

COUNCIL ON AFFORDABLE HOUSING  
DOCKET NO. COAH 87-20a

IN RE CLINTON TOWNSHIP

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Civil Action

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OPINION

The present matter was opened to the Council on Affordable Housing by motion filed by Bi-County Development of Clinton, Inc. (Bi-County), seeking a determination on the question of the appropriate housing element and fair share plan for purposes of the mediation and review process in the above-captioned matter.

The factual history of this case, as it relates to the issues presented by this motion, is not in dispute. Bi-County is the owner of a site in Clinton Township consisting of approximately 46 acres. Bi-County apparently purchased the property in December, 1986, at which time it was zoned for construction at eight units per acre. Previously, Clinton had filed with the Council a resolution of participation (in October 1985), and a draft housing element and fair share plan (on November 3, 1986). Clinton filed its final housing element and fair share plan with the Council on December 31, 1986, prior to the January 5, 1987 deadline. Both the draft and final plan included Bi-County's property as a site for Mt. Laurel housing, to be zoned at eight units per acre with an 18% set-aside.

Clinton elected not to petition for substantive certification at the time it filed its final housing element and fair share plan. Clinton's brief indicates that early in 1987 a potential environmental problem with the Bi-County site came to the Township's attention.\* Clinton states that during the period of April to June, 1987, an ad-hoc committee was formed to investigate the problem and to amend the Township housing element and fair share plan accordingly. However, on July 28, 1987 Bi-County filed suit in the Superior Court, and requested that the Council initiate the mediation and review process. As these actions constituted an automatic petition for substantive certification, Clinton published notice of its petition on October 8, 1987. The 45 day objector period thus ended on November 22. On December 1, 1987 the Clinton Township planning board approved a resolution amending the master plan; and on December 14, 1987 the Township adopted an ordinance amending the municipal zoning ordinance. In the interim, on December 3, 1987, the amended housing element and fair share plan were submitted to the Council. The amended plan deletes the Bi-County site in its entirety.

Mediation was scheduled to commence on December 15, 1987; however, a dispute arose as to which of the two plans was properly the subject of mediation. By motion dated January 11, 1988 Bi-

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\* Although not relevant to the legal issues presented by these motions, it should be noted that the potential problem with the Bi-County site identified by Clinton involves the existence of extensive cavernous limestone on the site. Clinton has expressed concern over whether it is advisable to locate a large housing project in this area.

County requested that the Council order that mediation proceed on the original housing element and fair share plan; and that Clinton be thus prevented from replacing Bi-County's site. In response, Clinton filed on January 22, 1988 an answer and cross-motion, seeking a Council order permitting mediation on the amended plan, or, in the alternative, allowing the municipality to object to the original plan, and giving those objections a presumption of validity. Oral argument on the motions was heard on February 1, 1988.

Bi-County argues that, having filed a timely housing element and fair share plan, Clinton cannot unilaterally amend it once mediation and review is initiated. In support it cites a letter from Douglas Opalski, Executive Director of the Council, to all New Jersey municipalities, informing them that no unilateral amendments will be permitted post-petition; as well as the Council's decision in In the Matter of Middletown Township, Docket No. , in which Middletown's request for time to unilaterally amend its plan post-petition was denied. Bi-County argues that the plan may only be amended as the result of mediation or Council input. In Bi-County's view Clinton may appear as an objector to the original plan; however, if the original plan meets all Council requirements it cannot be altered. As a basis for this position, Bi-County cites its reliance on the original plan, as well as a Legislative intent to avoid "sham" plans.

In response, Clinton argues that nothing in the Fair Housing Act or regulations prohibits such amendment. It cites the case of In re Washington Township - Morris County, to the affect that a municipality is first given an opportunity to construct its

own plan. Clinton states that it should be given this opportunity, and not forced to accept a site it does not want, or which could result in a poor planning choice. It contends that to grant Bi-County's motion would permit developers to select the sites for Mt. Laurel housing, thus resulting in an unwarranted intrusion on the municipal zoning power. Clinton argues that it has an obligation to bring to the Council's attention the existing flaw in its plan; and that replacing the site should not depend on whether the Township's amended plan was finished prior to suit by Bi-County. Clinton also argues that the Municipal Land Use Law, specifically N.J.S.A. 40:55D-28 permits such amendments; and that no party has been prejudiced by the small delay in time. Finally, in the event amendment is not permitted, Clinton asks that it be allowed to enter an objection, and that the objection be accorded a presumption of validity, as it represents the municipality's preference as to how its obligation is to be satisfied.

The Fair Housing Act, N.J.S.A. 52:27D-301 et seq., provides a statutory framework within which municipalities may satisfy their Mt. Laurel fair share obligations. This is done by municipal creation of a housing element and fair share plan, containing the information required by N.J.S.A. 52:27D-310. Pursuant to the Act, each municipality was permitted to file with the Council a resolution of participation within four months of the effective date of the Act, and was then required to file a final housing element and fair share plan by January 5, 1987 (five months after Council adoption of its substantive regulations). N.J.S.A. 52:27D-309(a). The result of a timely filing is that the municipality is entitled

to proceed through the Council's mediation and review process in the event Mt. Laurel litigation is subsequently initiated against it in the Superior Court. N.J.S.A. 52:27D-316(b)\* Those municipalities filing after January 5, 1987 may also be entitled to exhaust administrative remedies if filing occurs prior to the institution of litigation. N.J.S.A. 52:27D-309(b). Thus the time of filing of a housing element has certain consequences in respect to the proper forum for any future Mt. Laurel litigation involving the municipality.

However, the filing of the housing element does not, by itself, trigger the Council's mediation and review process, which occurs only following a petition for substantive certification, or action that is equivalent to such a petition. Under the Act, a municipality has a six year period during which it may voluntarily petition. N.J.S.A. 52:27D-313. The filing of the petition and publishing of notice of said petition by the municipality commences a 45 day period during which any party may file objections to the proposed housing element and fair share plan. N.J.S.A. 52:27D-313 and 314. Following the expiration of the 45 day period, the Council will initiate the mediation and review process if valid objections have been received. N.J.S.A. 52:27D-315(a). If no objections are received, the Council will proceed to review the submission pursuant to N.J.S.A. 52:27D-314.

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\* Those municipalities subject to Mt. Laurel lawsuits that predated the Act by more than 60 days, and which were transferred to the Council pursuant to N.J.S.A. 52:27D-316(a), were given five months

(Footnote Continued on Following Page)

Mediation and review may also be triggered in cases where there is no voluntary petition by the municipality. A municipality that has filed a housing element and fair share plan with the Council, yet elected not to petition, may subsequently be the subject of a Mt. Laurel lawsuit. In such a case, the Council will initiate the process upon receipt of a "request for mediation and review" pursuant to N.J.S.A. 52:27D-315(a) and 316(b), which acts as a petition for certification. A municipality that is the subject of a Mt. Laurel lawsuit and which has not previously filed with the Council a housing element may still be transferred to the Council by the Superior Court. However, there is no statutory requirement of an exhaustion of administrative remedies in such cases.\*

Thus, while the date a municipality voluntarily files its housing element and fair share plan determines whether the municipality is entitled to mediation and review before the Council, it does not trigger the start of said mediation and review process.

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from the date of transfer or January 5, 1987 (whichever was later) to file a housing element with the Council. An untimely filing resulted in reversion of jurisdiction to the Court.

\* Cases involving N.J.S.A. 52:27D-316(a) municipalities (those municipalities subject to Mt. Laurel litigation predating the Fair Housing Act by more than 60 days) do not present the same issue as the case at hand. This is because the transfer acts as an automatic petition, pursuant to Hills Dev. Co. v. Bernards Tp. in Somerset Cty., 103 N.J. 1, 57 (1986), following which the municipality will prepare a housing element and submit it to the Council. There is thus no possibility of an interim period following submission of the housing element, as the municipality has already been deemed to have petitioned.

The process will commence only when the municipality elects to petition at some point during the subsequent six year period, or when a party institutes litigation and files a request for review and mediation. Thus, there is no reason to prevent a municipality from amending its plan after filing it with the Council. Since a municipality has a six year period in which to petition, a period of several years may pass between the two events. During this period no review of the plan is conducted by the Council. In fact, under the Act no further actions of any kind are triggered by the filing of a housing element and fair share plan with the Council. Under the circumstances, it would be senseless to prevent a municipality from changing its plan. Certainly, it is possible that conditions will change during the interim period, necessitating amendment. In light of the above, and the Act's preference for municipal creation of its own plan, it is the Council's interpretation that the Act was not intended to prevent unilateral amendments of plans by municipalities prior to petition.

However, unlike the filing of a housing element, the petition for substantive certification of a plan has additional ramifications, set forth in the Fair Housing Act. This is true whether the petition is voluntary or, like the present case, is the result of a request for mediation and review following institution of litigation. A petition starts the mediation and review process, and directly involves third parties in that process. Following a petition, a municipality must publish notice of the petition in a newspaper of general circulation within the municipality and county. N.J.S.A. 52:27D-313. Publication begins a 45 day comment period

during which any party may file objections to the housing element and fair share plan. N.J.S.A. 52:27D-314. As noted above, if there are objections, the Council initiates the mediation and review process; if not, it proceeds to review the plan. N.J.S.A. 52:27D-314 and 315. Any mediation must be finished within 60 days, unless the time is extended for good cause, N.J.A.C. 5:91-7.2(e), and any OAL proceeding must be concluded within 90 days of transmittal. N.J.S.A. 52:27D-314(c). Finally, after six months a party who instituted litigation may file a notice with the Superior Court to be relieved of the duty to exhaust administrative remedies. N.J.S.A. 52:27D-319.

For several reasons, it is the Council's determination that the Act did not contemplate unilateral amendments by municipalities of housing elements subsequent to a petition for substantive certification. First, as noted above, the Act draws a clear distinction between those municipalities that have filed a housing element and fair share plan prior to institution of a Mt. Laurel suit, and those municipalities with no final housing element on file with the Council at the time of suit. In the former instance, the Legislature determined that the case should proceed in the first instance before the Council rather than the Superior Court, while a municipality in the latter category has no right to exhaust administrative remedies. This Legislative distinction is a recognition that a municipality that has filed a final housing element has done the basic work required in formulating the plan designed to meet its obligation, and that the mediation and review process

may thus commence. Having "earned" the right to proceed before the Council, the municipality may avoid the remedies it would face in the Superior Court, such as an automatic builder's remedy. Thus, preparation of the final plan and submission to the Council confers certain statutory benefits. However, implicit in this legislative scheme is the requirement that mediation and review should be conducted on the housing element and fair share plan in existence at the time of the lawsuit and request for mediation and review (and thus the petition for certification). Having benefited from filing of the plan, and as a result having triggered the mediation and review process, the municipality may not also proceed to unilaterally create a different plan. This could encourage the original filing of "sham" plans, and disrupts the statutory intent to distinguish between municipalities that have previously filed a housing element and fair share plan and those that have not.

Second, it is clear that the 45 day objector period is intended to insure that all parties have an adequate opportunity to review a proposed plan and to prepare a suitable comment. To permit an amendment during the objector period or after that period has run permits a municipality to escape public comment on the amended portion of the plan. If such amendments were permitted, the Council would be faced with a situation in which the announced objectors had prepared objections based on a plan that no longer existed, and, more importantly, in which individuals affected by the new plan had received no objector period in which to comment. Further, as noted above the petition begins a series of events with statutory time limits designed to insure that the mediation and

review process be fully completed in a timely manner. The six month period provided in the Act is not an extensive period of time. Thus, even if the Act envisioned multiple 45 day objector periods in response to amendments of the plan, even a single repetition of the procedure would add at a minimum an additional month and one half to the process. This clearly does not further the Act's intention of promoting a timely mediation and review process. The desire to avoid unnecessary delay was specifically mentioned by the Supreme Court in the Hills case, supra, 103 N.J. at 36 and 39.

Finally, although the Council does not feel that such a problem is presented in this case, such amendments could permit a municipality to "punish" a developer whose lawsuit and request for mediation and review brought the municipality before the Council. This could easily be done by the simple act of removing that developer's site from the housing element and fair share plan. The potential chilling effect of such amendments on developers considering such litigation is obvious. Again, this mitigates against the intent of the Act, by discouraging developer lawsuits that would otherwise bring municipalities into the process.

Thus, as stated in Middletown, supra, the Council will not permit unilateral municipal amendment of plans that are not the result of mediation or Council review, and which occur after the petition for certification. Clinton argues that this interferes with the municipal prerogative to fashion its plan as it chooses. It is true that, under the Act, primary responsibility for drafting a housing element and fair share plan rests with the municipality. Thus, the first step in the process is the creation of a housing

element and fair share plan by a municipality and submission of that plan to the Council. This is precisely what has occurred in the present case. Recognition of this fact, however, does not mean that a municipality is thereby free to amend its plan as it wishes at any subsequent point in the mediation and review process. If such amendments were allowed, a municipality could thus wait until the end of mediation, and announce at that time that it had determined on a new approach it felt was more suitable. Clearly, for the reasons stated above, if the mediation and review process is to work as intended there must be a point at which the municipality is required to choose among options and settle on a final plan that can then be mediated. The Act clearly does not contemplate this municipal process continuing through the actual Council mediation period itself. Although preventing unilateral amendments after petition does impact in some small measure on the municipal prerogative to select its plan, the Council believes it is necessary under these circumstances. Further, it should be remembered that the site in dispute was originally included in the plan at the discretion of Clinton. Presumably, that selection came following a full municipal review process, which included submission to the Council of an initial, draft plan.

This does not mean that the plan may not be altered subsequent to certification. This may occur as the result of either Council review or the mediation process itself. Nor will Clinton be forced under any circumstances to accept a site that violates Council regulations or is adverse to sound regional planning. Clinton has properly alerted the Council to what it

regards as serious environmental and planning problems with Bi-County's site. Those concerns must now be addressed during the Council mediation and review process, perhaps before the Office of Administrative Law. If the result of that review is an indication that the Bi-County site is in any way inappropriate, it will not be included as part of Clinton's housing element and fair share plan. However, the Council disagrees with Clinton's argument that, in the event the Bi-County site is found to be suitable, Clinton should be given the option of selecting between all available, suitable sites (including Bi-County's). To permit Clinton such an option would simply be allowing the unilateral amendment of the plan under a different format. The Council does not believe that this is appropriate, for the reasons set forth at length above.

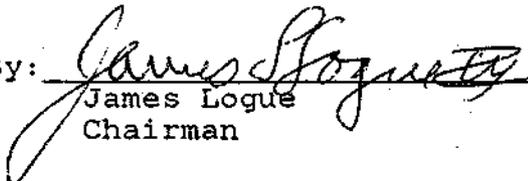
Further, the Council rejects Clinton's argument that the Municipal Land Use Law (MLUL) permits the amendment in question. While N.J.S.A. 40:55D-28 does allow a municipality to amend a master plan or any component part, this simply does not address the present issue. Under the Fair Housing Act, actions taken with regard to the housing element and fair share plan have certain specific consequences, that are spelled out in the Act and Hills decision and detailed above. Clinton is free to amend its master plan as it sees fit, but where those amendments affect the housing element and fair share plan Clinton will be subject to the repercussions contained in the Act. Thus, for example, Clinton could choose to amend its master plan following the close of the mediation and review process and Council certification, in a manner inconsistent with the plan certified by the Council. While this

might not violate the MLUL, it would result in Clinton's failure to obtain substantive certification pursuant to the Fair Housing Act.

For all of the above reasons, the Council will thus order that mediation shall be conducted on the housing element and fair share plan prepared by Clinton that was in existence at the time of Clinton's petition for substantive certification.

COUNCIL ON AFFORDABLE HOUSING

By: \_\_\_\_\_

  
James Loque  
Chairman

DATED: 3/7/88