

COUNCIL ON AFFORDABLE HOUSING
DOCKET NO. COAH

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

This matter comes before the Council on Affordable Housing (Council) upon the application of the Borough of Bernardsville for reconsideration of the Council's Opinion and Order of November 16, 1987 whereby the Council determined that accelerated denial of Bernardsville's petition for substantive certification was not warranted but further determined that it was appropriate, as a condition of its substantive certification, to require Bernardsville to rezone Block 125, Lot 27, more commonly known as the "Motzenbecker site", to allow for development of the property for multifamily purposes at a density of nine units per acre with a 20% set aside for low and moderate income housing. This matter originated with a motion for accelerated denial or, in the alternative, a builder's remedy brought by Helen Motzenbecker (Mrs. Motzenbecker). The procedural history and facts of this matter are more fully set forth in the Council's Opinion dated November 16, 1987, therefore, we need not repeat it at this time.

Bernardsville is requesting reconsideration of that portion of the Council's decision which determined that Mrs. Motzenbecker's site should be rezoned to allow for construction of low and moderate income housing. The Borough does not

request reconsideration of the Council's denial of the accelerated denial request. Bernardsville specifically requests that the Council transfer to the Office of Administrative Law (OAL) pursuant to N.J.S.A. 52:27D-315(c) the issue of whether site specific relief is appropriate so that an administrative law judge can evaluate the deficiencies in the housing element. Bernardsville argues that since mediation was unsuccessful in this instance, N.J.S.A. 52:27D-315(c) requires the entire matter to be transferred to OAL as a contested case. Bernardsville contends that the OAL is the proper place to examine the submissions made by it, particularly those involving the Borough's ability to finance the proposed municipal construction project, the existence of a feasibility plan or development proposal for the proposed municipal construction project, the existence of an implementation and administration program for rehabilitation and the submission, or lack thereof, of the necessary documents for a regional contribution agreement (RCA). Additionally, Bernardsville argues that prior to awarding a builder's remedy, the Council should have engaged in rulemaking pursuant to the Administrative Procedures Act (APA), N.J.S.A. 52:14B-1 et seq.

In response to Bernardsville's motion, Mrs. Motzenbecker raises essentially two points. First, she argues that the Council has the authority to award the type of site specific relief as a condition of substantive certification it did in this case. As part of this argument, Mrs. Motzenbecker points out that it was entirely appropriate for the Council to utilize the same remedy the court did prior to transfer since the New Jersey Supreme Court specifically stated that the Council was free to use any interim

orders developed in litigation. Hills Development Co. v. Bernards Tp., 103 N.J. 1, 60 (1986).

Second, Mrs. Motzenbecker contends that Bernardsville is incorrect in its determination that this matter should have been referred to the OAL. Mrs. Motzenbecker asserts that N.J.S.A. 52:27D-315(c) merely requires the Council to determine whether the matter is indeed a contested matter pursuant to the APA and further whether the Council wishes to hear the matter itself or refer it to the OAL. Mrs. Motzenbecker relies upon the APA and N.J.A.C. 5:91-8.1(a) in support of these arguments. Furthermore, Mrs. Motzenbecker argues that there is no need for an OAL hearing since there is no contested issue of material fact present in this case. Mrs. Motzenbecker contends that Bernardsville's desire to explain its reasons for the deficiencies in the plan does not rise to the level of a contested case and therefore it is unnecessary to refer the matter to the OAL.

It should be noted that the Council afforded Bernardsville, as well as Mrs. Motzenbecker, an opportunity to be heard. Both Bernardsville and Mrs. Motzenbecker submitted voluminous documentation and legal arguments in support of their positions. The Council further afforded the parties the opportunity to present oral arguments, which both parties did. The Council's role was to review the documentation and legal arguments and determine whether there was a basis to grant Mrs. Motzenbecker's request. Neither party objected to the procedure at that time.

The Council disagrees with Bernardsville's contention that this matter is required to be transmitted to the OAL. N.J.S.A. 52:27D-315(c) provides that:

If mediation efforts are unsuccessful, the matter shall be transmitted to the Office of Administrative Law as a contested case as defined in the "Administrative Procedures Act".

This section applies when objections are not resolved during mediation and those objections rise to the level of a contested case as defined in the APA.* However, such is not the case in this instance. Mrs. Motzenbecker's motion for a "builder's remedy" was brought outside the mediation process. It was a motion separate and distinct from mediation. The fact that mediation did not resolve all of the objections does not automatically render a separate motion made outside the scope of mediation subject to N.J.S.A. 52:27D-315(c). Mediation is designed as a forum to permit persons to voice their objection to a municipality's housing element and fair share plan and work with the municipality in an attempt to resolve those objections. Mrs. MOTzenbecker availed herself of this forum. However, independent of mediation, Mrs. Motzenbecker brought a motion for accelerated denial of Bernardsville's housing element and fair share plan or, in the alternative, for a builder's remedy on her site. This motion was premised on Bernardsville's actions before the Council in submission of its housing element and fair share plan while mediation simply involved an attempt to address the objector's concerns. the motion requested the Council to grant a specific form of relief to Mrs. Motzenbecker based upon Bernardsville's submittal of a deficient housing element. The request for site specific relief is not akin to mediation where the parties to mediation

* N.J.S.A. 52:27D-315(c) does not require automatic transmittal to the OAL. The Council still must determine whether the matter is a contested case. Further, the Council also may exercise its discretion to hear the matter itself. See 18 NJR 1268.

attempt to resolve objections to the municipality's plan. Thus, in reviewing Mrs. Motzenbecker's motion, the Council was not resolving unresolved issues in mediation. The Council in actuality was deciding a party's request for relief. Accordingly, there was no need to transfer any issues to the OAL pursuant to N.J.S.A. 52:27D-315(c).

Even if an argument could be made that N.J.S.A. 52:27D-315(c) might apply to Mrs. Motzenbecker's motion due to the unsuccessful mediation, there still is no need to transmit the matter to the OAL. N.J.S.A. 52:27D-315(c) does not remove the discretion of the Council to determine whether a contested case as defined in the APA exists. The APA specifically states that the authority to determine whether a case is contested remains with the agency. N.J.S.A. 52:14F-7. Therefore, before transmitting a matter to the OAL, the Council must first determine whether a contested case exists that would necessitate a trial type hearing. A contested case is defined in the APA as:

...a proceeding, including any licensing proceeding, in which the legal rights, duties, obligations, privileges, benefits or other legal relations of specific parties are required by constitutional right or by statute to be determined by an agency by decisions, determinations, or orders, addressed to them or disposing of their interests, after opportunity for an agency hearing, but shall not include any proceeding in the Division of Taxation, Department of the Treasury, which is reviewable de novo by the Tax Court. [N.J.S.A. 52:14B-2(b)].

It is generally understood that a contested case which necessitates a full evidentiary hearing arises when there are factual disputes. Cunningham v. Dept. of Civil Service, 69 N.J. 13 (1975)

If there are no factual issues in dispute, an evidentiary hearing is unnecessary. In those instances either written or oral argument on the issues in question is sufficient. Bally Mfg. Corp. v. N.J. Casino Control Commission, 85 N.J. 325, 334 (1981). In the instant matter, there were no disputed facts and hence no contested case which would necessitate a trial type hearing. Mrs. Motzenbecker alleged that Bernardsville's housing element was deficient and therefore the relief sought should be granted. In response to Ms. Motzenbecker's allegations, Bernardsville presented certain documentation. Neither side disputed the documentation proffered or the point in time at which it was proffered. All that remained for the Council to decide was, based upon all of the documentation and the time at which it was submitted, whether Mrs. Motzenbecker's motion should be granted. The Council had all the facts before it and all that remained for the Council was to apply the law to the facts. The Council did not need the OAL to find any facts and it is clearly within the Council's purview to decide the ultimate issue. The Council did afford the parties the opportunity to present written and oral arguments on the issue. Such a hearing was entirely sufficient since there was no contested case.

Finally, on the issue of whether the Council should transmit this matter to the OAL, it must be noted that the Council's decision to require site specific relief prior to the conclusion of the administrative process rendered

moot the need to consider whether N.J.S.A. 52:27D-315(c) should be applied. Mrs. Motzenbecker made the motion in question to the Council during mediation. The Council heard oral argument on the motion while mediation was still in progress and rendered its decision shortly thereafter. In this case, based upon the facts before it, the Council determined to require certain site specific relief. The effect of the Council's decision was to obviate the need to pursue mediation with Mrs. Motzenbecker any further. The Council in essence prevented Bernardsville from delaying the administrative process any further. As discussed previously, since there were no disputed facts, there was no need for the Council to conduct a full evidentiary hearing. It would be a perversion of the process to allow Bernardsville to add unnecessary time to the administrative process for a meaningless hearing. The Council already has rendered its decision and Bernardsville does not point to any new information which would justify holding a full evidentiary hearing in the OAL.

Accordingly, regardless of how one views this matter, the Council sees no reason to transmit this matter to the OAL for a hearing. As discussed in the Opinion of November 16, 1987 the Council has the authority to require the type of site specific relief it did in this case. Although not explicitly stated in that Opinion, the authority to award such site specific relief is a function of the Council's authority to grant, deny or condition substantive certification. Thus, as a condition of Bernardsville's substantive certification, the Council will require the Borough to rezone

the Motzenbecker site in accordance with the decision. The fact that the required rezoning in this instance is consistent with a court order entered prior to Bernardsville's transfer to the Council is of little consequence. The New Jersey Supreme Court clearly stated that the Council has the authority to give whatever effect it deems appropriate to a prior court's order. Hills Development Co. v. Bernard Township, 103 N.J. 1, 60 (1986). In this case, after determining that site specific relief was appropriate, the Council decided to rely on the densities set forth in the court order entered in the previous litigation between Mrs. Motzenbecker and Bernardsville.

Finally, Bernardsville contends that the Council was required to engage in rulemaking before it awarded a "builder's remedy". Contrary to Bernardsville's contention, the criteria set forth in Metromedia, Inc. v. Director, Div. of Taxation, 97 N.J. 313 (1984) do not apply. The Council's decision in this matter was case specific. The decision applies solely to Bernardsville. No standards or directives are involved. Each matter such as this will turn on its own facts. In this case, the Council simply is exercising its authority to condition substantive certification on the inclusion of a certain site with a certain density which is designed to achieve the constitutionally mandated goal of providing a realistic opportunity for the provision of Bernardsville's fair share obligation.

In conclusion, the Council rejects Bernardsville's arguments that it was required to transmit the issue of a "builder's remedy" to the OAL. N.J.S.A. 52:27D-315(c)

does not apply in this instance and, in fact, even if it did, there was no contested case to transfer. Further, the Council's resolution of the matter rendered moot any need to apply N.J.S.A. 52:27D-315(c). Additionally, the Council finds that there was no need for it to engage in rulemaking procedures. Accordingly, Bernardsville's request for reconsideration is denied.



William Angus
Acting Chairman

Dated: 7 . 88