

Atlantic Site Developers, Inc..)	
and Robert Crimi, Sr.)	
)	COUNCIL ON AFFORDABLE HOUSING
)	DOCKET NO. 98-1002
v.)	
THE TOWNSHIP of EGG HARBOR)	
ATLANTIC COUNTY)	MOTION
)	DECISION

On January 28, 1998 the Honorable Carol E. Higbee, J.S.C., entered an order transferring the first count of a complaint filed in a builder's remedy law suit, Atlantic Site Developers, Inc. and Robert T. Crimi, Sr. v. The Township of Egg Harbor, et al., Docket No. ATL-L-2797-97, to the New Jersey Council on Affordable Housing ("COAH" or "the Council"). The first count of the complaint claims that Atlantic Site Developers, Inc. ("Atlantic") desires to develop its property in the Township of Egg Harbor ("Township") with a development of 386 mobile homes, with a 10 percent set-aside for low and moderate income units. Further, the complaint states that the Township did not file a housing element or fair share plan with COAH prior to the institution of the law suit. In the order of transfer, Judge Higbee ordered that the Council "...shall presumptively require the Township of Egg Harbor to include Plaintiff, Atlantic Site Developer's Inc.'s, site as a component of its Fair Share Plan pursuant to N.J.A.C. 5:91-3.6;...".

On February 23, 1998 a letter was sent by Shirley Bishop, Executive Director, COAH, to Mayor James McCullough, Mayor of Egg Harbor Township, informing him that pursuant to the order of transfer and N.J.A.C. 5:91-2.3 Egg Harbor must file an adopted

housing element and fair share plan with the Council within 60 days from the date of the court transfer, or March 30, 1998.

In response to the Bishop letter, Marc Friedman, Esq., representing the township, sent a letter dated March 25, 1998 in which he requested that the township be released from "the obligation to file a fair share plan as required by N.J.A.C. 5:91-2.3." In support of this request, Friedman stated that "...for a multitude of reasons plaintiff's site cannot possibly be a component of a fair share plan pursuant to N.J.A.C. 5:91-3.6(c)(1)." Further, he stated that plaintiffs' site "does not and will not" meet the requirements of N.J.A.C. 5:91-3.6(c)(1) and that "...therefore, the process of formulating, enacting and gaining certification of a Fair Share Plan would be an unnecessary burden and expense to the taxpayers..." He requested that mediation on the fair share plan be conducted prior to the imposition of the Council's requirement to submit a fair share plan. Alternatively, he requested a waiver of the 60 day time limit of N.J.A.C. 5:91-2.3 for filing a fair share plan after a court transfer and requested an extension of the time within which the township must file a fair share plan to July 27, 1998.

In response to Friedman's letter, a letter was sent by Renee Reiss, Council Secretary, stating that the Council would treat the requests in the March 25, 1998 letter as a motion on short notice. The Reiss letter set up a schedule for papers to be filed for that motion. Further the letter indicated that the motion would be scheduled for COAH's monthly meeting of May 6, 1998.

Friedman supplemented his March 25, 1998 letter with a submission dated April 8, 1998. He argued that N.J.A.C. 5:91-3.6 states that "the Council shall presumptively require" a municipality to include a site as a component of its plan only if the site is available, approvable, developable and suitable. N.J.A.C. 5:91-3.6(c)(1). He then stated that the plaintiffs' site cannot meet these statutory criteria because the site has no sewer services and water services are approximately one mile way. Also, the township claimed that title to the land is encumbered by an over \$5 million judgment. Further, the site is located in a CAFRA low growth zone and the requested development for 376 mobile homes would constitute a doubling of the greatest density levels permitted under Pinelands Comprehensive Management Program rules. Moreover, the letter states that although the township has adopted a housing element to its master plan in 1996, the township chose not to proceed under the Fair Housing Act because of its conclusion that it had sufficient housing available to low and moderate income individuals. Therefore, the township does not wish to formulate a fair share plan and takes the position that prior to the township meeting a requirement to formulate and submit a fair share plan, the plaintiffs should be made to prove that their site meets the statutory requirements to be presumptively included in any fair share plan.

A response was filed by Robert L. Taylor, representing Atlantic, on April 20, 1998. Taylor stated that the housing element submitted by the township with its April 8 letter, which the township stated was adopted in 1996, was not a valid element

because of the Township's claim that it constitutes an updated 1988 housing element. The 1988 housing element was never duly adopted by the municipality, claims Taylor, and there are no available records establishing that the 1988 housing element was ever adopted by the municipality as part of its master plan. Therefore Atlantic believes that the "1996 update" is invalid because the 1988 element it purports to update was never duly adopted. In fact, Taylor requests that COAH "investigate the legitimacy" of the 1988 housing plan, and argues that it constitutes a "fraud" on the citizens of the township. Finally, Atlantic states that it is prepared to develop 70 low and moderate income housing units on its site and objects to the Township being given any extension to file its fair share plan.

Two letters were also sent by pro se plaintiff Robert Crimi, Sr. in response to the township's motion. Crimi is the president and CEO of Atlantic, as well as a plaintiff in the Superior Court litigation. In his letters Crimi also set out what he claims is the history of the township's failure to adopt a housing element as a component of the municipal master plan and to formulate a fair share housing plan. He objected to the characterization of his site as not being a suitable site to provide affordable housing and stated that the site was available, approvable, developable and suitable. Finally, he objected to the requested extension of time which the municipality requested to file a fair share plan. He stated that the history of the matter convinced him that the township was just attempting to delay and

that "Egg Harbor Township will never comply at the end of the extension if granted".

On April 28, 1998 Friedman sent a letter of response with exhibits on behalf of the township. He stated that plaintiffs' issues with regard to the adoption of the 1988 housing element were previously litigated during a 40 day trial in Township of Egg Harbor v. Robert Crimi, Sr. et al., Docket No. C-159-91. In that litigation, the Township states, the plaintiffs raised and the court rejected plaintiffs' argument that because the township did not properly adopt in its November 1988 master plan, it has no authority to enforce its current zoning ordinances. Also, the township reiterated its claim that plaintiffs cannot develop their site without paying a \$5.2 million judgment that has been levied against it. Also, the township claimed that no development on the site can occur until the removal of a lake which now covers almost 50 percent of lot 7 of the site. The township reiterated these arguments to demonstrate that the site does not meet COAH's threshold requirements to be included in the township's fair share plan.

The Council has reviewed all of the submittals made by both parties to this matter. Further, the Council has reviewed Judge Higbee's January 28, 1993 order transferring this matter to the Council. That order requires the township to include the plaintiffs' site as a component of its fair share plan. The Council has no jurisdiction to grant the township relief from this order. If the township wishes to seek a reconsideration of that order before the court, it may do so. However, the Council cannot

and will not ignore this order of the Superior Court or grant the township relief from it. Therefore, the township must, pursuant to that order, file a fair share plan and include the Atlantic site in the filed plan.

The township's argument that N.J.A.C. 5:91-3.6 only requires plaintiff's site to be presumptively included in the fair share plan if that site is available, approvable, suitable and developable ignores Judge Higbee's order and the fact that the township is the defendant to a builder's remedy suit. However, the township should not misunderstand the COAH process or the meaning of the word "presumptively". While the township is required by COAH's rules and Judge Higbee's order to "presumptively" include the plaintiff's site in its fair share plan, if in fact the township can demonstrate that the site is not available, suitable, approvable and developable, the Council's rules do not require that the site to be a component of any final fair share plan approved by the Council. Moreover, in the COAH process the township would be given an opportunity to demonstrate that it has already fully met its obligation to provide low and moderate income housing in the township, as it argues it has in its submission to the Council. However, in order for the COAH process to begin, a fair share plan must be filed by the township.

Plaintiffs challenge the legality of the current housing element adopted by the township and state that the 1996 amended housing element is invalid because the 1988 housing element was never duly adopted. However, these issues are irrelevant at this point in the COAH process. While plaintiff's arguments may be

appropriate in the context of its builder's remedy suit, at this point, the township has been ordered to file a fair share plan. When the township files its fair share plan with COAH, that fair share plan must be properly adopted. N.J.A.C. 5:91-3.2, -2.2. The township has not filed anything with COAH at this point, so it is premature for plaintiffs to argue about the validity of the submission.

Finally, the township requests an extension to July 25, 1998 to file a fair share plan with the Council. The township has been on notice since Atlantic's suit was filed that it would have to formulate a fair share plan. COAH rules require that within 60 days of a court transfer, a municipality must file an adopted housing element and fair share with the Council. N.J.A.C. 5:91-2.3. Given the fact that a defendant municipality to a builder's remedy suit should know from the outset that a fair share plan will have to be formulated in response to the litigation, the Council feels that its requirement of a filing 60 days after the date of court transfer is sufficient time for any municipality to file a fair share plan. In the Council's experience, numerous municipalities have been able to comply within this requirement. Consequently, the Council will not grant to the township the requested extension to July 27, 1998. However, since the township has not complied with the Council's rule to date and has not filed a fair share plan within the 60 days provided by N.J.A.C. 5:91-2.3, the Council will grant a modest extension to the close of the business day (5 o'clock EDT) on June 1, 1998 for the filing of an adopted housing element and fair share plan by the township. If a properly adopted

fair share plan is not filed by the township on this date and if the filed plan does not comply with the requirement of the transfer order that the plaintiffs' site be presumptively included in the plan, COAH will dismiss this matter and allow the court to resume jurisdiction over the township's Mount Laurel compliance efforts.


Renee Reiss,
Council Secretary

Dated: May 6, 1998