

IN RE ROCKAWAY TOWNSHIP, MORRIS ) NEW JERSEY COUNCIL ON  
COUNTY, MOTION FOR A STAY OF ) ON AFFORDABLE HOUSING  
THE COUNCIL'S JUNE 13, 2007 AND , )  
SEPTEMBER 12, 2007 RESOLUTIONS ) DOCKET NO. 08-2000  
AND THE NOVEMBER 7, 2007 DECISION )  
PENDING AN APPEAL ) DECISION

By motion dated January 3, 2008, the New Jersey Council on Affordable Housing (the "Council" or "COAH") received a request from the Township of Rockaway seeking a stay from the Council of its June 13 and September 12, 2007 resolutions concerning the Pondview Estates site ("Pondview"), as well as a stay of the Council's November 7, 2007 decision dismissing Rockaway's third round petition for substantive certification. Rockaway seeks this stay pending a decision in its December 13, 2007 appeal in the Appellate Division of these actions of the Council.

PROCEDURAL AND FACTUAL HISTORY

The lengthy history of Rockaway's affordable housing obligation and the actions taken that resulted in the issuances of COAH's June 13, 2007 resolution, September 12, 2007 resolution, and November 7, 2007 decision, is set forth in detail in the Council's November 7, 2007 decision dismissing Rockaway's third round petition. The Council will rely upon those facts as set forth in the Council's decision in issuing its decision in the instant matter. As a result of COAH's November 7 decision, on December 13, 2007, Rockaway filed an appeal of the above cited resolutions and COAH's November 7 decision. On January 3, 2008, Rockaway filed its

motion for a stay of the Council's resolutions and decision. In a letter brief dated January 11, 2008, Pondview filed a letter brief in opposition to Rockaway's motion for a stay. On January 16, 2008, Morris Commons stated that it does not take any position with respect to Rockaway's motion for a stay. Finally, on January 29, 2008, Rockaway submitted a reply brief to COAH in response to Pondview's January 11, 2008 brief.

#### DISCUSSION

Rockaway's motion to stay the Council's June 13 and September 12 resolutions, and its November 7, 2007 decision, does not meet the standards necessary for granting such a request. As our courts have noted, a party is only entitled to the remedy of a stay if it can demonstrate that there is a reasonable likelihood of eventual success on the merits, the party will suffer irreparable injury if equitable relief is not granted, the grant of the requested relief will not work an inequitable result considering the hardships to the parties against whom relief is sought, and restraints will not harm the public interest. Crowe v. DeGioia, 90 N.J. 126 (1982). There must be a "strong showing of necessity" for injunctive relief to be granted. A.Q. Smith Corp. v. FTC, 530 F.2d 515, 527 (3d Cir. 1976). A review of COAH's November 7, 2007 decision and its resolutions of June 13 and September 12, 2007, demonstrates that Rockaway's request fails to meet the requirements for the granting of a stay.

Rockaway's assertion that it will suffer irreparable harm is based upon the fact that Pondview is seeking relief in the trial court to require Rockaway to submit data to the New Jersey Department of Environmental Protection (DEP) that is necessary for its consideration of the possible use of on-site wells at the Pondview site. Rockaway's rationale is that if it is so ordered by the trial court, then one of the issues that Rockaway is challenging before the Appellate Division will have already been decided. The Council does not view this as a basis to claim irreparable harm since the Council's June 13 and September 12 resolutions are not an issue that is subject to appeal before the Appellate Division. The subject of those resolutions is now solely an issue pending in the trial court proceedings between Pondview and Rockaway. Requiring Rockaway to submit data necessary for DEP to determine if on-site wells can provide water necessary for an affordable housing project in no way harms Rockaway. If Rockaway is required by the trial court to submit data to DEP and if DEP concludes that on-site wells on the Pondview site may receive permits, Rockaway will not have been harmed in any way. If DEP does not permit the use of on-site wells, Rockaway has obtained its goal. If DEP does grant permits for on-site wells, Rockaway is free to challenge that determination in the Appellate Division, based on the record established by DEP's decision. In either case,

there is no harm to Rockaway by permitting Pondview to proceed with an enforcement action in the trial court.

Rockaway further asserts the Council lacked the authority to issue its June 13 and September 12, 2007 resolutions. This assertion is incorrect. Pursuant to the Fair Housing Act ("FHA"), COAH shall review a municipality's affordable housing fair share plan and shall issue substantive certification to the municipality if the fair share plan "is consistent with the rules and criteria adopted by the council and not inconsistent with achievement of low and moderate income housing needs of the region...." N.J.S.A. 52:27D-314(a). In addition, a municipality shall have eliminated "unnecessary housing cost-generating features from the municipal land use ordinances and regulations" so as to "make the achievement of the municipality's fair share of low and moderate income housing realistically possible...." N.J.S.A. 52:27D-314(b) .

In compliance with the FHA, the Council adopted rules and criteria requiring a municipality to eliminate any unnecessary cost generating features that act to delay the production of affordable housing. N.J.A.C. 5:94-8.1(a) states that a municipality's failure to expedite decisions on development applications within the time limits mandated by the Municipal Land Use Law, N.J.S.A. 40:55D-1 et seq. , "shall be considered a reason for revoking substantive certification." In the instant case, the Rockaway Town Council has voted to refuse to submit data and reports to DEP that are required

in order to allow DEP to consider whether on-site wells for the Pondview site may receive permits, thus denying required water for a development that is to include 100 units of affordable housing and is within Rockaway's affordable housing plan. Clearly, Rockaway's actions impose cost generating impediments as well as practical ones to the goal of constructing affordable housing.

By refusing to allow DEP to consider on-site wells for the Pondview site, Rockaway is forcing Pondview to explore other unnecessary cost generating features for obtaining water required for development of the site. Rockaway's actions go beyond imposing unnecessary cost generating features. Rockaway has prohibited the development of a site in its Fair Share Plan that is to create 100 units of affordable housing. As a result of Rockaway's actions, COAH properly issued its resolutions of June 13 and September 12, 2007, as well as its November 7, 2007 decision dismissing Rockaway's affordable housing plan.

Similarly, Rockaway cannot show that there is a reasonable likelihood of eventual success on the merits, that restraints will not harm the public interest or that the requested relief will not work an inequitable result considering the hardships to the parties against whom relief is sought. Since the Council's March 2007 meeting, Rockaway had been urged to provide COAH with any data or evidence that would demonstrate not only the water available to the Township as a whole, as well as specifically

for the Pondview site, but also any efforts on the Township's part to meet its affordable housing obligation. The record is replete with evidence of Rockaway's failure to comply with COAH's requests and directives to take the steps necessary to ensure the realistic opportunity for affordable housing under Rockaway's third round plan. Most telling is the action of the Rockaway Township Council refusing to permit the submission to DEP of data and reports necessary for a determination as to the possible use of wells to provide water for the Pondview site. All of the facts that led to COAH's November 7, 2007 decision to dismiss Rockaway's third round petition, and the authority of the FHA and COAH's regulations that support COAH's action, demonstrate that Rockaway cannot show a reasonable likelihood of eventual success on the merits.

As noted above, Pondview has a pending complaint 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. The Council 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.

Rockaway's position concerning the use of on-site wells by Pondview has clearly created an impediment to Pondview's attempt to obtain water for its site. Rockaway has stated, and the action of its Town 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, COAH 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 issue, 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.

All of these facts demonstrate that it is not Rockaway, but Pondview, and more generally, the public interest of the low and moderate income residents of this State, that will be harmed if Rockaway's motion for a stay is granted. Granting a stay will work an inequitable result by allowing Rockaway to continue to avoid for months, if not years, having to take action to provide its required

affordable housing. The granting of a stay by the Council would have the real effect of the unnecessary expenditure of essential funds by Pondview on litigation rather than on affordable housing.

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, in the instant case, Rockaway's refusal to permit DEP to review the Pondview on-site pilot wells data and report must be viewed, as Rockaway's refusal to take the necessary steps for the implementation of its third round petition.

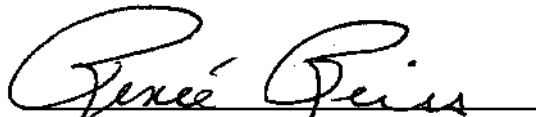
The Council determined that Rockaway failed to take the necessary action to implement its Fair Share Plan as set forth in its third round petition. The reluctance or inability of the Township to reach any accommodation with other parties that are potential sources of water necessary for the affordable housing obligation of Rockaway, led the Council to conclude that Rockaway's third round petition did not provide a realistic opportunity for the development of Rockaway's third round affordable housing obligation. As a result, Rockaway's third round petition for



substantive certification was properly dismissed. Rockaway may appeal this decision, as it has, but the Council should not permit such an appeal to act as a road block to efforts to construct affordable housing.

DECISION

For all of the above stated reasons, the Council has determined that the Township of Rockaway has failed to meet the standard necessary for the granting of stay by the Council of its June 13, 2007 and September 12, 2007 Resolutions related to the Pondview site, and of the Council's November 7, 2007 decision dismissing Rockaway's third round petition. Therefore, Rockaway's motion for a stay of the Council's June 13, 2007 and September 12, 2007 Resolutions related to the Pondview site, and the Council's November 7, 2007 decision dismissing Rockaway's third round petition, is denied.

A handwritten signature in cursive script, appearing to read "Renee Reiss", written over a horizontal line.

Renee Reiss, Secretary  
New Jersey Council on  
Affordable Housing

Dated: February 13, 2008