COUNCIL ON AFFORDABLE HOUSING
COAH DOCKET NO. COAH 89-202(a)

In Re	)	Civil Action
PETITION FOR SUBSTANTIVE CERTIFICATION FILED BY READINGTON TOWNSHIP	)	OPINION

This matter comes before the Council on Affordable Housing (COAH) upon the application of Readington Township, Hunterdon County asking that the Council on Affordable Housing grant its petition for substantive certification. The objectors to Readington's petition for substantive certification, MRFS Realty Corp. and Renay Salamon, oppose the motion. MRFS Realty Corp. and Renay Salamon objected together and have acted together throughout these proceedings and accordingly, although COAH uses the term objectors, they are considered as one. MRFS Realty and Renay Salamon own property in Readington on which they seek high density zoning.

Readington filed its housing element and fair share plan with COAH on January 5, 1987. Readington subsequently adopted its plan on January 26, 1987. Readington voluntarily petitioned for substantive certification of its housing element and fair share plan on May 20, 1987 and published notice of its petition in the Hunterdon Review on May 27, 1987. One group of objectors, MRFS Realty Corp. and Renay Salamon, filed objections to Readington's petition for substantive certification. As a result of the objections, COAH conducted mediation beginning on August 17, 1987 and concluding on November 30, 1987, after three extensions. At the

conclusion of mediation, the objectors' objections had not been resolved.

Readington proposes to satisfy its fair share obligation of 265, of which 82 are indigenous, by rehabilitating its indigenous need and providing for its inclusionary component of 183 by zoning three sites so as to allow construction of low and moderate income housing. All three sites have developers willing to construct affordable housing. The three sites are known as Whitehouse Estates on which 14 affordable units already have been constructed; Cushetunk Commons which will provide 32 affordable units to be developed by Checchio Associates; and Cushetunk Lake which will provide 70 affordable units to be developed by Trammell Crow, Inc. Readington already has zoned these sites for low and moderate income housing and, with the exception of Whitehouse Estates which is already constructed, the developers are at various stages of the approval process.

Additionally, Readington proposes to provide 60 affordable units through the construction of a senior citizens project to be constructed by Geneton, Inc., an experienced builder who has constructed similar projects in the past. This project will contain 60 low and moderate income units for senior citizens with proposed fun ding for the project from the Farmers Home Administration (FmHA). Trammell Crow presently holds an option on this land to be transferred as well as an option on the Cushetunk Lake Project which it is developing.*

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* The lands on which Trammell Crow, Inc. holds option for purchase was a subject of an outstanding lawsuit with the owners of the sites, however, that suit has been settled.

Before COAH had the opportunity to consider whether the unresolved objections constituted a contested case for which a factual hearing was necessary, the objectors filed a motion for accelerated denial, and/or a builder's remedy with COAH on December 31, 1987. COAH ruled upon the motion by opinion dated April 4, 1988. COAH found that accelerated denial or a builder's remedy was not warranted in this case, but did order Readington to submit additional documentation in support of its plan. Specifically, COAH requested Readington to submit a copy of the option agreement between Trammell Crow and the owners of the site for the senior citizens project; evidence that the option agreement still is viable; a pro forma for the senior citizens project; evidence that the clause in the contract between Trammell Crow and Geneton which provides that the contract to sell is subject to all approvals to develop this site being unappealable has been removed; and proof of approval or preliminary approval from the FmHA.

By letter dated April 28, 1988, Readington submitted an estoppel agreement signed by one of the owners of the site in question that the option was still viable as well as an affidavit from Mauro Cheverini of Trammell Crow. COAH was satisfied with this since the purpose of its request pertaining to the option agreement was to ensure that the option was still in effect. Presumably, Trammell Crow did not wish to submit a copy of the option agreement since it wished the agreement to remain private. Readington also submitted an affidavit from Arthur Burgess, one of the owners of the property Trammell Crow held the option on, which indicated the owner's intent to see affordable housing developed on the pro-

perty. COAH is of the opinion that Readington's failure to provide a copy of the option agreement does not constitute non-compliance with its request since the estoppel agreement and an affidavit was submitted which indicated that the option agreement was indeed in effect. Accordingly, receipt of the actual option agreement is not necessary. Readington did submit a pro forma for the senior citizens project and also evidence that the clause pertaining to unappealable issues has been removed. Finally, Readington was unable to submit proof that FmHA has approved or granted preliminary approval of the application for the senior citizens project, however, Readington, by letter from its Mayor, indicated that the application had been submitted and was presently before the FmHA. Subsequently, Readington forwarded a memorandum from James Gouryeb, state director of FmHA, dated April 28, 1988 to his superiors which recommended FmHA funding since all administrative criteria had been met and since the project in his opinion was appropriate for funding. As evidenced by a letter dated August 23, 1988, FmHA ultimately did grant preliminary approval of the pre-application and invited Geneton to submit a formal application.

After receipt and review of the information, and after giving the objectors an opportunity to respond, at its public meeting on September 26, 1988, COAH determined that the suitability of the Cushetunk Commons, the Cushetunk Lake and the senior citizens projects for development with low and moderate income housing raised by the objectors was a contested case for which a factual hearing was necessary. Accordingly, COAH ordered the site suitability issues to be transferred to the Office of Administrative Law (OAL).

Readington made a Motion for Clarification of the Referral to the OAL claiming that the hearing should be limited to whether or not the sites in question are "suitable" as defined in N.J.A.C. 5:92-1.3. COAH stated that it did not intend such a limited transfer and that by using the term "site suitability" COAH intended to transfer the general issue of the "buildability" of the sites to be developed with low and moderate income housing.

The matter was returned to the OAL where the parties continued to argue over the scope of the hearing. By decision dated February 24, 1989, Robert Miller, Administrative Law Judge, issued a decision which limited the scope of a hearing to whether the sites in question were "approvable, developable and suitable" as defined in COAH regulations. The objectors filed a Motion for Interlocutory Review of the ALJ's decision which, on March 13, 1989, COAH agreed to hear. COAH convened a special meeting on March 20, 1989 to consider the motion. The objectors argued that review of the sites for "approvability, developability and availability" necessarily included a review of the financial feasibility of the projects, particularly the senior citizens project. COAH rejected this argument and found that the ALJ correctly had ruled upon the motion. COAH found that there was not a factual dispute as to the financial feasibility of the project since in addition to the proposed FmHA funding, Readington agreed to bond for any monies which might be necessary to construct a project and it had submitted a letter from bond counsel indicating it had sufficient bond capacity. The matter was returned to the OAL and the objectors subsequently withdrew their request for a hearing on site suitability as

transferred to the OAL. Readington followed with this motion.

Readington argues that it is appropriate at this time for COAH to grant Readington's petition for substantive certification since the objectors have withdrawn their request for a hearing as to the suitability of the inclusionary sites. Readington argues that the remaining issues raised by the objectors do not present factual disputes for which an evidentiary hearing is necessary and, further, points out that COAH's staff, in the COAH report, has indicated that Readington's plan should receive substantive certification. Readington points out that COAH already has indicated that the only contested issue for which an evidentiary hearing was necessary was the site suitaiblity issue and since that has been withdrawn, COAH can proceed to act on Readington's petition for substantive certification.

The objectors argue that there are four issues which were unresolved at the end of mediation and which raise factual disputes for which a hearing is necessary and, therefore, COAH must refer those issues to OAL for a hearing and cannot act upon Readington's petition for substantive certification. The issues the objectors claim are still outstanding are: (1) that the economic viability of the entire housing plan is suspect, that inadequate funds exist to support a municipally sponsored senior citizens project, that developer's contributions have not and cannot materialize, and that inadequate bonding capacity exists as a backup plan; (2) that inadequate sewer capacity exists to service the proposed senior citizens project, and that sewer treatment capacity is not available to service the remaining inclusionary projects;

(3) that Trammell Crow has failed to demonstrate that it has control of the site upon which it proposes to construct an inclusionary project, and of the land that proposes to donate to the Township to construct a senior citizens project; (4) that Readington Township has failed to demonstrate the ability and expertise necessary to undertake a municipally sponsored inclusionary project under the standards enunciated by the Council in Motzenbecker v. Borough of Bernardsville, COAH Docket No. 87-18 (decided November 16, 1987). (Objectors' reply brief at p. 13). The objectors also raise due process issues claiming that COAH's staff has decided issues without affording the objectors an evidentiary hearing.

After review of the papers filed in this case, COAH is convinced that there are no factual disputes which would necessitate an evidentiary hearing. The issues which are outstanding all involve the application of the Fair Housing Act and COAH regulations and policies to undisputed facts. COAH will resolve those issues in this opinion and, accordingly, COAH may act upon Readington's petition for substantive certification.

The objectors have detailed the unresolved issues in their papers in response to Readington's motion. Since all of the unresolved issues stem from the objectors' objections, COAH assumes that the objectors' papers list all unresolved issues. This assumption appears correct since the issues the objectors raise in response to Readington's motion are essentially the same as those the objectors raised throughout the administrative process. The objectors have listed four unresolved objections and COAH will deal with

each issue as set forth in the objector's papers, although not in the precise order set forth in the papers.

The objectors argue "that Readington Township has failed to demonstrate the ability and expertise necessary to undertake a municipally sponsored inclusionary project under the standards enunciated by the Council in Motzenbecker v. Borough of Bernardsville, COAH Docket No. 87-18 (decided November 16, 1987)." (objectors reply brief at p. 13). This particular objection relates to the senior citizens' project which Geneton proposes to construct. As Readton's plan indicates, it is undisputed that Readington proposes to satisfy 60 units of its fair share obligation through the construction of a senior citizens project. The method in which the project is to be developed likewise is undisputed. Trammell Crow will transfer title to six and one half acres, to which it presently holds an option to purchase, to Geneton and Geneton will construct 60 low and moderate income units on the site. Geneton proposes to secure financing for the project from the FmHA. It also is undisputed that Geneton has constructed similar projects in the past.

The present case is distinguishable from Motzenbecker because the problems present in the Bernardsville plan do not exist in this case. Readington has submitted a pro forma for the senior citizens project, steps have been undertaken to acquire the site, financing has been identified and is being pursued, so far with favorable results, and an experienced developer, Geneton, will develop the project. Additionally, Readington has set forth a contingency plan for development of the project and has pledged its bonding capacity. Conversely, Bernardsville failed to present any of

this information. Bernardsville simply stated it would oversee construction of affordable units without any support for its plan. Readington has presented detailed information on development of the senior citizens project and thus the dangers COAH sought to protect against in Motzenbecker are not present in this case.

The objectors' argument that a factual dispute exists because Readington has allegedly "failed to demonstrate the ability and expertise necessary to undertake a municipally sponsored inclusionary project" is premised upon the Motzenbecker case and the stricter standard of review COAH requires with a municipal project. Readington, however, has presented the information on such a project that the Motzenbecker case stated would be necessary. Accordingly, the objectors' objection on this point can be resolved based upon the undisputed facts.

The objectors also argue "that inadequate funds exist to support a municipally sponsored senior citizens project." (objectors' reply brief at p. 13). Based upon the undisputed facts, COAH is satisfied with the funding for this project. It is undisputed that Readington's plan indicated that Geneton will develop the senior citizens project and that Geneton proposes to secure financing from FmHA for construction of it. It also is undisputed that the FmHA has issued a letter dated August 23, 1988 which states that Geneton's pre-application for financing had been accepted and invites Geneton to submit a formal application. It is also undisputed that this letter and the invitation to submit a formal application does not constitute a reservation of funds.

Given these undisputed facts, COAH is satisfied that the

funding is realistic. COAH is familiar with the FmHA approval process. COAH is aware that pursuant to FmHA procedures, a formal application generally only is invited from those parties to whom the agency will allocate funds. Approval is not immediate and Geneton will have to follow the required procedures. Nothing in COAH's regulations requires Geneton to have final approval from FmHA for such a project. Readington has zoned the site for the senior citizens project and Geneton is in the process of securing necessary approvals. A representative of FmHA, James Gouryeb, has stated that he feels the project should be allocated funding and FmHA further has indicated that the application is eligible for funding. Given all of these factors, COAH is satisfied that the senior citizens project is sufficiently underway and presents a realistic opportunity for the construction of the 60 units.

It also should be noted that if for some reason FmHA financing is not forthcoming, Readington has agreed to bond for the monies necessary for Geneton to construct the project. Readington has submitted a letter from its bond counsel that indicates that Readington presently has a bonding capacity of $15,000,000 and that Readington can bond for the senior citizens project.

The objectors do not dispute that Readington has a present bonding capacity of $15,000,000, nor do they dispute bond counsel's conclusion that Readington may bond for the project. Instead, as set forth in previous arguments, the objectors' claim that Readington will have to utilize its bonding capacity to fund school improvements. The objectors, therefore, argue that while theoretically

Readington may show sufficient bonding capacity, in actuality, its capacity already has been committed due to the school improvements.

The objectors' argument on this point overlooks the fact that Readington Township's and the school district's bonding capacity are separate. The bonds for the schools, of which the objectors specifically complain, are issued by the school district and are separate from Readington's capacity. See N.J.S.A. 18A:24-1, et seq. Accordingly, the fact that the school district has committed to bond for school improvements does not effect Readington's separate capacity to bond. Thus, as a matter of law applied to the undisputed fact that Readington has a bonding capacity of $15,000,000 and that the school district has committed to bond for school improvements, the objectors' arguments that Readington has inadequate bonding capacity must fail.

It should be noted that there is no claim that the $15,000,000 of present bonding capacity is insufficient to cover the costs of the senior citizens project and the rehabilitation of Readington's indigenous need. The objectors' only objection pertaining to the bonding capacity throughout the administrative process has been that Readington has committed its bonding capacity for school purposes, thereby practically removing Readington's ability to bond for its fair share obligation.

The objectors also argue that Trammell Crow "has failed to demonstrate that it has control of the site upon which it proposes to construct on inclusionary project, and of the land it proposes to donate to the Township to construct a senior citizens project," and that this objection presents a factual dispute for which

an evidentiary hearing it required. (objectors' reply brief at p. 13) The objectors argue that a hearing on this issue is especially necessary since the Cushetunk Lake and the senior citizens project are premised upon Trammell Crow's control over the site.

After review of this issue, COAH is satisfied that, based upon the undisputed facts, Trammell Crow's control over the sites in question is satisfactory. In response to the objectors' Motion for Accelerated Denial and a Builder's Remedy, COAH ordered Readington to submit a copy of the option agreement between Trammell Crow and the owners of the sites and evidence that the option still remained viable. The purpose of this request was to insure that Trammell Crow still held a valid option to purchase the property in question. Readington submitted an affidavit from Mauro Cheverini of Trammell Crow, which indicated that all necessary payments had been made and that Trammell Crow was complying with all contractual provisions. An estoppel agreement which also indicated the option was viable was presented as well. This was buttressed by an affidavit signed by Arthur Burgess, one of the four owners of the sites, which stated that even if the Trammell Crow option collapsed, the owners were committed to seeing affordable housing constructed on the sites. Readington already has zoned the sites so as to provide for the low and moderate income units. Presumably, Readington did not submit the option agreement itself due to Trammell Crow's concerns that the agreement was private and Trammell Crow wanted the terms to remain confidential.

The objectors do not dispute the facts that the option agreement is still viable and that the owners are committed to pro-

ducing affordable housing. Rather, the objectors seize upon Readington's failure to produce the option agreement as requested and argue that this failure raises a factual dispute as to Trammell Crow's control over the sites it will develop and transfer to Geneton. COAH, however, does not agree that a contested factual issue is raised and does not find Readington's failure to submit the agreement itself to be sufficient to raise a factual dispute.

COAH made the request for the option agreement to insure that the option was still viable. The information Readington submitted served the same purpose and COAH is satisfied with it. The objectors do not dispute the fact that the agreement is still viable. There is no law or regulation that would require that the option agreement be filed with COAH. COAH, in the exercise of its discretion, determined to request the agreement and now COAH is satisfied that it does not need to see it to pass upon Readington's petition for substantive certification.

There is nothing in the Fair Housing Act or COAH regulations that states that a plan is insufficient if it relies upon a site upon which a developer holds an option to purchase. In fact, COAH has granted substantive certification to plans where a component of the plan indicates that the proposed developer of a site holds an option to purchase the site and it is not unusual for a developer to hold an option to purchase property. In this case, it is undisputed that Readington has zoned the Cushetunk Lake site so as to provide for the construction of 70 affordable units, Trammell Crow is complying with the terms of the option agreement and Trammell Crow already has initiated the approval process. In support of

its argument against the use of Trammell Crow's sites, the objectors point out that a lawsuit filed by the owners of the site against Trammell Crow calls the entire contract into question. This lawsuit has been settled so it no longer is an issue. The objectors' real objection on this issue is that they feel that COAH should not allow a municipality to designate a site where the proposed developer holds an option to purchase the property. This objection simply raises a question of whether COAH should allow such a site to be included in the plan and does not raise any factual disputes. The fact that a developer holds an option to purchase a proposed site for affordable housing does not disqualify the site. The site will be zoned for affordable housing and if the option falls through, in this case, the present owners have indicated that they intend to see the sites developed with affordable housing. Under these circumstances, the development proposed by Trammell Crow presents a realistic opportunity for the construction of those units.

The objectors also claim "that inadequate sewer capacity exists to service the proposed senior citizens project, and that sewer treatment capacity is not available to service the remaining inclusionary projects." (objectors reply brief at p. 13). There is no dispute as to the amount of sewer capacity available to Readington from the Readington-Lebanon Sewer Authority. Readington has a written agreement with the Authority for 595,000 gallons per day of capacity. 392,800 gallons per day already has been allocated of which the Whitehouse project is part. Out of the remaining 202,200 gallons per day, Readington already has reserved already has re-

served capacity for all four inclusionary projects. In fact, as noted earlier, Whitehouse Estates already is constructed and utilizing its allocated sewer capacity.

In support of its position, the objectors point to alleged discrepancies in Readington's draft Wastewater Management Plan, documents submitted by Trammell Crow and sewer agreements. These alleged discrepancies do not present a dispute since it is clear that the Readington already has allocated capacity to the inclusionary sites.

Finally, the objectors argue "that the developers' contributions have not and cannot materialize." (objectors' reply brief at p. 13). The objectors overlook the fact that Readington has pledged to bond if monies for which the developers' contributions are to be applied do not materialize. Therefore, even assuming the contributions do not materialize, Readington still will be able to supply the necessary funds. Additionally, it is undisputed that Readington has $305,000 from contributions already. COAH generally requires a municipality to demonstrate that it has sufficient funds on hand to pay for the first two years of its rehabilhabilitation component, or one-third of its indigenous need. In Readington's case, it has an indigenous need of 82 and COAH requires at a minimum $10,000. per unit for rehabilitation. N.J.A.C. 5:92-17.1. Therefore, Readington must demonstrate that it has $270,000 available (27 units x $10,000). Readington already has collected $305,000. The objectors simply claim that these funds can be withdrawn from Readington. Such an assertion is highly speculative and in any event as COAH already has decided Readington

has sufficient bonding capacity and has pledged that capacity if FmHA funds or developers' contributions are not forthcoming. Thus, even if all contributions are not made, Readington still can fund its projects. Given the undisputed facts, and as COAH has previously discussed, Readington has demonstrated sufficient funds.

COAH also notes that it transferred issues related to the suitability of the inclusionary sites, with the exception of Whitehouse Estates, to OAL for an evidentiary hearing. In addition to all the issues raised herein, the objectors also claimed that the sites were unsuitable for development. After referral, the objectors withdrew their request for a hearing from the OAL. In light of this withdrawal, COAH finds that those issues are no longer in dispute.

The objectors also allege that they have been denied due process as a result of COAH's failure to transfer all issues raised in its reply brief to Readington's motion to the OAL. Contrary to these assertions, and as set forth in this opinion, there are no factual disputes that would require an evidentiary hearing. COAH is able to resolve all issues by applying its regulations and policies to the undisputed facts. The objectors were given opportunities to respond to Readington's position and documentation throughout the entire process and thus were afforded necessary due process rights.

COAH has resolved all issues pertaining to Readington's petition for substantive certification by this opinion and now may act upon it. COAH has found that none of the objections the objectors raise prevent COAH from granting Readington's petition and

that the objectors do not require an evidentiary hearing for resolution since they do not involve disputed facts. COAH recognizes that Readington has moved for a grant of substantive certification of its petition, however, COAH normally takes such action by resoltion. COAH will follow its normal procedure in this case. Accordingly, COAH will not grant Readington's petition for substantive certification pursuant to this motion but rather will act separately upon Readington's petition. In light of this procedure, COAH will not enter an Order in this case. This Opinion will serve to memorialize COAH'S decision.

NEW JERSEY COUNCIL ON AFFORDABLE HOUSING

By _____
William Angus, Acting Chairman

Dated: June 26, 1989.