

**IN RE MOTION TO WAIVE PHASING ) NEW JERSEY COUNCIL ON**  
**REQUIREMENTS FOR CONSTRUCTION ) AFFORDABLE HOUSING**  
**OF AFFORDABLE UNITS BY DEVELOPER )**  
**LENNAR IN EDISON TOWNSHIP, ) OPINION**  
**MIDDLESEX COUNTY. ) COAH DOCKET #08-2004**

This matter comes before the Council on Affordable Housing (“COAH” or the “Council”) on the motion of U.S. Home Corporation d/b/a Lennar (“Lennar”) seeking a waiver of COAH’s rules which require that the affordable units in an inclusionary housing development be constructed pursuant to the phasing schedule outlined in COAH’s rules. Edison Township opposes this request as it is concerned that the affordable housing will not be constructed in a timely manner, and therefore may potentially leave the Township with a shortfall in its affordable housing plan. This matter was presented to the Council on the papers at its June 11, 2008 meeting. Thereafter, at a special Council meeting held on July 29, 2008, the Council voted to grant the waiver in part, and deny the waiver in part, and ordered further action as set forth below. This opinion memorializes the Council’s decision.

**PROCEDURAL HISTORY**

On December 2, 2003, Edison received a final judgment of compliance from the court, which approved the Township’s Housing Element and Fair Share Plan. As a result, Edison was directed to adopt an ordinance rezoning Lennar’s property to permit the construction of up to 300 units of multi-family housing, of which 15 percent (or 45 units) were to be affordable to persons of low or moderate income. Pursuant to the court’s order, Edison adopted an ordinance and granted the approvals for this project. The ordinance required the affordable housing to be constructed pursuant to the phasing schedule set forth in COAH’s second round rules.<sup>1</sup>

On May 14, 2007 Edison filed a petition for third round substantive certification with COAH. Prior to filing the present motion, Lennar filed a similar motion seeking a waiver of COAH’s phasing requirements, which was subsequently withdrawn. Instead, Lennar filed a Motion in Aid of Litigant’s Rights with the court

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<sup>1</sup> The phasing schedule set forth in N.J.A.C. 5:93-5.6(d) is identical to that set forth in COAH’s current rules at 5:97-6.4(d).

seeking similar relief. On March 7, 2008, the court denied Lennar's motion finding that the issue should be determined by this Council. Accordingly, the present motion was filed.

### **FACTUAL BACKGROUND**

Lennar is the developer of Centre Place at Edison Condominium Project ("Centre Place" or "Project") formerly known as College Park at Edison Condominiums and Beechwood at Edison. Lennar took title to the land comprising of Phase I of the project on December 8, 2005 and to Phase II of the project on February 1, 2008. Centre Place is comprised of 285 residential units to be constructed in two phases, made up of 198 condominium flats and 87 market rate townhouses. Of the 198 flats, 45 will be affordable rental units. The flats will be constructed through nine separate buildings, with each building containing 22 garden-style homes or "flats," and will provide five affordable units within each garden building. When Lennar originally filed the present motion it had completed a total of 48 townhouses and 44 garden homes, including 10 affordable units. Since that time Lennar has sold additional townhouses and garden homes, and therefore expects that a total of 78 townhouse units and 48 garden style units will be closed upon by September 30, 2008. As such, Lennar is concerned that it will soon reach the 50 percent marker for completed market rate units, thus requiring that 50 percent of the affordable units also be constructed under COAH's rules.

N.J.A.C. 5:97-6.4(d) requires that affordable units within inclusionary developments be constructed pursuant to the following schedule:

Percentage of market rate units completed	Minimum percentage of low and moderate income units completed
25	0
25+1	10
50	50
75	75
90	100

Lennar entered into an agreement with Beechwood to purchase the residential components of its project on June 2, 2005. Lennar commenced work on the property prior to taking title in December 2005. In September 2005, while excavating for installation of storm sewer lines, unexploded ordnance<sup>2</sup> was encountered and required remediation. Lennar undertook the work necessary to remedy the ordnance. In April and May 2007, after all the ordnance had been removed, the New Jersey Department of Environmental Protection (“NJDEP”) requested additional information based on a review of various environmental reports and required further soil testing from Lennar.

Between April and June 2006, Lennar was processing an application for registration and public offering statement with the DCA to allow Lennar to proceed with the sale of the units, and registered with DCA on June 28, 2006. In August 2006, Lennar retained a firm to conduct soil sampling, and based on the test results all sales on the property were stopped on August 27, 2006. Thereafter, on September 8, 2006, Lennar signed a Memorandum of Agreement (“MOA”) with the NJDEP. The firm that had conducted the soil sampling produced a work plan for cleanup and remediation of the site, which was approved by DEP in October 2006. Cleanup commenced in February 2007. Currently cleanup is still ongoing, but is substantially complete. To date Lennar has spent \$3,426,286 on cleanup and remediation efforts, and an additional \$250,000 is needed to complete the cleanup.

Although Lennar had obtained contracts and/or deposits for 19 townhouses and 3 garden flats, prior to the August 2006 discovery of soil contamination, at that point all sales were stopped. While many of the purchasers were willing to wait and see when closing might take place, ultimately all but five of the purchasers terminated their contracts or requested refund of their deposits. The five remaining on contract obtained a reduction in their purchase prices.

Lennar was able to restart construction of homes in May 2007 and reopen for sales on August 11, 2007, at which point the real estate market had slowed

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<sup>2</sup> **Unexploded ordnance** are explosive weapons (bombs, bullets, shells, grenades, land mines, naval mines, etc.) that did not explode when they were employed and still pose a risk of detonation, potentially many decades after they were used or discarded.

dramatically and prices had plummeted. Lennar states that due to the decline of the housing market its profits and stock price have fallen and sales have slowed. Lennar has been able to sell 78 townhouses, but the average sales price has been 10 percent less than the average sales price of the earlier lost contracts. In addition, the garden homes have taken three times as long as the townhouses to sell. Lennar is able to deliver the townhouses in about four months, but the garden homes take about eight months to deliver.

In light of these facts, Lennar asks that COAH's phasing schedule for the construction of the affordable units in this project be modified as follows:

1. To allow the market-rate townhouses to be excluded from the percentage of market-rate units completed in calculating the required percentage of completed affordable units, so that the garden homes would be viewed separately from the townhouses. The garden homes would be viewed as a separate development project under this scenario, which would be comprised of 198 total units, 45 of which would be affordable, providing a 23 percent set-aside; or
2. Allow Lennar to adhere to a schedule based upon the provision of 5 affordable units in every garden home building, and only build the affordable units as the market rate flats are sold and built.

### ARGUMENTS

Lennar asserts that if COAH's current phasing schedule is applied without modification, Lennar will not be able to complete or convey the 121<sup>st</sup> home until a total of 23 affordable units are built, which would have to be built concurrently with the 51 market rate garden homes as they are integrated together. Lennar contends that this will take an additional two years to do. Lennar states that it has incurred extraordinary costs, including \$6.9 million in clean up costs for on site contamination and carrying costs that it was not responsible for, and had no legal obligation to assume. Lennar initially anticipated approximately \$7.5 million in profits from the project, and now, with this waiver, hopes to limit its losses to approximately \$20 million. Lennar explains that the townhouse portion of the project is more reliable than the garden home portion, and is therefore more likely to provide the most reliable internal subsidy for the creation of the affordable units, as the townhouses can be delivered faster than the garden homes. Thus, Lennar seeks a waiver of COAH's phasing requirements.

Lennar relies on the Council's In Re South Brunswick Twp., Middlesex County, Waive Phasing Requirements, COAH Docket No. 91-311, p.1 (January 8, 1992). In that case, the Council explained that "[t]he rule is designed to allow a developer some cash flow before absorbing the losses associated with the low and moderate income units." Lennar explains that it has commenced construction of the affordable units at the same time as the market rate units, and continues to build the homes as approved. However, Lennar argues that the market rate units must not only create an internal subsidy to fund the 45 low and moderate income homes, but also the unexpected financial burden of the environmental cleanup. Further, Lennar states that had it not done the cleanup, the development would not have been built at all. Lennar also asserts that it is not seeking to avoid its obligation to construct affordable homes, but rather, is seeking a waiver to modify the phasing schedule for the construction of those units to facilitate completion of the entire development. As such, Lennar contends that it can meet all of the waiver criteria set forth in COAH's rules.

Lennar argues that the waiver it seeks will foster the production of low and moderate income housing, as the same would allow Lennar the best possible chance of completing the project because the waiver would allow Lennar to continue building the more desirable market-rate townhouses, which can also be built more quickly. Lennar asserts that COAH has previously granted waivers from its phasing requirements in order to facilitate a developer's ability to proceed with its project and thereby provide affordable housing. In support of this argument, Lennar cites to the Council's decision in The matter of Parkside Realty Associates, L.P., COAH Docket No. 95-709, August 2, 1995, where the Council granted a waiver from 5:93-5.6(d) after the developer argued that it could not meet the strict requirements of the rule because of financing issues. In that case the developer proposed to construct 10 percent of the affordable units upon completion of 47 percent of the market rate units. COAH granted the waiver stating that it would foster the production of affordable housing.

Lennar argues that in this case, that, given the state of the real estate market, failing to modify the phasing schedule would force Lennar to artificially restrict sale of the market rate units at a time when sales are already depressed. Thus, Lennar argues that it should not have to halt construction and sale of the townhouses, which are a

more reliable source of revenue for the project, or continue to build the garden homes in advance of sales, as doing so would jeopardize the viability of the entire project.

Lennar also argues that the waiver fosters the intent of COAH's rules by allowing Lennar to respond to market demand and create the internal subsidy necessary to fund the affordable housing obligation. Lennar argues that the intent of COAH's regulations is to strike a balance between the acknowledged need for a funding source for the affordable units and the need to assure that the affordable units are actually constructed. Lennar relies on In Re South Brunswick Twp., for support of this argument. In that case, COAH granted the inclusionary developer a waiver from strict compliance with the phasing schedule. In that matter, the developer had already built 82 of 196 market rate units and 12 low and moderate income units. In granting the waiver COAH considered the various goals of the regulation, and specifically, noted the need to allow the developer some cash flow before absorbing the losses associated with the low and moderate income units while ensuring that the developer could not escape the responsibility to build the units. COAH based its decision in part on the design of that development, and stated that while the phasing schedule did not conform to the exact letter of the regulations, it addressed the spirit of the rule.

Lennar also asserts that strict application of the phasing schedule would cause an unnecessary hardship for Lennar. Lennar notes that although it has previously developed the project in accordance with or ahead of the phasing schedule set forth in COAH's rules, there will clearly be a financial hardship if Lennar is required to build the garden homes when there is no demand for them.

Finally, Lennar submits that COAH has recognized the appropriateness of granting a waiver from the phasing schedule in similar circumstances and COAH should grant Lennar the requested relief. Lennar argues that it is committed to completing the entire project, including the affordable units, as demonstrated by the costs it has already incurred as a result of the environmental cleanup. In addition, Lennar also notes that it has laid all the foundations of all the garden home buildings and has completed the sub slab plumbing for some of the garden buildings. Lennar has already made significant investment in the actual construction of the garden homes, and is seeking a relaxation of

the phasing schedule to allow construction to proceed without further interruption or delays that would threaten the viability of the project.

In response to Lennar's present motion, the Township asserts that Lennar is essentially requesting a waiver due to the current state of the real estate market, and as such, Lennar's situation is not unique and does not warrant the waiver requested. Edison also argues that Lennar does not meet COAH's waiver requirements because the waiver does not foster the production of affordable housing as it impedes Edison's ability to produce low and moderate income units in compliance with its COAH obligation. In addition, the Township asserts that Lennar's request does not foster the intent of COAH's rules as the production of the affordable units pursuant to Lennar's proposed modifications of the phasing schedule would be speculative. Further, Edison asserts that Lennar has not met its burden of demonstrating that the strict application would create an unnecessary financial hardship. In support of this argument the Township notes that, as of December 14, 2007, Lennar had sold 75 percent of the townhouses in Phase I of the project. Thus, Edison does not understand how the delivery of affordable units in accordance with the schedule presents an unnecessary financial hardship.

The Township is also opposed to Lennar's concept of delaying its affordable housing obligation until it has finished building the garden style condominiums. Thus, the Township notes that although Lennar states that it will build five units in each of the nine buildings, in reality Lennar will build them as the market dictates. The Township maintains that Lennar does not want to build the garden homes because the market has slowed and not because it does not have the financial resources to build the apartment units. The Township does not believe that this is the unnecessary hardship contemplated by COAH's waiver provisions.

Edison also argues that the cases relied upon by Lennar are not on point with the facts in the current matter. Edison notes that in Parkside Realty case, the municipality consented to the waiver of the phasing schedule requirements after learning that the developer needed such a waiver in order to secure a mortgage commitment necessary to finance construction of the affordable units. Edison also distinguishes the South Brunswick case, noting that both the developer and the municipality in that matter requested the waiver to permit the plan to deviate from the phase in requirements of

N.J.A.C. 5:92-10.4(c). There, the developer's plans were approved by the municipality prior to its receipt of certification from COAH. The Council granted the waiver based upon "grandfathering" principles and found that the waiver supported the spirit of COAH's rules.

Finally, the Township argues that the basis for Lennar's motion, that it needs to derive income from the market rate units to make the affordable unit completion less financially draining, is flawed. The Township asserts that during the oral argument before the court on Lennar's Motion in Aid of Litigant's Rights, the court noted that Lennar could complete over 118 market rate units before it needs to complete any more affordable units. Thus, the Township contends that Lennar has the ability to complete all of the more economically attractive market rate townhouse units and up to 31 more market rate garden apartment units.

### **DISCUSSION**

The Council's rules provide for a construction phasing schedule for affordable housing to be constructed within an inclusionary development. The purpose of these rules is to assure that the affordable units in such developments are built in a timely manner, while also recognizing the need for some internal subsidy for the creation of those affordable units from the revenue generated by the market rate units. Accordingly, COAH's rules provide that once an inclusionary development has built 50 percent of the market rate units, 50 percent of the affordable units should also be constructed. In this case, Lennar is very close to meeting that 50 percent mark, but has serious concerns about its ability to provide the commensurate affordable housing required by COAH's rules. Additional information from Lennar indicates that it expects to close on 78 townhouses, 48 garden flats, and fifteen affordable units by September 30, 2008. As such, the Council is aware that a timely resolution of this matter is necessary in order to assure that affordable housing opportunities will not be lost. Likewise, the Council is also mindful of the Township's concerns that a waiver of the affordable housing construction schedule may create a shortfall of such housing within the Township's plan.

COAH's rules at N.J.A.C. 5:96-15.1 and -15.2 provide for a waiver of COAH's rules if the same would foster the production of low and moderate income



housing; foster the intent, if not the letter, of COAH's rules; and if strict application of the rules would cause an unnecessary hardship.<sup>3</sup> As Lennar has noted, COAH has previously waived the phasing schedule set forth in its rules for the construction of affordable units in inclusionary developments. See In re South Brunswick Twp, supra and Parkside Realty, supra. However, the circumstances in those cases were not the same as those presented by Lennar's request as the waiver requests in both those cases had been supported by the municipalities. Moreover, the waiver in the South Brunswick case was granted because South Brunswick had approved the site plan prior to COAH's adoption of its phasing requirements. As such, the Council waived the application of the phasing requirements pursuant to a policy of "grandfathering" developments which had received approvals prior to the adoption of its rules. Nonetheless, those decisions do provide some insight on the present waiver request. As the Council stated in the South Brunswick case, "[t]he rule is designed to allow a developer some cash flow before absorbing the losses associated with the low and moderate income units. However, the intent of the rule is also to ensure that a developer cannot escape his or her responsibilities to the poor." These principles guide the Council's determination again.

In the present matter, the Council believes that some flexibility in the application of COAH's rules is necessary to see that the project is completed and the commensurate affordable housing is created. In this regard the Council finds that strict application of its rules would create a financial hardship if Lennar were required to construct the affordable housing in its inclusionary development pursuant to the schedule set forth in COAH's rules. At the moment, there appears to be less of a demand for the market-rate flats, than for the townhouse units. However, the design of this development requires that additional market-rate flats be built in order to provide the necessary affordable units. Notwithstanding the foregoing, the Council agrees with the Township that the waiver proposed by Lennar does not provide sufficient assurance that the affordable units will be built.

In order to assure that the affordable units will be constructed, COAH will waive its phasing requirements for the construction of the affordable units, however, in so

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<sup>3</sup> COAH's rules also require that the municipal affordable housing plan provides for a mix of housing options, but that is not at issue in this matter.

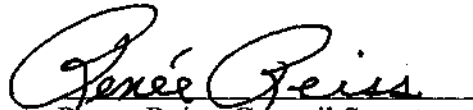
doing, Lennar will also be required to deposit funds into a special escrow account to be created by the Township to guarantee the ultimate creation of affordable units within the Township. The amount deposited into this special fund shall be an amount equal to the number of affordable units required in accordance with the phasing schedule set forth at N.J.A.C. 5:97-6.4(d), as determined through the issuance of certificates of occupancy for the market rate units, multiplied by the amount of the appropriate third round payment-in-lieu amount for an affordable unit for COAH Region 3 as set forth in COAH's rules at N.J.A.C. 5:97-6.4(c)3. It should be noted, however, that these funds will not be considered a "payment-in-lieu," and thereby alleviate the need to build the affordable units. Rather, the developer shall continue to have an obligation to construct the affordable units on-site pursuant to the court-approved Fair Share Plan. This waiver will allow Lennar to continue the construction and sales of the market rate units within the Centre Place development, specifically the townhouse units, without the requirement, and potential economic burden, of building additional market-rate flats at this time. As such, as Lennar builds the garden flat buildings, and the required affordable units included in those buildings, the Township shall return to Lennar the corresponding per-unit payment previously paid into the special escrow fund, to be determined through the issuance of certificates of occupancy for the buildings containing the affordable units. Finally, an update of the status of this project and affordable units provided therein shall be provided to the Council in the Township's upcoming third round petition. At that time, staff will evaluate the site in order to determine if the development continues to provide a realistic opportunity for the creation of affordable housing.

The Council believes that the remedy fashioned by the Council in this matter will provide Lennar with the necessary flexibility required to keep its project a viable one, while at the same time, providing the Township adequate assurance that its affordable housing obligation will continue to be met through Lennar's project, as required by its court-approved plan. Thus, the Council believes its decision here, while not strictly adhering to the letter of its rules, will nonetheless further the intention behind its rules, namely to create affordable housing. Moreover, the Council believes its decision will foster the production of affordable housing by allowing Lennar to proceed with its inclusionary development and ultimately create 45 affordable units in Edison.

CONCLUSION

Therefore, for the foregoing reasons, the Council hereby denies the waiver request, in part, and grants the waiver, in part. The Township shall provide a draft resolution for the creation of the special escrow account for review by COAH staff as soon as possible. A status update shall be provided to the Council at its August 2008 meeting.

DATED: August 13, 2008.

  
Renee Reiss, Council Secretary