COUNCIL ON AFFORDABLE HOUSING
DOCKET NO. COAH 87-18

HELEN MOTZENBECKER,	)	
Plaintiff,	)	Civil Action
v.	)	OPINION
THE BOROUGH OF BERNARDSVILLE,	)	
Defendant.	)	

This matter comes before the Council on Affordable Housing (Council) on the application of Helen Motzenbecker (Ms. Motzenbecker) who seeks to accelerate denial of the Borough of Bernardsville's petition for substantive certification. In the alternative, Ms. Motzenbecker requests the Council to award her a builder's remedy by requiring Bernardsville to include her site as part of its compliance plan to satisfy its fair share obligation which the Council has determined to be 119. Ms. Motzenbecker owns an 8.454 acre parcel of land on which she seeks to construct an inclusionary development. Bernardsville opposes the motion and argues that neither accelerated denial nor a builder's remedy is appropriate. The Department of the Public Advocate filed a brief response to Ms. Motzenbecker's motion, however, the Department took no position on the motion.

Ms. Motzenbecker argues that accelerated denial of Bernardsville's petition for substantive certification is appropriate in this instance because Bernardsville has acted in bad faith before the Council and has acted in a manner to frustrate the substantive certification process. In support of her argument, Ms. Motzenbecker relies primarily upon the three housing elements that Bernardsville submitted to the Council. Ms. Motzenbecker alleges that all three plans submitted (the draft plan, final plan and revised plan) were deficient despite specific guidance from the Council as to the problems contained each. Ms. Motzenbecker argues that, in fact, Bernardsville ignored the Council's requests and guidance and submitted plans that were patently deficient and in noncompliance with Council regulations.

Conversely, Bernardsville argues that it has participated in the substantive certification process in good faith and accordingly the motion should be denied. The Borough points to various steps it has taken towards satisfaction of its fair share obligation such as utilizing its power of eminent domain to acquire sites for low and moderate income housing and adopting a bond ordinance in order to appropriate funds for low and moderate income housing. Bernardsville contends that its housing element and fair share plan represents a unique approach to satisfaction of its obligation and is rather complex and should be viewed accordingly. The "minor deficiencies," as the Borough characterizes the problems, should not weigh against it and Ms. Motzenbecker's motion should be denied. For the reasons stated herein, the Council finds that

Ms. Motzenbecker's request for accelerated denial should be denied, however, her request for a builder's remedy should be granted.

The procedural history of this matter is undisputed. On June 20, 1983 Ms. Motzenbecker filed a lawsuit against Bernardsville challenging the Borough's zoning ordinances as being exclusionary. On February 9, 1984 the parties entered into a Stipulation of Partial Settlement whereby it was agreed that Ms. Motzenbecker be awarded a builder's remedy while the Borough did not admit to any noncompliance with Mt. Laurel II. The parameters of the builder's remedy were not set forth in the Stipulation, but rather a special master was appointed to fashion the builder's remedy for the property. With the aid of the special master, the parties agreed to a specific builder's remedy for the Motzenbecker property. Accordingly, on November 20, 1984 the Court entered an Interim Order that permitted Ms. Motzenbecker to build multi-family housing on her property at a density of nine (9) units per acre with a 20% set aside for low and moderate income housing. The Order also specified that of fifteen resulting affordable units, eight would be affordable to moderate income households and seven would be affordable to low income households. Additionally, the Order required Bernardsville

> to submit to the Court for its review and approval, revised zoning ordinances and land use regulations which provide a realistic opportunity for the construction of two hundred and ninety (290) units of low income housing, representing the Borough's fair share of the region's present and prospective need as calculated by the Borough in accordance with the AMG analysis...

On January 14, 1985 Bernardsville submitted a compliance plan to the Court pursuant to the Order. The substance of this compliance plan will be addressed in a subsequent discussion as it has a direct bearing on the issues raised.

In the Hills Development Co. v. Tp. of Bernards, 103 N.J. 1 (1986) the New Jersey Supreme Court transferred the Bernardsville case to the Council. Accordingly, Bernardsville was required to comply with the Fair Housing Act, N.J.S.A. 52:27D-301 et seq., and the regulations promulgated thereunder by the Council. N.J.A.C. 5:91-3.1 required Bernardsville to submit a draft housing element and fair share plan on or before November 4, 1986 and on October 27, 1986 Bernardsville did submit its draft plan. By letter dated November 21, 1987, the Council informed Bernardsville of certain deficiencies in the plan and specified what further information had to be incorporated into the final housing element which was due on or before January 5, 1987. See N.J.S.A. 52:27D-309 and N.J.A.C. 5:91-3.1. Additionally, the letter advised Bernardsville to refer to Council regulations in preparing its final plan. On January 5, 1987 Bernardsville submitted its final housing element and fair share plan, however, the plan was deficient and on March 16, 1987 the Council returned the plan with specific instructions on what was needed to render the plan satisfactory. The details were sent to Bernardsville in a letter dated March 19, 1987. Bernardsville resubmitted its revised housing element and fair share plan on May 22, 1987.

With the procedural history of this matter set forth, it is now necessary to examine the various plans submitted by Bernards-

ville. On October 27, 1987 Bernardsville submitted its draft housing element and fair share plan (draft plan) to the Council as required by N.J.A.C. 5:91-3.1(d). The draft plan indicated that Bernardsville intended to satisfy its obligation through municipal construction and a regional contribution agreement (RCA) and that it would rehabilitate its indigenous need. Bernardsville provided a map with its draft plan that indicated nine possible sites for the municipal construction proposal. However, the map indicated only location of the sites and gave no other information as to whether the sites were available, suitable, developable and approvable as defined by N.J.A.C. 5:92-1.3 nor were any of the sites prioritized as required by N.J.A.C. 5:92-9 et seq. The draft plan also did not indicate whether Bernardsville had control of any of the possible sites or how Bernardsville intended to acquire control of any necessary site. Additionally, there was no information as to how Bernardsville intended to fund or implement the municipal construction project.

Additionally, the draft plan stated that Bernardsville intended to conduct a housing survey to reduce its indigenous need thereby reducing the amount of rehabilitation necessary. However, the draft plan did not indicate when the survey would be conducted or in fact give any details as to the specifics of a survey. The draft plan also contained no information as to how the indigenous need would be rehabilitated or how any program would be administered.

Finally, Bernardsville's draft plan proposed an RCA. No details of the RCA were given other than that it would be with New

Brunswick. Moreover, no information was given as to how Bernardsville would fund the RCA.

In response to the draft plan, the Council sent a letter to Bernardsville outlining some of the problems with the plan. The letter also referred Bernardsville to Council regulations and stated that all information required by the regulations must be contained in the final housing element and fair share plan. The letter also indicated that the possible sites for municipal construction must be prioritized and documented in the final housing element in accordance with N.J.A.C. 5:92-9 et seq. and N.J.A.C. 5:92-1-3. Additionally, the letter indicated that the final submission should include details as to how Bernardsville intended to administer all affordability controls. The letter also referred Bernardsville to the supplemental rules published in the New Jersey Register regarding bedroom distribution, range of affordability and affirmative marketing. Essentially, this letter highlighted areas of concern with the draft plan as well as referring Bernardsville to Council regulations to ensure compliance with the regulations.

On January 5, 1987 Bernardsville submitted its final housing element and fair share plan (final plan). The only change in substance made to the plan was the fact that Bernardsville no longer intended to attempt to reduce its indigenous need through a housing survey. Instead, Bernardsville stated that it would rehabilitate the entire indigenous need of 37 as soon as it located the same. Otherwise, Bernardsville's plan to satisfy its fair share obligation remained the same - transfer units to New Brunswick through an RCA and construct the remaining units itself. However,

many of the deficiencies contained in the draft remained in the final plan.

Bernardsville did submit additional maps pertaining to the sites it was considering for municipal construction. The Borough submitted a location map of the infrastructure, a United States Geological survey and a wetlands map, but it failed to include a flood plain map. Five of the nine potential sites were prioritized, however, the final plan did not evaluate any of the sites in accordance with N.J.A.C. 5:92-9 et seq. Additionally, Bernardsville provided no information as to the financial and administrative feasibility of the proposal nor did it indicate a stable funding source for the project. Moreover, the plan did not indicate whether the Borough had control of the proposed sites.

As previously stated, in the final plan Bernardsville abandoned the idea of reducing its indigenous need as proposed in the draft plan. Instead, Bernardsville stated that it would rehabilitate its entire indigenous need of 37, however, it would do so after it had conducted a survey to locate these units. The Borough did not state how it intended to rehabilitate the units, how the rehabilitation would be funded or how the program would be administered. Additionally, there was no information pertaining to the housing survey.

The final plan also stated that Bernardsville would enter into an RCA with New Brunwsick. The plan indicated that the Borough was involved in "advanced negotiations" with New Brunswick, however, it gave no other details as required by N.J.A.C. 5:92-12.1. Additionally, the plan did not contain an alternate plan as

required by N.J.S.A. 52:27D-311(c) which would be especially necessary since details of the proposed RCA were so sketchy.

Due to the numerous deficiencies outstanding in the final plan which rendered Council review difficult, the Council determined to return Bernardsville's housing element and fair share plan to the Borough with instructions on how to remedy the deficiencies. Bernardsville was instructed to return a satisfactory plan (revised plan) no later than 60 days from the date it received the Council's detailed report on the deficient housing element. Bernardsville did submit its plan within the required time period, however, all deficiencies were not adequately addressed.

The revised plan indicated that Bernardsville had received $185,000 in a Community Development Block Grant which was to be applied towards the municipal construction project. This money, while a step towards funding the proposal, was not nearly sufficient to fund an entire project of the magnitude proposed by Bernardsville. Nevertheless, the revised plan contained no other information as to how the Borough would fully fund the project. Additionally, no feasibility plan or development proposal was submitted to demonstrate that the plan was viable. Furthermore, the revised plan did not provide any information as to whether the proposed sites complied with the Council's regulations, as requested in the letter.

The revised plan did state that Bernardsville intended to fund its rehabilitation program with money from the Department of Community Affairs or a Community Development Block Grant. However, there was nothing to indicate that Bernardsville had or would

receive such monies. In fact, the revised plan contained no information on whether Bernardsville had even applied for said funds. Additionally, as with the draft plan and final plan, the revised plan did not indicate how the rehabilitation program would be implemented or administered.

Finally, the revised plan stated that Bernardsville was going to transfer 32 units to New Brunswick at the cost of $22,000 per unit pursuant to an RCA. Bernardsville stated that it would bond for the necessary money, however, there was no indication of Bernardsville's ability to issue these bonds. The only other information submitted pertaining to the RCA was a newspaper article discussing the negotiation between Bernardsville and New Brunswick. This essentially describes the various plans Bernardsville submitted. We now must address the motion itself.

It is clear that the Council has the authority to accelerate denial of a municipality's petition for substantive certification. In Hills Development Co. v. Bernards Tp., 103 N.J. 1, 56 (1986) the New Jersey Supreme Court stated that the Council has " ...the implied power to accelerate its denial." The Court then went on to state:

> 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:

> 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.

The Council discussed its authority to accelerate denial in our opinion in Real Estates Equities, Inc. et al v. Holmdel Tp., et al, Docket No. COAH 86-1. In that case we stated:

> 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.

This is the standard the Council will consider in evaluating whether accelerated denial is appropriate.

However, in this instance, it is unnecessary to consider whether accelerated denial is appropriate. As we recognized in Real Estate Equities, the effect of accelerated denial is to remove a municipality's petition for substantive certification from the mediation and review process. Id. at 5. However, in this case, the review and mediation process has concluded. Bernardsville has been through mediation and the Council has proceeded with its review. Thus, the main purpose of accelerated denial, is inapplicable in this matter. Essentially, the issue of whether accelerated denial should be utilized in this matter is moot since the

review and mediation process has concluded. However, it should be noted that while accelerated denial is inappropriate in this instance, the Council will not hesitate to utilize its power under appropriate circumstances.

However, the issue of whether a builder's remedy should be awarded in this instance most certainly is not moot. Initially, the Council finds that it does indeed have the authority to award a builder's remedy. In Oakwood at Madison, Inc. v. Township of Madison, 72 N.J. 480 (1977) the Supreme Court determined that it was appropriate to award the specific relief of a builder's remedy in Mt. Laurel cases. The Court based its decision on both the equities of the situation (the fact that the developer/litigator had "borne the stress and expense" of public interest litigation); and on the Court's perception that such an award would create an incentive to builders to institute Mt. Laurel suits. Id. at 549-551. Thus, the Court in Madison ordered a builder's remedy, requiring the town to zone the developer's site for at least a 20% low and moderate income set aside. The Court added that a condition of its decision was that the land be found to be "environmentally suited to the degree of density and type of development" proposed. Id. at 551. However, the Court also added the caveat that there would be no "automatic right" on the part of developers to such relief; and that such a remedy should "ordinarily be rare," and rest on the discretion of the Court, based on all circumstances of the case. Id. at 551, n. 50. Thus, the Court, while approving the concept of the builder's remedy, apparently did not foresee it as a tool to be widely used in all Mt. Laurel cases.

This approach was broadened considerably by the New Jersey Supreme Court in So. Burlington Cty. N.A.A.C.P. v. Mount Laurel Tp., 92 N.J. 158 (1983) (Mt. Laurel II). In Mt. Laurel II, the Court was concerned with what it perceived as continued non-compliance with the Mt. Laurel constitutional obligation. The Court thus determined to "put some steel into the doctrine." Id. at 200. One method to be used was the strengthening of the effectiveness of judicial remedies to be awarded in Mt. Laurel cases. Id. at 214. Further, affirmative governmental action on behalf of municipalities would be required by the Courts to assure that a realistic opportunity was being provided. Id. at 217. However, the Court added that it hoped to preserve municipalities' control over their zoning, Ibid., and reaffirmed its desire for a legislative, rather than judicial approach. Id. at 212.

The Mt. Laurel II Court determined that the approach taken in Oakwood would have to be replaced, and builder's remedies made "more readily available to achieve compliance with Mount Laurel." Id. at 279. Thus, the Court concluded that

> where a developer succeeds in Mount Laurel litigation and proposes a project providing a substantial amount of lower income housing, a builder's remedy should be granted unless the municipality establishes that because of environmental or other substantial planning concerns, the plaintiff's proposed project is clearly contrary to sound land use planning. We emphasize that the builder's remedy should not be denied solely because the municipality prefers some other location for lower income housing, even if it is in fact a better site. Nor is it essential that considerable funds be invested or that the litigation be intensive. Ibid. See also Id. at 218.

The court envisioned a "substantial amount of lower income housing" as a subject for case by case determination, although it suggested 20% as a "reasonable minimum." Id. at 279, n. 37. The decision thus took a strong stand in favor of builder's remedies, by requiring them in all cases where a builder-litigator succeeded in Mt. Laurel litigation and proposed a development with a substantial Mt. Laurel component. The burden of proof was placed on the municipality to demonstrate that the developer's site was inappropriate for Mt. Laurel housing. Barring such proof, the builder's remedy would be awarded. As noted, the rationale for this decision was to correct the problem of non-compliance and municipal inaction. This need obviously outweighed the Court's concern over permitting municipalities to control their own zoning and planning.

The Fair Housing Act, designed to provide a mechanism by which municipalities can meet their constitutional obligation, shifts the focus on how compliance is to be achieved. First, the Act provides a mechanism by which municipalities may voluntarily submit plans to the Council for review. Thus the Council, unlike the courts, will not be totally dependant on suits brought by developers, and on many occasions there will be no developer who has carried the burden of forcing a municipality into complying with its Mt. Laurel obligation. The Council also will review those cases transferred by the courts that arose because of a developer's lawsuit.

Pursuant to the Act, all municipalities before the Council (including those sued and transferred by the Superior Court) are first provided with an opportunity to formulate a plan and

submit it to the Council for review. The municipality thus has, in effect, a "fresh start." As to the actual content of the housing elements submitted by municipalities, the Act emphasizes the necessity of approaches that demonstrate a comprehensive and sound planning concept, taking into account regional considerations. N.J.S.A. 52:27D-311(c); N.J.S.A. 52:27D-303. Further, the Act provides a municipality with a great deal of flexibility in developing its housing element and fair share plan. It provides that, in adopting its housing element, a municipality "may provide for its fair share ... by means of any technique or combination of techniques which provide a realistic opportunity for the provision of its fair share." N.J.S.A. 52:27D-311(a). This emphasis on new approaches is most evident from N.J.S.A. 52:27D-303, which provides that it is the Act's intention to "provide various alternatives to the use of the builder's remedy as a method of achieving fair share housing." Thus, the Legislature clearly indicated its intention that primary reliance not be placed on the use of builder's remedies.

Many of these concerns were echoed by the Supreme Court in upholding and interpreting the Act in Hills Dev. Co. v. Bernards Tp. in Somerset Cty., 103 N.J. 1 (1986). The Court noted the importance under the Act of sound regional planning in responding to the statewide obligation. The Court stated that "instead of depending on chance - the chance that a builder will sue - the location and extent of lower income housing will depend on sound, comprehensive statewide planning ..." Id. at 21. The Court emphasized the broad powers of the Council, and the fact that it is not

bound by prior approaches to the problem. Id. at 23 and 33. Further, the Court recognized that one of the primary purposes of the Act was the replacement of the judicial Mt. Laurel remedies. Id. at 35-36. Finally, the Court noted that the builder's remedy was never part of the Mt. Laurel constitutional obligation, but only a form of relief adopted by the Court as it saw necessary. Id. at 42.

However, despite the evident change in emphasis away from the builder's remedy, there is nothing whatsoever in the Act which would preclude the Council from the granting of some form of site specific relief. One specific restraint imposed on a municipality in formulating its housing element is the requirement that it consider lands owned by developers "who have expressed a commitment to provide low and moderate income housing." N.J.S.A. 52:27D-310 (f). This was made clear by Judge Skillman in Morris Cty. Fair Housing Council v. Boonton Tp., 209 N.J. Super. 394 (Law Div. 1985). In this case challenging the constitutionality of the Fair Housing Act, the Court specifically dealt with the Council's power to award a builder's remedy. The Court held that the Council "may in the exercise of its regulatory powers determine that it has the power to award builder's remedies or to encourage in some other way participation by builders before the Council." Id. at 434. The Court went on to quote approvingly the language of the Attorney General's brief that

> plaintiffs offer no support for their proposition that the Council may not award a builder's remedy as a condition for granting substantive certification, and, in fact, no such prohibition exists. Implicit in the Act is the expectation that in approving a municipal housing

> element, the Council may require that techniques be implemented which will have an effect comparable to that achieved by a builder's remedy, but accomplished within the context of regional planning and not simply as a reward for a successful litigant. Ibid.

This conclusion was specifically affirmed by the Supreme Court in the Hills case. 103 N.J. at 47, n.13. The Supreme Court added that the builder's remedy moratorium contained in the Act (N.J.S.A. 52:27D-328) applied only to litigation, and not matters before the Council. 103 N.J. at 60.

The question now arises as to whether the Council should grant Ms. Motzenbecker's request and award her a builder's remedy. Based upon the facts of this case, specifically Bernardsville's failure to comply with the Council regulations in its housing element and fair share plan as well as Bernardsville's failure to supply the information requested by the Council, and the fact that Ms. Motzenbecker's site has been found by a special master to be appropriate for an inclusionary development as evidenced by the Stipulation of Partial Settlement and the Court's Interim Order of November 20, 1984 and based upon Bernardsvilles's failure to offer any other alternatives which would at this time provide a realistic opportunity for the satisfaction of its fair share obligation, the Council finds it is appropriate to require Bernardsville to rezone Ms. Motzenbecker's site to allow for the construction of low and moderate income housing.

After receiving the various plans submitted by Bernardsville, it is clear to us that Bernardsville has not responded within an acceptable plan despite numerous opportunities to do so and despite several letters of direction. The effect of this was to

hinder or at least delay the substantive certification process. Bernardsville submitted its draft plan as required by N.J.A.C. 5:91-3.1(d) on October 27, 1985. As previously discussed, the draft plan indicated that Bernardsville would satisfy its fair share obligation of 119 through an RCA and municipal construction with rehabilitation of its present indigenous need.* The draft plan indicated little else.

Since Bernardsville was going to utilize an RCA, it should have complied with N.J.A.C. 5:91-12 which specifically addresses what the draft plan should include with an RCA. N.J.A.C. 5:91-12.1(a)2 requires:

> A sending municipality shall include within its draft report a detailed statement of the terms and conditions of a proposed regional contribution agreement which shall include specific information regarding the factors enumerated in 1. above, and which shall further specify the range of costs associated with such a proposed agreement and the source of any funds or resources upon which the sending municipality will rely. The draft shall also contain an alternative plan by which the municipality will achieve its fair share in the event the municipality fails to enter into its proposed regional contribution agreement.

N.J.A.C. 5:91-12.1(a)1 requires:

> 1. Letter of Intent: A sending municipality which proposes to transfer a portion of its fair share to another receiving municipality shall include within its letter of intent:
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> i. A statement of reasons for the proposed regional contribution agreement; and

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* Bernardsville rounded its fair share obligation down to 118 instead of utilizing the actual number of 119. The Council will utilize the actual number of 119.

> ii. A summary of the proposed agreement, including an estimation of the number of units to be transferred, and an explanation or description of any proposed compensation for the acceptance of such units by a receiving municipality;

None of this information was included in the draft. This failure to comply with the rules might not have been so significant if Bernardsville had supplied the adequate information in its final plan, but it did not.

In response to the draft plan, the Executive Director of the Council, Douglas Opalski, sent Bernardsville a letter detailing certain problems with the plan. The letter obviously was intended to alert Bernardsville to the problems with the draft plan which were expected to be dealt within the final housing element as well as to indicate to Bernardsville that the Council expected the Borough to consult Council regulations and submit a final plan in accordance with those regulations.

Prior to submission of its final housing element and fair share plan Bernardsville should have consulted the Fair Housing Act and the Council regulations to ensure compliance with all statutory and regulatory requirements. Moreover, Bernardsville should have reviewed the letter on the draft plan to ensure that it addressed the specific concerns raised as a result of the draft plan and supplied the relevant information. Bernardsville failed to do this. In fact, Bernardsville failed to even offer any explanation as to why the necessary information was not included. While explanations would not have remedied the problems, at least there would be some indication as why the deficiencies existed.

The final plan Bernardsville submitted on January 5, 1987 addressed some of the concerns expressed in the draft plan letter and complied with some of the Council's regulations. However, many of the Council's concerns that had a direct bearing on whether Bernardsville's plan provided the requisite realistic opportunity went unanswered.

Bernardsville ignored the directions in the draft letter pertaining to the rehabilitation program for the Borough's indigenous need. Despite the direction that Bernardsville submit a "detailed plan of the rehabilitation program administration," no such plan was included in the final plan. In fact, in direct contravention to the Council's instruction, Bernardsville stated that it would "develop" a plan with no other information about the development. Once again Bernardsville was making mere promises that had no place in the final plan.

Moreover, as further guidance, an article describing necessary components of a rehabilitation program was forwarded to Bernardsville. That article stated:

> Municipalities that intend to become involved in rehabilitation of existing units must consider and provide for the following:
>
> (1) An administrative mechanism to implement and market the rehab program
>
> (2) Adequate funding to include both the hard and soft costs
>
> (3) Either cost estimates for each unit or sufficient financial resources budgeted for the total project to ensure viable programs
>
> (4) Program coordination with the local code enforcement officials.

None of this information was included in the final plan, including how Bernardsville intended to fund the program. It is clear that Bernardsville was well aware of what information the Council needed in order to evaluate a rehabilitation program and the Borough chose to ignore it.

The final plan, as did the draft plan, indicated that Bernardsville would satisfy a portion of its fair share obligation through a municipal construction project. Municipal construction of its fair share is an ambitious undertaking and quite different than rezoning a site to permit a developer whose livelihood is construction to provide the units. Accordingly, in order for the Council to evaluate whether the proposal will provide a realistic opportunity for the provision of the units, the municipality must be able to demonstrate that it is equipped for such an undertaking. At the least, a municipality must be able to demonstrate that it has or will have control of the proposed site(s) and that it has sufficient funds for such a project. Implicit in this demonstration is some indication that the municipality has conducted some type of feasibility study or development study so that it is sure it is capable of actually providing the units. Mere assertions and promises that the municipality will get the site and the money are insufficient to show that the plan is realistic. The Council would be derelict in its duties if it permitted towns to simply promise that it would provide the units. The Council must be satisfied the plan is a reality. Certainly no municipality can reasonably argue that such information is not necessary. In order to satisfy its statutory duty, the Council must be able to fully evaluate the

proposal and determine whether it provides the requisite realistic opportunities. There is nothing in the final plan that the Council can point to that demonstrates that the proposal is feasible and therefore provides the realistic opportunity required by the Act.

Finally, as with the draft plan, Bernardsville failed to comply with the regulations relating to RCA's N.J.A.C. 5:91-12.1(b) states:

> (b) Housing Element and Fair Share Plan: A municipality which proposes to enter into a regional contribution agreement shall include within its proposed housing element and fair share plan a statement of the terms and conditions of any proposed agreement, including:
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> 1. The number of units to be transferred; and
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> 2. The amount of compensation to be paid in return for such a transfer, the nature of such compensation, and the source of such compensation; and
>
> 3. A draft or final form of contract which includes all terms and conditions of the regional contribution agreement; and
>
> 4. A memorandum of understanding with a receiving municipality that such receiving municipality will enter into the proposed regional contribution agreement with the sending municipality and will execute an agreement substantially embodying the terms and conditions set forth above, and which includes a schedule for the submission of a project plan by the receiving municipality to the Agency for review, as set forth in section 12(e) of the Act.

None of this information was included in the final plan. The only information on the RCA Bernardsville deigned to include in the final plan was that it was in "advanced negotiations" with New Brunswick.

In light of these glaring deficiencies, the Council returned the final plan to Bernardsville for revision with instructions ("incomplete letter"). This "incomplete letter" addressed all three aspects of Bernardsville's housing element once again, just as did the draft letter. And, just as with the draft letter, Bernardsville ignored most of the instructions.

The "incomplete letter" once again points out that the plan dealing with the rehabilitation program "neglects to include details of the program including an administrative mechanism to implement and market the program, eligibility criteria and a description of funding sources." In regards to the municipal construction project, the "incomplete letter" stated that "funding sources for acquisition and development of the sites must be submitted. Also, a development proposal is required." Additionally, the letter once again stated that:

> each site must meet all the criteria established by COAH to indicate that it is available, suitable, developable and approvable. With the revised plan please include details on how the selected sites will accommodate the 81 units. This should include:
>
> a. Total acreage and percent that is developable.
>
> b. Number of units per site.
>
> c. Proposed densities.

The letter also requested that Bernardsville indicate the availability of sewer service on one of the proposed sites. In regards to the RCA the letter indicated that details pursuant to N.J.A.C. 5:92-12.1 were necessary, particularly "the number of units to be transferred, funding sources and a memorandum of understanding with the receiving municipality." Additionally Bernardsville was reminded that an affirmative marketing program as required by N.J.A.C. 5:92-15.1 was necessary.

The revised plan submitted did not adequately address any of these concerns and in fact failed to address most of them. In many instances Bernardsville did not even attempt to address the problems with even the weakest of explanations. The revised plan indicated that Bernardsville had received $185,000 in a Community Block Development Grant which it intended to use for its municipal construction proposal. This grant is the only funding Bernardsville listed for its proposed construction of 81 low and moderate income units. It is obvious that $185,000 is not sufficient to fund such a project which includes site acquisition as well as construction costs. Yet, Bernardsville failed to specify from where the necessary funds would come, despite explicit instructions from the Council that it do so.

Furthermore, the "incomplete letter" unequivocally stated that the Borough must provide information that demonstrates that the proposed sites for municipal construction are available, suitable, developable and approvable as required by N.J.A.C. 5:92-9 et seq. This was the second time the Council had requested this information (it was requested by the draft letter) and the third

opportunity Bernardsville had to submit it. This is not difficult information to supply. In fact, Bernardsville should have been developing this information all along so that it could adequately demonstrate that the proposal was financially and administratively feasible. Likewise, Bernardsville failed to indicate the developable acreage, proposed densities and number of units per site. It would be virtually impossible for us to evaluate Bernardsville's proposal with out this information.

Again, Bernardsville also failed to include the details of how it planned to administer its rehabilitation program.

Finally, all the information as required by the Act and regulations for the RCA was not supplied. In the revised plan, Bernardsville induced the transfer price and indicated it would bond for it. However, the revised plan did not offer any support that Bernardsville could bond for it. The only other information supplied was a newspaper article discussing the proposed RCA. Certainly the Council cannot rely on a newspaper article in lieu of the regulatory requirements.

After comparing all three plans submitted by Bernardsville, it is painfully obvious that the revised plan was altered little from the original submission. What further aggravates the situation is that Bernardsville actually had a much longer time to prepare its plan and work out all the details. As previously discussed, Bernardsville had submitted a compliance plan to the Court on January 14, 1985. That plan, just as the plans submitted to the Council, called for municipal construction of the fair share obligation. While transfer to the Council necessarily resulted in

changes to Bernardsville's fair share obligation and the approaches it could take, Bernardsville essentially kept the same approach with the addition of an RCA. Thus, Bernardsville has had since January, 1985 to work out the details of its municipal construction project. Thus, there is no excuse for Bernardsville to not have the funding and site issues resolved, especially since transfer to the Council resulted in a lower fair share obligation.

In response to Ms. Motzenbecker's motion, Bernardsville did submit information in attempts to secure control of the necessary sites and the availability of funding. For instance Bernardsville submitted letters which indicated it had received Green Acres funds and adopted bond ordinances. It is interesting to note, however, that all of those letters are dated prior to October 27, 1986, the date the draft plan was submitted. It is unfathomable why Bernardsville would not include that information in its various plans, especially since the Council was requesting information on funding and site control. We can only surmise that the information is dated and no longer applicable or that Bernardsville was attempting to delay the process by withholding relevant information as long as possible. Regardless, this dated information is insufficient simply because it is dated. In either case, the Council never received information directly relevant to realistic opportunity in any of the plans.

Bernardsville's actions in this matter are inexplicable. The Council is faced with a situation in which a municipality ignored repeated Council requests for important information that impacted directly on the Council's ability to evaluate the Bor-

ough's plan. The Council cannot sit back and permit a municipality to manipulate the process to its own advantage and only act when it is threatened with possible adverse action. The Council is statutorily obligated to ensure that a municipality proceeds expeditiously through the substantive certification process with the final result of a housing element and fair share plan which meets all statutory and regulatory requirements and thus can be certified. If the Council is faced with a situation whereby a municipality is not proceeding through the process in a manner that will result in a certifiable plan, the Council must take whatever steps it legally can in order to achieve the result of an appropriate plan.

In this instance we have a municipality that has had ample opportunity to create a realistic plan and has failed to do so. However, we also have a property owner who is committed to provision of low and moderate income housing. Ms. Motzenbecker instituted a suit in 1983 to secure a right to construct low and moderate income housing in Bernardsville and has followed the case through the Council's process. She has never retreated from her position that she wishes to utilize her property for low and moderate income housing. The property in question has been found by a special master to be suitable for an inclusionary development at a density of nine units per acre with a twenty percent set aside for low and moderate income housing. There has been no indication that the site has changed since that finding. The Borough conceded this at oral argument. Thus, the Council is satisfied that, in this case, it is appropriate to require Bernardsville to rezone Ms. Motzenbecker's property at a density of nine units per acre

with a twenty percent set aside for low and moderate income housing. Requiring Bernardsville to rezone Ms. Motzenbecker's property will result in the production of fifteen affordable units. That is approximately twelve percent (12%) of Bernardsville's obligation. Bernardsville still will have to satisfy the remainder of the obligation.

An appropriate Order embodying this opinion will be entered.

Arthur R. Kondrup
Chairman

Dated: 11/16/87