

IN RE TOWNSHIP OF RANDOLPH) COUNCIL ON AFFORDABLE HOUSING
MOTIONS FOR RELIEF FILED BY) DOCKET NO. 03-1505
BAKER RESIDENTIAL AND RANDOLPH)
MOUNTAIN PARTNERSHIP) OPINION

This matter involves a site located in Randolph Township ("Randolph" or "Township") at block 199, lots 6 and 9, which is owned by Baker Residential, and known as the "Randolph Mountain site." The site, which was formerly owned by Randolph Mountain Industrial Complex and the subject of a mediation agreement, has been deleted from Randolph Township's housing element and fair share plan without the owner's consent. On June 20, 2003, the Council on Affordable Housing ("COAH" or 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. This opinion addresses that 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.

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, which 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).

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 Baker motion. At that time, the Council 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. This opinion memorializes the Council's August 11, 2004 decision.

ARGUMENTS

Douglass F. Sclar, Esq., submitted a brief and certification on behalf of Baker's request for relief in this matter, to wit, 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 be included in the Township's second and third round township certification. In support of its request for relief from this Council, Baker makes several arguments.

First, Baker argues that COAH is empowered to provide the relief requested because the Council has broad powers and wide discretion to resolve affordable housing problems. In addition, Baker asserts that the Township's refusal to comply with the mediated agreement regarding the Randolph Mountain site, as well as the Council's Opinion and Final Decision regarding that site, require revocation of the township's certification pursuant to N.J.A.C. 5:93-10.5. Finally, Baker argues that the Township is required to include the Randolph Mountain Property in its second round certification. Baker explains that the Township cannot preclude the Randolph Mountain property, which was the subject of a mediated agreement, from the township's second round certification pursuant to N.J.A.C. 5:93-5.13(b).

On January 21, 2002, Edward J. Buzak, Esq., on behalf of Randolph Township, submitted a letter brief in opposition to Baker's motion. The Township argues that the Council should deny Baker's motion because the Township has actually fulfilled its obligation to provide its fair share of low- and moderate-income housing and the best path to continue to actually meet Randolph's inclusionary housing needs in the future is to expeditiously process the Township's re-petition for second-round substantive certification. The Township further states that before making a determination regarding Baker's motion, COAH should first make a determination regarding the Township's re-petition for second-round substantive certification. In addition, the Township asserts that its existing substantive certification should not be revoked, nor should its second round repetition for substantive certification be denied. The Township contends that Baker's citation of N.J.A.C. 5:93-10.5 as authority for COAH to revoke Randolph's certification, has been incorrectly applied by Baker. The Township argues that the delay came not because of municipal action or inaction but rather in light of an increase in the extent of wetlands on Lot 6. That increase, the Township argues, resulted in the submission of an amended site plan application, which the Township rejected, and prompted Baker to seek relief from COAH.

The Township further asserts that the Randolph Mountain site need not be included in the Township's re-petition for second round substantive certification nor any third round certification. The Township, relying on N.J.S.A. 52:27D-311(g), asserts that the legislature has decided that there has been sufficient progress in the area of affordable housing development to permit municipalities which have actually met their low- and moderate-income housing commitments to amend their affordable housing element or zoning ordinance without approval of the council. The Township claims

that based on the foregoing, COAH should deny in full Baker's motion.

On October 9, 2003, Baker filed a reply brief in response to Randolph Township's opposition. In response to the Township's opposition, Baker reiterated its arguments that COAH has authority to grant relief requested by petitioners, and that the Township's failure to abide by COAH's previous directives warrants revocation of substantive certification. In addition, Baker argues that the Township's reliance on N.J.S.A. 52:27D-311(g) cannot affect the decisions by COAH and the Appellate Court, nor the applicability of N.J.A.C. 5:93-5.13(b).

DISCUSSION

Baker has asked this Council to enforce COAH's previous directives and decisions with regard to the Randolph Mountain site. In considering this request, the Council notes that this site was the subject of a mediated agreement from the first round between the Township and Baker's predecessor in title. N.J.A.C. 5:93-5.13(b)1 governs sites which addressed the first-round obligation and explains that such sites shall retain zoning in the second round petition if they were subject to a COAH mediation agreement. In addition, COAH's rules require consent from both parties to the mediated agreement in order to remove a mediated site from a township's plan. In the present matter, there is no dispute that Randolph Township has attempted to remove the Randolph Mountain site from its second-round re-petition. It is also undisputed that the Township failed to obtain consent to remove this mediated site. Such action by the Township was not in conformance with the Council's rules. Nonetheless, the Township argues that a recent amendment to the Fair Housing Act ("FHA"), N.J.S.A. 52:27D-311(g),

sanctioned such action. The Council disagrees with the Township's reading of the FHA.

Effective January 1, 2002 the FHA was amended as follows:

A municipality which has received substantive certification from the council, and which has actually effected the construction of the affordable housing units it is obligated to provide, may amend its housing element or zoning ordinances without the approval of the council.

While Randolph Township did receive substantive certification for the first-round, it has not yet received certification for its second round affordable housing plan. As such, the Council is not persuaded by the Township's arguments that the amendment set forth in section 311(g) should be applied to it in the present matter. The amendment clearly requires a township to have a COAH certified plan before it may change its affordable housing plan. The Council does not support the Township's arguments that a first-round certification is what the Legislature intended when it promulgated this statute, in light of the overarching policy behind the FHA, namely that municipalities come to COAH to address each round of their affordable housing obligations. Accordingly, because Randolph Township does not yet have certification of its second-round plan, the Council finds that section 311(g) is not applicable here.

In addition, the Council notes the importance of mediated agreements to its administrative process. Indeed, the Legislature stressed the need to resolve affordable housing disputes through this process, rather than litigation, in adopting the FHA. N.J.S.A. 52:27D-303. In light of the importance that the Council and the Legislature have placed on the mediation process, the Council finds that the Randolph Mountain site, a "mediated site," should remain part of Randolph's affordable housing plan. The Council finds that this determination conforms with the Appellate

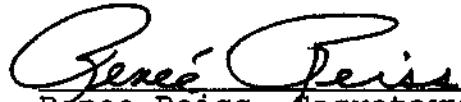
Division's June 2002 decision, as well as Judge Bozonelis' May 26, 2004 order, upholding the Council's Final Decision issued on June 30, 2000. Both of the Appellate Division decisions determined that the Randolph Mountain site could be developed above the 600-foot contour line.

Baker's motion also sought confirmation that the Randolph Mountain site would be included in the Township's second- and third-round certification pursuant to N.J.A.C. 5:93-5.13. Because the Township's second-round petition is presently pending before the Council, this opinion will only address Baker's request to be included in the Township's second-round plan. As explained above, the Council places great importance on its mediation process and the agreements, which result therefrom. Moreover, because the Township has not yet received certification for its second-round plan, the Council is not convinced that the amendment to the FHA allowing municipalities to change their fair share plans without COAH approval is applicable here. In light of the foregoing, the Council directs Randolph Township to adopt an amendment to its housing element and fair share plan, which includes the Randolph Mountain site and re-petition for substantive certification within 30 days of the motion decision. If Randolph Township does not re-petition with the Randolph Mountain site included in its new plan, the Council will dismiss Randolph Township's petition.

Baker also requests that the Council revoke Randolph Township's existing Substantive Certification and deny its re-petition for second-round certification. Since Randolph Township has not yet received second-round substantive certification from COAH, substantive certification may not be revoked. Moreover, the Council has directed the Township to amend its plan to include the Randolph Mountain site, and re-petition. As such, the Council does not believe that denial of the Township's re-petition is warranted at this time. As explained above, if the Township does not comply

with the Council's directive, the Council will take appropriate action with regard to the township's pending petition.

For the reasons stated above, the Council has denied in part and granted in part the motion from Baker Residential. The Township will have thirty days to amend its plan and re-petition the Council for substantive certification consistent with this opinion. The Township's time shall be deemed to run from the date of the Council's oral decision in this matter (August 11, 2004). The Township has been advised of the timing in this matter at the Council's August meeting.



Renee Reiss, Secretary
New Jersey Council on
Affordable Housing

DATED: *September 8, 2004*