

ROCKAWAY TOWNSHIP, MORRIS COUNTY
IMPOSITION OF A SCARCE RESOURCE RESTRAINT ON WATER AND
ORDER TO SHOW CAUSE AS TO WHY ROCKAWAY TOWNSHIP SHOULD
NOT BE DISMISSED FROM COAH'S JURISDICTION

COA H 06-1817

WHEREAS, Rockaway Township ("Rockaway") received a judgment of compliance on November 20, 1985 for the first round, and

WHEREAS, on March 2, 1995, Rockaway petitioned the New Jersey Council on Affordable Housing ("COAH") for second round substantive certification, proposing to rezone the Pondview site (the subject of the within motion) to reduce the number of units on the tract from 1,600 total units, to 1,100 multi-family units with 100 affordable units; and

WHEREAS, Pondview objected to the proposed rezoning of its site for a lesser density and set-aside, and mediation began on April 15, 1986 and concluded on June 20, 1996 with a signed agreement between the parties; and

WHEREAS, Rockaway Township received second round substantive certification on April 2, 1997, and received amended second round certification on July 16, 2002, containing the Pondview development and including a total of 142 credits, leaving a remaining obligation of 270 units consisting of a 247-unit new construction obligation and a 23-unit rehabilitation obligation; and

WHEREAS, Pondview was the subject of litigation in the first affordable housing round which resulted in a settlement agreement that required inclusion of rental units that qualify for a two - for - one bonus credit pursuant to the limitations of N.J.A.C. 5:93-5.15(d); and

WHEREAS, at the time of extended substantive certification, construction was pending, subject to New Jersey Department of Environmental Protection (DEP) approval of water services (Water Allocation Permit); and

WHEREAS, pilot testing on the site had commenced, and as a result it was determined by CO AH that the Pondview Estates site represented a realistic opportunity for affordable housing, and accordingly, Rockaway Township was granted 100 zoned family unit credits and 92 bonus credits for the site; and

WHEREAS, Rockaway Township filed a motion with CO AH on December 8, 2004 requesting extended substantive certification, prior to the December 13, 2004 deadline established by N.J.A.C. 5:91-14.3 and N.J.A.C. 5:95-15.2; and

WHEREAS, Rockaway petitioned CO AH for third round substantive certification on December 9, 2005; and

WHEREAS, the Pondview Estates project is included in Rockaway's third round Housing element and Fair Share Plan, as is a site owned by Morris Commons, another party to this action, whose site provides a total of 198 age restricted units, 27 of which will be affordable, and will be developed at a rate of 8 units per acre; and

WHEREAS, on December 19, 2006, Guliet Hirsch submitted a motion on behalf of Pondview requesting the following:

1. That Rockaway reserve all existing unallocated water supply capacity from the Morris County Municipal Utility Authority ("MCMUA") and all other sources, for the purpose of providing water supply to the Pondview development;
2. That the Township reserve any new water supply capacity for the Pondview development;
3. Restraining Rockaway from allocating or committing any further water supply capacity to any applicant within the Township other than Pondview until sufficient capacity is reserved for the entire Pondview development;
4. Directing Rockaway to give priority status to the Pondview project for any water capacity that becomes available to the Township as a result of any revocation or recoupment of water capacity held by third parties for projects in the Township that have failed to obtain the required approvals, failed to proceed with construction or otherwise abandoned or failed to utilize their water supply within reasonable time periods ("lapsed projects");
5. Directing Rockaway to immediately proceed to take all actions necessary in order to recoup and revoke water supply gallonage previously allocated by the Township to any project meeting the definition of a lapsed project as set forth in Paragraph 4 above and to reallocate said water capacity to the Pondview development;
6. Directing Rockaway to diligently pursue discussions with both MCMUA and member municipalities with respect to the transfer at cost of any unused water capacity held by either MCMUA or any MCMUA member municipality, for allocation by the Township to Pondview Development;
7. Directing the Township to consent to Pondview's use of water available from Wharton Borough pursuant to the November 28, 2005 Agreement without any additional payment; and
8. Directing the Township to take all necessary actions to pursue and obtain the water allocation permit previously applied for the on-site wells for the Pondview development and to take all other necessary steps to assure the provision of potable water service to said project.; and

WHEREAS, Pondview states that the development can start as soon as adequate water supply is available, and if permitted to use the water available from Wharton Borough pursuant to the November 29, 2005 Agreement, the project can be started immediately; and

WHEREAS the Developer's Agreements, Settlement Agreement and Planning Board approvals require the developer to construct an on-site water supply treatment and distribution center; and

WHEREAS, Pondview maintains that DEP was prepared to approve the water allocation permit as of August 15, 2001, conditioned upon a hydraulic barrier system to protect the wells from groundwater contamination from the Picatinny Arsenal site, and Pondview hired hydraulic experts as required by DEP; and

WHEREAS, in November 2004, Rockaway indicated that it would not support the hydraulic barrier system without first running a pilot test, and thereafter, after the pilot test was completed, Rockaway would still not allow the proposed on-site wells to be approved by DEP or utilized; and

WHEREAS, on November 28, 2005, Pondview executed an agreement with Wharton Borough ("Wharton") for 100,000 gallons per day ("gpd"), which agreement Rockaway will not approve and is requesting a \$6 million contribution to Rockaway, in addition to the \$4.3 million payment Pondview would be contributing to Wharton in order to allow the agreement to go forward; and

WHEREAS, Pondview points to: DHills Development Corp. v. Bernards Twp., stating that where public water or sewer is necessary for the construction of low and moderate income housing, the failure to assure the availability of that resource violates the municipality's constitutional obligations; 2)Toll Brothers, Inc. v. West Windsor, arguing that municipalities have an affirmative obligation to facilitate provision of public water and sewer service; and 3)COAH's rules at N.J.A.C. 5:95-4.3 (c)1 and N.J.A.C. 5:95-10.1, which state that a municipality shall reserve and set aside new water and or sewer capacity when it becomes available for low and moderate housing on a priority basis and that the Council may issue orders as may be necessary to require that a municipality takes appropriate measures to reserve scarce resources essential to fulfill a fair share obligation; and

WHEREAS, Pondview argues that a scarce resource restraint upon Rockaway is necessary to ensure the availability of water service to Pondview Estates and is essential to Rockaway's fulfillment of its second and third round Fair Share Plans; and

WHEREAS, Pondview states that no more than 632,000 gpd in water supply capacity is available to Rockaway from MCMUA, and requests that this capacity be preserved for Pondview's affordable housing project via a scarce resource restraint order and that in the event that Rockaway pursues and obtains the water allocation permit for the Pondview on-site wells, Pondview requests that the Scarce Resource Restraint may be lifted commensurate with the volume of supply via that permit; and

WHEREAS, Morris Commons LLC submitted a brief in opposition dated January 17, 2007, and is the owner of an affordable housing site located in Rockaway Township that has immediately available sewer, water, electric, gas and other utilities, and is ready to provide affordable housing; and

WHEREAS, Morris Commons argues that Pondview's motion is not necessary or appropriate and will act to obstruct, rather than facilitate the municipality's ability to fulfill its fair share obligation, and will delay Morris Commons's project, which Pondview sees as its competition; and

WHEREAS, Morris Commons argues that N.J.A.C. 5:93-5.4(d) requires that COAH give preference to sites that have the existing infrastructure to allow immediate development of affordable housing, and that Pondview's development lacks the necessary infrastructure and has been waiting to receive approvals for more than a decade; and

WHEREAS, Morris Commons maintains that while Rockaway may have a shortfall of 22,450 gpd, Pondview has 100,000 gpd available to it through Wharton, and that Pondview will also be able to take an additional 100,000 gpd through the MCMUA, and that there is a surplus available to service both to the Morris Commons project and the Pondview Project of approximately 177,550 gpd, so long as Pondview exercises its contractual right to 200,000 gpd from Wharton and the MCMUA; and

WHEREAS, Ed Buzak, Esq., on behalf of Rockaway Township, submitted a cross - motion on January 17, 2007, asking COAH to compel Pondview to implement its water supply agreement with the Borough of Wharton and to restrain the construction of an onsite water supply system; and

WHEREAS, Rockaway requests the following relief from COAH:

1. An Order compelling Pondview to implement the November 28, 2005 Agreement between the Borough of Wharton and Pondview as amended in August 2006;
2. Compelling third parties, including, but not limited to the Borough of Wharton and Morris County Municipal Utilities Authority to show cause before COAH as to why they should not be simultaneously ordered to implement and assist in implementing the aforesaid Agreements by and between the Borough of Wharton and Pondview;
3. Compelling Pondview to make available to Rockaway 1.2 million gpd of water capacity, less the necessary capacity for the Developer's project;
4. Alternatively, compelling the Developer to provide adequate compensation and consideration to Rockaway for the Developer's inability to fulfill this obligation that was assumed on or about November 13, 1989;
5. Enjoining and restraining Pondview from proceeding with any further activities related to an application to install wells on-site, the result of which can result in the contamination of the water system to service the project as well as the entire Rockaway water system; and
6. Any other such relief as COAH may determine; and

WHEREAS, Rockaway states the Pondview project site is immediately adjacent to the Picatinny Arsenal and that a portion of the Picatinny property is a Superfund Site listed on the National Priority List; and

WHEREAS, Rockaway argues that DEP was not convinced in 2004 that the hydraulic barrier system proposed by Pondview would in fact work, and wanted to ensure that there would be an alternative supply available to ensure that the individuals in living the development would have a water supply in the event of failure and potential superfund site contamination; and

WHEREAS, regarding the wheeling agreement with Wharton, Rockaway states that neither Pondview nor Wharton can provide water to a project in Rockaway without Rockaway's consent and that the signed Agreement between the Developer and Wharton does not provide adequate water for the full development of the Pondview project; and

WHEREAS, Rockaway states that its water system is in a negative firm capacity mode, and that the imposition of a Scarce Resource Order will not achieve the result of providing water to Pondview, and Pondview should obtain water through the Wharton/MCMUA and provide alternative consideration to the Township in lieu of Pondview providing additional water to Rockaway and fulfilling its obligation under Pondview's original approval and subsequent agreements with the town; and

WHEREAS, Rockaway argues that the imposition of a scarce resource restraint will detrimentally affect other approved projects that have depended on the Township's water supply; and

WHEREAS, Rockaway suggests that as an alternative to CO AH establishing the level of consideration Pondview is obligated to pay Rockaway, that CO AH utilize the mediation process; and

WHEREAS, Pondview submitted a reply to Rockaway's and Morris Common's submissions dated January 26, 2007; and

WHEREAS, Pondview asserts that Rockaway has a firm capacity of 632,000 gpd, and they further assert the difference between Rockaway's assessment of its firm capacity and DEP's assessment is 1,014,183 gpd, and

WHEREAS, Pondview argues that if Rockaway were to cooperate regarding Pondview's use of water from Wharton pursuant to its November 28, 2005 agreement, the scarce resource order could be adjusted commensurate with the volume of water supply available from Wharton; and

WHEREAS, Pondview argues that according to DEP, the Wharton Borough Water Department has no more than 178,000 gpd available in firm water capacity that could be transferred to Rockaway for Pondview's use, and that that the total peak daily demand for the development of all phases of Pondview Estates is 566,835 gpd, more than three times

the amount of water available from Wharton and, therefore, Wharton Borough Water Department cannot supply all of Pondview's water needs, and supplemental capacity, either from the on-site wells or from Rockaway is necessary; and

WHEREAS, Pondview maintains that, contrary to Morris Common's assertions, Pondview does not seek to preclude Morris Commons from receiving necessary water supply and instead believes that it is imperative that Rockaway must reserve its remaining water capacity for the benefit of both affordable housing projects; and

WHEREAS, the parties argued their position before CO AH at the March 14, 2007 CO AH meeting, and at the Council's suggestion, agreed to enter into mediation in an attempt to resolve the issues; and

WHEREAS, mediation has been ongoing, taking place on April 5, May 3 and May 31, 2007; and

WHEREAS, on May 24, 2007 a task force recommended that the matter be brought before the Council, and that the Board consider the relief requested in Pondview's December 20, 2006 motion, and depending on the status of mediation, that a scarce resource restraint be issued, and an Order to Show Cause as to why Rockaway should not be dismissed from COAH's protective jurisdiction be issued as well.

NOW, THEREFORE, BE IT RESOLVED COAH finds that it is questionable whether there is sufficient water capacity available to the Pondview Estates affordable housing development or other elements of Rockaway's affordable housing plan; and

BE IT FURTHER RESOLVED if there is not available water capacity for the elements of Rockaway's affordable housing plan, Rockaway no longer has a plan that meets the criteria of its substantive certification as granted by COAH; and

BE IT FURTHER RESOLVED COAH hereby imposes a scarce resource restraint until such time as COAH issues a decision that it has been provided with credible information from Rockaway that there is sufficient water capacity to service Pondview and any other element of Rockaway's Housing Element and Fair Share Plan; and

BE IT FURTHER RESOLVED that the Rockaway Township Board of Adjustment, Planning Board and Council are restrained from issuing any approval or taking any action that would lead to the provision of public water for any project not included in Rockaway's housing element and fair share plan and

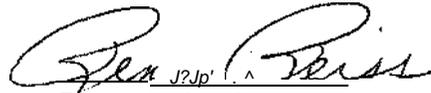
BE IT FURTHER RESOLVED that this scarce resource restraint does not prevent Rockaway from issuing any approval or taking any action that would lead to the provision of public water for any project included in its housing element and fair share plan, including the Morris Common's property; and

BE IT FURTHER RESOLVED that the issuance of this scarce resource restraint in no way precludes the parties from continuing with mediation, and COAH encourages the parties to do so; and

BE IT FURTHER RESOLVED Rockaway is hereby ordered to show cause as to why the Council should not dismiss Rockaway's third round petition specifically demonstrating that there is sufficient water capacity to service Pondview and any other element of its Housing Element and Fair Share Plan, including all sources of water supply, gallonage and allocation of water to each affordable housing project; and

BE IT FURTHER RESOLVED the Order to Show Cause is returnable on August 8, 2007, at the Council's monthly meeting; and Rockaway shall file any and all supporting documentation with COAH no later than 20 days from the date of this resolution, and shall serve all parties to the motion with all documents; all replies to the Township's submission shall be filed with COAH no later than 10 days after service of the Township's filing; and the Township shall have seven days in which to respond to any replies filed with COAH.

I hereby certify that this resolution was duly adopted by the Council on Affordable Housing at its meeting on

A handwritten signature in cursive script, appearing to read "Renee Reiss".

Renee Reiss, Secretary
Council on Affordable Housing