

IN THE MATTER OF THE MENDHAM : COUNCIL ON  
TOWNSHIP, MORRIS COUNTY : AFFORDABLE HOUSING  
APPLICATION FOR A WAIVER : COAH DOCKET NO. 06-1807  
FROM N.J.A.C. 5:94-4.20 :

This matter comes before the Council on Affordable Housing ("COAH" or "Council") on the application of Mendham Township, Morris County ("Mendham" or "Township") for a waiver from N.J.A.C. 5:94-4.20, which requires that at least 25 percent of a municipality's third round growth share obligation be addressed through rental housing. Mendham argues that it should not be required to provide a rental component as part of its third round housing element and fair share plan because its prior round credits exceed its third round growth share obligation, thus leaving it with no third round obligation. In support of its arguments, Mendham has submitted a Letter Brief and a Certification of its planner, Susan C. Kimball, P.P. The Township of Vernon also submitted a letter in support of Mendham's motion. For the following reasons, COAH denies Mendham's motion.

On August 27, 1997, Mendham filed with COAH a housing Element and Fair Share Plan addressing its second round (1987-1999) fair share obligation of 42 units (41 new construction and 1 rehabilitation). One party filed an objection to the plan within the objector period. COAH conducted mediation and that objection ultimately was resolved. COAH granted Mendham's petition for substantive certification on August 4, 1999. Mendham's certified

plan consisted of 38 post-1986 credits for affordable ownership units, a three unit regional contribution agreement with the City of Orange, Essex County and a rehabilitation program.

A municipality's fair share obligation for the third round, the period from 1999-2014, consists of the rehabilitation share from 1999-2014, the remaining balance of the 1987-1999 obligation (prior round obligation) and the growth share obligation. N.J.A.C. 5:94-1.4. As part of its third round growth share methodology, COAH recalculated Mendham's prior round obligation using 2000 Census data. N.J.A.C. 5:94-Appendix A. As a result of this recalculation, Mendham's prior round obligation (1987-1999) was calculated to be 20 units, with no rehabilitation component. Ibid.

Mendham petitioned for third round substantive certification of its Housing Element and Fair Share Plan ("plan") on June 17, 2005. Mendham calculated its growth share component to be 12 units comprised of an 11-unit obligation generated by residential development and a one-unit obligation as a result of non-residential development. N.J.A.C. 5:94-2 et seq. Mendham's plan proposed to satisfy its entire obligation by applying prior round credits which resulted from the recalculation of its second round obligation from 42 units to 20 units. Mendham's plan did not provide for a rental component as required by N.J.A.C. 5:94-4.20 because Mendham took the position that the 25 percent rental

component is calculated after taking prior round credits. Thus, Mendham concluded that since its prior round credits exceeded its third round growth share obligation, its growth share obligation was reduced to zero, and it therefore has no rental component under N.J.A.C. 5:94-4.20.

After reviewing the Township's plan, COAH staff found that Mendham actually had a residential growth share obligation of 14 units. Staff verified Mendham's proposed one-unit non-residential growth share obligation. Thus, staff concluded that Mendham's third round growth share obligation is 15. Third Round Report Requesting Additional Information, Mendham Township/Morris County, dated January 13, 2006. Relying on N.J.A.C. 5:94-4.20, which requires every municipality to provide 25 percent of its third round fair share through rental housing, staff concluded that Mendham has a four-unit rental obligation. None of Mendham's prior round credits were for rental housing. All were "for-sale" units. Accordingly, among other things, COAH requested that Mendham submit a re-petition addressing its four-unit third round growth share rental obligation no later than April 18, 2006.

In response to the COAH Report, Mendham filed this motion. Mendham argues that COAH's interpretation of N.J.A.C. 5:94-4.20, which results in a rental component for Mendham, is contrary to N.J.S.A. 52:27D-307(c)(1) of the Fair Housing Act ("FHA" or "Act"), N.J.S.A. 52:27D-301, et seq. Specifically,

Mendham argues that under N.J.S.A. 52:27D-307(c)(1), COAH first must subtract Mendham's prior round credits from the third round growth share obligation before COAH can apply N.J.A.C. 5:94-4.20. Thus, according to Mendham, its third round obligation is zero since its 20 prior round credits exceed its 15 unit third round growth share obligation. In this regard, Mendham also argues that under Bernards Tp. v. Dept. of Com. Affairs, 233 N.J. Super. 1 (App. Div. 1989), COAH must allow prior round credits without regard to the type of unit being credited. Accordingly, Mendham argues that since it has a zero third round obligation after applying prior round credits, it has no third round rental component. Mendham, therefore, claims that any COAH interpretation of its regulations that would impose a rental component is contrary to the FHA and arbitrary, capricious and unreasonable.

Mendham also argues that it is entitled to a waiver of N.J.A.C. 5:94-4.20 should COAH conclude that it has a rental component. Mendham posits that strict application of the rule would unfairly penalize the Township because Mendham already has produced more housing than required by COAH. Mendham argues that a waiver is appropriate because the Township will be given credit for actual affordable units already provided and a waiver would encourage other municipalities to ensure that units are actually constructed.

Vernon Township submitted a letter in support of Mendham's motion because, according to Vernon, it has an interest in COAH's decision in this matter. Specifically, as Vernon details in its letter, Vernon has received second round substantive certification for its plan which addressed its second round obligation of 125 (71 rehabilitation and 54 new construction) through, in part, three regional contribution agreements for 54 units at \$25,000 per unit. Under the third round rules, Vernon's second round obligation was recalculated to be 46 units (2 rehabilitation and 44 new construction). Vernon has submitted a third round plan to COAH and is concerned that it will not receive credit against its third round growth share obligation for the RCA units. While Vernon's letter does briefly discuss Mendham's motion, the focus of Vernon's arguments address why COAH should allow Vernon to receive credit for its second round RCA units.

COAH will not address Vernon's arguments as they pertain to Vernon's third round plan and the crediting of second round RCA units. The appropriate remedy is for Vernon to file its own motion as this motion addresses Mendham's motion and the third round rental component, not Vernon's claims that it should get credit for second round RCA units.

COAH will, however, consider Vernon's arguments that address the pending motion. In support of Mendham, Vernon argues that N.J.S.A. 52:27D-307(c) requires COAH to calculate Mendham's

third round rental obligation after allowing Mendham to take prior round credits. According to Vernon, N.J.S.A. 52:27D-307c(1) does not require that COAH requirements be met before allowing credits.

Vernon also cites N.J.A.C. 5:94-3.1(a)(1) and 5:94-3.2(a) and argues that "...the claimed credits must comply with the criteria established in N.J.A.C. 5:93, not N.J.A.C. 5:94..."

In adopting its third round methodology, COAH considered various ways in which to provide affordable housing to low and moderate income families. After this careful consideration, COAH determined that, among other things, "...the production of rental housing is essential to any program designed for low and moderate income households." 36 N.J.R. 3729, 3730. To ensure that this essential housing is provided, COAH adopted N.J.A.C. 5:94-4.20. N.J.A.C. 5:94-4.20 differs from the predecessor rule in that not only does it require a municipality to provide for 25 percent of its growth share obligation through rental housing, but it also eliminates the rental bonus previously allowed for the units required to be provided. Now, the rental bonus is applied only to those units provided in excess of 25 percent obligation. After identifying the significant need for affordable rental units, COAH adopted N.J.A.C. 5:94-4.20 in an effort to advance this important policy. As COAH stated, it hopes to not only provide rental housing through the 25 percent requirement, but also "... create an

incentive to provide housing for this population..." 36 N.J.R.  
3773.

N.J.A.C. 5:94-4.20(a) provides:

In addressing the housing need, the Fair Share Plan shall create a realistic opportunity to construct rental units. At least 25 percent of a municipality's growth share obligation shall be addressed with rental housing. This rental obligation shall be provided in proportion to the growth share obligation generated by the actual growth as monitored at the third, fifth and eighth year anniversary pursuant to N.J.A.C. 5:95-9. (Emphasis added).

This regulation as initially proposed stated that "[a]t least 25 percent of a municipality's affordable housing obligation shall be addressed with rental housing." (Emphasis added). Upon adoption, COAH changed this language to read "growth share obligation" to make it clear that the rental component is applied to the third round growth share obligation, as opposed to other components of the third round fair share obligation. 36 N.J.R. 5821.

This distinction is important. A municipality's third round fair share consists of the sum of the rehabilitation share, the remaining prior round (1987-1999) obligation and the growth share which encompasses actual growth from 2004-2014. N.J.A.C. 5:94-1.4; 5:94-2.1(a). "Growth share" is defined as "...the affordable housing obligation generated in each municipality by both residential and non-residential development from 2004 through 2014..." N.J.A.C. 5:94-1.4. A municipality must first evaluate

each of these components to determine its fair share before taking any credits. Thus, pursuant to N.J.A.C. 5:94-4.20, a municipality must determine its growth share and then calculate 25 percent of that to arrive at its rental component. Once that is done, as well as evaluation of the other two components, the municipality can avail itself of appropriate credits. By specifying that the rental component applies to the growth share obligation, COAH is advancing its important policy goal of ensuring that much needed rental housing is provided for units created from 2004 through 2014.

In this case, Mendham's growth share obligation is 15 units. Thus, its rental component is four units. While Mendham does have an excess of affordable units from the second round as a result of the recalculation of its second round obligation, none of the units provided in the second round are rental units. Mendham's rental component does not disappear because it has prior round credits. Mendham still has a rental component for which it must provide. Of course, if any of the prior round units had been rental units, Mendham would be able to claim those excess units as credits and may have addressed all or a portion of its rental component. Since they are not, however, Mendham must provide for the rental component generated by its growth share obligation. Any interpretation of COAH regulations that would allow otherwise, would undermine the significant policy to provide much needed



rental units for households who might not otherwise be able to afford housing.

Mendham and Vernon argue that N.J.S.A. 52:27D-307(c)(1) prohibits such an interpretation of N.J.A.C. 5:94-4.20 and that COAH is required to allow Mendham to credit the excess second round units that resulted from the recalculation of the second round need without limitation. In support of their argument, they rely on one sentence in N.J.S.A. 52:27D-307(c)(1) which states:

[m]unicipal fair share shall be determined after crediting on a one-to-one basis each current unit of low and moderate income housing of adequate standard, including any such housing constructed or acquired as part of a housing program specifically intended to provide housing for low and moderate housing.

Contrary to the Township's claims, N.J.S.A. 52:27D-307(c)(1) does not prohibit COAH from applying its Rental Housing regulation in the manner described above.

N.J.S.A. 52:27D-307(c)(1) must be considered as a whole.

N.J.S.A. 52:27D-307(c)(1) charges COAH to adopt criteria and guidelines for:

[m]unicipal determination of its present and prospective fair share of the housing need in a given region. Municipal fair share shall be determined after crediting on a one-to-one basis each current unit of low and moderate income housing of adequate standard, including any such housing constructed or acquired as part of a housing program specifically intended to provide housing for low and moderate income households. Notwithstanding any other law to the contrary, a municipality shall be entitled to a credit for a unit if it

demonstrates that (a) the municipality issued a certificate of occupancy for the unit, which was either newly constructed or rehabilitated between April 1, 1980 and December 15, 1986; (b) a construction code official certifies, based upon a visual exterior survey, that the unit is in compliance with pertinent construction code standards with respect to structural elements, roofing, siding, doors and windows; (c) the household occupying the unit certifies in writing, under penalty of perjury, that it receives no greater income than that established pursuant to section 4 of P.L. 1985, c. 222(C.52:27D-304) to qualify for moderate income housing; and (d) the unit for which the credit is sought is affordable to low and moderate households under the standards established by the council at the time of filing of the petition for substantive certification. It shall be sufficient if the certification required in subparagraph (c) is signed by one member of the household. A certification submitted pursuant to this paragraph shall be reviewable only by the council or its staff and shall not be a public record;

When this paragraph is read in its entirety, it becomes apparent that the Legislature adopted this provision to ensure that municipalities receive credit for affordable units provided between 1980 and 1986. While the second sentence speaks of "crediting on a one-to-one basis", the following sentence discusses the specifics of the crediting and clearly delineates units "created or rehabilitated between April 1, 1980 and December 15, 1986." These consecutive sentences when read together demonstrate the Legislature's intent to allow credits on a one-to-one basis for units created between 1980 and 1986. This reading of the section

makes sense since the FHA became effective on July 2, 1985. By adopting this provision, the Legislature wanted to make sure that affordable housing provided before and shortly after the adoption of the FHA received credit.

Bernards Tp. v. Dept. of Com. Affairs, supra, supports this interpretation. In Bernards Tp., the court reviewed a COAH regulation which required all units to be restricted to low and moderate income households as a condition for credits. The court found that such a requirement did not comport with the intent of N.J.S.A. 52:27D-307(c)(1). In interpreting N.J.S.A. 52:27D-307(c)(1), the court reasoned that the Legislature, through this provision, intended to ensure that municipalities receive credit for affordable housing units that it voluntarily provided before COAH adopted criteria. As the court found, the Legislature did not wish to penalize towns that acted at a time when there were no requirements for affordability controls. Id. at 15.

In its regulations governing the second round fair share obligation, COAH acted in accordance with the above interpretation of N.J.S.A. 52:27D-307(c)(1). Pursuant to COAH's second round regulations, in determining the second round calculated need, COAH granted credits, on a one-to-one basis, for units created between April 1, 1980 and December 15, 1986. N.J.A.C. 5:93-2.15; 5:93-3.1 and 5:93-3.2. However, it should be noted that Mendham seeks credit for units that do not fall within the scope of N.J.S.A. 52:27D-

307(c)(1) in that the units in Mendham's second round plan were constructed between 1990 and 1998.

Moreover, N.J.S.A. 52:27D-307(c)(1) should be interpreted in accordance with present circumstances. Indeed, N.J.S.A. 52:27D-307(c)(1) refers to allowing credits for units created between 1980 and 1986, twenty years ago. At this point in time, COAH has now adopted its third round methodology, which is a departure from the previous two methodologies. The prior two methodologies were based on projecting need using available data. Each municipality was assigned a fair share need based on the projections. The third round relies on actual growth or "growth share" as it is called. In light of this new approach, COAH has adopted regulations for allowing credits that are consistent with this new methodology.

Contrary to Mendham's and Vernon's claim, Bernards Tp. V. Dept. of Com. Affairs, supra, does not compel a different result. In Bernards Tp., the court found that since N.J.S.A. 52:27D-307(c)(1) did not limit credits to those units with affordability controls, COAH could not do so through regulation. The court reasoned that the Legislature did not intend to exclude from crediting units that traditionally had been occupied by lower income households but simply did not have controls to ensure continued occupancy. In fact, COAH has allowed credits for affordable units created between 1980 and 1986 as the Legislature

intended. COAH simply is saying that a municipality seeking credits against a third round 1999 to 2014 growth share obligation must also provide rental units.

Likewise, contrary to Mendham's and Vernon's claims, COAH's interpretation of N.J.A.C. 5:94-4.20 is consistent with its other regulations. COAH's regulations are not to be read in a vacuum. The regulations should be considered and construed as a whole, designed to achieve the overarching goal of providing affordable housing to the low and moderate income population. State v. Hodde, 181 N.J. 375 (2004); Miah v. Ahmed, 179 N.J. 511 (2004). The Legislature has charged COAH with the responsibility to determine how to achieve this goal. N.J.S.A. 52:27D-307. In exercising its authority and its discretion, as discussed above, COAH determined that rental housing must be provided as the low and moderate income population is sorely in need of such housing. Thus, COAH's regulations must be interpreted consistently with N.J.A.C. 5:94-4.20.

N.J.A.C. 5:94-3.1(a) states in the relevant part that "[c]redits, reductions and adjustments for prior housing activity may be applied against total municipal fair share (1987-2014)." N.J.A.C. 5:94-3.2(b) states in the relevant part that "[a] municipality may address its growth share with surplus credits from its prior Fair Share Plan that addressed its 1987-1999 total housing need..." As discussed above, these regulations must be

interpreted consistently with N.J.A.C. 5:94-4.20. Indeed, N.J.A.C. 5:94-2.2, Preparing a Housing Element, specifically states that "[a] municipality's Housing Element shall be designed to achieve the goal of providing affordable housing to meet the total 1987-2014 affordable housing need comprised of growth share..."

N.J.A.C. 5:94-4.20 specifically provides that the growth share component must include rental housing. By using the term growth share throughout the regulations and by requiring a rental component as part of the growth share, COAH intended that 25 percent of the growth share component be rental units. Thus, when allowing credits, all of the regulations must be satisfied, including the rental component, hence, also, the use of the term "may" in N.J.A.C. 5:94-3.1 and 3.2(b). The regulations do not state that the municipality shall receive the credits. Credits are allowed as long as they are consistent with the regulatory and statutory requirements. Thus, while a municipality may address its growth share with surplus credits, it still must satisfy the rental component as required by N.J.A.C. 5:94-4.20. If the surplus credits are not rental units, those units may not be used to eliminate the rental component of the growth share obligation.

Mendham also argues that it is entitled to a waiver of the rental component under N.J.A.C. 5:95-14.1 should COAH require one. Contrary to Mendham's claims, the requirements for a waiver

are not met in this case. N.J.A.C. 5:95-15.1 provides that COAH may grant waivers from the regulatory requirements if:

...strict application of the rule would create an unnecessary financial, environmental or other hardship; or

1. That such waiver fosters the production of affordable housing; and
2. That such waiver fosters the intent of, if not the letter of its rules; and
3. That the Housing Element and Fair Share Plan provides a mix of housing options.

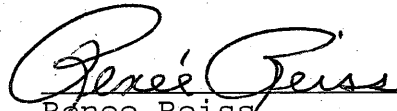
Mendham argues that application of the regulation unfairly penalizes the Township, causing it unnecessary hardship, because, as a result of its recalculated second round need, it has provided units in excess of its third round growth share obligation. Mendham is not being penalized. As the Report states, Mendham still is able to receive credit against its remaining growth share obligation for the excess units provided as a result of the recalculation.

Waiving the regulation does not foster the production of affordable housing. Indeed, in this case, a waiver would undermine COAH's intent to ensure that sorely needed rental housing is provided since the effect of the waiver would be that Mendham would not provide any rental housing. Likewise it would not foster the intent of N.J.A.C. 5:94-4.20 for the same reason. Moreover, Mendham's request certainly does not satisfy the third waiver requirement since waiving the regulation would mean that Mendham

would have only for-sale units, not the mix of housing options contemplated.

Therefore, Mendham is not able to eliminate its four-unit rental obligation through the use of prior round credits for for-sale units that do not meet the rental housing requirements of COAH's third round rules. The rental component is not a "formulistic, technical requirement" as Mendham states in its letter brief. (Mendham Letter Brief, p. 6). It is intended to provide much needed rental units and a waiver of the requirement under these circumstances is contrary to both the letter and the intent of COAH's third round regulations.

For the foregoing reasons, COAH denies Mendham's request for a waiver of N.J.A.C. 5:94-4.20.

  
Renee Reiss  
Council Secretary

DATED: August 9, 2006