

COUNCIL ON AFFORDABLE HOUSING

DOCKET NO. (C.O.H. 88/89 - 100 (b))

IN RE MIDDLETOWN)
TOWNSHIP/REQUEST)
FOR TRANSFER OF ISSUES)
TO THE OAL)

Civil Action
OPINION

Following the close of mediation as to Middletown Township, the Council on Affordable Housing (the Council) transferred two issues to the Office of Administrative Law (OAL) for resolution. These issues are: first, the suitability of the Tomaso Plaza and Wilson Avenue sites, and of the 20 scattered site rental units; and second, the financial feasibility of the construction and maintenance of the senior citizen project and the scattered site units. Subsequently, motions to expand the issues transferred were filed by Calton Homes, Inc. (Calton), on April 20, 1989, and by the Public Advocate on April 19, 1989. In the motions, the Public Advocate requests that the Council transfer eleven additional issues, and Calton requests the transfer of four additional issues.

As a preliminary matter, it is important to describe Middletown's current plan for providing its obligation of 1000 lower income units. Middletown's plan proposes to transfer 500 units through five RCA's; to rehabilitate its indigenous need of 286 units; to construct 5 sales units on scattered sites; to construct 20 rental units on scattered sites; to construct 123 senior citizen units on the Tomaso Plaza site or, if necessary, part or all of these on the Wilson Avenue site; to zone for 19 accessory apartments; and to request a rental bonus of 47.

The Council has determined that, with one exception, the requests to expand the issues transferred to the OAL should be denied. A review of those issues raised in the motions filed by the Public Advocate and Calton indicates clearly that they do not present contested issues as to

disputed facts. The moving parties do not raise a dispute as to the underlying facts, or as to whether the Middletown plan complies with the requirements of the Council's regulations. Instead, the motions attack the appropriateness of applying the regulations in the present case thus, in effect, challenging the regulations. The motions do not necessitate an OAL adjudication.

This Opinion will briefly review the issues raised by petitioners. First, the Public Advocate argues that the Township's plan provides that most rental units will go to senior citizens, and that this approach does not respond to the needs of area families for rental housing. However, the plan fully complies with Council regulations (a point not disputed by the Public Advocate). Middletown's plan age-restricts 123 units. This is within the 25% range permitted by N.J.A.C. 5:92-14.3 (125 units in the present case). Thus, as noted above, the facts of the matter are undisputed, as is Middletown's compliance with the applicable regulation.

Similarly, the Public Advocate objects to the Township's calculation of rents by excluding the cost of utilities, the lack of any price stratification for the rental housing to be provided, Middletown's use of the residency preference contained in the regulations, and the inclusion of accessory apartments in the plan. As in the case of age-restricted units, the underlying facts are not in dispute as to any of these items, and the compliance of each item with the Council's regulations is not contested. The Public Advocate also argues that the plan provides an insufficient number of low income units. However, as per N.J.A.C. 5:92-5.14, the Township's plan provides that 1/2 of each component will be low income units, with the exception of the rehab component (as per the regulations, Middletown provides only that it will rehab at a 50% low/moderate ratio "to be the best extent feasible"). Again, these facts are not in dispute.

Another issue raised in the motion is the municipality's "failure" to affirmatively demonstrate the existence of the 286 units it intends to rehab. However, the Council does not require a municipality to provide such evidence. The rehab number assigned a municipality is the product of the Council's methodology for calculating fair share. To the extent

the Public Advocate disputes this figure, its objection is to the methodology, not Middletown's compliance plan. Similarly, any argument as to the appropriateness of permitting Middletown to rehab the units despite utilizing the 1000 cap permitted under the regulations is properly addressed to the Council.

The Public Advocate also challenges the Council's lowering of Middletown's fair share number as the result of filtering. This issue, raised in several other cases, constitutes a direct attack on the Council's methodology, which includes filtering as one component in its calculation of fair share obligations. The same is true as to the Public Advocate's challenge to credits provided for units constructed prior to 1987, (which the Public Advocate argues amounts to a "double counting"), which is specifically permitted under the Council's methodology.

Another issue raised by the Public Advocate that has also been raised in several other cases is its contention that Middletown's use of RCAs in partial fulfillment of its obligation is improper, on the ground that such use perpetuates existing patterns of racial discrimination and exclusionary zoning. The Public Advocate does not allege that Middletown in transferring more units than permitted, as the amount is admittedly within the percentage allowable under the Fair Housing Act. Nor is there any dispute as to the actual terms of the RCAs, or their compliance with Council requirements. Rather, the Public Advocate's disagreement is with the Council's decision to permit municipalities to transfer the full amount permitted under the Fair Housing Act. This is clearly not an issue requiring OAL review. The same is true as to the Public Advocate's argument that, despite compliance with the regulations, the Township's plan is still exclusionary because too few units are created within Middletown. Both issues are appropriate for Council review, rather than an OAL hearing.*

* The Motion also raises an objection to the Kanes Lane site. However, this site was only proposed as an alternative to the RCAs, which have since been approved by the Council. The site is thus no longer part of the Township's plan in any manner.

Thus, the issues detailed above do not necessitate transfer to the OAL under the Fair Housing Act. The Public Advocate raises no underlying factual dispute requiring OAL review and adjudication. The issues represent the application of the Council's regulations to the uncontested facts of the case. The questions raised in the motion, challenging the Council's regulations or the Council's actual application of the regulations, are properly before the Council for decision.**

As noted, Calton filed a similar motion seeking transfer of four additional issues. Two of those issues overlap the Public Advocate's motion, and thus have already been discussed above - first, the absence of proof of the existence of 286 units for the rehab component and the inappropriateness of such rehab due to the 1,000 cap; and second, the use of accessory apartments as part of the plan. The third issue concerns Calton's concern over the funding for Middletown's RCAs.

However, Middletown has submitted documentation demonstrating that it will bond for the full amount required by the RCAs. Calton does not seem to dispute this, or the fact that the amount is within the Township's bonding capacity. Calton's objection is simply that the amount is very large, and may result in opposition. This may be true, but does not render the bonding commitment ineffective, or raise a contested issue suitable for OAL review. Finally, Calton questions the suitability of the five scattered site sales units. The question of site suitability presents an issue of disputed facts suitable for OAL review, and thus, this issue will be transferred to the OAL. It should be noted, however, that several of the five units in question have already been constructed, and that the issue as to these sites is presumably moot. This matter can be dealt with by the OAL.

** It should be noted that the Public Advocate's motion also questions the lack of both a municipal plan for administration of the scattered site rental units, and of a rehabilitation timetable. Both items will be required as a condition of certification, as per normal Council procedure.

Thus, for all of the reasons set forth above, the motions to expand the issues transferred to the OAL shall be denied.

COUNCIL ON AFFORDABLE HOUSING



William A. Angus, Jr.
Acting Chairman

DATED: *June 11, 1977*

D0106r