

COUNCIL ON AFFORDABLE HOUSING
DOCKET NO.

IN RE TOWNSHIP OF
MIDDLETOWN

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Civil Action

OPINION

This matter comes before the Council on Affordable Housing on separate motions seeking the same relief. The motions were filed by the Township of Middletown; by five individual residents of the Township; and joined by the Township Planning Board, and request the following relief:

- 1) An order waiving Middletown's present fair share number and reducing it by 50%;
- 2) An order waiving the time constraints on the submission of Middletown's housing element and petition for substantive certification;
- 3) An order waiving the phase-in requirements of N.J.A.C. 5:92-10.2(b);
- 4) An order altering the mediation process, in light of the Township governing body's objection to the Township's plan;
- 5) An order modifying or waiving the credit requirements of N.J.A.C. 5:92-6.1;
- 6) An order requiring the Council to conduct hearings on proposed rules in accordance with the Administrative Procedure Act, N.J.S.A. 52:148-1 et seq., and the Fair

Housing Act, N.J.S.A. 52: 27D-301 et seq.;
and*

- 7) An order finding that the present fair share number assigned Middletown would cause "drastic alteration" to the Township, and waiving N.J.A.C. 5:92-7.1 to provide more "substantial" relief to the Township; and further finding that the 20% cut off contained in N.J.A.C. 5:92-7.1 is arbitrary and unreasonable.

The brief submitted in support of the motions also requests certain additional relief not outlined in the Notice of Motion. These include:

- 1) An objection to Middletown's inclusion in the East Central region as arbitrary;
- 2) An objection to the plan previously submitted as failing to apply for all necessary credits, adjustments and waivers;
- 3) An objection to the Council's limitation of a municipal mediating team to three individuals, and to the Council's use of mediators not previously approved by Middletown;
- 4) An objection to the procedure by which a municipality's planning board may submit a housing element to the Council prior to a vote by the municipal governing authority;
- 5) An objection to the crediting regulations contained in N.J.A.C. 5:92-6.1; and
- 6) An objection to the regulation's methodology as mandating an "unobtainable" goal; to its use of "aggregate income"; and to its failure to consider developed land in a municipality.

* Although petitioners raise this issue, no specific instance of a Council violation is cited. Thus, it is sufficient to note that future rules will, of course, be adopted in compliance with all appropriate statutory provisions.

The procedural history of the case is not in dispute. Middletown is a court transferred municipality, and filed with the Council its final housing element and fair share plans in time to meet the January 5, 1987 deadline imposed by the Fair Housing Act. Subsequently, the Council by resolution dated March 2, 1987 returned the submission to Middletown for further work due to substantial deficiencies. Middletown was given 60 days to correct the deficiencies and refile with the Council, (a period that expires on May 7, 1987), and to republish notice of its petition for substantive certification. The present motion was filed prior to the March 2, resolution.

It is clear that a number of petitioners' requests for relief are in actuality challenges to Council regulations, as being arbitrary, unreasonable and capricious. As challenges to the regulations of an administrative agency, these issues must be raised in the Appellate Division, pursuant to R. 2:2-3(a)(2). Included in this category is petitioner's contention that the fair share number assigned to Middletown is "too high", and imposes a disproportionate share of the Mt. Laurel burden on Middletown. Petitioners allege that the overly high number will result in unduly burdensome costs and in a "drastic alteration" to the Township, and cause a loss of adequate recreational and conservation land; inadequate open space; and severe burdens on Township infrastructure (specifically education, sewerage capacity and water). Petitioners note that these are the very areas the Act directed the Council to take note of in adjusting fair share obligations, pursuant to N.J.S.A. 52:27D-307(c)(2).

As a complaint premised on the argument that the methodology for calculating fair share set forth in the regulations is unreasonable (due to the high number assigned to Middletown) this issue must be raised in the Appellate Division, as noted above. However, the Council also wishes to note that its regulations provide specific adjustments to the fair share number reflecting the precise areas of petitioners' concerns (N.J.A.C. 5:92-7.1 on drastic alteration; and 5:92-8.1 et seq. on historic sites; agricultural lands; environmental impact; recreation, conservation and open space; and infrastructure considerations). Thus, Middletown may be able to avail itself of the adjustment process to amend its fair share number. If following such adjustments, petitioners still conclude that the Council methodology imposes too high a number, their recourse is to the Appellate Division.

Other challenges to the regulations that must be raised in the Appellate Division include: Middletown's placement in the East Central region; the length of the 45 day objection period; the application of the phasing regulations; the regulation's requirement of "unobtainable" goals; the rules as to credits for structures built or rehabilitated during the post 1980 period; the placement of the drastic alteration cap at 20%; the regulations' "failure" to consider developed land; and the use of "aggregate income" by the regulations. As challenges to the reasonableness or

constitutionality of these regulations, these issues properly belong in the Appellate Division.*

A second issue involves petitioners' request for additional time to permit further municipal work on the plan. This issue is moot, however, as the Council has already in effect provided the relief requested, by its returning of Middletown's plan for an additional 60 day period to correct the prior submission, due to substantial defects. The Council also wishes to note that this is not the first time that it has received such a request for an extension. On February 17, 1987 the Council issued an order denying a motion by the Middletown Planning Board for the same relief. The Council will not entertain repetitive motions for the same relief, where the Council has already acted by order to deny the relief requested.

Another issue raised by petitioners is based on the fact that the first housing element and fair share plan were apparently submitted to the Council by the Township Planning Board without review by the municipal governing body. This has resulted in the anomalous situation in which the Township is objecting to its own municipal submission. Petitioners argue that the Council has invested planning boards with powers not envisioned by either the Municipal Land Use Law or the Fair Housing Act - by permitting planning boards to submit plans directly to the Council without municipal government review.

* Although the issues must be raised in the Appellate Division, the Council notes that the regulations do consider the amount of developed land in a municipality, N.J.A.C. 5:92-8.4.

It is clear that the responsibility for creating a master plan (a component of which is a housing element) is placed by the Municipal Land Use Law in the municipal planning board. N.J.S.A. 40:55D-28. Of course, a municipal government has the authority to deviate from the plan's findings and guidelines when adopting zoning ordinances. N.J.S.A. 40:55D-62. Neither the Municipal Land Use Law nor the Fair Housing Act speak directly to the mechanism by which the proposed housing element and fair share plan are submitted to the Council.

It is the Council's interpretation that the Fair Housing Act was premised on the Council conducting its review on a proposed housing element and fair share plan that has received full municipal review and has necessary municipal approval. The Council will then review the plan, in some cases in discussion with the municipality. In the event that there are objectors, a mediation process will take place, in which the municipality represents the plan it has submitted. This process is senseless if the municipality has submitted a plan it does not intend as the appropriate method for meeting its Mt. Laurel obligation. As a practical matter, this means that the municipal government must take whatever steps it feels are appropriate to review the plan prepared by the planning board for submission to the Council. Whether it adopts the plan by resolution is a decision for the municipal government. It is not the Council's role to involve itself in internal municipal affairs, nor can the Council permit the mediation process to become a forum for internal municipal work that should have been previously accomplished.

Thus, petitioners are correct when they argue that the mediation process was not designed to handle the situation in which municipality objects to its own plan. Nor will the Council hear a municipal government (or a planning board) in the capacity of an objector to its own municipal submission. The Council trusts that it is not overly burdensome for municipalities to submit plans pursuant to the terms outlined above. Finally, it should be noted that in the present case the return of the plan to Middletown has rendered this issue moot, as the Township can now submit a plan satisfactory to the municipal government.

Petitioners also argue that Middletown's prior submission to the Council is defective in that it fails to seek necessary credits, adjustments, drastic alteration and waivers; and further, that the submitted plan violates Council regulations. The Council need not reach this issue as it is patently moot, in light of the Council's returning of this plan to Middletown by the March 2 resolution. Middletown thus has an opportunity to correct those deficiencies that exist in the prior submission.

Petitioners raise certain questions regarding the conduct of the mediation process. Specifically, petitioners contend that the Council's limiting of mediation teams to three individuals is ultra vires and unreasonable, and that the Township should be permitted to have "veto" power over the Council's selection of an individual to act as mediator. However, it is clear that the Fair Housing Act provides the Council with extremely broad powers in the operation of the mediation process. As a practical matter, the Council must be permitted to structure the process as it sees

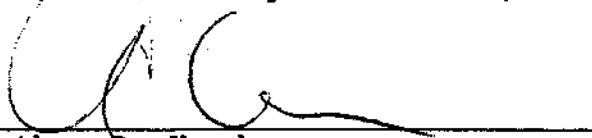
necessary. A mediation session involving too many individuals could become unworkable, and thus the Council's limitation on mediation teams to three individuals is a reasonable restriction. Certainly it does not mean that these individuals may not consult with other municipal officials, nor that the municipal presentation may not utilize other experts on occasion as the need arises. Further, it is clear that the Council cannot permit each objector a veto power over the choice of a mediator, as the act of selecting the mediator could become interminable, and the time allotted for mediation is limited.

As noted above, any challenge to the phasing regulations as being arbitrary or in violation of the Act must be raised in the Appellate Division. However, the Council notes that petitioners' main complaint is that the regulation seems to mandate that one-half of a municipality's obligation be phased in during the first three years. N.J.A.C. 5:92-10.2(b). However, this argument misconstrues the intent of the regulation. The section does not require that one-half of a municipality's total obligation be provided during the first three years, but only that one-half of its first six-year obligation be provided during that first three year period. Thus, the maximum this section could require is 500 units.

Finally, petitioners request numerous waivers of provisions of the regulations. It would be clearly premature for the Council to grant waivers to Middletown outside the context of a review of the entire plan, to be submitted by May 7, 1987. However, the Council does note that it will not simply "waive" a

municipality's fair share number and arbitrarily select a different figure (in this case, petitioners request a reduction of 50%). The Council regulations provide ample measures, in the form of adjustments and credits, to allow a municipality to lower its fair share number. The Council will not simply use the waiver process to step outside the regulations and allow a municipality to select another number that it feels is more appropriate.

Thus, for all of the reasons set forth above, the Council will order that the motions filed by the Township of Middletown, the Township Planning Board, and five Township residents, be denied.



Arthur R. Kondrup
Chairman

DATED: 4/20/87