

SIDNEY KUCHEN AND THE )  
ESTATE OF EVELYN FISHER )

COAH DOCKET NO. 96-803

v. )

OPINION

THE TOWNSHIP OF FRANKLIN )

Sidney Kuchin and the Estate of Evelyn Fisher (Kuchin and Fisher) filed a motion with the Council on Affordable Housing (COAH) on an emergent basis requesting that COAH enjoin Franklin Township, Somerset County, from rezoning Kuchin and Fisher's property from an inclusionary to a non-inclusionary zone. Kuchin and Fisher also requested in the motion that COAH order the township to enter into mediation with Kuchin and Fisher concerning the township's proposed fair share plan and the site's zoning. The mediation request was based upon Kuchin and Fisher's contention that the township failed to provide them with notice pursuant to N.J.A.C. 5:91-3.5 of Franklin's petition for substantive certification. The township objected to the motion for an injunction contending that no irreparable harm would come to Kuchin and Fisher if the ordinance was adopted, and also cross-moved for COAH to waive any notice requirements of N.J.A.C. 5:91-3.5 with which the Township may have failed to comply. This cross motion was based in part on a COAH staff directive to the township that it was required to provide notice to the owners of certain sites under N.J.A.C. 5:91-3.5.

On August 13, 1996, the date upon which Franklin was scheduled to consider the ordinance that prompted Kuchin and Fisher's motion, the Council met in an emergency phone meeting and denied the motion to enjoin the township from adopting the ordinance. The Council did, however, order the township to continue to comply with the terms of the substantive certification issued by the Council on September 28, 1987. On August 13 the Council also postponed consideration of the remaining motion requests and asked COAH staff to prepare a memo as to the status of the Kuchin and Fisher property in Franklin's 1987 fair share plan, as well as Franklin's 1995 fair share plan. A COAH staff report drafted by Monica Etz was presented to the Council at its October 2, 1996 meeting. The Council considered the motions of Kuchin and Fisher and the township, and for the reasons discussed below denied Kuchin and Fisher's motion for notice pursuant to N.J.A.C. 5:91-3.5 and for mediation, as well as the township's cross-motion for a waiver of the requirements of N.J.A.C. 5:91-3.5.

#### Background

Franklin Township, Somerset County, first received substantive certification from COAH on September 28, 1987 and received interim certification on November 10, 1993. Franklin petitioned COAH for substantive certification of a fair share plan addressing its 1987-1999 cumulative obligation on March 6, 1995.

Franklin's cumulative 12-year obligation is 819 units, including a 53-unit rehabilitation obligation and a 766-unit new construction obligation. A careful review of the plan shows that Franklin has met its 12-year obligation and that its calculated need is zero. The township published notice of its petition on March 9, 1995. The publication of notice initiated a 45-day comment period which ended on April 24, 1995. There was one objector, J. DuFour & Associates and the Providence Corporation, the contract purchasers of Block 11.01, Lot 10.01, which jointly submitted the objection. Mediation concluded with a draft agreement between the parties.

### The Contentions of the Parties

#### Kuchin and Fisher

Kuchin and Fisher supported its motion with a certification written by Arthur Bernard, P.P. According to his certification the Kuchin and Fisher properties (Block 11.01, Lots 15 and 16) are located in Franklin's CR Zone, which permits residential development at a density of eight units per acre with a 15 percent setback for affordable housing. According to Bernard, the proposed amendment to Franklin's zoning would change the zoning designation on the Kuchin and Fisher property to RR-3, permitting single-family detached dwellings with a minimum lot size of one unit per three acres. Bernard also stated that the Kuchin and Fisher properties were included in Franklin's certified first-round fair share plan and that, as a result: (1) Franklin Township could not "unilaterally" change the zoning on the Kuchin and Fisher sites and (2) Kuchin and Fisher were entitled to notice of the township's petition for substantive certification. Bernard argued that because of the lack of notice, Kuchin and Fisher were not provided the opportunity to participate in mediation on the proposed plan. In addition, Bernard noted that prior to the petition for substantive certification of its second-round plan, Franklin has amended its sewer service area to eliminate the Kuchin and Fisher site from the Township's sewer service area.

#### Franklin Township

Franklin submitted a certification of Ellen Ritchie, P.P., the planner for Franklin, which noted that the CR zone was referred to in the township's first-round plan as consisting of two phases. Phase I contained 248 acres and was zoned to allow multi-family development at a setback of 15 percent. Phase II of the CR zone contained 316.5 acres not contiguous to Phase I. As set forth in the township's first-round plan:

This area is to be rezoned R-R single family residential. The township views this area to be available for development of affordable housing in accordance with applicable COAH rules and regulations in the successive conformance period (1994-1999). The township neither proposes nor seeks formally or informally certification of the Phase II area

to meet post 1994 needs. (Franklin Township fair share plan, p.14; emphasis added)

Affordable units created in either Phase I or II of the CR zones were in excess of the township's first-round fair share number and, as noted in the township's proposed second-round plan, are not needed to address the Township's 1987-1999 cumulative obligation. According to Ritchie, the Kuchin site was located in Phase II of the CR zone and, therefore, was not included in the township's first-round plan. In addition, Ritchie states that the Fisher property is in the R10-A Zone and is not affected by the proposed rezoning. Therefore, it was Franklin's position that the Kuchin and Fisher motion should be denied.

Further, Franklin argued that the certification of Arthur Bernard should be excluded from consideration by COAH because Bernard, the former Acting Executive Director of COAH, was the mediator of Franklin's first round fair share plan. His certification was, therefore in violation of the state's conflict of interest statute, argued Franklin. Because Kuchin and Fisher relied solely on the Bernard certification, and because COAH could not accept Bernard's certification, Franklin took the position that the Kuchin and Fisher's motion must be dismissed as unsubstantiated.

#### ANALYSIS

Based upon the conclusions of the report of Etz to the Council dated October 2, 1996, which is attached and which is incorporated by reference, the Kuchin and Fisher property is currently located in three different zones: 1.37 acres are zoned R10-A, 32 acres are zoned C-R and 36.2 acres are zoned RR-30. The Kuchin and Fisher property is not included in Franklin's 1995 fair share plan. These conclusions are important in addressing the contentions of the parties and in disposing of the following issues raised in the motion and cross-motion.

Should Kuchin and Fisher have received notice pursuant to N.J.A.C. 5:91-3.5?

N.J.A.C. 5:91-3.5 states in its entirety:

5:91-3.5 Owners of sites designated for low and moderate income housing.

At the time it files its petition for substantive certification, a municipality shall provide the Council with the names and addresses of the owners of record of those sites designated in its housing element and fair share plan for low and moderate income housing. The owners of sites designated in the municipal submission shall be given individual written notice by the Council of

the filing of the petition, may participate in mediation and shall have the rights granted to objectors of the municipal submission.

The Etz report concludes that in Franklin's first round certification, the Kuchin and Fisher property was included in Phase II of the C-R zone, which required a 15 percent setaside for affordable housing. The 1987 housing element stated relative to Phase II:

Phase II...is to be rezoned R-R single family residential. The Township views this area to be available for development of affordable housing in accordance with applicable COAH rules and regulations in the successive conformance period (1994-1999). The Township neither proposes nor seeks formally or informally certification of the Phase II area to meet post 1994 needs.

Therefore, the 316.5 acres of Phase II land was not included as providing affordable housing in the 1987 fair share plan, even though the land was zoned for an affordable housing set-aside. The reason for this was that the township was able to meet and exceed its affordable housing obligation with four inclusionary developments. Also, there was no sewer available to the C-R zoned property.

Franklin's 1995 plan does not refer to "Phase II" of the C-R zone, but does refer to Phase I as the "northern" C-R zone. A portion of the Kuchin and Fisher land, 36.2 acres, remains zoned C-R. The C-R zone continues to be zoned for affordable housing, with a 15 percent setaside. However, the Kuchin and Fisher property is not included in the 1995 Franklin plan, which does not need the C-R zoning to meet its new 12 year obligation, which the 1995 plan meets and exceeds.

From these above facts, the Council concludes that the notice requirements of N.J.A.C. 5:91-3.5 and N.J.A.C. 5:93-5.12(d) do not apply to the Kuchin and Fisher site. N.J.A.C. 5:91-3.5 requires notice to be provided to sites "designated" in a fair share plan to provide low and moderate income housing. The Kuchin and Fisher site is zoned C-R in what was called "Phase II" of that zone in 1987. All of Phase II was specifically excluded from the 1987 Franklin plan and is not mentioned in the 1995 plan. Therefore, the notice requirements of N.J.A.C. 5:91-3.5 clearly do not apply to the Kuchin and Fisher site. Similarly, the provisions of N.J.A.C. 5:93-5.12(d), which require notice to owners of sites included in the prior plan that are being removed from the new plan, do not apply to Kuchin and Fisher because their site was not in the prior plan. Therefore, the Kuchin and Fisher motion request that they be given notice, allowed to object to the Franklin plan and to mediate their objections is denied.

Should owners of properties in Phase I have been given notice pursuant to N.J.A.C. 5:91-3.5?

Franklin's 1987 housing element and fair share plan with regard to Phase I stated:

Phase I of the C-R district provides a total of 248 acres available and suited for high density multiple family development. This district requires a minimum of 15% of all multifamily units to be affordable and occupied by low and moderate income households.

COAH's September 29, 1987 resolution granting substantive certification did not specifically mention the Phase I properties or their C-R zoning, although the COAH staff report which accompanied the resolution does refer to the excess zoning of the C-R zone.

Franklin's 1995 housing element and fair share plan states with regard to the Phase I properties:

The 173 acres in the C-R and GB zones are not necessary to validate Franklin's cumulative 1987-1999 obligation at zero. However, these acres could yield additional low/moderate income units. The zoning in place is being revisited to see if the zoning conforms to N.J.A.C. 5:93-3.5. Once the review is completed, Franklin will make a decision to retain the existing zoning or to modify the zoning.

Again this zoning is not necessary to certify a zero fair share obligation for the 12 year period from 1987-1999.

The requirements of N.J.A.C. 5:91-3.5 provide that sites "designated in the municipal submission" to provide low and moderate income housing must be given individual written notice of the petition by the municipality. The owners of the sites in these 173 acres of Phase I C-R zoning from the 1987 plan were not given such notice when Franklin petitioned in 1995 and Franklin in its cross-motion asks that the Council not require the township to provide notice to the Phase I property owners.

The Phase I properties were included in Franklin's 1987 certified plan as providing affordable housing, but the zoning was noted as not being necessary for certification. In 1987 the Phase I properties were characterized as excess and certification was not dependent upon their inclusion in the plan. However, Franklin did not specifically exclude them from the certification, as it did the Phase II properties. Also, although the provisions of N.J.A.C.

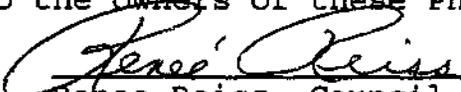
5:93-5.12(b) did not compel Franklin to include the Phase I sites in its 1995 plan because the Phase I sites did not "address" the 1987-1993 obligation, as required by the language of N.J.A.C. 5:93-5.12(b), Franklin chose to include the C-R zoned sites in its 1987-1999 fair share plan. The 1995 plan does not state that the Phase I sites will be counted toward Franklin's fair share plan. However, the Phase I sites are zoned C-R to be developed with a 15 percent affordable housing setaside. The Council could view the inclusion of the Phase I sites in the 1995 plan as merely informational, because there is a clear indication that the zoning would be "revisited". However, the Council believes that the sites were clearly "designated" for affordable housing in the plan such that the owners of the sites need to be given notice. Franklin clearly stated in its 1995 housing element that the C-R zoning may be changed and that the zoning "was not necessary" for certification, but it equally clearly included the sites with their affordable housing overlay in the plan, although as "excess".

Therefore, for all of the above reasons, the Council concludes that Franklin Township was required to notice the owners of sites zoned C-R in Phase I. The township's cross-motion therefore, is denied. It should be noted that in its submission before the Council the township raises conflict issues with regard to Bernard, the former COAH Acting Executive Director. The Township raises these conflict issues to prevent COAH from considering Bernard's certification written in support of Kuchin and Fisher. The township argues that Bernard, because of the alleged conflicts, should not have written the certification and, therefore, because of the conflicts, COAH should not consider the certification. Therefore, Franklin argues, COAH should deny the emergent motion and other relief requested by Kuchin and Fisher because it was based upon an impermissible certification.

In fact, the information in Bernard's certification is fully ascertainable from COAH's records and in the records and documents provided by the municipality. Bernard's certification is, therefore, not necessary for COAH to decide the matter.

#### Conclusion

The motion of Kuchin and Fisher for notice pursuant to N.J.A.C. 5:91-3.5 and for a period of mediation pursuant to N.J.S.A. 52:27D-315 is denied. The Township of Franklin's motion to be excused from the notice requirements of N.J.A.C. 5:91-3.5 is also denied for sites zoned CR in Phase I. Franklin must, therefore, provide notice to the owners of these Phase I sites.

  
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Renee Reiss, Council Secretary

October 23, 1996.  
date