

IN RE: TOWNSHIP OF)
SOUTHAMPTON - MOTION)
FOR AN ORDER GRANTING)
ACCELERATED DENIAL OR)
AN AMENDMENT TO THE)
COMPLIANCE PLAN FOR)
SITE SPECIFIC RELIEF)

New Jersey Council on
Affordable Housing

COAH Docket No. 98-1005

OPINION

This motion is filed by L.T.D., L.L.C. ("LTD"), the contract purchaser of a 226-acre tract (Block 1401, Lots 4, 4.03 and Block 902, Lot 2), consisting of two adjacent properties west of the designated Vincentown Village Center in the Township of Southampton, Burlington County ("Southampton"). LTD seeks an order from the New Jersey Council on Affordable Housing ("COAH" or the "Council") granting accelerated denial of Southampton's remanded petition for substantive certification, or, in the alternative, amending the township's plan for site specific relief.

Southampton petitioned COAH on May 22, 1995 for certification of a fair share plan addressing an obligation of 153 units of affordable housing, 67 rehabilitation units and 86 new construction units. At the direction of the Council, Southampton repeticioned COAH on February 18, 1997, with an amended plan and again repeticioned on October 7, 1997, with a third plan. There were several objectors to Southampton's first petition, all of which were resolved in mediation. There were no objectors to Southampton's second or third petitions. LTD was not an objector to any of Southampton's three filed petitions.

In a March 13, 1998 COAH Compliance Report recommending that conditional substantive certification be granted to Southampton's third filed fair share plan, COAH Staff analyzed Southampton's housing element and fair share plan. The inclusionary element of that plan consists of two zones, the Rural Residential RR-1 ("RR-1") zone and the proposed Town Center Extension ("TC-1") zone. The RR-1 zone is made up of multiple lots and owners, contains 169 acres, of which approximately 56 are developable, and is zoned for a gross density of six units per acre with a 20 percent set aside for affordable housing, to yield 68 affordable units.

The RR-1 zone does not have sewer or water, is not included in a sewer service area and is not in a designated center. However, because the zone was included in Southampton's original 1989 certified plan the site received a waiver from COAH's center designation requirements. According to N.J.A.C. 5:93-4.3(a), when a municipality lacks sewer and water, COAH will review the inclusionary site to determine if there is a realistic opportunity for the site to receive the necessary sewer and water during the six year certification. In support of its housing element and fair share plan, Southampton submitted to COAH the signed statements of property owners asserting that the zoning in the RR-1 zone was realistic and explaining that the parcels in that zone did not develop during the prior certification because of a previous decline of the housing market. COAH concluded that sewer and water

would be made available if the owners decided to develop the property under the RR-1 zone.

With regard to the TC-1 zone, Southampton proposed to include two lots in that zone to be designated for inclusionary development. The plan contemplated residential development at a density of eight units per acre with a 20 percent set aside to yield 37 affordable units in the TC-1 zone. As a condition of COAH's grant of conditional substantive certification, the two TC-1 zone lots were required to be included in an amended wastewater management plan to DEP and an amended application for center designation to the State Planning Commission so that the lots would provide a realistic opportunity to be developed for affordable housing. Southampton met these conditions and, COAH granted substantive certification on July 1, 1998.

On March 30, 1998, LTD sent a letter with supporting documentation to COAH which stated that the RR-1 zone could not achieve the designated yield. LTD requested COAH to postpone action on Southampton's petition for one month to consider this information. On March 31, 1998, COAH's executive director sent a letter to LTD denying its request to postpone consideration of Southampton's petition because the objection was not timely. On April 1, 1998, the COAH board voted to grant conditional substantive certification to Southampton's plan.

On July 13, 1998, LTD filed a motion seeking reconsideration of the grant of substantive certification to Southampton's housing element and fair share plan. The Township opposed that motion. On January 5, 1999, COAH denied LTD's motion, finding that reconsideration of COAH's grant of substantive certification was not warranted because LTD failed to show that that decision was arbitrary, capricious, or "palpably incorrect or irrational." In addition, COAH found that LTD's motion impermissibly sought waiver of the 45-day objector period under N.J.S.A. 52:27D-314.

LTD filed an appeal of the Council's denial of LTD's motion for reconsideration on February 11, 1999. In a reported decision issued March 20, 2001, the Appellate Division reversed COAH's grant of substantive certification to Southampton and remanded the matter back to COAH for consideration. In re Petition for Substantive Certification, Twp. Of Southampton, 338 N.J. Super. 103 (App. Div. 2001). The Appellate Division found that the factual materials provided by LTD raised serious questions as to whether Southampton's plan provided a realistic opportunity for the creation of affordable housing. Ibid. Southampton petitioned the New Jersey Supreme Court for certification on the Appellate Division's decision. That petition was denied on July 16, 2001. In re Petition for Substantive Certification, Twp. Of Southampton, 169 N.J. 610 (2001). Thereafter, COAH staff met with all parties

and requested the submission of additional information on Southampton's petition for substantive certification. The parties provided additional information, however, prior to the issuance of a COAH Staff Report on Southampton's remanded plan, on December 3, 2001, LTD filed the present motion.

On January 24, 2002, COAH staff issued its report on Southampton's remanded plan, attached and incorporated by reference herein, which recommended that neither the RR-1 and TC-1 zones receive credit because the same could not be shown to provide a realistic opportunity for the creation of affordable housing. COAH staff received three comments to its January 24, 2002 report, and, thereafter issued a Response to COAH Report on April 17, 2002. That report, attached and incorporated by reference herein, recommended that Southampton be provided 90 days to amend its plan because neither the RR-1 zone, nor the TC-1 zone, were found to provide a realistic opportunity for affordable housing.

In support of its motion, LTD filed a brief by its attorneys, Sharon A. Morgenroth, Esq., and Carl S. Bisgaier, Esq., and a certification of David N. Kinsey, P.P. Southampton submitted a letter from its attorney, Ronald C. Morgan, Esq., and certification of Thomas J. Scangarello, P.P., in opposition to LTD's motion. In response, LTD filed a letter from its attorney, Sharon A. Morgenroth, Esq., and an additional certification from David N. Kinsey, P.P. The motion was orally argued on April 3, 2002.

LTD's brief set forth the procedural history of this matter and argued that accelerated denial of Southampton's plan was warranted in light of that history, COAH's regulations, and the Mount Laurel doctrine. LTD argued that Southampton's plan failed to create a realistic opportunity for the creation of affordable housing due to a lack of infrastructure and buildable acreage. In addition, LTD asserted that this case presented extraordinary circumstances which warranted site-specific relief for LTD. In support of this argument, LTD relied on Motzenbecker v. Borough of Bernardsville, Docket No. COAH 87-18 (decided November 16, 1987) for the proposition that site specific relief is appropriate where municipality has failed to provide an acceptable plan, despite repeated requests and guidance from COAH. LTD's brief argued that the present matter is analogous to the Motzenbecker case because Southampton has not produced one unit of affordable housing since 1975, and has twice repitioned COAH, but continues to rely on a flawed Fair Share Plan despite guidance from the Appellate Division. Finally, LTD, relying on the certification of David Kinsey, P.P., asserted that its site is available, suitable, approvable and developable, and, therefore, appropriate for site specific relief.

In response, Southampton argued that accelerated denial was inappropriate and that the present motion was premature because at the time that LTD filed its motion COAH staff had not yet issued

any report on the remanded plan. The Township asserted that it has never abused the COAH process or otherwise dealt in bad faith with COAH. Southampton also pointed out that it voluntarily complied through two cycles and previously received substantive certification from COAH. The Township further asserted that its plan continues to provide a realistic opportunity for affordable housing. Moreover, the Township argued that LTD's request for site-specific relief was clearly not warranted, asserting that LTD's parcels lack realistic development opportunity for inclusionary zoning. Specifically, Southampton claimed that: both parcels are located PA 4 and not in a center; both parcels are currently used as farmland and provide a greenbelt around the existing town center; both parcels have been identified as areas targeted for farmland preservation; and no analysis regarding water infrastructure availability, sewage capacity or traffic impact has been provided for these parcels.

LTD's reply reiterated its position that Southampton's plan is fatally flawed and that Southampton has failed to produce affordable housing.

After reviewing the materials submitted by LTD and the other interested parties in this matter, the Council agrees that Southampton's plan is inadequate because credit cannot be given to the RR-1 and TC-1 zones. However, the Council disagrees that

accelerated denial is warranted in this matter. Southampton has voluntarily participated in the COAH process and was previously granted substantive certification. Moreover, there has been no indication that Southampton has utilized the COAH process in bad faith or otherwise abused the system. In addition, it appears that Southampton has relied, to a certain extent, on COAH's previous grant of substantive certification. To now penalize the township for such reliance would not be appropriate. Finally, as explained in the April 17, 2002 COAH Staff Report, attached and incorporated by reference herein, COAH staff could not determine the realistic opportunity for affordable housing in the TC-1 zone due, in part, to DEP's lack of action on Southampton's 208 Plan amendment. Because this inaction was not within the exclusive control of Southampton, it would be unfair to penalize Southampton for the same. In light of the foregoing, the Council finds that accelerated denial of Southampton's plan is not warranted at this time. Instead, the Council agrees with the recommendation of the April 17, 2002 COAH Staff Report, that Southampton must amend its plan to address the inadequacies noted in that report and repetition within 90 days.

LTD has also requested that site specific relief be granted in an amendment to Southampton's compliance plan. Although LTD argues that the present matter is analogous to Motzenbecker v. Bor. of Bernardsville, supra., and that, therefore, the extraordinary remedy of site specific relief is warranted, the

Council disagrees. As explained above, Southampton voluntarily participated in the COAH process and constructed a plan which was previously certified by the Council. However, after additional information was made available, it became unclear whether certain sites in Southampton's plan could produce a realistic opportunity for affordable housing. The Council finds that the facts presented here are distinguishable from those in the Motzenbecker case, and denies LTD's request for site specific relief.

For the foregoing reasons, and in light of the April 17, 2002 Staff Recommendation, the Council denies LTD's motion for accelerated denial and site specific relief. Rather, as COAH directed at its June 5, 2002 meeting, Southampton should amend its plan and repetition COAH with a revised Fair Share Plan within ninety (90) days of the Council's oral decision on this matter (or by September 5, 2002).


Renee Reiss
Secretary

Date: *July 16, 2002*