

IN RE SOUTHAMPTON TOWNSHIP, BURLINGTON) NEW JERSEY COUNCIL ON
COUNTY, MOTION SEEKING AUTHORIZATION TO) AFFORDABLE HOUSING
SPEND DEVELOPMENT FEES PRIOR TO RECEIPT) DOCKET NO. **03-1504**
OF SUBSTANTIVE CERTIFICATION) OPINION

On August 1, 2003, the Township of Southampton (the "Township" or "Southampton") filed a motion seeking authorization from the Council on Affordable Housing (the "Council" or "COAH") to spend affordable housing development fee revenues to facilitate the construction of new affordable housing units. Ronald C. Morgan, Esq., filed the notice of motion on behalf of the Township, with a certification of counsel in support of the motion.

Under N.J.A.C. 5:93-8.2(c), "...municipalities that have not received substantive certification or a judgment of repose shall not spend development fees until they have received substantive certification or a judgment of repose." Although Southampton did receive second round certification on July 1, 1998, the Township's certification was revoked and remanded to COAH by the Appellate Division on March 20, 2001. Therefore, Southampton's motion requires a determination by the Council whether or not to grant a waiver of N.J.A.C 5:93-8.2(c).

Southampton petitioned COAH for second round substantive certification on May 22, 1995, in response to a 12-year obligation of 153 units (86 new construction, 67 rehabilitation). As a result of mediation and in response to a COAH Report noting deficiencies in the original second round plan, the Township re-petitioned COAH in April, 1997. Due to remaining defects in the plan, COAH adopted

a resolution on July 9, 1997, directing Southampton to address the deficiencies and re-petition within 90 days.

Southampton re-petitioned COAH on October 7, 1997, with a revised plan that included a new Town Center Extension (TC-1) zone for inclusionary development (in addition to the previous RR-1 inclusionary zoning site and rehabilitation program). On March 13, 1998, COAH issued a Compliance Report recommending conditional substantive certification to Southampton. In the interim, COAH received a request from L.T.D., L.L.C. ("LTD") to postpone action on Southampton's petition so that additional information concerning the RR-1 Zone could be taken into consideration. Because the objection was not timely, LTD's request was denied, and COAH granted final substantive certification to Southampton on July 1, 1998.

In response to an appeal by LTD, the Appellate Division reversed the grant of substantive certification and remanded the case to COAH on March 20, 2001. After preparing a Report on Court Remand Review (January 24, 2002) and a Report on Court on Remand Review and Responses (April 17, 2002), COAH concluded that affordable housing credit could not be given to either the RR-1 or the TC-1 at that time. The April 2002 Report recommended that the COAH Board direct Southampton to amend its plan by September 5, 2002. COAH received Southampton's re-petition and amended Housing Element and Fair Share Plan on August 23, 2002. During the ensuing

45-day comment period, five timely objections were received. COAH staff prepared a Premeditation Report Requesting Additional Information dated July 3, 2003.

As noted in the Premeditation Report, the Township's current affordable housing plan included only the larger of two parcels within the TC-1 zone: Block 903, Lot 21, which is owned by Stokes Holding Co., LLC (Stokes). This property is 21.09 acres in size and consists of an abandoned industrial facility containing several deteriorated warehouses and outbuildings. It is within the Village Center of Vincentown, which was designated as such by the State Planning Commission on September 22, 1999 (after Southampton's original second round certification but before the Court's remand).

COAH staff raised several concerns about the Stokes property in the Premeditation Report and conditioned a reduction for this site upon the execution of a developer's agreement and verification of sewer and water availability. A developer's agreement has not yet been presented to COAH, although the Township asserts that this motion is being presented in the interest of securing such an agreement. With regard to sewer availability, the Township submitted a revised Water Quality Management Plan Amendment application to the Department of Environmental Protection (DEP) on March 26, 2003. A DEP notice dated September 2, 2003, states that the TC-1 COAH site is "currently under review as a

separate site specific amendment to the Tri-County WQMP." Consequently, Southampton has not yet demonstrated that sewer and water are readily available to the Stokes property.

Counsel on behalf of Southampton filed a motion seeking authorization from COAH to spend affordable housing development fee revenues prior to obtaining second round certification. Southampton reports that, as of July 31, 2003, the Township had \$36,285.00 in its dedicated affordable housing development fee trust account. Southampton states that it plans to use a portion of the development fee funds to cover appraisal costs and to apply the remainder toward "acquisition costs," thus reducing the amount of its bonding obligations.

Southampton's motion seeks to permit the Township to expend development fee revenues for the appraisal and purchase of property intended not only for affordable housing purposes, but also for open space and recreational use. The Township states that it is pursuing this motion in response to the analysis and recommendations in COAH's July 2, 2003 Premeditation Report. Southampton states that the Report conditions the grant of affordable housing credit for the TC-1 parcel on the completion of a developer's agreement and verification of sewer availability. Southampton asserts that N.J.A.C. 5:93-8.16(a) "clearly authorizes the use of collected development fee revenues for the purchase of land to facilitate the construction of new low and moderate income

housing units." The Township also claims that this motion, if approved, would "enable the Township to partially satisfy its constitutional mandate to the beneficiary class of economically challenged households in the Southwest Housing Region in desperate need of safe and decent least-cost housing opportunities." Southampton also contends that the non-profit affordable housing developer located by the Township, Moorestown Ecumenical Neighborhood Development Inc. ("MEND"), is proposing 37 new low and moderate income family rental units that would satisfy Southampton's rental obligation and result in 2 for 1 bonus credits up to the 25% rental cap.

COAH received two letters in response to the Township's motion, both from Patrick F. McAndrew, Esq., on behalf of the Stokes Holding Company. The first letter, dated August 2, 2003, acknowledges receipt of the Township's motion and points out two errors in the moving papers. Mr. McAndrew notes that Stokes did not seek a use variance as claimed by Southampton, but rather, sought "a certification of non-conforming use status from the ZBA...." In addition, Mr. McAndrew objects to the Township's suggestion that Stokes did not display a good faith effort to find a buyer for his property. He notes, however, that "we will not oppose the motion" and concludes, "we hope the motion is granted and await the Township's commencement of good faith negotiations on

the issues of the date of taking and the appropriate fair market value of the site."

The second letter from Mr. McAndrew, dated September 2, 2003, is written in support of the Township's motion. Mr. McAndrew states: "Without waiving any other rights concerning this case or the pending litigation, my client does not object to this limited motion and the limited relief sought."

DECISION

Because Southampton's motion request is not consistent with N.J.A.C 5:93-8.2(c), a waiver is required in order to grant the Township's motion. Granting the waiver would allow Southampton to expend development fees prior to COAH's grant of substantive certification in order to cover the cost of the appraisal of property to be either acquired or condemned for both affordable housing and open space/recreational purposes. While facilitating the production of affordable housing is an appropriate use of development fees and a commendable objective of the Township, the Council does not support a waiver of COAH rules in this instance. The requirement that a municipality obtain substantive certification prior to the expenditure of development fees is to ensure that the use of such fees is for a municipality's affordable housing obligation. To permit the use of development fees prior to receiving substantive certification presents a risk that such fees may be used for properties that ultimately are not part of a

municipality's affordable housing plan. Further, the cost of the appraisal portion of Southampton's proposal is nominal, and the acquisition portion of the proposal is a future endeavor that does not require funding at this time.

For all of the above stated reasons, Southampton's motion, constituting a request for a waiver of COAH's regulations, is hereby denied.


Renee Reiss, Secretary
New Jersey Council on
Affordable Housing

DATED: November 5, 2003