

IN RE MOTION FOR ISSUANCE OF SCARCE
RESOURCE RESTRAINT ON BLOOMINGDALE
BOROUGH, PASSAIC COUNTY

)
) NEW JERSEY COUNCIL ON
) AFFORDABLE HOUSING
) DOCKET NO. 05-1704
)
) OPINION

D.R. Horton, Inc. - New Jersey (D.R. Horton) is the contract purchaser of property located in the Borough of Bloomingdale. The site, known as the "Meer tract," is included in Bloomingdale's Fair Share Plan that received substantive certification from COAH on December 6, 1995. A motion for the extension of substantive certification has been submitted and is under staff review. This motion, brought by D.R. Horton, is to issue a scarce resource order reserving sewer and water capacity for the 360 units permitted by a site-specific inclusionary zoning ordinance. Oral argument was heard at the May 11, 2005 COAH meeting, at which time the Council voted to have the motion considered by a task force. The Council also voted to impose a temporary scarce resource restraint on sewer and water, to remain in effect until the Council's June 8, 2005 meeting, at which time the Council will consider the matter and the task force's recommendation.

PROCEDURAL HISTORY

The premises are located along Van Dam Avenue and Union Avenue; Block 59, Lot 1.04; Block 60, Lots 9.02, 16.01, 16.02, 21.02, 21.03, 45, 46, 47, 48.02, 60.01 and 60.02. The tract is approximately 179 acres. It is known as the Meer tract and is in the Inclusionary Multi-family Zone district. Pursuant to a mediated agreement on June 26, 1987 between the Borough and the Applicant, this tract was added to the Borough's Fair Share Plan.

As described in the March 3, 2005 affidavit of Rocco Palmieri, PE, supervising engineer for the development of the subdivision and site plans, the Meer tract has received Town Center designation in PA5 as a zoned or planned COAH site. The tract is also within the Highlands Planning Area designated for growth.

This site was previously the subject of an application before the Planning Board that was denied by resolution dated August 21, 2003. That application proposed 360 condominium units in 50 structures of townhouse design, with 72 of those units as low- and moderate-income units. COAH's rules and the Mediation Agreement specifically required the application to be processed within 120 days, yet the Planning Board held over fifty hearings over several years prior to the denial.

A second development application has been submitted to the Planning Board for preliminary and final site plan and subdivision approval to construct 253 townhouse style units with 26 of those set aside for low- and moderate-income households and funding for an RCA for an additional 25 units. In this proposal, the units will be constructed on approximately 39 acres of the 179-acre tract, leaving 140 acres that will be permanently restricted as open space. This equates to an overall density of 1.5 units per acre. This is less than the 360 units permitted in the site-specific Inclusionary Multi-family Zone.

The current motion before COAH for extended substantive certification proposes to rezone a new site, the "Horse Farm," for high-density housing. This site was not a part of the Borough's Fair Share Plan nor proposed as an inclusionary site in the plan that was certified by COAH. Public water will be provided by the municipality and public sewer by the Pequannock River Basin Sewerage Authority (PRBSA). The Authority also provides sanitary sewer service to three other municipalities. Under the current proposal for 253 units, the site will create a sewer demand of approximately 74,850 gallons per day. As of 2002, Bloomingdale was allocated 0.95 million gallons per day (mgd) out of the total allocation of 2.5 mgd. By letter dated June 28, 2002, the PRBSA confirmed that allocation. Movant notes that both the mediation agreement and the ordinance subsequently adopted permit a total of 360 units. However, that letter, submitted as Exhibit M in the Movant's brief, notes "as to the availability of allocation, the Borough of Bloomingdale must make that determination." A subsequent letter dated September 9, 2002 from the Borough Administrator confirmed to Mr. Linnus the "availability of the 95,775 gallons per day of sewer capacity based upon the current bedroom mix." On November 1, 2002 the Borough Administrator confirmed in a letter to Mr. Linnus that "the Borough is able to supply the required 66,310 gallons of water per day."

MOTION

Point I: The Movant cites case law and COAH's Second Round Rules that require municipalities to make every attempt to provide public utilities to inclusionary sites. In particular, the Movant references N.J.A.C. 5:93-4.3(c)1 which provides: "Notwithstanding the lack of adequate water and/or sewer at the time a municipality petitions for substantive certification, the municipality shall reserve and set-aside new water and/or sewer capacity, when it becomes available, for low and moderate income housing, on a priority basis." N.J.A.C. 95-1.1(c) is cited, which indicates that municipalities petitioning before December 20, 2004 remain governed under the provisions of the prior Procedural Rules at N.J.A.C. 5:91. Those petitioning after that date must conform to the provisions of the Third Round Rules.

Movant asserts that scarce resource orders are necessary to preserve resources which may otherwise be exhausted before providing service to the certified affordable housing sites. It is noted that there are significant other development applications that will put demands on the sanitary sewer service capacity. The "Knolls at Bloomingdale" (the Ball tract in the Fair Share Plan), after having over 50 hearings before the planning board, is expecting a decision soon for 140 townhouse units. The Decker tract has received approvals but is not yet under construction. The Isabel Mitchell site is also zoned for development. And further, the Borough is proposing to amend its Fair Share Plan with the inclusion of an additional site known as the "Horse Farm." These projects, coupled with the other building permits and the demands on the capacity posed by the other three municipalities in the PRBSA could significantly reduce capacity for the Meer tract.

The final argument presented on this point begins with the comment that "Not a single unit of affordable housing has yet been constructed in the Borough. In Hills, the Supreme Court held that "previous actions of a municipality and its officers" should be reviewed in motions to grant scarce resources.¹ It is argued that absent the scarce resource order, no affordable units will be built while other development continues.

¹ The Hills Development Company v. Bernards Township, 103 N.J. 1 (1986)

Point II: The imposition of a scarce resource order is appropriate. The Supreme Court further held in the Hills: “Appropriate’ refers not simply to the desirability of preserving a particular resource, but to the practicality of doing so, the power to do so, the cost of doing so, and the ability to enforce the condition . . . Those conditions should be designed not for the protection of any builder but for the protection of the ability of the municipality, pending the outcome of the Council proceedings, to provide the realistic opportunity for lower income housing, as it may be required to do in the near future. [Supra, 103 N.J. at 62.] Thus, in this case, it is argued that the reservation of sewer and water capacity is the only means of providing a realistic opportunity for low- and moderate-income housing, particularly as other projects move forward that were not in the approved Fair Share Plan.

Point III: There is no basis for the Borough of Bloomingdale to oppose this motion. Decisions of the Law Division, Appellate Division, and the Supreme Court have clearly indicated that regional and municipal sewerage authorities are required to provide service and capacity to inclusionary developments. Further, the Mediation Agreement specifically provides: “Bloomingdale will cooperate with the developers to the best of its ability to provide sewer and water capacity to the extent required by the current COAH regulations to make the inclusionary development viable and to the extent required by the law.”

SUPPORTING BRIEFS

Francis Linnus, on behalf of Bloomingdale Joint Venture (BJV), submitted a letter dated March 23, 2005, in support of the D. R. Horton motion. Mr. Linnus represented the applicant before the planning board on the first development proposal for the Meer tract that was denied. BJV is now a co-applicant on the second subdivision and site plan application submission that is pending before the planning board. Specifically, BJV supports D. R. Horton’s conclusions that the Meer tract is an integral component of the Borough’s Fair Share Plan and that COAH should not allow Bloomingdale to divert attention from its inability to comply with the terms of its substantive certification by proposing to introduce a new site, the Horse Farm, into its Fair Share Plan. COAH should place clear conditions on the rights of inclusionary developers, specifically the Meer tract and the Ball site, as requested in D.R. Horton’s motion, and require the Borough to cooperate with developers to expedite action on these development applications.

Woodward Ball, owner of the Ball site, submitted a letter on April 13, 2005, also in support of the motion. Mr. Ball states that his property has been under contract since it was rezoned over five years ago, and is currently under contract to BNE Associates. Furthermore, he indicates his understanding that Passaic County may be looking to acquire his property through Green Acres funding.

Thomas Jay Hall, Esq. on behalf of the Knolls at Bloomingdale, contract purchaser of the Ball tract, submitted a letter date April 14, 2005 indicating his client has no objection to the D.R. Horton motion. This site was included in the Fair Share plan approved by COAH in December 1995 to provide for 57 units toward the Borough’s obligation. However, through the process before the planning board the total number of units has been reduced from 350+/- to 140, with a corresponding reduction in affordable housing units to 23 that will now be rental units. Mr. Hall notes that this site has been before the planning board for four years with no conclusion. He supports the D. R. Horton

motion but urges COAH to permit the Knolls' inclusionary development to go forward and to reserve sewer and water capacity.

REPLY BY BOROUGH OF BLOOMINGDALE

A response brief was submitted on April 22, 2005, by Jeffrey Surenian, Esq., on behalf of the Borough. Mr. Surenian presents the argument that the motion for a scarce resource order does not rise to the legal standard for the issuance of such an order, and that sanitary sewer service and water service capacity is sufficient to serve the sites within its Fair Share Plan as well as the additional site proposed at the Horse Farm tract. Therefore, the motion should be denied.

The Supreme Court, interpreting the Fair Housing Act, empowered COAH to impose a scarce resource restraint only when there is a finding that "further development or use of sewer and water facilities is likely to have a substantial adverse impact on the ability of the municipality to provide lower income housing in the future." Hills Dev., supra, 103 N.J. at 62.. Mr. Surenian further argues that the Supreme Court noted that restraints or conditions should only be imposed upon a thorough analysis of the record to determine what conditions would be "appropriate." The Supreme Court further prescribed that any conditions or restraints should be designed to assure the municipality's future ability to comply with its Mount Laurel obligation.

Mr. Surenian indicates that this authority is analogous to the equitable powers of the courts to prevent the implementation of restrictions until a full and deliberative investigation of a case can take place. In Crowe,² the Supreme Court noted that an injunction should only issue when necessary to prevent irreparable harm, upon a balancing of the relative hardship to the parties in granting or denying relief, and should not issue where all material facts are controverted or where the legal right to relief is unsettled. Mr. Surenian asserts the standards in both Hills and Crowe require a finding that without issuance of restraints, irreparable harm will occur which will unfairly prevent a studied determination and resolution of the matter. The reply brief provides certifications of William Gregor, Borough Engineer and Jason Kasler, Borough Planner, dated April 22, 2005 to demonstrate that D. R. Horton did not establish "irreparable harm" entitling the "extraordinary" relief sought in the motion.

The certification of Mr. Kassler provides the projected bedroom yield of the four sites in the plan. Due to environmental constraints and the redesign of the Meer tract following the planning board denial, the sites now provide less than the required number of affordable units in the certified Fair Share Plan. Therefore, a new site, the Horse Farm, is proposed to be added. The projected bedroom amounts and associated sewer and water demand analysis as provided by the Borough engineer is as follows:

SITE	# Units	# Bedrooms	Water Demand gpd	Sewer Demand gpd
Mitchell	40	140	8,400	12,000
Decker	47	141	9,870	14,100
Ball	140	120	37,800	42,000

² Crowe V. DeGioia, 90 N.J. 126, 132 (1982)

Meer	253	745	52,395	74,850
SUBTOTAL	480	1,146	108,465	142,950
NEW Horse Farm	205		43,050	61,500
TOTAL			341,535	204,450
AVAILABLE CAPACITY			450,000^A	214,000^B

^A 1,000,000 gpd allocation – 550,000 gpd used in 2004 = 450,000 gpd indicating that “water capacity is available.”³

^B 950,000 gpd allocation – 736,000 gpd used in 2004 = 214,000 gpd available capacity

Mr. Surenian further indicates that the above projections are conservative based on 1) a site-specific inflow/infiltration study could indicate curative measure that would free up capacity, 2) DEP estimates of flow demands often tend to be conservative, 3) “assuming that not all the projects will be developed simultaneously, the development of the first projects should free up capacity to address the needs of later projects, and 4) the analysis assumes that all projects will be developed at the projected density which may not prove feasible.

In conclusion, Mr. Surenian asserts that the Movant has not successfully carried its burden to obtain the requested relief. Specifically, Bloomingdale states the questions that COAH “must determine whether it is necessary and practical to exercise [its] extraordinary power to preserve the status quo” subject to the outcome of a final hearing.”⁴ Bloomingdale further asserts that such extraordinary measures are neither necessary nor practical because the Borough has sufficient water and sewer capacity to supply the D.R. Horton project and to fully address its responsibilities.

ORAL ARGUMENT

At the May 11, 2005 Council meeting, counsel for D.R. Horton and Bloomingdale presented oral argument in support of their positions. In summary, D.R. Horton emphasized that Bloomingdale had failed to provide any affordable housing units pursuant to the affordable housing obligations placed upon it by COAH. D.R. Horton also noted the limited remaining capacity for water and sewage in Bloomingdale and stated that if the Horse Farm site was permitted, that there would not be any additional capacity available to meet Bloomingdale’s affordable housing obligations. Bloomingdale argued that D.R. Horton had not met the legal standard for the granting of a scarce resource restraint and further stated that even if the Council were to consider the motion as legally viable, the facts demonstrate that there is more than enough water and sewer capacity currently available to make a scarce resource restraint unnecessary and improper.

Upon the conclusion of oral argument, the Council voted to impose a temporary scarce resource restraint on water and sewer that would run until the next Council meeting, scheduled to be held on June 8, 2005. The Council also voted to refer the matter to a task force to provide a

³ Certification of Borough Engineer , William Gregor I.10, page 2.

⁴ Morris County Hair Housing Council et al v. Boonton Township, New Jersey Council on Affordable Housing, Docket No. 86-2, at 5.

recommendation for the full Council at the June 8 COAH meeting. The Council also stated that it would request any additional information it deemed necessary from either party.

DISCUSSION

A task force met on May 20, 2005, and reviewed the motion papers and opposition papers. In addition, Bloomingdale submitted to the task force a table regarding building permits and certificates of occupancy in Bloomingdale for the period from January 1, 2003 through May 20, 2005. The task force also reviewed a table listing estimated per unit daily sewer usage in the State of New Jersey for both residential and non-residential uses. In reviewing all of the information provided, including the motion papers submitted by D.R. Horton in support of a scarce resource restraint and the opposition papers of Bloomingdale, the Council concludes that the scarce resource restraint request should be viewed as two separate requests: one for water demand and the other for sewer demand. While there may be differences between the parties as to the actual remaining water and sewer capacities, these differences are such that COAH is capable of reaching a decision as to the ability of the municipality to provide water and sewer capacity that is essential to Bloomingdale's ability to meet its affordable housing obligation. In making this determination, COAH has viewed water and sewer capacities separately. Based on the information provided by the parties and applying COAH's regulations requiring that water and sewer capacities be made available in order to make an affordable housing proposal realistic, COAH has determined that it is necessary to impose a scarce resource restraint on the existing sewer capacity remaining in Bloomingdale.

Initially, Bloomingdale's assertion that the legal standard of irreparable harm must be used before imposing a scarce resource restraint is incorrect. As stated in the Council's regulations, "At any time, upon its own determination or upon the application of any interested party, and after a hearing and opportunity to be heard, the Council may issue such orders as may be necessary to require that a participating municipality take appropriate measures to preserve scarce resources that may be essential to the satisfaction of the municipality's obligation to provide for its fair share of its region's present and prospective need for low and moderate income housing." N.J.A.C. 5:91-10.1. The irreparable harm standard is a much stricter standard that is used in granting a stay of action or restraining orders. Here, a scarce resource restraint does not prevent development, but requires that before such development occurs, the Council shall review the proposed development to insure that necessary affordable housing opportunities are not lost. As noted in Hills Dev., the Supreme Court declined to create specific conditions for the granting of a scarce resource restraint and instead, chose to allow COAH to exercise its discretion as to what conditions would require the imposition of a scarce resource restraint. Hills Dev., *supra*, 103 N.J. at 62. Therefore, notwithstanding the argument of counsel for Bloomingdale, the Council may, pursuant to its regulations, issue a scarce resource restraint in order to preserve such resources that may be essential to the satisfaction of a municipality's affordable housing obligation.

There is no question that water and sewer capacity are essential to any housing that may be developed. In this case, while sufficient excess water capacity currently appears to exist to allow development in the municipality to proceed without the review process that accompanies a scarce resource restraint, the same cannot be said for the existing sewer capacity. Assuming the "conservative" sewer demand numbers provided by the municipality are accurate, the total sewer

capacity of Bloomingdale is 214,000 gallons per day and the currently committed sewer demand is 204,500 gallons per day. Using these figures, there exists a remaining sewer capacity of less than 5% of the total sewer capacity volume for Bloomingdale. Applying this limited remaining capacity to Bloomingdale's current affordable housing obligation demonstrates the need for the scarce resource restraint.

A review of Bloomingdale's second round fair share plan that received substantive certification reveals that Bloomingdale has not completed any of the 163 new construction units required under its affordable housing obligation. In order for Bloomingdale to meet even a portion of this obligation, the existing sewer capacity may not be sufficient. Therefore, it is clear that even a conservative application of the facts demonstrates that a scarce resource restraint is necessary in order for COAH to insure that the essential resource of sewer capacity is available for Bloomingdale to meet its second round affordable housing obligation.

ORDER

For the reasons stated above, the Council finds that there exists a need to preserve the essential sewer capacity necessary in order for Bloomingdale to fulfill its second round affordable housing obligation. Therefore, the Council hereby grants in part and denies in part, D.R. Horton's motion for the imposition of a scarce resource restraint upon Bloomingdale. The Council hereby orders the imposition of a scarce resource restraint on sewer capacity for all land in Bloomingdale Borough that is one-half acre (0.5 acres) or more. All unexpired final approvals that were valid, effective and granted prior to the date of this decision shall be exempt from the scarce resource restraint. In addition, any building addition to an existing non-residential property where the addition does not involve housing or more than 0.5 acres of land, is exempt from this scarce resource restraint.

The Council denies, without prejudice, D.R. Horton's motion for the imposition of a scarce resource restraint upon Bloomingdale for the purposes of water capacity. This Order shall take effect immediately upon adoption by the Council.


Renee Reiss
Council Secretary

DATED: *JULY 8, 2005*