

FAIR SHARE HOUSING CENTER,)
et al.,)

Plaintiff,)

Civil Action

v.)

OPINION

TOWNSHIP OF CHERRY HILL,)

Defendant.)

This matter comes before the Council on Affordable Housing (Council) upon the application of the Township of Cherry Hill. Cherry Hill places two alternative requests before the Council. First, Cherry Hill seeks to amend its housing element and fair share plan (plan), which already has been the subject of full mediation and review, to incorporate certain techniques for the provision of its fair share obligation into the plan. Cherry Hill refers to these techniques as: condominium and cooperative conversions, requalified set asides, Township purchase or builder's buy down of existing units and Township purchase of new construction. The incorporation of these new techniques necessarily would require Cherry Hill to revise its entire plan presently before the Council.

Second, Cherry Hill alternatively requests that, if the Council denies its first request, it be permitted to amend its plan to alter the sites presently designated for low and moderate income housing and include additional sites. At the same time Cherry Hill

seeks to change its rental component and add units to a project known as St. Mary's Village. Both the rental component and St. Mary's Village were subject to mediation and review. This approach, likewise, will require Cherry Hill to revise its entire plan before the Council.

Objectors Fair Share Housing Center and the Public Advocate oppose Cherry Hill's motion. Both objectors argue that the Council should deny Cherry Hill's petition for substantive certification because the plan presently before the Council no longer is the "official" plan of Cherry Hill since the Township's motion makes it clear that it no longer wishes to implement the mediated plan. The objectors further argue that Cherry Hill should not be permitted to amend its plan in any respect at this late date after the plan has been fully mediated and reviewed.

Additionally, the Fair Share Housing Center points out that pursuant to N.J.A.C. 5:92-7.1(b) Cherry Hill was able to cap its original fair share obligation of 2,295 at 1,000. The Fair Share Housing Center asks the Council to address the issue of what will happen to those 1,295 units above and beyond the cap invoked. The Council will not address this issue in this motion. Pursuant to Council regulations, Cherry Hill is obligated to provide a plan for 1,000 units. The Council will limit its review on this motion to provision of those 1,000 units.

A group known as the Charleston Homeowners Association (CHA) took it upon itself to file a brief as amicus curiae in support of Cherry Hill's motion. However, contrary to the group's

assertion in its brief, the group did not participate in the Council process and did not file as an objector to the plan. In fact, the group did not even file as an interested party to Cherry Hill's plan. The Council has nothing on record to indicate CHA's participation before it. Accordingly, CHA has no standing before the Council.

Before discussing the basis for the Council's determination to deny both requests of Cherry Hill, it is appropriate to set forth in detail the procedural history and facts of this matter. The procedural history is especially salient since the Council's denial is based in part upon the fact that Cherry Hill has engaged the entire Council process as set forth in the Fair Housing Act and it now seeks to disregard that process and submit an entirely new plan and thus initiate a new process.

The Fair Share Housing Center initiated an exclusionary zoning lawsuit against Cherry Hill which was transferred to the Council by Order dated January 23, 1986. As a result of the transfer, Cherry Hill was required to submit its plan to the Council by January 5, 1987. N.J.S.A. 52:27D-316. Cherry Hill submitted its adopted plan on January 5, 1987. However, on March 2, 1987 the Council determined that Cherry Hill's plan required further information and returned the plan to Cherry Hill with instructions to resubmit it within 60 days of receipt of the council letter detailing the deficiencies.

In the meantime, the Council proposed N.J.A.C. 5:92-7.1(b) which provides that if, after all allowable credits, a municipality's fair share obligations exceeds 1,000 units, that municipality may cap its obligation at 1,000. The Council recognized that N.J.A.C. 5:92-7.1(b) would affect the manner in which a municipality satisfied its obligation. Therefore, the Council informed all municipalities affected by the regulation that a plan addressing the capped obligation should be submitted by July , 1987. Cherry Hill was such a municipality and thus it was permitted until July 3, 1987 to submit its plan addressing the 1,000 units. Cherry Hill submitted its plan on July 1, 1987. Since Cherry Hill was a court transferred case, submission of its plan acted as a petition for substantive certification. N.J.A.C. 5:91-4.2. Cherry Hill published notice of its petition in the Courier Post on July 13, 1987. Six parties filed objections to Cherry Hill's Plan.

Consequently mediation was scheduled and commenced on August 27, 1987. N.J.S.A. 52:27D-315. Generally, mediation is to be conducted for 60 days, unless extended for good cause. N.J.A.C. 5:91-7.2(e). In this case, the mediator asked for three extensions of mediation. The mediator felt that mediation was proceeding towards a resolution of the objections, however, additional time was necessary in order to successfully conclude mediation. The Council granted each extension request all of which totalled 104 days. Thus, mediation was conducted over a 164 day period, instead of the 60 days as provided for in the regulations.

During the mediation period, in November , 1987, there was an election in a Cherry Hill which resulted in election of a new mayor. The outgoing mayor had been represented in all mediation sessions up until the election. After the election, the new mayor elect and a new municipal attorney attended the mediation sessions on behalf of Cherry Hill. Thus, throughout the entire mediation process, Cherry Hill was represented by its mayor or new mayor elect. Mediation concluded on February 8, 1988 and resulted in a plan which addressed all objections capable of being mediated. The only outstanding objections were objections that directly related to Council regulations and not Cherry Hill's plan. The new mayor candidly admitted during oral argument that she had attended all mediation sessions after officially being elected and had in fact agreed to and/or signed off on the mediation agreement which resulted in the present plan before the Council.

Additionally, mediation specifically addressed the techniques Cherry Hill now asks the Council to consider. Cherry Hill's plan as submitted on July 1, 1987 included the techniques which are the subject of this motion as a means to satisfy its fair share obligation. The Public Advocate and the Fair Share Housing Center objected to the use of those techniques. Consequently they were a subject of a mediation. The mediator presented the various techniques to a Council task force as a means to facilitate resolution of the issue. A Council task force consists of less than a quorum of Council members and simply makes recommendations as a means of offering guidance. The task force concluded that the techniques

were not in accordance with the Fair Housing Act and Council regulations, and therefore recommended that Cherry Hill not rely on them. The mediator presented the task force's recommendation to all parties in mediation by way of a written memorandum dated October 23, 1987. The mediator also informed Cherry Hill that it could bring the matter before the full Council if desired and recommended that this be done expeditiously if at all. At this point, Cherry Hill made a conscious decision to abandon the techniques as a method of meeting its fair share and determined to negotiate with objectors to find another manner of addressing its obligation. Cherry Hill frankly admitted during oral argument that it deliberately chose not to pursue the matter before the full Council.

Since the plan had changed as a result of mediation, Cherry Hill published notice of a planning board hearing on the mediated plan. The notice indicated that the planning board would act to adopt the mediated plan. The Council received no objections to that plan. Cherry Hill, however, indicated that it received public input from neighbors of the Sergi Farm who objected to the number of units to be placed on the Sergi site. The Sergi Farm is a 270 acre tract in Cherry Hill upon which Cherry Hill decided to place a significant portion of its fair share. The contract owner of the Sergi Farm was an objector to the township's original plan. Cherry Hill undertook, on its own, outside the Council administrative process, negotiations with the neighbors of the Sergi Farm and property owners of other sites in Cherry Hill. As a result of

these negotiations, Cherry Hill apparently devised a new plan which would appease the neighbors. The new plan which is the subject of this motion, has not been submitted in detail, however, Cherry Hill's motion papers indicate it would like to reduce the number of units to be placed on the Sergi Farm and zone three additional sites to accommodate those units.

Additionally, although apparently not the result of public input, Cherry Hill would like to further amend its plan to include more units in the project known as Village at St. Mary's and reduce its rental component. These aspects of Cherry Hill's plan were a subject of mediation and were specifically negotiated. Cherry Hill now seeks to alter the mediated agreements.

Meanwhile, Council staff proceeded through its normal process and reviewed the plan that emerged from mediation. The Council staff prepared its report dated March 8, 1988 which recommended that the Council grant Cherry Hill's petition for substantive certification with certain conditions. The report was forwarded to Cherry Hill, all parties to mediation and all interested parties. All parties receiving the report were advised that they had 14 days in which to file any comments on the report. Cherry Hill did not file any comments.

Council staff presented Cherry Hill's petition for substantive certification to the Council at the public meeting on May 6, 1988, and consistent with the March 8, 1988 report, recommended that the Council grant Cherry Hill's petition for substantive certification with conditions. This all but concluded the

entire mediation and review process. All that remained was for the Council to act upon Cherry Hill's petition.

The Council was scheduled to act on Cherry Hill's petition at the public meeting on June 6, 1988. However, on June 1, 1988 Cherry Hill delivered a motion to the Council requesting the full Council to consider allowing Cherry Hill to utilize the condominium conversion, buy down, purchase and set aside techniques as a means to satisfy its fair share obligation. Subsequently, by letter dated June 2, 1988, Cherry Hill presented its proposal to amend its plan so as to zone additional sites. In light of the motion, the Council adjourned its action on the petition to enable it to decide the motions.

REQUEST TO AMEND PLAN TO INCLUDE CONDOMINIUM CONVERSION,
REQUALIFIED SETASIDES AND TOWNSHIP PURCHASE OR BUILDER'S BUYDOWN

Cherry Hill requests the Council to allow it to amend its plan so as to provide for its fair share through condominium conversion, requalified set asides, Township purchase of units or builder's buydown and Township purchase of new units. The condominium conversion would involve requiring owners of multi-family rental dwelling converting to condominiums or cooperatives to set aside 20% of the converted units for low and moderate income households. Requalified set asides involve requiring developers of newly constructed multi-family structures to make a percentage of the units available to low and moderate income households. In this situation, Cherry Hill proposes to provide cash subsidies to quali-

fied households to further reduce the purchase price and make the units affordable. Under the technique of Township purchase or builder's buydown, Cherry Hill would purchase existing units throughout the municipality and offer them either for sale or rental at affordable prices to qualified households. Cherry Hill claims the same result could be "accomplished by the buydown of existing units in the Township by developers proposing new construction." Along these same lines Cherry Hill proposes to purchase newly constructed units at full price and subsidize those units for sale or rental at affordable prices to low and moderate income families.

The Council finds that Cherry Hill's request is untimely and must be denied. Cherry Hill's plan as submitted on July 1, 1987 contained the exact techniques Cherry Hill now puts forth in its motion. At that time, several objectors objected to the use of these techniques. As a result of these objections, as well as other objections, mediation was conducted. While in mediation, the parties turned to the objections regarding the techniques in question. In order to receive guidance and as a means to facilitate mediation, the mediator presented the matter to a Council task force. A Council task force consists of less than a quorum of Council members and it is used during the mediation process as a means to facilitate mediation. The mediator presents the issue to the task force and the task force advises the mediator of its position on the issue, which position is then related to the mediation

participants. A task force recommendation is not binding on the parties and is simply used as guidance.

In the present case, the task force met on October 22, 1987 and by memo dated October 23, 1987 the mediator advised all participants in mediation that the task force did not find the techniques proposed by Cherry Hill to comport with the Fair Housing Act and Council regulations and thus should not be used. The mediator additionally informed the parties that the matters could be pursued before the full Council. After receiving the task force recommendation, Cherry Hill consciously determined not to pursue the issue and instead turned its attention to devising another means of satisfying its fair share obligation. As previously discussed, mediation ultimately concluded on February 8, 1988 with a plan which has been recommended for substantive certification.

Now, eight months later, after the entire mediation and review process has come to an end and the Council is prepared to act on Cherry Hill's petition for substantive certification, Cherry Hill asks the Council to consider allowing it to include techniques it purposely chose not to pursue in October, 1987. Cherry Hill is simply too late. Cherry Hill elected not to pursue the matter in October and proceeded to participate in mediation and review accordingly. The Council cannot permit it to resurrect those same issues at this late date. Cherry Hill sets forth no compelling reasons for desiring to amend its plan in this regard now. The plan has been subject to full mediation and review and there must be an end to the process. Accordingly, the Council finds Cherry

Hill's request to be untimely and it will not permit Cherry Hill to amend its plan to incorporate techniques it chose not to pursue in mediation, but rather consciously abandoned them in mediation.

Moreover, the Council notes that even if it were inclined to consider Cherry Hill request, it still would not permit Cherry Hill to utilize the proposed techniques. The Council agrees with the task force's recommendation as set forth in the mediator's memorandum of October 23, 1987. Additionally, while the Council bases its decision on this issue on the untimeliness of Cherry Hill's request and the fact that Cherry Hill in effect waived its opportunity to utilize the proposed techniques, the factors of delay and the need to preserve the integrity of the administrative process as discussed in the subsequent section of this opinion are equally applicable to Cherry Hill's request in this regard.

REQUEST TO AMEND PLAN TO INCORPORATE NEW SITES

Cherry Hill also asks the Council to permit it to amend its plan so as to change the plan that resulted from mediation and review and incorporate new sites into the plan. According to Cherry Hill, due to public input subsequent to mediation, Cherry Hill now has determined that it is more advantageous to reduce the number of units to be placed on the site known as the Sergi Farm and disperse them over other sites throughout the municipality. Cherry Hill thus asks the Council to permit it to amend its plan at this time. The Council finds that such a request at this juncture in the process, after the administrative process has basically been

concluded and at a time when the Council is prepared to act upon Cherry Hill's petition for substantive certification, will cause delay of the satisfaction of the fair share obligation and is simply too late and cannot be permitted.

The Fair Housing Act provides for mediation and review of a municipality's plan if there are objections to a plan. N.J.S.A. 52:27D-3.5. Mediation as set forth in the Council's regulations involves meeting with the objectors and the municipality in an attempt to resolve the objections. N.J.A.C. 5:91-7.1. The Fair Housing Act anticipates that after mediation and review of the plan has concluded, the Council will be able to act on the petition for substantive certification in a timely manner. N.J.S.A. 52:27D-315(b) provides that if mediation is successful "...the Council shall issue substantive certification if it finds the criteria of section 14 of this act have been met." N.J.S.A. 52:27D-315(c) provides that if mediation efforts are unsuccessful, the matter is referred to the Office of Administrative Law (OAL) as a contested case pursuant to the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq., for a hearing. That section specifically provides that the OAL "...shall expedite its hearing" and further states that "the evidentiary hearing shall be concluded and the initial decision issued no later than 90 days after transmittal of the matter..." These sections make it clear that an intent of the Fair Housing Act is expeditious mediation and review and hence expeditious action on petitions for substantive certification.

The New Jersey Supreme Court made it clear that prompt and expeditious action on petitions for substantive certification and adoption of ordinances implementing the plan was a significant feature of the Fair Housing Act. In Hills Development Co. v. Bernards Tp., 105 N.J. 1 (1986), the Supreme Court in upholding the constitutionality of the Act indicated that the Act sets forth a procedure that "...may be concluded much more quickly than ordinary Mt. Laurel litigation since the time periods provided for are extremely short." Id. at 36. While recognizing the "inevitable start up delays," the Court indicated that "...if the Act works according to its apparent intent, within the not-too-distant future most municipalities subject to Mt. Laurel obligations will have conforming ordinances in place providing a realistic opportunity for the construction of their fair share..." Id. at 36-37. A review of the Hills decision makes it apparent that Supreme Court placed significant weight upon the intent of the Act to expedite satisfaction of the fair share.

The Court underscored the importance of a timely process at the outset of its opinion by stating: "[I]f, however, as predicted by its opponents, the Act, despite the intention behind it, achieves nothing but delay, the judiciary will be forced to resume its appropriate role." Id. at 23. The Council must heed this warning and ensure that the Act is not used to achieve delay.

Cherry Hill's request to amend its plan after mediation and literally at the moment the Council is prepared to act on its petition for substantive certification will necessarily result in a

delay of the satisfaction of Cherry Hill's obligation which the Council cannot countenance. Cherry Hill has not presented its amended plan in detail to the Council although during oral argument the mayor indicated that the Township wishes to reduce the number of units to be placed on a site known as the Sergi Farm and disperse the units over several sites throughout the municipality. This proposal, however, was not reached as a result of mediation and in fact, since an amended plan is not before the Council, at this time we do not know whether such a change will impact upon the agreements reached in mediation. The impact on mediation will be discussed later in this opinion, however, in any event, the changes contemplated by Cherry Hill may very well result in the need to reopen mediation since a new plan with new sites is being proposed. If the Council were required to initiate mediation, months could be added to the process. At the very least, if the Council were to accede to Cherry Hill's request, it would have to give Cherry Hill sufficient time to amend the plan. Thus, satisfaction of the obligation will be delayed. This is especially troublesome since Cherry Hill has emerged from the mediation and review process with a plan that the Council staff has recommended for substantive certification with conditions. Moreover, the council is concerned since restraints on the development of vacant land are in effect pending council action in Cherry Hill's petition for substance certification.

Additionally, given the facts of this matter, if the Council were to grant Cherry Hill's request, the integrity of the

entire Council administrative process could be jeopardized. The Council has before it a plan that has been recommended for substantive certification. The recommendation was made known to Cherry Hill on two separate occasions--once when the Council report was issued and once when the Council staff presented the report at a public meeting. Cherry Hill failed to comment on both occasions. The plan was the subject of a lengthy mediation and review process which was attended by representatives of Cherry Hill, including its mayor and subsequent mayor elect. The mayor agreed to and signed off on the mediation agreements signaling the Township's agreement to and acceptance of the plan. The Council process was successful in Cherry Hill. Cherry Hill emerged from mediation and review with a plan its representatives agreed to which satisfied all mediatable objections and which the Council staff was able to recommend for substantive certification with conditions. Cherry Hill now asks the Council to discount the entire proceedings conducted in accordance with the Fair Housing Act and permit it to change its plan.

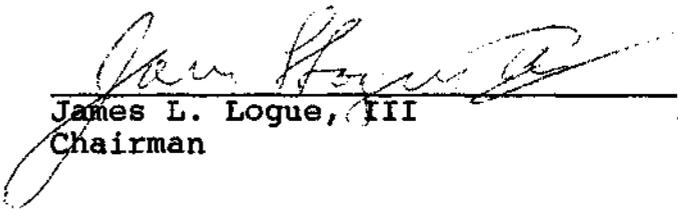
If the Council were to grant Cherry Hill's request under these circumstances, the Council would be sending out the dangerous message that a municipality may participate in the entire Council process and at the conclusion of that process change the plan and disregard all that was done. Such a result would render meaningless the entire process. While the Council does not suggest Cherry Hill's actions are designed intentionally to disrupt the process the Council cannot allow such a result to occur. Moreover, such a

result would allow a municipality to engage the entire Council process and then delay satisfaction of the obligation by suddenly declaring at the last minute that it wishes to substantially alter its plan. The Council cannot allow such a result to occur. There must be some finality to the process and parties must be able to be assured that if they participate in the process there is an end.

Moreover, the integrity of mediation especially would be jeopardized. Presently, parties negotiate in mediation with the understanding and good faith that if the agreements reached comport with the Fair Housing Act and Council regulations, those agreements will be honored. Council regulations lend support to this position. N.J.A.C. 5:91-7.3(c) provides that all parties shall be bound by any agreements reached in mediation if the matter is transferred to the OAL. Clearly, mediation agreement must mean something. However, if a municipality knew that despite the agreements reached in mediation, it could come before the Council and change its plan just prior to action on a petition for substantive certification, even if that plan had been recommended for approval, the purpose and significance of mediation would be questionable at best. The Council cannot allow a municipality to disregard the process in such a manner.

Accordingly, the Council denies Cherry Hill's request to amend its plan to incorporate new sites. To grant Cherry Hill's request would result in unnecessary delay of the fair share obligation and frustrate the Council's entire process. The Council

cannot permit such results and therefore must deny Cherry Hill's motion.


James L. Logue, III
Chairman

Dated: July 25, 1988