

IN RE PETITION FOR SUBSTANTIVE )  
 CERTIFICATION FILED BY )  
 RIVER VALE TOWNSHIP, BERGEN COUNTY ) COAH DOCKET #10-2223  
 GRANTING OF RIVER VALE’S REQUEST FOR )  
 EXTENSION OF TIME TO SUBMIT DEVELOPER’S )  
 AGREEMENTS REQUIRED BY COUNCIL’S )  
 MARCH 10, 2010 GRANT OF SUBSTANTIVE )  
 CERTIFICATION TO THE TOWNSHIP’S HOUSING )  
 ELEMENT AND FAIR SHARE PLAN ) OPINION

ISSUE

This matter comes before the Council on Affordable Housing (COAH or Council) upon the Township of River Vale’s April 22, 2010 application for an extension of time in which to submit the developer’s agreements required by COAH’s March 10, 2010 grant of substantive certification. Pursuant to COAH’s Resolution Granting Third Round Substantive Certification, #60-18, COAH required River Vale to submit the agreements by April 26, 2010. Citing economic hardship, River Vale requests a 45-day extension of time in which to submit the agreement for the Kirk site and a 60-day extension for the Mesker site. For the following reasons, COAH accepts the May 25, 2010 Developer’s Agreement and the June 3, 2010 Amendment (**Developer’s Agreement and Amendment** ), which was executed on June 4, 2010; which address both sites, and thereby effectively grants River Vale an extension until that date. As discussed subsequently, COAH issued an oral decision at its public meeting on June 9, 2010. This Opinion memorializes that oral decision and sets forth COAH’s decision on the motion.

River Vale petitioned COAH on December 29, 2008, with a Third Round Housing Element and Fair Share Plan (HE/FSP) addressing its cumulative affordable housing obligation, which consists of a zero-unit rehabilitation obligation, a prior round fair share obligation of 121 units and a net projected growth share obligation of 28 units. According to the COAH’s Compliance report of January 21, 2010, River Vale proposes to address its 121-unit prior round affordable housing obligation with 48 post-1986 credits and 30 rental bonuses, 19 proposed family for-sale units within inclusionary zoning projects (eight at River Vale Developers and 11 at Mesker inclusionary), and 24 proposed municipally-sponsored

age-restricted rental units at Kirk. River Vale will address its 28-unit growth share obligation with 31 units in municipally-sponsored projects (24 family rental units at the Mesker municipally-sponsored development and seven age-restricted rental units at the Kirk development), seven rental bonuses at the Mesker family rental project, and one family for-sale unit at the adjacent Mesker inclusionary project, which creates an 11-unit surplus.

By letter dated February 9, 2009, Henry Bonnabel objected to River Vale's petition for substantive certification. Bonnabel is the owner of a site that was not included in River Vale's HE/FSP. COAH conducted mediation with River Vale and Bonnabel, however, mediation was unsuccessful. Subsequently, by Resolution adopted March 10, 2010, COAH granted River Vale third round substantive certification. Pursuant to the Resolution, COAH required River Vale to submit, within 45 days (on or before April 26, 2010), a copy of the adopted, COAH-approved municipal affordable housing ordinance and a copy of the executed developer's agreement for the Kirk and Mesker sites.

In response to the Resolution, River Vale adopted Ordinance #231-2010 on April 26, 2010 and, pursuant to N.J.A.C. 5:97-3.6(a)ii and 6.7(d), made this motion, dated April 22, 2010, for an extension of time to submit the developer's agreements. Relying on N.J.A.C. 5:97-15.2(a), River Vale argued that "the current economic climate, the moratorium of collection of Developer Fees, the new budget caps and the reduction in State aid to the Township of River Vale" complicated issues concerning the finances of the Kirk site and, therefore, the Township needed more time to complete the agreement and, consequently, it needed a waiver of the deadline. Regarding the Mesker site, River Vale cited the same economic reasons and also noted that bankruptcy proceedings on the site further complicated the matter. Accordingly, River Vale requested a 60-day extension for the Mesker site. In support of its request, River Vale stated that the developer, the Bergen County Housing Development Corporation has committed \$15,000 toward architectural plans, and the Township and the County have jointly applied for a \$65, 000 Community Development Grant from Bergen County.

By letter dated May 6, 2010, Bonnabel opposed River Vale's motion. Bonnabel argued that the request was procedurally deficient because it did not specifically set forth the

time and place to be heard, the grounds upon which it was made and the nature of relief sought and was not accompanied by supporting affidavits, certifications, exhibits or certification of service. Bonnabel also argued that COAH lacked jurisdiction to consider the motion because the 45-day deadline for municipal action is statutorily mandated. Further, Bonnabel asserts that COAH cannot and did not provide an extension for the submittal of the fair share ordinance during this 45-day period, COAH no longer had jurisdiction over River Vale's plan. Bonnabel noted that it had filed a builder's remedy lawsuit on April 30, 2010. In addition to addressing the extension request, Bonnabel also argued that River Vale further failed to comply with the terms of its substantive certification because it had adopted an incomplete affordable housing ordinance. According to Bonnabel, River Vale adopted only five pages of the 16-page ordinance that had previously been approved by COAH

COAH heard oral argument on the matter at its May 13, 2010 public meeting. At that time, River Vale provided COAH with a copy of an unsigned Developer's Agreement which addressed both the Kirk and Mesker sites. The Agreement did not include referenced exhibits. River Vale's attorney assured COAH that the Township could provide the fully executed Agreement within 14 days. COAH referred the motion to a task force for consideration and advised River Vale that, while the motion was pending before the task force, it should provide COAH with the complete, fully executed Agreement within 14 days, in accordance with its representations at oral argument.

River Vale submitted a Developer's Agreement dated May 25, 2010. This Agreement, however, was deficient. Most notably, one of the signatures was illegible, the signatory was not identified and exhibits were not attached. COAH staff notified River Vale of the deficiencies, and on June 4, 2010 River Vale submitted a fully compliant Developer's Agreement and an Amendment.

Bonnabel filed a supplemental brief on June 3, 2010. In light of referral of the matter to a task force, Bonnabel requested further oral argument on the anticipated task force recommendation. Bonnabel repeated the arguments made in its May 6, 2010 submission. Bonnabel also challenged the sufficiency of the unsigned agreement River Vale presented at the May 13, 2010 meeting. According to Bonnabel, even though River Vale's current growth

mandates immediate development of the Kirk and Mesker sites, the proposed agreement allowed uncertainty as to the actual development. According to Bonnabel, the time frame for construction hinges on the securing of financing and the agreement does not include time frames for funding to be secured.

River Vale responded to Bonnabel's supplemental brief by letter brief dated June 4, 2010. Initially, River Vale argues that the supplemental brief is improper and COAH should not consider it. River Vale argues that it has complied with the terms of the substantive certification by adopting its implementing ordinance on April 26, 2010 and subsequently adopting an amended ordinance on May 24, 2010 to correct clerical errors in the initial adoption. Thus, River Vale argues that its ordinance adoption is proper and Bonnabel's claims to the contrary should be dismissed. River Vale also notes that, contrary to Bonnabel's assertion, the Township made its request for an extension of time to submit the developer's agreements prior to the expiration of the 45 days set forth in the substantive certification. River Vale also disputes the alleged procedural deficiencies of its motion. In response to Bonnabel's claims that the developer's agreements do not provide a realistic opportunity for the affordable housing, River Vale notes that it is ultimately responsible to provide the affordable housing units, even if the developer should cancel the agreement. River Vale points out that it already has rezoned the Mesker site and it owns the Kirk site.

Consideration of River Vale's motion was listed on COAH's June 9, 2010 agenda. By letter dated June 8, 2010, River Vale and Bonnabel jointly requested that COAH delay its decision on the motion until July or August so as to allow "an opportunity to explore settlement." COAH orally denied the request, finding that settlement regarding development of Bonnabel's site was not related to COAH's grant of substantive certification since Bonnabel's property was not included in the Township's affordable housing plan.

At its June 9, 2010 public meeting, COAH accepted the task force's recommendation and issued an oral decision on River Vale's motion for an extension of time to submit the Developer's Agreement for the Kirk and Mesker sites. COAH found that it would accept the June 4, 2010 final Developer's Agreement and Amendment and, therefore, granted an extension until that date. This opinion is intended to memorialize that oral decision and sets

forth the basis for COAH's opinion.

The issue before COAH is whether River Vale's motion for an extension of time in which to provide an appropriate developer's agreement for the affordable units that will be constructed on the Mesker and Kirk sites should be granted. On June 4, 2010, River Vale submitted a final Developer's Agreement and Amendment that addressed construction of 31 age-restricted units at the Kirk site and 24 family rental units at the Mesker site. Joseph Blundo, the Mayor of River Vale, and Daniel Ortega, President of the Bergen County Housing Development Corporation signed the Agreement and Amendment. The Agreement and Amendment meet COAH's requirements for such documents in that they:

1. Provide a firm commitment for the development of these 31 and 24 units so that the municipality may receive credit for the future construction of these units;
2. Provide that the family units will be rental units, which enables the municipality to receive rental bonuses for these 24 units;
3. Provide that four of the family units will be available to and reserved for households with very low-incomes, in partial satisfaction of the municipality's obligation to provide these types of units;

Additionally, COAH has determined that both sites are suitable for affordable housing.

Given this, COAH finds that accepting the compliant final Developer's Agreement and Amendment fosters the development of affordable housing. River Vale owns the Kirk site and zoned the Mesker site for multifamily housing. Through this Agreement and Amendment, River Vale now has a developer for the projects. The Housing Development Corporation of Bergen County (Corporation), a nonprofit housing corporation, and River Vale can begin the steps towards construction of the housing. Indeed, the Corporation has committed \$15,000 towards the cost of architectural drawings for each project and the Township and the Corporation have jointly applied for \$65,000 from Bergen County for site preparation and pre-construction costs. If COAH were to refuse to accept the Agreement as Bonnabel urges, affordable housing will be frustrated, rather than fostered. Thus, accepting the Agreement and Amendment fosters the intent of COAH regulations and the Fair Housing

Act by ensuring that affordable housing will move forward. The affordable housing units on these sites are part of an overall plan that will provide a variety of housing options.

Contrary to Bonnabel's claims, COAH has the authority to accept the Agreement and Amendment as of June 4, 2010. N.J.S.A. 52:27D-314(b) provides that a municipality must adopt its implementing ordinance within 45 days of substantive certification. Likewise, if a municipality's petition is denied or COAH grants conditional substantive certification, the municipality has 60 days to make necessary changes. The purpose of these time frames is to ensure that plans are implemented in a timely manner, thereby providing affordable housing in timely manner. In this case, COAH determined that River Vale's HE/FSP provides a realistic opportunity for its provision of its fair share need and, therefore, granted River Vale's petition for substantive certification. While COAH made this determination, a compliant developer's agreement for the two sites was needed. COAH gave River Vale 45 days, the same time frame in which to adopt the ordinance, to provide the agreement. River Vale requested an extension in which to file the Developer's Agreements within 45 days from the grant of its petition of substantive certification. River Vale provided a compliant Agreement and Amendment during the time its motion was under COAH consideration. The projects are now at a point where there is a Developer's Agreement and Amendment in place with a nonprofit organization experienced in delivering affordable housing, and steps have begun towards providing 48 affordable units on both sites.

It would undermine the intent of the Fair Housing Act, as well as COAH's regulations, to reject the Agreement and Amendment and dismiss River Vale from COAH's jurisdiction, as Bonnabel suggests, only because River Vale provided it to COAH on June 4, 2010 instead of April 26, 2010. The overriding purpose of the Act, and of COAH regulations, is to provide affordable housing. If COAH were to apply the 45 days as an absolute, without regard to the circumstances of this case, River Vale's HE/FSP would be rendered meaningless. This petition was subject to the exhaustive COAH review and mediation processes, during which COAH determined that these projects provide a realistic opportunity for the provision of River Vale's fair share.

Bonnabel has filed a builder's remedy lawsuit against River Vale. Thus, an approved

affordable housing plan, which has gone through the COAH processes and provides a realistic opportunity and which is ready to be implemented, will be stalled indefinitely by litigation. Instead of affordable housing, there will be litigation. The FHA specifically is intended to resolve affordable housing disputes through the COAH process rather than litigation. N.J.S.A. 52:27D-302. Therefore, COAH finds that, in accordance with the FHA, accepting the Agreement and Amendment that River Vale submitted on June 4, 2010, fosters the production of affordable housing.

Bonnabel also argues that COAH no longer has jurisdiction over River Vale because River Vale failed to adopt its implementing ordinance within 45 days, pursuant to N.J.S.A. 52:27D-314(b). River Vale adopted an incomplete ordinance within the 45 days. Specifically, only five of the 16-page ordinance was actually before the River Vale Council when it adopted the ordinance on April 26, 2010. When the omission was brought to River Vale's attention, the Council provided a new public notice and on May 24, 2010, adopted an amended ordinance which included all pages of the COAH-approved draft ordinance. River Vale states that the missing pages were a clerical mistake. Again, under these circumstances, the FHA's purpose is not met by dismissing River Vale from COAH's jurisdiction. River Vale took action to adopt the ordinance within 45 days. The adoption was faulty due to a clerical mistake and River Vale rectified the situation. As discussed above, the FHA's intent is undermined if COAH were to dismiss River Vale for this reason.

In conclusion, for the reasons discussed above, COAH accepts the Developer's Agreement and Amendment River Vale submitted on June 4, 2010. The Agreement and Amendment comply with COAH regulations and River Vale's substantive certification.



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Renee Reiss, Council Secretary

DATED: September 8, 2010