

AQN ASSOCIATES, INC.)
Petitioner)
)
v)
)
FLORENCE TOWNSHIP,)
BURLINGTON COUNTY)
Respondent)

COAH DOCKET NO. COAH 91-307
OAL DOCKET NO. CAH 6062-90

OPINION

On April 11, 1991, Solomon A. Metzger, ALJ issued a written Opinion and Order in response to motions before him on the scope of the Office of Administrative Law (OAL) hearing. He found that the subject of the hearing involved only those issues the Council on Affordable Housing (COAH) specifically transferred for hearing rather than the entire plan as AQN had argued. Additionally, he ruled that since the economic feasibility of Florence's plan was transferred and the plan included a RCA between Florence and Pemberton, the economic feasibility of the RCA therefore, was part of the issues transferred.

Florence sought interlocutory review of the part of the decision in which the ALJ concluded that the economic feasibility of the RCA was at issue. Florence argued that COAH already had reviewed and approved the RCA, which review necessarily included the economic feasibility. Florence argued that the RCA approval constituted a final agency action which is not reviewable by the OAL, and asked COAH to reverse the ALJ's decision as it pertained to the RCA. Florence asked COAH to affirm the ALJ's decision in all other regards.

AQN asked COAH to expand the scope of the hearing to essentially place the entire plan at issue rather than those specific unresolved objections COAH referred for hearing. AQN urged COAH to accept the dicta of the ALJ that such a hearing would best serve COAH's interests. AQN also argued that the ALJ was correct in ruling that the economic feasibility of the RCA was at issue.

After consideration of the papers submitted, as well as the ALJ's Opinion, COAH finds that it is not appropriate to expand the scope of the

hearing as AQN urges. The entire plan and review thereof is not automatically transferred to the OAL simply because there are unresolved objections. Only the factually disputed unresolved objections are transferred.

Anyone is allowed to file objections to a municipality's petition for substantive certification, N.J.S.A. 52:27D-314. If mediation is unsuccessful, then COAH must transfer to the OAL only the unresolved objections that raise factual disputes. Hills Development v. Bernards Tp., 229 NJ Supr 318 (App. Div. 1988). COAH is not required to refer the entire plan. The entire focus of N.J.S.A. 52:27D-315 is to resolve objections. Thus, it follows that only unresolved objections are susceptible to transfer. Of course, if there is no factual dispute, there is no need for transfer, as COAH can resolve those objections without an evidentiary hearing as it did in this case. Certainly, if an objection is not properly raised before COAH, it cannot be raised in the OAL. Any other result would defeat the purpose of N.J.S.A. 52:27D-315 since the Fair Housing Act intends for objections to be resolved in the first instance in mediation.

After consideration of the papers filed and the ALJ's decision, COAH finds that the economic feasibility of the RCA between Florence and Pemberton is not one of the issues transferred, as COAH already has approved the RCA. Initially, COAH apologizes for any confusion caused by its transfer. The transfer did not specifically exclude the RCA from financial feasibility issue because COAH thought its resolution approving the RCA answered all questions.

In this case, in accordance with the Fair Housing Act's directives, COAH referred the Florence/Pemberton RCA to the required agencies. The Burlington County Planning Board found the RCA to be in accordance with sound planning principles and also found the proposed housing to be within convenient access to employment opportunities. Likewise, the HMFA found the RCA to be feasible. Consequently, in accordance with N.J.S.A. 52:27D-312, COAH approved the RCA. There was nothing to prevent COAH from conducting this review. COAH, therefore, through this approval, has removed any disputes to the RCA and the RCA no longer is an issue.

Notwithstanding, contrary to AQN's claims, AQN did not raise the economic feasibility of the RCA. AQN's objections to economic feasibility focused on Florence's proposed municipal construction project which COAH did transfer for hearing. As evidenced by AQN's objections and submissions throughout the administrative process, AQN's main objection to the RCA focused on the overall concept of RCAs as opposed to the particular method for financing this RCA. AQN consistently argued that COAH should not allow a municipality with a relatively small fair share obligation, such as Florence, to transfer 50 percent of its fair share through an RCA. On this point, AQN argued that the RCA allows a municipality to avoid providing units in town and, therefore, does not integrate affordable units with market units in Florence. AQN also objected to the RCA claiming that the legality of this technique was questionable in light of the Public Advocate's appeals challenging certain RCAs. These constituted AQN's objections to the RCA in this case.*

COAH resolved these objections in the Post Mediation Status Report. COAH will not reiterate the responses in detail but instead refer all parties to that Report. Briefly, after review of these objections, COAH concluded an evidentiary hearing was not necessary since the objections did not raise disputed facts. Essentially, COAH found that the reasons AQN advanced to challenge the RCA were insufficient and rejected AQN's position.

In its papers supporting this Motion, AQN attacked the RCA, claiming that Florence's intent to bond is invalid because the voluntary developer contributions Florence anticipates to write down the cost of the bonds will not be realized and Florence will have to raise taxes to cover the costs. Presumably, this is the economic feasibility objection AQN now has to the RCA. AQN, therefore, argues that the hearing should include this issue. Obviously, if an objection is not raised, COAH is under no obligation to have that issue included in a hearing simply because the party chooses to raise it at the OAL. COAH is only required to transfer

*The Appellate Division recently affirmed COAH's approval of the RCAs that were the subject of the Public Advocate's appeal.

for hearing factually disputed unresolved objections. Nevertheless, even assuming for the sake of argument, that AQN raised this argument as part of its objections, it does not raise a factual dispute that would require transfer to the OAL.

Florence has decided to bond. With that decision comes the reality that the bonds must be repaid and the developer's contribution may not be realized. In any event, Florence will have to repay the bonds. That is a municipal decision which Florence has freely undertaken. COAH followed its normal practice when a municipality says it will bond to provide for its fair share. Florence provided COAH with a letter from bond counsel, dated February 20, 1990, which indicated that Florence has sufficient capacity to bond for the RCA. The bonding capacity is undisputed. Thus, again, there is no factual dispute.*

AQN also points out it has attacked Florence's actions in bonding for the RCA in court and, therefore, the matter should be referred as part of the OAL hearing. The Attorney General's Office issued an Opinion dated January 12, 1988, which indicates that municipalities may bond for costs of an RCA. The Law Division has upheld Florence's actions. There are no factual disputes here either. If the Appellate Division finds that Florence's bonding is illegal, then Florence will have to address that change in fact in relation to its plan. At this time, there is no factual dispute that requires an evidentiary hearing.

In response to COAH's May 10, 1991 decision, by letter dated May 16, 1991, AQN argues that it did raise the economic feasibility of the RCA. AQN relies on three letters dated May 15, 1989, September 18, 1989 and May 22, 1990 in support of its arguments. These letters do not demonstrate that AQN challenged the economic feasibility of the RCA. To the contrary, they show that AQN failed to raise that issue.

*Florence's decision to use its bonding capacity first for the RCA coupled with the amount of its capacity did raise a question as to whether Florence had sufficient capacity left to help pay for its municipal construction project. AQN objected to the economic feasibility of this municipal project and COAH did refer that issue for hearing.

In the May 15, 1989 letter, responding to the Mediation Report, AQN simply stated "[t]he Public Advocate's Office is presently challenging the legality of RCA's in a judicial action presently pending before the New Jersey Supreme Court, Appellate Division." This is the only complaint to the RCA. In the September 18, 1989 letter, AQN again reiterates the possible illegality of RCAs because of the Advocates challenge and additionally argues that the plan "...is overly dependent upon regional contribution agreements" and does not integrate affordable units with other units in town, in part because of the RCA. AQN's May 22, 1990 letter essentially attacks Florence for failing to reach an agreement with it to include AQN's site in the plan. This letter does generally raise, in one sentence, Florence's anticipation of developer contributions. The RCA, however, is not mentioned in this sentence. The only reference to the RCA is AQN's philosophical dispute with Florence's use of an RCA. Even if this sentence could somehow be interpreted to be an objection to the economic feasibility of the RCA, as discussed previously, it does not raise a factual dispute for which an evidentiary hearing is necessary.

For the reasons set forth herein, as well as those given orally at the May 10, 1991 public meeting and the May 10, 1991 letter of Douglas Opalski, COAH Executive Director, COAH denies AQN's motion to expand the scope of the hearing and grants Florence's motion.


Charles Griffiths, Chairman

DATED: June 5, 1991.

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