

IN RE SUBSTANTIVE CERTIFICATION ) COAH DOCKET NO. 05-1715  
OF WANAQUE BOROUGH, PASSAIC )  
COUNTY, MOTION FOR SCARCE ) OPINION  
RESOURCE RESTRAINTS )

This matter comes before the Council on Affordable Housing ("COAH" or the "Council") on a motion for scarce resource restraints from RSK Development. RSK asked COAH to grant the following relief in conjunction with its motion: 1) a scarce resource restraint requiring the Borough of Wanaque to reserve sufficient water and sewer allocation to service the RSK property; 2) an order requiring the Borough to issue a letter to the Department of Environmental Protection ("DEP"), Division of Watershed Management, indicating that the Borough is seeking to enforce its rights under the Highlands Water Protection and Planning Act, and 3) an order requiring that DEP authorize the development of RSK's property. The Council heard oral argument on this motion at its March 8, 2006 monthly Board meeting. At the Council's April 12, 2006 monthly meeting, COAH voted to deny the relief requested, but ordered the Borough to provide a status update explaining how the Borough's certified fair share plan continues to provide a realistic opportunity for the creation of affordable housing in Wanaque. This opinion memorializes the decision made by the Council at the April 12, 2006 meeting.

### **BACKGROUND**

Wanaque Borough, Passaic County, adopted a Housing Element and Fair Share Plan addressing its 1987-1999 cumulative fair share obligation on November 21, 1996. The Borough petitioned the Council on December 16, 1996 and published notice in the Herald News on December 22, 1996. COAH received no objections to Wanaque's plan.

Wanaque's plan sought to address its second round (1987-1999) cumulative fair share obligation of 369 units, including a new construction obligation of 332 units and a rehabilitation obligation of 37 units. Wanaque requested that its obligation be adjusted due to a lack of developable vacant land. In response to Wanaque's request, on September 29, 1998, COAH released a Report Requesting Additional Information ("RRAI"), which determined the Realistic Development Potential ("RDP") to be 98 units and requested that Wanaque amend its plan to address the RDP and provide documentation in support of its Plan within 60 days. Almost one year later, on September 13, 1999, Wanaque re-petitioned COAH for substantive certification of an amended plan, and again, no objections were received.

In response to Wanaque's submission, on January 8, 2001, COAH released a third RRAI, which recommended that the RDP be increased to 275 units to reflect the Borough's new residential zoning on a site located in Wanaque's Plan known as the Powder Hollow site. On April 4, 2001, COAH conditionally denied Wanaque's petition, listing six conditions that the Borough had to meet in order to receive substantive certification pursuant to the provisions of N.J.S.A. 52:27D-314(b).

Wanaque addressed COAH's conditions and the increased RDP of 275 units by rezoning three affordable housing sites at 12 units per acre with a 20 percent set aside for a yield of 28 affordable units; by an RCA of 24 rental units with Hoboken City; and by rezoning the Powder Hollow site to require the set-aside of 20 percent of the units developed or 223 units, whichever was smaller.<sup>1</sup> The RSK site is also part of the

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<sup>1</sup> As the Powder Hollow site had already received preliminary site plan approval requiring that the developer provide 60 affordable units, Wanaque could not require a greater low and moderate income unit yield on the site under the existing approval. However, both Wanaque and COAH

Borough's certified fair share plan. The site proposes to build 18 units, four of which are to be affordable.

On December 18, 2003, the RSK site received preliminary and final major site plan approval from the Wanaque Planning Board. However, RSK was not able to obtain the necessary signatures for DEP water and sewer applications until May 12, 2004. The sewer extension permit application was submitted to DEP in June 2004. While this application was pending, the Highlands Water Protection Act, N.J.S.A. 13:20-1, et seq. (the "Highlands Act"), was passed. As RSK's application remained outstanding at that time, the DEP determined that RSK's development was not exempt from the Highlands Act's more stringent requirements for obtaining water and sewer service. On September 6, 2005, DEP issued a letter to this effect explaining that the protections afforded under section 23(b) of the Act are intended only for the protection of the municipality, not the developer.<sup>2</sup>

RSK has appealed DEP's determination, and that appeal is currently

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recognized that projects may undergo substantial amendments prior to the grant of final site plan approval and that the rights under the preliminary or final approval may expire before construction begins. Therefore, the Borough proposed draft zoning regulations on the Powder Hollow site requiring a 20 percent set aside or 223 units which would become effective if the developer sought substantial amendments to the existing preliminary site plan approval, the rights vested under that approval or subsequent final approval expired. COAH's October 3, 2001 resolution granting Wanaque Borough substantive certification contained the condition that, if substantial changes to the approved site plan on the Powder Hollow Site were to be granted, then any revised site plan would have to set aside 20 percent of the units constructed for low and moderate income households, reflecting Wanaque's proposed fair share ordinance. However, on August 28, 2002, the Wanaque Planning Board granted substantial changes to the approved Powder Hollow site plan and failed to require the 20 percent set aside. COAH staff was informed shortly before the August 28<sup>th</sup> Planning Board meeting that the amendment was not considered by Wanaque to be a substantial change and would not initiate the 20 percent set aside. At its October 1, 2003 meeting, COAH permitted 60 affordable units to be generated by the site but required the remaining 163 units to be addressed in the third round.

<sup>2</sup> N.J.S.A. 13:20-23b explains, "[n]othing in this Act shall affect protection provided through a grant of substantive certification or a judgment of repose prior to the enactment of this Act."

pending in the Office of Administrative Law ("OAL"). RSK has also requested that the Borough seek to enforce its rights under the Highlands Act in order to allow RSK to proceed with its project.

On October 26, 2005, RSK filed its motion for scarce resource restraints and other relief with COAH. On March 8, 2006, the Council heard oral argument on RSK's motion, and on April 12, 2006, the Council voted to deny the relief requested.

**RSK's Argument:**

Despite DEP's determination to the contrary, RSK argues that the vigorous requirements of the Highlands Act are not applicable to its property. RSK asserts further that DEP's September 6, 2005 letter, which stated that DEP had determined that Section 23(b) of the Highlands Act was only intended to provide protection to municipalities, should prompt the Borough to seek to enforce its rights, thereby allowing the Petitioner to proceed with its project. RSK contends that Wanaque has not done this, and, therefore, is in violation of its previously granted substantive certification. Accordingly, RSK has requested a scarce resource restraint requiring the Borough of Wanaque to reserve sufficient water and sewer allocation to service the RSK property; an order requiring the Borough to issue a letter to indicating that the Borough is seeking to enforce its rights under the Highlands Act, and an order requiring that DEP authorize the development of RSK's property.

**REPLY BY WANAQUE BOROUGH:**

On February 15, 2006, Wanaque provided a reply to RSK's motion. Wanaque Borough argues that there is absolutely no factual support or legal basis for COAH to impose a scarce resource restraint order upon the Borough as sought by RSK,

and that RSK's requests implicate far reaching policy issues and interagency relationships. Furthermore, the Borough contends that the relief sought by RSK falls outside the purview of this motion.

Wanaque also asserts that it has behaved appropriately and has consistently fulfilled its obligations under COAH's grant of substantive certification. While RSK's motion implies that Wanaque "dragged its feet" and delayed the approval process for the RSK property and, as a result, the Legislature's subsequent adoption of the Highlands Legislation caused an impediment to RSK proceeding with its development, Wanaque argues that it has consistently and continuously discharged its obligations.

In addition, Wanaque argues that RSK must exhaust its administrative remedies regarding DEP's determination, rather than attempting to circumvent that process through the Council. Finally, the Borough suggests that COAH should defer to DEP's interpretation of the Highlands Act as DEP is the administrative entity with expertise in administering that Act.

### **DISCUSSION**

Having considered the arguments provided by the parties during oral argument, as well as the arguments set forth by the parties in their papers, on April 12, 2006 the Council voted to deny the relief requested by RSK. The following discussion sets forth the basis for the Council's determination.

On March 30, 2006, the Council received correspondence from the Wanaque Valley Sewer Authority ("WVSA") explaining that Wanaque does not have a scarcity of water or sewer capacity. Rather, it appears that there is sufficient capacity to

serve the RSK development, and that RSK must submit the appropriate documentation to the WVSA in order to reserve that capacity. Accordingly, the Council denies RSK's request for a scarce resource restraint requiring the Borough of Wanaque to reserve sufficient water and sewer allocations for RSK's development. However, the Council orders that it be provided with a status update of RSK's application as it is very interested in the progress of RSK's development as part of Wanaque's certified plan .

In addition, because DEP has already made a determination that the RSK site is not exempt from the Highlands Act, and has also determined that the proper forum for appealing this decision is in the OAL, the Council denies RSK's request for an order requiring the that Borough of Wanaque issue a letter to the DEP. Furthermore, the Council denies RSK's request for an order mandating that DEP authorize the development of RSK's property pursuant to the provisions of section 23(b) of the Act.

As noted above, DEP issued a letter dated September 6, 2005, interpreting section 23b of the Highlands Act to provide protection only to municipalities in the COAH process, and not to provide an exemption from the Act's requirements for inclusionary developments in COAH-certified plans. If RSK seeks to appeal DEP's decision in this regard the proper forum for doing so, pursuant to N.J.A.C. 7:38-1.5, is in the OAL, not COAH. In fact, RSK has already requested such an administrative hearing. Therefore, the matter will be heard by the OAL in the normal course. It should also be noted that RSK also has the option of seeking a waiver from the provisions of the Highlands Act.

Finally, although RSK's motion did not request the following relief, based on the Council's review of the Borough's certified Fair Share Plan related to this motion, the Council deems it appropriate to order additional relief. As such, the Council hereby

orders Wanaque to provide COAH with a status update regarding the implementation of its Fair Share Plan by May 15, 2006. This status update shall explain in detail how Wanaque's certified plan continues to create a realistic opportunity for the creation of affordable housing. Wanaque is directed to specify what steps it intends to take to support the RSK development as a component of its certified plan and is directed to work collaboratively with RSK to develop a solution within the confines of the applicable statutes and regulations. COAH staff will report back to the Council regarding the update at the June 14, 2006 COAH meeting. If the Council finds the plan no longer creates a realistic opportunity for affordable housing, the Council shall order Wanaque Borough to amend its second round plan, or in the alternative, submit a third round plan.

I hereby certify that this resolution was  
duly adopted by the Council on Affordable  
Housing at its public meeting on 6/14/06.



Renee Reiss, Secretary  
Council on Affordable Housing