

IN RE ALLAMUCHY TOWNSHIP)
PETITION TO AMEND SUBSTANTIVE)
CERTIFICATION)
)
) COUNCIL ON AFFORDABLE
) HOUSING
)
) OPINION 01-1306

On September 4, 1996 Allamuchy Township, Warren County (hereinafter "Allamuchy") was granted substantive certification of its second-round obligation. Included in the plan were two inclusionary sites: (1) the Baker site, the owner/developer of which is Baker Residential, L.P., (hereinafter "Baker"), a 375-acre parcel located in the gated community of Panther Valley and which was granted preliminary site plan and subdivision approval on October 25, 2000 for 47 single-family lots and for 324 townhouses of which 10 are low and moderate income units; and (2) the Carco site, the owner/developer of which is Carco Development Co. (hereinafter "Carco"), a 45-acre site, also located in Panther Valley, which on April 26, 2000 received preliminary site plan approval for 100 family rental units, three of which would be affordable units.*

On October 2, 2000 Allamuchy filed a petition to amend its substantive certification to add a 13-unit RCA to its certified plan. No sites were proposed to be eliminated from Allamuchy's plan in the amendment. However, the 13-unit RCA equaled the 13 units to be built on the inclusionary Baker and Carco sites. Baker and Carco filed objections to Allamuchy's petition for an amended plan and in their objection the developers stated that Allamuchy was planning to condemn both the Baker and Carco inclusionary sites and utilize the land for preserving open space with Green Acres funding. Allamuchy had not mentioned the planned condemnation in its petition for an amended plan. However, on October 30, 2000, less than a month after filing its petition, the Allamuchy Township

*The original zoning on these sites that was approved in the Council's grant of certification allowed the sites' developers three options for the development of the sites' affordable housing: the three percent setaside option, which was exercised by the developers, as well as an option to transfer the affordable units to another site owned by the developer and the option to pay a fee to send the affordable units to another municipality in a regional contribution agreement ("RCA").

Council passed a resolution authorizing commencement of the condemnation of the two sites. Subsequently, the condemnation proceedings were initiated in court.

In court both Carco and Baker have opposed the condemnation of their properties. They have also instituted exclusionary zoning builders' remedy lawsuits against Allamuchy, alleging that the condemnation actions void the realistic opportunity provided by the Allamuchy plan. Therefore, they claim that a builders' remedy is necessary. Allamuchy has answered the builders' remedy suits by citing as a defense its COAH certification of its fair share plan. COAH has been made a party to one of the exclusionary zoning lawsuits pursuant to N.J.S.A. 52:27-317, which provides that COAH may be made a party to a builders' remedy lawsuit filed against a municipality that has substantive certification so that COAH may defend its grant of certification.

The condemnation actions and the builders' remedy lawsuits have recently been consolidated and are now being heard by the Honorable Roger F. Mahon, who is the Mount Laurel judge for Warren County. A briefing schedule for the parties has been set out by Judge Mahon and the case is proceeding.

Because Carco and Baker filed objections to Allamuchy's amended petition, COAH held one mediation session on February 21, 2001. A COAH Mediation Report was issued on March 13, 2001. The report noted that Baker and Carco were objecting to the township's ability to enter into the contemplated RCA because Allamuchy had a fully compliant plan utilizing the Baker and Carco sites and the 13-unit RCA would be surplus. Also, Baker and Carco objected to Allamuchy's ability to file a condemnation suit against their properties because the sites were Mount Laurel inclusionary developments. The Mediation Report concluded that these objections were legal objections and the parties were given the opportunity to submit briefs on the issues, which they did. Subsequently, oral argument with all parties participating was held before the Council at its meeting of May 2, 2001.

Carco and Baker question Allamuchy's ability to enter into an RCA because the RCA would be surplus and the RCA may be used to replace the inclusionary developments on the Carco and Baker tracts if condemnation is successful. The Fair Housing Act clearly states at N.J.S.A. 52:27D-312 that a municipality "may propose" an RCA of up to 50% of its fair share to another municipality which "shall be approved" by the Council if the RCA provides a realistic opportunity for affordable housing. The decision as to whether or not the RCA provides a realistic opportunity is made after consultation with the county planning board and HMFA with regard to the proposed project plan in the receiving municipality. Clearly, then, the Fair Housing Act allows any municipality to enter into an RCA for 50 percent of its fair share plan, if the RCA provides the required realistic opportunity. Prior to its filing of its amended fair share plan, Allamuchy did not have an RCA in its certified plan. Therefore, the Fair Housing Act provides no impediment to Allamuchy's including an RCA in its plan.

Baker and Carco also claim that COAH should not approve the contemplated RCA because the RCA would create "surplus units" designed to offset the removal from the plan of the 13 units included in the approved inclusionary developments. As previously stated, Allamuchy does not seek at this time to remove the inclusionary developments from its fair share plan, but rather to add the RCA. Allamuchy states that it did not seek to remove the inclusionary developments because it has no way of knowing whether the condemnation will actually be allowed by the courts. Therefore, until that condemnation is allowed, the inclusionary developments would remain in the plan.

With regard to the fact that the RCA would create surplus units, there is nothing in the Fair Housing Act, or court decisions, or the COAH rules which prevent a municipality from providing more than its fair share of affordable housing. COAH has approved fair share plans that included surplus units.

The objectors also state that COAH should not approve the

RCA request because it is intended as a substitute for the inclusionary units once the condemnation is approved by the courts. Further, the objectors argue that COAH should not allow Allamuchy to condemn their Mount Laurel inclusionary developments.

COAH, has no rule or policy with regard to the municipal condemnation of a Mount Laurel inclusionary development. The objectors have cited N.J.A.C. 5:93-5.13(b) as articulating a COAH policy which prevents the removal from fair share plans of inclusionary developments which have preliminary or final approvals. However, by its terms, this regulation only applies to sites that were included in a municipality's first-round certification and states that first-round sites for which a developer has applied for development approvals may not be eliminated in the municipality's second-round fair share plan. The Carco and Baker sites were not previously certified sites because Allamuchy did not have a first-round certified plan. Nor are the sites the subject of a mediation agreement or a developers' agreement.

Condemnation is clearly a responsibility of the courts, which have exclusive jurisdiction over condemnation issues. COAH has no jurisdiction over condemnation proceedings. The objectors have forwarded to COAH a case, Deland v. Berkeley Heights, in which a Mount Laurel judge enjoined the condemnation of an inclusionary development in Berkeley Heights. This is a case involving a court-approved fair share plan and a site for which there was a mediated agreement and various court orders. It is the Council's understanding that the case has been presented to Judge Mahon. Therefore, its applicability to the Carco and Baker sites is a matter for judicial decision in the context of the ongoing condemnation proceedings.

Given all of the above, it is the Council's decision at this time to not act on Allamuchy's petition to amend its certified fair share until Judge Mahon has decided whether the municipality may condemn the Carco and Baker properties. Therefore, the Council will not make any decision with regard to Allamuchy's proposed 13-

unit RCA until after the condemnation proceeding has been completed by the court. The Council does not believe that it is advisable to act on the requested RCA at this time because of the ongoing litigation over the condemnation of the Carco and Baker sites. Once that litigation is complete, COAH will act on the Allamuchy petition amendment. Until then, Allamuchy's amendment petition will be placed on inactive status.

December 12, 2001



Renee Reiss, Secretary
New Jersey Council on
Affordable Housing