

COUNCIL ON AFFORDABLE HOUSING
DOCKET NO. 87-22

IN RE WARREN TOWNSHIP - MOTION)
FOR IMPOSITION OF CONDITIONS
ON SUBSTANTIVE CERTIFICATION)

Civil Action

OPINION

This matter was brought before the Council on Affordable Housing on a motion filed by the developer Top O'The World (TOTW) requesting that the Council condition any grant of substantive certification to Warren Township on Warren's agreement to provide sewer capacity to its site in the adjacent municipality of Green Brook.

Warren was transferred to the Council by the Superior Court as a result of the Supreme Court's decision in Hills Development Co. v. Bernards Township in Somerset Cty., 103 N.J. 1 (1986), and filed its final housing element and fair share plan on May 7, 1987. TOTW filed as an objector to the submission, based on Warren's refusal to provide sewer capacity to a site owned by TOTW in the contiguous municipality of Green Brook. The site in question, which borders on Warren, is included in the Green Brook housing element as a site to be zoned for a Mt. Laurel inclusionary development. As this issue was not amenable to resolution through the mediation process, the mediator withdrew the issue from mediation and transferred it to the Council for determination. No

objection to this procedure was received. At the same time, TOTW filed its motion for the imposition of conditions on any certification. On November 16, 1987 the Council determined that it was premature to decide the question, pending the completion of mediation and review in Warren and Green Brook.

Like Warren, Green Brook is presently before the Council following transfer by the Superior Court. Objectors to Green Brook's housing element and fair share plan include Warren and the Warren Township Sewerage Authority (the Authority). Warren's objection is based on the lack of available sewer capacity for the inclusionary sites contained in Green Brook's plan. Green Brook's plan proposes to meet its fair-share obligation of 154 units through four inclusionary developments. These four sites will actually contain 197 low and moderate income units, with 140 being provided by the TOTW site. The mediator's report concluded that Green Brook has inadequate sewer capacity to cover its sites, and recommended a durational adjustment pursuant to N.J.A.C. 5:92-8.1 et seq. However, the mediator also noted that sufficient sewer capacity for the TOTW site presently exists within the Authority, and that Warren refuses to provide such capacity on the ground that it should be available in the first instance for Warren residents.

As a result, the Green Brook case was transferred to the Office of Administrative Law (OAL) for a determination on the question of the availability of sewer capacity for the Green Brook sites (including the TOTW site). In an Initial Decision dated December 21, 1987 the OAL made the following findings: first, that the Authority is the "logical" provider of sewer to the TOTW site,

and that no other source is presently available; second, that Warren and the Authority contend that any presently existing capacity should be reserved for the future use of Warren residents; and third, that the Authority has at present sufficient capacity for the TOTW site project in the Middlebrook trunk of the sewer system. These findings are not disputed by Warren. Further, by resolution dated October 13, 1987 the Authority agreed that in the event Warren is granted substantive certification by the Council, the Authority will reserve 175,000 gallons per day of capacity for the TOTW site. The capacity will be reserved for a period of two years, or until TOTW obtains a judgment entitling it to said capacity. The resolution also reserved the right of Warren and the Authority to contest TOTW's entitlement to any capacity.

Following completion of the Warren mediation process, TOTW refiled with the Council its motion for the imposition of conditions upon certification. Oral argument was held before the Council on February 1, 1988. The Council has completed review of Warren's housing element and fair share plan. TOTW's motion is the sole remaining issue preventing certification of the plan, which otherwise meets all Council requirements. As noted, Green Brook has also concluded the mediation process, although the Council has not yet completed its review of Green Brook's plan.

TOTW argues that the Council must condition any grant of substantive certification to Warren upon its willingness to provide sewer capacity to the Green Brook TOTW site. TOTW argues that the question of Warren's possible obligation to Green Brook is properly before the Council as part of Warren's petition for certification,

and that the Council, rather than the Superior Court, is the proper forum to decide the issue. TOTW bases its argument on the intention of the Fair Housing Act, N.J.S.A. 52:27D-301 et seq., that Mt. Laurel issues should be decided by the Council, and because of the need for consistent statewide planning in this area. However, TOTW concedes that if Warren were not before the Council seeking certification, that its only recourse in this matter would be by way of a complaint in the Superior Court. TOTW also admits that the Council must consider the future needs of Warren residents in reaching a determination, but states that this is not a problem in the present instance. Next, TOTW contends that Warren has a constitutional obligation to consider the welfare of the region, and regional sewer needs, in making determinations on how it will allocate sewer capacity. TOTW argues that N.J.S.A. 52:27D-314 imposes on the Council the requirement of insuring that Warren's allocation of capacity is consistent with regional needs prior to granting certification. TOTW states that the Council cannot certify Warren, while Warren is simultaneously acting to frustrate the regional need for low and moderate income housing in a neighboring community. TOTW cites the Hills case as to the broad powers of the Council, and argues that the action requested is clearly within the Council's implied powers. In the alternative, if the Council determines not to condition Warren's certification, TOTW asks that it transfer the issue back to the Superior Court.

In response, Warren contends that the relief requested by TOTW would, in affect, be requiring Warren to satisfy Green Brook's fair share obligation and top of its own. It points out that the

Authority is not a regional authority, and that Green Brook's only relation to it is as a customer (presently, for approximately 200 gpd of capacity). Warren contends that the burden for obtaining needed sewer should properly be placed on Green Brook, which may institute litigation if it feels it has a right to any further capacity from the Authority. Warren and the Authority argue that the TOTW site would take between one third and one half of the Authority's remaining sewer capacity, and that as a result a number of sites in Warren that can only be sewered through the Middlebrook trunk will be rendered useless. However, Warren admits that the capacity at issue is not needed for meeting its own fair share obligation. Warren states that its plan to meet its individual obligation is completed, and requests that the Council not delay satisfaction of the obligation through consideration of "external" concerns. Finally, Warren argues that to grant the relief requested would be an intrusion on the discretion given to municipalities in determining how sewer capacity will be allocated, and that COAH has no control over municipal property and finances.

Finally, AMG Realty (AMG) (a developer and objector) agrees with TOTW as to Warren's regional sewer obligation, but asks the Council not to condition Warren's certification. Rather than potentially delay satisfaction of Warren's obligation, AMG suggests that the Council either issue a separate order, requiring Warren to provide sewer to Green Brook; or deal with the issue as part of the Green Brook case, perhaps transferring the sewer issue to the Superior Court.

The present case thus presents the Council with an issue of first impression. TOTW is not contending that Warren's housing element and fair share plan does not present a realistic opportunity for meeting Warren's own fair share obligation. Instead, its argument is premised on Warren's unwillingness to provide infrastructure to a neighboring municipality that is essential to that municipality's ability to meet its fair share obligation. TOTW's contention is that, as a result of this failure, the Council should impose upon Warren the requirement of providing the necessary sewer capacity to Green Brook as a condition of receiving substantive certification. TOTW argues that the provision of sewer capacity is required before the council can certify that Warren has met its obligation under the Act. The question is thus what obligation is imposed on municipalities by the Mt. Laurel cases and the Fair Housing Act as a prerequisite to earning substantive certification. For the reasons set forth below, it is the Council's determination that, under the circumstances of the present case, Warren is not required to provide sewer capacity to the TOTW site in Green Brook as a condition to receiving substantive certification.

In So. Burlington Cty. N.A.A.C.P. v. Mount Laurel Tp., 92 N.J. 158 (1983) (Mount Laurel II), the Supreme Court restated the basis of the constitutional obligation; that the power to zone, delegated to the municipalities by the State of New Jersey, is part of the police power and must be exercised for the general welfare. Id. at 208. Because housing is such a "fundamental" concern, the Court added that the consideration of the general welfare includes more than just the needs of municipal residents - it also includes

consideration of the housing needs of those residing outside the municipality who are within the region contributing to housing demand within the municipality. Ibid. Land use regulations that fail to provide the requisite realistic opportunity for the municipality's fair share of the regional need for low and moderate income housing thus conflict with the general welfare and are unconstitutional. Id. at 208-209.

The Mount Laurel II Court went on to define the exact parameters of the obligation. The Court stated that all municipalities must provide for their own indigenous need (low and moderate income households within the municipality living in substandard housing) up to the regional average. Id. at 214. Further, those municipalities in "growth areas" of the State have a further obligation to provide for their fair share of the region's present and prospective need for low and moderate income housing. Ibid. Satisfying that obligation includes both the elimination of unnecessary land use restrictions and the provision of affirmative incentives for the construction of low and moderate income housing, such as density bonuses and mandatory set-asides. Id. at 217, 258-274. The court concluded that "once a municipality has revised its land use regulations and taken other steps affirmatively to provide a realistic opportunity for the construction of its fair share of lower income housing, the Mount Laurel doctrine requires it to do no more." Id. at 259-260.

The Fair Housing Act was designed to provide an administrative mechanism in which municipalities may satisfy their constitutional obligation, as that obligation is defined in the

Mt. Laurel cases. N.J.S.A. 52:27D-302 and 303. In upholding the constitutionality of the Act, the Supreme Court noted that the Act empowers the Council to "decide whether proposed ordinances and related measures of a particular municipality will ... satisfy its Mount Laurel obligation, i.e., will they create a realistic opportunity for the construction of that municipality's fair share of the regional need for low and moderate income housing." Hills, supra, 103 N.J. at 20. In furtherance thereof, a municipality prepares for submission to the Council a housing element and fair share plan designed to provide a realistic opportunity for its fair share of low and moderate income housing. N.J.S.A. 52:27D-311(a). In adopting its housing element and fair share plan, a municipality may use "any technique or combination of techniques" designed to meet its obligation. N.J.S.A. 52:27D-311. That obligation, as calculated pursuant to the Council's methodology, is based on the obligation set forth in Mount Laurel II, and requires that each municipality provide for its own indigenous need up to the regional average, and that all growth area municipalities provide for their fair share of the region's reallocated present and prospective need. N.J.A.C. 5:92-5.1 et seq.

The Council's statutory responsibility is to review municipal housing elements and fair share plans for the purpose of ascertaining whether said submissions will satisfy the municipality's Mount Laurel obligations. N.J.S.A. 52:27D-314. That obligation, as defined in Mount Laurel II and described in detail above, requires each municipality to provide for its own "fair share." In meeting that obligation, the municipality must demon-

strate that it has created a realistic opportunity that its fair share of low and moderate income units may be built or rehabilitated within the municipality (unless a portion of that obligation is transferred to another municipality through a Regional Contribution Agreement). In reaching a determination on whether the municipality's plan satisfies that obligation, the Council must find that:

The municipality's fair share plan is consistent with the rules and criteria adopted by the council and not inconsistent with achievement of the low and moderate income housing needs of the region ... and

The combination of the elimination of unnecessary housing cost - generating features from the municipal land use ordinances and regulations, and the affirmative measures in the housing element and implementation plan make the achievement of the municipality's fair share of low and moderate income housing realistically possible.... N.J.S.A. 52:27D-314.
(Emphasis added).

If the plan meets the above test, the Council "shall" certify it.
N.J.S.A. 52:27D-314.

There is no dispute in the present case that Warren's plan will provide for the necessary units, nor is it alleged that the plan fails to comply fully with all applicable Council regulations. As noted above, TOTW's argument is instead premised on the language of N.J.S.A. 52:27D-314 that a plan must be consistent with the low and moderate income housing needs of the region. However, there is nothing in the Warren plan that is inconsistent with regional need, nor is there any allegation that the plan utilizes resources or infrastructure in a manner that will prevent other regional municipalities from meeting their obligations under the

Act. The plan provides for satisfaction of Warren's obligation in an appropriate manner. TOTW's disagreement with Warren is actually over Warren's sewer policies outside the context of its plan. In affect, TOTW is arguing that Warren bears an additional obligation to refrain from adopting any municipal policies that would hinder satisfaction of the regional need, and to do everything in its power to actively help other municipalities meet that need. Thus, as Warren's plan meets its fair share obligation, as defined in the Act and Mount Laurel II, the Council must certify the plan pursuant to the dictates of N.J.S.A. 52:27D-314.

The Council notes, however, that TOTW has raised an issue of serious concern. The Administrative Law Judge's factual findings indicate that TOTW's site may only receive sewer from Warren; that Warren has adequate capacity; and that Warren will not provide it.* Without that capacity, Green Brook may still receive certification of its own plan, by way of a durational adjustment pursuant to N.J.A.C. 5:92-8.1 et seq. However, while its plan will be certified, no housing will actually be constructed due to the lack of sewer capacity. The Council does not feel that satisfaction of the regional need should be frustrated in this manner. The Superior Court has previously suggested that in such cases a judicial remedy may be appropriate. See, Urban League of Essex County v. Mahwah, 207 N.J. Super. 169, 258-259 (Law Div. 1984).

* The Council notes, however, that Warren has indicated that the capacity may be required for the future use of its own residents. This will certainly be an issue in any future action to allocate capacity.

Thus, the Council agrees with TOTW that the issue needs to be addressed. However, the Council feels that it is constrained by the language of the Fair Housing Act and the cases cited above. It must be recalled that the Council's authority is premised on its review of plans for substantive certification. Disputes over allocation of limited amounts of sewer or water capacity may involve the competing claims of several municipalities (especially if a regional authority is involved), and require that a limited resource be divided among them. It is possible, in such a case, that several of the necessary parties might not even be before the Council. Further, the municipality controlling the capacity could have already received certification and begun its six-year period of repose prior to the allocation issue being raised by another municipality. This raises the question of the Council's ability to adequately address such issues under a variety of circumstances. As a more comprehensive approach to the problem is necessary, it would appear that the Superior Court would be the appropriate forum to hear this issue in the first instance. This can easily be done in the context of the Green Brook case.

Thus, for the reasons set forth at length above, the Council will order that the motion to condition Warren's substantive certification upon its agreement to provide sewer capacity to Green Brook be denied.

Council on Affordable Housing

By: 
James L. Logg, III
Chairman

Dated: 3/7/88