

COUNCIL ON AFFORDABLE HOUSING
DOCKET NO. COAH 89-200

IN RE CLINTON TOWNSHIP,)
HUNTERDON COUNTY)

Civil Action
OPINION

The present matter was opened to the Council on Affordable Housing (the Council) by three motions filed by Bi-County Development of Clinton, Inc. (Bi-County) and Clinton Township, following transfer by the Council of four issues to the Office of Administrative Law.

Clinton filed a final housing element and fair share plan with the Council on December 31, 1986. The plan included property owned by Bi-County as a site to be zoned for an inclusionary development. Clinton elected not to petition for substantive certification at the time it filed its plan. Subsequently, on July 28, 1987 Bi-County filed suit in the Superior Court and requested Council review and mediation (which acted as a petition for certification). As a result, the Council instituted the administrative mediation and review process. However, on December 1, 1987 the Clinton Township planning board amended the Township's plan to omit the Bi-County site. Faced with the question of which plan was properly the subject of mediation, the Council determined in an Opinion dated March 7, 1988 that Clinton could not unilaterally amend its plan post-petition to remove the Bi-County site, and that mediation would thus involve the original plan (which included Bi-County). However, the Council also noted that if the Bi-County site was found to be unsuitable, the Council would not mandate the sites use.

During the mediation period several issues relative to the suitability of the Bi-County site were discussed. Following the termination of mediation, a mediator's report was issued, and was commented on by several parties. Following a discussion of the matter at its public meeting of December 19, 1988, the Council determined that the case presented four contested issues relative to the suitability of the Bi-County site.

The four issues in question are:

1. Whether the Bi-County site can obtain sufficient water and sewer capacity for the proposed inclusionary development, and, if so, the time frame in which such capacity can be obtained;
2. Whether, given the ground recharge capabilities of the Bi-County site, the proposed inclusionary development is feasible;
3. Whether the Bi-County site has, at the present time, adequate access for the proposed inclusionary development, and, if not, whether such access can be provided; and
4. Whether the existence of limestone on the Bi-County site renders the proposed inclusionary development economically unfeasible.

As a result, the Council concluded that the issues should be transferred to the OAL for resolution. Transfer was effectuated by letter dated January 3, 1989 (and amended January 9, 1989). However, the OAL case has been stayed pending resolution by the Council of the present three motions.

The initial motion was filed by Bi-County on January 17, 1989 (and amended by letter dated January 19, 1989). First, Bi-County requests that the Council terminate OAL proceedings, on the ground that each of the issues were transferred improperly (for various reasons). In order to constitute a valid objection subject to transfer, Bi-County argues that an objection must meet the following criteria:

i) the objection must be raised by an objector as defined in the Fair Housing Act, N.J.S.A. 52:27D-301 et seq.; i.e. by a party who has filed objections to a municipality's proposed housing plan within 45 days of publication of notice of a petition for certification, as per N.J.S.A. 52:27D-314;

ii) the objection must be raised in the original objection papers filed within the statutory 45 day period;

iii) mediation on the issue must prove unsuccessful;

and

iv) the objection must be commented on by the objector in the written response to the mediator's report.

Only if these criteria are met, Bi-County argues, can the Council transfer the issue consistent with the Act.

In the present case, Bi-County argues, in effect, that none of the issues can be transferred to the OAL. First, Bi-County asserts that only the issues of access and sewer capacity were raised as timely objections (by Honachefsky). Thus, they are N.J.S.A. 52:27D-315 issues, and may be transferred (assuming all other conditions for transfer are met); the other issues are N.J.S.A. 52:27D-314 issues, and cannot under any circumstances be transferred, but instead must be reviewed by the Council itself. However, Bi-County next contends that the issues of access and sewer cannot be transferred, as they were successfully mediated (as was the issue of limestone). Finally, Bi-County notes that none of the issues were commented on by a legitimate objector in comments to the mediator's report (in fact, the issues of limestone and ground recharge capability were not commented on by anyone).

The Council must thus determine what is required in order to transfer an issue to the OAL, and whether the present issues qualify for such transfer. The Council's administrative review process on a petition for certification begins with publication of notice of the petition by the municipality, and the running of the 45 day objector period. If there are no objectors, the Council will review the plan to insure compliance with the N.J.S.A. 52:27D-314 test. However, if there are objectors, the Act requires a mediation of "the dispute" between the municipality and objectors, N.J.S.A. 52:27D-315(b). If mediation ends successfully, the Act returns the case to the Council for review to insure compliance with the N.J.S.A. 52:27D-314 test (N.J.S.A. 52:27D-315(b)); if unsuccessful, contested issues are transferred to the OAL. Following OAL review, the Council will review the proposed plan and certify it if it complies with N.J.S.A. 52:27D-314.

Thus, mediation is triggered by comments filed by objectors and, as a general matter, mediation should concern those issues raised by the objectors. If mediation proves unsuccessful, and there are contested issues requiring transfer, such transfer should involve those issues properly raised and in dispute as part of the mediation and review process. Thus, the Council agrees with Bi-County that, in general, issues raised by third parties who are not objectors would not be transferred to the OAL (even if a mediator invited these parties to participate in mediation in some limited sense).

However, Bi-County also argues that Clinton Township should not be allowed to raise issues relating to its own plan since the Council decided, in the Middletown case, that a municipality could not be an "objector" to its own plan. In Middletown the Council wished to avoid situations where a municipality submitted a plan that did not represent its considered intention on meeting its obligation, "objected" to that plan, and then proceeded to use mediation as a forum for fashioning a new plan that no party had previously had an opportunity to review or object to. Thus, the Council concluded that, in general, a municipality could not simply "object" to its own plan and unilaterally amend it post-petition for no given reason (although, of course, the municipality could change its plan as the result of input from objectors or the Council).

Unlike third parties, however, the municipality is a party to mediation, pursuant to N.J.S.A. 52:27D-315. Thus, when the municipality raises issues in mediation that relate directly to the Council's ability to act on a petition for certification, such issues must be resolved, through an evidentiary hearing if necessary. In this case, Clinton has contended that the Bi-County site is unsuitable and does not comply with Council regulations (and that it was moving to remove the site from its plan at the time Bi-County sued). If Clinton is correct, then the site should not be used, and the Council should not approve it. If Clinton is incorrect, then it will be required to use the site as a condition of receiving certification. In any event, the issues were properly raised by Clinton.

As noted, Bi-County also argues that to constitute a legitimate objection, the precise issue must be set forth during the 45 day objector

period. The Council disagrees with this argument. Certainly, an objector should try to provide the Council with a complete list of all issues at that time. That will help the mediator and all parties prepare for mediation, thus facilitating the process. However, it seems unfair to foreclose a legitimate objector, who has filed within the 45 days, from raising a different issue during the mediation process. During mediation, issues may become evident that were not clear from a facial review of the municipality's housing plan. Further, as noted above, during mediation plans may change, and parties need to be able to respond to such changes. The Council does not wish mediation to become a continual argument over whether certain issues were precisely stated within an objector's original objections. The Council is more concerned that the mediation process be able to hear all disputes between the parties (objectors and municipality) as to the proposed plan. This has been consistent Council policy during mediation, and is evident from N.J.A.C. 5:91-5.1(b) which provides only that an objection shall constitute "as completely as possible" a full statement of all issues.

As per the mediator's report, all four issues (access, water/sewer availability, ground recharge capability, and limestone) were raised by Clinton during mediation as objections to the suitability of the Bi-County site (the issues of access and sewer were also raised by an objector during the 45 day period). By definition, the Council must rely heavily upon the mediator's account of what transpired during mediation. The Council thus accepts the mediator's statement that these issues were legitimately raised by a party to mediation.

Next, Bi-County argues that at least three of the issues (access, sewer and limestone) were successfully mediated, and thus cannot be transferred. Certainly, if the parties to mediation reach an agreement on an issue that meets with all Council regulatory requirements there will be no need for transfer for an evidentiary hearing. However, that agreement is lacking in the present case, as evident from the Township's papers, which indicate that it feels that these issues have not been resolved. More importantly, the mediator has indicated that these specific issues were not resolved during the process. Again, the Council will rely upon the mediator's statements on this matter.

Finally, Bi-County argues that a matter cannot be transferred if an objector has not filed a written response to the mediator's report, indicating that the particular issue is unresolved and requires transfer. The Council disagrees with this. Following mediation, the Council must decide what issues are to be transferred as contested case issues to the OAL. It is certainly the Council's intention that parties respond to the mediator's report and indicate what issues they view as unresolved, as an aid to the Council in reaching a determination (the Council is presently preparing amendments to its procedural rules to make this explicit). However, the ultimate decision on transfer rests with the Council, not the parties or mediator. If contested issues requiring an evidentiary hearing exist, the matter must be transferred, whether or not the mediator has recommended transfer or the parties requested it. The Council has concluded that such issues exist in the present case. (The Council also notes that written comments on several of the issues were filed by the Township).

Thus, since the issues in question were raised during mediation by a legitimate party; since the issues relate directly to the Council's ability to act on the municipal housing element and fair share plan; and since they are contested issues unresolved during mediation, requiring an evidentiary hearing; the Council will deny that portion of Bi-County's motion requesting termination of OAL proceedings. The issues will thus remain with the OAL for appropriate proceedings.

However, Bi-County's motion raises a second issue - that the original service list of parties sent to the OAL must be amended. The original list included the names of Bi-County, the Township, other objectors (Hilsenroth and Honachefsky), and several interested parties. The interested parties had been invited to participate in mediation by the mediator. Bi-County argues that each of the parties on the list suffers from an infirmity rendering them ineligible for participation in any OAL proceeding. First, as to all parties who did not file as objectors, Bi-County argues that they thus have no status to be heard on any transferred issues (Bi-County includes the Township in this group). Second, Bi-County contends that any party that failed to file written comments to the mediator's report is also disqualified on that ground (this includes both original objectors, Hilsenroth & Honachefsky).

Bi-County concludes that no single party in the present case is eligible to participate in the OAL.

As set forth in detail above, mediation is designed to resolve disputes between specific parties—the municipality and all objectors. The objectors are eligible by virtue of having complied with the statutory requirement of a timely filing of objections. If the mediation that follows such filing is ultimately unsuccessful, and there are contested issues to be resolved, the next step in the process of resolving the dispute is an OAL hearing. That hearing should in general involve only the parties to the dispute (the municipality and objectors), except as the Council determines is necessary. In most cases parties who elected not to file as objectors should not be permitted to simply enter the process at a later stage (i.e. the OAL) without having fulfilled the prior requirement for entry into the process (filing of a timely objection). The fact that a third party may be involved in mediation at the request of the mediator does not alter the result.

However, all objectors should be permitted to participate in an OAL proceeding if they so choose. Even though the particular issue transferred might not seem to affect each objector, all objectors should have the right (as participants in the process) to protect their interests by participation before the OAL. Further, as noted above, the failure to file a written comment to the mediator's report is not determinative. Thus, in the present case, the parties who may appropriately participate in OAL proceedings are Bi-County, the Township, Hilsenroth and Honachefsky (whether the latter two are actually interested in participating is a matter to be resolved by the Administrative Law Judge). The remaining third parties may not actively participate in OAL proceedings, but may remain on the service list to receive copies of any papers filed in the OAL. Thus, Bi-County's motion to prevent the parties from participating in OAL proceedings shall be denied in part and granted in part.

The second motion was filed by the Township on January 18, 1989. In this motion Clinton seeks to expand the issues transferred to the OAL to include all possible issues affecting the suitability of the Bi-County site. Clinton argues that site suitability should be read broadly, and that it should not be foreclosed from raising any issues potentially

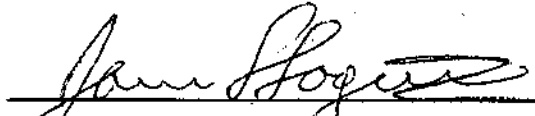
affecting "suitability". Clinton also argues that it raised other issues during mediation through submission of a planning report.

The fact that the Council determines to transfer certain issues affecting site suitability to the OAL does not mean it must automatically open up the case to all potential site suitability issues. For example, if at the conclusion of mediation a party has raised the question of whether a site has wetlands, but has raised no other site suitability issues nor even indicated other concerns as to site suitability, only the issue of wetlands will be transferred. The Council should only send over to the OAL those issues that are left unresolved following mediation. The question is thus whether Clinton raised site suitability issues other than those already transferred. The mediator indicates that the Township did file a planning report during mediation (the "Banisch report"). As this report was properly raised during mediation, it has already been included in those documents transferred to the OAL. Although it was not made clear at the time of the original transfer, the OAL may address any issues raised in that report that relate to the site suitability (as per the Council's substantive regulations) of the Bi-County site. However, the suitability of the Annandale site, which is also discussed in the report, is not an issue that has been transferred to the OAL. Thus, Clinton's motion will, in effect, be granted to include only those site suitability issues raised as to the Bi-County site in the Banisch report.

Finally, in a second motion, dated February 7, 1989 Clinton raises the question of the appropriate burden of proof in this case. As noted above, the Council has already determined that Clinton cannot unilaterally amend its plan so as to delete Bi-County's site, unless the site is found to be unsuitable. The question remains as to the burden of proof before the OAL. The Council has determined that this issue should be determined, in the first instance, by the Administrative Law Judge. Matters relating to the order of proofs, etc. should first be heard in that forum. Thus, the Council will not reach a determination on that issue at this time.

An appropriate Order will be entered implementing this Opinion.

COUNCIL ON AFFORDABLE HOUSING


James L. Logue III, Chairman

DATED: APR 23, 1989

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