NEW JERSEY COUNCIL ON
AFFORDABLE HOUSING
DOCKET NO. COAH 88-122

IN RE PETITION FOR SUBSTANTIVE)
CERTIFICATION, FILED BY
HIGH BRIDGE BOROUGH, )

Civil Action

)

OPINION

This matter comes before the Council on Affordable Housing (COAH) upon the application of Pat Catanzareti, (Catanzareti) who was an objector to High Bridge's petition for substantive certification. By this motion, Catanzareti seeks relief from a sewer connection ban imposed by the Department of Environmental Protection (DEP), or, in the alternative, seeks an order requiring High Bridge to give Catanzareti's property priority when sewer capacity becomes available.

Catanzareti owns approximately 86 acres of land in High Bridge. He filed an exclusionary zoning lawsuit which was transferred to COAH which acted as a petition for substantive certification. See N.J.A.C. 5:91-3.2. High Bridge and Catanzareti reached a settlement whereby High Bridge agreed to zone Catanzareti's site to allow for the construction of 170 units of which 34 would be affordable to low and moderate income households. The affordable units proposed satisfied High Bridge's entire inclusionary component. COAH granted High Bridge's petition for sub-

stantive certification by resolution dated April 4, 1988 and pursuant to the terms of the resolution, High Bridge subsequently adopted all ordinances necessary to implement its housing element and fair share plan, which included the zoning of Catanzareti's site.

Meanwhile, on July 1, 1988 DEP imposed a sewer connection ban on the Clinton Sewage Treatment Plant which is owned and operated by the Town of Clinton. The Clinton Sewage Treatment Plant provides sewage capacity to High Bridge pursuant to a contractual agreement and therefore the ban necessarily effected the allocation of sewer capacity in High Bridge. Clinton adopted an ordinance imposing the sewer connection ban.

Catanzareti alleges in his motion that the circumstances upon which COAH granted High Bridge's petition for substantive certification have changed due to the DEP ban and, as a result of the ban, Catanzareti's ability to provide the affordable housing has been altered and COAH must react to this situation. Catanzareti acknowledges that COAH has no authority to direct an exemption from the ban. Catanzareti asserts that since the provision of low and moderate income housing in satisfaction of the constitutional obligation is not a basis for an exemption pursuant to the DEP regulations which govern this subject, COAH is the only forum available to address this issue and that is why he makes this motion. Catanzareti specifically asks COAH to develop a procedure in conjunction with the DEP that would accommodate the countervailing interests of both agencies and allow developers in his situation to

receive relief from a sewer connection ban so that low and moderate income housing to be built in satisfaction of the fair share obligation can be exempted from the ban. Catanzareti argues that COAH should do this because COAH is the appropriate forum to address the effect of sewer ban on an affordable housing plan and because the Mt. Laurel cases indicate that environmental considerations should not be used to frustrate satisfaction of the fair share obligation. Catanzareti suggests that this result should be achieved by a site specific inquiry as to whether the implementation of the Mt. Laurel doctrine overrides the goals of the DEP in each particular case. Additionally, Catanzareti contends that COAH should reconsider High Bridge's housing element and fair share plan because the availability of necessary infrastructure may undermine the plan.

Alternatively, Catanzareti asks that, if COAH finds that Catanzareti may not be exempted from the sewer connection ban, he be given priority when the sewer capacity becomes available. He points out that in cases where a municipality has received a durational adjustment pursuant to COAH regulations, those regulations require that the municipality reserve and set aside the new infrastructure capacity when it becomes available for low and moderate income housing on a priority basis. See N.J.A.C. 5:92-8.5. Catanzareti argues that in this case, the sewer connection ban raises a de facto durational adjustment situation and therefore Catanzareti should be given priority when the sewer capacity becomes available. High Bridge supports Catanzareti's motion.

In response to Catanzareti's motion, the Town of Clinton argues that COAH has no jurisdiction over it and that this motion is not a proper manner in which to seek jurisdiction over Clinton. Clinton also points out that the capacity of the Clinton Sewage Treatment Plant is allocated to various municipalities pursuant to contracts between Clinton and each individual municipality and that COAH has no authority to interfere with these contracts and require Clinton to allocate capacity for the Catanzareti development. Additionally, Clinton argues that COAH cannot order it to give priority to Catanzareti. In support of this argument, Clinton points out that it merely gives High Bridge capacity pursuant to a contractual agreement and High Bridge can allocate the capacity as it chooses. Therefore, Clinton contends that any appropriate relief would be against High Bridge and not Clinton. Finally, Clinton argues that COAH cannot review DEP regulations and if Catanzareti wishes to challenge those regulations he should do so in the proper manner and not by way of motion to COAH.

DEP argues that COAH has no authority over this matter since exemptions to sewer connection bans are solely the province of the DEP pursuant to statute. DEP points out that COAH lacks any expertise in these matters and that DEP has strong policy reasons for imposing a sewer connection ban. In this case, DEP points out that the Clinton Sewage Treatment Plant already is over burdened and is not capable of accommodating additional flow.

Moreover, the DEP argues that Catanzareti's reliance upon the Mt. Laurel cases in support of his position that COAH may over-

ride the DEP's concerns is misplaced. The DEP argues that in the Mt. Laurel cases, the courts indicated that a municipality should not be permitted to exclude sites from consideration thereby avoiding its fair share obligation by claiming exaggerated environmental constraints. The DEP contends that those discussions in the Mt. Laurel cases are not relevant to a situation where the DEP has imposed a sewer connection ban. The DEP also argues that the Federal Clean Water Act supersedes any authority COAH may have in this area. The DEP takes no position on the alternative relief Catanzareti requests.

Additionally, by letter dated March 28, 1989, COAH asked all parties and entities involved to address the issue of "whether COAH has the authority to order a regional sewerage authority to submit or apply to the Department of Environmental Protection for an exemption from the sewer ban where affordable housing is involved." Catanzareti indicated that the Town of Clinton should abstain from making any decision on Catanzareti's application and refer the matter to the DEP. He also argued that COAH had the authority to join nonparty municipalities and sewerage authorities in cases where they may be affected by any decision or where their presence is necessary for satisfaction of the fair share obligation. High Bridge supports Catanzareti's position on this issue and further notes that it is of the position that the DEP should grant the exemption. DEP took no position on this issue.

The Town of Clinton argues that it has no authority to act except in accordance with DEP regulations and therefore COAH

should not order the town to do anything in contradiction of those regulations. Additionally, Clinton points out that based upon information from the DEP, Catanzareti's request does not meet the exemption standards. Clinton states however, that it does not oppose an appeal directly to the DEP. Clinton also points out that it has no authority or responsibility to apply to the DEP for an exemption since, pursuant to DEP regulations, that is the responsibility of the party seeking the exemption.

As Catanzareti correctly acknowledges, COAH cannot require an exemption from the sewer connection ban. By law, the DEP is empowered to evaluate and regulate sewage treatment plants and the DEP has established regulations to do exactly that. COAH has no independent authority to order a sewage treatment plant to act contrary to duly promulgated DEP regulations. In this case, there is a question as to whether Catanzareti's application for an exemption presently is at the DEP for consideration. Under these circumstances, while COAH will not order Clinton to forward the application to the DEP, COAH will request Clinton to forward the application to the DEP for evaluation if it has not already done so. Clinton indicates that it has no objection to the DEP evaluating the application so this request does not seem contrary to Clinton's position.

Catanzareti realizes that he cannot request COAH to require an exemption in this case, so instead Catanzareti requests that COAH initiate a process with the DEP to establish an interagency review process which would allow both COAH and the DEP to

consider whether, under certain circumstances, an exemption from a sewer connection ban should be granted in cases where affordable housing is involved. Presumably, Catanzareti hopes that if such a review process is established, his project will be granted an exemption. While COAH shares Catanzareti's concern of the affect of sewer connection bans on the ability of a municipality to provide for its fair share obligation, the relief Catanzareti requests is not appropriate relief to be granted by way of motion.

The relief Catanzareti seeks requires a voluntary agreement between two State agencies to establish a joint review process. Such a process implicates many policy issues and logistical problems which would have to be worked out by both agencies. COAH cannot order or require the DEP to enter into such negotiations and to establish such a process and it is not appropriate to order such action on the basis of a motion. The DEP by statute has clear authority to monitor and regulate sewage treatment plants and to enact sewer connection bans when plants are operating outside their limits. These bans are enacted for health and safety reasons and any process to exempt low and moderate income housing from the terms of a sewer connection ban would have to be carefully worked out with the DEP. COAH and the DEP eventually may decide to establish such a process, however, the agencies are not prepared to do it at this time and certainly not pursuant to a motion. Accordingly, COAH will deny the relief that Catanzareti requests, namely that COAH enter into a joint administrative review process with the DEP to evaluate the effect of the sewer ban in High Bridge.

Catanzareti argues that COAH should grant the relief requested because COAH is the appropriate agency to evaluate the effect of a sewer connection ban on a certified plan. The effect of the sewer connection ban from COAH's perspective is clear - no new affordable housing can be constructed in High Bridge, unless it is a Section 202 federally subsidized project, because there is no sewer capacity to treat the sewage that will be created. This ban effects all construction in High Bridge, not just low and moderate income housing. This is not a situation where a municipality is attempting to avoid satisfaction of its fair share obligation by creating exaggerated environmental reasons to justify its failure to construct the necessary housing.

Catanzareti argues that in certain instances, production of affordable housing may override the DEP's environmental concerns and therefore in some instances it may be appropriate for housing to proceed despite DEP regulations. Catanzareti points to So. Burlington Cty. N.A.A.C.P. v. Tp. of Mt. Laurel, 67 N.J. 15 (1975) (Mt. Laurel I) in support of his position that COAH should not allow a municipality to exclude low and moderate income housing based upon environmental concerns that are not "substantial" and "real" dangers. He also relies upon So. Burlington Cty. N.A.A.C.P. v. Tp. of Mt. Laurel, 92 N.J. 158 (1983) (Mt. Laurel II) which he argues supports the proposition that low and moderate income housing and environmental considerations are not necessarily incompatible and that each case should be evaluated on its own facts to determine whether the need for affordable housing outweighs the

environmental concerns. Presumably, Catanzareti assumes that this evaluation will be done within the procedural framework established by COAH and the DEP which he requests in his motion.

A review of the cited passages of Mt. Laurel I and II upon which Catanzareti relies, reveals that the New Jersey Supreme Court primarily was concerned with those instances where a municipality sought to avoid its fair share obligation by claiming that land could not be developed with affordable housing due to environmental constraints. In Mt. Laurel I, the court indicated that an individual evaluation of a site on which a builder's remedy is sought should be made to determine whether there are environmental constraints which would preclude development of such housing on that site. In Mt. Laurel II the environmental issues the court discussed concerned the ability to develop a tract on which certain environmental constraints might be present. The court indicated that in determining whether environmental considerations precluded development on a site, deference should be given to the appropriate environmental agencies who must pass on the ability of the site to be developed. The court's discussions in these cases all centered on the characteristics of the site, namely whether or not given the particular characteristics of the site it is appropriate to develop it with low and moderate income housing.

Environmental considerations regarding the development of the site with low and moderate income housing are very different from a situation in which the DEP has imposed a sewer connection ban that prevents an entire municipality from granting any

approvals for sewer connections. The court's discussions on environmental constraints which may be outweighed by the need for affordable housing focus on situations where a municipality is attempting to circumvent satisfaction of the fair share obligation by claiming that environmental constraints preclude development. This does not apply to a situation where the DEP has enacted a sewer connection ban to prevent further hookups to a sewer treatment plant until such time as the plant is capable of handling the additional flow. Thus, COAH disagrees with Catanzareti's arguments that the court's discussions in Mt. Laurel I and Mt. Laurel II allow COAH to override the DEP's concerns in enacting a sewer connection ban.

COAH does agree with Catanzareti, however, that when sewage capacity becomes available, High Bridge should give Catanzareti's site priority. High Bridge must satisfy its fair share obligation and COAH expects High Bridge to do everything in its power to foster development of the affordable units. Of course, COAH recognizes that sewer capacity is allocated on a contractual basis and by ordering that Catanzareti receive sewage capacity on a priority basis, COAH in no way intends to order High Bridge to interfere with established contractual rights or any vested rights a party may have to sewage capacity.

William Angus, Acting Chairman

Dated: June 5, 1989