

IN RE ROCKAWAY TOWNSHIP, MORRIS)	NEW JERSEY COUNCIL ON
COUNTY, MOTION TO STAY COAH FROM)	AFFORDABLE HOUSING
REQUIRING REFUND OF DEVELOPMENT)	
FEES AND TO ALLOW ROCKAWAY TO)	DOCKET NO. 09-2108
CONINUE TO COLLECT DEVELOPMENT)	
FEES)	DECISION

On December 5, 2008, the New Jersey Council on Affordable Housing (the "Council" or "COAH") received a motion from Rockaway Township, Morris County ("Rockaway" or "Township") seeking a stay of the actions identified in a November 25, 2008 letter from COAH to Rockaway. In the letter, COAH required Rockaway to refund all residential and non-residential development fees collected after November 7, 2007 and to cease collection of residential development fees. COAH also stated that it would direct the remaining balance in the Township's Affordable Housing Trust Fund to the New Jersey Affordable Housing Trust Fund on or about December 15, 2008. COAH has abstained from acting pending its issuance of a decision on Rockaway's motion.

PROCEDURAL AND FACTUAL HISTORY

Rockaway's third round petition was dismissed from COAH's jurisdiction on November 7, 2007. See In Re: Rockaway Township, Morris County, Order to Show Cause of the Council, as to the Dismissal of Rockaway's Third Round Fair Share Plan Petition and Motion of Rockaway for Partial Relief, COAH Docket No. 06-1817. Rockaway was noticed of its dismissal by way of letter dated November 7, 2007. On December 13, 2007, the Township filed a Notice of Appeal with the Appellate Division appealing the November 7, 2007 dismissal, as well as a prior Council decision dated September 12, 2007 requiring Rockaway to submit a report regarding pilot test wells on an inclusionary site known as

Pondview, and a Scarce Resource Restraint imposed by the Council on June 13, 2007. All briefs have been filed and the appeal is pending in the Appellate Division.

On July 17, 2008, P.L. 2008, c. 46 (2008), the Statewide Non-Residential Development Fee Act, was signed into law, making significant changes to the New Jersey Fair Housing Act (N.J.S.A. 52:27D-301 et seq.) and the Municipal Land Use Law (N.J.S.A. 40-55D-1 et seq.). Pursuant to the new legislation, all non-residential development in the State is subject to a development fee of 2.5%, regardless of whether the municipality is under COAH or the court's jurisdiction.

In accordance with N.J.S.A. 40:55D-8.4(2), "The Council shall maintain on its website a list of each municipality that is authorized to use the development fees collected pursuant to this section and that has a confirmed status of compliance with the "Fair Housing Act," P.L.1985, c.222 (C.52:27D-301 et seq.), which compliance shall include a spending plan authorized by the council for all development fees collected." Thus, municipalities under COAH's jurisdiction and municipalities under the court's jurisdiction with a confirmed compliance with the Fair Housing Act are entitled to retain non-residential as well as residential development fees for deposit into the municipal Affordable Housing Trust Fund in accordance with COAH's regulations at N.J.A.C. 5:97-8.1. Other municipalities must deposit non-residential development fees into the New Jersey Affordable Housing Trust Fund as set forth at N.J.S.A. 40:55D-8.4(c)(1).

Pursuant to the Statewide Non-Residential Development Fee Act, COAH maintains exclusive jurisdiction over the collection and expenditure of both residential and non-residential development fees, "provided that any municipality which is not in compliance with the regulations adopted by the council may be

subject to forfeiture of any or all funds remaining within its municipal trust fund." N.J.S.A. 52:27D-329.2(8a).

COAH approved Rockaway's development fee ordinance as part of the Township's second round petition for substantive certification on August 2, 1995. On April 2, 1997, the Township received second round certification and on July 16, 2002 the Township received amended second round certification. Rockaway Township petitioned COAH for third round certification on December 9, 1995. As a result, Rockaway was approved to collect development fees from August 2, 2005 until its November 7, 2007 dismissal. Despite the fact that Rockaway was dismissed from COAH's jurisdiction, the municipality continued to collect development fees from both residential and non-residential developers.

By way of letter dated November 25, 2008, COAH advised Rockaway that due to the dismissal of the Township from its jurisdiction on November 7, 2007, the Township should have ceased the imposition, collection and expenditure of development fees. COAH directed the Township to:

- 1) Immediately cease the imposition and collection of residential development fees;
- 2) Direct developers of non-residential developments to pay development fees into the New Jersey Affordable Housing Trust Fund;
- 3) Refund all development fees collected by the Township after November 7, 2007;
- 4) Immediately cease expenditure of any monies from the Township's Affordable Housing Trust Fund; and
- 5) Enter data regarding affordable housing trust fund activity from January 1, 2008 to present into COAH's Tracking and Monitoring System by December 15, 2008.

In addition, the November 25, 2008 letter states that on or about December 15, 2008 COAH will direct the remaining balance in the Township's affordable housing trust fund to the New Jersey Affordable Housing Trust Fund.

ROCKAWAY TOWNSHIP'S MOTION TO STAY COAH FROM REQUIRING ROCKAWAY
TO REFUND DEVELOPMENT FEES AND
ALLOWING ROCKAWAY TO CONTINUE TO COLLECT FEES

Rockaway Township requests an order granting the following relief:

- 1) Staying COAH from taking the actions identified in its November 25, 2008 letter to Rockaway, and in particular staying COAH from requiring the Township to refund all residential and non-residential development fees collected after November 7, 2007 and staying COAH from directing the remaining balance in the Township's Affordable Housing Trust Fund to the New Jersey Affordable Housing Trust Fund on or about December 15, 2008, pending a decision in the Appeal of COAH's November 7, 2007 Decision dismissing the Township from COAH's jurisdiction, presently before the Appellate Division, Superior Court, under Docket No. A-001771-07T2; and
- 2) Allowing the Township to continue to impose and collect, but not spend, residential and non-residential development fees and to maintain those fees in the Township's Affordable Housing Trust Fund pending a decision in the Appeal of COAH's November 7, 2007 Decision dismissing the Township from COAH's jurisdiction.

Rockaway argues that the primary purpose of a stay is to, "maintain unchanged, as far as practicable, the status or condition of the subject matter of controversy during the pendency of a suit." Christensen v. Local 680 of the M. Drivers and D. Employees, 127 N.J. Eq. 215, 219 (E&A 1940). It states that the purpose of temporary relief is to "maintain the parties in substantially the same condition when the final decree is entered as they were where the litigation began." Crowe v. DeGioia, 90 N.J. 126, 134 (1982).

When seeking the relief of a stay pending a decision on an appeal of a judgment or an administrative agency decision, a movant must demonstrate the following five elements:

1. The movant is likely to suffer immediate and irreparable injury if relief is not granted;
2. The movant has a settled right to the relief sought;
3. The movant has a substantial likelihood of success on the merits;
4. The relative hardships weigh in favor of the movant; and
5. The public interest favors the imposition of a stay.

McNeil v. Legislative Appointment Commission of the State of New Jersey, 176 N.J. 484, 486 (2003)

Rockaway argues that it has met the above listed criteria, as follows:

a. Irreparable Harm

Rockaway argues that if the Township's appeal is successful, and COAH's November 7, 2007 dismissal is reversed, it would be entirely proper for Rockaway to impose, collect and expend the development fees. Rockaway maintains that if it is forced to forfeit all fees collected it will have no way of recouping them. Additionally, if the Township ceases to collect, it will have no way of going back and obtaining fees

from developers who otherwise should have paid. Further, Rockaway argues that since the Township will not spend any of its affordable housing trust funds until it received authorization from COAH or the court to do so, COAH will not suffer any harm.

b. Settled Legal Right

Rockaway argues that pursuant to N.J.S.A. 52:27D-329.2 and N.J.S.A. 40:55D-8.1, municipalities are authorized to collect, maintain and spend residential and non-residential development fees if they have petitioned COAH for substantive certification and have adopted a municipal development fee ordinance in accordance with COAH's rules. Rockaway states that COAH approved its development fee ordinance on August 2, 1995 and that it has been under COAH's jurisdiction since it petitioned COAH for second round substantive certification on March 2, 1995. Rockaway argues that it has been authorized to collect fees since August 2, 1995 and that if COAH had not dismissed the Township, it would still be able to do so.

c. Reasonable Probability of Success on the Merits

1. Exclusive municipal authority

Rockaway argues that it has a reasonable likelihood of success regarding its appeal because a municipality has the exclusive authority to decide which improvements should be made to its water system. Rockaway states that while the Fair Housing Act gives COAH wide-ranging powers, it does not give COAH the authority to decide if specific improvements should be made to a municipal water system. Rockaway states that the Legislature authorized COAH to adopt and promulgate all rules and regulations necessary to the prompt carrying out of the provisions and purposes of the Fair Housing Act. As such, COAH

has the authority to restrain scarce resources, deny certification on an accelerated basis, issue administrative orders for a municipality to provide information, or take an action that expedites an administrative process, and ultimately, issue an order dismissing a municipal housing element and fair share plan. However, since a municipal action is accorded a presumption of validity the Township contends that COAH's ability to issue administrative orders does not supersede a municipality's ability, under N.J.S.A. 40A:31-5(a), to "acquire, construct, improve, extend, enlarge or reconstruct and finance water supply facilities, and to operate, manage and control all or part of these facilities."

Rockaway further argues that the Legislature has likewise not granted such authority to DEP.

2. The Resolutions and Decisions are arbitrary capricious and unreasonable and are not supported by substantial evidence in the record.

Rockaway maintains that the evidence that COAH relied upon in its June 2007 order was incorrect, and that COAH consistently maintained that Rockaway had more water than was actually available. Rockaway further argues that there is little evidence in the record to support COAH's September 2007 order requiring Rockaway to submit the pilot well study to DEP because Rockaway was not afforded a hearing regarding the viability of the hydraulic barrier system. Further, Rockaway argues that the November 2007 decision is inaccurate in its statement that Rockaway did not provide to COAH clarification regarding the amount of water capacity available within the municipality.

d. Relative Hardships Weigh in Favor of the Township

Rockaway states it will suffer irreparable harm in the absence of a stay because if the Appeal is granted, COAH will

have improperly seized the monies in the Township's Affordable Housing Trust Fund and the Township will be unable to collect the monies that it should have been entitled to collect. Further, Rockaway states that there is no harm to COAH or to third parties if the Township is permitted to maintain the funds it has already collected and to continue to collect the funds pending the disposition of the Appeal.

e. The Public Interest Favors the Granting of a Stay

Rockaway argues that the public interest heavily favors the creation of affordable housing in Rockaway, and that if the stay is not granted the Township will lose opportunities to construct affordable housing. The public interest favors maintaining the status quo and preserving the monies in the Township's fund.

Pondview Estates' Opposition to Rockaway's Motion

On December 8, 2008, Pondview submitted opposition to Rockaway's motion, stating that while it is not directly involved in the dispute over the collection of developer's fees, it states that the Township appealed COAH's orders to the Appellate Division of the Superior Court. Pondview argues that the Township fails to note that the court has denied previous requests for stays of COAH's decisions. By denying the stays, the Appellate Division has made it clear that Rockaway does not have a reasonable probability of success on the merits now. Pondview additionally argues that there is no reason for COAH to excuse Rockaway from the consequence of being dismissed from COAH's jurisdiction, namely, loss of the right to collect development fees.

DISCUSSION

The Council hereby incorporates within this decision its November 7, 2007 decision dismissing Rockaway Township. The Council's mission is to ensure that municipalities meet their affordable housing obligations under the Fair Housing Act. To that end, the Council is responsible for determining whether a municipal Housing Element and Fair Share Plan continues to demonstrate a realistic opportunity for the fulfillment of the municipal fair share obligation. The Council gave Rockaway numerous opportunities in 2007 to demonstrate that its plan was realistic, which were met with reluctance or with an inability to reach any accommodation with other parties to provide the water necessary for Rockaway's affordable housing obligations. As a result of Rockaway failing to take the necessary actions to implement its Fair Share Plan, and not carrying out its responsibilities for the implementation of its plan, the Township was dismissed from COAH's jurisdiction.

Regarding Rockaway's argument for a stay based on the success on the merits, the Council believes that Rockaway does not have a likelihood of success on the merits.

Rockaway claims that it will suffer irreparable harm, but the Council finds that Rockaway's dismissal indicates that it does not have a realistic plan to provide affordable housing and so it is unclear on exactly what projects Rockaway is proposing the use of its municipal trust funds. Further, forfeiture of non-residential fees collected since July 17, 2008 will be transferred to the state-wide affordable housing trust fund which will in turn be used to provide affordable housing.

Regarding Rockaway's settled legal right, the Council agrees that COAH approved Rockaway's development fee ordinance in 1995. That approval was a direct result of Rockaway being under COAH's jurisdiction. As of November 7, 2007, Rockaway was

no longer under COAH's jurisdiction and therefore, was no longer authorized to collect fees.

The Council disagrees that Rockaway has a reasonable likelihood of success on the merits. While Rockaway may have the authority to decide what improvements should be made to a municipal wide water system, COAH is responsible for ensuring that municipalities provide a realistic opportunity for affordable housing. Rockaway was given numerous opportunities to provide water for the Pondview site, and it was only after Rockaway failed to take appropriate action that COAH dismissed Rockaway's petition.

While the Council agrees that it would be difficult for Rockaway to retrieve monies that it otherwise would have been entitled to collect in the event that the Township is successful in its appeal, the Council does not find that it is likely that Rockaway will be granted the relief it seeks from the Appellate Division.

Rockaway will not be entitled to collect residential development fees, and will have to return the non-residential development fees collected between November 7, 2007 and July 17, 2008 and all residential development fees collected since November 7, 2007. In addition, all non-residential development fees collected after July 17, 2008 as well as any remaining balance in Rockaway's Affordable Housing Trust Fund will go to the Statewide Affordable Housing Trust Fund and will be used for the production of affordable housing units. The Council believes that forfeiture of the funds is precisely what the Legislature intended and that as a result the public interest is being served.

DECISION

While COAH is concerned with the potential loss of affordable housing trust funds, COAH does not view Rockaway's argument as having a reasonable probability of success on the merits in the Appellate Division. Rockaway continued to collect development fees despite being dismissed from COAH's jurisdiction. As set forth in COAH's November 25, 2008 letter, Rockaway is directed to

- 1) Immediately cease the imposition and collection of residential development fees;
- 2) Direct developers of non-residential developments to pay development fees into the New Jersey Affordable Housing Trust Fund;
- 3) Refund all residential development fees collected by the Township after November 7, 2007;
- 4) Refund all non-residential development fees collected by the Township from November 7, 2007 until July 17, 2008
- 5) Immediately cease expenditure of any monies from the Township's Affordable Housing Trust Fund; and
- 6) Enter data regarding affordable housing trust fund activity from January 1, 2008 to present into COAH's Tracking and Monitoring System by December 15, 2008.

Accordingly, the Council denies Rockaway's motion.

DATED: March 12, 2009