

IN RE MOTION TO RESCIND)
BOROUGH OF ALLENDALE'S)
SUBSTANTIVE CERTIFICATION)

NEW JERSEY COUNCIL ON
AFFORDABLE HOUSING
OPINION
COAH DOCKET #06-1803

This matter comes before the New Jersey Council on Affordable Housing ("COAH" or the "Council") on the motion of Calm Development, Inc. ("CD"), seeking (1) action by COAH to rescind the Borough of Allendale's October 1, 2003 substantive certification for failure to comply with the terms of its substantive certification; and (2) an order from the Council requiring Allendale to include CD's site as an inclusionary site in the Borough's Plan for affordable housing. COAH heard oral argument on this motion at its June 14, 2006 meeting.

PROCEDURAL HISTORY

Allendale Borough petitioned the Council on Affordable Housing (COAH) for substantive certification on February 24, 1997, in order to address its cumulative 1987-1999 affordable housing obligation of 146 units, including an eight-unit rehabilitation obligation and a 138-unit new construction obligation. The petition by Allendale came at the end of a six-year period of repose granted by a Judgment of Compliance from the Superior Court, Bergen County.

COAH received one objection to the Borough's plan during the initial 45-day objection period. The objector, Thomas Caleca, alleged that environmental constraints on Site B1 impeded his ability to develop the number of units sought by the Borough. The objector asked that the Borough amend its fair share plan to permit payment in lieu of construction. A COAH Pre-mediation Report Requesting Additional Information was issued on May 14, 1997. Mediation was not scheduled, however, because an agreement to provide nine on-site affordable units and a four-unit regional contribution agreement (RCA) was reached prior to the opening of mediation. Nonetheless, additional litigation ensued when neighboring property owners questioned the applicability of the New Jersey Residential Site Improvement Standards (RSIS) specified in N.J.A.C. 5:21-1 et seq. on Caleca's site. The case was dismissed on January 22, 1999 and Allendale repeticioned COAH on December 9, 1999. The repetition

included the results of the negotiated settlement that occurred prior to the opening of COAH mediation.

During the 45-day objection period that followed Allendale's repetition, there was one objection to the plan filed on behalf of Sanford Freeman, owner of a site in the Allendale plan. Pursuant to N.J.A.C. 5:91-7, COAH staff conducted mediation that began on October 24, 2000. A mediated agreement was reached on April 4, 2002 and COAH issued a COAH Mediation Report on April 12, 2002. The substantive result of the mediated agreement was that the objector was to provide a minimum of 20 affordable units of which at least 12 were to be family rental units to be built on site. Affordable units not built on site were to be realized by way of a payment in lieu of construction that would be used to fund a regional contribution agreement (RCA) that transferred a portion of the Borough's rental obligation to another municipality within the region.

In conjunction with the court's judgment of repose, Allendale was assessed a realistic development potential (RDP) of 111 affordable housing units. Although COAH usually honors an RDP established by court action and permits municipalities to carry that obligation forward in addressing the 1993-1999 affordable housing need, here, after conducting an analysis of its resources, Allendale requested that COAH disregard the vacant land adjustment granted by the court because the Borough determined that it could address its entire 138-unit cumulative new construction obligation. COAH therefore did not utilize the court's RDP or vacant land adjustment when it granted substantive certification to Allendale's plan on October 1, 2003.

Prior to this, on December 13, 2002, CD, which is the owner of Block 15; Lot 701 in Allendale, filed a complaint (Superior Court of New Jersey, Law Division, Docket No. L-10047-02) seeking amended zoning and approval of development of its property as part of the Borough's affordable housing plan. By order dated March 19, 2003, the Honorable Jonathan N. Harris, J.S.C. ordered that the case be transferred to COAH pursuant to "Mt. Laurel jurisprudence and the rules of COAH." The plaintiff's property in this case was not part of the housing element and fair share plan that had been under review by COAH and was not required, by either the Court or COAH, to be included in the Borough's housing element and fair share plan. In November 2005, CD filed a motion with Judge Harris seeking to restore its former lawsuit to the trial calendar

and for summary judgment declaring that its property is a "Mt. Laurel site." This motion was denied.

CD'S MOTION:

CD now claims that Allendale's certified fair share plan does not adequately address the Borough's affordable housing obligation nor present a realistic opportunity to meet its fair share, and therefore asks that COAH rescind Allendale's substantive certification. In addition, CD's motion asks that COAH require the Borough to amend its fair share plan and award CD site specific relief. Specifically, CD asks that COAH order the Borough to:

- a. Modify its vacant land adjustment;
- b. Modify its housing element to comply with N.J.A.C. 5:92-8.3(a), which excludes from calculation as potential sites for low and moderate income housing those sites owned by non profit organizations;
- c. Modify the Borough's total RCA entitlement;
- d. Order the Borough of Allendale to account for all monies disbursed on account of RCA's;
- e. Order the Borough to include the property owned by Calm Development, located at 316 E. Allendale Avenue as part of its Housing Element and Fair Share Plan and determine that this property is available, approvable, developable, and suitable pursuant to N.J.A.C. 5:93-1; and
- f. Awarding Calm Development ten units per acre as a penalty for the lack of compliance by the Borough.

In support of its motion, CD has submitted the certification of Michael D'Antonio, which details his frustration that Allendale has not included the CD site in the Borough's plan to construct affordable housing. D'Antonio certified that, to his knowledge, Allendale has failed to comply with the terms of its substantive certification and COAH's rules and regulations. In support of its position that Allendale is not compliant, CD submits that the information and data submitted in support of and contained in the Housing Element and Fair Share Plan is based on dated, inaccurate and misleading data designed to curtail and avoid construction of affordable housing in the Borough. Further, CD maintains that the Borough has inappropriately handled its RCA's, incorrectly computed its vacant land adjustment, and has not chosen suitable sites for development of affordable housing.

Regional Contribution Agreements

CD states that based on information it received from an OPRA request to the Borough regarding RCA funds, that Allendale has cancelled checks for \$80,000 and \$2,500,000.00, an amount which exceeds the amount allowable for RCA's under Allendale's plan. Additionally, CD states that Allendale has an "unexplained Housing Trust Account" containing \$61,200.00 "allegedly for RCA's and development agreements."

Vacant Land Adjustment

CD also argues that Allendale's vacant land adjustment for Allendale is based on a misrepresented amount of undeveloped vacant land in the Borough, which resulted in a higher adjustment than that which should have been allowed. CD submits there are several pieces of property in Allendale that should have been included in Allendale's Plan, such as: a 117 acre "celery farm," a 20 acre property owned by Jack Levin, a 3.24 acre property owned by Mr. D'Antonio, a 3 acre property owned by Stiles Thomas, a 2.5 acre property owned by Conte and a 4 acre property owned by Mr. Album. CD states that the Borough excluded the above mentioned sites from its vacant land adjustment which should have been included, and instead included the Episcopal Church (Site D) and the Hillside School (Site E) in its Plan. CD alleges that to date, no affordable housing has been constructed on these sites. CD argues that COAH should order that the Borough amend its Plan so that it includes "legal" sites, such as the property owned by CD.

Deed Restrictions

CD states that the Borough does not have proof of construction of 44 units with deed restrictions, and that the Borough has built only 29 units with deed restrictions in the past 29 years. CD believes that the Borough has 40 more units that need to be built in the Borough and 25 more units to transfer through RCAs.

Violations of the grant of Substantive Certification

CD argues that the Borough takes too long to approve development permits, and points out that the Borough took four years to review the planning approvals for the Alvarez property located on West Orchard Street, and has caused four years of applications, reviews, hearings and delays for the Freeman property, located on Chestnut Street, neither of which required any variances. CD concedes that these sites are currently approved, but only after negotiations for decreases in the number of affordable units.

RESPONSE BY THE BOROUGH OF ALLENDALE:

The Borough notes that CD and the Borough have been involved in litigation and other disputes for many years on a number of issues, including zoning disputes, land use matters, tax appeals, OPRA Complaints, and affordable housing issues. The Borough states that many of the matters raised in CD's motion have already been brought to COAH and the Court's attention, and recently, CD moved before the Honorable Jonathan N. Harris seeking similar relief to that sought from COAH. Judge Harris denied CD's motion.

The Borough asserts that CD's motion should be denied because it does not constitute a valid objection and COAH's rules do not provide for mediation subsequent to the grant of substantive certification for owners of property that have not been included in the municipality's certified affordable housing plan. The Borough argues that during the objection period following the Borough's December 9, 1999 repetition, CD did not file a timely objection. Allendale submits that CD has never filed a valid objection to the Borough's Housing Element and Fair Share plan, and contrary to D'Antonio's certification, both he and his attorney were served with the COAH compliance report, notice of the October 2003 meeting and an agenda. CD never filed an appeal from the grant of substantive certification and never filed a motion with COAH until January 2006, after the Superior Court denied the same relief. Thus, Allendale submits that there is no basis for mediation subsequent to the grant of substantive certification by a property owner whose property was not included in the certified plan of the municipality.

In addition, Allendale assert that there is no basis for the relief requested in CD's motion, including revoking or amending COAH's grant of substantive certification. Allendale submits that CD has submitted information based on false assumptions, misunderstandings and inaccuracies. However, the Borough contends that through its correspondence to COAH, it has clarified these discrepancies.

Regional Contribution Agreements

The Borough contends that CD's allegation that Allendale transferred \$2,580,000.00 representing 129 RCA units is incorrect, as is the accusation that Allendale has an unexplained \$61,200.00 in its Housing Trust Account. The Borough notes that the amount of money in its Housing Trust Fund fluctuates during the year depending on revenues received from the Borough's Development Fee Program. In addition, Allendale states that all RCA's have been documented and approved by COAH, and all monies have been paid. The Borough also explains that the cancelled checks to which CD refers in its motion relate to funds spent on other municipal business. Thus, Allendale states that it would not transfer money for RCA units without obtaining COAH's permission.

Vacant Land Adjustment

The Borough maintains that it did not mislead COAH regarding its vacant land adjustment, and notes that, in fact, its second round substantive certification was received without any vacant land adjustment.

Sites included in Borough's Housing Element

The Borough notes that the two sites identified by CD's motion as inappropriate, the Episcopal Church and the Hillside School, were included in the Borough's plan, and previously approved by COAH's substantive certification.

Deed Restriction

The Borough maintains that its affordable units have been built and properly deed restricted. Allendale submits that if units have not been built in the Borough, it is not due to the Borough's actions, but due to market conditions.

As such, Allendale asserts that it has complied and continues to comply with its second round certification.

CD'S REPLY:

CD states that the matter in front of Judge Harris was dismissed on procedural grounds, not on the merits. CD raises additional concerns regarding Allendale's certified sites, specifically the Alvarez and Freeman sites.

DISCUSSION

As noted above, COAH heard oral argument on this motion at its June 14, 2006 meeting. At that time, the Council ordered the Borough to provide updated monitoring reports to COAH so that the Council could properly assess the contentions presented by CD's motion and determine whether the Borough remains in compliance with its certified fair share plan. The Council has received updated information from Allendale, however, it should be noted that this information was not provided to COAH in the appropriate format. As such, the Borough must provide any further information required by COAH or COAH staff on the proper COAH monitoring forms. In this regard, the Council also notes that Allendale has not yet provided an appropriate development fee monitoring report to the Council. As such, in a separate decision, COAH will determine whether or not to issue an Order to Show Cause limiting Allendale's ability to collect and spend development fees pursuant to N.J.A.C. 5:94-6. However, the issue in the present matter is whether CD's motion and allegations raised therein warrant revocation of the Borough's second round substantive certification. The Council finds that it does not.

Upon receipt of the information requested by the COAH Board at its June 14, 2006 meeting, COAH staff initiated a full and complete review of Allendale's fair share plan, as well as the Borough's compliance with that plan. This review found that the Borough is in compliance with its certified plan. Preliminarily it should be noted that Allendale is participating in the Bergen County Home Improvement Program to address its rehabilitation obligation and that all of the Borough's new construction affordable housing sites are located in Planning Area 1. More specifically, COAH review found that Allendale has transferred all funds necessary to complete a total of 44 units via RCA's with Jersey City and Ridgefield. These RCA units were approved in conjunction with COAH's grant of substantive certification to the Borough. The Council further

accepts the Borough's explanation that the cancelled checks to which CD refers in its motion related to other municipal business and do not represent monies spent for RCA's, as no additional RCA's have yet been approved by the Council. COAH's review also revealed that several inclusionary and contributory affordable housing sites have been constructed, monies transferred and the necessary deed restrictions put in place.¹ In addition, COAH found that Site H in the Borough's plan, the Thurston and Alvarez property with which CD takes issue, has received conditional site plan approval. The condition which must be satisfied for this site to obtain approval is premised upon the issuance of a Letter of Map Revision (LOMR) for a floodway revision from the Federal Emergency Management Agency (FEMA).² Pursuant to correspondence issued by FEMA on May 26, 2006, the Borough must submit additional documentation to FEMA before the LOMR can be issued.³ As such, the Borough shall notify COAH of the status of its correspondence with FEMA regarding this information within sixty (60) days of this opinion. The Freeman site (Site B2), another site with which CD takes issue, has also received site plan approval with conditions. Finally, although the Former Farm and Hillside School (Sites I and J) have not yet been developed, the zoning for affordable housing remains on these sites and the same remain developable pursuant to COAH's rules. Therefore, COAH's review of Allendale's plan reveals that the Borough remains in compliance with its certified plan. Moreover, it should be noted that CD's allegations regarding a vacant land adjustment are misplaced as the Borough's plan received substantive certification without such an adjustment from the Council. As such, these allegations warrant no further discussion herein.

COAH therefore finds that Allendale's plan continues to present a realistic opportunity for the creation of affordable housing and that the Borough is in compliance

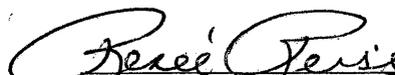
¹ Site A is a contributory site which has been subdivided into 23 single family lots, a \$420,000 contribution to be used toward 32 unit RCA was made; Site B1 was completed in September 1992 producing 59 market rate units, 9 affordable units and payment for a 4 unit RCA; Site C was completed in 1997 producing 15 age-restricted affordable rental units and 5 rental bonuses; Site D provided funding for an 8 unit RCA; Site F was completed in 1999 creating 3 affordable for sale units; Site G has provided partial funding for an RCA.

² The 1991 court-ordered compliance plan permits a \$120,000 payment in lieu of construction for the six units to be produced. Should the developer choose this option, Allendale will be required to amend its plan to address the six-unit obligation.

³ The Borough must provide a Community Acknowledgement form, written assurance that there is compliance with the Local Flood Damage Prevention ordinance, and distribution of a public notice of intent to revise the floodway.

with this plan. CD's motion to rescind Allendale's substantive certification and for site specific relief is hereby DENIED.

Dated: August 9, 2006


Renee Reiss, Secretary
New Jersey Council on
Affordable Housing