

IN RE WINSLOW TOWNSHIP,	:	
CAMDEN COUNTY	:	
MOTION FOR TEMPORARY RELIEF	:	COUNCIL ON AFFORDABLE HOUSING
IN ADMINISTRATIVE PROCEEDING	:	COAH DOCKET NO. 09-2129
FOR STAY OF ENFORCEMENT OF	:	
PORTION OF APRIL 8, 2009	:	OPINION
COAH ORDER PENDING OUTCOME	:	
OF APPEAL	:	

This matter comes before the Council on Affordable Housing (COAH) upon the application of the Winslow Township Planning Board (planning board) for a stay pending appeal of COAH's April 8, 2009 Opinion. For the reasons set forth below, COAH denies the planning board's Motion.

By Motion filed August 1, 2008, Taylor Woods, L.L.C., filed a motion for scarce restraints on the allocation of sewer capacity in Winslow Township (Winslow or Township). Winslow opposed the application. By Resolution Imposing Temporary Scarce Rsource Restraint Upon Winslow Township, Camden County, adopted September 24, 2008, COAH restrained Winslow from allocating sewer capacity pending a decision on the motion. On October 29, 2008, the Council on Affordable Housing (COAH) issued a decision finding that sewer capacity is a scarce resource in Winslow. Accordingly, COAH issued a scarce resource restraint, prohibiting Winslow from allocating that scarce resource until COAH acts on Winslow's petition for third round substantive certification.

By motion filed December 2, 2008, Winslow asked COAH to reconsider and clarify numerous aspects of that decision. By

Opinion dated April 8, 2009, COAH denied the motion for reconsideration but clarified various issues. One of the issues clarified concerned applications before the planning board. Specifically, regarding development applications submitted prior to April 8, 2009, COAH advised the planning board that it should follow the Municipal Land Use Law (MLUL), N.J.S.A. 40:55D-1 et seq., and issue approval conditioned upon the lifting of the restraints. Regarding applications after that date, COAH advised Winslow that, if the application is not otherwise exempt, the planning board shall require the applicant to receive a waiver from the restraint before the application is deemed complete. Also, by Opinion dated April 8, 2009, COAH found that Taylor Woods' development was exempt from the restraints as it is an inclusionary development.

On May 26, 2009 and May 21, 2009, respectively, the Township and the planning board filed separate notices of appeal as of right from the above decisions. By letter dated May 18, 2009, the planning board moved before COAH for a stay of the decisions pending resolution of its appeal. The letter stated that, in support of its stay motion before COAH, the planning board relied on an attached brief that it planned to file with the Appellate Division. The attached brief apparently is in support of its appeal and sets forth the planning board's arguments concerning alleged inconsistencies between the MLUL and COAH's April 8, 2009 clarification Opinion. By separate Notice of Motion to Dismiss

Appeal as Interlocutory, filed July 2, 2009, COAH moved before the Appellate Division to dismiss both the Township's and planning board's appeals as interlocutory since COAH has not issued a final decision on Winslow's petition for substantive certification.

At this time, Winslow's petition still is pending before COAH. Winslow filed its petition for third round substantive certification on December 31, 2008. COAH deemed Winslow's plan incomplete on March 25, 2009. In response to the incomplete letter, Winslow submitted the necessary information and COAH deemed Winslow's plan complete on June 24, 2009. Pursuant to the Fair Housing Act (FHA), N.J.S.A. 52:27D-301 et seq., Winslow must publish notice of its petition for substantive certification and the public may file objections to the plan within 45 days of publication. N.J.S.A. 52:27D-314. COAH is awaiting proof of publication, but assuming that Winslow published notice on June 24, 2009, the objector period will end on August 8, 2009. If an objection is filed, COAH will conduct mediation. Otherwise, COAH will review Winslow's plan and act on the petition. Ibid.

In its papers filed before COAH, the planning board fails to address the stay criteria and their application to the present situation. Rather, the planning board relies solely on its arguments in the attached brief that COAH's April 8, 2009 clarification Opinion is inconsistent with the MLUL. A party is entitled to a stay only if it can demonstrate that there is a reasonable likelihood of success on the merits; the party will

suffer irreparable harm if the relief is not granted; the relief will not work an inequitable result considering the hardships to the parties against whom relief is sought and there is no public harm. Crowe. v. DeGioia, 90 N.J. 126 (1982). There must be a "strong showing of necessity" for injunctive relief to be granted. A.O. Smith Corp. v. FTC, 530 F.2d 515, 527 (3rd Cir. 1976). It is apparent upon review of the stay criteria that Winslow and the planning board fail to satisfy those criteria.

Initially, COAH has filed a Notice of Motion to Dismiss both Winslow's and the planning board's appeals as interlocutory. As set forth in COAH's brief in support of that Motion, a party may only appeal as of right a final agency decision. R. 2-3(a)(2). In accordance with the process set forth in the FHA, the grant or denial of a petition for substantive certification is COAH's final agency decision. N.J.S.A. 52:27D-314. The imposition of scarce resource restraint simply is one step in the process towards substantive certification. Indeed, as the COAH stated in its October 29, 2008 Opinion imposing the restraint, the restraint remains in effect until COAH acts finally on Winslow's petition. As discussed above, Winslow's plan only is in the objector period.

Thus, there does not appear to be a reasonable likelihood of success on the merits as it appears that the planning board's appeal is interlocutory.

Moreover, as set forth in Hills Dev. Co. v. Bernards Tp., 103 N.J. 1 (1987), COAH has the authority to preserve scarce

resources that might be necessary to a municipality's satisfaction of its need. Id. at 61. That is precisely what COAH did in this case. As set forth in its Opinion, Winslow has been under a de facto sewer moratorium since 2004. The Township has a fair share need of 1107. Until COAH imposed the restraint, Winslow undisputedly had been allocating what little sewer capacity there is to non-inclusionary projects. Under these circumstances, COAH certainly was justified in imposing the restraints set forth in both the October 29, 2008 and April 8, 2009 Opinions. The planning board complains that the restraints cannot work consistently with the MLUL. Since the Supreme Court first enunciated COAH's authority to impose a scarce resource restraint in Hills in 1987, COAH has imposed similar scarce resource restraints in numerous other municipalities without issues. Under these circumstances, it does not appear that the planning board has a reasonable likelihood of success on the merits.

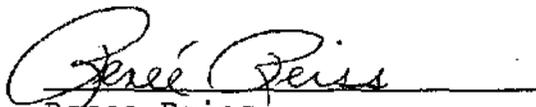
The planning board also has not set forth any irreparable harm that it may suffer if it is not granted a stay. Indeed, it is low and moderate income households that will suffer harm if the stay is granted. COAH seeks to preserve a scarce resource until such time that Winslow has an approved plan to meet its need. Winslow has a substantial need of 1107 affordable units. Without the restraint, which is essentially what the planning board seeks through the stay, Winslow's ability to satisfy its need can be undermined. COAH is not willing to take this risk. The hardship

that will be suffered here will be to the low and moderate households if a scarce resource is depleted before COAH approves a plan. Clearly, the public interest in this case weighs in favor of maintaining the scarce resource restraint while the COAH process continues.

In conclusion, the planning board has not satisfied the criteria necessary to receive a stay of COAH's April 8, 2009 Opinion. Winslow has not demonstrated a likelihood of success on the merits and the public interest in this case weighs strongly in favor of continuing the restraints until COAH acts on Winslow's petition for substantive certification. Accordingly, the planning board's motion for a stay of COAH's April 8, 2009 Opinion pending appeal is denied.

DATED:

July 8, 2009.



Renee Reiss
Council Secretary