

IN RE BOROUGH OF TINTON FALLS,)
MONMOUTH COUNTY, MOTION TO)
IMPOSE SCARCE RESOURCE RESTRAINT)
ON EXISTING SEWER CAPACITY)

NEW JERSEY COUNCIL ON)
AFFORDABLE HOUSING)

DOCKET NO. 06-1805)

OPINION AND ORDER)
TO SHOW CAUSE)

On February 28, 2006, Avalon Bay, LLC (“Avalon Bay”), a contract purchaser of property located in Tinton Falls, filed a motion with the New Jersey Council on Affordable Housing (the “Council” or “COAH”) seeking the imposition of a scarce resource restraint against the Borough of Tinton Falls to reserve all existing unallocated sewer capacity available to the Borough from the Township of Neptune Sewerage Authority (“TNSA”), in order to permit the development of Avalon Bay’s housing development. Avalon Bay states that its development consists of 216 residential units, including 33 affordable rental units, and is relied upon in Tinton Falls’ Housing Element and Fair Share Plan that received second round substantive certification on December 15, 2004.¹

On June 14, 2006, after reviewing the papers submitted and having heard oral argument, the Council imposed a temporary scarce resource restraint upon Tinton Falls. The order restrained the Tinton Falls Planning Board from acting upon any development applications in the TNSA sewer service area. The scarce resource restraint also applied to the TNSA, restraining TNSA from approving new commitments of sewer capacity and was limited to TNSA sewer capacity contracted to service Tinton Falls. The scarce resource restraint was limited to a period of 60 days or until the next Council

¹To date, COAH has not received any amendment from Tinton Falls to its second round substantive certification reflecting a change in the Avalon Bay project from the development of 297 units, containing 59 affordable housing ownership units, as included in its second round certified plan.

meeting, scheduled for August 9, 2006. The Council also referred the matter to a task force and encouraged all parties to meet in order to determine the actual available sewer capacity at the TNSA facility , the capacity available to Tinton Falls and whether such capacity includes the Avalon Bay project.

PROCEDURAL HISTORY

The Borough of Tinton Falls voluntarily submitted a Fair Share Plan to the Superior Court of New Jersey for Declaratory Judgment in 1984 and received a Judgment of Compliance on January 18, 1991, from the Honorable Eugene Serpentelli, J.S.C., to address its 590-unit affordable housing obligation.

Tinton Falls petitioned COAH with its second round Housing Element and Fair Share Plan on March 26, 1999, addressing its 12-year cumulative affordable housing obligation of 634 units, consisting of a rehabilitation obligation of 12 units and a new construction obligation of 622 units. On August 25, 2004, COAH staff issued a Report Requesting Additional Information. Thereafter, on October 21, 2004, COAH received Tinton Falls' resolution of re-petition and Amended Housing Element and Fair Share Plan. Tinton Falls received second round substantive certification on December 15, 2004. In its certified plan, Tinton Falls relies upon the Avalon Bay development of 297 residential units, of which 59 are to be affordable ownership units.

Pursuant to N.J.A.C. 5:95-15.3, Tinton Falls is required to submit a resolution by the governing body committing to file or petition with a Housing Element and Fair Share Plan addressing its third round obligation for third round substantive certification by May 15, 2007.

AVALON BAY MOTION

In its motion, Avalon Bay requests that COAH direct Tinton Falls, pursuant to N.J.A.C. 5:91-10.1, to reserve all existing unallocated sewer capacity available to the Borough from the TNSA, for Avalon Bay's development of 216 residential units, including 33 low and moderate income rental units. Avalon Bay requests that COAH require the following: 1) That the Borough reserve any new sewer capacity available to the Borough from TNSA for the Avalon Bay project; 2) That Tinton Falls, its Planning Board and the TNSA be restrained from allocating or committing any further sewer capacity to any applicant within the Borough other than Avalon Bay, until such time that sufficient capacity is reserved for Avalon Bay; 3) Restrain TNSA from approving any new commitments of sewer capacity within the Borough; 4) Direct the Borough to give priority status to the Avalon Bay project for any sewer capacity that becomes available to the Borough as a result of any revocation of recoupment of sewer capacity held by third parties for projects in the Borough that have failed to obtain required approvals from the Borough, failed to proceed to construction, have been abandoned or otherwise failed to utilize their gallonage within the time periods required; 5) Direct the Borough to immediately initiate and diligently undertake all actions necessary to revoke and recoup the sewer capacity gallonage previously allocated by the Borough to any lapsed project, irrespective of the source of said sewer capacity, and to reallocate any sewer capacity recouped by the Borough as a result of such efforts, to Avalon Bay; 6) Direct the Borough to diligently pursue discussions with member municipalities of the TNSA, and with TNSA, concerning the transfer of any unused committed sewer capacity held by any such municipality, to the Borough for allocation to

Avalon Bay; and 7) Direct the Borough, pursuant to N.J.A.C. 5:93-4.3(c)2, to take all necessary steps to ensure the provision of potable water service to the Avalon Bay project.

Avalon Bay also requests that COAH direct Tinton Falls and the Borough Planning Board, pursuant to N.J.A.C. 5:93-10.4(c) and N.J.A.C. 5:91-10.3, to expeditiously process the review of an application for site plan approval for Avalon Bay's development.

Avalon Bay is the contract purchaser of Block 155, Lot 1.01 (the "property"), located along Route 33 in Tinton Falls. The property, located in an R-5 affordable housing zone, is proposed for construct of an inclusionary development with approximately 33 affordable family rental units, out of a total of 216 rental units. Avalon Bay asserts that these units represent 44% of the Borough's affordable housing obligation under its Fair Share Plan. Additionally, Avalon Bay states that the 33 units will be eligible for 33 rental bonus credits and that if the bonus credits are awarded, the project would satisfy 88% of the Borough's affordable housing obligation. Avalon Bay anticipates that the site plan approval will be issued by the Borough for the project in approximately the next three months.

The project is to be connected to public sewers owned and operated by the Borough. The projected sewer flow from the project is 51,590 gallons per day (gpd), based on calculations for projected flow under DEP's regulations set forth at N.J.A.C. 7:14A-2.3(a). TNSA provides sewer service to the Borough. Sewer flow is conveyed to a treatment plant owned and operated by the TNSA. As of February 2006, Avalon Bay stated that the Borough had approximately 36,015 gpd of uncommitted flow capacity for treatment at the TNSA facility. Avalon Bay states that the projected sewage flow from the project exceeds the reported uncommitted flow available to the Borough by 15,575 gpd.

Additionally, Avalon Bay states that the presently allocated sewage capacity of 36,015 gpd is in jeopardy of being exhausted as the Borough issues approvals for other developments, which are currently pending.

DISCUSSION

Whether or not the opportunity for affordable housing created by a municipality is realistic is measured by whether the municipality has made it likely that low and moderate income housing will actually be built. Avalon Bay argues that municipalities that fail to zone for affordable housing or zone only for less than their fair share, or that zone for their fair share but in a way that makes it unlikely that developers will construct it, are in violation of their constitutional obligation. Additionally, Avalon Bay argues that a municipality is in violation of its obligation if it fails to provide the infrastructure necessary to make development feasible, or acts in a way that thwarts production of affordable housing.

Avalon Bay asserts that nearby municipalities whose cooperation or assistance may be necessary to assure the provision of public water and sewer and public entities exercising additional provisions that affect land use may have an obligation to take appropriate measures to preserve scarce resources that may be essential to another municipality's fair share obligation. Additionally, Avalon Bay argues that the Council's regulations and policies implementing the Fair Housing Act specifically require municipalities to cooperate with efforts to provide water and sewer to sites zoned for inclusionary development. Avalon submits that the Council's regulations favor and encourage inclusionary developments in areas with existing infrastructure, and in areas

designated as PA1 and PA2 under the State Plan. N.J.A.C. 5:93-4.3(c) and N.J.A.C. 5:93-5.4.

Avalon Bay argues that “[N]otwithstanding the lack of adequate water and/or sewer at the time a municipality petitions for substantive certification, the municipality shall reserve and set aside new water and/or sewer capacity when it becomes available for low and moderate income housing, on a priority basis.” N.J.A.C. 5:93-4.3(c). Avalon Bay states that a scarce resource restraint on the amount of sewer capacity available to the Borough is necessary to ensure the availability of sanitary sewer service for the Avalon Bay project and is essential to the Borough’s satisfaction of its Fair Share Plan. Avalon Bay states that a scarce resource restraint is practical and appropriate because of the limited sewer capacity and the effect it will have on the viability of the project and the plan.

RESPONSES TO AVALON BAY’S MOTION

In response, the Borough argues that Avalon Bay’s claim that there is only 36,015 gpd of uncommitted sewage flow is mistaken. The Borough submits that its engineer has performed a limited investigation which reveals that there is available capacity within the TNSA for Avalon’s proposed development of 216 residential units, which is projected to create a flow of 51,590 gpd. Tinton Falls explains that by contract, the Borough is allowed to discharge 962,000 gpd into TNSA’s system. When a developer or other applicant seeks approval from the Borough and the TNSA to process sewage generated by a certain development, the applicant files a Treatment Works Approval application (TWA) application. If Tinton Falls’ facilities have the capacity and the application is compliant, the application is approved and forwarded to the DEP for its approval. Tinton Falls states that only after this process is complete does TNSA reserve

capacity for a development against the Borough's contractual capacity. To date, Avalon Bay has not filed its development application.

Tinton Falls submits that TNSA granted it the additional capacity and did so by resolution. DEP approved the application, but in doing so removed the Avalon Bay site from the approval. However, TNSA has, to date, continued to calculate the Borough's remaining contractual capacity to include the 60,000 gpd originally applied to the Avalon Bay site, and it remains available. Tinton Falls points out that Avalon Bay has not filed a TWA application for its site, and therefore the gallonage remains unreserved. The Borough argues that sewerage flow is not a scarce resource and that there is sufficient flow for Avalon Bay's project. The Borough's engineer states that it is TNSA's practice to "double count" projects that have been approved and built for their reserved sewage flow, which would have included the site for Avalon Bay's project, based on the TWA application that Tinton Falls submitted to the TNSA.

JSM at Tinton Falls LLC is the contract purchaser of properties known as "Hunters Run" and/or "Traditions." The Hunters Run/Traditions site is designated to produce 44 units of low and moderate income housing under Tinton Falls' Housing Element and Fair Share Plan as certified by the Council. JSM asserts that the Council should: 1) impose temporary restraints against the allocation of sanitary sewer treatment capacity by the Borough; and 2) direct the Borough to prepare a report documenting the status of its treatment capacity. JSM states that the Council should not make a determination as to which inclusionary development has priority to treatment capacity, and if the Council determines that there is not enough treatment capacity to serve both the Hunters Runs and Avalon Bay sites, the Council should hold a fact finding hearing to

establish the priority status of the developments. The Hunters Run/Traditions site has been designated and zoned for development as an inclusionary site since the Borough was granted a Judgment of Repose in 1991. Avalon Bay's application for preliminary site plan approval was filed on March 6, 2006, and has not received either final or preliminary site plan approval.

JSM cross-moves for an order temporarily restraining the allocation of sewer treatment capacity as a scarce resource within the Borough of Tinton Falls, pending a full and accurate accounting of treatment capacity available for inclusionary projects included in the Borough's certified Housing Element and Fair Share Plan. JSM submits that if there is a shortage of sanitary sewer treatment capacity in the Borough, JSM will be unable to build its inclusionary development. JSM agrees with Avalon Bay that temporary restraints should be imposed on the Borough's ability to allocate sanitary sewer capacity, pending a full and accurate accounting of the capacity left in the Borough. To allow the Borough to give away remaining capacity to commercial or non-Mount Laurel developers in the interim would undermine the Council's substantive certification of the Borough's housing plan.

In response to Avalon Bay's motion, Tinton Falls submitted a certification by the Borough Engineer claiming that the Borough received an additional allocation of 180,000 gpd of sewage treatment capacity from the TNSA in 2003 to service properties and "projected future sewerage for currently undeveloped residential and commercial properties." The Borough Engineer states that the Avalon Bay site is slated to receive a portion (60,000 gpd) of the total 180,000 gpd. However, the papers filed by Tinton Falls do not indicate whether capacity exists for JSM's sites, which, JSM maintains, is "inexplicable".

JSM argues that the Council must not allow Tinton Falls to ignore the issues of sewer service to the Hunters Run/Traditions inclusionary project. To properly implement its housing plan, JSM argues that Tinton Falls must provide adequate service to its development. Since it has not demonstrated that it has adequate service, the Council should impose temporary restraints against the allocation of capacity by Tinton Falls.

JSM submits that Avalon Bay cannot be declared first in line to receive sanitary sewer treatment capacity in the event that treatment capacity is declared a scarce resource in Tinton Falls. JSM argues that if the Council held a fact finding hearing to determine whether JSM or Avalon should receive priority, such a hearing would find that JSM has priority over Avalon Bay since JSM's project was recognized in the late 1980's as an inclusionary development. JSM argues that Avalon Bay's project came into consideration as an affordable housing site in 2004. Further, JSM states that its project is further along in the development approval process than the Avalon Bay site. JSM argues that since JSM filed its application with the Planning Board over a year before Avalon Bay, it is reasonable to conclude that JSM should obtain its approvals first. Finally, JSM states that its project will provide the Borough with more affordable housing as it has a larger set aside. JSM's project will provide 44 units at a set aside of 20% while Avalon Bay's site will provide 33 affordable units at a set aside of 15%.

Wayside is the contract purchaser for property on Wayside Road near the Earle Military Base in the Borough, and McDowell owns property within the Borough. Both Wayside and McDowell intend to develop these properties for primarily commercial purposes. They assert that the temporary restraints requested by Avalon Bay and JSM would be onerous and over reaching, and could halt development in the Borough, including

the McDowell and Wayside projects. Wayside and McDowell submit that all property owners with planned projects in the Borough will be impacted by COAH's decision in this matter. Wayside argues that it is not equitable for a restraining order to prevent viable development projects from proceeding while JSM and Avalon Bay pursue all of their necessary approvals, especially if capacity is reserved for the projects by the TNSA.

Hovtown, Inc. is the owner of property located in Tinton Falls with substantial frontage on Route 66 and located between Route 66, Route 33 and the Garden State Parkway. Hovtown specifically responds to the certification of the Tinton Falls Borough Engineer, Gerald Freda, which states in paragraph 3 that the current metered flow from Tinton Falls to TNSA is 554,796 gpd, and that an additional 80,625 gpd is set aside for approved, but not yet connected, developments. Hovtown states that the list of approved but not yet connected developments listed in Freda's certification does not include Hovtown's development, which consists of 108 townhouse/condominium units ("Hovtown Village"), including 18 low and moderate income units, and office, hotel and other commercial facilities. Hovtown argues that Hovtown Village should be included in Freda's list as it has been approved by the Borough of Tinton Falls. Hovtown further alleges that Tinton Falls previously committed 32,400 gpd of sewer capacity for the Hovtown Village site and 94,900 gpd of sewer capacity for the non residential site, in an agreement dated December 27, 1985. Therefore, Hovtown requests that it be added to the list of projects with committed but not yet connected flow.

Avalon Bay argues that the Borough has not established that sufficient capacity is available to the Borough at the TNSA facility and that Tinton Falls has not taken appropriate measures to document the exact amount of capacity that may be available for

the project and other affordable housing developments. Avalon Bay responds to the Borough's assertion that sufficient capacity exists by stating that this conclusion is contrary to the Borough's repeated acknowledgments that the amount of sewerage capacity available at the TNSA facility is currently unknown. The Borough admits that it is two years delinquent in its submission of customer reports to TNSA and that its engineer has not filed an updated report to accurately calculate the Borough's remaining contracted capacity with TNSA. The Borough stated, "any recent statement concerning the volume of capacity which the TNSA can process from sewerage generated in Tinton Falls cannot be accurate...." Avalon Bay asserts that this uncertainty confirms that the Council should place restraints on the Borough's allocation of any additional capacity, pending confirmation that sufficient capacity remains for the project.

Tinton Falls asserts that pursuant to its contract with TNSA, Tinton Falls is permitted to discharge 962,000 gpd into TNSA's system. TNSA recently reported to the Borough that in 2005 the total metered flow from Tinton Falls through TNSA amounted to 554,796, and the Borough Engineer performed an analysis and determined there is 80,625 gpd set aside for approved developments (Tinton Falls Town center, Twins Brook Village, Fox Chase IV, Sections 2 and 3, and the Richman Group) which have not yet been connected to TNSA. Therefore, there is a remaining capacity of 326,979 gpd. As such, the Borough Engineer has opined that there is sufficient capacity to address the 101,090 gpd generated from Avalon Bay and JSM's developments.

Avalon Bay relies on a letter addressed to the Borough by Schoor DePalma stating that the remaining capacity is 36,016 gpd. The Borough argues that this letter is factually erroneous. For example, when denoting the total reserved capacity, Schoor

DePalma does not consider the 782,000 gpd contractual capacity and only considers the 180,000 gpd additional capacity allocated for the Avalon project. Additionally, the letter does not take into account the 63,360 gpd derived from projects in 2005 which were counted against the Borough's actual flow in 2005. TNSA refutes the position taken by Tinton Falls that the contracted remaining sewer capacity available to the Borough is 326,979 gpd, confirms that the Borough has failed to submit customer reports for the years of 2004 and 2005, and states that the remaining capacity is only 36,015 gpd.

On June 7, 2006, COAH received supplemental correspondence from the Borough of Tinton Falls, in which the Borough continues to assert its position regarding the remaining sewerage capacity. Further, Tinton Falls points to a resolution adopted by TNSA on February 19, 2003, stating that there existed a "moratorium on the processing of additional sewer service permits in excess of 782,000 gallons per day" since 1989, and affirming that based on conservative calculations "the facilities of the [TNSA] could accept an additional 180,000 gallons per day in excess of the flow currently being sent by the Borough of Tinton Falls as well as the potential flow from existing permits that have been processed but not yet connected by Tinton Falls."

COAH additionally received a June 9, 2006 letter from Birdsall Engineering, Inc. to the Borough of Tinton Falls Re: Remaining Capacity Calculations for the Borough stating that the total remaining capacity for the Borough is 215,844 gpd. This amount is inclusive of the 180,000 gpd provided by Resolution No. 3466. If the 180,000 gpd amount is not contemplated as part of the total contractual capacity, as TNSA alleges it should not be, Tinton Falls has a total remaining capacity of 35,844 gpd (215,844 gpd - 180,000 gpd).

Finally, Tinton Falls comments that TNSA has taken an adversarial position with Tinton Falls regarding its remaining capacity, despite the Borough's attempts to resolve the dispute amicably. The Borough suggests that COAH order the affected parties, including TNSA, into mediation so that the sewerage capacity dispute may be resolved.

DECISION

The purpose of COAH granting a scarce resource restraint is to ensure that "a participating municipality take appropriate measures to reserve scarce resources that may be essential to fulfill the municipality's fair share obligation." N.J.A.C. 5:91-10.1. In the instant case, both Tinton Falls and the Neptune Township Sewerage Authority ("TNSA") were ordered by the Council on June 14, 2006 to withhold from taking any action that would diminish the existing sewer capacity at the TNSA facility that Tinton Falls was entitled to pursuant to its contractual agreement with TNSA. These temporary scarce resource restraints took effect on June 14, 2006 and were to last 60 days or until the Council's next meeting, scheduled for August 9, 2006.

The purpose of these restraints, in addition to preserving the existing sewer capacity that was contracted for by Tinton Falls and its affordable housing obligation, was to permit all parties, including COAH, to obtain the most accurate information available as to the actual capacity of the TNSA facility, the amount of capacity that had been allocated to Tinton Falls pursuant to its contractual agreement with TNSA, and the overall remaining capacity at the TNSA facility. At oral argument before the Council on June 14, 2006, the parties to this motion presented conflicting representations as to what capacity existed at the facility, what capacity Tinton Falls was entitled to and what capacity, if any, remained for the Avalon Bay project. These representations and the contradictions they provided

were exasperated by the lack of an appearance by any representative of TNSA or the submittal of any information by TNSA to the Council.

On June 21, 2006, a number of the parties met with COAH staff and a representative of TNSA. Based on the representations made at that meeting, correspondence received from Birdsall Engineering, and information provided by TNSA by way of a letter dated June 28, 2006 at the request of COAH², COAH finds that it is questionable whether there is sufficient sewer capacity available, let alone committed, to the Avalon Bay project or other elements of Tinton Falls' affordable housing plan, as documentation provided by TNSA and Birdsall Engineering indicate that there may be as little as 35,844 gpd remaining capacity. If there is not available sewer capacity for elements of Tinton Falls' affordable housing plan, then Tinton Falls no longer has a plan that meets the criteria of its substantive certification as granted by COAH.


Given the uncertainty of the present situation facing Tinton Falls, the Council hereby orders that the scarce resource restraint ordered by the Council on June 14, 2006, shall remain in effect against the Borough of Tinton Falls, limited to the TNSA sewer service area, until such time that the Council issues a decision that it has been provided with credible information evidencing that sufficient sewer capacity is available to fulfill Tinton Falls' affordable housing obligation. The Tinton Falls Planning Board is restrained from acting upon any development applications in the TNSA sewer service area, other than

² The attorney for TNSA provided COAH with correspondence from the TNSA engineer, setting forth that the capacity of the TNSA treatment plant is 8.5 million gallons per day (mgd); that there are no reserve capacity requirements for the treatment plant, but that upon reaching 80% of its design capacity the TNSA would be subject to the requirements of the Capacity Assurance Program; that the contractual capacity of the seven municipalities that TNSA serves is 8,500,650, and listing the individual capacities by town; that Tinton Falls' capacity is 782,400 gpd; and that the average daily flow to the plant in 2005 was 5.84mgd.

developments proposed to include affordable housing that are part of Tinton Falls' second round certified plan. The scarce resource restraint against TNSA shall expire with the issuance of this decision.

Further, the Borough of Tinton Falls shall show cause as to why the Council should not revoke Tinton Falls' second round substantive certification. This order to show cause is returnable on October 11, 2006, at the Council's monthly meeting. The Borough shall file any and all supporting documentation with COAH no later than 20 days from the date of this decision. All parties in the present motion shall also be served with any filings by the Borough. Any replies to the Borough's submission shall be filed with COAH no later than 10 days after service of the Borough's filing. The Borough shall have seven days in which to respond to any replies filed with COAH.

With regard to Avalon Bay's motion seeking expedited action from Tinton Falls regarding the necessary approvals for the Avalon Bay project, the Tinton Falls Planning Board granted Avalon Bay preliminary and final subdivision/site plan approval on July 26, 2006. Therefore, that portion of Avalon Bay's motion seeking expedited action from Tinton Falls is rendered moot.



Renee Reiss, Secretary
New Jersey Council on
Affordable Housing

Dated: *August 9, 2006*