

**IN RE BOROUGH OF ATLANTIC
HIGHLANDS, EMERGENT MOTION
FOR RESTRAINTS**)
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**NEW JERSEY COUNCIL ON
AFFORDABLE HOUSING**

OPINION
COAH 05-1716

This matter comes before the Council on Affordable Housing ("COAH" or the "Council") on the motion of K. Hovnanian who seeks emergent relief restraining the Borough of Atlantic Highlands from condemning or taking any further steps towards the condemnation of property known as the "McConnell tract," and further restraining the Borough from granting any development approvals on property within the Borough. The Council heard this application at its January 19, 2006 meeting. After considering the papers submitted and oral arguments of the parties, the Council voted to grant the motion in part and deny the motion in part. The Council voted to restrain the Borough from condemning, purchasing, or taking any other irreversible steps toward the condemnation of the McConnell tract, and further ordered that neither party take any adverse action with regard to the application currently pending before the Borough's Board of Adjustment. This opinion memorializes the Council's January 19, 2006 decision.

PROCEDURAL HISTORY/ BACKGROUND

Atlantic Highlands petitioned COAH for second round Substantive Certification on July 23, 2003. During the 45-day objector period, no objections to the plan were received by COAH. Nonetheless, on July 6, 2005, COAH received correspondence from Judith M. Richman, Esq. on behalf of K. Hovnanian Shore Acquisitions, L.L.C. ("K. Hovnanian"), stating that its site, Block 142, Lot 5 (as known as the McConnell tract) was available and suitable for inclusionary development and should be included in Atlantic Highlands' Housing Element and Fair Share Plan. Atlantic Highlands responded to K. Hovnanian's correspondence in a letter dated July 14, 2005, which explained that K. Hovnanian should not be treated as an objector because it did not file a timely objection to the Borough's petition for substantive certification. K. Hovnanian was not afforded objector status by the Council; however, any factual information presented by K. Hovnanian was included in COAH's staff review of the Borough's plan. COAH staff

issued a Report Requesting Additional Information on November 28, 2005. Atlantic Highlands did not receive second round substantive certification prior to the adoption of COAH's Third Round Rules on December 20, 2004. To remain under COAH's jurisdiction, Atlantic Highlands was required to adopt a resolution by February 20, 2005, committing to petition COAH by December 20, 2005. The Borough adopted such a resolution on January 31, 2005.

On December 20, 2005, COAH received a petition for third round substantive certification from the Borough of Atlantic Highlands. Atlantic Highlands' re-calculated prior round new construction obligation is 87 units, however, the Borough has submitted a request for a vacant land adjustment to reduce this prior round obligation to a realistic development potential ("RDP") of seven units. The Borough does not have a third round rehabilitation share and its growth share obligation will be determined pursuant to N.J.A.C. 5:94-1 et seq.

K. HOVNIANIAN'S ARGUMENT:

K. Hovnianian asserts that COAH should restrain the Borough from proceeding to condemn the McConnell tract, and asks that the Council enter a "scarce resource restraint" barring development approvals, with limited exceptions, anywhere in the Borough. In support of its argument, K. Hovnianian submits that Atlantic Highlands has not provided one unit of affordable housing since Mount Laurel was decided thirty years ago. K. Hovnianian proposes to build an inclusionary development in the Borough on the McConnell tract. The McConnell tract is a 7.26 acre waterfront parcel of land located on Avenue D immediately south of Sandy Hook Bay. The tract is located in an R-1 residential zone, and there are currently several businesses located on the tract and it is also used for boat storage. K. Hovnianian submits that these uses are visually unappealing and are inconsistent with the current zoning of the tract.

In July 2005, K. Hovnianian applied to the Borough's Board of Adjustment for approvals to build an inclusionary development on the McConnell tract, and hearings on the application began on November 10, 2005. K. Hovnianian submits that its proposed development would create nine units of affordable housing which would meet all of COAH's standards as well as the requirements of the Coastal Area Facilities Act

("CAFRA"). K. Hovnanian proposes to clean up any pollution that exists on the site as a result of diesel fuel spills and oil contamination, to create a safe public access to the waterfront, and to improve pedestrian links to adjacent beach areas. However, K. Hovnanian claims that the Borough now wants to condemn the McConnell tract to create open space in the municipality. K. Hovnanian contends that the Borough has never stated such an intention, and in fact the Master Plan contemplates a continuous pedestrian path along the waterfront to which K. Hovnanian's development proposal would contribute. K. Hovnanian also asserts that the Borough is attempting to obtain Green Acres funding to purchase the McConnell tract, however, that funding application has not yet been acted upon by Green Acres.

In support of its motion for emergent relief, K. Hovnanian argues that COAH has the express power and duty to ensure that municipalities perform the constitutional obligations regarding affordable housing that the Supreme Court set forth in the Mount Laurel cases, and that the Fair Housing Act gives COAH broad powers to carry out its mission. One of these powers is the ability to issue restraining orders as necessary to preserve scarce resources that may be essential to compliance with a municipality's constitutional obligation for affordable housing. Thus, K. Hovnanian asserts that the Council is empowered to issue an order restraining the Borough of Atlantic Highlands from condemning the McConnell tract or taking any further steps towards doing so, such as obtaining Green Acres funding.

K. Hovnanian relies on Holmdel Builder's Ass'n v. Holmdel Tp., 121 N.J. 550, 565-566 (1991), wherein the Supreme Court stated that, "...any land that is developed for any purpose reduces the supply of land capable of being used to build affordable housing. The scarcity of land as a resource bears on the opportunity and means to create affordable housing." And K. Hovnanian notes that to implement this ruling, COAH has restrained municipalities from acting to divert, for other purposes, land that is suitable for affordable housing. K. Hovnanian compares the actions of Atlantic Highlands to the actions of Haddonfield Borough, where COAH issued a scarce resource restraint, restraining the municipality from granting any further development approvals on any property in town (other than for improvement of existing one and two family houses) pending COAH's review and approval of the municipality's compliance plan. Haddonfield had been

permitting development of non-affordable housing even as it asserted that it had no vacant land on which affordable housing could be built. In the case of Atlantic Highlands, K. Hovnanian asserts that once the Township obtains Green Acres funding and buys the property for open space, it will be practically impossible to redirect the land for residential purposes.

K. Hovnanian argues that the courts have the power to restrain a condemnation that has the purpose or effect of blocking affordable housing in a town that has not fulfilled its Mount Laurel obligation. In support of this argument, K. Hovnanian cites Allamuchy Tp. v. Progressive Properties, Inc., Docket No. A-987-02T3 (App. Div. July 16, 2004); Mount Laurel Tp. v. Mipro Homes, LLC, 379 N.J. Super. 358, 376-377 (App. Div. 2005); and Deland v. Berkeley Tp., 361 N.J. Super. 1, 18-19 (App. Div. 2003). Moreover, K. Hovnanian states that as the agency charged by the Legislature with advancing affordable housing in New Jersey, COAH has at least the same power as the courts do to restrain a condemnation that hinders affordable housing in a municipality that has failed in its constitutional obligations. COAH's power, argues K. Hovnanian, springs from N.J.A.C. 5:91-10.1 or its broad, implied powers to advance its statutory mandate. Thus, K. Hovnanian asserts, COAH should restrain the Borough from condemning the property because to do otherwise would allow Atlantic Highlands to undermine COAH's mission and the intent and purpose of the Fair Housing Act.

In support of its assertion that the McConnell tract should be included in the Borough's fair share plan, K. Hovnanian argues that inclusion of the McConnell tract as a site for inclusionary redevelopment is in line with COAH's policy of recognizing the value of redevelopment. K. Hovnanian suggests that if COAH allows for exemptions based on lot size, that only properties less than one half acre be exempted from the restraint.

BOROUGH OF ATLANTIC HIGHLANDS REPLY:

In response to K. Hovnanian's motion, the Borough notes that it has submitted a fair share plan to the Council for third round substantive certification. Atlantic Highlands contends that its plan completely satisfies its RDP, third round growth share and COAH's

rules regarding unmet need. The Borough also notes that it is prepared to address any concerns or recommendations that COAH may have regarding its plan.

The Borough maintains that it has taken affirmative steps to preserve open space for many years and has specifically targeted the McConnell tract since at least 2000. The preservation of the bay front, including the McConnell tract, is an important concern to Atlantic Highlands and also to the State of New Jersey. Although the Borough concedes that vacant developable land is limited in the town, it contends that it has fully complied with its responsibilities concerning its unmet need. The Borough asserts that COAH should not institute a scarce resource restraint on land within the Borough because the Borough has demonstrated a genuine interest in addressing its responsibilities and has taken significant affirmative actions to reach its goal. Atlantic Highlands also asserts that the benefits of the restraint would not outweigh the burdens that the restraint imposes.

The Borough argues that COAH lacks jurisdiction to decide condemnation issues, noting that the Council has previously deferred to the courts in such matters. Specifically, Atlantic Highlands relies on COAH's determination in the Allamuchy case, COAH Docket No. 01-1306 (December 12, 2001), where the Council noted that condemnation is a responsibility of the courts. In addition, the Borough explains that COAH's refusal to accept jurisdiction over a municipality's right to condemn is part of a well established pattern of COAH's refusal to decide "legal issues." Atlantic Highlands also asserts that the courts have exclusive jurisdiction over condemnation proceedings including claims of fraud, bad faith or abuse regarding the same. Moreover, the Borough posits that even if COAH could award injunctive relief concerning an issue over which the courts have exclusive jurisdiction, K. Hovnanian has failed to demonstrate satisfaction of the Crowe criteria for awarding such injunctive relief. Crowe v. De Gioia, 90 N.J. 126, 134 (1982).

Atlantic Highlands further contends that COAH's regulations specifically authorize the preservation of the subject property for open space, and relies on COAH's rules at N.J.A.C. 5:93-4.2(e) 4 and 5 which explain that a municipality can exclude from its vacant land inventory certain active recreational lands, conservation lands, parklands or open space lands. The Borough argues that these regulations limit the extent to which a municipality can reserve land for municipal open space, but do not limit the extent to

which a municipality may reserve open space which is acquired or to be acquired by the County, State or Federal government. Atlantic Highlands thus argues that COAH's regulations do not require that affordable housing goals take precedent and that the County, State and Federal government can meet their recreational objectives only if the municipalities meet their fair share goals. The Borough states that by devising regulations that do not obstruct how other branches of government fulfill their recreational objectives, COAH has ensured that the state will continue to remain a desirable place to live – for all households including those of low and moderate income.

Accordingly, Atlantic Highlands submits that the following principles are clear: 1) a municipality may reserve land for active or passive open space – even if that reduces the municipality's RDP – provided that the municipality can do so within the 3 percent limitations set forth in N.J.A.C. 5:93-4.2(e) 4 and 5; 2) the three percent limitations do not constrain County, State or Federal government from acquiring land for open space or meeting the open space goals of these higher branches of government or a municipality from excluding such parcels subject to the higher branches of government acquiring the site within one year from the date the plan is certified; and 3) the consequence of excluding sites from the inventory is not to preclude the preservation of land from open space. Rather, a municipality that exceeds the 3 percent limit must be prepared to address the RDP that all lands over the 3 percent limit would generate. Therefore, the Borough argues that, pursuant to applicable COAH standards, it has every right to preserve the McConnell property pursuant to COAH's rules.

K. HOVNIANIAN'S REPLY :

K. Hovnianian submitted a reply which responded to several points made by the Borough. Specifically, K. Hovnianian states that two days after COAH staff prepared a November 28, 2005 report finding the Borough's second round submission to be inadequate and requiring the McConnell tract to be included in the Borough's realistic development potential, the Borough voted to include the McConnell tract in its open space inventory in its Master Plan. K. Hovnianian claims that the Borough did not designate the McConnell tract for condemnation as open space until November 30, 2005, well after K. Hovnianian had applied to construct affordable housing on that site. K.

Hovnanian also asserts that if the Borough was in fact planning on preserving a portion of the McConnell Tract as open space, it would have acted to condemn that land prior to the present motion. Finally, K. Hovnanian notes that the Borough has admitted that land is scarce within its borders.

K. Hovnanian reiterates its argument that COAH has the power to prevent the Borough from condemning the McConnell Tract, since a condemnation would have the effect of blocking actual affordable housing. K. Hovnanian asserts that the Borough's reliance on In re Allamuchy Tp. Petition to Amend Substantive Certification, COAH Docket No. 01-1306 (Dec. 12, 2001), is misplaced. K. Hovnanian explains that COAH, in the Allamuchy case, was not asked to enjoin a condemnation proceeding. Rather, in that case, the condemnation proceedings had already been initiated in court. As such, the Council in Allamuchy explained that "it has no jurisdiction over condemnation proceedings" because a Superior Court judge was already presiding over such a matter, and the issues were thus a "matter for judicial decision in the context of the ongoing condemnation proceedings." Id. at 4. K. Hovnanian thus argues that the Allamuchy decision is distinguishable on its facts from the present case because in the present matter there is no condemnation proceeding currently pending in court.

K. Hovnanian submits that the Borough's position that COAH cannot protect potential affordable housing when an issue involving a potential condemnation is present, was rejected by COAH in In re Scotch Plains Tp./Woodland Estates, COAH Docket No. 92-407 (Nov. 10, 1993). In that case, among other things, the township argued that the property owner was insisting that a development agreement required the township to secure a sanitary sewer easement over contiguous private property so as to facilitate sewer service on the parcel to be developed. The township contended that the developer was forcing the township to condemn a sewer easement, and that COAH should not mandate the exercise of the condemnation power. Id. at 5-9. COAH ruled that the property should be rezoned so as to allow the affordable development, thus rejecting the township's objections. Id. at 10 -11. K. Hovnanian also points to Sod Farm Associates v. Springfield Tp., 366 N.J. Super. 116 (App. Div. 2004), wherein the Appellate Division noted that there are environmental and rural farming issues that are within COAH's

purview. Thus, K. Hovnanian argues that there is no rule that COAH can never decide "legal issues."

K. Hovnanian asserts that it has satisfied the criteria of Crowe v. DiGioia, *supra*, and that COAH should enjoin Atlantic Highlands from condemning the McConnell tract as the circumstances here weigh in favor of such restraints. First, K. Hovnanian claims that it has demonstrated that imminent irreparable harm will result if the Borough is not precluded from condemning the McConnell tract as the permanent loss of tangible affordable housing is irreparable. K. Hovnanian notes that the harm is imminent as the Borough has already commissioned an appraisal of the McConnell Tract. Second, K. Hovnanian asserts that its right to relief is settled as COAH unquestionably has the ability to enjoin condemnation of the McConnell tract. In support of this proposition, K. Hovnanian relies on the Mipro Homes, *supra*, decision and states that Judge Skillman made it clear in that case that a municipality may be precluded from using the condemnation power to block proposed affordable housing. Third, K. Hovnanian argues that it has a reasonable likelihood of success on the merits as the Borough's submission to COAH is deficient in many ways. Moreover, K. Hovnanian notes that although the Borough argues that taking the McConnell tract for open space would not result in the Borough exceeding the 3% threshold that COAH's regulations establish, K. Hovnanian notes that the Borough has not provided COAH with the information necessary to perform this calculation. Finally, K. Hovnanian asserts that the balance of hardships favors the grant of relief sought as K. Hovnanian will lose the McConnell tract permanently if the Borough is allowed to condemn it.

Thus, K. Hovnanian submits that COAH should enter a scarce resource restraint because there is no dispute that land is a scarce resource in Atlantic Highlands and there is reason to conclude that the Borough's present submission to COAH is no more adequate than its prior submission. Moreover, because COAH has not yet calculated the Borough's realistic development potential, a scarce resource restraint would protect the status quo until COAH can make a determination on these issues.

DISCUSSION

After consideration of the papers filed, as well as arguments made by the parties during oral argument, COAH finds that it is appropriate under the facts of this case to

restrain the Borough of Atlantic Highlands from condemning, purchasing, or taking any other irreversible steps toward the condemnation of the McConnell tract. Moreover, the Council further orders that neither party shall take any adverse action with regard to the application currently pending before the Borough's Board of Adjustment.

In Hills Dev. Co. v. Bernards Tp., 103 N.J. 1 (1986), the New Jersey Supreme Court found that COAH has the authority to require a municipality to preserve resources that may be necessary for the municipality to satisfy its fair share obligation. Id. at 61.¹ The Court stated that the Council can require a municipality to preserve a resource upon a finding that "further development or use of these facilities is likely to have a substantial adverse impact on the ability of the municipality to provide lower income housing in the future." Id. at 62. COAH codified this authority in N.J.A.C. 5:95-10.1.

It is undisputed that suitable vacant land for affordable housing development is at a premium in the Borough of Atlantic Highlands. Thus, the Borough has sought a vacant land adjustment from the Council in connection with its petition for substantive certification in both the second and third rounds. Accordingly, Atlantic Highlands has asked the Council to reduce its cumulative first and second round affordable housing new construction obligation of 87 units to a realistic development potential of 7 units. In order to analyze the Borough's request and perform a thorough review of the vacant land inventory within Atlantic Highlands, the Council requires additional information from the Borough. Although COAH staff previously asked the Borough to provide this information, as of the Council's hearing on the request for emergent relief, the Borough had not yet provided the information needed to thoroughly analyze the plan and request for a vacant land adjustment.²

Under these circumstances, if COAH does not act to restrain the Borough from purchasing, condemning or taking any other irreversible action with regard to the

¹For a detailed discussion of COAH's authority to impose scarce resource restraints see the Council's Opinion in Morris County Fair Share Housing Council, et al. v. Boonton Township, et al., COAH Docket No. 86-2.

²After the Council heard and decided this matter at its January 19, 2006 Board meeting, however, COAH staff issued a letter to the Borough, dated January 26, 2006, which outlined the additional documents required to begin review of the vacant land inventory. On February 6, 2006, COAH received the documents requested.

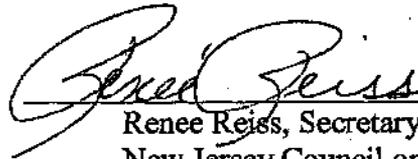
condemnation of the McConnell tract, the ability of Atlantic Highlands to provide any affordable housing within the Borough may be permanently lost. Although the Borough asserts that it can meet its affordable housing obligation without the McConnell tract, the Borough has only recently provided the information needed by the Council to assess this contention. As such, COAH staff will soon begin its analysis and review of the Borough's plan. Accordingly, Atlantic Highlands' claim that inclusion of the McConnell tract in its plan is not necessary for the Borough to meet its affordable housing obligation will be considered in the normal course. The Council notes that the Borough may well be able to address its obligation as it states, however, until COAH has had the opportunity to fully review Atlantic Highlands' plan and information pertinent thereto, such a determination cannot be made by the Council. Therefore, COAH finds that it is appropriate to restrain Atlantic Highlands from taking any further irreversible steps toward the condemnation of the McConnell tract at this time. Issuing such restraints will allow the *status quo* to be maintained while the Council reviews and evaluates the Borough's plan in its entirety. Accordingly, the Council has also ordered that neither party take any adverse action on the application pending before the Board of Adjustment on the McConnell property.

It should also be noted that the Council finds the situation presented by the present motion different from the issues dealt with by the Council in Allamuchy, supra. In that case, the parties were already before the Superior Court with regard to the condemnation proceedings at issue there. Moreover, the parties in Allamuchy were not seeking a restraining order from the Council vis-à-vis those condemnation proceedings. Rather, the Township had submitted an application to amend its previously certified plan to add a Regional Contribution Agreement ("RCA"), thus creating an overall surplus of affordable units in Allamuchy's plan. There were two objectors to this amendment, developers of sites in the certified plan which were also the subject of the pending condemnation proceedings. These objectors claimed, among other things, that the condemnation was pretextual. As the condemnation was then pending before the Court, the Council found it inappropriate to comment or address those issues, and thus placed the entire matter on inactive status. In the case presently before the Council, the parties

are properly before the Council to address the Borough's third round petition for substantive certification, and no condemnation proceedings have yet been implemented.

Given the lack of available land in the Borough, the Council seeks to review the Borough's plan and maintain the *status quo* as to property available for affordable housing development during its review. As such, it should also be noted that by entering the restraints noted herein the Council makes no determination regarding the legitimacy of any proposed condemnation proceeding contemplated by Atlantic Highlands. Rather, the Council's decision to restrain the Borough from any irreversible action on the condemnation of the McConnell tract only represents the Council's desire to maintain the *status quo* pending review of the plan submitted.

In conclusion, COAH grants K. Hovnanian's motion for emergent relief in part, as explained above, and hereby restrains the Borough from purchasing, condemning or taking any other irreversible action with regard to the condemnation of the McConnell tract. Furthermore, neither party is to take any adverse action with regard to the K. Hovnanian's pending Board of Adjustment application. The restraints ordered here will remain in effect until COAH acts on the Borough's petition. These restraints are necessary to ensure that no opportunity for affordable housing is lost. All other relief requested in K. Hovnanian's request for emergent relief is denied. In addition, the Council orders that COAH staff provide a status report to the Council at its April 12, 2006 Board Meeting. Also at that time, the Council may revisit the issue of "adverse action" vis-a-vis K. Hovnanian's pending application before the Borough's Board of Adjustment.



Renee Reiss, Secretary
New Jersey Council on
Affordable Housing

Dated: *March 8, 2006*

