

NEW JERSEY COUNCIL ON AFFORDABLE  
HOUSING  
DOCKET NO. CCH 87-12

BOROUGH OF ROSELAND, )  
 )  
 Petitioner, ) Civil Action  
 )  
 v. ) OPINION  
 )  
 ALAN C. GREEN, et al., )  
 )  
 Respondents. )

This matter was presented to the Council on Affordable Housing (the Council) by motion filed by the Borough of Roseland, seeking to have the objection filed by Alan C. Green summarily dismissed; and requesting that Green's counsel, Alan Schussel, Esq., be disqualified from any participation in the mediation process.

The basic facts of the case are not in dispute. Roseland is before the Council as a court transferred municipality, pursuant to N.J.S.A. 52:27D-316(b), and submitted to the Council a final housing element and fair share plan dated January 5, 1987. As the transfer acted as a petition for substantive certification, Roseland published notice of its petition as required by N.J.S.A. 52:27D-313. An objection to the housing element and fair share plan was subsequently filed in a timely manner by Green. The objection requests that the Township consider for inclusionary

zoning for Mt. Laurel a site, owned by Green, and consisting of approximately 2.2 acres. It appears that the site was originally under two acres in size, but that a recent purchase has resulted in the present size. The site was the subject of a previous application by Green to the Roseland Zoning Board of Adjustment to build townhouses. Green's appeal of an adverse ruling of that application is now pending in the Superior Court, Appellate Division. It is undisputed that Green served as a member of the Roseland Planning Board during the period of adoption of the housing element and fair share plan in question, and that he has continued to do so. Further, Schussel served as counsel to the Planning Board during at least a portion of the period during which the proposed housing element was under consideration.

As noted above, the Township's motion seeks to have Green's objection to the housing element dismissed. In support, the Township cites three main arguments. First, it contends that the site proposed for inclusionary zoning by Green is inappropriate. Roseland argues that the site is in reality two lots, and that as each lot is below the minimum two acre size, and one lot is already developed, both lots violate Council regulations. Further, Roseland claims that the site falls within a floodplain and suffers from inadequate infrastructure.

Second, Roseland argues that Green should be prevented from acting in the capacity of an objector due to the doctrines of estoppel and "unclean hands." This argument is based on Green's membership of the Planning Board during the period that the housing element was adopted and submitted to the Council. Finally,

Roseland cites the entire controversy doctrine as requiring that Green raise his present objections to the housing element in the pending Superior Court proceeding, and that the jurisdiction of the Council to hear the objections is thus pre-empted.

With regard to Schussel, Roseland requests that the Council determine that it would be improper for him to appear as part of the mediation process, and that any objections prepared by him should not be considered by the Council. As noted above, this argument is premised on Schussel's former representation of the Planning Board. Schussel had previously requested an opinion by the Advisory Committee on Professional Ethics as to the propriety of his representation of Green before the Council. However, by letter dated June 24, 1987 the Committee declined the request for an opinion, due to the ongoing mediation and review process.

Oral argument was held on July 6, 1987. At that time, Schussel argued that the Council should hear only the threshold questions of the Council's jurisdiction to determine the conflicts issues as to himself and Green. This request was made due to Schussel's concern that the Council lacked jurisdiction to hear these issues, and that any argument as to the conflicts issues could thus result in defamatory statements outside of any qualified privilege. As a result, argument before the Council was limited to the jurisdictional issues.

With regard to the issue of site suitability (based on the questions raised as to the site's size, its location in a possible floodplain, and its potentially inadequate infrastructure), the Township's motion requests in effect that the Council intercede

in the on-going mediation and review process in order to make a final determination. However, it is precisely this issue that the mediation and review process was designed to deal with. Pursuant to this process, a municipality's housing element and all objections are first the subject of mediation. If mediation is successful in reaching agreement on all objections, then the matter will be referred to the Council for its final decision on certification; if not, it may first have to proceed through an OAL hearing prior to going before the Council. In either case, at the time the Council makes a determination on the plan, there will have been a full opportunity to hear all issues. Further, the Council will receive both a mediator's report, as well as a full staff report on the plan and objections, as well as any responses to those reports from the parties.

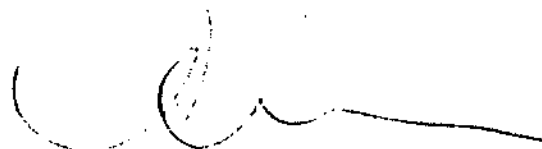
Thus, the Council will not act now to prematurely determine whether the Green site is appropriate for Mt. Laurel purposes. To do so would short circuit the mediation and review process, and would necessitate a Council decision before it has the benefit of all necessary reports on the plan. Further, it would be inappropriate to issue a final decision on the site pending a determination on the other issues raised by Roseland's motion.

With regard to the conflicts of interest issues as to Green and Schussel, it is the Council's decision that it has jurisdiction to hear these matters. Administrative agencies, in the course of fulfilling their statutory functions, have inherent jurisdiction to determine issues of fact and law incidental to the

main issue, even if arising under different statutes. Swede v. City of Clifton, 22 N.J. 303 (1956); Sukin v. Northfield Bd. of Education, 171 N.J. Super. 184 (App. Div. 1979). This includes questions relating to conflicts. Matter of Tenure Hearing of Onorevele, 103 N.J. 548 (1986). Certainly, the issue of the status of parties and their counsel appearing in the mediation and review process is sufficiently connected to the Council's statutory responsibility as to fall within the ambit of the Council's incidental jurisdiction.

Further, it is the Council's determination that these issues, and the issue of the entire controversy doctrine, would be more appropriately handled by the Office of Administrative Law. The Council has the undisputed authority to refer contested matters to the OAL for adjudication. As noted the present issues are not directly part of the Council's review of the housing element, although they do have an enormous impact on that review. The Council feels that the OAL would thus be a more appropriate forum to hear the issues, and that further, the OAL can deal with them more expeditiously, which shall benefit all parties.

Thus, for all of the reasons set forth above, the Council will order that the Township's motion be dismissed as to the issues of site suitability, and that the remaining issues be transferred to the OAL as a contested matter.



50-7-8<sup>th</sup>, 1967