

COUNCIL ON AFFORDABLE HOUSING
DOCKET NO. *COAH 88-103*

IN RE BOROUGH OF)
CLOSTER - APPLICATION)
FOR CREDITS)

Civil Action
OPINION

The Borough of Closter is presently before the Council on Affordable Housing seeking substantive certification of its housing element and fair share plan. As part of its plan, Closter has requested credit for a 48 unit intermediate care facility for the developmentally disabled known as "Spectrum for Living" (Spectrum), first occupied in November 1983. The present motion was filed by Closter on January 22, 1988 in an attempt to establish its right to the credits. The motion was opposed by the Office of the Public Advocate. The Council heard oral argument on the motion on March 21, 1988. In an oral decision delivered at its public meeting on April 4, 1988 the Council denied the motion. This opinion will set forth the basis for that decision as discussed at the April 4 meeting.

There is no dispute as to the nature of the facility in question. Closter admits that it is an "intermediate care facility," and is thus regulated by the Department of Health pursuant to N.J.S.A. 26:2H-1 et seq. (the Health Care Facilities Planning Act). As such, it can only be constructed or expanded after receipt of a certificate of need; based on proof that the action is necessary to provide required health care for the area. N.J.S.A. 26:2H-7 and 8. A review of the certificate of need application submitted by Spectrum indicates that in order to be admitted to the facility an individual must i) be

developmentally disabled and have a physical impairment in conjunction with another impairment, and ii) need assistance to manage some of the activities of daily living.

Closter advances several arguments in support of its request for credits. First, it argues that the Council's prior policy decision that nursing homes (and similar facilities) are not eligible for credit should have been promulgated as a rule, and is thus invalid. Second, Closter argues that housing is a fundamental right, and that the Council cannot discriminate against the developmentally disabled by not granting credit to the facility. Without this credit, Closter sees no inducement for municipalities to zone for such homes. Thus, the burden is on the Council to insure against this result. Closter sees no good reason for the distinction drawn by the Council. Finally, Closter states that pursuant to the Mt. Laurel doctrine the Council should encourage housing for all categories of people.

The credits section of the Council's substantive regulations provides, in pertinent part:

Municipal present and prospective fair share shall be determined after crediting, on a one to one basis, those housing units created or rehabilitated after April 1, 1980...Credits are applicable when a unit's occupancy is restricted to low or moderate income households and when the municipality has implemented adequate assurances for continued affordability...[N.J.S.A. 5:92-6.1 (a)].

As Closter correctly states, the Council has on a prior occasion determined that this section did not contemplate credit for nursing homes or other providers of health care services. There are several reasons for the Council's determination to deny credit for units in facilities that are primarily health

care providers. Facilities such as spectrum impose conditions upon access that go beyond those permitted under the Council's regulations. Pursuant to the regulations, units provided to meet a municipality's fair share obligation must be open to all income eligible members of the general public, with certain exceptions: occupancy may be partially limited to senior citizens (NJAC 5:92-14.3) and to individuals who reside within municipality or work there (NJAC 5:92-15.2(f)). By definition, Health Care Facilities restrict occupancy based upon the physical or mental condition of applicants, and thus impose restrictions beyond those permitted by the Council. Spectrum admittedly falls within this category.

Further, it is clear that health care facilities do not meet the problem addressed by the Fair Housing Act - exclusionary zoning that effectively precludes low and moderate income individuals and families from access to many communities. Rather than dealing with this problem, health care facilities are specialized institutions providing shelter for only a limited number of individuals. As such, they do not truly address the need set forth in the Council's methodology, and any credit would thus be inappropriate.

It must be recalled that the issue before the Council is not whether intermediate care facilities are socially desirable, or whether municipalities should zone to permit such facilities. These questions are simply outside the scope of this case.* The issue before the Council is whether a municipality should receive credit towards meeting its fair share obligation for such a facility. As noted above, however desirable such residences may be, they simply do not go to addressing the same problem dealt with by the Council municipal exclusion of low and moderate income households. Rather than

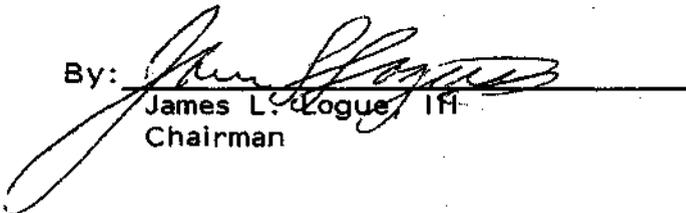
*The Council notes that certain homes for the developmentally disabled are permitted uses pursuant to the Municipal Land Use Law, N.J.S.A. 40:55D-66.1.

discriminating against the developmentally disabled, the Council's policy is a recognition tht this particular type of housing does not go to satisfy the Mt. Laurel present need, and thus cannot be credited.

Finally, the Council disagrees with Closter's argument that its policy must be promulgated as a rule. As the Public Advocate points out, the Council is doing nothing more than identifying one type of housing that fails to meet the regulatory criteria needed to qualify for credit. Having already set forth the types of housing units entitled to credit, the Council cannot be expected to list every conceivable type of housing that does not qualify.

For all of the reasons set forth above, and at the Council's public meeting of April 4, the Council will order that the present motion be denied.

COUNCIL ON AFFORDABLE HOUSING

By: 

James L. Logue, III
Chairman

DATED: 5/2/88