

IN RE TOWN OF )  
SECAUCUS/XCHANGE AT )  
SECAUCUS JUNCTION )  
INCLUSIONARY DEVELOPMENT )

OPINION

DOCKET #09-2156/09-2104

This matter comes before the Council on Affordable Housing (COAH or Council) upon the joint application of Fraternity Meadows, LLC (Fraternity Meadows) and the Town of Secaucus (Secaucus or Town). Fraternity Meadows is the developer of a phased inclusionary and commercial development called Xchange at Secaucus Junction (Project) and the movants seek a determination that the Project has vested development rights and should be permitted to proceed under the July 26, 2006 Affordable Housing Agreement (Agreement) negotiated between Fraternity Meadows and Secaucus. The Fair Share Housing Center (FSHC) opposes the motion, arguing that N.J.S.A. 52:27D-329.9(a) requires the Project to include a 20 percent set aside for affordable housing. For the following reasons, COAH finds that N.J.S.A. 52:27D-329.9(a) is inapplicable to the Project and Fraternity Meadows is permitted to develop the Project in accordance with the terms of the Agreement and the approvals granted.

Fraternity Meadows owns Block 5, Lots 3 and 5 in the redevelopment area of Secaucus designated as the Secaucus Transit Village. In accordance with the terms of the Agreement entered into between Fraternity Meadows and Secaucus on July 26, 2006, Fraternity Meadows agreed to construct a planned residential and commercial development consisting of 1,805 market-rate units, 230 affordable units and 30,000 square feet of commercial space. As discussed subsequently, Fraternity Meadows received various approvals for the Project and has completed one residential building and will complete another one shortly. Additionally, Fraternity Meadows has

constructed various infrastructure for the Project as a whole.

By Notice of Motion for Waiver and Recognition of Developer's Vested Rights filed with COAH on January 30, 2009, Fraternity Meadows and Secaucus ask COAH to determine that the Project may proceed in accordance with the July 26, 2006 Agreement. Fraternity Meadows and Secaucus brought this motion in response to the July 17, 2008 amendment to the Fair Housing Act (FHA), N.J.S.A. 52:27D-301 et seq., which requires that at least 20 percent of newly-constructed residential units in the Meadowlands be affordable units, to the extent economically feasible. N.J.S.A. 52:27D-329.9.

In its papers, Fraternity Meadows and Secaucus set forth the chronology of the Project to date. Regarding the chronology, FSHC does not dispute the material facts as set forth therein. Rather, FSHC's arguments address the alleged effect of the approvals and the July 18, 2008 FHA amendment on the construction undertaken to date.

Fraternity Meadows and Secaucus began negotiations for the Project in 2004. In response to COAH's initial December 2004 third round regulations Fraternity Meadows and Secaucus reached agreement whereby Fraternity Meadows would construct 1,805 market-rate units and 230 affordable on the site. This was consistent with COAH's regulations in effect at the time. In furtherance of this agreement, on December 31, 2005, Fraternity Meadows entered into a sewer service capacity agreement with the Secaucus Municipal Utilities Authority, with pre-payment for the 2,035 units. Fraternity Meadows and the Secaucus Affordable Housing Board signed the Agreement on July 26, 2006. Among other things, Fraternity Meadows agreed to build a number of the affordable units as rental units at rents more affordable than required under COAH regulations. Fraternity Meadows also agreed to construct the affordable units at an earlier phase than required

under COAH regulations. In July, 2006, Fraternity Meadows received a zoning certificate approval from the New Jersey Meadowlands Commission (NJMC) for the first residential building for 304 units, including 64 affordable units.

Between June and September 2007, the NJMC, the Secaucus Planning Board and the Hudson County Planning Board issued preliminary and final major subdivision approvals for the entire project. In October, 2007, the NJMC also issued final improvement plan approval for the Project's entire infrastructure. In accordance with this approval, Fraternity Meadows constructed infrastructure for the Project as a whole, including roads, sanitary sewer pump station, upgrades to an off-site regional pump station and stormwater systems and public utilities. In May 2008, the NJMC issued zoning certificate approval for the second residential building for 178 market-rate units and 38 affordable units. To date, the first building is complete and the second is nearing completion. On June 13, 2008, Secaucus' Affordable Housing Board began public advertising for the units. On September 16, 2008, the Affordable Housing Board conducted a public lottery to select 102 families from the 613 applicants. The qualified low income households began occupancy of the 64 affordable units in the first building in November, 2008.

On December 22, 2008, Secaucus adopted its revised third round housing element and fair share plan (plan). The plan included the Project with the 230 affordable units in accordance with the Agreement. Secaucus filed the plan with COAH on December 30, 2008.

In light of the above, Fraternity Meadows and Secaucus argue that COAH should find that the Project has vested rights and, therefore, should not be subject to the 20 percent set aside under N.J.S.A. 52:27D-329.9(a). Relying on N.J.A.C. 5:97-6.5(c), they say that the Project should be able to proceed under the Agreement. They argue that the Project remains a suitable project under

that provision and, therefore, continues to present a realistic opportunity for the provision of Secaucus' fair share need. They point out that the Project is partially completed and already will provide almost half of the units required under the Agreement. They also argue that the preliminary and final major site plan approvals the Project received between June and September 2007 conferred vested rights on the project. Finally, they alternatively argue that the Project is entitled to a waiver of the 20 percent requirement because of the substantial progress on the Project, including the actual construction. Under these circumstances, they claim that it would not be economically feasible at this point to require a 20 percent set aside.

By Notice of Motion to Intervene and for Other Relief filed April 14, 2009, FSHC seeks to intervene in this motion and asks COAH to require that the remaining four buildings of the Project include a 20 percent aside in accordance with N.J.S.A. 52:27D-329.9(a). FSHC argues that there is no need for it to formally intervene, but if COAH should find that it is necessary, FSHC should be permitted to intervene as a long standing advocate for low and moderate income households and as an objector to Secaucus' plan. FSHC argues that the Project has vested rights only for the two buildings that have received zoning certificate approvals. According to FSHC, N.J.S.A. 52:27D-329.9(a) requires a 20 percent set aside for the remaining buildings. FSHC claims that despite Fraternity Meadows' and Secaucus' argument that the number of affordable units the number of affordable units has been established, in reality the set aside is not clear. In any event, FSHC claims that COAH should establish the set aside, and, therefore, the Agreement is not binding. FSHC further argues that it is financially feasible for the remaining buildings to include a 20 percent set aside. In this regard, FSHC argues that if COAH should find that the Project is not financially feasible, COAH should then order Secaucus and NJMC to reduce alleged cost generating features.

FSHC argues that COAH should refer this matter to the Office of Administrative Law for hearing as a contested case.

Fraternity Meadows and Secaucus filed a joint letter brief in reply to FSHC's papers. They dispute FSHC's claim that the number of affordable units was not established. They point out that the number of affordable units agreed to in the Agreement complied with COAH regulations in effect at the time. They further argue that Fraternity Meadows began construction on the two buildings and other aspects of the Project in good faith reliance on the Agreement and the approvals received. They claim that the two buildings are part of an integrated development, with the affordable units provided at the earlier phases, and therefore it is neither appropriate nor financially feasible to separate the buildings and impose a 20 percent set aside on the remaining buildings.

By letter dated May 5, 2009, the NJMC states that the fees assessed and infrastructure requirements are mandated under NJMC regulations and statutes. Likewise, the open space requirements provide an important environmental benefit and serve the public interest and welfare. The NJMC argues that the requirements "are grounded in essential land use planning and environmental concerns" and cannot be waived. The NJMC notes that it has increased maximum density as an incentive for affordable housing. Thus, the NJMC disputes FSHC's request that COAH require the NJMC to provide waivers or other relief should be denied.

By letter dated May 27, 2009, FSHC reiterated its position that the required set aside for the Project has not yet been established. FSHC further argued that under NJMC regulations, vested rights occur only when a development receives a zoning certificate and, therefore, since only two buildings received such certificates, the remaining buildings are subject to the 20 percent set aside. FSHC also argues that COAH regulations address approvals received under the Municipal

Land Use Law (MLUL), N.J.S.A. 40:55D-1 et seq., and movants therefore cannot rely on COAH regulations since the Project is governed by NJMC regulations and not the MLUL. Additionally, FSHC argues that requiring a 20 percent set aside is not a taking. Relying on Roselle v. Borough of Moonachie, 49 N.J. Super. 35 (App. Div. 1958), FSHC further argues that Fraternity Meadows' reliance on the Agreement and various approvals does not immunize the Project from a change in the law. In this regard, FSHC opines that the inherent beneficial use of the property for affordable housing outweighs Fraternity Meadows' reliance on the Agreement and approvals. Finally, FSHC argues that the 20 percent set aside is financially feasible and that it is entitled to a contested case hearing on the issue. FSHC claims that Fraternity Meadows has not presented any information concerning financial feasibility.

At its public meeting on July 8, 2009, COAH rendered an oral decision finding that the Project could proceed in accordance with the terms of the Agreement. Subsequently, before COAH memorialized its oral decision, by letter dated August 31, 2009, FSHC asked for oral argument on the issue of the current set aside for the Project. FSHC alleged that Fraternity Meadows had made conflicting statements before COAH and the Appellate Division on the issue. FSHC stated that COAH did not address this issue in the July 8, 2009 oral decision and, therefore, it was appropriate for COAH to consider it. By letter dated September 3, 2009, Fraternity Meadows opposed the motion, arguing that COAH had considered the issue and disputing FSHC's claim that Fraternity Meadows was being duplicitous. Fraternity Meadows also argued that FSHC's motion essentially amounted to a motion for reconsideration which is prohibited under COAH regulations.

COAH granted FSHC's request and heard oral argument on this limited issue at its public meeting on September 9, 2009. COAH allowed the parties five days after the oral argument

in which to submit any additional information. By letter dated September 14, 2009, Fraternity Meadows argues that there never was any uncertainty as to the number of affordable units the Project would provide. Fraternity Meadows pointed out that several documents stated the 230 affordable units that it had agreed to provide in the Project and it included a List of Attachments with the letter.

In order to ensure that all relevant issues are addressed in its decision, COAH granted FSHC's motion for oral argument. COAH heard oral argument on FSHC's motion at its September 9, 2009 public meeting. Accordingly, COAH has considered the oral argument and papers filed relative to that motion, as well as all papers filed on all motions, in reaching this decision. Notwithstanding COAH's oral decision on July 8, 2009, this written opinion sets forth COAH's decision on the various motions and cross motions.

COAH grants FSHC's Cross-Motion to Intervene in this matter. As FSHC notes in its papers, FSHC represents the interests of low and moderate income households. Additionally, FSHC has been involved in representing the interests of lower income households in this particular project as evidenced by its 2006 appeal of the NJMC's decision. Accordingly, COAH finds that it is appropriate to grant FSHC's Motion to Intervene.

On July 17, 2008, various amendments to the FHA were adopted. Included among these amendments is N.J.S.A. 52:27D-329.9(a) which provides that:

...for developments consisting of newly-constructed residential units located, or to be located, within the jurisdiction of any regional planning entity required to adopt a master plan or comprehensive management plan pursuant to statutory law, including the New Jersey Meadowlands Commission [citation omitted]... there shall be required to be reserved for occupancy by low or moderate income households at least 20 percent of the residential units constructed, to the extent this is economically feasible.

Since the Project at issue received various approvals and commenced prior to the date of adoption of the above provision, COAH must examine the status of the Project in order to determine whether the 20 percent set-aside enacted on July 17, 2008 applies. A review of the chronology of the Project, including the relevant documents and the actual development, demonstrates that it is not appropriate to impose the 20 percent set-aside requirement set forth in N.J.S.A. 52:27D-329.9(a).

On November 15, 2005, Fraternity Meadows and Secaucus reached agreement for development of Fraternity Meadows' property in the Town. The agreement stated that the Project would comply with COAH's growth share affordable housing obligation. Subsequently, the parties renegotiated the agreement and, on July 26, 2006, the Affordable Housing Board of the Town Of Secaucus (Board) and Fraternity Meadows entered into an Affordable Housing Agreement (Agreement). This Agreement plainly states that Fraternity Meadows proposes to develop its property "...with approximately 1,805 market-rate residential units, approximately 30,000 sq. ft. of neighborhood commercial space, and approximately 230 affordable units." The Agreement specifically states that the parties arrived at the 230 affordable unit figure by applying COAH's initial third round regulations in effect at that time, N.J.A.C. 5:94 and 5:95, which required one affordable unit for every eight market rate units and one affordable unit for every 25 newly created jobs.

The Hudson County Register of Deeds recorded the Memorandum of Affordable Housing Agreement on April 9, 2007. While this Memorandum does not specifically state that the development will provide 230 affordable units, it does state that "...the parties have entered into an Agreement to set forth inter alia, the number of affordable residential units to be provided in compliance with the Town's Housing Element and Fair Share Plan relating to the applicable regulations of the New Jersey Council on Affordable Housing..." Thus, there was public notice of the

Agreement, which clearly states that the Project will provide 230 affordable units, in accordance with COAH regulations in effect at the time.

Subsequent to reaching agreement with Secaucus, Fraternity Meadows filed applications for major subdivision approval with the Secaucus Planning Board, the Hudson County Planning Board and the NJMC for approval to subdivide Block 5, Lots 3 and 5 into six development parcels and two parks for a phased-in development as described in the Agreement. The Hudson County Planning Board approved the application by Resolution dated June 20, 2007; NJMC approved the preliminary major subdivision plat by letter dated September 6, 2007 and the Secaucus Planning Board approved the application by Resolution adopted September 18, 2007. The NJMC approval stated that the terms and conditions upon which the approvals were granted could not be changed for three years and that Fraternity Meadows had three years to apply for final approval. By letter dated October 4, 2007, and released November 27, 2007, the NJMC approved the Final Improvement Plans, which approval is valid for three years. Finally, by letter dated November 27, 2007, the NJMC approved the final major subdivision plat.

In addition to the above approvals, on December 29, 2006, Fraternity Meadows recorded a Declaration of Zoning Restriction with the Hudson County Register of Deeds, signed by Fraternity Meadows and the NJMC. Pursuant to NJMC regulations, a zoning lot of record may be established "...in order to utilize two or more lots as a united parcel." N.J.A.C. 19:4-3.22(a). A zoning lot of record is under single ownership and "...shall be designed, developed, built and used as a single unit." N.J.A.C. 19:4-3.22(a)1 and 2. Thus, by recording the Declaration of Zoning Restriction, while the Project was being built in phases, the property was considered a single lot.

As set forth in the Certification of Nicholas Agnoli, P.E., C.F.M., NJMC's Chief

Engineer, and in Fraternity Meadows' papers, in accordance with the approvals granted, Fraternity Meadows undertook improvements and commenced construction before July 17, 2008. Fraternity Meadows constructed three new roads; new stormwater systems and public utilities; a new sanitary sewer pump station; and upgraded an off-site regional pump station and sidewalks, all of which serve the Project. Additionally, Fraternity Meadows commenced construction of two of the six residential buildings prior to July 17, 2008, and in fact received approval for those two buildings prior to June 2, 2008, the adoption date of N.J.A.C. 5:96 and 5:97. The first building, which includes 64 affordable units, was occupied in November 2008. The second building, which includes 38 affordable units, will shortly be ready for occupancy. Many of the infrastructure improvements necessary for the entire, phased development also have been completed.

After review of the approvals granted and the subsequent actions Fraternity Meadows undertook as a result of those approvals, COAH finds that the 20 percent set-aside required in N.J.S.A. 52:27D-329.9(a) should not apply in this case. As discussed above, Fraternity Meadows received approvals from the Secaucus and Hudson County Planning Boards and final major subdivision plat approvals from the NJMC prior to July 17, 2008. In reliance on these approvals, Fraternity Meadows built infrastructure and utilities for the entire Project, not just for the two buildings that received zoning certificates. This makes sense since Fraternity Meadows filed a Declaration of Zoning Restriction which made clear that while the residential units were to be built in six phases, the entire development was to be considered as a single zoning lot. Thus, Fraternity Meadows proceeded with construction in reasonable reliance on approvals that were granted prior to enactment of N.J.S.A. 52:27D-329.9(a). Moreover, Fraternity Meadows agreed to comply with COAH's initial third round regulations and provide 230 affordable units as required under those

rules. Thus, while this is not the 20 percent set-aside that the Legislature required as of July 17, 2008, the Project did comply with COAH's initial third round regulations in place at the time and provided the requisite affordable units under those regulations.

COAH recognizes that, while there are six residential buildings in the Project, Fraternity Meadows received zoning certificates from the NJMC for only two buildings prior to July 17, 2008. Specifically, Fraternity Meadows received the zoning certificate for the first building in July 2006 and for the second building in May 2008. FSHC argues that Fraternity Meadows has vested rights for only the two buildings that received zoning certificates prior to July 17, 2008 and that the four remaining buildings are subject to the statutory 20 percent set-aside. This argument recognizes that July 17, 2008 is the significant action date. COAH, however, disagrees with FSHC that the receipt of zoning certificates is the significant factor under the facts of this case.

As set forth in the Agreement, Fraternity Meadows and Secaucus negotiated the development as an entire phased-in Project, consisting of 1,805 residential units, 230 affordable units, 30,000 sq. ft. of commercial space and two parks. The NJMC and Fraternity Meadows executed a Declaration of Zoning Restriction which declares the property to be a single lot upon which a phased residential and commercial redevelopment Project will be built. Fraternity Meadows received major subdivision approvals from the relevant entities for the entire Project. Fraternity Meadows received these approvals prior to July 17, 2008. Fraternity Meadows made improvements to the property related to the entire Project, not just the two buildings, before July 2008. In short, unlike the plaintiff in Roselle, *supra*, Fraternity Meadows undertook substantial actions to advance the entire Project, not just two buildings, in reliance on approvals received prior to enactment of N.J.S.A. 52:27D-329.9(a). Accordingly, COAH considers the status of the Project as a whole as of

July 17, 2008, and not just the fact that only two buildings received zoning certificates as of that date. Fraternity Meadows completed substantial work, including significant construction of two buildings, prior to July 17, 2008 in reliance on approvals received. Thus, it is COAH's conclusion that N.J.S.A. 52:27D-329.9(a) does not apply. Indeed, application of the provision to this Project essentially would undo the approvals received and require complete revision of the Project. There is nothing to indicate that this is the intent of N.J.S.A. 52:27D-329.9(a) or that the provision is to be applied retroactively.

Since COAH finds that the 20 percent set-aside is inapplicable, there is no need to consider FSHC's Motion for fee waivers, as Fraternity Meadows can proceed under its Agreement and approvals and, therefore, fee waivers are not necessary. Likewise, economic feasibility is not an issue and there is no need for a contested case hearing.

FSHC also argues that the issue of the set-aside is open because Fraternity Meadows purportedly took contradictory positions on the issue in its papers in this matter and before the Appellate Division in FSHC's NJMC appeal. FSHC argues that Fraternity Meadows argued before the Appellate Division that COAH would establish the set-aside. Accordingly, FSHC argues that COAH can, and should, apply the 20 percent set-aside. Upon review of the various documents, COAH finds that the set-aside was clearly established between Fraternity Meadows and Secaucus. The Agreement, the Hudson County Planning Board Resolution and the Secaucus Planning Board Resolution all specifically state that 230 affordable units will be provided in the Project. As discussed above, these documents were adopted in 2006 and 2007.

While this Project is not subject to the 20 percent set-aside, there will be future opportunities to capture affordable housing in the Secaucus Transit Village Redevelopment Area.

The Redevelopment Plan, adopted by the NJMC on April 16, 2004, and subsequently amended on May 24, 2006 and April 23, 2008, requires the construction of sufficient affordable units within the zone to satisfy the growth share obligation associated with both residential and non-residential development pursuant to standards in the COAH's third round rules at N.J.A.C. 5:96-1 et seq. and N.J.A.C. 5:97-1 et seq. As such, the Redevelopment Area is responsible for providing affordable housing commensurate with the market-rate residential and non-residential growth that occurs within it. Indeed, on September 10, 2009, the NJMC issued a Request for Proposal (RFP) for a Planning Study of the Station Square Zone in the Secaucus Transit Village Redevelopment Area that may increase opportunities above a 20 percent affordable housing set-aside within the Redevelopment Area. [www.njmeadowlands.gov/public/notices.html](http://www.njmeadowlands.gov/public/notices.html). This RFP specifically states that the NJMC wishes to examine the feasibility of allowing a more significant residential component in the Station Square Zone. The RFP also specifically recognizes the need for affordable housing and lists as a task the evaluation of market rate and affordable densities.

Further, the RFP states that the Consultant will coordinate with the NJMC regarding N.J.S.A. 52:27D-329, which revises the FHA and assigns new authority and responsibilities to the NJMC to plan and zone for affordable housing needs as a regional entity. N.J.S.A. 52:27D-329.9(a) requires that development consisting of newly-constructed residential units located, or to be located, within the jurisdiction of the NJMC are required to reserve at least 20 percent of the units constructed for low or moderate income households, to the extent economically feasible. This provision recognizes that "regional planning entities are appropriately positioned to take a broader role in the planning and provision of affordable housing based on regional planning considerations." Regional entities are required to "identify and coordinate regional affordable housing opportunities

in cooperation with municipalities in areas with convenient access to infrastructure, employment opportunities, and public transportation.

In addition to the requirements of N.J.S.A. 52:27D-329.9(a), the NJMC has adopted “*Interim Policies Governing Affordable Housing Development in the Meadowlands District*” (Interim Policies; see Appendix IV), which shall remain in effect until the new housing rules are promulgated, and which require projects consisting of five units or more to provide an affordable housing set-aside in accordance with COAH’s regulations at N.J.A.C. 5:97. Thus, depending upon the outcome of the study, there may be opportunities for increased affordable housing in the Station Square zone. Secaucus is directed to work with the NJMC to identify additional affordable housing opportunities within the Redevelopment Area.

Accordingly, for the reasons set forth above, COAH grants Fraternity Meadows’ and Secaucus’ motion to the extent that COAH finds that the 20 percent set-aside required under N.J.S.A. 52:27D-329.9(a) does not apply to this Project. Also, for the reasons set forth above, COAH grants FSHC’s Motion to Intervene and Motion for Oral Argument and denies FSHC’s Motion to Require the Town Secaucus and the New Jersey Meadowlands Commission to Provide Fee Waivers.

DATED: November 12, 2009

A handwritten signature in cursive script that reads "Renee Reiss". The signature is written in black ink and is positioned above the printed name of the signatory.

~~Renee Reiss, Council Secretary~~