

IN RE PETITION FOR SUBSTANTIVE) COAH DOCKET NO. 08-2011
CERTIFICATION FILED BY WINSLOW TOWNSHIP,)
CAMDEN COUNTY,)
MOTION FOR SCARCE RESOURCE RESTRAINTS)
))
) OPINION

This matter comes before the Council on Affordable Housing (COAH or Council) by way of motion filed by Taylor Woods, LLC (Taylor). Taylor’s motion asks the Council to issue an Order restraining Winslow Township from allocating available or future sewer treatment capacity and to receive priority to any available sewer capacity in the Township.

PROCEDURAL HISTORY

Winslow Township received first round certification on November 6, 1987 with a precredited need of 455 units. On October 11, 1995 Winslow received second round certification with an obligation 455 units (378 new construction and 77 rehabilitation units). The certified plan included a total of 444 new construction credits and 11 units that had been previously rehabilitated pursuant to COAH rules.

On December 19, 2005, Winslow Township petitioned COAH with a Third Round Housing Element and Fair Share Plan. Under the original Third Round rules set forth in N.J.A.C. 5:94, Winslow’s fair share consisted of a 44-unit rehabilitation share, a 394-unit prior round obligation and a growth share obligation of 250 affordable units. Winslow submitted a draft growth share ordinance with its third round petition which was not adopted.¹

¹ The Township states it did not adopt the proposed ordinance because at the time of Winslow’s substantive certification for the second round they had more credits than needed to address the assigned affordable housing need and because the Township believed that the growth share

In response to the Appellate Court's January 25, 2007 decision (*In the Matter of the Adoption of N.J.A.C. 5:94 and 5:95*, 390 N.J. Super. 1, 56 (App. Div. 2007), certif. denied 192 N.J. 72 (2007)), COAH recalculated each municipality's cumulative fair share obligation. The result is that Winslow Township currently has a 92-unit rehabilitation share, a 377-unit prior round obligation and a projected growth share obligation of 638 affordable units.

Winslow Township has a land area of 58.3 square miles, 81 percent of which is located in the State-designated Pinelands Area. Pinelands Management Areas in Winslow include, from largest to smallest land area, Rural Development Area, Regional Growth Area, Agricultural Production Area, Forest Area, five Pinelands Villages and Preservation Area. In accordance with the PCMP, a municipality may not accept an application for development until the developer first obtains a Certificate of Filing (CF)² from the Pinelands Commission.

Since 2005, the Pinelands Commission has issued 18 Certificates of Filing (applications) for major development in the Winslow Regional Growth Area, including eleven requests to develop housing, including the Taylor Woods application and seven for non-residential development. None of the eleven residential applications except for that submitted by Taylor include affordable housing. Taylor Woods received an Inconsistent Certificate of Filing on June 5, 2008. As of September 10, 2008, Winslow has approved sewer allocation for five residential developments, which total 142,500 gpd. As of the same date there are four projects seeking sewer allocation which have not been approved by Winslow. The total sewer allocation requested by these projects is 29,740 gpd.

It should be noted that on December 20, 2005 Winslow Township adopted a Resolution Establishing a Waiting List for Sanitary Sewer Capacity. Then, on February 27, 2007 Winslow adopted a Resolution Approving Revised Sewer and Water Allocation Policy, which states that

ordinance needed to be reviewed and approved by COAH prior to adoption by the Township. (See Bell Certification at ¶17)

²N.J.A.C. 7:50-4.34 provides that no local permitting agency may determine any application for development complete unless it is accompanied by a Certificate of Filing issued by the Pinelands Commission. The certificate may identify any inconsistencies of the proposed development with the PCMP and local ordinances. A CF is not an approval. Upon approval by the local entity, the Pinelands Commission receives notice of the local action and issues a letter indicating whether or not the approval raises issues with respect to the PCMP. Only when all issues are resolved may the development go forward.

Winslow has requested an additional 188,000 gpd of sewer capacity which is pending before the DEP and that Winslow is trying to increase its sewer allocations through the decommissioning of the Sicklerville Wastewater Treatment Plant. In the meantime, Winslow will require that all applicants seeking authorization for sanitary sewer must follow the revised sewer allocation policy which, among other things, limits the initial allocation of sewer to any applicant at 7,500 gpd.

The Township has had a development fee ordinance in effect since 2006. That ordinance requires payments of one percent and two percent of the equalized assessment value of residential and non-residential development, respectively. Winslow has not filed monitoring reports concerning its affordable housing trust fund. The Township has not submitted a Third Round spending plan to COAH.

TAYLOR'S MOTION

On August 1, 2008, Taylor submitted a motion to COAH requesting that the Council impose a scarce resource restraint upon Winslow's sewer capacity. Taylor proposes to construct a 264 unit inclusionary project in Winslow on a site that is approximately 100 acres. Of the 264 units, 15 percent or 40 residential apartments will be set aside for low and moderate income households. In its papers, Taylor maintains that the basis for Winslow's first and second round certifications were existing affordable units and that Winslow has not affirmatively created any affordable units in furtherance of its substantive certification. Additionally, Taylor states that in the Third Round petition submitted to COAH in accordance with the Third Round Rules adopted in 2004, Winslow proposed to meet its affordable housing obligation by means of a blanket growth share ordinance and the carrying forward of 82 surplus units from its prior round substantive certification.

Taylor submits that as a result of the 2007 Appellate Division decision, Winslow will be required to submit a new Third Round petition to COAH by December 31, 2008 which will be required to demonstrate a realistic opportunity for the creation of 638 affordable units. Taylor argues that as of the date of this motion, Winslow's zoning code and Fair Share plans do not provide for any inclusionary zoning within the municipality's borders and that its development

will provide new affordable units in an inclusionary context.

Taylor explains that it will include an affordable component in its development plan without the additional density bonus mandated by the Appellate Division. Taylor's site is within the Pinelands Regional Growth Area and is located in the Cedarbrook sewer service area. The Cedarbrook sewer service area is a public sewer area which has its effluent controlled by the Camden County Municipal Utilities Authority (CCMUA). Taylor states that since 2004 there has been a *de facto* sewer moratorium in effect for the Cedarbrook sewer service area. Currently the Department of Environmental Protection (DEP) is considering the release of an additional 188,000 gallons per day (gpd) of sewer capacity for the Cedarbrook service area. Taylor argues that in light of the foregoing, it is clear that sewer is a scarce resource in Winslow. Taylor states that pending the approval of the 188,000 gpd of sewer treatment capacity, Winslow has adopted a policy of sewer allocation and authorization which allocates a maximum of 7,500 gpd of sewer treatment capacity to any given applicant at one time and Winslow does not give priority to inclusionary projects.

Taylor argues that its project requires 74,625 gpd of sewer capacity, and that in order to preserve sufficient public sewer capacity, COAH should restrain Winslow from depleting available sewer treatment capacity further. Taylor further maintains that it should get priority to the 188,000 gpd that will be made available once DEP grants the pending Water Quality Management Plan (WQMP) amendment. Taylor submits that it is not seeking a density bonus in exchange for the 15 percent set-aside of affordable housing. Taylor maintains that it will construct the affordable units without any zoning obligation to do so in consideration of the ability to develop the Taylor Woods Project promptly.

In furtherance of its position, Taylor argues that COAH should use its authority to impose scarce resource restraints on available or future sewer treatment capacity within Winslow. Taylor states that even if the pending WQMP amendment is granted, Winslow recognizes that it will not have enough capacity to address the current existing demand for sewer capacity. Taylor argues that the Winslow sewer allocation policy frustrates the municipality's *Mount Laurel* obligation as it does not prioritize sewer treatment for inclusionary projects.

Taylor argues that Winslow has a Third Round affordable housing obligation of 638 units

and lacks the sewer treatment capacity to meet that obligation. In addition, Winslow does not have a compliance plan that demonstrates its ability to achieve the Third Round obligation. Absent scarce resource restraints against Winslow for all remaining public sewer, the ability of Winslow to meet its constitutional requirements could be lost or delayed.

Taylor states that such resources are considered scarce if, when diverted to non-*Mount Laurel* uses, the ability to provide for the production of affordable units within the municipality would be undermined. Accordingly, in Winslow, such a restraint in Winslow is necessary even if the WQMP amendment is granted.

WINSLOW'S REPLY

Winslow Township submitted opposition to Taylor's motion on August 21, 2008. The Township states that 80 percent of its land area is located within the Pinelands and that at the present time there is no available capacity for additional sewer discharge. Winslow further states that it will have a compliance plan ready for public hearing in the early part of November 2008. Winslow intends to seek a durational adjustment pursuant to N.J.A.C. 5:97-5.4 and has begun that process in anticipation of petitioning COAH by December 31, 2008. Winslow submits to COAH that Taylor has not expressed an interest to be included in Winslow's Third Round plan and the motion submitted to COAH is the first Winslow has heard of Taylor's interest in providing affordable units. Winslow further argues that as it will be submitting a Third Round plan to COAH in accordance with COAH's rules that COAH should wait until the Township completes its plan to issue a scarce resource restraint.

Winslow argues that as of the date of its submission to COAH of the motion for a scarce resource restraint, Taylor has not submitted a plan to the Winslow Township Planning or Zoning Board for consideration.³ Further, Winslow notes that of the 188,000 gpd pending before the DEP, 110,000 gpd has already been allocated to the Cedar Brook development pursuant to a settlement agreement. The remaining 78,000 gpd and a method for disbursement of that capacity have been addressed by a Resolution of the Township Committee. Given this, Winslow does not dispute that sewer is a scarce resource, but it is Winslow's position that Taylor's motion is

³ As of the date of this motion decision Taylor has submitted an application to Winslow which is pending before the Township Planning Board.

premature and that Taylor does not have standing to seek restraints and a priority allocation.

CEDAR BROOK'S MOTION TO INTERVENE

Cedar Brook Properties LLC (Cedar Brook) submitted a motion to intervene on dated August 29, 2008. Cedar Brook is the owner and developer of a 274-lot subdivision in Winslow. In December 2004 and in January 2005 the Winslow Township Zoning Board granted final major subdivision approval for the development. At that time there was no requirement for the provision of low- or moderate- income housing. As a result of the *de facto* sewer moratorium in Winslow, Cedar Brook has been unable to proceed with its development. Due to litigation commenced by Cedar Brook against Winslow, the Township Council adopted a Resolution creating a waiting list for sewer allocation. As a part of the settlement to the litigation, Cedar Brook was granted first priority on the waiting list, and will receive sewer capacity once it is available. The Cedar Brook project requires 82,000 gpd of capacity.⁴

TAYLOR'S REPLY

In response to Winslow's opposition, Taylor submitted papers dated September 2, 2008 in which it argues that a scarce resource restraint is warranted because the town acknowledges that it has a lack of available sewer and a significant outstanding affordable housing obligation. Taylor points out Winslow's position relative to its *Mount Laurel* obligations as set forth in the certification of Brett Ingram, P.E., "[I] do not dispute that the "Winslow Allocation Policy" does not afford a priority to inclusionary projects, however it is my understanding that until such time as the Third Round obligations are submitted and approved, there has not been a need to include such obligations since the Township has met their prior Round I and Round II obligations." See Ingram Certification at ¶17. Taylor argues that the town's position ignores the potential for affordable housing within its borders.

Taylor further argues that as the developer of an inclusionary project, Taylor is entitled to

⁴ Neither Taylor nor Winslow object to Cedar Brook's motion to intervene or to Cedar Brook being entitled to its full allocation of 82,000 gpd.

priority over available sewer capacity. Taylor points out that it is willing to provide affordable units without any density bonus, and that Winslow is resisting its attempts to provide affordable housing. Further, Taylor states that it filed site plans with Winslow on August 27, 2008, and that, as a by-right development, it will be approved by all reviewing agencies.

DECISION

The purpose of COAH granting a scarce resource restraint is to ensure that “a participating municipality takes appropriate measures to reserve scarce resources that may be essential to fulfill the municipality’s fair share obligation.” N.J.A.C. 5:96-12.1. In the instant case, COAH scheduled oral argument on the motion for September 22, 2008. At the September 22, 2008 meeting COAH imposed a temporary scarce resource restraint against Winslow’s ability to allocate sewer capacity, preventing the municipality from taking any action that would diminish the existing sewer capacity available in the municipality, but exempting single and two family homes. Additionally the resolution granted Cedar Brook’s motion to intervene. See Resolution Imposing a Temporary Scarce Resource Restraint Upon Winslow Township, Camden County, COAH Docket No. 08-2011.⁵

After consideration of the papers filed as well as oral argument, COAH finds that it is appropriate under the facts of this case to restrain Winslow from issuing sewer allocation pending COAH’s grant of substantive certification of a Third Round Housing Element and Fair Share Plan, to be submitted by December 31, 2008. COAH’s power to preserve resources through a scarce resource restraint originates from *Hills Dev. Co. v. Bernards Tp.*, 103 N.J. 1, 61-63 (1986) (*Hills*). In that case, the court stated that “where infrastructure capacity is limited, sewerage or other resources may be exhausted, precluding future *Mount Laurel* development. The objective of these conditions is to prevent such use of scarce resources.” *Hills* at 25. The Court went on to state, “We have concluded that the Council has the power to require...that the applying municipality take appropriate measures to preserve scarce resources, namely those resources that will probably be essential for the satisfaction of its *Mount Laurel* obligation.” *Id.*

⁵ The Resolution does not exempt the Cedar Brook development and as a result Cedar Brook submitted a motion to COAH dated October 9, 2008, requesting a waiver from the temporary scarce resource restraint. That motion will be considered by the Council separate and apart from the current matter.

at 61-63.⁶

As discussed previously, Winslow, despite its *de facto* sewer moratorium, has been allocating sewer capacity in conformance with its Resolution Approving Revised Sewer and Water Allocation Policy for the Township of Winslow, Resolution Number R-87-2007, and attached Township Policy, both adopted February 27, 2007. As per the policy, an applicant requesting sanitary sewer must include, among other items, all resolutions of the Winslow Township Planning/Zoning Board as required within the Completeness Checklist. The Completeness Checklist must be deemed administratively complete in order to proceed through the allocation process. As of September 10, 2008, Winslow had allocated 142,500 gpd of sanitary sewer (including the sewer reserved for Cedar Brook). When added to the sewer needed by the Taylor inclusionary development (74,625 gpd) the amount already allocated exceeds the 188,000 gpd being requested from DEP. Further, there are additional applicants that have requested sewer which total 29,740 gpd of capacity.

As evidenced by the amount of committed sewer capacity, it is clear that Winslow is allocating its limited sewer capacity resources and is not providing for affordable housing as part of that commitment. It is a very real possibility that absent the Council enforcing permanent restraints upon the Township there will be no sanitary sewer available to service Winslow's affordable housing obligation. Under these circumstances, if COAH does not act to restrain further sewer allocation, the ability of the Township to provide any affordable housing will be lost.

The Council disagrees that Taylor does not have standing to bring its motion. COAH's rules allow any interested person to apply to the Council for the issuance of a scarce resource restraint. See N.J.A.C. 5:96-12. The Council notes that Taylor has expressed readiness to move forward expeditiously with an inclusionary family rental project. The Council finds it appropriate, however, to provide the Township the opportunity to develop a compliant Housing Element and Fair Share Plan by December 31, 2008. Therefore, regarding Taylor's request for priority, the Council finds it is not appropriate at this time to grant priority to Taylor and denies

⁶ For a detailed discussion of COAH's authority to impose scarce resource restraints see the Council's Opinion in Morris County Fair Share Housing Council, et al. v. Boonton Township, et al., COAH Docket No. 86-2.

Taylor's request without prejudice. However, Taylor may reintroduce its motion at any time after the submission of Winslow's third round Housing Element and Fair Share Plan.

As such, Winslow is restrained from allocating sewer capacity until such time that the Council grants substantive certification to Winslow's third round Housing Element and Fair Share Plan. The Winslow Planning Board is restrained from acting upon any development applications other than developments proposed to include affordable housing. Single and two family residences shall be exempted from this scarce resource restraint. Based on the facts submitted to COAH, Taylor is also exempt from the scarce resource restraint. Any other affordable housing developer that seeks an exemption from the scarce resource restraint may move before COAH for relief until such time as Winslow receives third round substantive certification.

Kevin Paine
Council Secretary

Dated: *October 29, 2008*