

In re Township)
of Manalapan)

COAH DOCKET NO. 99-1104

MOTION DECISION

This motion was filed before the New Jersey Council on Affordable Housing ("the Council" or "COAH") by K. Hovnanian Companies ("Hovnanian") and Westminster Realty Corporations ("Westminster"), (collectively "movants"). The motion requests a waiver of the requirements of provisions of COAH's rules regarding Regional Contribution Agreements ("RCA"). An RCA is a mechanism created by the Fair Housing Act ("FHA"), N.J.S.A. 52:27D-301 to -329 at -312, by which a sending municipality may transfer "up to 50% of its fair share" by means of a contractual agreement to a receiving municipality.

The COAH rules from which movants seek a waiver are: N.J.A.C. 5:93-6.2(a), which requires that "at least 50% of the [RCA] units accepted by a receiving municipality shall be affordable to low income households;" N.J.A.C. 5:93-6.5(b), which requires that a sending municipality that prior to January 2, 2001 petitions for substantive certification or amends a certified plan to include a new RCA "shall transfer at least \$20,000 to a receiving municipality for each unit transferred as part as an RCA;" and N.J.A.C. 5:93-6.5(c), which increases the amount to "at least \$25,000" for each RCA unit transferred by a municipality that petitions for substantive certification or amends a certified plan to include a new RCA "on or after January 2, 2001."

The movants are developers who have an interest in "The Villages", a proposed inclusionary development in the Township of Manalapan, Monmouth County ("Manalapan" or "the Township"). Movants' request a waiver of COAH's rules pertaining to the amount of funds needed to be transferred per RCA unit with regard to an RCA which is proposed to be funded from the development of The Villages. The movants' motion was originally filed on October 28, 1999, but was deferred at the request of the movants. Thereafter, in October 2001 the movants met with COAH and the municipality and requested that the motion be heard by the Council. A supplemental brief was filed by the movants on November 5, 2001. Manalapan,

which did respond initially to the motion filed in 1999, did not submit a supplemental brief in 2001. The motion was orally argued before the Council at its regular monthly meeting of January 9, 2002.

The history of The Villages inclusion in Manalapan's fair share plan is long. In 1984 the Superior Court issued a Consent Order for Partial Judgement to permit a total of 3,430 units on The Villages site, including 2,744 market units and 686 affordable units. The 686 affordable units were to be half low-income units and half moderate-income units. On April 11, 1986 the Superior Court approved an Consent Order for Final Judgement of Compliance and Repose with regard to Manalapan. This Order reduced the total number of units to be built at The Villages to 2,680 units, 2,244 market units and 436 affordable units. Of the 436 affordable units, 21 percent (93 units) would be low-income units and 79 percent (343) would be moderate-income units. In addition to the 436 affordable units, the developers of The Villages were required to contribute \$1,000,000 to Manalapan in lieu of constructing 100 low-income units.

On October 23, 1996 the Council granted substantive certification to Manalapan. In certifying the Township's fair share plan, the Council honored the provisions of the 1986 Consent Order with regard to The Villages and included the 436 affordable units to be built in The Villages in Manalapan's certified fair share plan. The 21 percent/79 percent distribution of low and moderate income units was included in Manalapan's certified plan, as well as the \$1,000,000 contribution in lieu of constructing the 100 low-income units. COAH's compliance report dated October 3, 1996 noted that the Township was to use \$590,000 of The Villages' contributions toward a rehabilitation program and \$410,000 for a portion of the 41-unit RCA. The remaining \$410,000 needed to cover the total \$820,000 cost of a 41-unit RCA (at \$20,000 per unit) would be paid for by the Township. To date, The Villages has not been developed and therefore the 41-unit RCA has not yet been initiated.

Since COAH's 1996 certification of Manalapan, the movants have acquired an interest in The Villages. The developers are seeking to develop The Villages at a lower density of housing than is provided in 1986 Consent Order. Hovnanian wishes to pursue the construction of an active adult community on its portion of the Villages site to contain approximately 1,100 units. Westminster proposes to develop 546 units on its portion of the site. Together, therefore, the two developers proposed to construct 1,646 housing units. Also, the developers desire the Township to transfer an additional 277 units as RCA units in addition to the 41 RCA units already provided for in the Township's certified plan. Therefore, the total RCA component of the Township's plan would be 318 units. However, in this motion the movants note that the Township still expects the developers to address the full 436 unit obligation from the 1986 Consent Order and to also contribute \$1,000,000 of the in lieu payment also provided in the Consent Order. Finally, the movants state that any units not transferred from The Village site in an RCA will be provided on site.

The movants support their motion with a certification from Arthur Bernard, P.P. The movants claim that the subsidies necessary to support their proposed inclusionary development on the Villages site are cost prohibitive, but do not support the claim with financial data regarding the site's development. They note that no development has taken place on The Villages site, even though the site has been zoned for inclusionary development for almost 16 years. Further, the movants state that the provision of 436 affordable units within the 1,646 unit development with the payment of the \$1,000,000 contribution is the equivalent of a 29.5% set-aside.

In this motion as originally filed the developers asked that the newly-proposed 277 unit RCA reflect the low and moderate income split provided in the 1986 Consent Order. Instead of the \$20,000 per unit that N.J.A.C. 5:93-5.6(b) requires for RCA's, the developers proposed to transfer \$27,500 per low-income unit and \$12,500 per moderate-income unit. The developers claim that by

applying the Consent Order's 21 percent/79 percent split to the proposed RCA resulted in an "average per unit transfer" of \$15,650. The movants also claimed that five municipalities had expressed a willingness to accept these funding amounts in an RCA with the Township.

In its updated motion filed on November 5, 2001 Hovnanian states that as of November 2001 with the consent of Westminster and Manalapan, it was seeking the lower average per unit RCA payment in connection with the original \$20,000 payment standard or the newly-adopted \$25,000 payment standard, provided in N.J.A.C. 5:93-5.6(c). The movants, therefore, calculate that if the \$25,000 standard were used, the "average per unit cost" based on a 21 percent/79 percent distribution would be \$20,650.

Manalapan's reply to the original motion was filed on December 6, 1999 and chiefly consisted of a certification by Richard Cramer, P.P. Cramer stated that the \$1,000,000 in lieu payment negotiated by The Villages 14 years ago was no longer sufficient to provide 100 low-income units in 1999. The Township stated that it had advised the movant that the in lieu payment needed to be increased to \$2,041,300.00. Manalapan further stated that the developers of The Villages should be required to provide a plan that yielded 536 credits for affordable housing, as contemplated in the original 1986 Consent Order. Additionally, Manalapan asked that the payment schedule for the in lieu payments be accelerated and requested that the developers post a performance guarantee to secure the full payment amount of their newly proposed RCA within the certification period.

This response by Manalapan prompted a letter from the movants requesting that instead of proceeding with the motion, COAH grant the parties time to resolve their differences. COAH granted this request on January 13, 2000 and did not reschedule this motion until October 2001. Manalapan did not submit any further papers to the Council prior to oral argument on this matter.

After careful consideration of the arguments made by the movants in their original and updated papers, as well as the arguments presented to the Council on January 9, 2002, it is the decision of the New Jersey Council on Affordable Housing to deny this motion and to not grant the requested waivers.

The 21 percent low income/79 percent moderate income development of The Villages was allowed in COAH's 1996 grant of substantive certification to Manalapan's fair share plan because it was included in the 1986 Consent Order of the Superior Court. The Council has uniformly deferred to prior court orders in the granting of certifications to municipal fair share plans. Therefore, the consent agreement reflected in the 1986 Order for Final Judgment of Compliance and Repose was permitted to be included in Manalapan's fair share plan that was certified on October 23, 1996 to meet Manalapan's second round fair share obligation. However, the movants now wish to materially change the provisions of the Consent Order and take the position that the development of The Villages contemplated in COAH's certified fair share plan and the court's 1986 Consent Order is not financially feasible. As such, the developers seek Manalapan to transfer via an RCA an additional 277 units of affordable housing to another municipality and further request that the new RCA reflect the 21 percent/79 percent distribution of low and moderate income units that would otherwise be built on in The Villages site pursuant to the 1986 Consent Order.

N.J.A.C. 5:93-6.2 requires that "At least 50 percent of the units accepted by a receiving municipality shall be affordable to low-income households." The rule further states that "The Council may modify this requirement if it determines that the sending municipality has adequately provided for its low-income housing obligation elsewhere in its housing element." Neither the movants nor Manalapan have demonstrated that Manalapan's fair share plan would adequately provide for the Township's low income units if the sought RCA would be calculated using only 21 percent low income units. Further, in order for Manalapan to increase the

amount of units transferred through an RCA, it would have to amend its current certified fair share plan. That amendment would bring into effect the requirements of N.J.A.C. 5:93-6.5(c) that "at least \$25,000" be transferred in an RCA for each RCA unit.

The standards for the Council to grant a waiver of any of its rules is found at N.J.A.C. 5:93-15.1(b). A waiver may be granted if the Council finds the existence of any one of the following three criteria: (1) that a waiver fosters the production of low and moderate income housing; (2) that a waiver fosters the intent of, if not the letter of COAH's rules; or (3) where the strict application of a rule would create an unnecessary hardship. Movants' requested waivers of COAH's RCA rules do not meet the standards set out at N.J.A.C. 5:93-15.1.

Movants state that the per unit cost of the RCA set out in COAH's rules creates a financial burden that prevents the development of The Villages as contemplated by the developers. In order for COAH to accept such an argument the movants would have to support it with a vastly more elaborate set of financial data with regard to the contemplated development of The Villages site than has been provided to support this motion. A complete accounting of the cost of the development would be needed, as well as all financial criteria necessary to demonstrate the financial hardship of developing the site as zoned or contemplated. This has not been done by the movants here.

Moreover, this is not the only data that must be provided to the Council, for the Council to be able to waive the minimum RCA amount set out in its rules. The Fair Housing Act states at N.J.S.A. 52:27D-312 that "A municipality may propose to transfer up to 50 percent of its fair share to another municipality...". It is, therefore, a fair share obligation to provide affordable housing that is being transferred in an RCA; not cash. The Council has determined that for new RCAs, the minimum that may be transferred to the receiving municipality to provide an affordable unit is \$25,000. To grant a waiver of this amount, the Council

would have to be convinced that a proposed receiving municipality could create the required affordable housing units for less than \$25,000. It is not sufficient to demonstrate that a receiving municipality would be willing to accept a reduced amount, as movants have tried to do here, but rather that the proposed transfer amount was sufficient to create the needed affordable units in the proposed receiving municipality. The movants have provided no information to the Council to support such a conclusion for the proposed RCA units here.

For the reasons stated above, the Council will not waive its RCA rule requirements based upon the motion that has been filed with COAH in this matter. If Manalapan chooses to enter into an RCA, the cost of the per unit transfer is \$25,000. In addition, affordable units in Manalapan must conform to the Council's regulations so that at least half are affordable to low income households. The motion for the waiver of COAH's requirements set out at N.J.A.C. 5:3-6.2 and -6.5 is, therefore, denied.


RENEE REISS

DATED: *April 3, 2002.*