

IN RE TOWNSHIP
OF MEDFORD

: NEW JERSEY COUNCIL ON
: AFFORDABLE HOUSING
: DOCKET NO. COAH 97-910

This motion was filed by Medford Affordable Housing, Inc. ("MAH") before the Council on Affordable Housing ("COAH" or "the Council") on November 18, 1996 to dismiss the petition for substantive certification filed by Medford Township ("Medford") in Burlington County. After several delays, which were requested by the parties, argument on the motion was heard by the Council at its meeting of May 7, 1997. Decision on the motion was postponed pending the outcome of mediation, which began in July, 1997 and ended without a final resolution of all objections on December 31, 1997. MAH' refiled and updated this motion to dismiss on December 1, 1997.

At its meeting of February 4, 1998, COAH voted to deny MAH's motion to dismiss Medford's petition for substantive certification. It also voted to forward all outstanding contested material issues of fact that arose out of mediation to the Office of Administrative Law for a hearing. This opinion memorializes that motion decision.*

* Attached to this opinion and incorporated by reference herein are Mediation Report III dated January 13, 1998 of Shirley M. Bishop, COAH Mediator, and Comments to Mediation Report III and Responses to Comments dated February 4, 1998 by Shirley M. Bishop. These reports document the mediation process. The Council adopts the reports' reasoning with regard to their recommendations and conclusions with regard to the transfer of material contested factual issues to the OAL. The reports also set out the history of Medford's compliance efforts with its Mount Laurel responsibilities while under COAH's jurisdiction, which the Council adopts as part of this opinion.

MEDFORD AFFORDABLE HOUSING, INC. (MAH)

On November 18, 1996, MAH filed this motion to dismiss Medford's petition for substantive certification. MAH is the contract purchaser of 278 acres in the northeast corner of Medford Township. The site is adjacent to the two Samost developments in the Medford plan. According to MAH, a small portion of the MAH property is in the sewer service area and in Planning Area 3 with the majority of the site in Planning Area 4. MAH stated in its initial brief that sewer services can be provided to its site and that the Mount Holly Sewerage Authority is willing to extend its sewer service to serve the MAH property. MAH stated that its site can also be served by water mains at one of the Samost properties and these public water mains can be easily extended, according to MAH. MAH proposed to provide at least 341 affordable units on its property. It claims that it can satisfy Medford's entire obligation on its site.

MAH's motion was filed simultaneously with the institution of the builder's remedy lawsuit against Medford by MAH. The suit to date has not gone forward because of the COAH process. MAH's position in its motion is that for ten years Medford Township "deliberately and consistently attempted to avoid its constitutional and statutory responsibility to provide a realistic opportunity for the development of affordable housing in the Township" and that, therefore, COAH should dismiss Medford's petition so that its builder's remedy suit can go forward.

In a letter brief accompanying the motion, MAH set out a history of what it claimed is Medford's non-compliance with its Mount Laurel responsibilities. MAH stated that it is ready, willing and able to satisfy Medford's affordable housing obligation. It claimed that public sewer is "immediately available" to service its property and that "if zoned properly" the property "will completely satisfy" the township's affordable housing obligation. Inextricably linked with MAH's argument and its ability to develop its site is its claim that its property can receive sewer services. MAH includes, as part of Medford's history of avoidance of its constitutional responsibility, its failure to provide sewer service to MAH's site.

MAH attached a copy of its builder's remedy complaint to its motion to dismiss. The complaint lists a series of allegations intended to demonstrate Medford's intent to avoid its Mount Laurel obligation. Included in this list are statements that: Medford issued 1,500 building permits since 1985 with no affordable housing component; Medford did not immediately petition for its first round obligation but delayed; years have elapsed since Medford's petition and there is no certification; the township did not respond to a COAH-imposed deadline of March 31, 1996; Samost had to sue Medford for delaying his development and increasing the costs of his development; and Medford has maintained it would not expand its sewerage treatment plan, would not adopt an overlay zone and does not intend to submit a plan for certification.

In MAH's reply papers, other arguments were presented in support of its motion. MAH claimed that Medford failed to meet the time deadlines of the Fair Housing Act and COAH regulations. MAH cited N.J.S.A. 52:27D-318 and stated that a January 31, 1996 letter sent by COAH staff requiring an amended housing element to be adopted at a public hearing and resubmitted to COAH by March 1, 1996 was actually a denial of Medford's petition or a denial with conditions under N.J.S.A. 52:27D-318 and -314.

MAH also included a planning and engineering report that alleged that only 220.5 acres in Medford's overlay zone were available for affordable housing and that this acreage would only yield 132 low/moderate income units. MAH also listed properties in the overlay zone that received development approvals without an affordable housing component. MAH also alleged that a density of four units per acre and a 15 percent setback in the overlay zone area was not possible because of open space requirements, roads, basins and environmental constraints.

MAH stated that its property meets COAH's criteria for an inclusionary site, except for its PA 4 designation. MAH's position is that there is no planning justification for a PA 4 designation given the land use patterns in the area and proximity of the site to high density development on Route 70. "There is no legal justification for COAH granting a waiver for the Eayrestowne site and not granting a waiver for the MAH properties."

MAH refiled its motion to dismiss on December 1, 1997 and updated the motion to include factual material and legal arguments

developed during the course of mediation. For example, MAH now suggested that there were two other ways in which sewer could be brought to MAH's site in addition to the provision of sewer from the Mount Holly Sewer Authority. MAH claimed that Medford could expand its plant to provide sewer to the site or that the site could be serviced by a private sewer plant. However, the motion was essentially the same as that filed in November, 1996. MAH's chief points were that public sewer and water are available to serve affordable housing projects in Medford, and that therefore the township is not entitled to a durational adjustment. Further, MAH claimed that Medford had not zoned sufficient land for affordable housing and that, after almost 12 years, Medford has still not submitted a petition for substantive certification with a plan that meets COAH regulations. Finally, MAH claimed that there was no statutory justification for COAH to give the township additional time to comply with the Fair Housing Act and COAH regulations. For these reasons, it continued to be MAH's position that COAH should dismiss Medford's petition for substantive certification or, alternatively, require Medford to designate new or additional areas for affordable housing or grant site-specific relief to MAH.

MEDFORD TOWNSHIP

Medford Township opposes MAH's motion. Medford replies that the Fair Housing Act offers municipalities a voluntary compliance process and that towns which voluntarily seek COAH's jurisdiction can formulate a fair share plan and not be subject to

a builder's remedy. Such fair share plans should take into consideration sound, comprehensive statewide planning and the State Plan, and development and growth should be in accordance with the State Planning Commission's plans, which do not encourage the extension of water and sewer infrastructure into planning areas (PA)4 and 5. Medford states that its plan is consistent with the State Plan policies by targeting higher density development in PA 2 and not targeting such areas in PA 4 or in the Pinelands. MAH's development proposal, argues Medford, is contrary to statewide and regional planning objectives set out in the State Plan. The MAH proposal, states Medford, is also contrary to the planning policies of Lumberton Township, the Burlington County Land Use Office and the Burlington County Farmland Preservation Board. Medford argues that it is participating in the COAH process in good faith and thus COAH should not consider accelerated denial or dismissal. Also, Medford states that its sewerage treatment plant is at capacity. Finally, Medford states that MAH petitioned Medford to amend its Master Plan in 1996 to increase density on the MAH site from one unit per four acres to one unit per two acres. No affordable housing was mentioned. The planning board denied the petition.

The Medford Township Planning Board also submitted a letter brief that reiterated the township's position. The planning board asked that COAH dismiss MAH's motion because COAH does not have jurisdiction to grant relief, because neighboring Lumberton Township is an indispensable party and because COAH does not have authority to resolve disputes between neighboring municipalities

with regard to the allocation of scarce resources. The Lumberton Township Planning Board adopted a resolution opposing the MAH development stating that the development would be adverse to the long range planning goals of Lumberton and to state policies.

DISCUSSION AND DECISION

In its briefs before COAH and in mediation, MAH has vigorously challenged Medford's Mount Laurel compliance efforts before COAH and, in particular, Medford's request for a durational adjustment to its fair share obligation because of the lack of infrastructure. After a careful review of the briefs filed by both parties in this matter, as well as Mediation Report III dated January 13, 1998 and the Comments to Mediation Report III and Responses to Comments dated February 5, 1998, it is the Council's decision that it will not dismiss Medford's petition for substantive certification of its housing element and fair share plan.

COAH does not believe that Medford has avoided its statutory and constitutional obligation to provide affordable housing in such a manner as would require COAH to dismiss its petition. Medford's long involvement with COAH began when the Fair Housing Act permitted a six-year filing without a petition. Thereafter, once the Fair Housing Act was altered to only allow a two-year filing, Medford did petition COAH for substantive certification and proceeded to work through the process, although not in the most expeditious manner. However, more recently,

Medford has complied with COAH requirements and has provided all necessary requested documentation. The Medford housing element and fair share plan are now in a form which could be ready for COAH action in the very near future if there were no outstanding challenge by MAH to Medford's requested durational adjustment and no offer by MAH of its land as an immediate site for affordable housing.

As is detailed in Mediation Report III attached, these two issues present material contested issues of fact which require a hearing at the Office of Administrative Law ("OAL"). Therefore, the Council will transfer MAH's objections to the Medford fair share plan to the OAL for a contested hearing with regard to the issues of Medford's requested durational adjustment and the suitability and approvability of MAH's site for an inclusionary development to provide affordable housing in Medford.

Therefore, for all of the above reasons, the motion by Medford Affordable Housing, Inc., for COAH to dismiss Medford's petition for substantive certification of its housing element and fair share plan is denied and the matter is transferred to the OAL for a contested hearing consistent with the recommendations of the mediator in Mediation Report III.


Renee Reiss, Secretary

DATED: 3/4/98