

BNE ASSOCIATES )  
v. ) COAH DECISION NO. 99-1106  
THE BOROUGH OF ) MOTION DECISION  
BLOOMINGDALE )  
)

BACKGROUND

BNE Associates ("BNE") filed a motion with the Council on Affordable Housing ("COAH" or "the Council") on October 29, 1999 requesting an order to direct the Borough of Bloomingdale ("Bloomingdale") in Passaic County to amend its land use and steep slope ordinances to allow development of 57 affordable units at Block 32, Lots 8, 9 and 10A and Block 92, Lot 38 ("the Ball Tract") in conformance with the borough's certified plan. BNE is the contract purchaser of the Ball Tract, which is included in Bloomingdale's certified fair share plan as an inclusionary site with a zoning of eight units per acre with a 20 percent setback that will produce 57 affordable units. In its fair share plan, Bloomingdale also proposed a rental overlay zone for the Ball Tract that would permit development at 10 units per acre with a 15 percent setback of affordable units if rental units were produced to address its 14-unit rental obligation.

COAH granted substantive certification to Bloomingdale's plan on December 6, 1995. Bloomingdale's plan addressed a 200-unit obligation through five credits, a 32-unit housing rehabilitation program and zoning on six sites for 164 affordable inclusionary units, of which 14 were to be rentals. The underlying zoning required by the substantive certification for the Ball Tract was for a for-sale development that would allow eight units per acre with a 20 percent setback and the rental overlay at 10 units per acre with a 15 percent setback to produce 14 rental units was also required by COAH's certification. Both COAH in its certification decision and the borough in its filed fair share plan determined that the Ball Tract was suitable for development at either density.

### THE MOTION

BNE's motion seeks an order from COAH directing Bloomingdale to adopt and modify its land use ordinances, and/or to enter mediation to permit the construction of affordable housing on the Ball Tract consistent with Bloomingdale's certified plan. BNE argues that "Bloomingdale's failure to amend its ordinances so as to allow the construction of its 57-unit affordable housing obligation violates the Fair Housing Act, contradicts its own master plan and is contrary to both its petition used to secure substantive certification from COAH and to its town center designation from the State Planning Commission ("SPC")."

BNE states that Bloomingdale never adopted the rental overlay ordinance required by COAH to meet the borough's 14-unit rental obligation and to permit the development of rental housing on the Ball Tract. BNE states that without the overlay ordinance on the Ball Tract there is no realistic opportunity for the development of affordable rental housing in Bloomingdale, thereby violating the Fair Housing Act and COAH's grant of substantive certification.

BNE argues that Bloomingdale voluntarily agreed to zone the Ball Tract to allow the development of 57 affordable units with a rental overlay that would permit development at 10 units per acre with a 15 percent setaside of affordable rental units. BNE notes that both Bloomingdale and COAH agreed that, although all of the inclusionary sites selected to address the borough's obligation were impacted by steep slopes, there was sufficient land on each site to permit development at the densities proposed in Bloomingdale's plan. In addition, BNE states that it believes that the center designation granted to Bloomingdale by SPC took into consideration the higher density zoning proposed in the center under the overlay ordinance. Therefore, BNE claims that Bloomingdale is in violation of its center designation. BNE further

notes that the housing element portion of the borough's master plan, attached, states that, with regard to the Ball Tract, an overlay zone incentive "shall be built into the Zoning Ordinance [of 10 units per acre with a 15 percent setaside for rental units] to encourage the construction of rental housing." For this reason, BNE states that Bloomingdale's zoning ordinances are in violation of its own master plan.

BNE also argues that the biggest obstacle to the development of the Ball Tract in conformance with the borough's certified fair share plan is Bloomingdale's steep slope ordinance, which prohibits the construction of structures on slopes exceeding 15 percent. BNE notes that adherence to this portion of the borough's ordinance makes high-density development of the site impossible. BNE's engineer calculates that between the existing zoning, which prohibits rental units, and the steep slope requirements, only 64 townhouses can be constructed on the site at a gross density of 1.8 units per acre, thus achieving 13 affordable units rather than 57 affordable units.

BNE therefore, requests that COAH exercise its authority and require Bloomingdale to adopt the necessary and required rental overlay zone amendments to its zoning ordinances and to modify the steep slope ordinance to permit BNE to develop the Ball Tract as envisioned in the borough's certified plan.

#### BLOOMINGDALE

In its briefs filed in response to BNE's motion, Bloomingdale argues that no additional rental units are needed to comply with Bloomingdale's fair share obligation. Therefore, Bloomingdale states that it is not necessary for it to adopt an overlay zone or to permit the construction of rental units on the Ball Tract. Additionally, Bloomingdale notes that its rental obligation is 14 units and that, therefore, the borough need only

allow the development of 94 total rental units on the Ball Tract, of which 14 would be affordable units.

With regard to its steep slope ordinance, Bloomingdale states that COAH's Compliance Report recommending substantive certification did not require alteration to the ordinance, which was adopted prior to COAH's certification, and stated that the inclusionary sites selected by the borough "are of sufficient size for a developer to compensate for the steep slope areas and provide for the number of market and low and moderate income units proposed for the sites." Bloomingdale also quotes the provisions of Chapter 34, Section 38(6) of its Inclusionary Multi-Family District ("IMFD") zone, which states that the planning board may depart from the prohibition against construction on steep slopes "so as to meet the affordable housing obligations of the borough," and "that such departure shall not be deemed to constitute a need for a bulk variance." For this reason, Bloomingdale argues that there is no need to amend its steep slope regulations.

Also, Bloomingdale states that the development plan submitted by BNE does not meet the minimum standards required to permit full review by the planning board or COAH. Richard Burns, the borough's engineer reviewing BNE's submittal, notes that the relief requested by BNE cannot be substantiated without (1) a property survey by a licensed New Jersey land surveyor, containing a complete metes and bounds description, all easements and an accurate determination of the area to the nearest tenth of an acre and (2) a topographical map showing existing contours in two-foot intervals, all natural features including rock outcrops and water courses or other natural features that could limit development and delineation of those areas exceeding 15 and 25 percent slopes.

Bloomingdale also notes that because its Ordinance 16-88 allows the planning board flexibility in approving developments including affordable housing on sites with slopes in excess of 15

percent, the developer has an obligation to submit an application to the planning board for review before seeking relief from COAH. According to the borough, if BNE thought that the ordinance was restrictive, it should have objected during the 45-day period after Bloomingdale petitioned COAH for substantive certification.

Bloomingdale argues that BNE cannot claim that the provisions of the borough's ordinances are cost generative when COAH's report and resolution certify that they are not cost generative. Since all inclusionary sites are subject to the same considerations with regard to development on steep slopes, Bloomingdale argues that BNE should not be entitled to "superior rights" by having the revisions relaxed or eliminated for its site. Additionally, Bloomingdale claims that to change the ordinance for all affordable housing sites would violate both the mediated agreement with BNE and COAH's substantive certification.

Bloomingdale claims that COAH has already determined on two occasions that it would not act as a super planning board. For this reason, the borough believes that COAH should allow the planning board to complete its review and only step in if the planning board's action is arbitrary, unreasonable or capricious.

Finally, Bloomingdale argues that it should be permitted to address its rental obligation through means other than the originally proposed but unexecuted overlay zone. Bloomingdale believes that for COAH to require development at 10 units per acre on environmentally sensitive land would be detrimental to the borough. Also, Bloomingdale notes that the courts have not required municipalities to address more than their fair share, which Bloomingdale claims would be the case if this site were to be developed for all rental housing, as BNE proposes.

#### BNE REPLY

In reply, BNE argues that, because Bloomingdale has not constructed any affordable rental units, the borough cannot claim

that it has no need to permit the construction of affordable rental units. BNE believes that Bloomingdale must honor the terms of the COAH certification and adopt the rental overlay for the Ball Tract.

BNE contends that Bloomingdale's interpretation that the borough need only permit the development of 14 affordable rental units and that the total units constructed on site need be only 298 units is mathematically and statutorily incorrect. According to BNE, Bloomingdale must permit its proposal for the development of the entire Ball Tract at 10 units per acre with a 15 percent setback, yielding 355 total units and 53 affordable rental units, although BNE states it will setback 57 affordable rental units.

BNE states that Bloomingdale has misrepresented the provisions of its IMFD zone, which could be interpreted to only permit affordable units to be developed on slopes steeper than 15 percent. According to BNE, the Bloomingdale Borough Planning Board is granted no power to permit the development of market units on such slopes. Without such permission, BNE contends it cannot construct sufficient market units to be able to construct 57 affordable units. Additionally, BNE believes that the provisions of the IMFD zone may not apply to the Ball Tract, thereby eliminating any determination by the planning board to permit development on steep slopes. For these reasons, BNE restates its request that COAH require Bloomingdale to amend its steep slope regulations affecting the Ball Tract.

BNE also submitted the requested topographical map in reply, but argued that the property survey is not a requirement at this stage of the review process.

BNE further argues that it is within COAH's power to require Bloomingdale to approve an amended steep slope ordinance, since the borough is in violation of the conditions of its substantive certification in that Bloomingdale never adopted the rental overlay. BNE notes that the courts have required

municipalities to adopt all aspects of their fair share plans and have also ordered planning boards to conduct expeditious reviews.

BNE states that it is reasonable for COAH to mandate changes to the ordinances because the current ordinances are cost generative. BNE specifically notes the height and setback requirements as well as the number of units permitted per building and steep slope regulations as being cost generative. BNE also contends that its development plan can be executed without major environmental impact. BNE also notes that, historically, when inclusionary developments need variances, affordable housing developments do not receive such approvals.

Finally, BNE argues that any act short of requiring Bloomingdale to change its land development ordinances will allow the borough to evade its obligation. BNE states that Bloomingdale's request to be permitted to modify its certified plan and address its rental obligation in some other manner should be rejected. BNE believes that Bloomingdale should be required to implement its plan by amending its ordinance and by expeditious approval of BNE's development plan.

#### DISCUSSION

Because of postponements requested by the parties, oral argument on this motion was not held until May 3, 2000.

In its motion and at oral argument, BNE requested COAH to order Bloomingdale to enact a rental overlay zone at 10 units per acre with a 15 percent setaside of affordable units to address Bloomingdale's 14-unit rental obligation. The overlay zone was included in Bloomingdale's fair share plan, which received certification from the Council on December 6, 1995. However, to date, Bloomingdale has not adopted the overlay zoning for the development of rental housing pursuant to the certified fair share plan.

The development proposal submitted by BNE to the Council assumes that the entire Ball Tract would be zoned at 10 units to the acre to produce approximately 355 units of rental housing, which with a 15 percent setaside would yield 53 units of affordable rental housing. In order to achieve this zoning, BNE also requests that COAH order the Borough to grant BNE relief from its steep slope ordinance in order to achieve the proposed rental project and also seeks relief from the height and density requirements of the borough's land use ordinances.

In response, Bloomingdale argues that it should be permitted to amend its plan to address its rental obligation through means other than the overlay zone for which it sought certification from the Council and which the Council granted to it. In fact, Bloomingdale argues that COAH should allow it to amend its fair share plan in response to the BNE motion and without further formal procedure, as required by COAH rules. Bloomingdale states that it has discovered affordable rental units in the municipality in a group home for which it would like credit from COAH and, thereby, argues that the 14 units of rental housing provided for in the overlay zone of the Ball Tract are no longer necessary.

Alternatively, Bloomingdale argues that COAH should not require development of the Ball Tract entirely at 10 rental units per acre, as proposed by BNE, because that would result in more rental units than are necessary to meet Bloomingdale's fair share obligation of 14 rental units. Bloomingdale also cites cases in which the courts have allowed municipalities relief from certified fair share plans when the development of sites included in the plans becomes impossible and argues that COAH should allow Bloomingdale to alter its fair share plan because of the impossibility of developing the Ball Tract at the density of zoning of 10 units per acre, as provided for in Bloomingdale's certified fair share plan.

With regard to BNE's arguments with regard to the applicability of Bloomingdale's steep slope ordinance to the Ball Tract, as well as BNE's request for relief from the Borough's land use ordinances, Bloomingdale argues that BNE has an obligation to submit an application to the planning board for review before seeking relief from COAH. Bloomingdale further notes that its Ordinance 16-88 allows the planning board flexibility in developing affordable housing on sites with slopes in excess of 15 percent. Bloomingdale argues that the planning board should be given an opportunity to evaluate BNE's proposed development of the Ball Tract, prior to COAH taking any action with regard to BNE's request for relief. Bloomingdale argues that COAH should allow the planning board to complete its review of a properly filed, and complete, development proposal application by BNE prior to any action by the Council.

In evaluating the arguments of the parties, it is very clear that Bloomingdale has not complied with the terms of its substantive certification in that it has not adopted the overlay zone of the Ball Tract to produce the 14 units of affordable housing provided for in its fair share plan for which it sought and received COAH's substantive certification. Attached to this opinion are pages 12 and 13 of the Borough of Bloomingdale's housing element dated September 1, 1995 for which Bloomingdale sought COAH's certification. These pages clearly set forth Bloomingdale's intention to create an overlay zone to encourage the construction of rental housing at 10 units per acre with a 15 percent setaside on the Ball Tract. Bloomingdale was required by the Fair Housing Act, N.J.S.A. 52:27D-314, to implement by the appropriate municipal ordinances its fair share plan within 45 days of COAH's substantive certification decision. Bloomingdale did not do that. Therefore, COAH will order Bloomingdale to adopt the

required overlay zone within 45 days of the date of this decision, i.e. 45 days of June 7, 2000, or by July 22, 2000.

Further, COAH will not grant Bloomingdale's request for relief from the rental component of its certified fair share plan. The Council's rules provide procedures whereby a municipality may seek to amend a certified fair share plan. Bloomingdale has not followed these procedures. COAH will not consider such a request when it is made in opposition to a motion such as the one filed by BNE.

It should be noted, however, that the overlay zone that Bloomingdale is required to adopt need only provide for an inclusionary rental development that will provide 14 units of affordable rental housing. The remainder of the Ball Tract may be developed at eight units per acre to provide an inclusionary development of market-rate and affordable for-sale housing at the underlying zoning of eight units per acre with a 20 percent setback.

In COAH's substantive certification decision of December 6, 1995 COAH determined that the Ball Tract could provide the requisite affordable housing for which it was zoned. Bloomingdale, in seeking certification of its fair share plan, also stated that the Ball Tract could provide the requisite affordable housing. Because BNE has presented to COAH a proposed development zoning the entire Ball Tract at 10 units per acre with a 15 percent setback for rental housing, a development which is not required by Bloomingdale's certified fair share plan, COAH cannot make a determination with regard to BNE's request for relief from Bloomingdale's land use ordinances, including the steep slope ordinance. BNE must, like any other developer, first submit, as Bloomingdale has argued, a development plan to the planning board prior to seeking relief from COAH from the steep slope and other

land use ordinances. Ordinance 16-88 allows the planning board to exempt a developer of affordable housing from the steep slope ordinance. BNE must first make the request for relief from the steep slope ordinance from the planning board, prior to COAH acting on any request for relief.

Further, because no formal planning board action has been initiated by BNE, the developer's request for relief from what it claims are cost generating features of the borough's ordinances cannot be considered by COAH at this time. The ordinances were in place when COAH granted substantive certification. Also, BNE's request for mediation will be denied at this time because of the lack of a planning board review of BNE's development application.

In so holding, it is important to remind the parties, that one of the municipal obligations with regard to affordable housing set out in Mount Laurel is that municipalities expedite the production of affordable housing. Therefore, COAH will monitor closely BNE's progress before the Bloomingdale Borough Planning Board. And, COAH will be available to hear any motions filed by any developer in Bloomingdale at any time, including BNE, with regard to issues which arise during the planning board process.

#### THE DECISION

Therefore, for all the above-stated reasons, the New Jersey Council on Affordable Housing grants BNE's motion with regard to the Council ordering Bloomingdale to enact the rental overlay ordinance for the Ball Tract which was included in Bloomingdale's certified fair share plan. The Council, therefore, orders the Borough of Bloomingdale to adopt a rental overlay ordinance for the Ball Tract at a density of 10 units per acre with a 15 percent setaside to produce 14 units of affordable rental housing by July 22, 2000.

All other requests made by BNE in this motion are denied for the reasons stated in this decision.

  
Council on Affordable Housing

Dated: June 7, 2000