

IN RE MOTION TO DISMISS )  
OR STAY THE PETITION FOR )  
SUBSTANTIVE CERTIFICATION )  
FROM THE BOROUGH OF RUMSON, )  
MONMOUTH COUNTY )

COAH DOCKET NO. 04-1609

OPINION

This matter comes before the Council on Affordable Housing (COAH or Council) by way of a motion filed by K.T.K. Trust; Michael Kostuk (K.T.K.); and Homes for Human Kind, LLC (HHK), collectively referred to as K.T.K. By motion filed September 13, 2004, K.T.K. requested the Council on Affordable Housing (Council) to dismiss or stay the petition of the Borough of Rumson (Borough or Rumson) for substantive certification on grounds of lack of jurisdiction. Through this Opinion, COAH decides the motion.

On February 26, 2003, Plaintiff K.T.K. Trust, LLC, the owner of property at 15 Avenue of Two Rivers South, filed a complaint in lieu of prerogative writ alleging exclusionary zoning in the Law Division of Superior Court against the governing body and the planning board of the Borough of Rumson. COAH was notified of this action by letter dated March 12, 2003. Subsequently, Michael Kostuk acquired the property and K.T.K. filed an amended complaint to include Mr. Kostuk as a plaintiff. This amended complaint also added Homes for Human Kind, LLC, owner of property at 63 West River Road. The Plaintiffs sought a site-specific builder's remedy.

On August 18, 2003, the Superior Court entered an order for temporary immunity from additional exclusionary zoning lawsuits as requested by Rumson. Subsequently, on January 15, 2004 Plaintiffs moved for summary judgment as to Rumson's alleged violation of their constitutional fair share obligation and for site-specific relief.

On March 2, 2004, Plaintiffs filed a notice of motion to vacate or modify the order granting temporary immunity. On March 24, 2004, Defendant Rumson filed a motion to dismiss the complaint. On the same date, having been granted leave to intervene on July 17, 2003, Defendant Bernard Goldsmith cross-moved for partial summary judgment and Defendants John Keegan and West River Road Concerned Citizens Association also filed a motion to dismiss Plaintiffs' complaint.

On July 16, 2004, the Hon. Joseph P. Quinn, J.S.C. entered an Order Entering Judgment which dismissed Plaintiffs' Amended Complaint for failure to participate in good faith negotiations with the municipality prior to instituting the litigation. The Order also denied the cross-motions to dismiss, Plaintiffs' motion for summary judgment and request to appoint a court master and vacate the temporary immunity order, and Plaintiffs' motion to have the Court approve its affordable housing plan. In its Order, the Court specifically stated that "Defendants may seek approval of the plan from the Council on Affordable Housing."

On July 23, 2004, Plaintiffs filed a notice of appeal from the Court's Order. On the same day, Rumson filed its petition for second round substantive certification with COAH. On September 1, 2004, Plaintiffs wrote to COAH updating the status of the matter. K.T.K. filed the only objections to the petition.

By motion dated September 13, 2004, K.T.K. requested the Council on Affordable Housing (Council or COAH) to dismiss or stay the petition of the Borough of Rumson (Borough or Rumson) for substantive certification on grounds that the Council lacks jurisdiction to consider the petition. K.T.K. argues that because the exclusionary zoning complaint was filed prior to the municipality's filing of a housing plan with the Council and the litigation is ongoing as a result of the appeal filed, the Council, as a matter of law, does not have jurisdiction to accept the filing pursuant to the Fair Housing Act. Specifically, K.T.K. argues that N.J.S.A. 52:27D-309(b) provides that COAH has jurisdiction only if the municipality files its fair share plan and housing element prior to the institution of litigation. In this case, K.T.K. filed in Superior Court on February 22, 2003; the Superior Court dismissed the suit for failure to engage in negotiations prior to filing the suit; K.T.K. filed a timely appeal from this judgment on July 23, 2004; and the Borough Council adopted a resolution authorizing the filing of the plan with COAH and "filed a petition sometime thereafter." K.T.K. further asserted that there has never been a gap during which Rumson could have, or did, file its plan with COAH prior to litigation to invoke the Council's jurisdiction.

K.T.K. asserts in its motion that the Council's retention of jurisdiction over Rumson's petition would violate Constitutional, statutory and judicial rules of the Court. According to K.T.K., because the appeal is currently pending, Rumson's petition to the Council would have the Council resolve the factual and legal issues currently properly pending before the Appellate Division. Furthermore, the Rules of Court prohibit the Council from assuming jurisdiction over issues related to Court Rule 2:9-1(a).

Therefore, K.T.K posits that Rumson must await the completion of the proceedings in the court and may not raise these issues at this juncture before the Council.

Alternatively, K.T.K. requests the Council stay the proceedings pending the outcome of the appeal regarding the duty of Plaintiff to conduct good faith negotiations before the filing of a Mt. Laurel lawsuit. K.T.K. also indicates that it does not object to mediation under COAH auspices, provided the mediation is confidential and fully insulated from any other agency proceedings.

On October 21, 2004, the Borough filed a response in opposition to K.T.K.'s motion. The Borough asserted and provided certifications recounting a neighbor's attempt to purchase the property, and describing the suitability of the site for development. Also discussed was whether K.T.K. has standing to file the exclusionary lawsuit.

The Borough asserts that it has formalized its commitment to Mount Laurel and has demonstrated that commitment by the following actions. On May 29, 2003 (subsequent to the filing of the lawsuit on February 26, 2003), the Borough adopted a Resolution stating its commitment to comply with all of its Mount Laurel obligations. A Mount Laurel Subcommittee was created (no date provided) which conducted a series of meetings that led to the preparation of an affordable housing plan that was adopted within 90 days of the formation of the Subcommittee. This plan addresses how the Borough will create affordable housing under circumstances where there is no vacant developable land. The plan proposes an accessory apartment program, an overlay ordinance, and a development fee ordinance. A qualified administrator for the accessory apartment program was found. A form of agreement was drafted for the Monmouth County Community Development Program to administer the rehabilitation program. The Borough adopted a bond ordinance for \$360,000 to fund these programs. And finally, the Borough adopted an Affirmative Marketing Ordinance, an Accessory Apartment Overlay Ordinance, a Development Fee Ordinance, and a "Fair Share" Ordinance, even though these ordinances are not required to be adopted until substantive certification is received pursuant to the Fair Housing Act.

Respondent further asserts that because the trial judge dismissed the suit solely on the basis of the threshold defense that negotiations should have preceded the litigation, the trial judge never reached conclusions on other aspects of the case. Specifically, the Court stated: "Certainly, with the dismissal of plaintiff's complaint, the defendants are free to seek approval of

this plan through COAH." As a result of this ruling, the Borough indicates that no exclusionary zoning litigation was pending against the Borough since July 16, 2004 when the Court dismissed the suit, and the Borough was free to seek COAH's review and approval of its affordable housing plan.

The Borough asserts that COAH properly accepted jurisdiction pursuant to Sections 309 and 316 of the Fair Housing Act, which requires COAH to accept jurisdiction if there is no pending exclusionary zoning litigation at the time the municipality files its fair share plan and housing element with the council. Additionally, the Borough's petition should be accepted because it meets COAH's regulations at N.J.A.C. 5:91-2.1(a)1.

Rumson maintains that it has complied with these requirements by the adoption of its housing element on August 18, 2003, the passage of a resolution by the governing body endorsing the housing element and fair share plan on August 21, 2003, and the submission to COAH on September 24, 2003 of its affordable housing plan. Rumson points out that because an exclusionary zoning lawsuit was pending at that time, COAH could not formally accept the plan for filing. However, on July 16, 2004 the exclusionary zoning lawsuit was dismissed and on July 23, 2004 (the same day the notice of appeal was filed), the Borough adopted an appropriate resolution to formally file its affordable housing plan with COAH and petition for substantive certification. There was, therefore, no exclusionary lawsuit pending at this point because the suit had been dismissed on July 16, 2004; and while the Movant had filed an appeal, they had not secured, nor attempted to secure, a stay of the dismissal of their lawsuit.

Rumson states that there is no law that prohibits COAH from exercising jurisdiction. The Fair Housing Act confers primary jurisdiction upon COAH; and, in drafting the Act, the legislature intended to maximize COAH's jurisdiction over affordable housing matters and minimize the role of the court. "The legislative history of the Act makes it clear that it had two primary purposes: first, to bring an administrative agency into the field of lower income housing to satisfy the Mount Laurel obligation; and second, to get the courts out of that field." [Hills Dev. Co. v. Bernards Tp. In Somerset Cty., 103 N.J. 1, 49 (1986).]

Rumson also cites Elon Assoc, L.L.C. v. Tp. Of Howell, 370 N.J. Super. 475, 480-481 (App. Div. 2004) where the Court stated that the FHA's declaration of legislative purposes expresses a strong preference for use of COAH's administrative procedures to secure compliance with a municipality's affordable housing obligation. N.J.S.A. 52:27D-303 also states 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 this act and not litigation [.]” To this end, the FHA confers “primary jurisdiction” upon COAH “for the administration of [affordable] housing obligations in accordance with sound regional planning consideration [.]” N.J.S.A. 52:27D-304(a).

Rumson asserted that the issues before the Appellate Division and COAH are fundamentally different. The issue on appeal is very narrow, and rests purely on the legal issue of whether Mount Laurel II requires a developer to act in good faith and attempt to obtain relief without litigation. In contrast, the petition only asks COAH to decide if the affordable housing plan complies with applicable regulations, entitling the Borough to substantive certification.

In its final point, Rumson asserted that the Motion represents an improper effort to stay the trial court’s ruling in violation of the procedure for stays by the Rules of Court. By seeking COAH’s rejection of jurisdiction, the Movant is undermining the trial court’s ruling that dismissed the Borough’s motion to have the Court approve its Housing Plan, and the finding that “Defendants may seek approval of the plan from the Council on Affordable Housing.”

Furthermore, there are standards in earlier COAH motion decisions based upon other court decisions that are not met in the Movant’s request for a stay of COAH’s actions. These include failure to meet the burden of demonstrating that denial of this request will cause irreparable harm, failure to demonstrate that the appeal presents a meritorious issue and that they have a likelihood of success on the merits, and failing to demonstrate that greater harm would occur if a stay were not granted.

Replies to the motion were also filed by two additional parties, intervenors to the lawsuit, John Keegan and West River Road Concerned Citizens. By letter dated October 21, 2004, the intervenors assert that the complaint was dismissed in Superior Court at the inception of the case as a result of the failure to satisfy the requirements of builders remedy litigation and to engage in good faith negotiations prior to filing the suit. The Superior Court has not made any determination on any of the substantive issues in the complaint. K.T.K. has failed to identify any statute, regulation or case that would preclude COAH from proceeding with Rumson’s petition, or any prejudice they would suffer if COAH proceeds.

Defendant to the litigation, Bernard Goldsmith also filed a letter

response. The October 21, 2004 letter joins in the brief submitted by the Borough of Rumson and by intervenors John Keegan and West River Road Concerned Citizens Association. Several certifications are attached to the letter, but they address issues such as site suitability and actions of the principal of K.T.K. that the Council has determined are unrelated to the motion before it.

By letter dated November 1, 2004, K.T.K. responded on five points. First, K.T.K. alleges that certifications submitted by Rumson are misleading and wholly irrelevant to the issue of whether COAH has jurisdiction over Rumson's petition. Secondly, K.T.K. asserts that the Council has no authority to conduct an end run around the Appellate Division's jurisdiction over issues regarding K.T.K.'s entitlement to pursue its lawsuit. K.T.K. claims that the briefs submitted in opposition to K.T.K.'s motion to dismiss or stay incorrectly argue that the pending appeal of the Superior Court's dismissal of the lawsuit has no foundation in the law or in the facts of the case. According to K.T.K., that litigation is ongoing, either in the Law Division or pending in the Appellate Division continuously since the dismissal and there has never been a gap during which Rumson could have filed its petition.

Thirdly, K.T.K. claims that Rumson's assertion that it is not likely to succeed on the merits of its appeal is speculative and premised upon an erroneous interpretation of case law. K.T.K. advises COAH that prior to the dismissal of its complaint, three other courts came to an opposite conclusion regarding the duty of a plaintiff seeking a builder's remedy to enter into negotiations prior to filing exclusionary zoning litigation. K.T.K. asserts, therefore, that there is a likelihood that its case will be proven in the Appellate Division, and any approval by the Council at this time would potentially be in conflict or void. Next, K.T.K. asserts that in order for a final judgment to be appealable it must be final as to all issues and all parties. Assuming a stay of the Order had been granted, the Order dismissing the objector's complaint would not be final, and therefore not appealable, leaving the complaint in limbo in the Superior Court indefinitely.

Finally, K.T.K. argues that in the alternative the Council should stay proceedings on Rumson's petition pending resolution of its appeal. Under case law, a stay pending appeal of a final action is warranted under several circumstances. K.T.K. argues that it meets those circumstances because, first, it would be irreparably harmed if the Council grants substantive certification and the appeal becomes moot, thus avoiding judicial review of the legally debatable dismissal in court. K.T.K. states that it believes it will prevail in court on the merits. According to K.T.K., the harm that the K.T.K. will suffer if the stay is not granted outweighs

the harm that the respondent will suffer if the stay is granted because the end result of the proceedings in Superior Court is to bring Rumson into compliance with its Mount Laurel obligations, thus Rumson will not be harmed if the stay is granted. However, if the stay is not granted, K.T.K. may lose their ability to pursue their rights. And finally, granting the stay will not harm the interest of the public because the primary interest of the public is assuring compliance with the New Jersey Constitution as construed in the Mount Laurel decisions.

On November 16, 2004, the Borough submitted a surreply in response to K.T.K.'s reply brief that was filed past the end of the motion schedule. K.T.K. submitted a letter dated November 17, 2004 objecting to the filing of the surreply as surreplies are not permitted under the Council's rules, nor do the rules permit filings after the end of the comment period. The Council agrees with K.T.K. and will not accept the delinquent filing.

COAH first will address the jurisdictional issue. The Council finds that it does have jurisdiction over Rumson's petition for substantive certification. Pursuant to N.J.S.A. 52:27D-309(b), in cases where there is exclusionary zoning litigation, ". . . there shall be no exhaustion of administrative remedy requirements pursuant to section 16 of this act unless the municipality also files its fair share plan and housing element with the council prior to the institution of the litigation." Thus, COAH has jurisdiction to review a municipal petition for substantive certification if the municipality files its housing element and fair share plan prior to the institution of litigation.

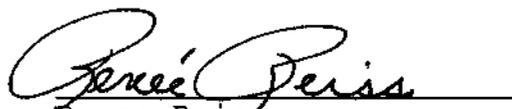
In this case, K.T.K. initially did file its complaint against Rumson prior to Rumson's filing of its plan with COAH and the matter was properly before the courts. Judge Quinn, however, dismissed the complaint on July 16, 2004. Thus, as of July 16, 2004, there no longer was pending an exclusionary zoning lawsuit. There is no dispute that the dismissal constituted a final decision. Indeed, K.T.K. appealed the Order to the Appellate Division as of right and not on an interlocutory basis. In the July 16, 2004 Order, the Court specifically stated that "Defendants may seek approval of the plan from the Council on Affordable Housing." K.T.K. did not seek a stay of the Order from either Judge Quinn or the Appellate Division. Thus, the Order remains in full force and effect. Accordingly, when Rumson filed its plan with COAH on July 23, 2004, COAH properly accepted jurisdiction. COAH's action is consistent with the Court's Order.

K.T.K. argues that if COAH accepts jurisdiction, COAH would be assuming jurisdiction over issues currently and properly before the

Appellate Division. The Council disagrees. The issue before the Appellate Division is whether Judge Quinn properly dismissed K.T.K.'s complaint for failure to participate in good faith negotiations prior to filing its complaint. This issue is not before COAH nor will COAH decide this issue. COAH's authority is to review Rumson's petition for substantive certification. Since the Order was not stayed, COAH considers the complaint dismissed. Thus, when Rumson filed its plan, COAH's jurisdiction was engaged.

COAH is mindful of the fact that if K.T.K. is successful on appeal, the Order can be reversed and the complaint may be reinstated. COAH also is aware that the issue presented to the Appellate Division is a novel one. In light of this, COAH finds that it is prudent to proceed in a circumspect manner. Rumson and K.T.K. have advised COAH that they currently are engaged in negotiations in an effort to resolve their differences. Indeed, the parties have jointly asked COAH to defer decision on this motion to allow them time to continue negotiations. The Council's ultimate goal in all cases is to see that affordable housing is provided. With this goal in mind, COAH finds that it is appropriate to conduct mediation. K.T.K. is the only objector to Rumson's plan. Thus, mediation will be between Rumson and K.T.K. Since the parties already have begun negotiations themselves, COAH may be able to facilitate an agreement through mediation. In this way, the ultimate provision of affordable housing in Rumson may be expedited. COAH will reserve its decision on whether to grant a stay of the proceedings pending the outcome of mediation. When mediation has concluded, COAH will revisit K.T.K.'s application for a stay of further proceedings.

In conclusion, for the foregoing reasons, COAH denies K.T.K.'s motion to dismiss the proceedings before COAH due to lack of jurisdiction. COAH finds that it has jurisdiction over Rumson's petition for substantive certification. COAH further holds in abeyance any decision on K.T.K.'s application to stay the proceedings before COAH pending the appeal of the July 16, 2004 Court Order. COAH finds that it is appropriate to conduct mediation at this time.

  
Renee Reiss  
Council Secretary

DATED: *February 9, 2005*