

IN RE TOWNSHIP OF SPRINGFIELD) COUNCIL ON AFFORDABLE HOUSING
MOTION FOR DISMISSAL FILED) DOCKET NO 02-1402
BY SOD FARM ASSOCIATES) OPINION

This is a motion filed by Sod Farm Associates ("Sod Farm"), the owner of 650 acres in Springfield Township, Burlington County ("Springfield"), seeking an order from the Council on Affordable Housing ("COAH" or the "Council") dismissing Springfield's December 2001 Petition for Substantive Certification ("December 2001 Petition"), or in the alternative, denying the December 2001 Petition in an accelerated fashion.

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 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.

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).

On January 24, 2000, Sod Farm filed a motion to dismiss or deny on an accelerated basis Springfield's December 1999 petition for substantive certification. In response, Springfield filed a cross-motion seeking dismissal of Sod Farm's motion. COAH considered the motion and cross-motion on the papers at its April 5, 2000 meeting, and tabled the motions until the conclusion of mediation, pursuant to N.J.S.A. 52:27D-315. On March 8, 2000, a COAH Report Requesting Additional Information was issued in response to Springfield's repetition. The report, attached and incorporated by reference, analyzed the Township's repeticioned 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 December 19, 2001, Springfield adopted a resolution authorizing the township to amend its housing element and fair share plan and repetition for substantive certification. Springfield then published notice of its Repetition and Amended Plan on December 23, 2001. Springfield filed its Repetition and Amended Plan with COAH on December 31, 2001. Thereafter, Sod Farm and Springco requested clarification from COAH as to whether Springfield's notice and petition had been properly published and filed, and, if so, when the objection period would close. Relying on the language of N.J.A.C. 5:91-3.3(a) which states that a municipal publication of a Notice of Petition must occur "within 7 days of the filing of the petition," as well as the rationale underlying New Jersey Court Rule 1:3-1, COAH's Executive Director advised, by way of letter dated January 18, 2002, that Springfield's filing was not improper. Sod Farm and Springco were further advised that any objection should be filed on or before February 6, 2002, which was within 45 days of the date of publication of the notice.

On February 4, 2002, Sod Farm filed the present motion. Springco also filed a motion to dismiss Springfield's December 2001 petition on February 4, 2002. Springfield filed opposition to both

motions on February 25, 2002. Sod Farm and Springco filed responses to Springfield's opposition on March 6, 2002.*

In support of Sod Farm's present motion, Sod Farm submitted a letter brief and certification of its attorney, Jeffrey Kantowitz, Esq. Sod Farm argued that the Notice and Filing of Springfield's Petition were untimely and defective. Sod Farm also claimed that Springfield's Petition was deficient on its face. In support of its claims, Sod Farm asserted that Springfield's December 2001 Petition should be dismissed because the Notice of the Petition was published prior to the filing of the Petition. It claimed that allowing such sequencing had the potential to create "untold mischief," and might allow towns to "smoke out" objectors by repeatedly publishing plans without ever filing a petition with COAH. In addition, Sod Farm relied on Island Club Condominium v. City of Atlantic City, 298 N.J. Super. 516 (Law Div. 1995), a case which held that notice of a city planning board's decision was

On March 6, 2002, COAH issued a formal opinion denying Sod Farm's Motion to Dismiss or Deny in an Accelerated Fashion Springfield's December 1999 Petition. That opinion, attached and incorporated by reference herein, found that Springfield's repetitioned plan was adequate (although Springfield still had a great deal more work to do), and that dismissal was not called for. Moreover, the March 6, 2002 opinion explained that COAH was not required to dismiss or deny Springfield's December 1999 Petition under N.J.A.C. 5:91-5.2(b) or -5.2(f), and noted the policy set forth by the Fair Housing Act, N.J.S.A. 52:27D-302, et seq., (the "FHA"), that municipal Mount Laurel disputes are best resolved through the Council's mediation and review process.

insufficient where the notice was published prior to written resolution of the board's decision was adopted.

Even if COAH permitted Springfield to publish notice prior to filing its petition with COAH, Sod Farm argued that Springfield's filing remained improper as it was not published within 7 days of filing under N.J.A.C. 5:91-3.3(a). Sod Farm contends that R. 1:3-1 is not applicable to COAH or COAH regulations. That rule allows courts to compute a deadline which falls on a Saturday, Sunday, or legal holiday to fall on the following business day.

Sod Farm also argued that Springfield's Petition is deficient on its face because (1) Springfield has only provided for a \$20,000 per unit (rather than \$25,000 per unit) contribution for its proposed RCA; (2) Springfield's proposed accessory apartments are insufficiently documented and supported; and (3) the rehabilitation component of Springfield's plan does not present a realistic opportunity for affordable housing. Furthermore, Sod Farm asserted that the changes to Springfield's December 1999 petition did not occur as a result of the mediation which occurred between Sod Farm and Springfield, and, therefore, the December 2001 petition should not be considered under N.J.A.C. 5:91-7.5. Thus, Sod Farm argued, Springfield was required to petition anew, but was out of time to do so. Finally, Sod Farm argued that COAH has failed

to implement its own administrative regulations and has, therefore, failed to meet its statutory obligation. In support of its contention, Sod Farm claimed that no affordable housing has been produced in Springfield.

In response to Sod Farm's motion, Springfield submitted a letter brief of its attorney, Dennis P. McInerney, Esq. Springfield argued that COAH has already properly concluded that Springfield's Petition for Substantive Certification was validly filed. Springfield relied on the January 18, 2002 letter from COAH's Executive Director which explained that N.J.A.C. 5:91-3.3 does not specify in what sequence a petition is to be filed and publication made. Springfield further asserted that reference to R. 1:3-1 was appropriate, as the rationale behind that court rule has been applied to several different statutory schemes. Springfield noted the following examples, Mercer County Park Commission v. DiTullio Plumbing & Heating Co., 139 N.J. Super. 36 (App. Div. 1976) (the acceptance of bids under the public contract statute); State v. Jones, 181 N.J. Super. 549 (Law Div. 1981), (where a notice of tort claim is filed under the Tort Claims Act). Springfield argued that there is no reason why the Fair Housing Act should be treated any differently than the statutes in the above-referenced cases.

Springfield further claimed that Sod Farm's allegations that objectors will be harmed by towns who attempt to "smoke" them out are merely hypothetical situations which need not be considered by the Council at this time. Additionally, the Township asserted that there has been no harm by the sequence of filing and publication of the Petition and Fair Share Plan at issue here. It claimed that in addition to the notice provided to the general public by way of the December 23, 2001 newspaper publication, the objectors were provided with Notice of the Publication, Notice of the Repetition, and supporting documents on December 28, 2001. Thus, Springfield argued that publishing the notice prior to the actual filing did not alter the time within which anyone could comment or object, and, therefore, asserted that the purpose of N.J.A.C. 5:91-3.3(a) has not been abrogated by the filing and publication at issue here.

In response to Sod Farm's argument that Springfield's December 2001 petition was deficient on its face, Springfield asserted the following: (1) Springfield is prepared to amend its RCA agreement to reflect a \$25,000 per unit agreement if COAH concludes that the same is required; (2) Sod Farm has ignored the Mediation Report of October 2001 and the November 2001 Response to Comments which indicate that the Accessory Apartment Program is a viable means to address Springfield's affordable housing obligation; (3) Sod Farm has ignored the Mediation Report of

October 2001 and the November 2001 Response to Comments which indicate that Springfield's Rehabilitation Program are in accord with COAH's rules; (4) Sod Farm misunderstood the mediation process, as Springfield was under no obligation to include Sod Farm in its revised plan merely because Sod Farm was an objector; and (5) although Springfield's previous efforts did not create affordable housing units, Springfield asserted that its 1992 plan represented the best opportunity to create affordable housing at that time, that it has learned from its past experience that inclusionary zoning and a self-administered rehabilitation program alone are not the best means to create a realistic opportunity for the creation of affordable housing in Springfield, and that it has taken steps to create a more realistic opportunity in its current plan.

In response to Springfield, Sod Farm further argued that the January 18, 2002 letter from COAH's Executive Director did not equate to the Council's ruling on the issue of the timeliness of Springfield's notice and petition and that the time periods set forth in COAH's rules should be strictly construed.

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 FHA] 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.

As set forth in COAH's prior March 6, 2002 decision, 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 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 the 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.

Sod Farm has argued that Springfield's December 2001 Petition should be dismissed because it is untimely and defective. The Council disagrees with Sod Farm's position. N.J.A.C. 5:91-3.3 explains that a municipality shall publish notice of its petition for substantive certification,

within seven days of the filing of the petition in order to provide the general public with an opportunity to review the municipal housing element and fair share plan and to object to or comment upon them.

As the January 18, 2002 letter from COAH's Executive Director correctly noted, N.J.A.C. 5:91-3.3 does not require that the filing of the petition should precede the notice of the petition, or vice-versa. What this regulatory provision makes clear, however, is that notice is required in order to allow the general public the opportunity to review and respond to the municipality's plan.

In the present matter, Sod Farm has not alleged that it was deprived the opportunity to review and/or object to Springfield's December 2001 Petition, pursuant to N.J.A.C. 5:91-3.3. Rather, the general public, as well as Sod Farm and Springco, were provided with notice by Springfield's newspaper publication on December 23, 2001. Moreover, Sod Farm and Springco were both provided with Notice of the Publication, Notice of the Repetition,

and supporting documents on December 28, 2001. Furthermore, Sod Farm and Springco were specifically advised that objections to this repetition were due on or before February 6, 2002 by way the January 18, 2002 letter from COAH's Executive Director, and they did in fact file such objections. Although Sod Farm described several hypothetical situations where allowing a municipality to publish notice prior to filing a petition might lead to prejudice and harm to potential objectors, those situations are not based on the facts presented in this matter. Accordingly, the Council need not address such speculative factual scenarios at this time. Should the potential harm imagined by Sod Farm materialize in an actual case before COAH, the Council can address the actual harm caused by such an abuse at that time. Additionally, the Council finds that Sod Farm's reliance on the Law Division's decision in Island Club inappropriate, as the court there dealt with a notice issue which was different and distinct from the issue currently before the Council. Therefore, because Sod Farm and the general public received notice of the December 2001 Petition, as well as a full 45 day period to object to the same, it appears that the objectives of N.J.A.C. 5:91-3.3 have been met in the present case.

In addition, the Council disagrees with Sod Farm's argument that the rationale underlying New Jersey Court Rule 1:3-1 cannot be applied to time periods set forth in COAH's Rules. While R. 1:3-1 on its face only applies to deadlines imposed by the New

Jersey Court Rules, it is clear that the underlying principle of the rule, which allows a deadline falling on a weekend or legal holiday to fall on the following business day, has been applied to deadlines other than those set by the Court Rules. See Estate of Harrington v. Linden, 338 N.J. Super. 500 (App. Div. 2001) (where 90-day period for serving notice of tort claim under N.J.S.A. 59:8-8a ended on weekend, service could be effectuated on the following business day). Springfield published notice of its amended Housing and Fair Share Plan on December 23, 2001. On Monday, December 31, 2001, Springfield filed its repetition with COAH. Springfield was not able to file its repetition on December 30, 2001 (i.e. on the seventh day) as that day was a Sunday and the COAH office was closed. Permitting Springfield to file on the next business day in the present case is reasonable and appropriate. Moreover, it is in accord with COAH's past practice in administering filing deadlines falling on a Saturday, Sunday or Legal Holiday. Interpreting N.J.A.C. 5:91-3.3 to require Springfield to file its petition with COAH on a Sunday is an unduly rigid interpretation of COAH's rules. While the Council recognizes the importance of adhering to deadlines, it nonetheless rejects Sod Farm's argument that the seven day time period in N.J.A.C. 5:91-3.3 must be strictly construed in this instance.

Sod Farm's motion also argues that COAH should relinquish jurisdiction over Springfield's Mount Laurel compliance because the

Petition is deficient on its face. The Council again disagrees with Sod Farm. Although the Council has noted that Springfield's plan contains some deficiencies and requires some additional work in order to obtain certification, the Council has also noted that certification remains possible if these deficiencies are corrected. Moreover, Springfield has expressed its willingness to work with COAH in order to correct any deficiencies. For example, Springfield has agreed to change its RCA from \$20,000 per unit to \$25,000 per unit if requested to do so. While, COAH's rules allow the Council to "take whatever action is appropriate, which may include dismissal," when a municipality's plan is inadequate, COAH's rules clearly do not mandate such dismissal. See N.J.A.C. 5:91-5.2.

Therefore, based upon the Council's analysis of Springfield's second-round plan, and the October 11, 2001 and November 5, 2001 COAH Reports with regard to mediation, 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.


Renee Reiss, Secretary
New Jersey Council on
Affordable Housing

DATED: June 5, 2002