

**RESOLUTION DENYING LDM'S MOTION FOR A WAIVER FROM THE
SCARCE RESOURCE RESTRAINT FOR SEWER IN WINSLOW TOWNSHIP,
CAMDEN COUNTY**

COAH 09-2118

WHEREAS, on October 29, 2008, the Council on Affordable Housing (COAH) found that sewer service capacity is a scarce resource in Winslow Township, Camden County (Winslow or Township); and

WHEREAS, as a result of this determination, in In re Petition for Substantive Certification Filed by Winslow Township, Camden County, Motion for Scarce Resource Restraints, COAH Docket No. 08-2011, COAH restrained the allocation of sewer capacity to all development, with the exception of single and two-family homes and developments providing affordable housing; and

WHEREAS, in In Winslow Township Amendment and Clarification of Scarce Resource Restraint, COAH Docket No. 08-2029, COAH found that:

The Scarce Resource Restraint is applicable to all development applications in both the Cedarbrook and Sicklerville Service Areas, regardless of whether the project is proposing the use of individual septic systems. Applicants on the Township's waiting list for sewer capacity are not exempt from the Restraint, and individual projects seeking a waiver of the restraint may apply to COAH pursuant to N.J.A.C. 5:96-13 and N.J.A.C. 5:96-15;

and

WHEREAS, Winslow petitioned COAH for third round certification under N.J.A.C. 5:97 and N.J.A.C. 5:96 on December 31, 2008; and

WHEREAS, the petition was deemed complete on June 24, 2009, and notice was published on July 1, 2009, commencing the public comment period; and

WHEREAS, to date no objections to the plan have been received; and

WHEREAS, LDM submitted a motion requesting a waiver of the scarce resource restraint on March 24, 2009; and

WHEREAS, LDM is the owner of a property located at Block 4503, Lots 1 and 6, within the Pinelands Regional Growth Area with a municipal zone designation of PR-2, Pinelands Residential; and

WHEREAS, the Pinelands Commission issued a Certificate of Filing for the project on March 17, 2005, requiring among other things that LDM purchase 2.75 PDCs for the project; and

WHEREAS, the Winslow Township Zoning Board of Adjustment granted LDM final major subdivision approval for the creation of 20 single-family for-sale units on June 8, 2005 (the project); and

WHEREAS, LDM's project requires 7,500 gpd of sanitary sewer allocation; and

WHEREAS, LDM states that since late 2004 Winslow has had a *de facto* sewer moratorium in effect for the Cedarbrook Sewer Service Area until DEP approves the release of additional sewer capacity, and that in 2005 Winslow established a waiting list for sewer capacity and water main extensions for projects within the Pinelands Regional Growth Area; and

WHEREAS, since obtaining its final subdivision approvals in 2005, LDM states that it has diligently pursued sanitary sewer capacity, and that LDM it is currently first in line for capacity allocation within the Cedarbrook Sewer Service Area; and

WHEREAS, LDM states that, as COAH is aware, DEP approved the release of 188,000 gpd and that the Council permitted Cedar Brook to go forward with its project after Cedar Brook agreed to provide an 8 percent on-site affordable housing set-aside; and

WHEREAS, LDM argues that assuming Taylor Woods has priority to the 75,000 gpd required by its development, and that Cedar Brook is allocated 82,000 gpd, which totals 157,000, 31,000 gpd of allocation is remaining. Therefore, the gallonage released by DEP is more than adequate to satisfy Cedar Brook, Taylor Woods and LDM with additional gallonage left over for development within Winslow Township; and

WHEREAS, LDM states that in reliance upon its vested subdivision approval and its position on the waiting list, it has invested substantial time and money into the project since the commencement of the development process in 2004, and that to date it has invested in excess of \$500,000 toward the development of the project and that the only reason it has not commenced construction is due to the sewer moratorium; and

WHEREAS, LDM maintains that in reliance upon the sewer allocation policy adopted by Winslow, LDM has submitted all necessary paperwork, paid all necessary fees and costs and engaged in all other necessary acts so that sewer capacity would be allocated to LDM; and

WHEREAS, LDM argues that it has no obligation to provide any affordable housing units because Winslow Township had been granted second round certification by COAH at the time of LDM's development approvals, and that in addition, Winslow did not have a third round growth share ordinance in effect at the time of approvals; and

WHEREAS, despite the fact that it should not be required to provide affordable housing, LDM states in order to provide affordable housing in a way that would not financially cripple LDM, it proposes to use the Council's Market to Affordable Program and purchase two existing market rate units in Winslow that it would convert to affordable units; and

WHEREAS, LDM maintains that the two units would represent a 9 percent set-aside for LDM's project, which LDM points out that is a greater set-aside than the 8 percent set-aside provided by the Cedar Brook project; and

WHEREAS, while LDM recognizes that Winslow does not include a market to affordable program in its plan submitted to COAH, it argues that LDM should be entitled to utilize the market to affordable program; and

WHEREAS, therefore, LDM requests that the Council require that Winslow provide LDM with a subsidy for the two units from the municipality's affordable housing trust fund, which has a balance in excess of the subsidy amount required by the market to affordable program, which is \$25,000 for a moderate income unit and \$30,000 for a low income unit; and

WHEREAS, LDM points out that COAH has ordered disbursements of municipal trust funds in the past and argues that this is an equitable resolution of the issue at hand as it provides affordable units but also permits; and

WHEREAS, LDM maintains that it is ready to proceed with its already approved project; and

WHEREAS, Richard Hoff, Esq., on behalf of Taylor Woods, L.L.C. (Taylor Woods), filed papers in opposition to LDM's motion; and

WHEREAS, Taylor Woods argues that LDM has not established sufficient justification for the waiver; and

WHEREAS, Taylor Woods points out that there is language in LDM's final approvals that states, "Sanitary sewer capacity may not be available for this land development project, and the Applicant was notified of this condition both at the time of the Application and at the time of the Hearing" and that any hardship now felt by LDM is self imposed since it knew at the time of its application that sewer was not available for the project; and

WHEREAS, Taylor Woods further argues that COAH should not release sewer capacity on a piecemeal basis as there will be a negative cumulative effect on Winslow's ability to satisfy its fair share need, especially since Winslow must demonstrate that there is existing capacity to meet its 638-unit need; and

WHEREAS, Taylor argues that LDM's motion and all future motions seeking to deplete the available sewer resources within Winslow should be denied absent the Council granting Taylor's motion for priority to and a reservation of sewer capacity for its project; and

WHEREAS, Taylor argues that LDM's application is representative of a trend whereby market rate residential developers attempt to become "inclusionary" thereby laying claim to Winslow's limited sewer capacity; and

WHEREAS, Taylor states that the Council should reject these attempts and by granting them the Council would be using up the remaining sewer capacity for projects that are not providing a substantial amount of affordable housing; and

WHEREAS, Taylor further argues that by granting sewer allocation to these projects, the Council is jeopardizing the sewer capacity that Taylor is entitled to under J.W. Field Company, Inc. v. Township of Franklin, 204 N.J. Super. 445, 460 (Law Div. 1985); and

WHEREAS, Taylor argues that the J.W. Field case established a priority system in builders remedy litigations and that the case is applicable in the current situation as there is limited sewer capacity and a number of developers would be inclusionary developers seeking to take a claim to those resources; and

WHEREAS, Taylor Woods maintains that in J.W. Field, Judge Serpentelli established criteria to determine priority, one of which is that the builder who initiated the process would be entitled to first priority and that Taylor brought the application for scarce resources to the Council and should be granted priority to the remaining capacity; and

WHEREAS, Planland, Inc. filed opposition to LDM's motion on May 12, 2009; and

WHEREAS, Planland is the owner of the proposed Moorland Farms Development, Block 2101, Lot 36¹ in Winslow, consisting of almost 40 acres; and

WHEREAS, Planland states that it has paid \$500,000.00 to the Township's designee, 437 Land Company, for 30,600 gpd of sewer allocation and that it is prepared to construct an inclusionary development of approximately 240 units with a 20% set-aside; and

¹ It should be noted that COAH staff has determined that Planland is located within the Sicklerville Sewer Service Area, not the Cedar Brook Sewer Service Area.

WHEREAS, Planland states that it intends to file an application with the Zoning Board for a use variance for its inclusionary development; and

WHEREAS, in support of its argument that LDM should not be granted a waiver, Planland argues that the purpose of the Restraint is to preserve sewer capacity for Mt. Laurel uses pending COAH's determination of Winslow's third round obligation; and

WHEREAS, Planland further argues that LDM's position on the sewer capacity waiting list is of no effect since COAH addressed the issue of the waiting list in its decision, "Applicants on the Township's waiting list for capacity should not be deemed exempt from the restraint"; and

WHEREAS, Planland also argues that regardless of whether LDM has any affordable units as the result of its planning board approval, the critical question is whether or not scarce resources should be preserved for Mt. Laurel sites and LDM provides no information about how many other developers throughout Winslow are in similar positions to LDM, or what the cumulative impact of granting the waiver would be; and

WHEREAS, Planland further takes issue with LDM's assertion that it is entitled to the exemption due to Winslow's claim that it has a credit of 251 units for the third round, stating that this argument is premature because the review of Winslow's plan is not yet complete; and

WHEREAS, Planland in addition disputes LDM's argument that since no affordable housing obligation was initially placed upon LDM it is exempt from the Restraint; and

WHEREAS, Planland argues that LDM's development raises fundamental questions about the policy of COAH granting exemptions from scarce resource orders when the party seeking the relief is not seeking to provide a 20 percent low and moderate income housing set-aside; and

WHEREAS, Planland argues that exemptions from restraints should not be based upon watered down token Mt. Laurel efforts such as that proposed by LDM; and

WHEREAS, Planland points out that COAH is not yet in a position to evaluate the cumulative impact of exemptions such as LDM submits and that as a result the waiver request should be denied; and

WHEREAS, in response to Taylor, Planland argues that J.W. Field did not involve a scarce resource and that there was recognition in J.W. Field that a party seeking to obtain a builder's remedy must satisfy all site suitability criteria requirements, which Taylor has not, and that there must be a fairness hearing, which has not occurred. As such, Planland argues that it would be premature to grant Taylor first priority; and

WHEREAS, Planland suggests that Winslow or Taylor should be required to publish notice of Taylor's request for priority and that all interested parties be provided an opportunity to respond before it renders a decision; and

WHEREAS, on June 26, 2009 Winslow Township submitted a reply to additional information provided by LDM stating that Winslow has filed an appeal challenging the Council's issuance of the Scarce Resource Order as well as the grant of a waiver to Cedar Brook properties; and

WHEREAS, Winslow argues that the grant of LDM's request would impose a "mini" builder's remedy upon Winslow when Winslow has Prior Round Substantive Certification and when it submitted a timely third round Housing Element and Fair Share Plan to the Council; and

WHEREAS, Winslow maintains that it has a site specific plan which does not include inclusionary zoning, which Winslow argues is within its rights and the Council's regulations and Winslow maintains that to grant LDM's motion would require the Council to ignore its own regulations and would overturn the purpose of the Fair Housing Act, which is to encourage municipalities to meet their fair share housing obligation; and

WHEREAS, Winslow states that the market to affordable program is but one program that a municipality may use in meeting its fair share obligation, and that LDM is attempting to impose the mechanism upon Winslow when the mechanism hasn't been approved by the Planning Board as required by the MLUL; and

WHEREAS, Winslow also takes issue with LDM not providing any information regarding how much money is in Winslow's trust fund and ignoring Winslow's plans to use money from the trust fund for projects in the third round plan. Winslow maintains that it plans to use its trust funds on two other projects that are in its plan; and

WHEREAS, Winslow further argues that LDM is trying to force it to accept a set-aside that is inconsistent with COAH's rules and to the April 8, 2009 ruling which requires a 20 percent set-aside on all development applications; and

WHEREAS, a task force convened on July 23, 2009 and considered the arguments of all parties filing papers; and

WHEREAS, the task force notes that the sewer capacity requested by LDM is significant and that the allocation of capacity greater than that needed by single or two family homes negatively effects Winslow's ability to provide sewer to the affordable housing set forth in Winslow's fair share plan; and

WHEREAS, the task force recommends that LDM's request be denied because while LDM is correct that the Council granted a waiver to the Cedar Brook development for a slightly smaller affordable housing set-aside, Cedar Brook provided its affordable units on-site while LDM is not; and

WHEREAS, the task force also recommends that LDM's request be denied because LDM requests allocation from Winslow's affordable housing trust fund account and Winslow has committed that money to other projects that are included in its fair share plan pursuant to COAH's regulations.

NOW THEREFORE BE IT RESOLVED THAT the Council denies LDM's request for a waiver from the scarce resource restraint for the reasons set forth by the task force.

I hereby certify that this Resolution was
duly adopted by the Council on Affordable
Housing at its meeting on *August 12, 2009.*



Renee Reiss
Council Secretary