

IN RE RED BANK BOROUGH,)	NEW JERSEY COUNCIL ON
MONMOUTH COUNTY,)	AFFORDABLE HOUSING
MOTION OF GRANDVIEW AT)	
NAVESINK SEEKING AN)	DOCKET NO. 09-2113
EXEMPTION FROM A SCARCE)	
RESOURCE RESTRAINT)	<u>MOTION DECISION</u>

This matter comes before the Council on Affordable Housing (COAH or Council) by way of motion filed by Grandview at Navesink (Grandview). Grandview's motion requests the Council to issue an Order granting a waiver from the Scarce Resource Restraint in Red Bank Borough, Monmouth County (Red Bank or Borough), so that Grandview may convert a currently existing 91-unit apartment building into condominiums, and create 5 new condominiums, including one affordable unit.

PROCEDURAL AND FACTUAL HISTORY

Red Bank received second round substantive certification of its Housing Element and Fair Share Plan from COAH on March 5, 1997, addressing an obligation of 482 units (54 rehabilitation and 428 new construction). Red Bank received extended substantive certification on April 13, 2005. Red Bank petitioned COAH for third round substantive certification under *N.J.A.C. 5:94* on December 19, 2005. COAH imposed a Scarce Resource Restraint upon the Borough, memorialized by way of Resolution dated December 10, 2008. The Restraint was imposed as the result of a motion filed with the Council by Fair Share Housing Center (FSHC) on September 22, 2008 that asserted that Red Bank had approved 145 residential units and 7,750 plus square feet of non-residential space with only an 11 percent affordable housing set-aside.

The Borough had adopted a growth share ordinance under the first set of third round rules but had failed to update the ordinance to reflect the new growth share requirements. FSHC stated in its papers that the Borough was disregarding its second round certification which required a 20 percent set-aside due to the fact that the Borough had received a vacant land adjustment. In order to address its unmet need of 428 units, Red Bank had proposed 37 age restricted units, and redevelopment programs and proposals in identified "Areas of Residential Redevelopment" in its second round

petition. FSHC also included a list of three pending redevelopment project applications--Siros at Monmouth, RW @ River's Edge, and Grandview at Navesink--contending that they may further exhaust scarce land resources within Red Bank. COAH staff reviewed the Borough's second round plan to determine the sites located within the "Areas of Residential Redevelopment" requiring a 20 percent set-aside.

Under the Scarce Resource Restraint, until the Borough adopts the appropriate ordinance requiring a twenty percent set-aside in the residential redevelopment area, Red Bank is restrained from approving development applications. The following types of development applications are exempt from the scarce resource restraint, and are not required to obtain a waiver:

- a. Projects consisting of a 20% (or greater) setaside;
- b. Single or two family homes on existing lots;
- c. Commercial development applications seeking to re-occupy existing commercial spaces;
- d. Extensions of any prior approvals that do not modify the terms of the prior approval, or that are covered by the exemptions listed herein;
- e. Changes of occupancy;
- f. Interior or exterior renovations, unless new residential units are proposed;
- g. Demolition of non-residential structures only, except for imminent hazard situations;
- h. Requests for interpretations;
- i. Permits for signage;
- j. Applications for site improvements that are not related to new construction or development;
- k. Appeals of decisions by the Administrative Officer;
- l. Applications for subdivisions not related to new construction or development (*e.g.*, lot line adjustments, consolidations, minor subdivisions);
- m. Applications for development required by an Order of the Fire Marshal, Construction Official, or Code Enforcement Officer to address conditions cited pursuant to the Uniform Fire Code, the Uniform Construction Code,

or the adopted Property Maintenance Code, or other standards, for remediation of conditions affecting public health, public or occupant safety, structural safety, or accessibility hazards; and

- n. Construction of accessory structures only;
- o. Cell phone antennae on existing structures;
- p. Lot line adjustments where no new building envelope is created;
- q. Development proposals that involve properties less than 0.10 acres in area;
- r. Subdivisions necessary to settle the estate of a decedent;
- s. Applications to the Zoning Board of Adjustment for 'a' and 'b' variances under N.J.S.A. 40:55D-70.

Red Bank petitioned COAH for third round certification on December 30, 2008. COAH issued a premediation report on July 8, 2009. Among other items, the premediation report requires Red Bank to adopt the zoning required by the Scarce Resource Restraint by September 7, 2009.

Grandview submitted a motion requesting a waiver of the Scarce Resource Restraint in Red Bank on February 17, 2009, so that it may convert a currently existing 91-unit apartment building into condominiums, and create 5 new condominiums on the first floor, including one affordable unit. Fair Share Housing Center submitted opposition on April 14, 2009 and Grandview replied on May 13, 2009. The parties appeared for oral argument at the Council's June 11, 2009 meeting at which time the matter was referred to a task force. At the June meeting, the Council also requested additional information from Grandview. A number of task forces subsequently convened, requesting that additional information be provided. The task force recommended to the Council that Grandview's conversion of 91 apartment units to condominium units does not create a growth share obligation but that the construction of five new condominium units does create a growth share obligation, requiring that one of the five new units constructed be an affordable unit.

DISCUSSION

GRANDVIEW AT NAVESINK'S MOTION

Grandview submitted a waiver request by way of motion on February 17, 2009, requesting that the Council allow it to proceed before the Borough's Zoning Board of Adjustment with respect to the Applicant's request for Major Site Plan and related development approvals; and clarification and definitive direction as to the set-aside and growth share obligations which COAH would expect to impose in conjunction with any approval of the proposed project.

Grandview is requesting Major Site Plan Approval from Red Bank which requires use variances and bulk variances and any other variances that may be required. The purpose of the application is to allow the construction of interior and exterior renovations to an existing 91-unit apartment building, including:

- the addition of five new residential units within the existing building;
- a two-story clubhouse of 2,523 square feet containing new community meeting rooms, bathrooms, and special purpose rooms (e.g. exercise equipment); and
- other on-site improvements and property upgrades and aesthetic enhancements.

Grandview states that it is agreed that Grandview is located within the Northerly district [residential] redevelopment area. However, Grandview states that its site, unlike Districts 2 (West Side), 3 (Train Station) and 6 (Rehabilitation and Infill), is not within an area designated as an area in need of redevelopment in which additional affordable housing units are expected to occur. Rather, it is described as an area consisting of market rate mid-rise apartment buildings.

Grandview argues that even though it is not in one of the areas identified to provide a 20 percent set-aside, it is proposing to set-aside one of the five new units (20%) as an affordable for sale deed restricted unit. Grandview also states that the existing 91 units, which are to be renovated and upgraded but not increased in size, are not subject to the Borough's growth share ordinance. Further, Grandview states that none of the units constitute residential growth to be counted towards the Borough's Third Round growth share obligation. The 91 units will be given a certificate of continuing occupancy upon completion of the renovations, not a new certificate of occupancy. Finally, Grandview argues that even the new units should not be subject to the ordinance which exempts new construction consisting of eight or fewer units.

FAIR SHARE HOUSING CENTER'S OPPOSITION

FSHC submitted opposition to Grandview's waiver request on April 14, 2009. FSHC states that Grandview's application does not fall within any of the exemptions listed within COAH's scarce resource restraint, pointing out that the restraint exempts only "A" and "B" variances while Grandview's application requests "C" and "D" variances. FSHC also argues that COAH's resolution does not exempt changes in use, and FSHC asserts Grandview's application is a change in use.

In response to Grandview's assertion that it is not within an area of residential redevelopment, FSHC states that it is undisputed that Grandview's site is located within one of the Borough's redevelopment zones. FSHC maintains that COAH has already found that these areas require a 20 percent set-aside, and that it is improper to include the area as an area to address unmet need and then not require that affordable units be built in that area. FSHC also states that even if Grandview was outside the redevelopment area, the Restraint would still apply to it because the Restraint applies to the entire Borough.

FSHC asserts that a change in use in an area with overlay zoning to meet unmet need requires a 20 percent set-aside of low- and moderate-income housing. The Borough has determined that Grandview's application constitutes a change of use granting substantial rights to the developer that it would not otherwise have.

FSHC states that N.J.A.C. 5:93-4.2(h) sets forth the requirements of unmet need, which language remains in the third round rules,

If the RDP described in (f) above is less than the precredited need minus the rehabilitation component, the Council shall review the existing municipal land use map for areas that may develop or redevelop...After such an analysis, the Council may require at least any combination of the following in an effort to address the housing obligations:

101. Overlay zoning requiring inclusionary development or the imposition of a development fee consistent with N.J.A.C. 5:93-8. In approving an overlay zone, the Council may allow the existing use to continue and expand as a conforming use, but provide that where the prior use

on the site is changed, the site shall produce low and moderate income housing or a development fee.

N.J.A.C. 5:93-4.2(h)

FSHC maintains that Grandview's application in fact does constitute a change in use because it allows a use that is currently a non-conforming use to remain and expand. Additionally, FSHC argues that the Borough Engineer, in his report on the application to the Borough, found that use variance approval and bulk variance relief for the project will result in enhanced development rights for the property. FSHC argues that the report states that the current application is seeking new variance relief. FSHC states that COAH's regulations require that when the prior use is changed with an overlay zone, "the site shall produce low and moderate income housing or a development fee." In the present case, the appropriate requirement is a 20 percent set-aside. FSHC argues that the 20 percent applies to the full site because the new use permitted by zoning encompasses the full site – not just the increase in units.

Regarding the growth share obligation to be incurred by Red Bank as a result of the Grandview project, FSHC maintains that Grandview will generate a growth share obligation commensurate with all 96 units, which at a 20 percent set-aside would equal 19 affordable housing units, according to Red Bank's own analysis as set forth by the Borough's Engineer, Richard Kosenski of T&M Associates, who states that the Grandview conversion and expansion generates a growth share that is based on the entire development. FSHC states that this conclusion was based on a number of factors, including:

- 1) The Borough's growth share ordinance does not exempt the project;
- 2) The Grandview development requires several zoning variances; and
- 3) The variances are not merely extensions of prior variances but are new.

FSHC further argues that Grandview has not met the waiver criteria under COAH's rules. First, FSHC maintains that it does not appear from Grandview's papers that the movant will suffer a financial hardship; rather it will reap a financial windfall. Grandview was originally built through funding received from HUD and HMFA in 1975

under a program to provide modestly priced small apartments. The conversion of the subsidized units to condos would create a windfall to the owner.

Second, FSHC argues that the grant of the waiver would not foster the production of affordable housing and that, rather, it fosters the destruction of affordable housing. The removal of the apartments from the rental stock in Red Bank will add to the present need in the Mercer-Monmouth-Ocean region, similar to the manner in which demolitions of low and moderate income units exacerbate the housing need. FSHC maintains that Grandview's project will displace 91 families, most of whom would likely qualify as low or moderate income households

Third, FSHC argues that granting the waiver to allow a development that will provide one affordable unit out of 96 units does not further the intent of COAH's rules.

GRANDVIEW AT NAVESINK'S REPLY TO FSHC

Grandview submitted a reply to FSHC's opposition papers on May 13, 2009. In response to FSHC's argument that even if Grandview were outside the residential redevelopment area the restraint would still apply, Grandview concedes that COAH's existing scarce resource restraint covers Grandview. However, Grandview states that its proposal does not require an affordable housing set-aside and therefore, should be exempted from the scarce resource restraint. Grandview argues that it is not subject to a 20% set-aside for all 96 units since only five new units are being constructed and the Borough's Ordinance permits Grandview to pay a Developer's fee. Grandview states that it is below the threshold of eight units in the Borough's Ordinance for having to provide any affordable units since it is only constructing 5 new units.

Grandview also maintains that FSHC's argument that Grandview should provide a set-aside of 20 affordable units does not provide an incentive but rather acts as a disincentive. If the 20% were required by COAH, the Developer would have to withdraw its current development application and merely renovate the building in its current configuration. This would result in no affordable units and the Borough would not benefit from the building being given a "facelift."

In response to FSHC's assertion that Grandview's application is a change of use pursuant to N.J.S.A. 40:55D-1 et seq., and therefore, cannot be subject to a 20 percent set-aside requirement, Grandview states that the Planning Board's Director stated in the Remarks section of Grandview's application that the application is not a change of use. Rather, Grandview argues that its application contains a request for a "d" variance for density, a non-conforming use variance, and a height variance. Grandview states that since the application is not for a change in use, FSHC's arguments in this regard are not valid.

Regarding the growth share obligation associated with the project, Grandview argues that except as applicable to the proposed five new residential units, the Grandview development will not generate a growth share obligation. Grandview states that COAH's rules define growth share to be calculated based on the number of units constructed, and that the 91 existing units are to be renovated and upgraded, not constructed. The 91 existing units will be reoccupied pursuant to a Certificate of Continued Occupancy (CCO) as opposed to an initial Certificate of Occupancy (CO) for new construction. Grandview further argues that COAH's rules clearly state that inclusionary developers must be provided with a financial incentive.

Grandview argues that it has met the waiver criteria set forth in COAH's rules, as Grandview is burdened by an unnecessary financial hardship as a result of having its development application needlessly delayed, and has expended significant money towards the construction of its proposed development. Further, Grandview argues that COAH's rules permit the Council to grant waivers when doing so fosters the production of affordable housing. Grandview states that it is willing to provide a 20 percent set-aside of the newly created units (1 out of the 5 new units).

Contrary to FSHC's assertion, Grandview argues its proposal will not remove a single unit of existing low-and moderate-income housing since the apartment does not contain any deed restricted low- or moderate-income units.

ADDITIONAL INFORMATION RECEIVED BY COAH

On June 26, 2009 Grandview provided the Council with additional information including the rent rolls for the existing apartment building and the amount of money that is being spent rehabilitating each unit. Regarding the rent rolls, for two-bedroom units the rents range from \$1,200 to \$1,474 per month and for one-bedroom units the rents range from \$912 to \$1,186 per month. There are three types of one-bedroom units in the building at three different square footages: 900 square feet, 700 square feet and 640 square feet. The two-bedroom units are 1,000 square feet¹. Regarding the most recent appraisal for the property, which was completed in April 2009 in conjunction with a mortgage refinancing, the "as is" value of the property is \$9,900,000.00. This equates to a unit value of approximately \$109,000 per unit. Grandview states that it intends to invest a total of \$1,844,435 into the units, as follows:

- Two BR (1,000 square feet) \$23,370 per unit
- One BR (900 square feet) \$17,285 per unit
- One BR (700 square feet) \$16,400 per unit
- One BR (640 square feet) \$16,090 per unit

The first task force to review the motion requested additional information, including information about the HUD funding received by the property and whether the existing apartment building is covered by Red Bank's rent control ordinance. Possible HUD funding received by the existing project was researched, and based on the information available, the existing apartment units are not deed restricted or restricted through mortgage. The apartment building is subject to a local rent control ordinance, which permits the rent to be increased by the percentage CPI increase in any given year. Under the rent control ordinance, a unit that becomes vacant during or at the end of any lease term is decontrolled and may be raised by the landlord who shall not be restricted in

¹
It should be noted that the rents for COAH units in Region 4 are as follows

<u>Low Income (46%)</u>	<u>Moderate Income (60%)</u>
One BR \$761	\$993
Two BR \$913	\$1191

the amount by which the rent is raised. The rent control ordinance will then dictate the amount that the new rents may be increased each year if the units are still rental units.

The matter was reviewed by a task force once again on July 2, 2009. The task force requested additional information regarding condominium conversion law, why the project was receiving a certificate of continued occupancy (CCO) instead of a certificate of occupancy (CO) given the amount of work being completed in the units, Red Bank's position regarding the required set-aside and whether the condominiums would create a growth share obligation for Red Bank.

The condominium conversion will fall under the following statutes:

- The Planned Real Estate Development Full Disclosure Act, N.J.S.A. 45:22A-21.
- The Senior Citizen and Disabled Protected Tenancy Act, N.J.S.A. 2A:18-61.22.
- The Anti-Eviction Act, N.J.S.A. 2A:18-61.1(k) and 2A:18-61.8.
- The Tenant Protection Act of 1992, N.J.S.A. 2A:18-61.40.

Regarding the terms certificate of continued occupancy and certificate of occupancy, a certificate of continued occupancy means the certificate provided for in N.J.S.A. 5:23-2, indicating that as a result of a general inspection of the visible parts of the building, no violations of N.J.S.A. 5:23-2.14 have been determined to have occurred and no unsafe conditions violative of N.J.S.A. 5:23-2.32 have been found, and that the existing use² of the building has heretofore lawfully existed. Certificate of occupancy means the certificate provided for in N.J.S.A. 5:23-2, indicating that the construction authorized by the construction permit has been completed in accordance with the construction permit, the Act and the regulations.

Pursuant to the International Building Code of New Jersey (IBC), Chapter 3, Section 310, the currently existing 91-unit apartment building and the proposed 96-unit condominium building are both classified as an R-2 use group. Pursuant to the IBC, an R-2 use group is

² "Use" means that portion of a building or tenancy which is devoted to a single group or special use or occupancy as defined in the building subcode or as established by the provisions of any other subcode for the purpose of specifying special requirements applicable to that portion of a building or tenancy. "Change of use" means a change from one use to another use in a building or tenancy or portion thereof.

comprised of residential occupancies containing sleeping units of more than two dwelling units where the occupants are permanent in nature. As a result, the issuance of a CCO is appropriate since the existing use of the building is not changing. The Construction Reporter does not count CCOs and as such, Red Bank would not accumulate a growth share obligation associated with the renovation of the 91 apartment units.

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. 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). 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. at 61-63.³

In the instant case, the Council entered an order which specifically set forth types of development applications to be exempted from the Scarce Resource Restraint. One such exemption, listed as item f., is “Interior or exterior renovations, unless new residential units are proposed.” Here, Grandview is rehabilitating 91 currently existing units, which it intends to convert from rental apartments to ownership condominiums. While this represents a change in tenancy, it does not represent a change in use. The issue of whether or not Grandview’s application represents a change in use is significant in determining whether or not new units are being created as indicated by the issuance of a certificate of occupancy. Grandview asserts that it will be receiving a CCO for the 91 existing apartments and a CO for the five new units that will be created on the

³ 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.

first floor. Due to the fact that the current apartment building is coded as an R-2 use group, and will remain as such after the 91 units are rehabilitated, the Council determines that the rehabilitation of those 91 units will not create any new units. However, the Council also determines that the five new units that will be created on the first floor are new units and as such, Grandview is required to provide an affordable housing set-aside equal to 20 percent of the new units created, or one affordable housing unit. The rehabilitation of the 91 existing apartment units will not count towards Red Bank's affordable housing obligation.

In respect to FSHC's claim that renovation of the apartment building results in the loss of existing affordable units, the Council finds that the existing units are not deed restricted and are not currently affordable pursuant to COAH's regulations. Based on the record before it, the Council finds that for the 91-unit existing apartment building which will be rehabilitated, Grandview meets Scarce Resource Restraint exemption f., "Interior or exterior renovations, unless new residential units are proposed" and therefore a motion by Grandview to waive the existing Scarce Resource Restraint is not required in the instant case. Based on the record, the Council finds that Grandview is not required to provide an affordable housing set-aside in connection with the 91 apartment units that will be rehabilitated and converted to condominiums. The Council further finds that Grandview must meet its growth share obligation for the five new units that will be created on the first floor of the apartment building, requiring the construction of one affordable unit for the four market rate units to be built. The Council also finds that Grandview is required to comply with the condominium conversion law with regard to the converted units.

The Council also notes that Red Bank is required to adopt its third round inclusionary affordable housing zoning ordinance no later than September 7, 2009.



Dated: August 12, 2009