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COUNCIL ON AFFORDABLE HOUSING
DOCKET NO.

FRIENDS OF THE RUTGERS ECOLOGICAL PRESERVE )
v )
TOWNSHIP OF PISCATAWAY )

Civil Action
OPINION

The present matter was opened to the Council on Affordable Housing (the Council) by a motion filed by the Friends of the Rutgers Ecological Preserve (FREP) dated January 10, 1989, seeking decertification of the Township of Piscataway's housing plan. The basic facts of the matter are not disputed.

Piscataway was transferred to the Council by the Superior Court, and subsequently received substantive certification of its housing element and fair share plan on March 7, 1988. The plan certified by the Council included a requirement that a site designated as Cedar Lane Tract II (Cedar Lane), currently zoned at 10 units per acre, be increased to 12 units per acre. At 12 units per acre the site would contain 480 units, 96 of which would be lower income units (as opposed to 400 units, with 80 lower income, at the current zoning of 10 units per acre). Piscataway adopted ordinances supplementing its plan on June 21, 1988. However, it is undisputed that the zoning on the Cedar Lane Tract was not changed as required by the terms of the certification.

As some point prior to certification, Piscataway began negotiations with New Brunswick over a possible regional contribution agreement (RCA). A memorandum of understanding was entered into in May, 1988. However, the RCA was not part of the plan certified by the Council. On December 8, 1988 Piscataway formally requested that it be permitted to amend its certification by substitution of the New Brunswick RCA for portions of the existing, certified plan. Pursuant to the RCA proposal, the Cedar Lane site would be zoned at 10 units per acre, and the additional 16 lower income units that would have been provided at a zoning of 12 units per acre would instead be transferred to New Brunswick.

The Council was first informed that Piscataway had not adopted ordinances properly zoning the Cedar Lane site by Susan Kozel, a representative of FREP, at a meeting with Council staff held on January 3, 1989. At its public meeting of January 9, 1989, the Council formally requested that Piscataway explain the lack of proper zoning. A letter response dated January 18, 1989 was provided by the Township. Further, on January 10 FREP filed papers with the Council, seeking to register as an objector to the proposed RCA amendment, and also requesting that the Township's certification be declared null and void. FREP later provided additional materials in support of its motion for decertification. The Council heard oral argument on the motion on February 21, 1989. Appearing at the argument were representatives of FREP, the Township, and the Civic League of Greater New Brunswick (the original litigant in the Piscataway Mt. Laurel matter).

In its motion, FREP asks the Council to:

i) suspend all negotiations on the proposed RCA;

ii) declare the Township's certification null and void; and

iii) as a result of decertification, reopen the certification process, so that FREP may demonstrate the unsuitability of the Cedar Lane site.

FREP bases its motion on the Township's failure to properly zone the Cedar Lane site, as required by the terms of the certification; on the Township's failure to inform the Council of this fact; and on the Township's attempt to transfer by RCA the 16 additional Cedar Lane lower income units that had not been zoned for.

FREP argues that Piscataway's unilateral change in the certified plan amounts to a significant omission. FREP suggests that the Council should make an example of Piscataway in order to discourage other municipalities from deviating from the terms of a certification. Further, FREP sees Piscataway's request to transfer the 16 additional units as inappropriate, given the Township's failure to even zone for these units. Finally, FREP submitted to the Council information as to the suitability of the Cedar Lane site and Rutgers' commitment to development

of that site. This information included an informational letter from the Public Advocate on the question of whether certain Rutgers meetings (at which the issue of the Cedar Lane site was discussed) should have been held in open (rather than executive) session.

In response, Piscataway contends that it has not acted in bad faith. As noted, the Township admits that it failed to zone the site in question at the agreed upon 12 units per acre. However, Piscataway states that this was in anticipation of the proposed RCA (pursuant to which zoning on the site would remain at 10 units per acre) and that FREP supported this decision. Piscataway notes that Council staff was aware of the Township's interest in the RCA at each stage of the process. However, the Council did not advise the Township to keep the zoning at the lower level. Piscataway adds that it would be senseless to deviate from one small portion of its plan for production of 787 units, and that it has fully complied with the remainder of the certified plan. Finally, the Township states that it would be willing to rezone the site at 12 units per acre if the Council so requires.

Finally, the Civic League filed no papers in opposition to or support of the motion, but did appear at the hearing. At the hearing the Civic League stated that its primary interest in the matter was two-fold: insuring that the zoning on the site be raised to the agreed upon level; and moving expeditiously to a consideration by the Council of the request for amendment filed by Piscataway.

As a preliminary matter, it is important to note what this motion is <u>not</u> about. First, the issue of the suitability or non-suitability of the Cedar Lane tract is not at issue. Both FREP and Piscataway have addressed this point in their submissions; however, it is not relevant to the issue of decertification raised by FREP's motion. Second, the appropriateness of the proposed RCA is not yet an issue before the Council. The Council has established a procedure for the review of amendment requests, which the Township has properly initiated. However, the issue raised by FREP predates any consideration of the RCA. (In this respect, FREP's first request for relief has effectively been "granted," as the Council has stayed all consideration of the amendment pending the outcome of this motion). Third, Rutgers possible violation of the Sunshine Law is not at issue (in fact, FREP admitted candidly at the

hearing that the Township did nothing wrong in this regard). The question simply has no bearing on the issue raised by the motion.

The issues before the Council are i) whether Piscataway properly adopted its housing plan as certified by the Council, and ii) if not, what the ramifications of Piscataway's action should be. As noted above, the answer to the first question is undisputed - Piscataway failed to properly zone the Cedar Lane tract at a density of 12 units per acre as required by the plan certified by the Council. The sole remaining question is thus what Council action is appropriate in light of this fact.

The Council does not read the Act as mandating an automatic return to the Superior Court in cases where a municipality fails to adopt an ordinance implementing a portion of its certified plan within the 45 day period. As an alternative, the Council has the option to permit a municipality to rectify the situation by correcting the deficiency in appropriate cases. In such a case, the matter would not return to mediation (as FREP proposes) as the defect is procedural, rather than going to the merits of the already mediated plan.

The question facing the Council is thus whether Piscataway should be given an opportunity to correct its plan in order to bring it into compliance with the Council certification, or instead have its plan returned to the Superior Court for further proceedings. FREP has correctly pointed out that the Council cannot tolerate municipalities unilaterally determining to change certified plans by selectively adopting only portions of the plan. For a certification to be valid, the entire plan must be adopted by municipal ordinance, with no omissions or alterations. Piscataway's reliance on its proposed RCA has a sufficient basis for the change is misplaced, as an amendment is not effective until formally approved by the Council. Piscataway should have adopted ordinances implementing the certified plan, and amended them later if the RCA were approved. Further, a question has been raised over whether FREP encouraged the Township to keep the site zoning at 10. The Council need not reach a determination on this factual issue, as it is irrelevant; a municipality is responsible for ensuring adoption of its plan, and cannot excuse non-compliance by pointing to the actions of third parties.

On the other hand, Piscataway has offered a plausible explanation of its actions, which seem to be more the result of confusion than any desire to deliberately evade its obligation. Piscataway did inform the Council that it was commencing negotiations on a proposed RCA, prior to certification. Further, it filed a formal request for an amendment to the plan in order to implement the RCA, before the filing of FREP's motion. Also, the Council draws no improper behavior from the Township's attempt to transfer the "lost" 16 units as part of its RCA. If Piscataway were seeking to avoid providing these 16 units, it would not have proposed transferring them (and thus paying for them) through an RCA. Piscataway's actions thus support its arguments made before the Council. Finally, Piscataway has expressed a willingness to rezone the site at the correct density.

Given the statutory intent to provide an administrative mechanism as a preferable alternative to a judicial solution to Mt. Laurel cases and the clear preference that these matters be determined by the Council; the fact that Piscataway has created a complying plan, and adopted ordinances covering 771 out of 787 units of its obligation; the particular factual background of the case as outlined in detail above; and the fact that Piscataway is in a position to remedy the situation by adoption of complying ordinances, the Council determines that it is appropriate to permit the Township an opportunity to bring its plan into compliance. In order to do so, Piscataway must immediately adopt the necessary ordinances rezoning the Cedar Lane tract at 12 units per acre, and must provide the council with notice of each step of the process. Only upon receipt of such information will the Council initiate any process to review the amendment request.

For all of the above reasons, the motion for decertification filed by FREP shall be denied. An appropriate Order implementing this Opinion will be entered.

COUNCIL ON AFFORDABLE HOUSING

James L. Logue, III, Chairman

DATED: March 13, 1989

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