

IN RE: TOWNSHIP OF        )  
SOUTHAMPTON - MOTION     )  
FOR RECONSIDERATION     )

New Jersey Council on  
Affordable Housing

COAH Docket No. 98-1005

OPINION

On July 11, 1998 L.T.D., L.L.C. ("LTD"), the contract purchaser of Block 602, Lot 9.06, a property zoned as an inclusionary site in the housing element and fair share plan of the Township of Southampton, Burlington County ("Southampton"), filed a motion with the New Jersey Council on Affordable Housing ("COAH") seeking an administrative order dismissing Southampton's petition for substantive certification and/or granting a reconsideration of said petition and requiring further documentation and an amendment to the terms of certification.

This motion, which followed COAH's grant of substantive certification to Southampton on July 1, 1998, asserted that reconsideration was essential because "There simply has not been a proper review and/or determination as to the suitability of the sites which are subject to the Township's proposed inclusionary zoning ordinances and it is clear that such sites do not, in fact, provide for a realistic affordable housing opportunity for the number of units proposed and, indeed, necessitated". LTD's position was supported by a memorandum and supplemental report of Robert Bower, a licensed engineer, which was attached to the motion as Exhibit B. Southampton filed a brief with supporting appendix in opposition to the motion for reconsideration on August 27, 1998.

That response was supported by a certification of Thomas J. Scangarello, P.P., defending Southampton's plan as providing a realistic opportunity for affordable housing. A response brief was filed by LTD on October 19, 1998, to which was attached a planning report of David Kinsey, P.P., dated October 15, 1998, which dissected the Southampton fair share plan.

Southampton petitioned COAH on May 22, 1995 for certification of a fair share plan addressing an obligation of 153 units of affordable housing, 67 rehabilitation units and 86 new construction units. At the direction of COAH, Southampton repeteditioned COAH on February 18, 1997 with an amended plan and again repeteditioned on October 7, 1997 with a third plan. There were several objectors to Southampton's first petition, all of which were resolved in mediation. There were no objectors to Southampton's second or third petitions. LTD has not been an objector to any of Southampton's three filed petitions.

In a March 13, 1998 COAH Compliance Report recommending that conditional substantive certification be awarded to Southampton's third filed fair share plan, Monica Etz, a COAH principal planner, analyzed Southampton's housing element and fair share plan. The inclusionary element of that plan, which LTD challenges in its motion, consists of two zones, the Rural Residential RR-1 ("RR-1") zone and the proposed Town Center Extension ("TCE-1") zone. The RR-1 zone, which contains 169 acres,

of which approximately 56 are developable, is zoned for a gross density of six units per acre with a 20 percent set aside for affordable housing, to yield 68 affordable units. The RR-1 zone is made up of multiple lots and owners and includes the lot of which LTD is the contract purchaser.

The RR-1 zone does not have sewer or water, is not included in a sewer service area and is not in a designated center. However, because the zone was included in Southampton's original 1989 certified plan the site received a waiver from COAH's center designation requirements. According to N.J.A.C. 5:93-4.3(a), when a municipality lacks sewer and water, COAH will review the inclusionary site to determine if there is a realistic opportunity for the site to receive the necessary sewer and water during the six year certification. All current property owners within the RR-1 zone, including the owner of the site of which LTD is the contract purchaser, signed statements submitted with Southampton's fair share plan. These statements stated that the zoning in the RR-1 zone was realistic and that the reason the parcels did not develop during the previous certification was the decline of the housing market. COAH concluded that sewer and water would be made available if the owners decided to develop the property under the RR-1 zone.

With regard to the TC-1 zone, Southampton proposed to include two lots in that zone to be designated for inclusionary

development. This zone will permit residential development at a density of eight units per acre with a 20 percent set aside to yield 37 affordable units. The two lots are adjacent to a sewer service area which is the focus of a current amendment before DEP and are adjacent to the Vincentown portion of Southampton that is the focus of a township center designation application currently before the State Planning Commission ("SPC"). As a condition of COAH's grant of conditional substantive certification, the two TC-1 zone lots were required to be included in an amended wastewater management plan to DEP and an amended application for center designation to SDRP so that the lots would provide a realistic opportunity to be developed for affordable housing. These conditions were met and, therefore, certification was awarded by COAH on July 1, 1998. This motion followed.

In its July 11, 1998 motion seeking reconsideration of COAH's grant of substantive certification to Southampton's housing element and fair share plan, LTD relied on reports from its consulting engineer and consulting planner. With regard to the RR-1 zone, it is LTD's position that there is insufficient developable acreage within the zone to create the required 68 units of affordable housing. With regard to the TCI zone, LTD claims that there are better, more developable properties that should be included in this zone, rather than the two that Southampton has included.

In its response to LTD's motion, Southampton sets out a lengthy and accurate chronology of Southampton's efforts to receive substantive certification under N.J.A.C. 5:93-1 et seq. An affidavit of Southampton's planner, Scangarello, with attached exhibits was also submitted by the township to support its argument that its fair share plan creates a realistic opportunity for affordable housing. Scangarello contends that LTD is incorrect with regard to the analysis of the RR-1 zone and that 68 affordable units may be produced in that zone. With regard to the TC-1 zone, Scangarello states that the alternate sites proposed by LTD for the TC-1 zone should not be included in the TC-1 zoning, but rather should be preserved for farmland or green acres, consistent with the goals and objectives of Southampton's master plan, the goals of the State Development and Redevelopment Plan ("SDRP") and Burlington County's farmland preservation program.

Southampton also takes the position that the reconsideration motion is not timely and that if LTD wished to present COAH with its expert reports and opinions regarding Southampton's fair share plan it should have done so as an objector to one of Southampton's three petitions for substantive certification.

In reply, LTD countered that its motion was timely and consistent with R. 4:49-2. LTD also submitted an October 15, 1998

planner's report written by David Kinsey, P.P., listing six "flaws" in Southampton's fair share plan.

In its original motion for reconsideration, LTD did not set out the basis for its motion for reconsideration. However, in its reply brief, LTD cites the New Jersey Court Rules' R. 4:49-2 as justification for the motion. R. 4:49-2 states:

Motion to Alter or Amend a Judgment or Order.

Except as otherwise provided by R. 1:13-1 (clerical errors) a motion for rehearing or reconsideration seeking to alter or amend a judgment or order shall be served not later than 20 days after service of the judgment or order upon all parties by the party obtaining it. The motion shall state with specificity the basis on which it is made, including a statement of the matters or controlling decisions which counsel believes the court has overlooked or as to which it has erred. [R. 4:49-2]

With regard to reconsideration allowed under R. 4:49-2, D'Atria v. D'Atria, 242 N.J. Super 392 (Ch. Div. 1990) states that:

Reconsideration should be utilized only for those cases which fall into that narrow corridor in which either 1) the Court has expressed its decision based upon a palpably incorrect or irrational basis, or 2) it is obvious that the Court either did not consider, or failed to appreciate the significance of probative, competent evidence. Said another way, a litigant must initially demonstrate that the Court acted in an arbitrary, capricious, or unreasonable manner, before the Court should engage in the actual reconsideration process. The arbitrary or

capricious standard calls for a less searching inquiry than other formulas relating to the scope of review. Although it is an overstatement to say that a decision is not arbitrary, capricious or unreasonable whenever a Court can review the reasons stated for the decision without a loud guffaw or involuntary gasp, it is not much of an overstatement. The arbitrary, capricious or unreasonable standard is the least demanding form of judicial review. Alternatively, if a litigant wishes to bring new or additional information to the Court's attention which it could not have provided on the first application, the court should, in the interest of justice (and the exercise of sound discretion), consider the evidence. Nevertheless, motion practice must come to an end at some point, and if repetitive bites of the apple are allowed, the core will swiftly sour. Thus, the Court must be sensitive and scrupulous in its analysis of the issues in a motion for reconsideration. [Id. a 401-402.]

This language from D'Atria is quoted in part with approval in Cummings v. Bahr, 295 N.J. Super 374, 384-385 (App. Div. 1996), in which the Appellate Division upheld the denial of a personal injury plaintiff's second motion for reconsideration which offered a new theory as to liability premised on a new characterization of plaintiff's status after summary judgment had been granted against the plaintiff.

While R. 4:49-2 and the cases on reconsideration are instructive with regard to LTD's motion, they must be read in the context of the Fair Housing Act ("FHA"), N.J.S.A. 52:27D-301 et seq., particularly the FHA's requirements with regard to objectors. See, N.J.S.A. 52:27D-314. R. 4:49-2 and both cited reconsideration

cases, one a matrimonial matter and the other a personal injury suit, concern motions for reconsideration filed by a party to the action. Here, LTD has never been a party before COAH, either as an objector or a developer of a site zoned to provide affordable housing, to any of Southampton's three petitions for substantive certification. The first time that COAH became aware of LTD was in its March 30, 1998 letter sent to COAH subsequent to the close of a 14 day comment period to COAH's Compliance Report recommending conditional substantive certification for the Southampton fair share plan. That conditional substantive certification decision was made and granted two days later on April 1, 1998.

The FHA and COAH's rules create ample opportunity for interested parties, developers and land owners to participate in the COAH process through the filing of objections, participation in mediation or the filing of timely comments to various required COAH reports. Southampton initially filed a fair share plan for which it sought substantive certification under N.J.A.C. 5:93-1 et seq. on May 22, 1995. At no time until March 30, 1998, almost three years later, did LTD seek to become involved in Southampton's petition for substantive certification. However, the owner of the LTD site, from whom LTD presumably has contracted to purchase its land, signed an affidavit that was submitted in conjunction with Southampton's third fair share plan agreeing to the inclusionary zoning of the RR-1 zoning on her property and stating that the zoning provided a realistic opportunity for the future development

of the site. This statement, captioned "Agreement for Inclusionary Zoning" was relied upon by COAH in the granting of substantive certification.

While LTD does not agree with COAH's substantive certification decision and submits reports of its consultant engineer and planner to support its position that the Southampton plan does not provide a realistic opportunity for affordable housing, COAH will not at this late date alter its certification decision. If COAH were to grant LTD's motion and revoke its certification decision based upon LTD's submissions, such a procedure would compromise COAH's process in that there would never be any certainty or finality with regard to the COAH process. The Fair Housing Act and COAH's rules create ample opportunities for the participation of interested parties, land owners and the developers of sites within a municipality. The Fair Housing Act, for example, specifically gives all who wish to object to a municipal fair share plan, a statutory mediation period with which to resolve differences with the municipality. However, if COAH were to now grant LTD's motion for reconsideration of COAH's substantive certification decision, COAH would essentially be retroactively allowing LTD to intervene as an objector in this matter. Such an action would be in contravention of the FHA, which specifically states at N.J.S.A. 52:27D-314 that there are 45 days from the date of a municipal petition for substantive certification to file an objection. COAH has always rigorously enforced this statutorily-required 45 day period. Indeed, as a statutory

requirement, it is not waivable; which in essence is what LTD seeks with its motion for reconsideration.

The engineering and planning reports upon which LTD bases its motion for reconsideration are the kind of reports that COAH typically requires from objectors to substantiate their objections to filed fair share plans. COAH has reviewed Southampton's submitted reports and has considered them under the standard set out in D'Atria and within the context of the requirements of N.J.S.A. 52:27D-314. The reports do not convince COAH that its decision granting substantive certification was arbitrary or capricious, "palpably incorrect or irrational" and therefore COAH will not alter its grant of substantive certification based upon the submitted reports.

With regard to the RR-1 zone, which LTD attacks as not providing a realistic opportunity for affordable housing, Southampton has identified the RR-1 zone for inclusionary development since its first round (May 1989) substantive certification. The RR-1 zone at that time was identified as 190 acres comprised of block 602; lot 9, 9A, 9B, 9C, 9D, and parts of 10, 11 and 14. The township provided COAH in 1989 with U.S.G.S. Topographic Quadrangle maps, National Flood Insurance maps, National Wetlands Inventory maps and a Natural Resource Inventory for Southampton Township. Based on documentation submitted, after deducting for wetlands, it was determined that there were 93 developable acres for inclusionary zoning. Based on a proposed

density of six units per acre with a 20 percent setback, Southampton anticipated 112 units on the site. Due to the lack of sewer and water, Southampton received a durational adjustment and during the six-year period of substantive certification, the site was not developed.

When Southampton Township repeticioned COAH for substantive certification in May 1995, the RR-1 zoning remained in place for inclusionary development. However, the lots had been reconfigured and renumbered over time. No longer did 9A, 9B, 9C and 9D exist. In addition, lots were eliminated as a result of mediation. As a result, Southampton's housing element and fair share plan identified 169 acres (comprised of five lots) in the RR-1 zone. Of the 169 acres, Southampton calculated 56 developable acres. The parcels are identified as follows:

Block 602, lot 9	37.25 acres
Block 602 lot 9.06	20.20
Block 602 p/o lot 10	13.60
Block 602 p/o lot 11	9.18
Block 602 p/o lot 14	<u>90.48</u>
	169 acres

Southampton's housing element and fair share plan calculated that the 56 acres would yield 68 affordable units based on a density of six units per acre with a 20 per cent setback.

Before Southampton received substantive certification, COAH discovered that two parcels of land (Block 602, lot 9.04 and 9.05) had inadvertently been excluded from the housing element and

fair share plan in the RR-1 zone. However, it was determined that the two parcels would remain zoned as RR-1 but would not be considered part of the COAH-certified plan.

According to Southampton's housing element and fair share plan, there were no new environmental constraints on the lands in the RR-1 zone. In addition, the land owners signed letters stating that they were satisfied with the RR-1 zoning. This includes the owner of Block 602, lot 9.06, of which L.T.D., L.L.C. is the contract purchaser. Therefore, COAH's decision to grant substantive certification to a Southampton fair share plan which included the RR-1 zoning was most reasonable.

If the material submitted by LTD in support of its motion for reconsideration had been submitted by an objector within the statutorily required 45 day objector period provided by N.J.S.A. 52:27D-314, COAH would be obligated to give the reports more scrutiny than it has in the context of this motion. However, Southampton, having received substantive certification, is entitled to a substantial degree of finality with regard to the COAH process. It is that finality which LTD seeks to undermine with its motion.

Southampton voluntarily petitioned for substantive certification of a fair share plan in the first round of COAH certification under N.J.A.C. 5:92-1 et seq. and in COAH's second

round pursuant to N.J.A.C. 5:93-1 et seq. As such, COAH considers Southampton to be a municipality that is voluntarily compliant with its Mount Laurel responsibilities, a municipality that has sought and earned the protections afforded by the Fair Housing Act. Having received COAH's grant of substantive certification, Southampton is entitled to a six year period in which it may implement its fair share plan.

Therefore, for all the above reasons, LTD will not be permitted to retroactively intervene as an objector to Southampton's fair share plan. COAH is satisfied that its July 1998 decision to grant substantive certification to the Township of Southampton is reasonable and consistent with the requirements of the FHA and COAH's rules. LTD's motion is, therefore, denied.

  
Renee Reiss  
Secretary

Date: January 5, 1999