

In re Application for Emergent : Council on Affordable
Relief in Clinton Township, : Docket No. OS-no2.]&4J, .1603(d)
Hunterdon County :

This matter arises from an application for emergent relief filed with the Council on Affordable Housing ("COAH" or the "Council") by P&H Clinton Partnership ("P&H") on March 23, 2005. The Council adjourned the hearing of this matter pursuant to P&H's requests to postpone the matter while settlement discussions between P&H and Clinton Township were proceeding. Ultimately, however, a proposed settlement was rejected by the Township Council on October 27, 2005. Accordingly, on November 1, 2005, P&H requested that the Council hear its motion on an expedited basis at COAH's November 9, 2005 meeting. P&H's motion asks the Council to compel the Township to support P&H's efforts to obtain sewer service for the Windy Acres site in accordance with the terms of the substantive certification granted to the Township. Because the Appellate Division is scheduled to hear oral arguments on P&H's appeal seeking sewage capacity from the Readington-Lebanon Sewerage Authority ("RLSA") on December 7, 2005, the Council heard and decided P&H's application in an expedited fashion at its November 9, 2005 meeting. The relief requested by P&H was granted in part and denied in part.

BACKGROUND

Clinton Township received first round substantive certification from COAH on February 3, 1993 and second round substantive certification on March 7, 2001. The Township's second round fair share housing obligation is 392 units, including 57 units of rehabilitation and 335 units of new construction. The Township included an inclusionary zoning site known as Windy Acres in both its first round and second round plans. P&H is the owner of Windy Acres (Block 7/Lots 18, 18.01 & 31), which was proposed to produce 911 units, including 145 low and moderate-income for-sale units in

the plan certified by COAH. P&H received General Development Plan ("GDP") approval from the Township's planning board in 1995 and an amendment to that plan in 1999.

On April 2, 2004, COAH received a petition from Clinton Township to amend its second round substantive certification. The amended Housing Element and Fair Share Plan sought to remove the Windy Acres site from its plan and replace it with two municipally sponsored construction projects and a Regional Contribution Agreement ("RCA") with the City of Lambertville. The Township maintained that it removed Windy Acres from its plan because the New Jersey Department of Environmental Protection ("DEP") issued a Determination of Technical Incompleteness on July 14, 2003, which essentially denied the Township's application for the Final New Jersey Pollution Discharge Elimination System (NJPDDES) permit for the site. DEP issued a Determination of Technical Incompleteness because the discharge of effluents from Windy Acres proposed by Clinton would not meet the "no measurable change" standard of discharge into the South Branch of the Rockaway Creek, which was designated a Category 1 (C-1) waterway on May 19, 2003.

As a result of the reclassification of the stream, P&H sought alternative means for the provision of sewer service for the Windy Acres site. On July 29, 2003, P&H filed an action in the Superior Court before Honorable Edward R. Bernhard, J.S.C., seeking sewage capacity for the site from the RLSA and others. On January 20, 2004, Judge Bernhard dismissed P&H's complaint, mainly because all available sewer capacity from RLSA has already been allocated to other parties. Judge Bernhard determined that there was no precedent for a Mt. Laurel developer to wrest sewer capacity away from parties that already had a contractual right to that capacity. P&H has appealed this decision to the Appellate Division, which is

still pending. Clinton Township, among others, was named as a defendant/respondent in that case.

In response to a motion filed by P&H, on November 22, 2004, COAH ordered Clinton Township to re-petition with a new amendment to its certified plan, to include the inclusionary development Windy Acres, as well as an alternate plan in the event that the Appellate Division determines that RLSA is not obligated to provide sewer to Windy Acres. (See November 22, 2004 COAH Opinion incorporated by reference herein).

In accordance with COAH's directive, on January 24, 2005, Clinton re-petitioned with a new amendment that included the Windy Acres site in its plan as well as alternatives should the Appellate Division find that the Windy Acres site is unable to gain sewer service from the RLSA. The amendment is currently being reviewed by COAH staff.

On February 2, 2005, P&H filed a motion seeking emergent relief requesting that COAH direct Clinton to support its certified Fair Share Plan by withdrawing its request to Hunterdon County to re-designate the Windy Acres inclusionary site Planning Area 5 ("PA5") and to support the current Planning Area 2 ("PA2") designation. On February 22, 2005, the Hunterdon County Planning Board voted to adopt a cross-acceptance report that calls for the elimination of the entire PA2 from Hunterdon County. On March 9, 2005, COAH issued an opinion affirming Clinton's obligation to support its certified fair share plan and stating that efforts by Clinton Township to re-designate the Windy Acres site as PA5 may render the site unbuildable and that such action could arguably be deemed obstruction of an inclusionary development pursuant to N.J.A.C. 5:93-10.5. Accordingly, Clinton was directed to advise

COAH as to what action it intended to take to support its certified Fair Share Plan. (See March 9, 2005 COAH Opinion incorporated by reference herein).

In response, on April 8, 2005, Clinton Township passed a resolution amending the Township's prior resolution recommending that the State Planning Commission re-designate the Windy Acres site as a PA5 in the next State Plan. Clinton's amended resolution instead recommended that the Windy Acres site remain a PA2 in the next State Plan. The April 8, 2005 resolution also stated that in the event that COAH or the Appellate Division determined that Windy Acres is no longer viable, Clinton reserves the right to make further submissions to the Hunterdon County Planning Board, the State Planning Commission, the Office of Smart Growth and COAH.

In the interim, on March 23, 2005, P&H filed the present motion seeking, among other relief, that Clinton be directed to support P&H's position in its appeal of the RLSA sewer issue. However, because P&H and the Township were engaged in settlement discussions, P&H requested that COAH put off the hearing of its motion while settlement discussions proceeded. After the Township rejected the proposed settlement, P&H requested that COAH hear its application on an expedited basis at its November 9, 2005 meeting.

ARGUMENTS

P&H's Motion:

P&H asserts that COAH should direct Clinton to support P&H's efforts to obtain sanitary service for Windy Acres in accordance with the terms of its substantive certification, including but not limited to supporting P&H's lawsuit against the RLSA and its constituent members seeking to secure sanitary sewer service for Windy Acres. P&H argues that Clinton has failed to support and, in fact, opposed P&H's efforts to obtain sewer service

for Windy Acres from the RLSA treatment plant. P&H states that the Township has submitted briefs to the court opposing P&H's appeal. Additionally, P&H argues that the Mt. Laurel case law, COAH regulations and decisions require municipalities to cooperate with efforts to provide water and sewer to sites zoned for inclusionary development. P&H further submits, that COAH conditioned the Township's substantive certification upon the premise that Clinton would take all necessary steps to provide sewer service to its inclusionary developments. Accordingly, P&H claims that the Township is in violation of its substantive certification because it failed to assure availability of water and sewer for the site. P&H also relies on N.J.A.C. 5:93-4.3(c)(2), which states that "Municipal officials shall endorse all applications to the DEP or its agent to provide water and/or sewer capacity."

Clinton Township's Response:

Clinton Township contends that P&H's motion should be denied. The Township maintains that P&H's motion is essentially a motion for COAH to reconsider its March 9, 2005 Opinion. The Township argues that the March 9, 2005 opinion clearly set forth COAH's desire to maintain the *status quo* regarding Windy Acres "pending the Appellate Division's determination on sewer." Clinton states it is taking affirmative steps to comply with COAH's March 9, 2005 opinion.

The Township also asserts that P&H is incorrect in its arguments that Clinton opposed P&H's efforts to secure sewer service. The Township states that it filed a brief advising the Law Division that P&H's lawsuit against RLSA was premature because (1) P&H had not secured approval for Windy Acres from the Township; (2) DEP had not taken a final action on the NJPDES permit; (3)

Applied Wastewater Management (AWWM) had withdrawn its Township Planning Board application for the Clinton East Sewerage Treatment Plant; (4) amendments to the wastewater management plans of Clinton, Readington, and Lebanon would have to be amended and the amendments had not been applied for; and (5) Clinton was seeking an amendment from COAH, therefore COAH and not the Superior Court was the proper venue to adjudicate the sewer question. The Township states that it did not argue against the merits of P&H's case. In the Appellate Division, the Township states it filed a brief seeking to supplement the record to include the Township's petition for amended substantive certification.

Finally, the Township maintains that it has complied with its substantive certification requirement that required Clinton to take all necessary steps to provide sewer service to Windy Acres. Clinton argues that because the Township had no sewer service of its own to reserve, it took the necessary steps by entering into a Sewer Agreement with AWWM.

SJM's Response:

SJM joins in P&H's motion for emergent relief and also files a cross motion seeking an administrative order compelling Clinton to take action that expedites COAH's process in accordance with N.J.A.C. 5:95-10.3. SJM states that Clinton must take the following steps in order to maintain its substantive certification from COAH: file a report with the Office of Smart Growth to support the inclusion of Windy Acres with PA2; withdraw its opposition to Windy Acres in the Appellate Division; and support inclusion of Windy Acres in the sanitary sewer service plan for the Township or the RLSA.

Clinton Township Community Coalition ("CTCC") Response:

The CTCC maintains that P&H's motion should be rejected because COAH lacks jurisdiction to grant the requested relief. CTCC asserts that before mandating municipal action, COAH must first determine if environmental constraints on the Windy Acres site prevent a realistic opportunity for the development of affordable housing. In addition, CTCC argues that P&H's motion is essentially a motion for reconsideration of COAH's March 9, 2005 Opinion.

P&H's Reply:

P&H maintains that its motion is not a motion for reconsideration of COAH's March 9, 2005 Opinion as Clinton Township and CTCC argue. P&H states that COAH's March 9, 2005 Opinion addressed the issue of Clinton Township's efforts to change the planning designation of the Windy Acres site in the revised State Plan, but, that the opinion did not address whether Clinton had an obligation to support all efforts to obtain sewer service for Windy Acres. P&H states that Clinton Township is upsetting the *status quo* because it is not supporting and is directly opposing P&H's legal efforts to obtain sewer service from the RLSA. P&H maintains that Clinton Township's briefs to the Law Division contained its opposition to sewer service for Windy Acres in unambiguous language. In addition, P&H states COAH must reject CTCC's argument that the present motion cannot be considered until COAH determines whether environmental constraints prevent a realistic opportunity

for affordable housing because COAH has already twice determined that the Windy Acres site is suitable for development during its substantive certification review process. P&H claims that none of the physical characteristics of the site have changed since COAH granted Clinton substantive certification.

Merck & Bellemeade Dev. Responses:

Counsel for Merck and Bellemeade appeared at COAH's November 9, 2005 meeting and also opposed P&H's motion. Merck and Bellemeade are both existing users of RLSA sewer service and litigants in P&H's appeal seeking sewer capacity from the RLSA. Merck and Bellemeade argued that COAH does not have the authority to compel Clinton Township to take a position in the pending appeal. In addition, Bellemeade argued that P&H did not provide sufficient notice of its application pending before the Council to Bellemeade and the other parties to the RLSA appeal.

DISCUSSION

In light of the nature of the relief sought and the timing of the oral argument scheduled in the Appellate Division on P&H's RLSA appeal, the Council heard and decided P&H's application in an expedited manner on November 9, 2005. At that time COAH voted to grant in part and deny in part P&H's motion for emergent relief.

COAH agreed that, pursuant to the terms of the Township's substantive certification, Clinton Township has an affirmative obligation to support P&H's efforts to obtain sanitary sewer service for Windy Acres. Therefore, Clinton Township may not obstruct P&H's efforts to obtain sewer service from the RLSA. Any action taken by the Township to thwart the efforts of P&H to obtain such sewer service from the RLSA may be deemed to be obstruct an

inclusionary development, and, as such, may result in the revocation of Clinton's substantive certification pursuant to N.J.A.C. 5:93-10.5. Furthermore, the Council found that in order for Clinton Township to maintain its substantive certification, it must support any permit applications to DEP for sewerage treatment and any amendments to wastewater management plans of Clinton Township necessary for the development of the Windy Acres site. However, it is beyond the purview of this Council to compel the Township to make certain arguments in the context of the RLSA appeal. Rather the Council determined that it is for the Appellate Division to decide the issues pending before it on P&H's appeal. The Council is confident that the court will appropriately decide the issues presented by that appeal based upon the arguments presented by the parties and pursuant to applicable law.

Moreover, in light of the proceedings between the parties regarding the development of the Windy Acres site, the Council, at its November 9, 2005 meeting, issued an Order to Show Cause as to why Clinton Township's substantive certification should not be revoked and the pending amendment to that certification dismissed.

The parties were advised that this Order to Show Cause would be heard at COAH's December meeting. The parties were also given the opportunities to submit briefs to the Council in connection with this order.

dated: December 14, 2005



Re'nee Reiss/" Secretary
New Jersey Council on
Affordable Housing