

NEW JERSEY COUNCIL ON  
AFFORDABLE HOUSING  
DOCKET NO. COAH 87-32

IN RE PETITION FOR SUBSTANTIVE)  
CERTIFICATION OF WASHINGTON )  
TOWNSHIP (MERCER COUNTY) )

Civil Action

OPINION

This matter comes before the Council on Affordable Housing (Council) upon the separate applications of Princeton Research Lands, Inc. (PRL) and the New Jersey Conference Association of Seventh Day Adventists (NJC). Both PRL and NJC request the Council to accelerate denial of Washington Township's petition for substantive certification. Additionally both parties request the Council to award site specific relief for their respective sites in Washington and thus require Washington to rezone their properties so as to allow for construction of low and moderate income housing. Regarding the requests for site specific relief, PRL simply argues that its site in Washington should be rezoned while NJC argues that both its site and PRL's site should be rezoned. NJC does contend, however, that if it is appropriate to require Washington to only one site, its site should be chosen since it is more suitable for development for low and moderate income housing than PRL's site.

PRL owns 215 acres of land in Washington while NJL owns 155 acres. Washington opposes both parties' motions.

The Council heard oral argument on the motions at its public meeting on November 23, 1987. The Council gave the movants an opportunity to respond in writing to Washington's oral argument since the oral argument concluded before the movants could respond due to a health problem with the stenographer. Additionally, subsequent to oral argument, during the council review process and on the request of council staff, Washington submitted an affidavit from the Township Clerk regarding resale restrictions on the affordable units in the Township as well as supporting documentation initialed by the homeowners which indicate the purchasers knew at the time of purchase that resale of the units is restricted to income eligible housings. Ultimately Washington submitted copies of deeds which indicated that the original deeds were cross indexed with the corrective deeds which contained the resale restriction. Since this information impacted upon the pending motions, copies of all information were forwarded to the movants who were given an opportunity to respond in writing.

PRL argues that accelerated denial of Washington's petition for substantive certification is appropriate because Washington has acted in bad faith and has failed to submit a housing element and fair share plan which complies with the Fair Housing Act (Act), N.J.S.A. 52:27D-301 et seq. and the regulations promulgated thereunder. In support of its position, PRL points to various components of the plan which allegedly fail to comply with

the Act and regulation. Specifically, PRL points to Washington's failure to secure compliance with its own ordinance which requires the deed of each affordable unit conveyed to contain language imposing resale restrictions. PRL also points out that Washington has failed to comply with Council regulations and its own ordinances which require that the units be affordable to a range of low and moderate income groups. PRL also argues that the plan is deficient because it contemplates excessive down payments for the purchase of an affordable unit and assumes unrealistically low closing costs. PRL also argues that Washington's plan fails to provide 50% low and 50% moderate income units as well as the necessary rental units as required by the Council regulations. Finally, PRL questions Washington's reservation of affordable units for certain groups of persons as well as the use of developers contributions.

PRL essentially relies upon the same theory, as set forth above for its claim that the Council should grant a builder's remedy. It argues that Washington's failure to comply with the Act and its actions which amount to bad faith should prompt the Council to award site specific relief. It argues that such an award is necessary to ensure continued compliance with the Act. PRL consequently argues that its site, which it claims is suitable, should be zoned for low and moderate income housing.

In support of its motions, NJC points to many of the same items relied upon by PRL. Additionally NJC argues that the relief requested is appropriate because Washington failed to negotiate

with NJC despite knowledge that NJC was willing to utilize its land for low and moderate income housing. NJC contends that Washington has delayed satisfaction of the obligation and therefore it is necessary for the Council to award site specific relief to ensure that Washington, as well as other municipalities, do not abuse the substantive certification process.

Washington opposes the various motions and argues that its plan is not patently deficient as suggested by the movants. Washington points out that while the deeds do not contain the necessary restrictive language, the attached affidavits of consideration indicate the units are restricted and further all parties knew the units were restricted when they purchased them. Washington also provided copies of filed corrective deeds which inserted the necessary language. Washington pointed out that it was cooperative throughout the administrative process and took all actions necessary in order to comply with Council regulations. For example, Washington notes that when it was informed that Council regulations would not permit it to reserve units for a specified ethnic group, it removed that project from its plan. Accordingly, Washington asserts that it has participated in the process in good faith.

Accelerated denial and award of site specific relief are extraordinary measures, as the Council has recognized previously. The Council does not feel that such extraordinary measures are warranted in this case. Washington's precredited need number ultimately was determined to be 219, of which 16 was indigenous.

Therefore, Washington's plan was required to provide a realistic opportunity for the provision of 203 new units as well as rehabilitation of 16 units. Washington's housing element and fair share plan as submitted did set forth how it intended to satisfy its obligation. Washington's plan indicated that it would provide 140 units of moderate income housing through the Weiner Home (Cartaret Realty) development, all of which had been approved under the ordinances that predated Council regulations.\* Further the plan indicated that 140 senior citizen units would be provided through a project known as AHEPA and 30 units would be provided through a project known as Project Freedom. Thus, the total number of units proposed was 310. As noted the AHEPA project was to be a senior citizen project and therefore Washington could claim no more than 25 percent of its fair share as calculated after credits and adjustments of those units towards satisfaction of its obligation. N.J.A.C. 5:92-14.3. However, even with the 25 percent limit, the plan as initially submitted purported to satisfy the entire obligation. The plan contained information and documentation describing and supporting the various projects. Thus, the Council was not faced with a situation where the plan was patently deficient or defective. Washington had designated sites with developers who were willing and presumably capable of providing the units and had set forth certain details for each project.

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\* Washington had passed ordinances to govern the development of affordable units prior to the Council's promulgation of its regulations.

While the plan was not patently defective or deficient, mediation and review made it apparent that there were some problems with the plan. Washington, however, upon notice of the problems took action to remedy those problems. When it became obvious in mediation that the AHEPA project could not be included in the plan due to restrictions placed on the project that rendered it contrary to Council regulations on affirmative marketing, Washington eliminated it from the plan and negotiated with Cartaret Realty, to remedy the loss of units. Cartaret Realty already was a designated developer in the plan and Washington negotiated with Cartaret Realty for Cartaret Realty to build more low and moderate income units on its site so as to compensate for the loss of the AHEPA site. Consequently, a few days prior to the issuance of the mediator's report on November 6, 1987, Washington negotiated an agreement with Cartaret Realty whereby Cartaret Realty agreed to provide 70 low income units and 116 moderate income units in its inclusionary development.

Mediation and review also revealed that Project Freedom needed further documentation to demonstrate that the project was indeed feasible. During Council review, Washington agreed and pledged to bond for \$300,000. The majority of Project Freedom funds will come from a grant from the Department of Community Affairs which funds have already been committed. Project Freedom will provide 30 rental units which addresses Washington's rental component.

Thus, as a result of the mediation and review process, Washington has emerged with a plan which provides for the construction of 214 units of low and moderate income housing. PRL and NJC claim that a basis for the relief sought is the fact that the division of units between low and moderate does not comply with N.J.A.C. 5:92-5.14. However, of those 214 units, 22 units in the Cartaret Realty Project were constructed and occupied prior to promulgation of the Council regulations and 29 were constructed and occupied a prior to the conclusion of mediation. In fact, all of those 51 units are now occupied by income eligible households. The Council has recognized municipal efforts to provide affordable housing that preceded the Council's regulations and has allowed municipalities to deviate from the required 50% of low income units for those units which were approved prior to promulgation of Council regulations. Of course, for the remaining units, at least 50% must be affordable to low income households.

In this case, the 51 units on the Cartaret Realty site all were approved prior to promulgation of the regulations and 22 were actually constructed. The remaining 29 were under construction at the time the Council promulgated its regulations. Thus, the Council will not require Washington to strictly adhere to N.J.A.C. 5:91-5.14 for those units approved prior to knowledge of Council Regulations. Washington is required to and does in fact provide the necessary low income units for the remaining units. The Cartaret Realty site, excluding the 51 units, will provide 70 low income units and 63 moderate income units. The Project Freedom

site will provide 27 low income units and 3 moderate income units. Thus, there will be 97 low income and 63 moderate income units. N.J.A.C. 5:92-5.14 provides that at least 50% of the units must be low income units. Washington will provide more than 50%. The Council does not feel it is appropriate to award site specific relief or accelerated denial because the low-moderate split is not even as a result of units constructed prior to promulgation of Council Regulations especially since Washington has complied with N.J.A.C. 5:91-5.14 for the remaining units.

PRL argues that Washington should not receive credits for the 22 units mentioned above since the deeds transferring those units failed to contain the necessary language indicating that they are restricted. Washington argued that the problem had been remedied by the filing of corrective deeds, however, those deeds would fall outside the chain of title since there would be no way to know that the corrective deeds existed. PRL's concern on this point obviously is that without the restrictive language in the deed, the units may be conveyed to non income eligible persons. This concern is identical to the Council's concern. However, the Council is satisfied that the problem has been remedied. Washington has provided the Council, as well as the objectors, with copies of the original deeds which now contain notations to refer to the corrected deeds. Thus, any party searching the records will find the corrective deeds containing the necessary restrictive language and all subsequent purchasers will be on notice that the units are income restricted. PRL does not dispute the fact that

the homeowners to which the units in question have been conveyed knew that they were purchasing restricted units. The corrective deeds apparently merely inserted a clause that all parties to the transaction had agreed to and mistakenly was omitted. In any event the problem has been remedied.

PRL also argues that the relief sought should be granted because the plan calls for excessive down payments in violation of Council regulations. See N.J.A.C. 5:42-12.4. PRL argues that the only families who could afford to purchase the two bedroom units with the requisite ten percent down payment is a three person household. However, this is in accord with the regulations. N.J.A.C. 5:92-12.4 provides that a municipality shall consider down payments for two bedroom units so that it is affordable to a three person household. Thus, PRL's claim on this point is incorrect with Council regulations.

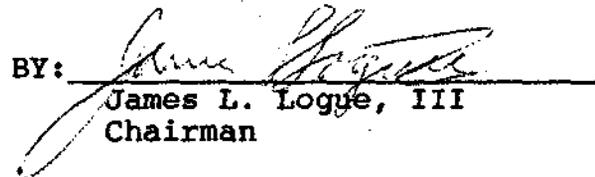
Both PRL and NJC have submitted letters to the Council whereby they argue that the Council should not accept any information submitted by Washington subsequent to the hearing of the motions, especially that referring to the deeds. However, as previously noted, that information was requested by Council staff. Additionally, all information submitted was supplied to movants and they were given an opportunity to respond to it. Thus, the Council will not ignore the documentation submitted.

In conclusion, the Council finds that both accelerated denial and a builder's remedy is unwarranted. Washington submitted a plan which provided for satisfaction of its fair share obliga-

tion. Mediation and review revealed problems with the plan. Washington remedied the problems raised, which included negotiating with a developer already designated in the plan to provide additional units. Accordingly, the Council hereby denies both PRL and New Jersey Conference's motions for accelerated denial and a builder's remedy.

COUNCIL ON AFFORDABLE HOUSING

BY:

  
James L. Logue, III  
Chairman

Dated: June 6, 1988