

COUNCIL ON AFFORDABLE HOUSING
DOCKET NO. COAH 88-100

IN RE MIDDLETOWN TOWNSHIP,)
APPLICATION FOR ACCELERATED) CIVIL ACTION
DENIAL/BUILDER'S REMEDY) OPINION

The present matter was opened to the Council by a motion filed by Calton Homes, Inc., (Calton), seeking accelerated denial of ~~Midland~~^{Middletown} Township's petition for substantive certification or, in the alternative, award of a builder's remedy to Calton as to a site designated as the "Neuberger tract." Subsequently, a motion seeking the same relief was filed by 883 West Front Street Associates, Inc. (West Front Street). Both movants are developers and objectors to Middletown's plan.

The history of this matter is not disputed. Middletown was transferred to the Council by order of the Superior Court dated May 16, 1986. Middletown filed with the Council a draft housing element and fair share plan on November 5, 1986. By letter dated November 21, 1986 the Council responded to the draft plan. On January 5, 1987 Middletown filed its final housing element and fair share plan (thereby complying with the time limit imposed by the Fair Housing Act, specifically N.J.S.A. 52:27D-309(a)).

In a letter dated March 6, 1987 and addressed to the Mayor of Middletown, the Council notified the Township that its final plan was incomplete for mediation and review, and was thus being returned for additional work. The letter specifically enumerated the areas of the plan that needed supplementation, and gave Middletown until May 7, 1987 to file an amended

plan. However, by letter dated May 5, 1987 the Council notified Middletown that the time period was being extended until July 3, 1987. The extension was the result of a Council amendment to its substantive regulations that provided a cap of 1000 on any municipality's fair share obligation. Those municipalities effected by the amendment (such as Middletown) were given additional time to rework their plans.

Middletown filed its amended plan on July 2, 1987. The Council issued a premediation report on the plan dated August 20, 1987. Mediation commenced on October 19, 1987, and the mediator's report was issued on January 25, 1988. The present motions for accelerated denial/builder's remedy were filed with the Council on January 7, 1988 (Calton) and January 19, 1988 (West Front Street).

Both movants advance the same basic arguments in support of their applications. Citing the Council's decision in Motzenbecker v The Borough of Bernardsville, Docket No. COAH 87-18, they claim that the relief requested is appropriate because Middletown has exhibited "bad faith and intransigence" throughout the Council process (and prior to transfer). The result has been that the mediation process has been "fruitless," and that Middletown has still not fashioned a realistic housing element and fair share plan that complies with the Act and Council regulations. Further, the movants allege that Middletown has failed to heed the Council's requests to correct deficiencies in the plan, and that some problems with the plan have persisted throughout the draft, final and amended versions, as well as mediation. In light of this, the movants argue that a continuation of the process will only result in additional time and expense being wasted by all parties, and that accelerated denial is appropriate. In the alternative, they request that the Council

order site specific relief in order to assure the creation of a certifiable plan.*

In response, Middletown denies engaging in dilatory tactics. The Township argues that the present submission fully complies with Council regulations and is appropriate for certification. Further, Middletown contends that it responded in a timely manner to Council requests for additional documentation and information. Middletown states that the present situation is clearly distinguishable from Motzenbecker, cited by movants. While not denying the Council's authority to grant the relief requested, Middletown argues that it is inappropriate.

The Council's authority to award the relief requested is not in dispute. In Motzenbecker, supra, the Council noted that accelerated denial is appropriate where a municipality is not acting in "a manner designed to expeditiously advance the substantive certification process," and is thus wasting the time of all parties without achieving a complying fair share plan. The granting of accelerated denial immediately terminates the mediation and review process. Award of a builder's remedy, on the other hand, does not end the process; instead, the municipality is required to zone a particular site for Mt. Laurel housing as a condition of receiving substantive certification. The site thus becomes part of the municipality's plan. In

* Assuming the Council were to agree with the moving parties, any site specific relief would be dependant on a future determination of site suitability.

Motzenbecker, the Council ordered a builder's remedy, based on its finding that the municipality had repeatedly failed to comply with Council regulations in the formulation of its housing element, resulting in an unrealistic and unworkable plan. Further, the municipality continually failed to respond to Council requests for information. Despite submitting three plans, the Council found that the final plan was "altered little from the original submission." As a result, the Council ordered site specific relief as to one site, thus meeting its statutory obligation to ensure creation of a plan realistically capable of meeting the Mt. Laurel obligation.

A review of the history of the present case indicates that it does not fall within the same category. As noted, Middletown first filed with the Council a draft housing element and fair share plan. In response, the Council sent the Township a letter dated November 21, 1986 commenting on the plan. That letter stated that the housing element submitted "generally complies with the requirements of the Council's substantive rule." The letter proceeds to note that the Council was not yet in a position to comment on the suitability of the sites selected for development. Finally, the letter noted regulations the Township should consult, and requested certain basic information. Thus, as of the date of this letter, the Council had done only a rudimentary review, and Middletown had not been advised of any major problems with its plan.

Middletown filed with the Council its final plan on January 5, 1987. This plan proposed to meet the Township's obligation of 1850 units in the following manner: Middletown requested adjustments and credits of 177, lowering its obligation to 1673. Middletown proposed to rehabilitate its indigenous need of 286. With regard to the new construction component, Middletown stated that it would provide 25 units through a scattered site infill program; 209 units

in an age-restricted community at Port Monmouth; and 225 through zoning for inclusionary developments on four sites. Middletown requested a rental bonus credit of 91 units, and proposed transfer of 836 units through Regional Contribution Agreements (RCAs). Finally, Middletown included an alternate plan, based on zoning six separate sites for development.

By letter of March 6, 1987 the Council notified Middletown that the plan needed further documentation and work and was not suitable for mediation, and as a result was being returned. The letter enumerated 17 different areas of concern for the Township to address, and gave the Township two months to refile a corrected plan. However, on May 4, 1987 the Council voted to amend its regulations to place a 1000 cap on all fair share obligations, after credits and adjustments. As a result, Middletown's number was reduced from 1850 to 1000. In recognition of the need to reform the housing plan to reflect this drastic change the Council provided Middletown (and all other municipalities similarly situated) with 60 days to redo the plan.

Middletown's amended plan was drastically different. No adjustments or credits were included. The plan still contained a rehabilitation component of 286 units. However, with regard to new construction, Middletown proposed to zone for 189 accessory apartments, and to transfer 500 units through RCAs. The plan still included 25 units to be provided through a scattered site infill program. The alternate plan contained zoning for 211 additional accessory apartments, as well as an inclusionary development of 289 units on the Kane's Lane site. In effect, as the result of the 1000 cap the amended plan became Middletown's "first attempt" at satisfactorily meeting its new obligation. This plan then became the subject of mediation.

It must be recognized that Middletown's amended plan addressed most of the concerns expressed in the Council letter returning the plan for further work. The amended plan deleted the adjustments claimed in the original plan, which the Council had objected to. Similarly, the amended plan dropped the Port Monmouth site (which the Council had questioned) in its entirety. The amended plan deleted the request for rental credit, as well as several sites that had been originally proposed at 100% low and moderate income housing. Further, in response to Council requests the amended plan included mapping of infill sites; a fair share plan; a description of the rehabilitation and infill administrative programs; and estimates of future employment. Complete RCA information was not provided; however the amended plan included identification of receiving municipalities and letters of intent, as requested by the Council.

In answer to the Council's question on funding, Middletown included a draft bonding ordinance (the Council letter had not requested anything more specific). Finally, as to the rental component, the amended plan indicated that the full amount was covered by the accessory apartments.* Thus, the amended plan as submitted by Middletown was determined to be appropriate for mediation and review.

*This determination was incorrect. Pursuant to the Council's regulation governing accessory apartments, such units may not be used in satisfaction of a rental component. However, this rule was not actually adopted until January 19, 1988, and there seems to have been some confusion as to the proper scope of the rule during formulation of the Middletown plan. This problem remains to be dealt with by the Council.

The Council's premediation report on the amended plan mentioned only five basic areas of concern. First, the Council asked for more information on the infill program, to insure its practicality. This information was supplied during mediation. Second, the Council requested more analysis of the existing structures to be used for the accessory apartment program, to demonstrate adequacy. Because this was a new component of the Middletown plan (as well as a new Council regulation) the report indicated that information on the make up of an acceptable accessory apartment program would be forwarded to Middletown. During mediation the information required by the Council was supplied. Middletown also supplied the necessary affirmative marketing information for the accessory apartment and infill programs.

Third, the report listed the RCA information required in order for the Council to treat the RCA component as part of the primary plan (rather than as an alternative plan). These criteria were not included in the March 6 letter. Since the start of mediation, Middletown has provided the Council with memoranda of understanding for all five RCAs; identification of the nature and amount of compensation; schedules for submission of project plans by the receiving municipalities; project plans for RCAs with Long Branch and Asbury Park; proof of sufficient bonding capacity and bonding ordinances; and two draft contract agreements, all as required by the Council. Thus, the reliance on mandatory developer contributions, which the Council has determined is inappropriate, has been eliminated.

Fourth, the Council report requested that the rehabilitation also address rental units, and that it reflects higher cost estimates. This has been done by Middletown. As to the funding for this component, Middletown has provided a commitment for 776,000 to cover the first two year period, as required by the Council.

The one area of concern set forth in the report that remains to be fully addressed is the question of the alternate plan. The report indicated that the alternate plan's reliance on accessory apartments might be inappropriate, due to the very large number of such units included in the plan. Further, the report questioned reliance on the Kane's Lane site, as it is not controlled by the Township. Since then, the Township has committed to condemning the Kanes Lane site and has developed a detailed proforma for the production of low and moderate income housing. In any event, due to the advanced stage of the RCA component, this problem maybe moot..

For all of the above reasons, the Council concludes that the present case is not appropriate for imposition of the extraordinary relief of accelerated denial or a builder's remedy. In reaching this conclusion, the Council is not saying that the plans submitted by Middletown were without problems that needed correction or that the plans complied with all regulatory requirements from the start of the process. However, recognition of these facts does not mean that the Township's behavior warrants the relief requested.

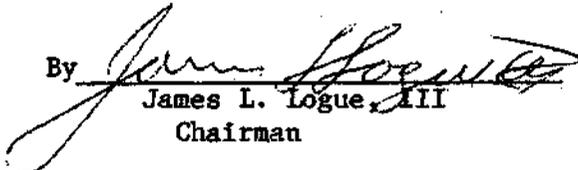
This is not a case such as Motzenbecker, described above. Rather, Middletown has proceeded to amend its plan to correct concerns raised by the Council, and has supplied information at Council request. Unlike Motzenbecker, Middletown's plan did not go through three drafts only to emerge "altered little from the original submission." As has been demonstrated, almost all of the problems indicated by the Council in its March 6 letter and its premediation report have been corrected. Further, the process of providing necessary information has continued through the mediation process itself. Thus, it cannot be said that the process has proved "fruitless," or

has been a waste of the time and energy of the participants. Finally, it must be recalled that, unlike the Motzenbecker case, Middletown was required at mid-process to adapt to a drastic change in its plan, due to Council amendment of its regulations. While this change may have been advantageous to Middletown, it does not alter the fact that additional work was required to reform the plan. Thus, in effect, the amended plan constituted the first final plan dealing with Middletown's new obligation. And, as demonstrated, since the filing of that plan almost all problems have been corrected. Finally, for the above reasons site specific relief is not necessary at this time to insure a complying plan.

Thus, for the reasons set forth at length above, the Council will order that the motions for accelerated denial or a builder's remedy be denied.

COUNCIL ON AFFORDABLE HOUSING

By


James L. Logue, III
Chairman

Dated: April 4, 1988

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