

RESOLUTION DENYING WAIVER FROM N.J.A.C. 5:97- 8.1(d)

Marlboro Township, Monmouth County

COAH DOCKET # 10-2203

WHEREAS, Marlboro Township (“Marlboro” or “the Township”), Monmouth County, received a consent order for a Final Judgment of Compliance concerning its affordable housing obligation on December 24, 1985, which was amended on June 5, 1990 and March 5, 1993 and extended by court order on January 17, 1995; and

WHEREAS, Marlboro petitioned COAH for, but never received, second round substantive certification; and

WHEREAS, on December 30, 2008, Marlboro petitioned COAH for third round substantive certification of its Housing Element and Fair Share Plan; and

WHEREAS, included in the Township’s petition was a proposed municipally sponsored 100 percent affordable project, known as the Ingerman project to be located on Ticetown Rd, which was to produce 176 affordable family rental units and to be developed by the Ingerman Group; and

WHEREAS, the Township’s petition also included a draft spending plan, which did not include the Ticetown Road project; and

WHEREAS, Marlboro’s affordable housing trust fund has a balance of \$13,436,717, and the Township’s draft spending plan anticipates the collection of an additional \$5,601,081 in revenues before the expiration of its third round substantive certification, for a total projected revenue of \$19,037,798; and

WHEREAS, a COAH Premediation Report Requesting Additional Information was issued on June 12, 2009; and

WHEREAS, COAH received fourteen (14) objections to Marlboro's third round Housing Element and Fair Share Plan and several mediation sessions were conducted; and

WHEREAS, the items listed in the COAH report were to be provided to COAH on August 14, 2009, pursuant to N.J.A.C. 5:96-6.2(c); and

WHEREAS, Marlboro received three extensions to submit the documentation listed in the report to COAH; and

WHEREAS, Marlboro originally requested and received the first extension to submit the documentation listed in the report to COAH until November 23, 2009, due to the fact that mediation had not yet concluded at that time; and

WHEREAS, on November 16, 2009, Marlboro requested and received a second extension to submit the remaining items no later than January 29, 2010;

WHEREAS, Marlboro requested the second extension because the Township indicated that it was exploring substituting an alternative site for the Ticetown Road project. However, COAH's extension stated that if Marlboro substituted an alternative site for the Ticetown Road site, the Township would be required to re-petition pursuant to N.J.A.C. 5:96-3.4 by March 15, 2010; and

WHEREAS, on March 13, 2010, Marlboro requested a third extension for a period of 180 days, stating that an additional extension was necessary due to the circumstances presented to municipalities throughout the State as to the status of the affordable housing laws, and that the Township needed additional time to coordinate and move forward on the Ingerman project; and

WHEREAS, on March 16, 2010, COAH staff issued a letter to Marlboro denying the Township's request for additional 180-day extension and provided the Township with a final 45-day extension until April 30, 2010, to submit the documentation listed in the report to COAH or re-petition COAH; and

WHEREAS, Marlboro did not re-petition by April 30, 2010, and did not submit all of the items requested in the COAH report; and

WHEREAS, on January 19, 2010, Kenneth W. Biedzynski, Esq., on behalf of Marlboro Township transmitted to COAH a motion for a waiver from N.J.A.C. 5:97-8.1(d) in order for the Township to expend \$250,000 from its affordable housing trust fund for (1) pre-development costs for site investigation and exploration of a new site (Amboy Road site, Block 172, Lots 35 & 37) for the Township's municipally sponsored 100 percent affordable project (\$190,000); and (2) reimbursement for pre-development costs expended as it related to the previous site for the municipally sponsored 100 percent affordable project (Ticetown Road site, Block 119, Lot 4) that was included in the Township's December 30, 2008 petition (\$60,000); and

WHEREAS, N.J.A.C. 5:97-8.1(d) states that a municipality may not spend development fees until such time as the municipality obtains approval of its spending plan from COAH; and

WHEREAS, Marlboro states in its waiver request that the granting of the waiver fosters the production of affordable housing because the monies sought by Ingerman relate to the pre-construction exploration and analysis of a site which is proposed to yield 176 family affordable rental units; and

WHEREAS, Marlboro states that by not granting the waiver, the Township will be subjected to a hardship because a critical centerpiece to its plan will have been stalled; and

WHEREAS, Marlboro also states that the granting of the waiver furthers the spirit and intent of COAH's rules; and

WHEREAS, COAH has received opposition to the motion from Jonathon Burnham, Esq., on behalf of American Properties at Marlboro, LLC (American Properties), which is an objector to the Township's plan; and

WHEREAS, Francis C. Accisano, Esq., on behalf of the owners of the American Properties' site, joins in Mr. Burnham's opposition and relies on his submissions; and

WHEREAS, American Properties is the contact purchaser for Block 206, Lot 53 in Marlboro, which was included in the Township's initial 2005 third round plan, but not included in the 2008 third round plan; and

WHEREAS, American Properties states that the Township's motion for a waiver should be denied because there is no indication that the grant of Marlboro's waiver would foster the production of affordable housing; and

WHEREAS, American Properties states that the Township should not be allowed to reimburse funds to Ingerman for costs it incurred in investigating a site that will not produce affordable units (Ticetown Road site) and to investigate another site which may or may not produce affordable housing (Amboy Road site); and

WHEREAS, American Properties argues that the suitability, and even the acquisition of the Amboy Road site, is questionable; and

WHEREAS, on March 30, 2010, an objector to the Township's plan, Michael Weitz/OHAD, filed a builder's remedy lawsuit with the Superior Court regarding the Northpointe site, which is included in the Township's petition; and

WHEREAS, on April 29, 2010, Marlboro filed a motion for an extension of 90 days from April 30, 2010 to re-petition COAH; and

WHEREAS, Marlboro's motion for an extension states that a re-petition cannot be filed until this spending plan waiver is granted because the Township needs to disburse funds to Ingerman for the exploration of the Amboy Road site, which will be included in the re-petition; and

WHEREAS, the Township states that it needs time to obtain an appraisal for the Amboy Road site, complete a site suitability analysis, and obtain site control; and

WHEREAS, the Township also maintains that it needs additional time to make changes to its Fair Share Plan and to its spending plan; and

WHEREAS, the Township also states that it needs additional time to defend and plan for the handling of the Weitz/OHAD lawsuit, and that the Township cannot provide information to COAH regarding Weitz's sites while that suit is still pending and active; and

WHEREAS, on May 3, 2010, COAH received a motion for accelerated denial of Marlboro's petition for substantive certification from American Properties at Marlboro, LLC, an objector to the Township's Fair Share Plan; and

WHEREAS, oral argument on both the Township's motion for an extension to re-petition and American Properties' motion for accelerated denial will be heard at the June 9, 2010 COAH meeting; and

WHEREAS, pursuant to N.J.A.C. 5:96-15.2, COAH may grant a waiver from specific provisions of its rules if it is demonstrated that strict application of the rules would impose an unnecessary financial, environmental or other hardship; or 1) The waiver would foster the production of affordable housing; 2) The waiver would foster the intent, if not the letter of COAH's rules; and 3) The Housing Element and Fair Share Plan provide a mix of housing options; and

WHEREAS, a COAH task force considered Marlboro's spending plan waiver request on May 5, 2010; and

WHEREAS, the task force recommends that the waiver request does not meet the waiver criteria set forth at N.J.A.C. 5:96-15.2 and that the reimbursement request for pre-development costs expended on the Ticetown Road site be denied with prejudice, and the request for costs

related to the expenditure of funds for pre-development costs for site investigation and exploration of the Amboy Road site be denied without prejudice; and

WHEREAS, any expenditures from the affordable housing trust fund must meet the requirements of N.J.A.C. 5:97-8.7, which sets forth examples of acceptable housing activities funded through the Township's affordable housing trust fund; and

WHEREAS, in view of the fact that the Ticetown Road site will no longer be used for affordable housing because the Township has chosen a different site for the affordable housing project, affordable housing trust fund money cannot be used by the Township to reimburse the Ingerman Group for pre-development expenses related to the Ticetown Road site, pursuant to N.J.A.C. 5:97-8.7(a); and

WHEREAS, the Township has not demonstrated that the Ticetown Road site was environmentally unsuitable for the affordable housing project, but that the Township chose a different site for the project; and

WHEREAS, the Township has informed COAH staff that the Ingerman Group will be receiving \$23,000 in deposit money returned from the owner of the Ticetown Road site, which funds could be used for a deposit on the Amboy Road site; and

WHEREAS, the Township has not demonstrated that it is committed to the Amboy Road site as part of the Township's Fair Share Plan; and

WHEREAS, a commitment to the Amboy Road site may be demonstrated by re-petitioning COAH with the Amboy site in an amended Housing Element and Fair Share Plan and submitting a revised spending plan to include the proposed expenditures for the Amboy Road site; and

WHEREAS, the task force recommends that the Township will not be subject to a hardship if the waiver request is not granted at this time, because the Township has received

three extensions to submit the information requested in the June 12, 2009 COAH Premediation Report Requesting Additional Information and to re-petition COAH with the Amboy Road site in the Township's Fair Share Plan and spending plan; and

WHEREAS, the last two extensions were granted by COAH because the Township maintained that it was exploring the possibility of a new site and would need to re-petition to include the new site; and

WHEREAS, at the present time, COAH is still waiting for the re-petition.

NOW THEREFORE BE IT RESOLVED that COAH hereby denies the waiver request from N.J.A.C. 5:97-8.1(d) for reimbursement for pre-development costs expended as it relates to the Ticetown Road site with prejudice, and denies the waiver request for expenditure of funds for pre-development costs for site investigation and exploration of the Amboy Road site without prejudice; and

BE IT FURTHER RESOLVED that if the Township re-petitions with the Amboy Road site in its Fair Share Plan and includes the proposed expenditures for the Amboy Road site in its revised spending plan, COAH may then proceed with approving the spending plan through the normal review process; and

BE IT FURTHER RESOLVED that once the spending plan is approved, the Township may disburse the funds to the Ingerman Group for the pre-development costs for the Amboy Road site, provided the site will be used for affordable housing as provided in N.J.A.C. 5:97-8.7(a).

I hereby certify that this resolution was
duly adopted by the Council on Affordable
Housing at its public meeting on May 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 and title.

Renee Reiss, Secretary
Council on Affordable Housing