

IN RE ORDER TO SHOW CAUSE)
ON ACCELERATED DENIAL)
MIDDLETOWN TWP/MONMOUTH COUNTY)

COAH DOCKET NO. - COAH 91-305
OPINION

By Order to Show Cause issued February 6, 1991, the Council on Affordable Housing (COAH) sua sponte Ordered Middletown Township to appear before COAH and Show Cause as to why COAH should not accelerate denial of Middletown's petition for substantive certification. The Order to Show Cause was returnable on March 6, 1991, at which time COAH heard testimony and oral argument from Middletown and the Public Advocate as to why COAH should not accelerate denial of Middletown's petition. After consideration of the papers filed and the oral argument and testimony presented, COAH has determined not to accelerate denial of Middletown's petition for substantive certification but rather to require Middletown to comply with strict deadlines to submit a revised housing element and fair share plan that addresses its obligation of 1850 consistent with COAH regulations including those on allowable credits and adjustments.

COAH's Order to Show Cause listed three reasons that might justify the use of accelerated denial. First, Middletown initially filed a deficient housing element and fair share plan (plan) and COAH was forced to return the plan to Middletown for further work. Thus, COAH was forced to delay initiation of the review and mediation process. Second, Middletown included two sites in its plan as part of its rental component that were of questionable suitability and were the subject of objections. Third, COAH transferred the unresolved objections to the Office of Administrative Law (OAL) for a hearing on the suitability of the two questionable sites as well as the feasibility of Middletown's scattered site rental project proposal. Middletown essentially failed to present any evidence to support these components of its plan and COAH ultimately rejected them based on OAL's recommendation. Thus after four years in the COAH process, Middletown still does not have a workable plan. The length of time that has elapsed without a complete plan and Middletown's failure to defend its plan in the OAL led COAH to believe that a complete plan may not be forthcoming in the near future. Accordingly, COAH issued the Order to Show Cause.

Middletown argues that COAH should not accelerate denial because Middletown now has a plan to replace the plan for 143 rental units that was rejected after the OAL hearing. Middletown now proposes to zone a 28 acre site located on Route 36, near Atlantic Highlands, so as to allow construction of a 500 unit senior citizen project of which 125 will be affordable. Middletown submitted preliminary documentation with its papers showing that there is a developer prepared to construct the units. Consequently, Middletown argues that it is making a good faith effort to make up the shortfall in its plan.

Although not directly at issue, Middletown also argues that COAH should cap its obligation at 1,000, or at least at something below the present precredited need of 1,850, despite the fact that the court invalidated COAH's 1,000 cap regulation. *Calton Homes, Inc., v. Council on Affordable Housing, et al.* 244 NJ Supr. 438 (App. Div. 1990). Middletown argues that its circumstances are unique and could justify the use of a cap. Middletown urges COAH to devise some method that accounts for its individual circumstances and allows COAH to cap its obligation.

The Public Advocate also argues that COAH should not accelerate denial of Middletown's petition because low and moderate income households will be better served if the case remains with COAH. The Advocate's view is that the COAH process will conclude more quickly than the court process and, accordingly, the housing will be provided sooner. Also, the Advocate correctly points out that it is questionable whether there is a litigant to pursue this matter in court if COAH accelerates denial of the petition. The Advocate, however, argues that COAH should not cap Middletown's obligation and should not even allow Middletown to avail itself of routine credits and adjustments but rather should require Middletown to provide its full obligation of 1,850.

Accelerated denial is reserved for those situations where COAH is convinced that a municipality is not participating in COAH's administrative process in a manner designed to expeditiously advance toward substantive certification. Real Estate Equities, Inc., v. Holmdel

Twp., COAH Docket No. COAH 86-1 (decided January 20, 1987). After considering Middletown's and the Public Advocate's arguments, COAH is not convinced that this situation exists and accordingly, will not accelerate denial of Middletown's petition for substantive certification.*

While Middletown's obligation was capped at 1,000, Middletown proposed to address its obligation by transferring 500 units through various regional contribution agreements (RCA). The remaining 500 units were to be addressed through a rehabilitation program, an accessory apartment program, a scattered site new construction program and a senior citizen rental development that was to be sponsored by a local housing authority. The plan was the focus of various objections from Calton Homes, the NAACP, the Public Advocate and numerous citizens of Middletown. Therefore, the plan proceeded through mediation as per N.J.S.A. 52:27D-315.

After mediation, objections to Middletown's plan were unresolved. The objections regarding Middletown's 143 unit rental component, the suitability of the sites for that component and the powers of the Middletown Housing Authority raised factual issues and pursuant to N.J.S.A. 52:27D-315(c) and N.J.A.C. 5:91-8.1 COAH transferred those objections to the OAL for an evidentiary hearing. After the hearing, the Administrative Law Judge found the rental component unsatisfactory and the sites unsuitable and consequently recommended that COAH reject the 143 unit rental component. After review of the OAL record, including the transcript and the exceptions filed, COAH accepted the ALJ's recommendation. Review of the OAL matter demonstrated that not only was the rental component unsatisfactory but that Middletown's defense of its plan seemed lacking. For example, Middletown declined to brief whether the housing authority could, under the statute, build moderate income units. Also, Middletown's planners did not know the location of the sites

* For the purposes of this discussion, COAH will consider Middletown's fair share obligation to be 1,000 since, until recently, that was the number COAH required Middletown to address in light of the 1,000 cap. COAH will address the effect of the Appellate Divisions recent decision in Calton Homes, Inc. v. Middletown Twp., _____ NJ Super _____ (App. Div. 1990), later in this opinion.

that would be used for the scattered site new construction program. This curious defense, coupled with the length of time Middletown had been in COAH's administrative process, prompted COAH to consider the possibility of accelerated denial and issue the Order to Show Cause. COAH had real questions about whether Middletown was working to frustrate rather than promote the goals of the Act.

Middletown's response to the Order to Show Cause has demonstrated to COAH that Middletown is willing to work towards satisfaction of its fair share obligation. In response to the Order to Show Cause, Middletown briefly explained that much of the delay in this case was not caused by Middletown. COAH recognizes that some delay in the OAL hearing is attributable to Calton Homes and not Middletown. Middletown, however, did not dwell on this but rather went on to present a replacement plan for the units that COAH rejected after the OAL hearing. Additionally, Middletown offered to implement the uncontested portions of its plan to demonstrate its good faith. It is these two actions that convinced COAH that accelerated denial is not appropriate at this time.

In its papers and during oral argument, Middletown presented a proposal for a 500 unit senior citizen development of which 125 units are to be affordable rental units. Middletown's planner, Anthony Mercantante, testified as to the details of the plan and stated that a developer, Frank A. Vaccaro & Associates, will construct the project. While COAH has not reviewed the proposal and does not intend at this time to indicate whether the project is acceptable, Middletown's efforts thus far demonstrate that it is serious about replacing the rejected rental component.

Another factor in COAH's decision is the possible lack of a litigant to pursue this matter in court if COAH were to accelerate denial. Calton Homes, the original litigant, no longer owns property in Middletown. Other litigants may step forward, but that is not a certainty. Given Middletown's recent demonstration that it will diligently pursue satisfaction of its fair share obligation and the lack of a litigant, COAH feels that the goal of affordable housing is best served by

requiring Middletown to expeditiously pursue satisfaction of its need within COAH's administrative process

As stated previously, one of the reasons COAH finds accelerated denial inappropriate at this time is Middletown's offer to implement the uncontested portions of its plan so that affordable housing can be provided immediately. COAH views this as an expression of Middletown's good faith. While COAH would like to accept Middletown's offer and require it to implement the major provision of its plan, the already approved 500 unit RCA, the Fair Housing Act prevents COAH from issuing such an Order. N.J.S.A. 52:27D-312(b) allows a municipality to enter into a RCA after it has received substantive certification. Since Middletown obviously has not received substantive certification, COAH cannot order Middletown to implement the RCA. COAH notes, however, that it approved the RCA in 1988 and the approval was partially based on the New Jersey Housing and Mortgage Finance Agency's finding of project feasibility. This finding could become outdated and it is possible COAH may have to reconsider its approval. Thus, COAH cautions Middletown to move expeditiously since it is possible that the RCA could be jeopardized by any delays. Accordingly, it is in Middletown's best interests to move quickly.*

COAH now turns to Middletown's argument that its obligation should be capped somehow despite the invalidation of N.J.A.C. 5:92-7.1(b). Throughout most of COAH's process, Middletown has been working with this 1,000 unit obligation. Now that the Appellate Division has invalidated the cap and the New Jersey Supreme Court has refused to hear the case, Middletown's obligation is the uncapped 1,850. COAH at this time sees no need to adopt regulations that establish another cap. The cap has been invalidated and Middletown now stands with every other municipality

* Further, since COAH cannot order Middletown to implement the major uncontested portion of its plan, it will not order the smaller component to be implemented.

in that it must devise a plan to address its full precredited need. Since Middletown is on the same footing as all other municipalities, Middletown is permitted to claim credits and adjustments under existing regulations. In this way, Middletown can seek to reduce its number. COAH does not agree with the Public Advocate's suggestion that COAH prohibit Middletown from taking any allowable credits or adjustments. COAH sees no reason to selectively prohibit Middletown from exercising rules available to every other municipality in the State.

COAH recognizes that since Middletown now must address its full precredited need of 1,850, it will need some time to prepare its plan. COAH finds that five months is a reasonable time. The five months corresponds to the time initially permitted by the Fair Housing Act.

COAH expects that Middletown will utilize the five months well and submit a reasonable plan for review. After the plan is submitted, COAH will entertain an argument to phase in the implementation of the plan. It should be noted, however, that a willingness to hear an argument does not indicate a willingness or a commitment to grant any relief from COAH's rules.

Finally, COAH notes that it retains the authority to accelerate denial and thus if Middletown fails to act expeditiously or in a manner designed to promote the goals of the Act, COAH may issue another Order to Show Cause.


Charles Griffiths, Chairman

Dated: *May 1, 1991*

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