

COUNCIL ON AFFORDABLE HOUSING
DOCKET NO. COAH 88-100(a)

IN RE MIDDLETOWN-)
REQUEST FOR RELIEF)
BY CALTON HOMES, INC.)

Civil Action

OPINION

Middletown Township is presently before the Council on Affordable Housing following transfer by the Superior Court dated May 16, 1986. Following filing of draft, final and amended housing elements by Middletown, the Council conducted mediation, which has concluded. Calton Homes, Inc. (Calton) took part in mediation as an objector. In an Opinion dated April 4, 1988 the Council denied motions for accelerated denial or a builder's remedy filed by Calton and another objector, West Front Street Associates, Inc.

The present motion was filed by Calton on April 25, 1988 and includes several different requests for relief. First, Calton asks that the Council reconsider its prior decision denying Calton's motion for accelerated denial or a builder's remedy. In its prior opinion the Council reviewed in detail the history of Middletown's participation in the Council's mediation and review process. This review will not be repeated here for the sake of brevity. Although recognizing that Middletown's submissions to the Council were not without problems that necessitated additional

work, the Council concluded in its Opinion that the case was not appropriate for the imposition of the extraordinary remedies of accelerated denial or a builder's remedy. The Council noted that Middletown had acted to change its plan in response to Council requests, and that the mediation process had not proved "fruitless" as the movants alleged.

As noted, Calton has now asked the Council to reconsider that decision, which it describes as without basis "in fact or law." However, Middletown offers no new information to support its request, but merely relies upon its prior arguments already considered and rejected by the Council.* Thus, Middletown argues once again that the Township's amended plan (which became the subject of mediation) was "missing" 500 out of 1000 units. In actuality, the Council had informed the Township that further documentation was needed as to its 500 unit RCA component. This information has since been supplied. **Calton argues that Middletown deserves no credit for making changes to its plan at the Council's request in order to remove unrealistic components. This argument misses the point. The Council's opinion did not state that Middletown's performance was exemplary - only that the extraordinary remedy sought by Calton was not warranted. As Calton has presented no new evidence requiring a different decision, the

*At another point in its brief, Calton mentions the fact that Middletown was recently ordered by the Council to add a rental component to its plan. However, as explained in the prior Middletown Opinion, this resulted from a misunderstanding between the Township and the Council.

**The issue of the "late" submission of RCA information will be dealt with separately in this Opinion.

Council will not revise its prior decision or order the award of a builder's remedy on any grounds.

Calton also requests that the Council clarify that the prior denial of its motion for accelerated denial or a builder's remedy does not preclude a future motion for the same relief in light of changed circumstances. Certainly, Calton (or any party) may react to changed circumstances and file a legitimate claim for relief, even though there has been a prior Council decision denying such relief based on different facts. In fact, the Council's prior decision notes that the relief sought is inappropriate "at this time." However, the Council wishes to warn against repetitive or untimely motions.

Calton's second argument is that the Council has improperly accepted documentation from Middletown as to its RCA component after the close of mediation. Calton argues that acceptance of such material is unfair to objectors, who have no opportunity to respond, and further, allows Middletown to escape comment on this section of its plan. Calton adds that Middletown's untimely filing violates Council rules, and that Middletown initially failed to provide information required by the regulations. In effect, Calton is asking that the Council reject the material in question. Presumably, the Township's plan would then go before the Council for final review without the RCA component (i.e. utilizing the "alternate plan").

At the start of mediation, Middletown clearly indicated that its amended plan included a transfer of 500 units through RCA's. Thus, all parties were aware of that component of the plan,

and could offer any objections as to Middletown's selection of that option.* It is true that the details of the plan were not provided at that time. The necessary memoranda of understanding, project plans and draft contracts were supplied later (some during mediation and some afterwards). This delayed HMFA and county planning board review of the proposed RCA's. However, as a practical matter, mediation usually does not concern itself with an analysis of precise terms of the contracts or memoranda. This is a matter for negotiation between the sending and receiving municipalities and for review by the Council, HMFA, and the county planning board. While not approving of Middletown's late submission of necessary RCA documentation, the Council does not feel that this is a sufficient reason to invalidate the present RCA's, especially as all parties were aware of the inclusion of the RCA component in the plan from the start. It should also be noted that the Council will accept any comments from Calton (and all other parties) on the complete RCA's.

Calton also argues that the Council has no authority to return deficient plans to municipalities for additional work, as it did in the present case. Calton contends that Middletown's amended plan did not meet the requirements necessary to constitute a housing element and fair share plan under the Act, and that (as the Council cannot extend the time for filing a final plan) Middletown's submission should have been returned to the Superior Court.

*As per N.J.S.A. 52:27D-311(c), Middletown also provided an alternate plan that could be reviewed in mediation.

Calton misinterprets what has occurred in the present case. The Council did not reach a determination that Middletown's final submission was so deficient that it did not constitute a housing element and fair share plan. If that were true, the case would have been returned to the Court. Instead, the Council acted in a practical manner, in order to deal with a plan that in the Council's opinion met the basic criteria for a submission, but contained patent defects that would render mediation and review difficult and impractical. Thus, the Council did not act to relinquish jurisdiction, but chose instead to require certain corrections in the plan to help insure efficiency in the subsequent administrative process. The Council views such action as appropriate under the Act.

Next, Calton cites two former Council opinions as demonstrating that a municipality may not unilaterally amend its plan following the petition for certification. In those cases, In re Middletown Township and In re Clinton Township, the Council concluded that the Act did not contemplate that a municipality would act post-petition to unilaterally amend its plan. Thus, in Clinton the Council refused the Township's request to alter its plan following petition, by replacing a proposed site for exclusionary zoning with a new site not previously included in the plan. The Council noted, however, that amendments occurring as the result of input from objectors or the Council itself were appropriate. The reasons for this decision are set forth in Clinton and will not be repeated here.

Calton's contention is that Middletown unilaterally amended its plan by submitting RCA material after mediation (discussed above) and by deleting from the plan a site owned by Calton (which was to be used as a source of funding for the Township to utilize in meeting its obligation). As a result, Calton asks that the Council reject the "amendments" to the plan.

The issue of the submission of RCA material has already been dealt with above, and will not be repeated here. However, it should be emphasized that the 500 unit RCA's were at all times part of Middletown's plan, and thus it cannot be said that the plan was amended post-certification to add them. As to Calton's site, a review of the amended plan indicates that it was included on a tentative basis only. Letters between the parties and to the Council dated April 22, May 7, and May 8, 1987 indicate clearly the tentative nature of the negotiations. More importantly, they demonstrate that the Township had not committed itself in its plan to utilization of the Calton site as a source for funds, but was instead merely considering it as one option. Thus, the present case is different from Clinton, discussed above, where the deleted site had been designated in the plan to definitely receive lower income units.

Finally, Calton argues that Middletown's present plan is not in compliance with the Act or Council rules, and that it fails to provide the requisite "realistic opportunity" for production of Middletown's fair share obligation. Specifically, Calton opposes the Township's rehabilitation plan; the use of accessory apartments; the scattered site component of the plan; the RCA's;

and the Township's alternative plan. As a result, Calton requests a "ruling" on the legality of the current plan. In the event any contested issues of fact exist, Calton asks that they be transferred to the Office of Administrative Law pursuant to N.J.S.A. 52:27D-315.

Pursuant to the Council's procedures, at the conclusion of mediation the mediator prepares a report that is submitted to all parties and the Council. Any party may comment on the report. The Council then prepares a review report, analyzing the municipality's full housing element and fair share plan. As with the mediator's report, any party may then comment on the plan. The Council then reviews the plan at a public session, along with any comments received, and acts to either certify or deny the plan.

Thus, the appropriate procedure for commenting on the final plan is by the filing of a response to the mediation and review reports, rather than by filing a motion requesting a "ruling" on the legality of the plan. In the present case, mediation has concluded, and the mediator's report has been submitted. However, the review report has not yet been released, because, as noted above, the Council previously granted the Township a period of 90 days in which to add a rental component to its plan. Thus, the Council shall consider the present comments by Calton on the plan at the time it performs its final review. Of course, Calton may still submit further comments following receipt of the review report.

However, while a full review of the final plan is premature, the Council must address the question of whether Calton

has raised any contested issue that must be transferred to the OAL. Such a request is properly made following the conclusion of mediation. As noted above, Calton has challenged several aspects of the Township's plan: the rehabilitation component; the use of accessory apartments; the scattered site component; the RCA's; and the alternate plan, and has alleged that they raise contested issues and should be transferred.

A review of the specific issues raised by Calton indicates that, while they present certain questions that must be answered by the Council in its final review of the plan, they do not constitute contested issues of fact that need be transferred to the OAL. First, as to accessory apartments, Calton argues that Middletown wishes to reserve a percentage of the units for families, rather than complying with the Council's affirmative marketing rules, and that Middletown will seek a waiver of the rule if necessary. Certainly, the Council's final review of the plan must establish that the Township has complied with the Council's rules governing affirmative marketing. If not, the plan cannot be certified. However, the Council does not need to transfer the case to the OAL, when its own review of the plan will indicate whether the plan is in compliance with the applicable regulations, and thus resolve the problem. The Council also notes that no request for a waiver has been received. In the event such a request is filed, it will be heard by the Council, and Calton will be given an opportunity to respond.

As to the scattered site component, Calton questions whether Middletown will offer the units at affordable prices, and


whether 50% of the units will properly be available to low income individuals and families. (Calton does not allege that Middletown's plan is deficient in this regard; only that the question is "unclear"). As in the case of the accessory apartments, Council review will insure that all regulations are complied with. It should also be noted that present documentation indicates that Middletown has complied with the concerns raised by Calton as to the scattered site program.

Third, Calton questions Middletown's plan to rehabilitate 286 units of its indigenous need. Calton states that, prior to the promulgation of the 1000 cap provision of the regulations (at which time Middletown's obligation was 1850 units) the Township indicated that it had previously rehabilitated at least 286 units. Such rehabilitation would be eligible for credit against Middletown's indigenous need pursuant to N.J.A.C. 5:92-6.1. (assuming the units otherwise qualified for credit). Under the new 1000 cap provision, all credits must be taken before the obligation is capped. Calton notes that, as there is now no incentive for the Township to request credits, it has elected not to do so. Calton concludes that Middletown cannot take advantage of the situation by also including in its plan a 286 unit rehabilitation component, as the Township has admitted that the units in question have already been rehabilitated. Calton has posed a serious question that must be dealt with. However, it is a legal issue that can be decided by the Council, without transfer to the OAL. If the Council concludes that the rehabilitation component is deficient, it will have to be replaced.

Finally, the remaining two areas of the plan clearly do not raise contested issues. With regard to the RCA's, Calton does not present any substantive arguments as to deficiencies. As to the alternate plan, this has been rendered moot by introduction of the RCA's. Thus, neither presents an issue that must be transferred to the OAL.

Thus, for all of the above reasons, the Council will order that the present motion by Calton Homes be denied.

COUNCIL ON AFFORDABLE HOUSING

By 
James L. Logue, III, Chairman

July 5, 1988