

NEW JERSEY COUNCIL ON
AFFORDABLE HOUSING
DOCKET NO.

REAL ESTATE EQUITIES, INC.,)
et al.,)

Plaintiffs,)

v.)

HOLMDEL TOWNSHIP, et al.,)

Defendants.)

Civil Action

OPINION

FRANK DIMISA and RONALD)
AQUAVIVA, T/A PALMER SQUARE)
LTD.,)

Plaintiffs,)

v.)

HOLMDEL TOWNSHIP, et al.,)

Defendants.)

NEW BRUNSWICK HAMPTON, INC.,)

Plaintiffs,)

v.)

HOLMDEL TOWNSHIP, et al.,)

Defendants.)

This matter comes before the Council on Affordable Housing on the application of plaintiffs Frank DiMisa and Ronald Aquaviva, t/a Palmer Square Ltd., (Palmer), pursuant to N.J.A.C. 5:91-11.2, for an order granting accelerated denial of substantive certification as to defendant Holmdel Township (Holmdel).

The procedural history of this case is not in dispute. Plaintiff Real Estate Equities, Inc. (R.E.E.) instituted Mt. Laurel litigation against defendant Holmdel on February 28, 1984, and plaintiff Palmer's predecessor in interest filed a similar complaint on August 13, 1984. Both complaints alleged that Holmdel's existing land use ordinances were exclusionary and unconstitutional, pursuant to Southern Burlington Co. N.A.A.C.P. v. Tp. of Mount Laurel, 92 N.J. 158 (1983) (Mt. Laurel II). Further, the complaint filed by Palmer's predecessor in interest specifically alleged that Holmdel's prospective amendment to its land use ordinances (No. 84-7, which was subsequently adopted on August 27, 1984) was similarly deficient. Both complaints requested that the court find the ordinances in question to be unconstitutional, and order that they be revised; that a builder's remedy be granted; that a special master be appointed to oversee the process; that scarce resource controls be imposed; and other relief. This case was subsequently transferred to the Council as per the Supreme Court's decision in The Hills Development Company v. Bernards Township, 103 N.J. 1, 56 (1986). In March 1986, Palmer was substituted as a plaintiff in the litigation. Palmer has since filed two amended complaints dated April 17, 1986 and December 19, 1986. The most recent amendment drops any claim that Holmdel's land use

ordinances are unconstitutional, yet includes a request for a builder's remedy, construction to be in accordance with existing ordinance No. 84-7. At the present time, Holmdel's proposed housing element is before the Council for review as per the substantive certification process.

The present dispute arises due to the Holmdel Planning Board's refusal to consider an application for site plan approval submitted by Palmer on May 9, 1986. The application concerns the same plot that is the subject of the request for a builder's remedy, as per the original Mt. Laurel litigation instituted by Palmer's predecessor in interest. The Planning Board has indicated that it will not consider the application until such time as Palmer has concluded proceedings before the Council and the Courts. As a result of this refusal by the Planning Board, Palmer submitted the present motion for accelerated denial of substantive certification as to Holmdel.

Palmer argues that it does not wish to challenge the validity of Holmdel's land use ordinances, but is participating before the Council solely for the purpose of preserving scarce resources in Holmdel.* It is thus willing to build in accordance with the present Holmdel land use ordinances. Palmer contends that the Municipal Land Use Law, N.J.S.A. 40:55D-1 et seq., mandates that Holmdel act on its application, and that this is supported by recent case law interpreting the Act. Finally, Palmer argues that

* The Council, following oral argument on October 20, 1986, issued an order on January 5, 1987 imposing scarce resource restraints on water usage in a portion of Holmdel.

this is an appropriate case for the Council's imposition of accelerated denial; otherwise, a "chilling effect" will result, with developers less inclined to participate in Mt. Laurel litigation and administrative proceedings for fear that they will find themselves unable to build in the municipality in question during the pendency of the Mt. Laurel case. Palmer concludes that Holmdel's actions are retaliatory and offend the spirit and purpose of the Fair Housing Act.

On the other hand, Holmdel argues that it has not acted in a retaliatory manner, as Palmer has itself created the dilemma, by the filing of a prerogative writ suit in the Superior Court by its predecessor in interest. As long as the prerogative writ action seeking a builder's remedy as to the plot involved is still pending, Holmdel contends that it is without jurisdiction to entertain an application to develop on that same plot. Holmdel states that if Palmer were to dismiss its lawsuit, that it would be then free to appear before the Holmdel Planning Board. Holmdel concludes that the remedy of accelerated denial would only improperly return the case to the courts.*

In the Hills case, supra, the New Jersey Supreme Court clearly established that the Council on Affordable Housing is empowered to order accelerated denial of a municipality's petition for substantive certification. The Court held that:

* Palmer's motion also requested an expedited hearing, to take place prior to the December 9, 1986 meeting of the Holmdel planning board. However, it is the Council's understanding that the meeting in question has been adjourned until a later date, and this portion of the motion is thus moot.

Accelerated denial of substantive certification would presumably be reserved for a specific kind of case, one where the circumstances strongly persuaded the Council that its role in achieving compliance with Mount Laurel called for such unusual action on its part. [Id. at 57.]

The Council has incorporated this authority within its procedural regulations. N.J.A.C. 5:91-11.2 states that:

At anytime, upon its own determination, or upon the application of any interested party, and after a hearing and opportunity to be heard, the Council may deny substantive certification without proceeding further with the mediation and review process.

Neither the Hills decision nor the regulations provide any further guidance to the Council in applying accelerated denial.

In the present case, the dispute between Palmer and Holmdel centers on the legal issue of whether a builder who has instituted or participated in Mt. Laurel litigation seeking a builder's remedy, which litigation is transferred to the Council, can be foreclosed from applying to the municipal planning board to develop in accordance with existing land use ordinances during the pendency of the Mt. Laurel litigation. The issue that must be determined by the Council is whether this is an appropriate forum and method of resolving this legal dispute.

It is clear that accelerated denial of substantive certification is an extraordinary remedy. It removes a municipality from the administrative process without permitting the Council full review of the municipality's proposed housing element and fair share plan, designed to meet the municipality's Mt. Laurel obligation. The result in some cases will be that jurisdiction reverts to the courts. This clearly contravenes the preference of the Fair

Housing Act and the Mt. Laurel decisions for an administrative review and adjudication of a municipality's attempt to meet its Mt. Laurel obligations, rather than a judicial resolution. N.J.S.A. 52:27D-303; Mount Laurel II, 92 N.J. at 212.

It is the Council's interpretation that its authority to accelerate denial of substantive certification is generally intended to be employed in those cases where a municipality before the Council for substantive certification fails to participate in good faith in the process. Thus, it is appropriate to accelerate denial where a municipality is not participating in a manner designed to expeditiously advance the substantive certification process and is, in effect, undermining the goals of the Fair Housing Act. The Supreme Court, in the Hills case, implicitly recognized that the Council need not permit its time and that of interested parties to be wasted, with the resulting delay in satisfaction of a municipality's Mt. Laurel obligation.

The present case, however, presents a legal dispute outside of the scope of the Council's consideration of Holmdel's petition for substantive certification. Clearly, it is not the Council's position to make a determination on that legal issue, and thus the Council will not offer an opinion on the validity of Holmdel's actions, or their consequences under the Municipal Land Use Law. Further, as outlined above, it is the Council's interpretation that in general accelerated denial was never designed to redress grievances between municipalities and builders outside the scope of the substantive certification process. Of course, this opinion is not intended to limit or foreclose the Council's ability

to apply accelerated denial in future cases as the need arises. However, it is the Council's opinion that it is inapplicable in the present instance.

Therefore, for the reasons set forth at length above, the Council on Affordable Housing will deny the present motion, instituted by Palmer Square Ltd., seeking accelerated denial of Holmdel Township's petition for substantive certification.

COUNCIL ON AFFORDABLE HOUSING

By: _____
Arthur R. Kondrup
Chairman