

IN RE PETITION FOR SUBSTANTIVE) COAH DOCKET NO. 09-2177
CERTIFICATION FILED BY WINSLOW TOWNSHIP,)
CAMDEN COUNTY,)
TAYLOR WOODS LLC)
MOTION FOR SEWER SERVICE PRIORITY)
))
) OPINION

This matter comes before the Council on Affordable Housing upon the application of Taylor Woods, LLC (Taylor Woods) for an Order directing Winslow Township, Camden County (Winslow or Township) to grant Taylor Woods’ development sewer service priority and for an Order directing Winslow to reinstate and approve Taylor Woods’ Treatment Works Approval (TWA) application. Taylor Woods is the developer of a proposed inclusionary development in Winslow that will provide 40 affordable rental units. The Taylor Woods project is located in the Cedarbrook sewer service area and COAH previously has found that the development is exempt from the existing scarce resource restraint. Winslow opposes the motion in its entirety. COAH granted Taylor Woods’ motion by oral decision at its public meeting on December 9, 2009. This written decision memorializes that oral decision and sets forth COAH’s decision.

For the following reasons, COAH directs Winslow to give Taylor Woods’ inclusionary development priority for 74,625 gallons per day (gpd) of sewer capacity from the 188,000 gpd capacity the New Jersey Department of Environmental Protection (DEP) approved in January 2009 for the Cedarbrook sewer service area. COAH further orders Winslow to review and endorse Taylor Woods’ TWA application to the Camden County Municipal Utilities Authority

(CCMUA) within 45 days from the date of COAH's oral decision on December 9, 2009. COAH further directs Winslow to conduct an expeditious and good faith review of the application.

Given the number of motions filed with COAH concerning sewer capacity in Winslow, a brief procedural history is warranted. By Decision dated October 29, 2008, in response to a Taylor Woods' motion, COAH found sewer capacity to be a scarce resource in Winslow and further found that Winslow had been allocating this scarce resource to projects that did not include affordable housing. Accordingly, COAH imposed a scarce resource restraint upon the allocation of available and future sewer capacity until COAH acts on Winslow's petition for third round substantive certification. COAH specifically found Taylor Woods' inclusionary project to be exempt from the restraint and further stated that any developer of an affordable housing development may move before COAH for an exemption. In its motion for a scarce resource restraint, Taylor Woods also asked COAH to direct Winslow to give Taylor Woods' inclusionary development priority for any remaining sewer capacity. COAH denied this request without prejudice, finding that Winslow should have the opportunity to file its third round housing element and fair share plan (plan) by December 31, 2008 before COAH considered such relief.¹

¹ Another developer, Cedar Brook Properties, L.L.C. (Cedar Brook), filed a Motion to Intervene in the Taylor Woods request for a scarce resource restraint. Cedar Brook had received final major subdivision approval for a 274-lot subdivision. Since Winslow did not have a growth share ordinance for affordable housing in place, Cedar Brook's development consisted solely of market rate units. Cedar Brook advised COAH that it would include an eight percent set aside in its project, which could be accomplished under the approvals already granted. Through its intervention, Cedar Brook sought to preserve its position of first priority on the sewer allocation waiting list. COAH granted Cedar Brook's Motion to Intervene and found that the Cedar Brook project was exempt from the restraints since it would be providing affordable housing.

By Motion filed December 2, 2008, Winslow asked COAH for reconsideration and clarification of its October 29, 2008 Decision. By Decision dated April 8, 2009, COAH clarified its October 29, 2008 Decision to state that the scarce resource restraint is applicable to residential and non-residential developments both in the Sicklerville and Cedarbrook sewer service areas, regardless of whether the project proposes individual septic systems. COAH further stated that applicants on the sewer service waiting list are not exempt from the restraint and that anyone seeking an exemption must apply to COAH.

Winslow and the Winslow Township Planning Board filed Notices of Appeal from COAH's April 8, 2009 Decision. They also appealed from COAH's Decisions concerning Cedar Brook. Subsequently, in response to COAH's Motion to Dismiss the appeals as interlocutory, Winslow filed a Notice of Motion for Leave to Appeal. By Orders filed August 18, 2009, the Appellate Division denied the Township's and Planning Board's Motions for Leave to Appeal and dismissed the appeals as interlocutory. Thus, COAH's October 29, 2008 scarce resource restraint as clarified by its April 8, 2009 decision remains in full force and effect.

Meanwhile, on April 20, 2009, Winslow moved before COAH for an Order revoking Taylor Woods' exemption from the restraint. Taylor Woods filed a cross motion requesting sewer service priority for its project. By Resolution adopted August 17, 2009, COAH denied Winslow's motion and granted Taylor Woods' cross motion in part. Specifically, COAH required Winslow to reserve capacity for all projects included in Winslow's housing element and fair share plan. Accordingly, COAH denied Taylor Woods' specific request for sewer service priority, finding that it was unnecessary at that time as Taylor Woods' project was included in the scope of the Order.

COAH, however, required Winslow to move expeditiously with the processing of Taylor Woods' applications.

On September 2, 2009, Taylor Woods submitted its TWA application to Winslow for endorsement. By letter dated and received September 3, 2009, Winslow stated that it could not entertain any application until final approval is granted from either the Planning or Zoning Board for projects within the Cedarbrook Sewer Service Area.

Taylor Woods now files this Motion asking COAH to require Winslow to give Taylor Woods' development priority for 74,625 gpd from the additional 188,000 gpd DEP granted to Winslow in January 2009 and to reinstate and approve Taylor Woods' TWA application. Taylor Woods claims that despite its long history both before Winslow and COAH and COAH's specific direction to Winslow to move expeditiously on Taylor Woods' applications, Winslow remains recalcitrant and refuses to act in good faith on Taylor Woods' applications. Taylor Woods argues that there is a real potential that the Township will lack the sewer capacity for its project since Winslow is not monitoring the sewer flows for projects that have received exemptions and, given Winslow's responses thus far, receipt of final approval for Taylor Woods's development may take some time. Taylor Woods also points out that instead of supporting its TWA applications as required by COAH's August 17, 2009 Resolution, Winslow summarily rejected it, stating that it would not entertain the request until Taylor Woods' received final approvals from the Zoning and Planning Boards. Taylor Woods' notes that it submitted its TWA to Winslow on September 2, 2009 and received the letter from Winslow dated September 3, 2009, the next day.

Winslow opposes Taylor Woods' motion. Winslow argues that Taylor Woods is precluded from bringing this motion under the law of the case doctrine since COAH already has

denied Taylor Woods' previous motions for sewer service priority. Winslow also argues that its local ordinances prohibit Winslow from endorsing Taylor Woods' TWA application until Taylor Woods receives at least preliminary approval. Winslow further disputes Taylor Woods' claims that there are no mechanisms in place to monitor the flow. Winslow claims that it is Taylor Woods that is failing to act expeditiously in submitting its applications. In support of this argument, Winslow cites various areas where it claims that Taylor Woods is not in compliance with various municipal ordinances that are prerequisites for Winslow's approval, including ownership of the site.

Taylor Woods filed a reply to Winslow dated November 5, 2009. In its reply, Taylor Woods disputes all of Winslow claims. Taylor Woods argues that the law of the case doctrine is not applicable in this case because it is Winslow that refused to process applications and the delay cannot be attributed to Taylor Woods. In this regard, Taylor Woods argues that Winslow has reneged on a previous agreement that allowed Taylor Woods to make deposits in four installments and instead required the deposit in two payments which effectively increased the deposit requirements. Taylor Woods also argues that, despite Winslow's claims to the contrary, Winslow is not allowing all phases of Taylor Woods' applications simultaneously and that Taylor Woods has not yet received necessary draft resolutions. Finally, Taylor Woods points out that DEP regulations only require an executed statement of consent from the municipality and, therefore, Winslow's ordinance, which requires site plan approval before Winslow will endorse the TWA, unnecessarily delays the provision of affordable housing.

COAH heard oral argument on November 12, 2009. Both parties subsequently filed written submissions with COAH. Not surprisingly, given the history of this matter, the submissions are contradictory. Winslow submitted a letter dated November 25, 2009 from Christopher J. Noll,

P.E., C.M.E., P.P., the Township's Municipal Utilities Engineer, in which Mr. Noll recommends that Winslow not endorse any TWA applications prior to the granting of development approvals because there is not sufficient sewer capacity to accommodate the Township's build-out.

By letter dated November 28, 2009, Taylor Woods submitted an e-mail from Andrew Kricun, P.E., Deputy Executive Director/Chief Engineer Camden County Municipal Utilities Authority, which states that "the CCMUA does have the physical capacity to accept the additional 188,000 gallons per day approved earlier this year for Cedarbrook. Therefore, we would endorse Treatment Works Approval applications forwarded by Winslow Twp. for the Cedarbrook section of Winslow only, up to 188,000 gallon per day limit." Thus, Taylor Woods argues that there is nothing to prevent Winslow from endorsing Taylor Woods' TWA application.

In response, Winslow filed a letter dated December 3, 2009, in which Winslow relies on an August 26, 2009 e-mail from Mr. Kricun concerning infrastructure upgrades. Winslow interprets this e-mail to mean that, because of necessary upgrades, Winslow cannot endorse any TWA applications unless the development has site plan approvals. Winslow argues that COAH cannot grant Taylor Woods' motion unless Taylor Woods has complied with all local ordinances, which includes receiving site plan approvals before the Township will endorse a TWA application.

It is undisputed that Winslow at this time has the requisite sewer capacity available for Taylor Woods' project. By public notice dated January 28, 2009, DEP announced the Adopted Amendment to the Tri-County Water Quality management Plan (WQMP). The notice stated that the amendment was to the Camden County Municipal Utilities Authority (CCMUA) Wastewater Management Plan (WMP) as well as to the Tri-County WQMP. The notice specifically stated that

Winslow's allocation in the Cedarbrook section was increased by 188,000 gpd, from 540,000 gpd to 728,000 gpd. Thus, Winslow now has an additional 188,000 gpd.

As set forth in COAH's October 29, 2009 Pre-Mediation Report, Winslow's plan includes three affordable housing projects in the Cedarbrook sewer service area. COAH already granted the Cedar Brook development an exemption from the restraint and that project will use 82,000 gpd. Taylor Woods' states that its project needs 74,625 gpd. Winslow's plan also includes a 128-unit municipally sponsored affordable housing project that will need approximately 38,400 gpd. While these three projects total in excess of the 188,000 gpd., Winslow's plan calls for the issuance of a RFP for the municipally sponsored project in January 2010 with building permits/construction beginning in June 2012 and occupancy in December 2012.. The Cedar Brook and Taylor Woods projects, on the other hand, are moving forward at this time. Accordingly, there now is sewer service capacity available for those projects, including the 74,625 gpd Taylor Woods requests.

Despite the fact that Winslow presently has sufficient capacity for the Taylor Woods development, Winslow argues that it cannot endorse Taylor Woods' TWA application. In response to COAH's request for further information concerning the sewer line for the Taylor Woods development and necessary CCMUA improvements, Winslow noted the additional 188,000 gpd DEP awarded in January 2009, but also submitted a November 25, 2009 letter from its Municipal Utilities Engineer which states that Winslow cannot endorse any TWA application prior to the developer receiving final approvals because there is not enough capacity to accommodate the Township's build out. Contrary to Winslow's claims, this letter does not provide a basis for Winslow to deny or refuse to act on Taylor Woods' TWA.

The definitive answer to this dispute comes from the CCMUA. In an e-mail dated November 18, 2009, addressed to counsel for both Winslow and Taylor Woods, Andrew Kircun, CCMUA's Deputy Executive Director/Chief Engineer, stated that "the CCMUA does have the physical capacity to accept the additional 188,000 gallons per day..." Mr. Kircun further stated that "we would endorse Treatment Works Approval applications forwarded by Winslow Township for the Cedarbrook section of Winslow only, up to the 188,000 gallons per day limit." Despite this clear statement, Winslow apparently did not fully understand the e-mail as Mr. Kircun found the need to clarify his November 18, 2009 e-mail in a December 3, 2009 e-mail sent to COAH and counsel for Winslow. In the December 3, 2009 e-mail, Mr. Kircun explicitly states that

[r]egarding Cedarbrook, the CCMUA does currently have the physical capacity to accept the additional 188,000 gallons per day that was the subject of a NJDEP amendment approved earlier this year. However, we cannot accept any additional flow over that amount until/unless the Pinelands Commission approves the MOU between themselves, CCMUA and Winslow Twp. AND the CCMUA constructs an upgrade to its existing Cedarbrook transmission line to Camden.

Thus, while the infrastructure and capacity presently may not exist to accommodate Winslow's entire build-out, the 188,000 additional gpd DEP approved on January 28, 2009 is available. The CCMUA will endorse any TWA forwarded by Winslow within the Cedarbrook sewer service area for up to the 188,000 gpd. Thus, the fact that there is not sufficient capacity for Winslow's entire build out is not a basis for withholding consent. There is capacity available from the 188,000 additional gpd for Taylor Woods' inclusionary development now. Winslow's assertion that the Sicklerville Sewage Treatment Plant and additional capacity for Cedarbrook beyond 188,000

gpd need to be finalized and agreed upon between the Township, DEP and the Pinelands Commission do not affect the 188,000 gpd, which DEP already approved.

While existing sewer capacity and the CCMUA are not impediments to a TWA application endorsement, Winslow claims that its existing municipal ordinances prohibit it from endorsing the TWA. Winslow argues that it has an ordinance that requires at least preliminary site plan approval before it can endorse a TWA application and that COAH cannot require the Township to ignore that ordinance. It is interesting to note that in its September 3, 2009 letter Winslow advised Taylor Woods that it could not endorse Taylor Woods' TWA application until the project received final approval, but that Winslow now states that its ordinance requires "at least preliminary approval." In any event, contrary to Winslow's argument, COAH does indeed have the authority to require Winslow to grant Taylor Woods priority.

As the Supreme Court noted in Hills Dev. Co. v. Bernards Tp., 103 N.J. 1 (1986), COAH "may use its powers to grant or deny substantive certification in a multitude of ways in order to accomplish its mission of bringing about statewide compliance with the Mount Laurel obligation." Id. at 56. One of the primary ways to bring about this compliance is to ensure that municipalities have in place ordinances that foster, rather than prohibit, the construction of affordable housing. N.J.S.A. 52:27D-310; 314. In this case, Winslow's ordinance requiring site plan approval before it will endorse a TWA application inhibits the provision of affordable housing. As discussed above, the CCMUA poses no barrier to the endorsement. The CCMUA has said that the capacity is there and that it will endorse TWA applications from Winslow up to the 188,000 gpd. DEP does not require preliminary or final approvals before a TWA application endorsement. Taylor Woods is attempting to move forward with its inclusionary development and is being thwarted, in part, by a

municipal ordinance. Thus, COAH has the authority to require Winslow to remove this barrier to affordable housing.

Winslow also argues that the “law of the case” doctrine requires COAH to reject Taylor Woods’ motion. According to Winslow, since COAH has denied Taylor Woods’ previous requests for priority, the law of the case doctrine now requires COAH to reject the request because it has been previously decided. Contrary to Winslow’s claim, the doctrine does not require that result in this case. The law of the case doctrine is designed to avoid re-litigation of the same issue in the same controversy. It is, however, discretionary and to be flexibly applied in the interests of justice. State v. Ruffin, 371 N.J. Super. 371, 390 (App. Div. 2004).

In this case, COAH initially denied Taylor Woods’ claim for priority without prejudice in order to give Winslow an opportunity to file its plan. When Taylor Woods next raised the claim, COAH still wanted to give Winslow an opportunity to comply with COAH directives. Accordingly, COAH did not grant priority to Taylor Woods specifically, but instead, through its August 17, 2009 Resolution, directed Winslow to reserve capacity out of the remaining gallonage available for all affordable projects proposed to be built in the Cedar Brook sewer service area that are included in its HEFSP, including Taylor Woods. COAH also ordered Winslow to expeditiously process Taylor Woods application. COAH believed that this Resolution addressed the necessary issues and Taylor Woods’ project would move forward expeditiously as ordered. However, as evidenced by the following events and this motion, this was not the case. COAH, therefore, is compelled at this time to act on Taylor Woods’ pending motion and order specific relief to ensure that Winslow provides affordable housing in accordance with its plan. The Township cannot now try and invoke the law of the case in order to avoid compliance. COAH recognizes that its August

17, 2009 Resolution required Winslow to expeditiously process the application in accordance with local ordinances. As discussed above, however, the local ordinances cannot be used to delay the construction of affordable housing.

Accordingly, for the above reasons, COAH grants Taylor Woods' request for priority for sewer service capacity for 74,625 gpd from the 188,000 additional capacity in the Cedarbrook sewer service area awarded to Winslow on January 28, 2009. Winslow is ordered to give priority to Taylor Woods for 74,625 gpd. Winslow is further ordered to process Taylor Woods' TWA application without reference to the municipal ordinance that requires any development approvals before Winslow will endorse the application. It is COAH's understanding that this ordinance provided the only basis for Winslow to reject Taylor Woods' TWA application, and, therefore, with this barrier to affordable housing removed, Winslow will be able to endorse the TWA application promptly. Winslow is ordered to act on the TWA application within 45 days from COAH's oral decision.

COAH has made every effort to be clear and direct in its decision so that the Taylor Woods project can move forward expeditiously at this time and affordable housing realized in Winslow. Given COAH's efforts in this regard, COAH does not expect that Winslow will need to file any motions for clarification or other similar motions. Taylor Woods is a component of Winslow's plan and COAH's previous orders that Winslow move expeditiously with that component continue in full force and effect.

Further, regarding Winslow's request that developers that have been or will be in the future, granted an exemption or waiver of the Restraint be required to deposit money to pay for monitoring of sewer flow, COAH requires that such funds necessary to pay the Winslow Township Engineer for

this service be deposited into an escrow account for this purpose. In the alternative, such developers shall be required to install a sewer flow meter to monitor the flow.

Lastly, COAH requires any remaining capacity from the 188,000 gpd allocation, after allocation to Taylor Woods and Cedar Brook, to be reserved for the remaining project in Winslow's December 31, 2008 Fair Share Plan, namely the 128-unit municipally sponsored affordable housing project that will need approximately 38,400 gpd. Winslow is further directed to take all steps necessary, including but not limited to working cooperatively with the Pinelands Commission and the CCMUA to effect the MOU, to ensure that additional sewer capacity can be secured for this municipal construction project and any other mechanisms included in its Fair Share Plan.

I hereby certify that this Opinion was
Duly adopted by the Council on Affordable
Housing at its meeting on January 13, 2010.

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

Renee Reiss, Council Secretary