

IN RE TOWNSHIP )  
OF RIVER VALE )

COUNCIL ON AFFORDABLE HOUSING  
COAH DOCKET NO. 98-1009  
MOTION DECISION

On September 18, 1998 the Township of River Vale, Bergen County ("River Vale" or "the Township") filed a motion with the Council on Affordable Housing ("COAH") requesting that COAH permit two ordinances adopted by River Vale, Ordinance No. 0-5-97(R), a Tree Preservation ordinance adopted on May 22, 1997 and Ordinance No. 0-10-98(R), an Environmental Impact Study Ordinance adopted on September 24, 1998, to be applicable to all COAH certified sites in the township. There are, in fact, only two COAH certified inclusionary sites in River Vale: the River Vale Developers, L.L.C. and United Properties Group, Inc. ("RVD") site and the Kalian site. A brief with attached certification was submitted by RVD in opposition to River Vale's motion on October 19, 1998. Kalian did not take a position in the motion.\*

BACKGROUND

River Vale was first granted substantive certification by COAH on January 10, 1996. The township's 1987-1999 precertified need is 121 units, all inclusionary. The certified plan included

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\*At the time this motion was filed, the Kalian property had received a preliminary major site plan approval which is reflected in River Vale's July 20, 1998 amendment to its certified plan. The approval included a negotiated variance from the application of the Tree Preservation ordinance. Kalian's only correspondence with COAH on the issue presented in this motion is a letter that predated the River Vale motion in which Kalian stated that, since Kalian had already received a variance from the Tree Preservation ordinance, its approved site plan was not actually affected by the ordinance and exempting COAH certified sites would only make the variance moot. However, Kalian also indicated that if the amendment to River Vale's fair share plan was not approved by COAH, its site would have to be redesigned and application of the Tree Preservation ordinance may then impact Kalian's ability to fully develop the site. On December 7, 1998, Kalian's preliminary major site plan was overturned by the Superior Court in a suit instituted by RVD. That case is now on appeal to the Appellate Division of the Superior Court.

zoning for 32 affordable units on the two inclusionary sites impacted by this motion, 44 regional contribution agreement ("RCA") units, a 30-unit group home and 30 rental bonus credits for a surplus of 15 units.

On July 20, 1998 River Vale petitioned COAH with an amendment to its certified plan. In the township's 1996 certified plan, the Kalian site is zoned for 77 total units with a 20 percent setaside: eight affordable units to be built on-site and seven affordable units to be transferred via an RCA. In its proposed amendment, River Vale proposed a total of 58 units to be built on the Kalian property, an RCA contribution of \$150,000 and no affordable housing to be built on site. In the township's 1996 certified plan, the RVD site is zoned for a total of 234 units with a 20 percent setaside of 47 affordable units: 24 built on-site and 23 transferred via an RCA.

The township's proposed amendment to the RVD site does not reduce the number of total units nor the setaside of affordable units. Rather, the township has proposed a range of affordable units on-site (eight to 24 units) and a range of units to be transferred via an RCA (23 to 39). The setaside remains at 20 percent; therefore, 47 affordable units will still be attributable to the RVD site. No other changes were made to River Vale Township's plan in the proposed amendment.

During the 45-day objection period that followed River Vale's amendment, two objections were filed, one by RVD and the other by River Vale Neighborhood Association. Mediation ended on February 6, 1999. A Mediation Report of Monica Etz, Mediator, was issued on March 12, 1999.

#### THE MOTION

On July 1, 1998, Roy Blumenthal, Township Administrator of River Vale, forwarded a copy of River Vale's Tree Preservation Ordinance to COAH and asked for COAH's approval of the ordinance. Shirley Bishop, Executive Director of COAH, responded on July 29, 1998 stating "I cannot answer the question as I do not know the impact of this ordinance if applied to the COAH certified sites."

Bishop directed the letter to be sent to the owners of the affected COAH sites for their review and comment. Both Kalian and RVD responded to COAH. Then, on September 18, 1998, River Vale filed a motion seeking COAH approval to apply the Tree Preservation ordinance and also an Environmental Impact Study Ordinance to all COAH certified sites. The township did not request any changes in density on the COAH-certified sites, but rather asked that the provisions of the ordinances be applicable to development plans for the sites.

River Vale's Tree Preservation ordinance requires a detailed (topography, stream and wetland locations, surrounding wooded areas, building locations, roads, driveways, parking lots, garden areas and recreation areas) site plan overlaid by a survey of all existing trees on a development site including the genus, species and size of all trees involved. A list and description of trees to be planted and a planting schedule must be incorporated into a tree removal and planting plan. Prior to the start of removal, all trees on site must be flagged for identification. Tree removal is permitted if no other area on a site can be found to accommodate the construction activity.

During the course of construction, the ordinance requires that standing trees be protected by the use of a brightly painted snow fence to be installed under the drip line of each tree. The ordinance also prescribes a formula to determine minimum standards for tree replacement. Pursuant to this formula, removed trees between six and 16 inches in diameter must be replaced with trees from a specified list. Replacement trees must be a minimum of two and a half inches in diameter and replaced in specified quantities. If 80 to 100 percent of the trees from an existing site are removed, 80 percent of the removed trees must be replaced. If 60 to 79 percent of the trees from an existing site are removed, 60 percent must be replaced. If 40 to 59 percent of the trees from an existing site are removed, 40 percent must be replaced. If 20 to 39 percent of the trees from an existing site are removed, 20 percent must be replaced. When less than 20 percent of the

existing trees are removed, 10 percent of the removed trees must be replaced. For trees larger than 16 inches in diameter, each tree must be replaced with between three and 15 two and a half inch trees, depending on the diameter of the tree removed. The ordinance also outlines penalties and fines for non-compliance.

River Vale's Environmental Impact Study ordinance requires an inventory of existing environmental conditions on a site including air and water quality descriptions, water supply, stream quality hydrology, aquatic organisms, zoology wildlife habitat, soils and properties thereof, slopes, light characteristics and levels, noise characteristics and levels, demography, topography, aesthetics historical sites, and archaeologic features. Upon completion of this inventory, the applicant must prepare a description of its development, including alternatives that would minimize adverse environmental impacts and remedial actions designed to compensate for such impacts.

Finally, the ordinance requires that an assessment of the anticipated impact of the project be prepared. This assessment must include reports on sewage disposal facilities, solid waste disposal, hazardous waste disposal, water supply and water quality, surface water runoff, air quality, traffic, noise, artificial light, demography, and wetlands. Statements of alternatives and impacts on resources must also be included.

Golf courses, single-family residences that disturb less than 5,000 square feet of land and agriculture uses are exempt from the provisions of the River Vale Environmental Impact Study ordinance.

In support of its motion, River Vale argues that the ordinances in question assist in guiding growth in the township in concert with statewide policies on preserving open space. The township further argues that the ordinances provide a tool to maintain balance between intense development and protection of natural resources. Finally, River Vale asserts that the application of these ordinances to the sites in question is of additional importance because the sites are adjacent to large water

courses and reservoirs that serve the northeastern region of the State.

RVD opposed the motion. RVD asserts that the motion is procedurally flawed because the request was by letter and it did not include any legal or factual foundation and did not include any information on the impact of the ordinance on the two COAH sites.

RVD further argued that the motion be denied and listed five major points in support of denial. First, RVD stated that the imposition of the ordinances is a unilateral change in the COAH certification which diminishes the realistic opportunity for affordable housing previously attributed to the COAH inclusionary sites. Second, RVD argues that the township has not demonstrated that the ordinances in question are not unduly cost generative. In fact, RVD states that the ordinances will be cost generative and may impede development of its site.

The third point raised by RVD is that the River Vale ordinances will reduce the affordable housing yield and undermine the realistic development potential of the affected sites. RVD also argues that the imposition of the new ordinances subsequent to acquisition and initiation of site development plans is contrary to N.J.A.C. 5:93-5.13(b) because of the ordinances' inherent adverse effect on density. RVD's fifth argument is that the ordinances constitute a major change in the township's certified plan and must therefore be the subject of a formal amendment to the River Vale fair share plan.

RVD submitted affidavits signed by Elizabeth McKenzie, P.P., and Charles Tint, development coordinator for RVD, in support of its opposition to River Vale's motion. Based upon these affidavits, RVD cites the following impacts that the ordinances in question would have on its property: 1. excessive cost-generation; 2. unnecessary re-engineering of the entire set of plans currently pending before the planning board; 3. reduction of density and therefore yield of affordable housing units; 4. contradiction of the "fast-track" provisions of COAH regulations requiring two additional approvals; and 5. potential installation

of 1,800 new trees on site and the preservation of 3,300 additional trees.

No reply brief was filed by River Vale.

Oral Argument was held on River Vale's motion at COAH's regularly scheduled meeting of February 3, 1999. River Vale was represented at oral argument by Stanley Morrow, Esq., and RVD was represented by Carl Bisgaier, Esq. Morrow asked that the two ordinances not be looked at "in a vacuum" but rather in the context of River Vale's entire Mount Laurel compliance efforts. He stated that River Vale had provided all the on-site affordable housing within the township that was necessary to provide and now desired to utilize RCAs to provide the remainder of River Vale's affordable housing obligation. Several developments had been built in the township that included affordable housing and the remainder of its affordable housing plan was located on Poplar Road, where both the RVD and Kalian sites are located. Morrow further noted that the Kalian approvals had been overturned in the Superior Court so that there were no valid development approvals along Poplar Road and that each of the developers would be treated similarly.

Morrow emphasized that the subject ordinances were to be applied town-wide and not just to the COAH approved sites. Further, Morrow noted that the consequence of the township's application to amend its grant of substantive certification would be that the ordinances "will not have the impact that [RVD] is claiming they have, being that we may ultimately RCA everything and there is no need to build on-site units." With regard to the cost generation arguments made by RVD, Morrow claimed that there was only one affordable housing unit to be built in the township on-site, according to River Vale's calculations. Also, he advised that if the ordinances in fact affect the RVD site, RVD can utilize the COAH mediation process to attempt to mediate the application of the environmental ordinances at COAH. "There is flexibility into your own regulations. If these are adopted, it is not the end of the line." stated Morrow.

Morrow urged application of the ordinances to the COAH sites because the ordinances encourage environmentally sensitive site design and are consistent with the River Vale master plan, which has as its goal the protection of natural resources. Further, Morrow noted that the level of tree replacement on a given site was the direct result of the design of the project "which is in the applicant's control."

In arguing against the ordinances, Bisgaier stated that the motion was an attempt by River Vale "to essentially amend its fair share plan without prior COAH approval." This is because the ordinances will dramatically impact the yield of housing that the sites can produce. As an example, Bisgaier noted that Kalian's approvals, which were for less units than contemplated by the COAH certification, required variances from the Tree Preservation ordinance. Therefore, yield clearly was affected on the Kalian site. (The environmental ordinance had not been adopted at the time of the Kalian approval.) He noted that COAH had an obligation in reviewing a plan before it to determine that the plan works "not that it works with variances." Further, he noted that on its face, the environmental ordinances were not only cost generative but would impact site yield and result in a plan not conforming with substantive certification.

He pointed out that RVD was currently before the planning board seeking site plan approval consistent with the COAH certification. If the ordinances were to apply, RVD would "have to totally redesign the site or seek variances from the application of the ordinance." In response to questioning from the Council, Bisgaier noted that the Kalian project was reduced from the zoned-for 78 units to 58 units with a variance from the Tree Preservation ordinance. He also stated that with regard to RVD's, project 1,800 trees on its land would be affected by the ordinance. He could not state what the exact reduction in housing units would be with regard to the application of the ordinance to the RVD site.

### DISCUSSION

River Vale has not demonstrated that the application of the two ordinances at issue to the COAH certified sites would not be cost generative and would not affect the density and yield on the certified affordable housing sites. In fact, the certifications presented by RVD in support of its opposition to this motion amply demonstrate that the ordinances are cost generative and could decrease density and affordable housing yield. Moreover, the example of the approvals given to the Kalian property show that variances from the Tree Preservation ordinance were necessary to develop that site even at densities that were less than approved in River Vale's current COAH-certified plan.

River Vale's suggestion in oral argument that a COAH mediation process would be available to developers if the ordinances in fact did affect the developability of the sites is not acceptable. When COAH certifies a housing element and fair share plan, it certifies a plan that may be realistic for a developer to utilize the zoning on his or her site without variances and without prolonged negotiations with a municipality as to the developability of the site. COAH cannot approve ordinances that will produce delay and uncertainty with regard to the developability of a COAH certified inclusionary site. Therefore, River Vale's suggestion that mediation would be available once the impact of its ordinances on the COAH certified sites is known, alone presents sufficient reason to deny River Vale's motion.

Therefore, because River Vale has not demonstrated that the ordinances in question would not adversely impact the ability of the owners of the COAH certified sites to develop these properties consistent with the terms of River Vale's current substantive certified plan, this motion must be denied.

  
Renee Reiss,  
Council Secretary

Dated: April 7, 1999