

IN RE TOWNSHIP OF SPRINGFIELD) COUNCIL ON AFFORDABLE HOUSING
MOTION FOR DISMISSAL FILED) DOCKET NO. 00-1200
BY SOD FARM ASSOCIATES) OPINION

On January 24, 2000 Sod Farm Associates, ("Sod Farm"), the owner of 650 acres in Springfield Township, Burlington County ("Springfield"), filed this motion before the New Jersey Council on Affordable Housing ("the Council" or "COAH") requesting dismissal or accelerated denial of Springfield's repetition for substantive certification.

Springfield first received substantive certification from the Council on October 8, 1992 for a first-round obligation calculated pursuant to N.J.A.C. 5:92-1 et seq. of 67 units of affordable housing. Springfield's second-round obligation is calculated pursuant to N.J.A.C. 5:93-1 et seq. at 68 units of affordable housing: 15 units of rehabilitation housing and 53 units of new construction housing. Springfield submitted a housing element and fair share plan on September 9, 1998, along with a petition for substantive certification. On September 13, 1998 Springfield published notice of the petition and during the 45-day comment period there were no objectors. On September 10, 1999 a "COAH Report Requesting Additional Information" was issued to Springfield. The report reviewed the submitted housing element and fair share plan and requested that additional information and documentation be submitted to the Council within 60 days. On December 23, 1999, Springfield responded to the September report by repetitioning COAH with an amended housing element and fair share plan. The amended plan had been adopted by the Springfield Township Planning Board on December 7, 1999. Thereafter, on December 8, 1999, the Springfield governing body had adopted a resolution endorsing the amended plan and repetitioned COAH for substantive certification. The Township published notice of the petition on December 27, 1999 and during the subsequent 45-day comment period one objection was filed, by Sod Farm.

In addition to filing its objection, Sod Farm on January 24, 2000 filed this motion requesting dismissal or accelerated denial of Springfield's petition for substantive certification. Springfield responded to the motion on February 17, 2000 by filing a cross-motion to dismiss the Sod Farm motion. Sod Farm filed its reply to Springfield's cross-motion on February 24, 2000.

Sod Farm and Springfield have a history of litigation with regard to the zoning of the Sod Farm property. In December, 1996 an appellate decision was issued affirming the Superior Court's upholding of Springfield's decision to not include the Sod Farm property in the Township's wastewater management plan and also affirming Springfield's zoning of the Sod Farm property at three acre zoning. In upholding the Township's actions the Appellate Division deferred to the Superior Court decision, which it characterized as "well reasoned and thorough." That decision stated that Springfield was classified as a "rural planning area" in the 1992 State Development and Redevelopment Plan and that Sod Farm's property was not included in a "growth corridor". Further, it noted that commercial development along Route 206, where plaintiff's property is located, was inconsistent with the preservation of farm land and the rural agricultural character of the community. Also the court stated that the 1988 Springfield Municipal Master Plan emphasized that a major planning goal of the municipality was "to preserve productive agricultural land and the rural agricultural character that the farm land gives to the community." However, the Appellate Division also noted that the trial court's support of Springfield's actions to preserve the rural character of Springfield was based upon the assumption that the Sod Farm three acre zoning was "not being used to deny opportunities for low and moderate income housing...." Sod Farm Associates v. Springfield Township Planning Board et al. 297 N.J. Super. 584, 588 (App. Div. 1996).

In support of its January 24, 2000 motion for dismissal or accelerated denial, Sod Farm submitted a letter brief of its attorney, Jeffrey Kantowitz, Esq., and a certification of its Planner Art Bernard, P.P. Sod Farm argued that Springfield had failed to produce one unit of affordable housing in its first-round certified plan. Sod Farm complained that Springfield's repeticioned plan did not address the deficiencies set out in COAH's September 10, 1999 report or supply the information requested by the report. The Bernard Certification detailed these deficiencies. Based upon the deficiencies, Sod Farm argued that COAH's procedural rules, particularly N.J.A.C. 5:91-5.2, required dismissal. Sod Farm pointed to COAH's January 5, 1998 COMMENT AND RESPONSE, which was made in conjunction with the adoption of amendments to N.J.A.C. 5:91-5.2(f), as supporting its dismissal request:

COMMENT: A municipal failure twice to supply adequate information should result in mandatory dismissal or denial of a petition. Continued discretion under N.J.A.C. 5:91-5.2(f) makes superfluous and ineffective the suggestion of dismissal of the petition in -5.2(b).

RESPONSE: The Council agrees that dismissal or denial of a municipal petition that twice fails to contain adequate information is appropriate. [30 N.J.R. 195].

Therefore, Sod Farm argued that accelerated denial was appropriate because Springfield in its repeticioned plan failed to adequately address the deficiencies noted in COAH's September 10, 1999 report.

In response, Springfield filed a cross-motion seeking the dismissal of Sod Farm's motion. Springfield pointed out that the changes it made to its repeticioned housing element and fair share plan were made as a result of COAH's September 10, 1999 report. Springfield also argued that Sod Farm was estopped from raising any

objections to Springfield's plan because Sod Farm had never applied to the Springfield Planning Board for an inclusionary development of the site. Springfield pointed out to COAH that the Township had prevailed in its prior litigation with Sod Farm and that the Township's Master Plan designating the Sod Farm property as a "view shed" with minimal residential density had been upheld by the Appellate Division. Further, Springfield pointed out that Sod Farm property is in Planning Area 4 and it is not in a sewer service area.

Springfield argued that the Sod Farm motion was either untimely or premature and that if there were problems with the repetition the parties should go into mediation and the problems should be addressed during mediation. Assuming that the Sod Farm objection was valid, Springfield argued that the appropriate process was mediation and then a referral to the Office of Administrative Law ("OAL") in the event of an unresolved material factual dispute. Springfield claimed that it was not required to take action on its second-round housing element prior to the plan's submission to COAH, contrary to the allegations of Sod Farm. Also, Springfield noted that it had met with COAH in December 1999 in response to the COAH September 1999 report, modified its housing element and fair share plan in response to the report, moved forward with an RCA with Beverly City, entered into an agreement with Burlington County with regard to the administration of Springfield's rehabilitation program and had gathered other necessary documentation requested in the report for submission to COAH. In conclusion, Springfield asserted that the objection filed by Sod Farm should be dismissed and the motion filed by Sod Farm should be denied.

In response to Springfield, Sod Farm argued that it should not be estopped from filing an objection because it did not submit development plans for affordable housing to Springfield. Sod Farm indicated that the public interest in creating affordable

housing is ongoing and continuous, as is its right to participate in the COAH process. Furthermore, Sod Farm claimed that its objection was timely and within the 45-day comment period provided under COAH's regulations from the date of publication of the notice of Springfield's repetition. Therefore, Sod Farm stated that it was properly an objector to Springfield's plan. Then, Sod Farm reiterated the arguments made in its motion in support of its position that Springfield should be dismissed from COAH's jurisdiction or that Springfield's fair share plan should be denied in an accelerated fashion.

COAH considered this motion and cross-motion at its regular monthly meeting of April 5, 2000. The Council considered the motions on the papers and tabled the motions until the conclusion of the COAH mediation required by N.J.S.A. 52:27D-315. Prior to COAH rendering this decision a COAH Report Requesting Additional Information was issued on March 8, 2000 in response to Springfield's repetition. The report, attached and incorporated by reference, analyzed the Township's repetitioned housing element and fair share plan and concluded that there were eight outstanding items that had to be filed with the Council within 60 days of receipt of the report. The report was sent to the service list, including Sod Farm.

Mediation began on April 14, 2000 and was extended to December 4, 2000. Sod Farm and Springfield did not reach an agreement during mediation. However, during mediation Springfield's plan evolved, as described in the attached COAH Mediation Report of October 11, 2001. Also, during mediation it became clear that Springfield wished to include 11 accessory apartments in its fair share plan, which required a waiver of the limit of 10 accessory apartments found at N.J.A.C. 5:93-5.9(a). Springfield moved before the Council for a waiver of this limitation, a motion that was opposed by Sod Farm. On July 10,

2001 the COAH Board denied Springfield's request and instructed the parties to return to mediation.

This renewed mediation was scheduled to begin on October 1, 2001. However, Sod Farm withdrew from mediation. Subsequently, the COAH Mediation Report was issued on October 11, 2001. The COAH Mediation Report responded to all of Sod Farm's objections and the Report and its responses are incorporated by reference herein. The report noted that Sod Farm would have to repetition once again to add one unit of affordable housing to its plan. Also, the report found no material contested issues of fact that necessitated a transfer to the OAL. The Mediation Report was distributed for a 14-day comment period.

Sod Farm filed extensive comments to the Mediation Report, as did Springco, LLC, ("Springco"), another developer in Springfield. All comments were responded to in a COAH Report dated November 5, 2001, also attached and incorporated by reference herein. The report concluded that "since Springfield is proposing substantial changes to the fair share plan, Springfield must publish notice that its housing element and fair share plan will be amended within 60 days as a result of mediation pursuant to the new N.J.A.C. 5:91-7.5."

On November 13, 2001 Springco filed a motion with COAH to dismiss Springfield from COAH's jurisdiction and to join in Sod Farm's January 2000 motion to dismiss Springfield's fair share plan or for accelerated denial of that plan. Springco is the contract purchaser of a lot located in a Planned Residential Development ("PRD") overlay zoning district in Springfield. Springco proposed to develop 215 units of housing with 43 affordable units. Springco's motion will be dealt with by COAH in a separate opinion issued contemporaneously with this decision. However, material to this decision was Sod Farm's response to the Springfield motion in which Sod Farm stated that COAH should determine this motion based

upon the facts that existed when Sod Farm's motion was initially made or when mediation was terminated. Sod Farm took the position that COAH could not decide this motion based upon how Springfield's plan had changed and evolved over the time in which COAH had delayed deciding the motion. Springco's motion was orally argued at COAH's January 9, 2002 board meeting. Sod Farm participated in that oral argument.

DISCUSSION AND DECISION

At N.J.S.A. 52:27D-303 the New Jersey State Legislature declared that "...the State's preference for the resolution of existing and future disputes involving exclusionary zoning is the mediation and review process set forth in [the Fair Housing Act] and not litigation, and that it is the intention of this act to provide various alternatives to the use of a builders' remedy as a method of achieving fair share housing." In the context of this statement of legislative intent, it is important to note that Springfield has voluntarily petitioned for certification of its housing element and fair share plan in both the first and second rounds of COAH's fair share calculations.

Springfield's task in achieving a certifiable fair share plan is difficult because it is a rural municipality that wishes to preserve its farm land. Therefore, Springfield has stated that zoning for inclusionary developments of market rate and affordable housing, such as the developments proposed by Sod Farm and Springco, is not a technique Springfield desires to use in order to achieve its fair share obligation.

However, Sod Farm in its motion filed in January 2000 correctly points out that Springfield's first-round certified plan failed to achieve a single unit of affordable housing within Springfield. At the very least, this fact requires the Council to

very carefully scrutinize Springfield's second-round fair share plan to assure that that plan will result in the actual creation of affordable housing. The Council's analysis of Springfield's second-round plan, and the necessary requirements for Springfield's plan to create a realistic opportunity for affordable housing are outlined, to an extent, in the October 11, 2001 and November 5, 2001 COAH Reports with regard to mediation. However, the Council's focus with regard to Springfield's affordable housing efforts in conjunction with the Council's deliberation with regard to this motion should, as Sod Farm points out, be the status of Springfield's fair share plan when the motion was filed in January 2000.

In January 2000 Springfield had a completed first-round fair share plan that did not result in the creation of any units of affordable housing in the municipality. Springfield had filed one fair share plan with regard to its second-round COAH obligation and then filed a second housing element and fair share plan and repeticioned on that plan. Sod Farm objected to the second repeticioned fair share plan and filed this motion for dismissal or accelerated denial because it alleged that the plan was so deficient and so unresponsive to the Council's directions to Springfield contained in the Council's September 10, 1999 COAH Report that dismissal or denial was appropriate. Sod Farm emphasized that N.J.A.C. 5:91-5.2 contemplated such a dismissal or accelerated denial. For example, N.J.A.C. 5:91-5.2(b) states that if a municipality fails to submit the information required by a COAH Report "the Council shall take whatever action is appropriate which may include dismissal of the petition." Also, N.J.A.C. 5:91-5.2(f) states that "if the municipality is directed by COAH to file a second fair share plan and repetition on that plan" and "the Council finds that the refiled housing element and fair share plan continue to require substantial changes..." then the Council "may dismiss the petition for substantive certification by issuing an administrative order... or may deny the petition." Further, Sod

Farm points to the comment and response from January 5, 1998, quoted above, that dealt with the amendment to N.J.A.C. 5:91-5.2(f). The comment stated that "a municipal failure twice to supply adequate information" to the Council "should result in mandatory dismissal or denial of the petition." The Council agreed with the comment. Therefore, Sod Farm argued in January 2000 that Springfield, because its refiled petition did not fully address the issues raised in the COAH Report dated September 10, 1999, should be dismissed or that the Council should administratively deny Springfield's refiled petition.

The Council disagrees with Sod Farm's position. Therefore, it will deny Sod Farm's motion. Neither quoted rule requires dismissal of Springfield's repetition, either in January 2000 or now. Both N.J.A.C. 5:91-5.2(b) and -5.2(f) use the term "may" which indicates that a COAH dismissal is an option but not mandatory with regard to the situations presented in the two rules. Also, the comment and response quoted by Sod Farm presumes that the repetitioned fair share plan did not supply to the Council "adequate information". As is clear from the COAH Report of March 8, 2000 analyzing Springfield's repetitioned fair share plan, the repetitioned plan was adequate and did address issues raised with regard to Springfield's first filed fair share plan. However, it should be understood that in stating that the information was "adequate" it is also clear that Springfield had a great deal more work to do with regard to its plan, as outlined in the March 8, 2000 report's conclusion that eight specific areas of information were to be supplied to COAH "within 60 days of receipt of this report."

Essentially, Sod Farm's motion argues that COAH should relinquish jurisdiction over Springfield's Mount Laurel compliance efforts because of Springfield's inadequate response to COAH's request for information and because of Springfield's inadequate repetitioned and refiled fair share plan. As such, Sod Farm's

motion is similar to the motion found in the COAH decision In the Matter of the Housing Element and Fair Share Plan Filed by the Township of Branchburg, COAH Motion No. 98-1012. In that case an objector argued that Branchburg's filed fair share plan was so deficient that COAH should dismiss the municipality from its jurisdiction. However, COAH denied the motion and held that the criticisms lodged by the objector were not sufficient to deny COAH jurisdiction over the Branchburg plan. COAH noted that the Branchburg fair share plan was "no better or worse than many plans that have been routinely filed with COAH. As such, COAH's rules contemplate that such plans may change during COAH's process and that during the COAH process municipalities may have to amend plans and repetition on the amended plans."

The difference between Branchburg and this matter is that the Branchburg motion was made with regard to an initially filed fair share plan and that Sod Farm files its motion here with regard to a repeticioned fair share plan. It is clear, therefore, that the Council must scrutinize the refiled plan more closely than it did the Branchburg plan. However, after such scrutiny, the Council here rules that Springfield's refiled and repeticioned fair share plan was sufficient to retain COAH's jurisdiction over Springfield's Mount Laurel compliance efforts. The March 8, 2000 COAH Report, while clearly demonstrating that the Springfield fair share plan had deficiencies, was also clear that Springfield's repeticioned plan was one that, once its deficiencies were corrected, could be certified by COAH. For example, the report concluded:

With the submission of the requested documentation, Springfield Township will have submitted a housing element and fair share plan which addresses the Township's obligation through group home credits, an RCA, inclusionary zoning, accessory apartments and a rehabilitation program.

Therefore, based upon of COAH's March 8, 2000 analysis of Springfield's repetedioned fair share plan, as well as the overarching philosophy of the FHA that the resolution of municipal Mount Laurel disputes are best achieved in the Council's mediation and review process, the Sod Farm motion will be denied.

It should be noted that Springfield's Mount Laurel compliance efforts have to date been tortuous. It is clear from the March 8, 2000 COAH Report that Springfield's refiled petition needed much more work. However, a careful reading of the report makes clear that Springfield's refiled plan was sufficient to retain COAH's jurisdiction over Springfield's Mount Laurel compliance and that is the basis upon which COAH denies Sod Farm's motion to dismiss Springfield from its jurisdiction.

Because COAH denies Sod Farm's motion, it also denies Springfield's motion to dismiss Sod Farm's motion. The Sod Farm motion raised reasonable issues with regard to Springfield's Mount Laurel compliance efforts. Therefore, there is no reason for COAH to dismiss the Sod Farm motion. Rather, for the reasons stated above, it will deny it.


Renee Reiss, Secretary
New Jersey Council on
Affordable Housing

DATED: March 6, 2000