wastewater management plan to DEP which included the Prudential site.

1993 DEP Approval

DEP approved the new wastewater management plan in August 1993. However, the approval contained conditions, including a down scaling of the Prudential development from one million to 750,000 square feet, a contribution from Prudential to assist in the maintenance of the Great Swamp Wildlife Refuge and a requirement that Prudential satisfy the township's remaining affordable housing obligation.

With the reduction of the office space to 750,000 square feet, the proposed Giralda Farms development will require 94,000 gallons per day (gpd) in sewer capacity. The township estimates that approximately 50,000 gpd remain in the plant's "authorized" 750,000 gpd capacity. The approval of the wastewater management plan by DEP authorizes the expansion of WPC No. 1 by an additional 250,000 gpd to one million gpd. This is to be accomplished in two phases. The first phase is an expansion of the plant by 150,000 gpd to 900,000 gpd. According to the DEP approval, priority in allocating the first 150,000 gpd was to be given to Prudential and other affordable housing activities pursuant to the court's 1990 scarce resource order.

The second phase of the expansion of WPC No. 1 will increase plant capacity by 100,000 gpd to one million gpd. This capacity was to be released upon completion of the development and implementation of a township stormwater management plan, septic management plan, water conservation plan and the operation of water quality monitoring stations on the Black Brook.

1994 Developer Agreement

In December 1994, the township and Prudential entered into an agreement to remove Prudential's obligation to construct 125 units of affordable housing on the Giralda Farms site. Instead, Prudential agreed to pay the township a cash contribution of up to \$180,000 to fund an RCA or assist Chatham Township in the purchase of a site for affordable housing. In the alternative, Prudential agreed to donate a portion of the Giralda Farms site to the township in lieu of making the contribution. The transfer of ownership would be at the option of the township.

In addition, Prudential agreed to pay the township \$1.5 million in sewer reservation fees in installments of \$100,000 per year for up to 15 years. The township will be permitted to use these funds at its discretion, including affordable housing

activities. Prudential has agreed to contribute \$1 million for stream monitoring and other environmental mitigation. In return, the township will zone the Giralda Farms site for 750,000 square feet of office development.

As part of the agreement the township was to file a motion with Judge Skillman to transfer jurisdiction to COAH for approval of a new fair share plan addressing the township's 1987-1999 obligation. In addition, the township was to request that the court maintain its August 1990 scarce resource order. If the court vacated its order, Chatham Township agreed to pursue a scarce resource order from COAH.

Prior to the filing of the township's motion, Tublitz filed a motion with the Court seeking the replacement of the Giralda Farms site with its site. This motion was denied. On January 24, 1995, Judge Skillman granted Chatham's request and transferred jurisdiction to COAH. He also vacated the scarce resource order. In the December 1994 hearing on the motion, Judge Skillman noted that circumstances had "changed rather significantly" since the 1990 scarce resource order was entered. Specifically, Judge Skillman stated that:

As far as the scarce resource order is concerned, it was entered under [a] particular situation that existed in 1990 where there seemed to be a need for Prudential to have a very substantial allocation of sewage in order to complete its project and an order to provide as of then 125 units of lower...income housing. The situation has changed since then...the size of Prudential's project is smaller. The apparent Mount Laurel obligation is less. DEP has indicated at least a tentative approval of an expansion of sewage capacity for the municipality, as of now, in two phases. [Transcript of Superior Court Hearing; December 19, 1994].

Proposed Fair Share Plan

Pursuant to the transfer order, Chatham Township petitioned COAH for substantive certification of a plan which addresses its 12-year cumulative obligation on May 11, 1995. The township's 1987-1999 precredited need is 89 units, including a rehabilitation obligation of six units and a new construction obligation of 83 units. COAH received no objections to the plan.

Chatham Township has requested 75 units of credit from the affordable units constructed as part of the Chatham Glen development. With these credits, the township's calculated need

would be reduced to 14 units, including a rehabilitation obligation of six units and a new construction obligation of eight units.

To address its obligation, the township proposed an eight-unit RCA with Newark and requested credit for an existing group home containing six bedrooms and six rental bonus credits.

Although Tublitz did not file an objection to the township's fair share plan, he submitted a letter to COAH indicating his status as an intervenor on sewer issues and his intent to object to the township's request for a scarce resource order.

MOTION

Chatham Township

Chatham Township's motion requests that COAH issue a scarce resource order restraining the township from releasing existing sewer capacity until such time as the township has obtained the necessary approvals from the New Jersey Department of Environmental Protection (DEP) to sewer the Prudential property. In support of its motion, Chatham essentially relies upon the history of Prudential's involvement in Chatham's affordable housing program and Prudential's efforts to obtain sewer to its site. Chatham notes that Prudential has agreed to fund the eight-unit, \$160,000 RCA and that the other funds Prudential has agreed to pay to the township may be used to pay for future affordable housing compliance activity. In return, Chatham agreed to "vigorously pursue the issuance of both the substantive certification and the COAH Scarce Resource Order."

Prudential

Prudential filed papers with COAH in support of the scarce resource restraint in November 1995. In the papers is the copy of the 1994 agreement in which Prudential agreed to fund Chatham's present housing obligation and provide monies for possible future affordable housing obligations or for other purposes.

Prudential supports the imposition of restraints by citing the long history of its involvement with Chatham since 1978 with both the provision of sewer and the provision of affordable housing, which it states are intertwined. Prudential notes that it undertook various actions to develop its site that was to include 125 affordable units. Both Prudential and Chatham worked together to upgrade and expand sewer capacity at considerable expense to Prudential. Prudential expended \$500,000 for the infiltration and

inflow program which resulted in the creation of additional capacity. A February 1988 letter agreement states that Prudential is entitled to the use of any additional sewage flow created as a result of the remedial work. In 1989, Chatham submitted a wastewater management plan to DEP that was subsequently rejected. The DEP rejection placed expansion of the sewer plant in jeopardy and Prudential applied to the court for a Scarce Resource Order granting Prudential priority to sewer capacity for Giralda Farms and the affordable housing units. The Order was granted in 1990. Thereafter, Prudential and Chatham entered into an agreement in 1991 that included revisions to the affordable housing plan: 100 units would be transferred in an RCA and Prudential would construct 25 units; Prudential would also donate a 23 acre parcel for parkland to the township.

The wastewater management plan was hotly contested and DEP proposed that the township, Prudential and environmental leaders reach a compromise. The township chose not to participate, but DEP, Prudential and environmental leaders reached an agreement in which the development was reduced to 750,000 square feet and Prudential would contribute \$1 million to DEP for studies to protect the Great Swamp. "It was also contemplated that Prudential would sign an agreement with NJDEP to make a \$1 million contribution for environmental monitoring purposes." In 1993, DEP granted approval but to a substantially different plan that was in two phases. Due to these substantial modifications, Prudential and Chatham entered into a new agreement in December 1994.

According to Prudential's papers, DEP approval is "an essential element in the request for a scarce resource order" and is needed until the conditions in Phase II are met. "The issuance of a scarce resource order until Phase II expansion of W/CP#1 is the only means which can assure sufficient capacity for affordable housing and the proposed corporate office park." The Phase II expansion is needed to assure sufficient capacity for the affordable housing plan. "The issuance of a scarce resource order is a condition precedent to Prudential's obligations under the Sewer Agreement."

COAH's issuance of a scarce resource order, Prudential argues, would recognize the long-standing cooperation between Prudential and Chatham. Prudential is committed to funding Chatham's affordable housing obligation in addition to providing \$1.5 million in sewer reservation fees and from \$3 million to \$4.5 million additional in connection fees for future affordable housing obligations.

Prudential requests that COAH grant the scarce resource order until Phase II conditions are met.

Raymon Tublitz

Tublitz filed papers in opposition to Chatham's motion for scarce resource restraints in November 1995. Tublitz has a 29-acre tract in Chatham Township that is under contract to Sterling Properties. Sterling Properties proposes to build 145 townhouses and needs gallorage from the currently available sewer capacity.

Tublitz alleges that Chatham brings this motion because the township is contractually obligated to do so because of its agreement with Prudential. He further states that the agreement provides for affordable housing contributions by Prudential but Tublitz notes that the agreement precludes Prudential from using existing sewerage treatment capacity for affordable housing. Only additional capacity may be used. He notes that this motion deals with existing capacity which is not related to affordable housing activity. Therefore, Chatham cannot meet the test that the scarce resource order is essential to the production of affordable housing. Furthermore, Chatham's housing plan does not rely on existing sewer capacity. The Prudential development is dependent upon DEP's approval of a discharge allocation certification for increased capacity. Tublitz is asking to use the existing capacity now. Further, he will fund the Chatham RCA now or will bond for its future funding should DEP not issue the DAC.

Finally, Tublitz states that facts have changed, that Prudential is not building 125 units and that there will be no need for sewer capacity. The development of the Prudential site is only dependent upon additional capacity. "Yet COAH is being asked to constrain others from using available sewerage treatment capacity that the Prudential complex cannot and will not ever use, thus preventing developers like Tublitz from moving forward with more modest developments and immediately providing funds to fully cover the RCA."

Tublitz states that COAH should not reinstate the scarce resource order for the following reasons:

1. COAH's jurisdiction over scarce resources is limited to such resources and restraints which are available to the production of affordable housing.
2. Restraints on the use of Chatham's existing sewerage treatment capacity is neither necessary nor essential to the satisfaction of Chatham's affordable housing obligations.
3. Chatham's existing sewerage treatment capacity could be used to provide funds for satisfaction of Chatham's fair share obligation.

4. The imposition of scarce resource restraints in this context would create a taking in violation of the constitution of the United States and the State of New Jersey and cause damage to a private party.

Tublitz asks that COAH deny the motion. In the alternative, he states that a scarce resource order should permit the release of existing sewer capacity only to developers who provide a guarantee that money will be available for the Chatham RCA should the DAC not be issued or should the Prudential development fail.

DECISION

Chatham Township has a 12-year cumulative obligation after credits of eight units. Chatham Township intends to address this obligation via an RCA with the City of Newark, which has been approved by COAH. Chatham Township has agreed to bond for the RCA.

The facts that were in place when Judge Skillman ordered the original scarce resource constraint are not in place today. The provision of affordable housing on the Prudential site is not included in the Chatham plan currently before COAH. The court acknowledged this change in fact and vacated the order effective May 15, 1995. Since that date, no scarce resource restraint has been in place.

In Morris County Fair Housing Council, et al. v. Boonton Township, et al., COAH docket No. 86-2, decided November 3, 1986, COAH developed criteria for preserving scarce resources. These criteria included a finding that the use of a scarce resource would have a substantial adverse impact on the ability of a municipality to provide lower income housing in the future. COAH stated that such a restraint should be imposed only when necessary to preserve resources which may otherwise be exhausted and which are necessary for the satisfaction of the constitutional obligation. Such is not the case here. The Prudential site for which the scarce resource restraint is sought will produce \$160,000 to pay for Chatham's RCA. However, Chatham has also agreed to bond for this RCA. Therefore, the development of the site is not necessary to Chatham's affordable housing obligation.

Moreover, constraining existing capacity has no effect on Chatham's affordable housing obligation. Prudential's involvement with Chatham's affordable housing obligation is connected to the provision of additional capacity not existing capacity. As such, placing a constraint on existing capacity is not necessary to preserve a resource which is necessary to meet a constitutional obligation.

COAH is very sensitive to the efforts that Prudential has expended in the past in aiding Chatham to meet its prior affordable housing obligation and COAH commends such efforts. However, the focus of a scarce resource constraint must be on the resource necessary to provide the affordable housing and that is not the case in this matter. Therefore, this motion must be denied.

Any reference to a COAH or court-ordered scarce resource constraint should be deleted from Chatham Township's fair share ordinances.

A handwritten signature in cursive script, appearing to read "Genee Lewis", is written over a solid horizontal line.

DATED: 2/5/97