

IN RE TOWNSHIP OF RANDOLPH : COUNCIL ON AFFORDABLE HOUSING  
MOTION TO GRANT SECOND ROUND : DOCKET NO. 04-1606  
SUBSTANTIVE CERTIFICATION :  
FILED BY RANDOLPH TOWNSHIP : OPINION

This matter involves Randolph Township's petition for second-round substantive certification. On April 5, 2004, the Council on Affordable Housing ("COAH" or the "Council") received a motion on behalf of Randolph Township asking COAH to grant second-round substantive certification. The Township's motion also asked the Council to grant a waiver, pursuant to N.J.A.C. 5:93-15.1 from COAH's requirement that zoning be retained on sites resulting from a court settlement or a COAH mediated agreement as set forth in N.J.A.C. 5:93-5.13. The Township has requested the waiver in light of the recently enacted amendment to the Fair Housing Act, N.J.S.A. 52:27D-301, et seq. (the "FHA"), at N.J.S.A. 52:27D-311(g), which allows municipalities that have received substantive certification from COAH to amend their affordable housing element or zoning ordinances without COAH approval if the municipality has actually effected the construction of the affordable housing units it is obligated to provide. This opinion addresses the Township's motion and represents the decision of the Council made at its August 11, 2004 board meeting.

#### BACKGROUND

Randolph Township received first round substantive certification from COAH on March 7, 1988. Its final fair share housing obligation was 310 units, 89 units of rehabilitation and 221 units of new construction. The Township's zoning at the Randolph Mountain site allowed for a total of 276 units, of which 55 would be available to low- and moderate-income households. On June 12, 1989, Randolph Mountain received planning board approval for 232 units, which included 48 low- and moderate-income housing units. On December 5, 1990, COAH approved an amendment to the fair

share plan for Randolph Township, which provided for the seven-unit affordable housing shortfall from the Randolph Mountain site to be accommodated elsewhere in the plan.

Due to subsequent Department of Environmental Protection ("DEP") delineations of on-site wetlands, on November 1, 1993, Randolph Mountain applied to the Randolph Township Planning Board to further reduce the extent of development to 165 units, on the site, of which 25 would be affordable units. The planning board determined that this reduction was of such a nature and extent that it constituted a new application rather than an amendment to a previously approved site plan. The planning board also required that the development conform to its new steep slope ordinance adopted in 1994 thereby creating significant restrictions on the development of the site.

Randolph Mountain filed a motion with COAH on April 8, 1994, claiming that the Township failed to comply with the terms of its executed mediated agreement and substantive certification. COAH heard oral argument on Randolph Mountain's motion on October 5, 1994. On February 1, 1995, COAH directed the parties into mediation explaining that if the parties could not come to an agreement about the site in mediation the matter would be sent to the Office of Administrative Law (OAL) as a contested case.

On March 6, 1995, Randolph Township petitioned COAH for second round substantive certification. Although no objections were received by COAH during the 45-day objector period, Randolph Township was already in mediation as a result of the 1994 motion filed by Randolph Mountain, the owner of an inclusionary development from the first round.

On June 7, 1995, COAH transferred the contested issues of fact from the mediation surrounding the Randolph Mountain site to OAL for an expedited hearing. On June 30, 2000, Administrative Law Judge (ALJ) Arnold Samuels issued an Initial Decision finding that

the Randolph Mountain site was suitable for development above the 600-foot contour line. On September 6, 2000, the Council voted to accept ALJ Samuels' June 30, 2000 Initial Decision as its Final Decision (attached and incorporated herein). Thereafter, Randolph Township filed an appeal of the Council's Final Decision.

On July 26, 2001, the Township filed a "Resolution of Governing Body Re-Petitioning COAH for Temporary Substantive Certification" along with an amendment to the Township's Master Plan. On August 27, 2001, the COAH executive director issued a letter explaining that COAH did not have authority to grant a "Temporary Certification" and "that no certification may be granted while there is an ongoing appeal in the Appellate Division." As a result, COAH could not accept the Township's July 2001 submission.

On June 5, 2002, the Appellate Division issued an opinion, whereby it affirmed COAH's final decision on the Randolph Mountain site. On October 9, 2002, the New Jersey Supreme Court denied the Township's petition for certification.

Thereafter, Randolph Township re-petitioned COAH for second-round substantive certification on May 8, 2003. The Township's amended housing element and fair share plan deleted block 101, lot 22 (known as the Kryspin site), block 184, lot 6 (known as S. Salem St. Assoc. site) and block 199, lots 6, 7 and 9 (the Randolph Mountain site).

On June 20, 2003, the Council received a motion from Baker Residential and Randolph Mountain Partnership ("Baker") seeking enforcement of COAH's previous directives and decisions; revocation of Randolph Township's existing substantive certification and denial of Randolph Township's re-petition for second round certification; and confirmation that the Randolph Mountain site would be included in the Township's second and third round township certification pursuant to N.J.A.C. 5:93-5.13.

Additionally, Baker filed a complaint against the Township in the Superior Court, Law Division, challenging the Township's action on the site plan application for the Randolph Mountain site. On May 26, 2004, the Honorable Theodore B. Bozonelis, A.J.S.C., issued a final judgment in that matter finding that the court had jurisdiction to enforce the Appellate Division's June 5, 2002 decision and to rule upon certain issues pursuant to Alexander's v. Paramus Boro., 125 N.J. 100 (1991). As such, Judge Bozonelis upheld a December 15, 2003 order granting Baker the right to develop the Randolph Mountain property above the 600-foot contour line.

On August 11, 2004, the Council voted to grant in part and to deny in part the relief requested by Baker. At that time, the Council also voted to deny the Township's motion seeking a waiver and request that the Council grant second-round substantive certification. The Council instead directed Randolph Township to amend its housing element and fair share plan to include the Randolph Mountain site, pursuant to N.J.A.C. 5:93-5.13, and re-petition for second-round substantive certification within 30 days.

#### ARGUMENTS

Edward J. Buzak, Esq., filed a brief in support of Randolph's motion asking COAH to grant second-round substantive certification and a waiver, pursuant to N.J.A.C. 5:93-15.1, from the requirements of N.J.A.C. 5:93-5.13.

The Township's motion asserts that it is entitled to have COAH grant second-round substantive certification to its amended housing element and fair share plan included in the Township's re-petition for substantive certification because the same fully satisfies the statutory criteria necessary for COAH to grant substantive certification. The Township alleges that it has

demonstrated that it had actually effected the construction of the affordable housing units it was obligated to provide and can delete sites in accordance with N.J.S.A. 52:27D-311(g). The Township recognizes that the removal of Baker's site from the plan remains the one outstanding issue that must be resolved before COAH grants substantive certification. The Township asserts that N.J.A.C. 5:93-5.13, which requires that sites which were subject to either a COAH mediated agreement or Court settlement addressing a first round affordable housing obligation, should be interpreted in the context of the amendment to the Fair Housing Act, N.J.S.A. 52:27D-311(g).

The Township charges that requiring the inclusion of the Baker site in the plan places "form over substance." The Township further claims that the same outcome would be achieved if COAH granted the Township second-round substantive certification without the Baker site or if the Township were to include the Baker site in the plan, receive second round substantive certification and, once certified, delete the site.

Moreover, the Township claims that since it has satisfied its affordable housing obligation without the Baker site, COAH should waive the requirement in its rules that mediated sites be retained in a township's affordable housing plan. The Township also claims that, since the Township's affordable housing obligation has been satisfied, COAH would be sending a message to other municipalities that COAH will not require municipalities to keep sites that are no longer needed in their plan when they have built the units they are obligated to build. Furthermore, the Township argues that requiring a municipality to continue to approve residential development that includes affordable housing to meet a non-existent affordable housing obligation denies the residents the benefit of other uses for the land. As such, the Township submits that a waiver of N.J.A.C. 5:93-5.13 in accordance

with N.J.A.C. 5:93-15.1(b) is warranted because, the Township asserts, it would foster the production of low and moderate income housing, as well as the intent of, if not the letter of, COAH's rules. Moreover, the Township claims that a waiver is justified because strict application of the rule would create an unnecessary hardship.

Accordingly, the Township requests that COAH waive the requirement under N.J.A.C. 5:93-5.13 to include the Baker site in its second-round plan and grant Randolph Township second-round substantive certification without the Baker site.

On April 28, 2004, Jeff Kantowitz Esq., on behalf of Baker, filed a letter in lieu of brief in response to Randolph Township's motion seeking COAH's grant of substantive certification to its second round re-petition.

Baker argues that any substantive certification granted to Randolph Township should include the Randolph Mountain component. Baker asserts that the amendment to the FHA allows municipalities to amend their plan to remove site(s) after the grant of substantive certification not before and therefore the township's reliance on N.J.S.A. 52:27D-311(g) is premature.

Baker further asserts that there are a number of legal and policy reasons requiring the inclusion of the Baker site in the Township's plan. Baker notes the fact that the criteria set forth in N.J.A.C. 5:93-5.13 have not been met; that it has been COAH's policy to uphold and enforce mediated agreements or Court determinations that have directed inclusion of sites; and that Randolph has failed to satisfy the criteria set forth in N.J.A.C. 5:93-15.1(b) warranting a waiver from N.J.A.C. 5:93-5.13.

In addition, Baker cross-moved for denial of the Township's petition.

DISCUSSION

At its August 11, 2004 board meeting the Council voted to deny the Township's motion. At the same time, the Council granted in part and denied in part the relief requested by Baker. Accordingly, the Council directed the Township to amend its plan and re-petition the Council for substantive certification including the Baker site in its plan pursuant to N.J.A.C. 5:93-13. Baker's request that the Council deny and/or revoke substantive certification was denied.

Primarily for the reasons set forth in the Council's opinion regarding the Baker motion for relief, attached and incorporated as if set forth at length herein, the Council did not find that the Township's request for a waiver was appropriate, and therefore denied its request that the Council grant substantive-certification to its second-round plan without the inclusion of the Baker site.

For these reasons, and the reasons set forth in the Council's opinion on the Baker motion, Randolph Township is directed to amend its housing element and fair share plan consistent with N.J.A.C. 5:93-13, within 30 days. The Township's time shall be deemed to run from the date of the Council's oral decision in the matter (August 11, 2004). The Township has been advised of the timing at the Council's August meeting.

  
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Renee Reiss, Secretary  
New Jersey Council on  
Affordable Housing

DATED: *September 8, 2004*