

WINCHESTER CONSTRUCTION)
COMPANY, INC.)
v.)
THE BOROUGH OF ROSELAND)

COUNCIL ON AFFORDABLE
HOUSING

COAH #97-904

OPINION

In this motion, filed on June 9, 1997, Winchester Construction Company ("Winchester"), a developer of an inclusionary development in Roseland Borough ("Roseland"), asks the New Jersey Council on Affordable Housing ("the Council" or "COAH") to (a) deny Roseland's petition for substantive certification; (b) eliminate cost generating provisions from Roseland's affordable housing ordinances and planning board resolution that pertain to Winchester; (c) permit a stacked flat design of the affordable units to be built by Winchester; (d) permit access onto Passaic and Harrison Avenues and (e) delete conditions 1, 2, 3, 5, 6, 8, 9, 10, 12, 13, 22 and 25 from Roseland's site plan resolution, all on an expedited basis. Absent the elimination of all cost generating requirements, Winchester alternatively asks that COAH grant a builder's remedy for a higher density in an apartment or townhouse configuration or for accelerated denial of Roseland's petition.

This motion was orally argued at COAH's September 3, 1997 monthly meeting and was decided at COAH's November 5, 1997 meeting. This opinion memorializes that decision.

BACKGROUND

Roseland was sued for exclusionary zoning in 1985 and the matter was subsequently transferred to COAH. There were three objectors to the first round plan: the Public Advocate, Alan C. Green and Winchester. Mediation occurred in 1987 and 1988 and did not result in a signed agreement with Winchester. Alan Green removed

his objection and the Public Advocate's outstanding objections were to COAH's formula, methodology and rules and, therefore, were not contested issues of fact. COAH subsequently denied Roseland's first round petition on July 7, 1988 with conditions and Roseland addressed the conditions within 60 days. As a result, Roseland received first round substantive certification from COAH on October 17, 1988 with a vacant land adjustment that reduced the borough's obligation from 260 units to 165.

Roseland's certified first round plan included three units of rehabilitation, a 66 unit regional contribution agreement (RCA) with the City of Newark and 96 units of zoning on three inclusionary sites. Roseland also received a 95 unit vacant land adjustment. Winchester's motion deals with one of the three zoned sites from the first round plan. Each of the three sites is located in a different affordable housing zone, AH-1, AH-2 and AH-3. Two of the three sites are either constructed or under construction. The third site is the 64-acre Winchester site, which is zoned at six units per acre with a 20 percent setback to contain 274 units of housing of which 56 are to be low and moderate income units. The site is in the AH-3 zone, which requires all low and moderate income units to be constructed in a two-story townhouse design. The AH-1 and AH-2 affordable housing zones do not have this requirement.

Roseland petitioned for a second-round certification on May 3, 1996. Winchester filed as an objector and objected only to the provision of the Roseland Land Development Ordinance that required low and moderate income units in the AH-3 zone to be constructed in two-story townhouses. Mediation began on October 15, 1996 and concluded on May 13, 1997 without a resolution of the disputed issue. The Mediation Report was presented to COAH at its July meeting and the mediation report noted the unresolved issue. This motion was filed on June 9, 1997. A Superior Court suit challenging the planning board decision was subsequently instituted by Winchester on June 13, 1997.

THE MOTION

WINCHESTER

Winchester cites as a basis for its motion what it characterizes as “an odyssey” of 25 hearings before the Roseland planning board since 1995 concerning its request for a variance to permit low and moderate income units in a stacked flat or apartment design instead of townhouses, as well as for other variances. Winchester also states that it modified its site plan in 1994 to provide a second access to the development via Passaic Avenue which would be in addition to a single access road on Harrison Avenue. This second access would eliminate an original loop road which crossed a wetlands area and required an Individual Wetlands Permit (IP). Winchester then contracted to purchase a parcel of land in the R-1 zone to accomplish this. This proposal resulted in further litigation.

On March 31, 1997 the Roseland planning board denied the subdivision that would have provided access to Passaic Avenue but granted site plan approval to the 274 unit development subject to 33 conditions. One of the conditions required a redesign of the project to provide one access at Harrison Avenue rather than two. Winchester states that this redesign would require a major wetlands crossing and an IP from DEP. Winchester’s consultant estimates that it would take 12-18 months to obtain an IP and more than \$100,000 exclusive of application costs and off-site wetlands mitigation costs. Winchester states that the planning board’s resolution contemplates that Winchester will also have to return to the planning board for further hearings and approval of the amended plan. Winchester therefore asks in its motion that COAH deny Roseland’s petition on an accelerated basis because:

1. The Roseland planning board’s actions “significantly delay and substantially increase the cost to construct the inclusionary development.”
2. The planning board’s conduct — the length of time to hear and decide the applications; the imposition of excessive requirements and cost generating provisions

for the development; the denial of the subdivision application (Passaic Avenue access) -- violates the Mt. Laurel doctrine and the Fair Housing Act.

3. From 1988 forward, COAH took issue with the borough's draft ordinances that included setback standards, height limitations, open space requirements, impervious surface limitations and distances between buildings. The present ordinance does not have these provisions deleted.

4. Both the developer's planner and the planning board's planning consultant question and do not support the low and moderate income units being in two-story townhouses but rather in apartments as are all other low and moderate income units in Roseland.

5. The various conditions imposed by the planning board add unreasonable costs to the development that will further delay development and escalate costs.

6. Condition No. 1 of the planning board's site plan approval not only denies the subdivision application but requires a redesign to eliminate the Passaic Avenue access that was part of the application since 1994.

7. Condition No. 2 requires an emergency access and therefore, a return to the planning board for approval of that access. Also, West Caldwell Township which is contiguous to Roseland, has instituted litigation challenging the single access redesign and this litigation will stall the project until the litigation is resolved.

8. Condition No. 3 requires that Winchester pay \$1,000 per unit or \$274,000 in lieu of constructing additional off-site recreational facilities "without placing any restriction on the Borough's use of the funds."

9. Condition No. 5 requires Winchester to upgrade the borough's major water supply pump, which will also benefit Roseland residents in addition to the residents of the Winchester development.

10. Condition No. 6 requires Winchester to pay "its fair share" of upgrading the sewer force main from the pumping station without testimony as to the need for an upgrade.

11. Conditions Nos. 12 and 13 add cost generating requirements for buffering

and landscaping in addition to that shown on the approved landscaping plan. Winchester must provide an additional 400 evergreen trees (six-eight feet high), an additional 200 deciduous trees and a screening buffer around the perimeter of the entire 64-acre tract.

12. The planning board imposed conditions that exceeded standards, such as, 30 feet road widths; 30 feet roads in the courtyard, all one way, in excess of the 24 feet ordinance requirement; and a parking requirement per unit ratio that exceeds the ordinance requirement.

With regard to the provision of sewer to the site, Winchester states that in COAH's first round substantive certification, Roseland was instructed by COAH to not interfere with Winchester's efforts to obtain sewer service. "Rather than cooperating, the Borough was an obstruction in the long and expensive process pursued by Winchester and Essex Glen," according to Winchester. (Essex Glen is one of the three inclusionary sites in Roseland's plan and is currently under construction). Winchester had to institute litigation against Roseland and Caldwell Borough to provide sewer capacity, which was only secured in 1993. Winchester states that the borough's conduct delayed development and increased costs.

Also, Winchester alleges that the planning board failed to expedite hearings and requests for additional or special hearings were resisted:

"After taking more than a year to commence hearing Winchester's application, when the Board finally did commence the hearings, it immediately determined that it did not have jurisdiction to proceed due to Winchester's intention to amend the application to include lot (Lot 8) upon which Winchester proposed to construct a new public street to provide access to Passaic Avenue. A court proceeding followed which resulted in a declaratory judgment that the Board did have jurisdiction to hear the matter. The Board appealed the judgment to the Appellate Division and moved to have the board hearings stayed pending decision on the appeal. The motion for a stay was denied. Following entry of the Appellate Division which required the matter to proceed in part on an expedited basis... in March 1995 the Board determined for the first time that it did not have jurisdiction to hear the application inclusive of the variance to

permit construction of low and moderate income units in stacked flats because a "d" variance was required. In July, 1995, Winchester obtained an interpretation from the Roseland Board of Adjustment that a "c" variance was required and the matter moved back to the Board again. Thereafter the Board conducted twenty (20) additional hearings on Winchester's applications finally taking action at the end of March 1997."

All of the above increased fees for consultants and counsel retained by the planning board that Winchester had to pay, according to Winchester:

"Winchester has been charged more than \$160,000.00 just for the work undertaken by the consultants retained by the Board to review the reports and studies for which Winchester was also required to pay, and for those additional studies which the Board deemed necessary although not provided for in its Ordinance. These studies included the endangered species study for the sum of \$6,285.00, which was in addition to the review work done by the Board's environmental impact study, the fiscal impact study, the traffic study, the water system study, the drainage report and the soil and the hydrological studies, all of which were undertaken at Winchester's sole expense. Worse yet, after incurring the costs of all of the consultants and charging these costs to Winchester, the Board chose to wholly disregard the testimony and reports of both its traffic and planning consultants."

Finally, Winchester alternatively requests that if COAH does not order Roseland to amend its ordinance to remove the cost generating provisions and to eliminate the majority of conditions in the site plan approval that a builder's remedy be imposed and COAH require a higher density, for the Winchester development in an apartment and/or townhouse design, "as it deems appropriate."

ROSELAND

In reply to Winchester's motion, Roseland filed a cross motion seeking COAH to either dismiss Winchester's objection or grant substantive certification to Roseland's petition. In the alternative, Roseland asks that COAH stay the matter pending the outcome of the Superior Court action on Winchester's appeal of the planning board

approval or transfer the matter to the Office of Administrative Law (OAL) as a contested case.

Roseland disputes Winchester's allegation that Roseland has a history of resisting affordable housing. As evidence, Roseland cites that two of its three inclusionary sites are built or under construction. Roseland states that the planning board process was lengthy due to the actions of Winchester, not Roseland. Roseland states that Winchester did not file an application until mid 1993 and that submission was substantially incomplete and not deemed complete until May 1994. During the hearing on the application Winchester proposed a second access which Winchester considered "a better plan," according to Roseland. As a result, the Passaic Avenue second access raised a legal issue as to the need for a use variance and Roseland's planning board attorney recommended "that Winchester seek a Declaratory Judgment to resolve the issue," which Winchester did. The court heard the matter and entered a formal order in October 1994 stating that the planning board had jurisdiction to hear the application that included the second access road. Roseland appealed this decision to the Appellate Division. As a result, planning board hearings did not begin until February 1995 while the appeal was pending. In April 1995 the Appellate Division directed that the planning board accelerate hearings on the subdivision.

Roseland states that Winchester did not submit a preliminary major subdivision application (Passaic Avenue access) until March 1996. The application was deemed complete in May 1996. When the hearings on the preliminary site plan application began in February 1995 Roseland learned that Winchester proposed apartment flats rather than townhouses and Roseland's experts advised that Winchester would need to obtain a "d" variance from the Board of Adjustment. Winchester proceeded to obtain an interpretation from the Board of Adjustment that the construction of flats did not require a "d" variance, but only a "c" variance which could be granted by the planning board. The hearings commenced again in November 1996. However, after the

commencement of hearings, Roseland states that Winchester modified its application to the planning board to build the low and moderate income units as townhouses rather than flats, a modification consistent with the ordinance.

Roseland states that Winchester's application took an unusual number of hearings because Winchester materially altered its plan on several different occasions, which in turn required additional testimony from experts. Major changes involved the dual access, the reconfiguration of units and the design of the sanitary sewer system. Also, Winchester failed to provide public notice on one occasion. In addition, public participation extended the hearing process and included public comment from residents in both Roseland and West Caldwell.

Roseland confirms that the planning board voted to approve Winchester's site plan application in March 1997, but turned down the major subdivision application for Passaic Avenue access. The approved application contained 33 conditions and Roseland states that 24 of the 33 conditions constituted errors that Winchester had to rectify, items which Winchester agreed to include and conditions restating statute and ordinance requirements.

Roseland alleges that Winchester has inaccurately characterized Roseland's involvement in providing sewer service for the inclusionary sites. Roseland states that COAH only required Roseland to endorse CP-1 applications and "Roseland has never refused to execute a CP-1 application for any developer with site plan approval for its property." Roseland disputes Winchester's claim that Roseland refused to cooperate with the Parsippany-Troy Hills sewer proposal and lobbied the user communities to reject Winchester's plan. Roseland states that the State of New Jersey and the Caldwell Sewer Treatment Plant were the decision makers and such a connection would be a breach of Roseland's obligation to the Caldwell plant.

In its reply brief, Roseland also discusses the apartment flats vs. townhouse issue and states that the planning board preferred approving the project without variances, if it could, but that was not to imply that the planning board would not grant a variance. By amending its application to include townhouses, Roseland states that Winchester's action "constitutes a waiver on its part to object to the townhouse requirement before COAH." Roseland contends that Winchester is "bound by the procedural consequences of the choices it makes and should not now be heard to complain."

If COAH does not dismiss the objection, Roseland asks that COAH stay the matter until the Superior Court proceeding is adjudicated regarding Winchester's appeal of the planning board decision. Alternatively, if COAH decides not to stay this matter, Roseland's position is that Winchester's objection to the townhouse configuration being cost generative must be transferred to OAL because the issue presents material contested issues of fact, which require transfer. For example, Roseland's planning consultant disagrees with Winchester that the requirement is cost generative. In addition, Roseland states that it has not acted in bad faith, as alleged by Winchester. Roseland cites its history of involvement with COAH and its first round certified plan and states that accelerated denial is "clearly inappropriate and unwarranted."

Roseland also states that its land development ordinance provisions are not cost generating. Roseland claims that the ordinances adopted by Roseland were reviewed by COAH and Winchester did not object to this adoption. The Roseland planner indicates that "Winchester has manipulated its number and unit design in order to support its cost generative argument."

Regarding the denial of the second access from Passaic Avenue, Roseland states that the denial was based on various safety and traffic concerns and violated the

ordinance provisions for minimum distance between intersections.

Regarding the other conditions, Roseland states that Winchester voluntarily agreed to the \$1,000 per unit for recreational facilities; that Winchester volunteered to cover the \$25,000 cost to upgrade the supply pump to maintain water pressure; that Winchester accepted the landscaping condition to fill in the natural buffer; that Winchester knew that the additional sewerage from its project would put the force main over capacity and that the County of Essex required that a warrant study be undertaken for the intersection of the Harrison Avenue access road.

Roseland disputes Winchester's depiction of the escrow account deposits for application review. Roseland states that the amounts expended were a direct result of Winchester's substantial changes to the application and its "incomplete, bare bones application..."

As to jurisdiction over the relief requested, Roseland contends that neither COAH nor OAL can reverse the planning board action in denying subdivision approval nor review the elimination of cost generating provisions from the site plan approval. "Neither COAH nor OAL have jurisdiction to direct a Planning Board to take certain actions or to make a legal determination regarding a Planning Board's decisions." Roseland notes that only the townhouse design resolution was the subject of Winchester's objection, that "This is the only issue within the scope of COAH and OAL's jurisdiction. Roseland notes that Winchester filed an action in Superior Court on June 13, 1997 seeking to reverse the planning board's decision.

Finally, Roseland states that the award of a builder's remedy to Winchester is inappropriate because the facts do not constitute an "extraordinary" situation and because Roseland's plan addresses its fair share obligation. Roseland states that only if COAH denies a petition for substantive certification with conditions and the

municipality fails to meet the conditions within the 60-day deadline, can COAH consider a builder's remedy.

Roseland requests that COAH either dismiss the objection and grant substantive certification or stay the matter until the Superior Court matter is adjudicated or transfer the objection to OAL.

WINCHESTER'S REPLY

In its reply brief, Winchester reiterated its position that Roseland's conduct constituted bad faith and restated its previous objections. Winchester also raised new issues, as well as replied to the issues raised by Roseland in its cross motion. Winchester claimed that the number of total units and low/moderate income units that were approved for the Winchester site to yield is less than originally contemplated due to net density calculations and excessive ordinance provisions. Winchester argued that COAH should not stay any action pending the Superior Court matter. Winchester stated that there was never an agreement to build townhouses rather than apartments and that Roseland inserted the townhouse requirement into its ordinance without Winchester's knowledge. Winchester claimed that Roseland never stated in its filed certifications or brief that the two-story requirement was not cost generative and also claimed that Roseland has not met its rental component.

A certification signed by Janice Talley, planning consultant for Winchester was submitted. Talley stated that the Roseland zoning for the Winchester site permits a maximum density of six units per acre, but requires that all wetlands and steep slopes be excluded from the density calculation. "As a result, the approved project has a density of only 4.03 units per acre." She states that Manalapan Builders v. Township Committee, 256 N.J. Super 295 (App. Div. 1992) invalidated zoning such as this.

In its second reply Roseland continued to rely on the facts set forth in its previous brief and proceeded to address Winchester's allegations. A certification of Carolyn Neighbor, Roseland's planning consultant, was submitted, which stated that Roseland had met its rental obligation in a regional contribution agreement (RCA) with Newark in its first round certified plan. In addition Neighbor stated that from a planning perspective, the townhouse requirement was preferable over an apartment design. Neighbor further stated regarding the net density issue, that COAH is authorized to adjust the density as "wetlands were considered unbuildable and were excluded in the calculation of unit yield." She claimed that the Manalapan decision postdated both the Roseland certification and the beginning of the Roseland approval process, and therefore was not applicable.

Roseland again reviewed its conduct with regard to the provision of sewer to the Winchester site and stated that Winchester's representations were "untrue and unsupported by any facts." Roseland stated that Winchester's new objections are "time barred under COAH rules and therefore should not be considered by COAH" since Winchester did not raise these issues in its original objection. Roseland contended that the objections should not be permitted. Roseland further stated that the density calculation does not violate COAH rules or applicable law because Roseland was certified under N.J.A.C. 5:92.

Roseland, also stated that if Winchester requests revisions to its zoning, the plan should be revised to fully reflect the requirements of N.J.A.C. 5:93, including bedroom mix. Roseland stated that the Manalapan case should not be applicable in the Roseland matter because Manalapan is not an affordable housing case and "There is nothing in this case to indicate that the provisions of the Fair Housing Act were meant to be preempted by the Municipal Land Use Law." Roseland noted that Winchester proposed to build 274 units on its site and "that is the number which was approved by the Roseland Planning Board." Roseland was not seeking to reduce this

number.

DECISION

The issues raised by this motion and cross motion are complex, both legally and factually, and necessitate a transfer of this matter to OAL. The Council has been asked to determine whether Roseland's actions with regard to Winchester's inclusionary development have unnecessarily delayed the provision of affordable housing in Roseland by delaying construction of the Winchester inclusionary development. Also, the Council must determine if Roseland has imposed unnecessary cost generating requirements and exactions upon Winchester, including the requirement that Winchester's affordable units be built as townhouses rather than flats. The briefs and certifications filed by both Roseland and Winchester clearly raise contested material issues of fact relating to these questions and, therefore, the matter must be the subject of fact finding by OAL prior to any determination by COAH.

In its decision to transfer this matter to OAL, COAH is guided by N.J.A.C. 5:93-10.5, which states:

A Council determination, after a hearing conducted pursuant to the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq., that a municipality has delayed action on an inclusionary development application, required unnecessary cost generating standards or obstructed the construction of an inclusionary development may result in Council action revoking substantive certification.

This rule, captioned "Revocation of Substantive Certification" is applicable to this motion because the Winchester development was included in Roseland's first-round fair share plan for which the Council granted substantive certification and because Roseland is currently seeking second-round certification for a plan that must include the Winchester site. (See N.J.A.C. 5:93-5.12) Roseland, therefore has been

obligated since the date of its first-round certification to effectuate the development of the Winchester site and the affordable housing the site is zoned to provide.

Winchester has claimed, and OAL must now determine through a hearing whether Winchester's claims are valid, that Roseland's actions and approvals have obstructed the construction of the Winchester development, unnecessarily delayed the provision of the development's zoned-for affordable housing and/or imposed unnecessary cost generating requirements on the developers of the site. This referral to OAL is analogous to the procedure set out in N.J.A.C. 5:93-10.5 for revocation, and is necessary for the Council to decide the issues raised by Winchester in this motion and to grant the relief requested by Winchester. Clearly, the Council can make no determination with regard to Winchester's motion, Roseland's cross motion or Roseland's petition for second-round substantive certification until the material contested issues of fact raised by this action have been decided by OAL.

Therefore, this entire matter is hereby transferred to OAL for an expedited hearing on all issues raised by both parties as per N.J.S.A. 52:27D-315(c).


Renee Reiss, Council Secretary

December 3, 1997

Date