

IN RE ROCKAWAY TOWNSHIP, MORRIS) NEW JERSEY COUNCIL ON
COUNTY, ORDER TO SHOW CAUSE OF) ON AFFORDABLE HOUSING
THE COUNCIL AS TO THE DISMISSAL)
OF ROCKAWAY'S THIRD ROUND FAIR) DOCKET NO. 06 - 1817
SHARE PLAN PETITION AND MOTION)
OF ROCKAWAY FOR PARTIAL RELIEF) DECISION

On December 19, 2006, the New Jersey Council on Affordable Housing (the "Council" or "COAH") received a motion from Pondview Estates ("Pondview"), a proposed inclusionary development located in the Township of Rockaway, Morris County, seeking relief from COAH requiring Rockaway to take various steps to reserve and obtain the necessary water supply for the Pondview site. The Council imposed a scarce resource restraint on Rockaway's allocation of water and issued an Order to Show Cause as to why Rockaway's third round petition should not be dismissed due to the failure of the Township to provide the necessary water for the affordable housing sites within its third round petition for substantive certification. On October 23, 2007, COAH received a motion from Rockaway seeking "partial relief" from the Council's September 12, 2007 Resolution that in part requires Rockaway to submit the on-site well pilot tests for the Pondview site to the New Jersey Department of Environmental Protection ("DEP") for its review and decision regarding the use of the proposed wells. Both the Council's Order to Show Cause and Rockaway's motion are considered in this decision.

PROCEDURAL AND FACTUAL HISTORY

Rockaway received a Judgment of Compliance from the Honorable Stephen Skillman, J.S.C., on November 20, 1985, which, among other things, required the Township to rezone the Pondview site to permit the construction of 1,600 residential units, of which 368 were to be reserved' for low- and moderate-income households. On March 2, 1995, Rockaway petitioned COAH for second round substantive certification. The Township's second round Housing Element and Fair Share Plan proposed the rezoning of the Pondview site to reduce the number of units on the tract from 1,600 total units, to 1,100 multi-family units with 100 affordable units. Pondview objected to the proposed rezoning of its site for a lesser density and set-aside. Mediation began on April 15, 1986 and concluded on June 20, 1996, with a signed agreement between the parties.

Rockaway received second round substantive certification on April 2, 1997, with a second round affordable housing obligation of 412 units, consisting of 370 new construction units and 42 rehabilitation units. An amendment to the second round plan was approved by COAH on July 16, 2002, which included a total of 142 credits, including four prior cycle credits for an ARC group home, 75 credits for age restricted rental units, four credits for a four bedroom group home operated by United Cerebral Palsy, 40 credits for age-restricted rental units at Green Pond Village, and 19

credits for units that had been previously rehabilitated pursuant to COAH rules. This left a remaining obligation of 270 units consisting of a 247-unit new construction obligation and a 23-unit rehabilitation obligation.

The amended Housing Element and Fair Share Plan that was certified by COAH addressed Rockaway's remaining obligation with a number of compliance mechanisms, including Pondview Estates, the subject of this motion. The site 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). The project received final site plan approval for Phase I on July 17, 2000. At the time of extended substantive certification, construction was pending, subject to DEP approval of water services (Water Allocation Permit). Pilot testing on the site had commenced, and as a result it was determined by COAH that the Pondview site represented a realistic opportunity for affordable housing. Accordingly, Rockaway was granted 100 zoned family-unit credits and 92 bonus credits for the site.

Rockaway received extended substantive certification from COAH on April 2, 2003, and thereafter filed a motion with COAH 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. Rockaway petitioned COAH for third round substantive certification on December 9, 2005.

On November 13, 1989, the Rockaway Planning Board granted preliminary subdivision and site plan approval and on October 8, 1991, granted final approval for Phase I of the Highlands at Morris development (Pondview Estates). At that time, the Highlands development consisted of 1,600 units including 368 lower income units. A Developer's Agreement was executed on November 6, 1991, which was ultimately replaced by a February 4, 2002 Site Plan Development Agreement. With regard to water supply, the Agreements provide that: Pondview will install on-site wells with a service capacity of 630,000 gallons per day (gpd) as well as back-up wells with 630,000 gpd capacity; Rockaway will obtain the water diversion permit for the on-site water supply system to be constructed by Pondview; Pondview will construct an on-site water treatment, storage and transmission system and make a pro-rata contribution for an off-site storage tank. The June 25, 1996 mediated Settlement Agreement resulting from Pondview's objection to Rockaway's second round plan provided for and limited development of the Pondview site to a total of 1,050 multi-family units, including 100 non-age-restricted affordable rental units, and 95,000 square feet of commercial development. Rockaway agreed to maintain a sewer allocation for Pondview and pursue additional sewage treatment capacity from the Rockaway Valley Regional Sewerage Authority. As part of this Agreement, Pondview consented to build 100 lower income units, to be completed in conjunction with the first 500 market rate units. Pondview states that the

property is a significant component of both the second and third round plans, and that the 100 affordable units and 92 rental bonuses address over 50 percent of Rockaway's second round obligation and that 19 surplus credits are proposed to meet part of Rockaway's third round plan.

Following COAH mediation/ a revised development plan containing a total of 1,050 units was granted final major subdivision and major site plan approval from the Rockaway Planning Board. Amendments were adopted November 19, 2001 and February 25, 2002. Sewage treatment is available and reserved for the project, and as of June 3, 2005, 5% of the stormwater management collections system, 100% of the on-site sanitary sewer collection system, 100% of the on-site water distribution system, and 25% of driveway, parking curbing and foundations for nine buildings had been installed.

Pondview asserts that its 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 Wheeling Agreement, the project can begin immediately. The Developer Agreements, Settlement Agreement and Planning Board approvals require the developer to construct an on-site water supply treatment and distribution center. Rockaway pursued water allocation permits required for the two on-site wells, and the excess capacity in these wells was to be provided to Rockaway by Pondview at no cost. 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 Pica-tinny Arsenal site. Pondview hired hydraulic experts and prepared a groundwater monitoring plan and hydraulic barrier plan as required by DEP and defined in an April 20, 2004 letter issued by DEP.

In November 2004, Rockaway indicated that it would not support the hydraulic barrier system without first running a pilot test. Thereafter, the parties worked with DEP to develop such a pilot test, and in a June 3, 2005 letter to COAH, it was stated that the pilot test was anticipated to be completed within several months. Additionally in the April 20, 2004 letter from DEP, Pondview was required to provide an alternative water supply source by way of contractual arrangement with other towns or suppliers. On November 28, 2005, in fulfillment of this requirement, Pondview executed an agreement with Wharton Borough. Pondview states that from December 2005 through May 2006, it requested that Rockaway submit the hydraulic barrier system documentation and expedite the Water Allocation Permit documents for the on-site wells. Pondview states that it became clear by June 15, 2006, that Rockaway would not allow the proposed on-site wells to be approved or utilized. Rockaway further insisted that it control any other water sources available to Pondview, and that it would only allow Wharton to provide water to Pondview if Pondview agreed to a \$6 million

contribution to Rockaway, in addition to the \$4.3 million payment Pondview would be contributing to Wharton.

The Pondview 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. The Morris Commons site is included in the third round plan with 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. The Morris Commons site was not included in Rockaway's second round Housing Element and Fair Share Plan.

In its December 19, 2006 motion, Pondview requested the Council grant the following relief:

Directing Rockaway, pursuant to N.J.A.C. 5:95-10.1, to reserve all existing unallocated water supply capacity available to Rockaway from the Morris County Municipal Utility Authority ("MCMUA") and all other sources, for the purpose of providing water supply to the Pondview Estates development as identified in the Township Housing Element and Fair Share Plan;

Directing the Township to reserve any new water supply capacity available to the Township from MCMUA or any other source for the Pondview development;

Restraining Rockaway Township 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;

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 recouplement 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");

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;

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 such municipality, for allocation by the Township to Pondview Development;

Directing the Township to consent without the need for any payment by Pondview to Rockaway, to Pondview's use of water available from Wharton Borough pursuant to the November 28, 2005 Agreement; and

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.

Pondview maintains that Rockaway now takes the position that it will not move forward to obtain the Water Allocation Permits for the two on-site wells. Pondview states that since Rockaway is unwilling or unable to fulfill its contractual obligation to pursue the water allocation permit, that Pondview

must pursue the water supply available to Rockaway from the MCMUA.

Pondview further asserts that placement of a scarce resource restraint upon Rockaway is necessary to ensure the availability of water service to the Pondview site, thereby meeting Rockaway's cumulative third round affordable housing obligation. Pondview claims that its development requires 565,835 gpd of water and the other proposed Rockaway affordable housing projects require at least 71,280 gpd, for a total of 638,115 gpd. Pondview states that Rockaway presently has only 632,000 gpd of public water available.

At its March 14, 2007 meeting, the Council heard oral argument regarding relief requested by Pondview in its motion dated December 19, 2006, specifically seeking the imposition of a scarce resource upon the Township and requesting action by the Council in order to secure the necessary water capacity to service the Pondview site. The Council also heard from Rockaway regarding the relief requested in its cross-motion dated January 17, 2007; namely, whether Pondview should be compelled to implement the November 28, 2005 Agreement between Wharton Borough and Pondview; to make available to Rockaway 1.2 million gpd of water capacity, less the necessary capacity for the Developer's project; or alternatively, to be compelled to provide adequate compensation to Rockaway for the obligation that was assumed at Pondview's original approval on or about November 13, 1989; whether Pondview may go forward with an application to install wells on-site; and any other such relief as COAH may determine.

A third party to the matter, Morris Commons, also presented oral argument as set forth in its papers dated January 17, 2007, 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' project.. Morris Commons also argued that at the time of the motion, the Pondview project had no means by which water from Rockaway can be supplied to Pondview, and that it would be necessary to construct pumping stations and water mains off of Pondview's property in order to connect to the municipal water supply.

The parties could not provide the Council with any definitive evidence as to what was the available water supply from Rockaway, what was available from Wharton Borough, what was available from the two Morris County utility authorities, or what, the DEP considered to be Rockaway's available water supply. As a result, the Council suggested that the parties enter into mediation in an attempt to resolve the issues between them. The parties agreed and mediation took place on April 5, May 3 and May 31, 2007.

The parties failed to resolve their differences at mediation and in addition, did not reach any agreement as to the outstanding factual questions the Council had regarding Rockaway's water supply.

On June 14, 2007, the Council again heard from the parties and thereafter, issued a resolution imposing a scarce

resource restraint upon Rockaway finding that it is questionable whether there is sufficient water capacity available to the Pondview affordable housing development or other elements of Rockaway's affordable housing plan. The Council found that 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. The restraint prevents the Rockaway Township Board of Adjustment, Planning Board and Township Council from acting on any development application that requires public water, but does not prevent Rockaway from issuing development approvals or water allocation to any project included in its housing element and fair share plan, including the Morris Commons property.

The Council also issued an Order to Show Cause at that meeting as to why the Council should not dismiss Rockaway's third round petition and required Rockaway to demonstrate 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.

The parties submitted replies to the Council's Order to Show Cause in accordance with the briefing schedule set by the Council. In addition, the parties issued numerous correspondence and responses to the various submissions to COAH. The parties appeared before the Council at its September 12, 2007 meeting, the

extended return date of the June 14, 2007 Order to Show Cause. After considering the papers submitted and the arguments presented, the Council issued a resolution ordering Rockaway to immediately take the necessary steps to: 1) provide COAH with accurate data from the Morris County Municipal Utilities Authority ("MCMUA") and the Southeast Morris County Municipal Utilities Authority ("SEMCMUA"), evidencing the total amounts of water supply available to Rockaway and the sites where any water supply has been committed, as well as the volume committed; 2) submit the on-site well pilot tests for the Pondview site to DEP for its review and decision regarding the viability of the proposed wells; and 3) take all steps necessary to secure a sufficient water supply for the Pondview site pursuant to the Wheeling Agreement with Wharton Borough as well as .any other actions necessary to meet this requirement. The Council continued to carry forward the Order to Show Cause until its October 10, 2007 meeting.

Information provided by Rockaway and Pondview as directed by the Council's September 12, 2007 Resolution

Rockaway provided COAH with copies of correspondence sent on September 19, 2007 to John Rheinhardt, Administrator of the Borough of Wharton, William Hutchinson, Executive Director of the SEMCMUA, and Glenn Schweizer, Executive Director of the MCMUA requesting meetings with the same to discuss the directives contained in the Council's September 12, 2007 resolution. On September 23, 2007, Pondview filed correspondence with COAH

enclosing a referenced map of the Rockaway water distribution system, stating that the map shows that connecting Pondview to the Township's water supply is feasible and has been fully engineered and previously approved by Rockaway.

By way of correspondence dated September 28, 2007, Rockaway provided COAH with a list of sites where water supply has been committed, as well as the volume committed within Rockaway's water supply system. These sites are as follows:

Christ Church
| Allocated 69,723 gpd

Green Pond Road and Sanders Road (Affordable Housing site)
Allocated 95,413 gpd

Sky View at Rockaway
Allocated 7,110 gpd

Sun Rise Road
Allocated 7,095 gpd

Miscellaneous Homes
Allocated 7,680 gpd

New School
Allocated 36,000 gpd

Commons Way (Affordable Housing site)
Allocated 87,615 gpd

Commons Way
Allocated 20,832 gpd

Simon Property Restaurant
Allocated 6,000 gpd

Boulders at Rockaway
Allocated 77,000 gpd

Total: 406,788 gpd

On October 1, 2007, Rockaway provided to COAH letters from the MCMUA indicating the amount of water capacity that may be available to the Borough of Wharton for servicing the Pondview Project and from SEMCMUA. Both letters were prepared subsequent to a meeting held between Rockaway and the two utility authorities. The letter from SEMCMUA outlines the current status of the SEMCMUA water system capacity and capability as it relates to furnishing Rockaway with potable water. Rockaway states that based on the meeting and letter, the SEMCMUA does not have water available for Rockaway and that SEMCMUA is presently furnishing the MCMUA with water that is already included in the MCMUA's calculations. Further, Rockaway states that MCMUA is at a deficit regarding its committed water supply as compared to its available water supply as evidenced by DEP's refusal to issue any water extension permits until the deficit is corrected. Attached to the MCMUA letter is correspondence sent to DEP setting forth a proposal to balance MCMUA's deficit. Rockaway states that if DEP approves the balancing, MCMUA will be able to make an additional 100,000 gpd available to Wharton.

Pondview issued correspondence to COAH dated October 2, 2007, in response to Rockaway's September 28, 2007 letter. Pondview states that Rockaway's letter and attachments do not meet the directives of COAH's September 12, 2007 Resolution because they fail to provide any data from the MCMUA and the SEMCMUA regarding the water supply available to Rockaway, or provide accurate data

regarding the sites where water supply is committed, demonstrate that Rockaway has submitted the on-site well report to DEP, or demonstrate that Rockaway has taken action to secure water for the Pondview site. Further, Pondview states that Rockaway has failed to explain how water supply has been committed to the Christ Church, Green Pond/Sanders Road, or the new school without any DEP issued water main extension permits, and that Rockaway also has not explained why there is a present commitment for Commons Way when both of its sites' water extension permits have expired. Pondview concludes that Rockaway's representation as to 309,583 gpd of committed capacity is completely unreliable.

In correspondence dated October 4, 2007, responding to letters from the MCMUA and SEMCMUA, Pondview took issue with the fact that it was not invited to participate in meetings with the utilities authorities, stating that a financial contribution by Pondview to the SEMCMUA might convince the Authority to provide Pondview water supply. Pondview requested that Rockaway be given deadlines to take the following action: arrange a meeting with the two utility authorities and a representative of Pondview; process a water main extension permit to allow the Pondview site to connect to the Rockaway public water system; and submit the December 15, 2005 hydraulic barrier report to DEP. Pondview urges that if Rockaway fails to comply that COAH enforce its orders in court.

By way of letter dated October 4, 2007, Rockaway addressed the Hydraulic Barrier System Report, stating that "the

test results for the on-site wells have in fact been submitted to the NJDEP for some time and are presently pending before them," differentiating the well test results from the hydraulic barrier test results. Regarding the hydraulic barrier test results, Rockaway states that at the Township Council's October 2, 2007 meeting, the Township Council declined to authorize the submission of the results to DEP and requests that COAH reconsider requiring the Township to do so. In the alternative, Rockaway requests a hearing before the OAL with regard to substituting other sites for the Pondview .site to accommodate the 100 rental units. Rockaway points to the potential contamination of its water system, and also to DEP's requirement that there be a backup system in place in the event of a • failure of the hydraulic system, as reasons for its refusal to submit the results to DEP. It states that if there is to be a backup system in place that this backup system be used instead as the primary supply of water to the site.

Rockaway further points to MCMUA balancing its deficit and states that the additional 100,000 gpd that should be available if DEP approves MCMUA's plan could go to Pondview. Rockaway further argues in favor of Pondview getting water via this route by stating that it is Rockaway's understanding that Wharton is currently attempting to have DEP reconsider the designation of its peak month due to aberrations and if DEP establishes a different peak there will be additional water available.

Morris Commons submitted correspondence to COAH dated October 8, 2007, stating that COAH should focus on the Wheeling Agreement and not on the onsite wells, and that Morris Commons is prepared to proceed with its affordable housing project as soon as the Township passes the ordinance allowing Morris Commons to proceed with its project. Rockaway submitted a letter to COAH dated October 5, 2007, in response to Pondview's September 24, 2007 correspondence. Rockaway's consulting water engineers state that the map of Rockaway's water distribution system provided by Pondview is 35-years-old and does not accurately reflect the current water distribution system and provides a false operation of how the municipal distribution actually operates. Based upon the information received by COAH from the parties, the October 10, 2007 return date of the Order to Show Cause was again carried until November 7, 2007.

COAH received additional correspondence from Rockaway regarding its efforts in meeting with representatives of Wharton and the utility authorities. In a letter dated October 23, 2007, Pondview responded to Rockaway's October 4, 2007 submission to COAH. Pondview asserts that Rockaway has failed to respond to COAH's request for the actual water supply available and the commitment of said water supply. Pondview states that Rockaway has stated that it has contractual commitments for its water supply in the amount of 641,583 gpd in one instance and states it has commitments of only 318,000 gpd in another submission. As a

result, Pondview states that it is impossible to determine how much water supply is actually available in Rockaway and for Pondview's development.

On October 24, 2007, COAH received a motion from Rockaway, dated October 23, 2007, seeking "partial relief" from the Council's September 12, 2007 Resolution requiring Rockaway to submit to DEP the pilot tests for the on-site wells for the Pondview development. Rockaway's motion reiterates its position and statements made before the Council at the March, June and September 2007 COAH meetings. Rockaway again states that on October. 2, 2007, the Rockaway Township Council declined to authorize the submission of the pilot test results and report to DEP. Rockaway's motion also requests that it be permitted to explore other alternatives to providing water for the Pondview site.

DISCUSSION

On June 13, 2007, the Council, pursuant to Resolution No, COAH 06-1817, imposed a scarce resource restraint upon Rockaway until such time as COAH determined that it had "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." In addition to the scarce resource restraint, the Council ordered Rockaway to show cause as to why the Council should not dismiss Rockaway's third round petition. The Council ordered that Rockaway specifically demonstrate that there

is sufficient water capacity to service Pondview and other elements of Rockaway's Housing Element and Fair Share Plan, including all sources of water supply, gallonage and allocation of water to each affordable housing project within Rockaway's affordable housing plan.

In response to its Order to Show Cause, COAH received numerous submissions from Rockaway, Pondview and Morris Commons. None of the submissions clarified what the actual water supply of Rockaway was, what amount of water had already been committed to other developments, or what amount of water, if any, was available from Wharton Borough or the two municipal utility authorities of Morris County, the MCMUA and the SEMMCMUA. At oral argument at the March, June and September 2007 COAH monthly meetings, despite continued inquiries from Council members as to what was the known water supply available and what was committed, no single answer supported by reliable documentation was presented. In addition, in questioning Rockaway as to why it had not submitted the on-site pilot wells test results to DEP in order to determine if the on-site wells met DEP's requirements for the safe provision of water to the Pondview site, Rockaway repeatedly stated that it had not done so because of concerns of contamination to such wells from the adjacent Picatinny Arsenal site, leading to the potential contamination of Rockaway's water supply. However, Rockaway did not offer any evidence that approval by DEP of on-site wells would lead to contamination from the Picatinny Arsenal site.

In response, on September 12, 2007, the Council directed Rockaway to immediately submit the Pondview on-site pilot wells results to DEP in order to determine if such on-site wells were an available source of clean water. Further, the Council required Rockaway to file "any and all supporting documentation with COAH as to the water supply available from the MCMUA and the SEMCMUA no later than 15 days from the date of this resolution." Finally, the Council required Rockaway to take the necessary steps to obtain sufficient water for the Pondview site from Wharton Borough pursuant to the Wheeling Agreement entered into between Wharton and Pondview. Thereafter, COAH received several letters from Rockaway evidencing contacts made with representatives of the MCMUA and the SEMCMUA, as well as with representatives of Wharton. As a result, COAH carried this matter for action until its November 7, 2007 meeting.

Despite the Council's best efforts at requiring Rockaway to provide it with the actual water supply data from the MCMUA and the SEMCMUA, Rockaway has failed to provide the Council with data evidencing the actual water available to Rockaway, or the water committed to projects other than Pondview. In addition, while Rockaway asserts that meetings and discussions are on-going involving Rockaway, Wharton and the MCMUA, no agreements have been reached concerning any additional allocation of water to Rockaway or the Pondview site. Finally, as noted by Rockaway in its October 23, 2007 motion for partial relief, the Rockaway Township Council

has formally declined to submit the Pondview on-site pilot wells test results and report to DEP for its determination as to whether to permit the on-site wells. The action of Rockaway in refusing to submit the on-site wells data to DEP is in contravention of both COAH's requirement that it do so and the agreement between Rockaway and Pondview for the use of on-site wells for the Pondview site.

Based on the record before the Council, as a result of Rockaway's refusal to permit DEP to determine whether on-site wells at the Pondview site are a viable option, Rockaway's refusal to consent to the Pondview/Wharton Wheeling Agreement, and its failure to provide COAH with verified data concerning Rockaway's water supply, the Council must conclude that Rockaway's third round petition fails to provide a realistic opportunity for the provision of affordable housing to meet Rockaway's affordable housing obligation. Given the specific facts in this matter, the Council deems it appropriate to order the dismissal of Rockaway's third round petition. Since the Council's March 2007 meeting, Rockaway has been urged to provide any data or evidence that would demonstrate not only the water available to Rockaway and the Pondview site, but also any efforts on the part of Rockaway to meet its affordable housing obligation. The Council cannot help but conclude that Rockaway, for whatever reasons, is not willing to take the necessary steps required of it to ensure that its third round petition provides the required realistic opportunity to meet its affordable housing obligation.

In particular, in addition to Rockaway's failure to provide the Council with actual documentation demonstrating the water capacity and allocation, data from the MCMUA and the SEMCMUA, two facts weigh heavily in the Council's decision: Rockaway's failure to execute the Wheeling Agreement entered into between Wharton Borough and Pondview; and Rockaway's refusal to submit the Pondview on-site pilot wells data to DEP for possible permitting. The Council notes that Pondview has a pending complaint filed in the Superior Court of New Jersey, Law Division, captioned Pondview Estates, Inc. v. Township of Rockaway, Docket No. MRS-L-230-07. In that matter, Pondview seeks, among other relief, the following: a court order that Rockaway file the Pondview on-site well data with DEP; and ordering Rockaway to take all action necessary to permit Pondview to make immediate use of water pursuant to its Wheeling Agreement with Wharton Borough. As stated in this decision, the Council has similarly required Rockaway to submit the necessary information to DEP regarding the potential on-site wells for the Pondview site and to take all necessary action to permit the Pondview/Wharton Wheeling Agreement to provide Pondview with water.

In its prior submissions and its most recent motion for partial relief, Rockaway states that it has had discussions with representatives of Wharton on October 19, 2007, regarding Wharton's supplying of water for Pondview through a franchise granted to Rockaway or for the bulk sale of water to Rockaway for use at the Pondview site. Notwithstanding this recent action, Pondview

asserts that all that is required of Rockaway is its consent to the Wheeling Agreement between Pondview and Wharton. • As noted above, this contractual dispute is pending in the Superior Court. COAH's concern and jurisdiction is limited to Rockaway's ability to meet the affordable housing requirements of its third round petition. Whatever the outcome of the dispute over the Pondview/Wharton Wheeling Agreement, what is clear from the facts submitted to the Council over the last 10 months is that based upon the position asserted by Rockaway, Pondview is unable to obtain water for its site from the Wheeling Agreement with Wharton.

Similarly, Rockaway's position concerning the use of on-site wells by Pondview has also created an impediment to Pondview's attempt to obtain water for its site. Rockaway has stated, and the action of the Township Council has confirmed, that it will not submit the required data and report to DEP that could lead to the permitting of on-site wells for the Pondview site. Rockaway's rationale for refusing to allow the possible permitting of these wells by DEP is its concern with possible contamination to such wells, and as asserted by Rockaway, to the Township's water supply, from the adjacent Picatinny Arsenal site. If this is the rationale for Rockaway's action, the Council notes that refusal to submit the necessary data for DEP's review is not the proper approach for Rockaway to address its concerns. As with any environment issues, where the Legislature has empowered the DEP to issue or deny

permits for development and its effects on ground, water or air, the proper regulatory procedures must be followed.

In the instant case, if 'Rockaway's concerns regarding potential contamination to on-site wells on the Pondview site have merit, the facts supporting such claims should be presented to DEP.

For Rockaway to simply refuse to allow the consideration by DEP of on-site wells for Pondview, without any review of the actual facts, is improper. As with all DEP permitting, Rockaway may certainly present any scientific facts, expert reports or any other data which supports its concerns. However, at this point in time in this specific case, Rockaway's refusal to permit DEP to review the Pondview on-site pilot wells data and report must be viewed by COAH as Rockaway's refusal to take the necessary steps for the implementation of its third round petition.

Having reviewed Rockaway's papers in support of its October 23, 2007 motion for partial relief from the Council's requirement that it submit the on-site wells data and report to DEP, and the response from Pondview, the Council finds that Rockaway's motion must be denied for the reasons already stated concerning the need to allow DEP to review and evaluate the facts and scientific data necessary to reach a decision as to whether on-site wells for the Pondview site should receive a permit.

DECISION

For all of the above stated reasons, the Council has determined that the Township of Rockaway has failed to take the

necessary action to implement its Fair Share Plan as set forth in its third round petition. In particular, Rockaway's refusal to submit the Pondview on-site pilot wells tests and report to DEP demonstrates the Township's failure to carry out its responsibilities for the implementation of its third *round* affordable housing plan. The reluctance or inability of the Township to reach any accommodation with other parties that are potential sources of water necessary for the affordable housing obligation of Rockaway, leads the Council to conclude that Rockaway's third round petition does not provide a realistic opportunity for the development of Rockaway's third round affordable housing obligation. Therefore, Rockaway's third round petition for substantive certification is hereby dismissed and Rockaway no longer remains under COAH's jurisdiction. As noted above, Rockaway's motion for partial relief regarding the Council's requirement for the submission of the Pondview on-site pilot wells data and report to DEP is denied.



Renee Reiss, Secretary
New Jersey Council on
Affordable Housing

Dated: November 7, 2007