

WINCHESTER CONSTRUCTION)
COMPANY,)

OAL DKT. NO. CAH 10725-97
AGENCY DKT. NO. 97-904

Petitioner,)

v.)

BOROUGH OF ROSELAND,)

Respondent.)

FINAL DECISION

On May 15, 1998 Administrative Law Judge Margaret M. Hayden, issued an Initial Decision in Winchester Construction Company v. Borough of Roseland, OAL Docket No. CAH 10725-97, attached. The Council on Affordable Housing ("COAH" or "the Council") has reviewed this Initial Decision as well as the exceptions with exhibits filed by the Borough of Roseland and by Winchester Construction Company. After careful consideration of the Initial Decision, the exceptions and the materials submitted with the exceptions, the Council accepts the Initial Decision as its Final Decision with the following modifications.

Page 42. The last nine lines of the last paragraph on page 42, beginning with the words "I CONCLUDE..." are deleted and the following language substituted: The cost generation regulations at N.J. A.C. 5:93-10 plainly demonstrate the intent of COAH that the municipal approval process not be used to thwart the development of inclusionary projects. In addition to requiring expedition of the approvals and municipal cooperation with developers in granting necessary reasonable variances to construct the project, the regulation states that the focus of municipal review shall be whether the design of the inclusionary development is consistent with the zoning ordinance and the mandate of the Fair Housing Act regarding unnecessary cost generation features. N.J.A.C. 5:93-10.1(b). Therefore, the planning board's actions, including the site plan approval and conditions, are subject to a cost generation analysis under N.J.A.C. 5:93-10.

Page 45. In the seventh line of the second paragraph of "Condition 3", the comma after "N.J.A.C. 5:93-10.1(a)" is eliminated and a period inserted. The remainder of the paragraph is deleted and the following inserted: Therefore, the Board's resolution which required a contribution of \$1,000 per unit, both market and affordable, was clearly cost generating.

Page 46. The last sentence of the first paragraph on the page (a continuation of the paragraph begun on page 45 under the caption "Condition 5") is eliminated. The following is substituted: If the Board approves a non-cost-generating plan consistent with this opinion within 60 days, Winchester should be held to its voluntary agreement because the \$25,000 cost to upgrade the pump to 1,200 gallons per minute would increase the water pressure and the adequate storage of water for fire fighting purposes, an important public safety purpose.

Page 46. The last sentence of the paragraph captioned "Condition 6 is eliminated and the following sentences substituted: However, the Municipal Land Use Law permits a pro rata contribution from developers for off-tract improvements, but only for the share necessitated by their development. N.J.S.A. 40:55D-42. Therefore, a contribution from Winchester for sewer improvements consistent with the MLUL will not be deemed cost generating pursuant to N.J.A.C. 5:93-10.1(a).

Page 53. The section captioned "Remedies" and the remainder of the Initial Opinion through page 55 are deleted. The following is substituted:

Under its regulations COAH has the authority to revoke substantive certification, N.J.A.C. 5:93-10.5, and to accelerate the denial of substantive certification, N.J.A.C. 5:91-10.2. COAH may condition the grant or denial of substantive certification on specific changes in the municipality's ordinance that make

achievement of the municipality's fair share realistically possible. N.J.A.C. 5:91-6.5. Therefore, COAH has the authority to condition Roseland's substantive certification on changing its ordinance and resolution to make development of the Winchester site realistically possible.

Winchester has also requested a builder's remedy, which in the circumstances presented is most properly awarded by the courts. As detailed above, it is clear that Roseland unduly delayed the construction of this inclusionary development for many years and has subjected the development to numerous cost-generating conditions. Ten years after a site was approved with a developer ready to build, the site, which will provide the major portion of Roseland's fair share of local affordable housing, should and could have been built by now if Roseland had followed COAH's requirements under N.J.A.C. 5:93-10.1. Therefore, if Roseland fails to change its ordinance and resolution to make development for affordable housing realistically possible, it will in all likelihood find itself vulnerable to a builder's remedy in the Superior Court.

Based on the foregoing, the Council concludes that Roseland delayed action on Winchester's inclusionary development application and required unnecessary cost-generating standards, both of which resulted in the obstruction of the construction of the site in a timely manner. The Council, therefore, concludes that under the facts here it will deny Roseland's petition for substantive certification. Pursuant to COAH regulations, Roseland will have the opportunity, within 60 days of COAH's final decision of August 5, 1998, to grant a final site plan and subdivision approval to Winchester that is consistent with this opinion and is not cost generating. Further, Winchester must remove from its ordinances within 60 days the cost generating conditions affecting Winchester.

ORDER

It is hereby ORDERED that Roseland's petition for second-round substantive certification is DENIED. It is further ORDERED that if Roseland within 60 days removes the cost-generating conditions from its ordinance and grants a final site plan and subdivision approval to Winchester that is not cost-generating, consistent with this opinion, COAH will grant substantive certification. The attached initial recommended decision of Administrative Law Judge Margaret M. Hayden is hereby adopted by the New Jersey Council on Affordable Housing as its final decision, with these modifications.



Reece Reiss,
Council Secretary

8/5/98
Date