

NEW JERSEY COUNCIL ON
AFFORDABLE HOUSING
DOCKET NO. COAH 87-20

IN RE CLINTON TOWNSHIP)
HUNTERDON COUNTY,)
APPLICATION FOR SCARCE)
RESOURCE RESTRAINT)

Civil Action

OPINION

This matter comes before the Council on Affordable Housing on a motion filed by Bi-County Development of Clinton, Inc., (Bi-County) seeking the imposition of scarce resource restraints in Clinton Township (Clinton). Specifically, Bi-County asks that the Council determine that sewer capacity is a scarce resource in Clinton, and issue an appropriate order preserving such capacity.

On December 29, 1987 Clinton filed with the Council a final housing element and fair share plan; however, it chose at that time not to petition the Council for substantive certification of that plan. Subsequently, on July 28, 1987 Bi-County instituted Mt. Laurel litigation against Clinton. As a result, the matter was transferred to the Council by Order dated November 13, 1987, so as to permit Clinton to exhaust the administrative process of the Council. Clinton has published notice of its petition for certification, and the Council has initiated mediation.

The Council's ability to preserve scarce resources through appropriate orders is not disputed. The Supreme Court, in the case of Hills Development Company v. Bernards Township, 103

N.J. 1, 61 (1986) clearly established that the Council may take "appropriate measures to preserve 'scarce resources,' namely those resources that will probably be essential to the satisfaction of its Mt. Laurel obligation." The Council has incorporated this authority within its procedural regulations, N.J.A.C. 5:91-11.1, and has granted such relief on a number of occasions.

In granting such relief, the Court directed the Council to consider whether "further development or use of [the facilities in question] is likely to have a substantial adverse impact on the ability of the municipality to provide lower income housing in the future." Hills, supra at 62. Further the Court noted that restraints or conditions should only be imposed after a "thorough analysis" of the record to determine what conditions would be "appropriate". In this respect, the Court determined that:

'Appropriate' refers not simply to the desirability of preserving a particular resource, but to the practicality of doing so, the power to do so, the cost of so doing, and the ability to enforce the condition. Ibid.

The conditions imposed:

[S]hould be designed not for the protection of any builder, but for the protection of the municipality, pending the outcome of the Council proceedings, to provide the realistic opportunity for lower income housing, as it may be required to do in the near future. Ibid.

The authority is thus similar in intent to the traditional power of the Courts to grant injunctive relief in order to preserve the status quo, and to prevent irreparable harm pending the opportunity for a full analysis of the situation. See, e.g. Crowe v. DeGioia, 90 N.J. 126, 132 (1982). In sum, the Council must determine whether it is necessary and practical to exercise an extraordinary power

to preserve the status quo pending the outcome of a final determination.

The first issue before the Council is whether sewer capacity constitutes a scarce resource in Clinton; in other words, the Council must determine how much capacity will be required to meet Clinton's probable fair share housing obligation. The Council must thus ascertain Clinton's 1987-1993 pre-credited need for construction of new units. Clinton's pre-credited, unadjusted need is 234. See: Council on Affordable Housing; Municipal Present, Prospective and Pre-credited Need Estimates, May 22, 1986; See also N.J.A.C. 5:92-5.1 et seq. for computation. That portion which constitutes indigenous need is 58 units, which may be met through rehabilitation. This leaves a total of 176 units to be addressed through the creation of new units. At the Council's 20% set aside rate for inclusionary developments, this means that Clinton must provide 880 total units to satisfactorily meet its obligation. Clinton's present housing element and fair share plan, however, apparently indicates that the Township is proposing to meet its entire need of 234 low and moderate income units through inclusionary zoning. If Clinton does proceed with this plan, it will have to provide 1170 units in order to meet its obligation.

It is, of course, possible that Clinton may choose to alter its pre-credited need in a number of ways. This may be done by completion of a housing survey, N.J.A.C. 5:92-5.2(b); by use of available credits, N.J.A.C. 5:92-6; or through the adjustment process, N.J.A.C. 5:92-8. Clinton may also elect to enter into a Regional Contribution Agreement. N.J.A.C. 5:92-11. Finally, it

may choose to deal with its new construction component by methods other than zoning at a 20% set-aside. However, it would be inappropriate at this stage for the Council to presume such actions, especially in light of Clinton's proposed housing element and fair share plan. For purposes of this motion, the Council must assume that Clinton requires sufficient capacity for at least 880 new units, and potentially 1170 new units.

The parties agree that Clinton presently has no sanitary sewage treatment plant. Further, it is undisputed that Clinton has contracted for capacity with the neighboring Clinton Town facility. The contract provides Clinton with 150,000 gallons per day (gpd) capacity, which is to be used in the Annandale section of Clinton. Bi-County estimates that Clinton is presently using only 65,000 gpd of that capacity, although how much of that amount has been previously allocated is unclear.* On the other hand, Clinton states that approximately 133,000 gpd of this capacity has been previously allocated to existing units in the Annandale area, in order to convert from presently existing septic systems for health reasons. Of the remaining capacity, Clinton states that it has been divided into three separate categories. First, 1,400 gpd has been reserved for "exempt lots" (in other words, existing units that are presently utilizing septic systems, and that may have to convert from said

* Bi-County also alleges that 350,000 gpd have been contracted for use within Clinton by three private developers. The agreements are also with the Clinton Town facility. Bi-County estimates that approximately 117,000 gpd of this capacity is being used, leaving 233,000 unused gpd. However, these developers were not parties to the present motion, and thus no relief can be afforded against them at this juncture.

systems in the future for health reasons). Second, approximately 7,350 gpd has been reserved for vacant lots. The capacity has been reserved on the basis of 350 gpd per lot, calculated so as to permit the construction of one unit on each lot. A portion of this capacity has already been allocated, although the percentage is not clear. Finally, approximately 7,600 gpd remains unreserved and unallocated. Clinton indicated at oral argument a willingness to hold this last 7,600 gpd for Mt. Laurel housing. No alternative sources of capacity can definitely be relied upon by Clinton in the immediate future, in Annandale or elsewhere in the Township.

As noted, Clinton must demonstrate capacity sufficient to cover at least 880 units. Whichever figures are accepted, it is clear that such capacity is not presently available. At oral argument, Bi-County estimated that the amount Clinton requires in order to meet its obligation to be at a minimum 64,000 gpd. Applying Department of Environmental gpd estimates, and assuming that the low and moderate income units meet Council bedroom mix and stratification regulations, and that the market units are evenly split between two and three bedroom units, Clinton will require over 200,000 gpd in order to meet an obligation of 880 units. Clinton may argue that, pursuant to its present housing element and fair share plan, only 50 low and moderate income units are intended to be provided in the Annandale area. At this time it is not clear that the other areas proposed by Clinton will be appropriate for Mt. Laurel housing, or if they will be able to obtain necessary sewer capacity. Thus, more units may have to be designated for the Annandale area. However, even if the present plan proves to be

acceptable, this still means that Clinton must provide sewer capacity for a 250 units inclusionary development in the Annandale area. This would still require capacity in excess of 60,000 gpd. Sewer capacity is thus unquestionably a scarce resource at the present time in Clinton.

The second question before the Council is whether, given the existence of a scarce resource (and thus the "desirability" of restraints), the imposition of restraints is "appropriate," as set forth above. As noted, it is clear that the Council has the authority to act to protect scarce resources. Further, the preservation of necessary sewer capacity is just as clearly the type of "scarce resource" envisioned by the Court:

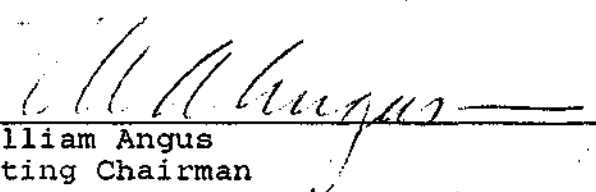
In some municipalities it is clear that only one tract or several tracts are usable for lower income housing, and if they are developed, the municipality as a practical matter will not be able to satisfy its Mount Laurel obligation. In other municipalities there may be sewerage capacity that, if used, will prevent future lower income housing, or transportation facilities, or water lines, or any one of innumerable public improvements that are necessary for the support of housing but are limited in supply. Id. at 61 (emphasis added).

It is the Council's determination that the present case is appropriate for imposition of scarce resource restraints. The Council is convinced that it is practical to require Clinton to preserve necessary remaining capacity, and that the cost of doing so would not be unduly burdensome. As noted, restraints will prevent the potential irreparable harm of the loss of Clinton's remaining sewer capacity without any allocation to the Township's Mt. Laurel obligation. On the other hand, restraints will be limited in scope and duration. The Council Order will only re-

strain presently unallocated capacity. This is especially appropriate in the present case, where the 133,000 gpd capacity already allocated to existing units has been necessitated by public health concerns. Further, the Council Order will specifically exempt the 1,400 gpd reserved for existing units, as this capacity may be required in the near future for health reasons. Thus, the only capacity restrained will be the 7,600 gpd that is unreserved and unallocated, and that portion of the reserved 7,300 gpd that is presently unallocated.* The holding of this remaining capacity can certainly not be considered burdensome, in light of the Township's professed intention to voluntarily hold the 7,600 gpd for possible Mt. Laurel use. Finally, the Order is subject to specific requests for exemptions, or proof of changed circumstances that would obviate the need for continuing any restraints.

An appropriate Order embodying the terms of this Opinion will be entered.

COUNCIL ON AFFORDABLE HOUSING

By: 
William Angus
Acting Chairman

Dated: *January 19, 1988.*

* The Council Order will also restrain use of any capacity that is regained by Clinton from metering in the Annandale area.