

**IN RE TOWN OF SEACAUCUS MOTION)
FOR SCARCE RESOURCE RESTRAINTS)**

**NEW JERSEY COUNCIL ON
AFFORDABLE HOUSING
OPINION
COAH Docket – 08-2002**

This matter comes before the Council on Affordable Housing (“COAH” or the “Council”) on the motion of Fair Share Housing Center (“FSHC”) who seeks an order from the Council restraining the Town of Secaucus (“Secaucus” or “Town”) from purchasing certain parcels within the Meadowlands District of the town for open space purposes as well as restraints upon development not within the Meadowlands District. FSHC asserts that COAH should impose scarce resource restraints because the Town has a large fair share obligation that it cannot otherwise meet and because, FSHC alleges, the Town’s Mayor is working to undermine compliance with the Mount Laurel doctrine. The Town disputes these allegations. COAH heard oral argument on this motion at its May 6, 2008 meeting and referred the matter to a task force for a recommendation.

PROCEDURAL HISTORY

The Town of Secaucus received first round (1987-1993) substantive certification of its Housing Element and Fair Share Plan on October 8, 1992. Secaucus’ first round certified plan included 772 zoned and completed units of affordable housing on eight sites, with a 10 percent set-aside on each site. Secaucus petitioned COAH for second round (1993-1999) substantive certification on October 8, 1998. This plan was never certified.

On August 9, 2000, COAH issued a Report Requesting Additional Information which addressed the second round petition and the deletion of certain sites zoned to produce affordable housing in the previously certified Fair Share Plan. Secaucus’ plan addressed its 257-unit shortfall with a request for a vacant land adjustment. The request was incomplete, however, as it did not include all vacant parcels as required by N.J.A.C. 5:93-4.2.

Because the Town of Secaucus does not have complete land use control over all of the property within its boundaries, sharing such control with the New Jersey Meadowlands Commission (“NJMC”) pursuant to N.J.S.A. 13:17-1, et seq, COAH staff facilitated several meetings with representatives from the municipality and the NJMC in order to help Secaucus

address its affordable housing obligation.¹ COAH staff also continued to work with municipal representatives in order to address the issues raised in COAH's August 9, 2000 Report. COAH staff made several site visits to Secaucus and worked with the Town and NJMC staff to evaluate and recalculate the Town's request for a vacant land adjustment. Ultimately, Secaucus decided not to file a re-petition of its second round plan and instead decided to wait until COAH's third round rules were promulgated, and address its entire affordable housing obligation at that time.

Secaucus petitioned COAH on December 20, 2005 with a third round (1999-2014) Housing Element and Fair Share Plan. COAH issued a Report Requesting Additional Information on October 24, 2006, pursuant to N.J.A.C. 5:95-6.2(d). As the plan did not fully address Secaucus' 1987-2014 fair share obligation, the Town was required to make revisions to its Housing Element and Fair Share Plan, and to re-petition pursuant to N.J.A.C. 5:95-3.4. Secaucus did not provide a full response to the Report Requesting Additional Information and did not re-petition with an amended Fair Share Plan.

During this time, COAH's third round rules were appealed by several parties, including FSHC. Ultimately, the court affirmed in part, reversed in part and remanded for further review and rulemaking certain aspects of COAH's rules *In the Matter of the Adoption of N.J.A.C. 5:94 and 5:95 by the Council on Affordable Housing (and related cases)*, 390 N.J. Super. 1 (App. Div. 2007), *certif. denied*. 192 N.J. 72 (2007). Also during this time, the Appellate Division issued its decision in another consolidated appeal filed by FSHC (and others) regarding the NJMC's zoning authority and regulations. *In the Matter of the Adoption of N.J.A.C. 19-3*, 393 N.J. Super. 173 (App. Div. 2007). In that case, the court considered whether the NJMC had a constitutional obligation to provide for affordable housing, and whether the NJMC should be required to determine the Meadowland District's affordable housing obligation and restrain any development that did not provide for such housing. In light of the court's decision in *I/M/O N.J.A.C. 5:94, supra*, the court found that it would be appropriate for the NJMC to address these issues through further "rule-making proceedings to be completed promptly after COAH acts." Moreover, the court specifically noted that although it agreed with NJMC that it had "no direct *Mount Laurel* responsibilities under the FHA," the court also recognized that the NJMC "is

¹ In fact, Secaucus only exercises land use control over 10.5% of its land, and the NJMC exercises control over the remaining 89.5% of the land in Secaucus.

constitutionally obliged to do more than merely assist municipalities in the manner indicated by N.J.A.C. 19:4-3.” *Id. at 179-180.*

In response to the court’s decision, on September 19, 2007, the NJMC adopted *Emergency Restraints upon Further Development in the Meadowlands District, Instituted by the New Jersey Meadowlands Commission*. This action recognized that immediate restraints upon further development in the Meadowlands were necessary and that continued development without the provision of affordable housing would negatively impact future opportunities for affordable housing within the Commission’s jurisdiction. Specifically, these restraints directed NJMC staff to review all applications for zoning certificates received on or after May 21, 2007 to determine the site suitability for the creation of affordable housing. The review criteria provide that certain environmentally sensitive and industrial zones shall be deemed unsuitable along with small sites, hazardous sites, sites with physical limitations such as shape or existing structures, and sites that do not meet COAH’s site suitability requirements as outlined in COAH’s remanded third round rules. The restraints were revised on January 23, 2008 to apply to all zoning certificate applications filed with the NJMC which have not received zoning certificate approval as of that date.

The NJMC guidelines for Emergency Restraints state that applications for residential projects that include a 20 percent set-aside for affordable housing will be permitted to proceed, although projects creating age-restricted housing in excess of 25 percent of the municipality’s growth share obligation may be halted. Any zone without a stated density requirement will be permitted a density of 30 units per acre, which is greater than the high density residential limit of 25 units per acre. In addition, parking requirements for affordable housing units are relaxed and a three unit density bonus is available for every 25 units of affordable rental housing. Developers of non-residential projects will address affordable housing obligations through development off site or through a payment in lieu of construction.

During COAH’s third round rule revision process, in order to continue to encourage and provide guidance on the creation of affordable housing, COAH staff issued Secaucus four checklists in July 2007, concerning information which remained outstanding in relation to its third round plan. In addition, COAH continued its review and analysis of the Town’s request for

a vacant land adjustment, working with both municipal staff and representatives from the NJMC to update information relative to that request.

On January 25, 2008, the FSHC sought scarce resource restraints from both the NJMC and COAH, which would preclude the Town of Secaucus from purchasing the two properties known as the "Oak Lane" and "Farm Road" properties for open space. On February 1, 2008, the NJMC responded to FSHC's motion asserting its lack of jurisdiction outside of the Meadowlands District and over transfers of title within the District. As the proposed transactions would not require the attainment of an NJMC zoning certificate, the sale of these properties would not trigger the *Emergency Restraints* previously adopted by the NJMC.

COAH heard argument from FSHC and the Town of Secaucus at its May 6, 2008 meeting.

ARGUMENTS

FSHC's motion argues that restraints are necessary here because FSHC claims that Secaucus cannot meet its affordable housing obligation and further, that the Town's Mayor is "working to undermine" both Secaucus' and the NJMC's compliance with the *Mount Laurel* doctrine. FSHC cites recent proposals by Secaucus, which were published in the *Secaucus Reporter* on January 19, 2008, to purchase residentially zoned parcels on Farm Road and Oak Lane in order to create public walkways along the Hackensack River. Purchase of these parcels was reported to be funded by a \$3.1 million dollar grant already allocated to Secaucus by the Hudson County Open Space, Recreation and Historic Preservation fund.

FSHC asserts that the two parcels in question are zoned for low density residential development, and alleges that Secaucus' claim of legitimate public policy in the acquisition of these properties for open space is merely a "ruse" for the Town's efforts to avoid compliance with its *Mount Laurel* obligation. In addition, FSHC claims that because Secaucus' second round request for a vacant land adjustment was never formalized with a substantive certification, Secaucus' actual affordable housing obligation is uncertain and may, by FSHC's calculations, be as high as 1,990 units. Thus, FSHC argues that COAH should maintain the status quo in Secaucus so that further analysis of the Town's vacant land inventory can proceed while the third round rules are finalized, and defer to the concept that overall affordable housing obligations within the NJMC jurisdiction may require intra-District transfers. Moreover, FSHC asserts that

Secaucus cannot be relied upon to equitably satisfy its affordable housing obligation because, FSHC alleges, Secaucus is working to undermine the NJMC's land use responsibilities with discriminatory motives that subvert the implementation of sound land use planning.

Secaucus responded to FSHC's motion on February 12, 2008, and requested that the motion be denied. The Town has also provided supplemental reports from its Consulting and Environmental Engineers, as well as certifications from its Planning Consultant and the Administrator of its Affordable Housing Board. Secaucus clarifies the locations of the subject sites and provides several maps in support of the assertion that the acquisition of these properties is "part of a long-standing comprehensive municipal and county effort to complete the River Walk project..." as delineated on the Hudson County Green Map, the Hudson County Open Space, Recreation and Historic Preservation Map and the New Jersey Meadowlands Commission Open Space Master Plan's Green Map.

Specifically, Secaucus provided information that the Oak Lane site (Oak Lane 1.55 acres at Block 194, Lots 14, 15, 15.01, 16, 16.01, 17, 17.01, 18, and 18.01) is environmentally constrained to the degree that it meets neither the COAH site suitability criteria at N.J.A.C. 5:94-4.5, nor New Jersey's Residential Site Improvement Standards (RSIS) at N.J.A.C. 5:21 et seq. As such, Secaucus' information delineates the entire site as within the flood hazard area, where development is limited to 15 percent of the site due to the mean high water mark. A 50-foot riparian buffer further constrains the site. In addition, the information provided shows that existing road widths are not sufficient to satisfy RSIS standards without costly renovation and are below grade by 4 feet as required by the RSIS. This parcel is zoned low density residential, which permits development at 10 units to the acre. Due to flood hazard issues, NJMC development regulations would require first floor elevations to be 9 feet above sea level. Existing elevations are between 2 and 4 feet above sea level, requiring any residential development to create first floor living space that is between 7 and 13 feet above the current elevation. Of a total acreage of 1.55 acres, less than half an acre is unconstrained. This site was included in the vacant land inventory submitted with the Town's third round petition, and COAH staff assigned it a realistic development potential of 3.72 affordable housing units.

In addition, the Town also submitted information on the Farm Road site. The Farm Road site consists of a total of 1.62 acres at Block 203, Lots 41 (.291 acres) and 42 (1.33 acres). Block 42 is owned by Plycloth Associates and is home to an unspecified industrial use. Block 41 is

owned by Farm Road Realty, but utilized by Plycloth for a truck parking area. This site is also entirely within the flood hazard area and is limited by tidewater claims and riparian buffers. It also does not currently meet RSIS roadway requirements. A sea level low point of 2 feet would cause first floor residential space and roadways to be at least 7 feet above current elevations. Of the total 1.62 acres, slightly more than half an acre is unconstrained. This tract is located between a vacant parcel owned by Secaucus and known as the Farm Road Park, at Block 195, Lots 5 and 5.01 and a vacant parcel owned by the NJMC at Block 203, Lots 40 and 40.01. These parcels were not included in the vacant land survey included in Secaucus' third round petition of December 2005, as one was not vacant and one was not suitable due to its small size and environmental constraints.

Secaucus asserts that the FSHC is not entitled to a scarce resource order based on several factors such as inaccurate calculations of Secaucus' municipal need, inaccurate information about vacant parcels, a failure to acknowledge the Hudson County Green Plan and River Walk project and disregard for the environmental constraints of the subject sites.

Although Secaucus notes that COAH has the power to impose a scarce resource restraint, the Town argues that the sites in question are not suitable for inclusionary development and therefore should not be subject to a scarce resource order. Additionally, the Town asserts that FSHC inaccurately bases its calculation of Secaucus' affordable housing obligation on shortfalls from East Rutherford, as a result of the Xanadu project and the absorption of a neighboring municipality's obligation. Secaucus' affordable housing administrator notes that Secaucus has built, or has executed developers' agreements for a total of 439 affordable housing units, despite "the fair share obligation that has been oftentimes generated by zoning decisions made outside of Secaucus' control." For example, Secaucus notes that in its second round petition a site previously relied upon by the Town to create inclusionary development, the Villages at Mill Creek, was removed from the available stock when the NJMC purchased it to provide wetlands mitigation. The Town refutes FSHC's allegations that Secaucus has tried to shirk its affordable housing obligation, providing documentation of the Town's efforts to create affordable housing units within projects previously approved by the NJMC or to collect development fees and payments in lieu of construction from major developments within Secaucus. In sum, Secaucus criticizes FSHC for ignoring fatal environmental constraints at both properties making these sites unsuitable for inclusionary development. Instead, Secaucus asserts that their acquisition for open

space is warranted and will not result in the kind of irreparable harm contemplated by COAH's rules on scarce resource restraints.

In response, FSHC notes that Secaucus has not withdrawn its request for a second round vacant land adjustment, and thus alleges that Secaucus itself recognizes that land in the Town is scarce.²

DISCUSSION

COAH's rules provide for the imposition of scarce resource restraints and allow COAH to order such restraints under certain circumstances. Specifically, N.J.A.C. 5:95-10.1 permits COAH to "issue such order as may be necessary to require that a participating municipality take appropriate measures to reserve scarce resources that may be essential to fulfill the municipality's fair share obligation." The Supreme Court has long-recognized COAH's ability to impose such restraints. *Hills Dev. Co. v. Bernards Tp.*, 103 N.J. 1 (1986). The Court in *Hills* noted that COAH can require a municipality to preserve such resources upon a finding that "further development or use of these facilities is likely to have a substantial impact on the ability of the municipality to provide lower income housing in the future." *Id. at 62*. In the present matter, FSHC contends that land is a scarce resource in Secaucus, as demonstrated by the Town's previous request for a vacant land adjustment, and thus, the Town should be restrained from purchasing two small parcels for open space purposes. The Council disagrees.

In reviewing and evaluating the Town's request for a vacant land adjustment, as well as the merits of the present motion, the Council has determined that the Town has sufficient vacant land to meet its affordable housing obligation, and thus a vacant land adjustment will not be necessary at this time. Moreover, the Town has confirmed that it does not intend to pursue such an adjustment in connection with its third round petition for substantive certification. COAH, together with input from the NJMC and the Town determined that the Town's vacant land could accommodate almost 616 units of affordable housing. (See COAH's October 24, 2006 Report Requesting Additional Information). Secaucus' prior-round affordable housing obligation is 590 units, and COAH has projected Secaucus' approximate growth share obligation at 289 units. Moreover, based on COAH's previous analysis of the Town's affordable housing inventory, it

² After oral argument, COAH received additional correspondence, dated May 21, 2008, from the Town of Secaucus indicating that the Town will not pursue a vacant land adjustment in connection with its petition for third round substantive certification.

appears that the Town is eligible to receive credit for at least 499 units of affordable housing created in conjunction with the Town's prior affordable housing plans.³ As such, it appears that the Town will have an adequate amount of land to accommodate its affordable housing obligation for the third round. Thus, it does not appear that land is a scarce resource in need of restraints in Secaucus at this time.

In addition, the Council does not agree that restraining the Town of Secaucus from purchasing the Farm Road and Oak Lane properties is necessary to help the Town meet its affordable housing obligation. To the contrary, it does not appear that these sites would be appropriate for the development of affordable housing as the sites have severe environmental constraints. The total acreage of both parcels is approximately 3.18 acres and both are impacted by the mean high water line of the Hackensack River and accompanying 50 foot riparian buffers as required by DEP. Moreover, COAH's 2006 Report Requesting Additional Information determined an RDP for the Oak Lane parcel as 3.72 affordable housing units. (The Farm Road parcel was not included as it was not vacant at the time of petition.) As noted above, COAH review indicates that these two environmentally-constrained properties will not be needed to address the Town's affordable housing obligation.

Furthermore, the Council rejects FSHC allegation that Secaucus' desire to purchase these two parcels for open space was merely a "ruse" to avoid its affordable housing obligation. These parcels were previously included as proposed walkways on the NJMC's 2004 "Secaucus Greenway" map included in the Commission's Master Plan and on the 2008 Hudson County Open Space, Recreation and Historic Preservation Map. Moreover, an interim walkway, in the form of a paved path, exists along the water's edge of the Farm Road parcel, at Block 203, Lots 41 and 43. Indeed, COAH's review of these sites confirms that use of these properties for open space purposes is a reasonable and sound planning decision.

Finally, COAH is confident that the NJMC will work with both COAH and the municipalities within its jurisdiction to address the affordable housing obligations within the Meadowlands District. Not only has the NJMC demonstrated its willingness to provide for affordable housing through its recent adoption of the Emergency Restraints, which provide specific mechanisms to capture affordable housing opportunities, but COAH's rules also provide

³ COAH's prior report requesting additional information of 2006 indicated that the Town was preliminarily eligible to receive credit for 169 previously constructed affordable housing units, credit for 330 proposed affordable housing units and 137 bonuses.

a mechanism for the NJMC to work directly with Secaucus in addressing this need through the Affordable Housing Partnership Program at N.J.A.C. 5:97-3.16(e), which states that “[t]he New Jersey Meadowlands Commission (NJMC) is authorized to address a portion of the municipal affordable housing obligation generated by growth occurring within the 14 municipalities in its jurisdiction in the form outlined in N.J.A.C. 5:97-6.13, the Affordable Housing Partnership Program. The NJMC is encouraged to adopt regulations consistent with these rules in order to assist the 14 municipalities in its jurisdiction in addressing municipal affordable housing obligations. The NJMC may address these obligations in accordance with N.J.A.C. 5:97-6.13 or in another manner consistent with these regulations.”

The NJMC has committed to plan and zone for affordable housing in a manner that facilitates the ability of its constituent municipalities to address their obligations. As such, the NJMC is drafting new interim policies and proposed amendments to its regulations that parallel COAH’s recently adopted regulations covering the period 1999-2018. COAH understands that these proposals will be considered by the NJMC Board of Commissioners in the near future. Accordingly, COAH looks forward to working with the NJMC, and the municipalities within its jurisdiction, to help meet the affordable housing obligations within Secaucus and the Meadowlands District at large.

Given all of the above-noted facts, it does not appear that land is a scarce resource in need of restraints, nor that any request for a vacant land adjustment is warranted at this time. Based on these facts, the Council will not consider a request for a vacant land adjustment from the Town of Secaucus in connection with the Town’s petition for third round substantive certification.

DECISION

For all of the foregoing reasons, COAH denies FSHC’s request to impose a scarce resource restraint on Secaucus at this time.

Date: June 11, 2008



Renee Reiss, Council Secretary

Council on Affordable Housing