

IN RE TOWNSHIP  
OF MIDDLETOWN

: NEW JERSEY COUNCIL ON  
: AFFORDABLE HOUSING  
: DOCKET NO. COAH 97-911

This is a motion filed by Middletown Township ("Middletown") in Monmouth County requesting the following relief from the Council on Affordable Housing ("the Council" or "COAH"):

"1. The right of Middletown Township, the Middletown Township Planning Board and Ocino, Inc., the successor to Frank Vaccaro, to deliver affordable housing consistent with the site plan approval received by Ocino in March of 1997; and

2. Any other relief within COAH's powers to promote this objective including, but not limited to, any relief COAH may deem necessary to the terms of substantive certification of Middletown's affordable housing plan."

The motion is prompted by a long-standing controversy between Middletown and its neighboring Borough of Atlantic Highlands ("Atlantic Highlands") over the development for affordable housing of a site on the border of the two municipalities known as the Vaccaro site. The site was the subject of a 1993 mediated agreement signed by both municipalities and incorporated into COAH's May, 1994 grant of substantive certification. The motion concerns the mediated agreement and the March, 1997 Middletown planning board approvals for development of the site, which Atlantic Highlands in a prerogative writ suit, as well as in response to this matter, claims are at variance with the terms of the settlement agreement. By this motion, Middletown seeks COAH approval and support of the March, 1997 site plan approvals.

The motion was orally argued before the COAH board at its meeting of January 7, 1998. A short, unsuccessful period of mediation followed. For the reasons articulated below, the Council denies Middletown the relief it seeks in this motion.

#### BACKGROUND

Middletown was certified by the Council on May 10, 1994 with a fair share obligation of 1,000. Included in the Middletown plan was a site known as the "Vaccaro" site that was to yield 375 senior citizen residential units consisting of 281 market units and 94 low/moderate income senior rentals. This zoning was the result of a mediated agreement signed in 1993 by Middletown, Atlantic Highlands and Frank A. Vaccaro Associates. Also included in the mediated agreement was the condition that Vaccaro create and convey a conservation easement to Middletown; that no site plan contain more than 35 percent impervious coverage; that a free-standing non-residential building contain no more than 20,000 sq. ft. with no retail uses; that the first floor be limited to 17,000 sq. ft. and five percent of the gross floor area of each residential building and that planning board applications must be substantially consistent with the conceptual site plan attached to the mediated agreement.

The mediated agreement further states: "This Settlement Agreement may not be amended except in writing executed by all parties."

No activity occurred on this site from 1992 until the end of 1996. At that time, Ocino, Inc. entered into a contract to purchase the Vaccaro site for affordable housing and an assisted living facility. Ocino proposed to construct 375 senior rental units that would all be affordable, 92 units of assisted living and no commercial uses. On March 19, 1997, the Middletown Township Planning Board granted site plan approval for the 375 affordable senior rental units and the 92 units of assisted living. No written consent as required by the settlement agreement was obtained from Atlantic Highlands. Thereafter, Ocino filed applications for two rounds of 1997 Federal Low Income Tax Credits and for Balanced Housing funds for 126 senior rentals. Ocino did not receive funding.

Atlantic Highlands filed suit in Superior Court alleging a breach of the settlement agreement by Middletown Township. A second suit was filed by the Navesink Estates Condominium Association, Inc., Leland Soper, Donald Nelsen and Lenape Woods Coalition ("Navesink Estates") challenging the planning board's decision. The Borough of Atlantic Highlands requested the Superior Court to stay the COAH administrative proceedings in a motion initially scheduled to be heard on January 9, 1998 but not decided as of the date of this decision.

Middletown filed this motion as part of its response to the Superior Court litigations.

## THE MOTION

### MIDDLETOWN

In its motion, Middletown states that the approved project is "substantially similar" to the Concept Plan appended to the 1993 settlement agreement and that any changes "enhanced the project". Middletown states that the approved site plan contains no commercial office space, does not contain a 5,000 sq. ft. restaurant that was in the Concept Plan, increased the percentage of low/moderate income units from 25 percent to 100 percent, placed parking below the first floor of each building so as not to disturb the lot coverage and building height, inserted an assisted living facility instead of the office building and restaurant and changed the senior bedroom mix from mostly one bedroom to two bedrooms.

Middletown states that these changes would not damage Atlantic Highlands and further that the changes more effectively address Atlantic Highlands' original objections. In this approved project, Middletown says there is less traffic, less impervious coverage, less problematic commercial lighting and more green space.

Middletown argues that COAH has jurisdiction to determine whether Middletown has acted within the bounds of its certified housing plan and, if not, whether the township can exceed those boundaries. Further, Middletown states that no amendment to Middletown's certified plan is necessary because the newly approved project is within bounds of what should reasonably be permitted by the certified plan. Middletown states that the 281 market senior

units would have rented for rates at least near the low/moderate income affordability rates based upon the senior rental market in Middletown. However, Middletown argues that if COAH determines that an amendment is necessary, then COAH should consider the Ocino approval as minor and allow the motion process for an amendment, as provided in N.J.A.C. 5:91-13.1(c). Middletown states that since there is no change in site, no increase in density and no fundamental change in approach, this amendment request should be treated as minor rather than a fundamental or material change requiring a petition. See, N.J.A.C. 5:91-13.1(b). In support of this argument, Middletown claims that the only material changes found in the Ocino plan permit a higher percentage of senior units restricted to lower income households and that only limited changes were made to the original Concept Plan.

COAH should, therefore, argues Middletown, permit Middletown to implement the settlement agreement with the Ocino project in light of the facts and circumstances of this case. Circumstances have arisen where equities should dictate the result of the request rather than the letter of the law. In addition, the interests of low/moderate income households will be advanced. The Ocino project is superior from a planning perspective and there are greater safeguards as to the economic viability of the Ocino plan, according to Middletown.

#### BOROUGH OF ATLANTIC HIGHLANDS

Atlantic Highlands filed a civil action in Superior Court against Middletown, its planning board, Vaccaro and Ocino and has

also filed a brief in support of a motion for a stay of COAH's administrative proceedings. Atlantic Highlands submitted its court brief and notice to COAH as its response to Middletown's motion.

Atlantic Highlands' position is that the planning board approval violated both the Settlement Agreement and the requirements of the Municipal Land Use Law (MLUL) and that jurisdiction properly rests with the Court. In addition, Atlantic Highlands states that the Ocino plan is different from and not "substantially consistent" with the 1993 Concept Plan. Furthermore, no written amendment to the 1993 Settlement Agreement was ever signed by the parties as required by the agreement.

The borough states that the Ocino plan appears to meet the definition of a "dwelling unit" in the Middletown ordinance and would therefore exceed the density permitted by the 1993 ordinance of 18 units per acre. As a result, such a variance could not be granted by the planning board. In addition, the borough contends that the elimination of other uses of the site, which is zoned for four uses, requires a use variance which can only be granted by the zoning board.

Finally, Atlantic Highlands states that the Court is the appropriate forum for resolution of all issues in this matter with all of the claims and parties to the controversy joined in one suit for an appropriate resolution.

NAVESINK ESTATES CONDOMINIUM ASSOCIATION, INC., LELAND SOPER,  
DONALD NELSEN AND LENAPE WOODS COALITION

Navesink Estates filed a brief in opposition to Middletown's motion requesting that COAH deny Middletown's motion because the mediated agreement required an inclusionary development with both market and affordable units. Navesink Estates was not a signatory to the prior mediated agreement. In addition, Navesink Estates argues that Middletown cannot amend its plan by motion but rather must do so by petition because the Ocino plan is a material and fundamental change to Middletown's certification. Furthermore, under Middletown's zoning ordinance, the maximum density is 18 units per acre and the Ocino development proposes densities of 19.92 units per acre. As a result, Navesink Estates contends that the Ocino project violates substantive certification because the developer ignored the inclusionary aspect of the project.

Furthermore, according to Navesink Estates, the legal obligations from the settlement agreement must be honored. The public had the opportunity to participate in the original mediated agreement and the result was an inclusionary development: "Ocino is bound by its predecessor's commitments" and must abide by its terms of certification.

Navesink Estates also questions the realistic opportunity on a site without market units and compares the Ocino project to municipal construction requirements. Navesink Estates states that no Letter of Interpretation has been issued by the New Jersey Department of Environmental Protection (DEP) and CAFRA issues remain unaddressed thus questioning the developability of the site.

Navesink Estates also questions the lack of access to recreational facilities; the project design of six story buildings and the financing and marketing issues connected with a senior development containing 80 percent two bedroom units.

The Navesink Estates brief opposes the Middletown motion because it claims COAH's procedural rules have not been followed in that Middletown is requesting a substantial amendment to a certified plan, which must be by petition and because COAH's substantive regulations spell out the requirements for a municipally-constructed housing development (which Navesink Estates now considers this project). Navesink Estates also questions the feasibility of an all affordable project without market units; questions the two-time denial of funding from the Federal Low Income Tax Credit Program; questions if there is a permanent source of mortgage commitment; questions a review of the financial capability of the developer to complete the project and questions the developer's track record.

In conclusion, Navesink Estates states that there is no sound factual basis to amend Middletown's plan to designate the Ocino tract as 100 percent inclusionary and if Middletown wishes to pursue this avenue, it must do so by petition rather than by motion.

#### DISCUSSION AND DECISION

There is little question that the March 19, 1997 site plan approvals with regard to the Vaccaro site contained many changes from the mediated settlement agreement. Among these

changes were the elimination of planned commercial uses and the alteration of the 375 senior citizen residential units from a combination of market and affordable units to an all affordable unit project.

It is also very clear that the planning board made these changes without a written amendment to the settlement agreement signed by Atlantic Highlands, as Middletown agreed to do in the settlement agreement. Therefore, Middletown did not comply with the terms of the settlement agreement with regard to the alterations of the Vaccaro site plan. According to the explicit, unambiguous terms of the settlement agreement, Atlantic Highlands should have been consulted by Middletown with regard to the contemplated changes and the municipality's written agreement secured.

The Council has consistently supported and enforced the terms of mediated agreements made in conjunction with the COAH process and incorporated those agreements into the Council's grants of substantive certification. COAH believes that its support and enforcement of such settlement agreements is essential to the integrity of its process and to the provision of affordable housing in New Jersey. Therefore, it cannot grant the relief requested by Middletown because Middletown has not complied with the terms of its settlement agreement in that it did not seek or obtain Atlantic Highlands' written consent to the changes made to the Vaccaro site plan and approved by the Middletown planning board.

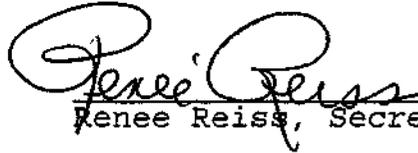
COAH reaches this opinion mindful that the site plan approved for the Vaccaro site would increase the amount of needed affordable housing that would be available to senior citizens. Further, COAH is mindful that such a change is not popular with the neighbors of the project or with Atlantic Highlands, as evidenced by papers filed by both of these parties in Superior Court and before COAH. Consequently, COAH is mindful of the possibility that Atlantic Highlands may continue to oppose the development of the Vaccaro project by withholding its written consent to any changes from the settlement agreement.

Therefore, if Middletown cannot obtain Atlantic Highlands' written consent to the new site plan for the Vaccaro site, Middletown may petition COAH to amend its fair share plan to include the new site plan contemplated for the Vaccaro site. The public notice required by this petition to amend the plan will give ample opportunity to Atlantic Highlands and all neighboring groups to object to Middletown's plans for development of the Vaccaro site and will also allow COAH to properly assess, formally, the new proposed plan for the site.

Finally, it should be noted that the contemplated affordable housing to be produced on the Vaccaro site, like all Mount Laurel housing is planned to meet a regional obligation. Therefore, all of a region's citizens and municipalities will benefit from such housing. Because of this, neighboring municipalities have been held to have an affirmative obligation to encourage and aid other municipalities in the provision of

affordable housing. See, Samaritan Center, Inc., et al v. Borough of Englishtown, et al, 194 N.J.Super 437 (Law Div. 1996).

Therefore, for these reasons, the New Jersey Council on Affordable Housing denies Middletown's motion.

  
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Renee Reiss, Secretary

DATED: *March 4, 1998.*