

) NEW JERSEY COUNCIL ON
) AFFORDABLE HOUSING
 IN RE TENAFLY BOROUGH:)
 ORDER TO SHOW CAUSE) COAH DOCKET NO. 99-1103
)
) DECISION

On March 31, 1999, the New Jersey Council on Affordable Housing ("Council" or "COAH") issued an Order to Show Cause directed to Tenafly Borough, Bergen County ("Tenafly" or "Borough") directing the Borough to show cause why COAH should not dismiss the housing element and fair share plan of Tenafly that was adopted by Tenafly on December 29, 1998 and filed with COAH, along with a petition for substantive certification, on January 22, 1999. The reason for the Order to Show Cause was that the adopted plan did not presumptively include an approximately five acre site, known as the East Clinton Avenue site, as a site for an inclusionary housing development in the Tenafly housing element/fair share plan, as required by N.J.A.C. 5:91-3.6(c) and included in a COAH directive to the Borough dated December 4, 1998. The Order to Show Cause was returnable before the Council at its regularly scheduled meeting of May 5, 1999.

The Borough of Tenafly has a 1987-1999 cumulative precredited need of 181 units of affordable housing, including a 23-unit rehabilitation component and a 158-unit new construction component. On July 21, 1997, Tenafly was sued for exclusionary zoning by Tenafly Associates, L.L.C. ("Tenafly Associates"), owner/developer of the East Clinton Avenue site. There was no Tenafly housing element and fair share plan on file with COAH at the time. The suit was dismissed without prejudice on November 21, 1997.

On November 25, 1997, Tenafly petitioned COAH for substantive certification of an adopted housing element and fair share plan. The East Clinton Avenue site was not included in the filed fair share plan. Tenafly Associates filed an objection to

the plan with COAH during the 45-day objector period. Simultaneously, Tenafly Associates appealed the dismissal of its exclusionary zoning suit to the Appellate Division. While the appeal was pending, COAH conducted a mediation between Tenafly and Tenafly Associates that began and ended on July 15, 1998.

On December 2, 1998, the Appellate Division reversed the trial court's dismissal of Tenafly Associate's suit and issued an opinion that held that the suit should have been transferred to COAH, citing N.J.A.C. 5:91-3.6(c), N.J.A.C. 5:91-6.3 and N.J.A.C. 5:91-6.4 in its decision. On December 23, 1998, pursuant to the appellate decision, jurisdiction of the matter was transferred to COAH. On January 22, 1999 Tenafly filed a second petition with COAH that included the amended housing element and fair share plan that was adopted on December 29, 1998. The East Clinton Avenue site was not included in the fair share plan as a site for inclusionary zoning. Rather, Tenafly had included the site as an available site in its vacant land adjustment calculation. The Order to Show Cause was issued in response to the non-inclusion of the East Clinton Avenue site in the fair share plan as a presumptive inclusionary site for affordable housing.

On May 3, 1999, Tenafly responded to the Order to Show Cause, with a letter signed by its attorney and an attached wetlands evaluation prepared by C & H Environmental, Inc. with regard to the East Clinton Avenue site; an attached certification of Nicholas Rotonda, a licensed professional engineer with regard to the suitability of the East Clinton Avenue site for low and moderate income housing; and an attached certification of Peter L. Abeles, P.P., further evaluating the East Clinton Avenue site. It was Tenafly's position in its letter that N.J.A.C. 5:91-3.6(c), by using the term "presumptively" did not require that the East Clinton Avenue site be included in Tenafly's fair share plan as a site for affordable housing. Further, the Borough stated "that the property in question is inappropriate for development of low and moderate income housing, and that it should be excluded from

consideration." It was in furtherance of the municipality's position that the site should be excluded from consideration as a site for low and moderate income housing that Tenafly submitted the three evaluations of the wetlands consultant, the engineering consultant and the municipal planner. Based upon these reports, it was Tenafly's position that it had rebutted the COAH rule's presumption that the East Clinton Avenue site should be included in the municipal fair share plan and concluded "that...it is abundantly clear that there is cause to exclude this entire site from consideration."

At oral argument before the Council on May 5, 1999, Tenafly reiterated its position articulated in its May 3 letter that COAH's rules did not require it to include the East Clinton Avenue site in its fair share plan and that the site was not appropriate for low and moderate income housing. Also at the May 5, 1999, meeting a representative of Tenafly Associates stated that it had not received Tenafly's submission to the Council and therefore could not respond to it. However, during oral argument the representative, David M. Watkins, Esq., stated that the site had already received a wetlands permit from the New Jersey State Department of Environmental Protection ("DEP") with regard to the subject site and subsequently provided the authorization dated July 29, 1997 to the Council.

Also in response to the Council's Order to Show Cause, the attorney for the Great Atlantic and Pacific Tea Company, Inc. ("A & P"), which is also an objector to Tenafly's filed fair share plan, responded by letter that A & P would rely on its filed objection with regard to the Order to Show Cause. The attorney for A & P was also present on the return date of the Order to Show Cause.

After careful consideration of the materials submitted in response to the Council's Order to Show Cause, including Tenafly's

letter of May 3, 1999 with its attached certifications and reports, and after careful consideration of the statements made by all parties at oral argument on May 5, 1999, it is this Council's decision that Tenafly must file an amended housing element and fair share plan with COAH within 45 days from the date of this decision that includes the East Clinton Avenue site as a presumptive inclusionary site for affordable housing.

Once Tenafly has filed a housing element and fair share plan that includes the East Clinton Avenue site as a presumptive inclusionary development for affordable housing, at the minimum density and setback provided at N.J.A.C. 5:93-5.6(b)1, the Borough's plan will be subject to mediation. Then, pursuant to N.J.A.C. 5:93-6.4(c) the Borough may contest the suitability of the East Clinton Avenue site and request a hearing on site suitability before the Office of Administrative Law ("OAL"), based upon certifications and reports such as the ones Tenafly has submitted in response to the Order to Show Cause. If, after an OAL hearing, it is concluded by COAH that the East Clinton Avenue site is not "available, suitable, developable and approvable," then the site may be eliminated from Tenafly's fair share plan. Conversely, if after an OAL hearing the site is found to comply with COAH's requirements for an inclusionary site, then the site must be included in the fair share plan at a density and setback determined by COAH. However, because Tenafly was sued for exclusionary zoning without a fair share plan on file with COAH, the East Clinton Avenue site must presumptively be included in Tenafly's fair share plan prior to that plan being accepted for filing by COAH. This procedure is clearly set out in COAH's rules with regard to transferred cases, such as Tenafly's.

N.J.A.C. 5:91-2.3 clearly states that when a case such as Tenafly's is transferred to the Council by court order pursuant to §16 of the Fair Housing Act, "...the municipality shall file an adopted housing element and fair share plan with the Council within

60 days from the date of transfer. The municipal plan shall conform to the filing requirements of N.J.A.C. 5:91-3." The requirements for such a filing are found at N.J.A.C. 5:91-3.6(c) and state:

If an exclusionary zoning lawsuit is filed against a municipality prior to a municipal petition for substantive certification and the case is transferred to the Council by the court, the Council shall presumptively require the municipality to include the contested site as a component of its plan if:

1. The site is available, approvable, developable and suitable pursuant to N.J.A.C. 5:93; and
2. The municipality has not filed a housing element; or has filed a housing element but has not petitioned for substantive certification within 2 years of filing.

Such a municipality "...shall be deemed to have filed a petition for substantive certification when the Council accepts for filing the municipality's adopted housing element and fair share plan as required pursuant to N.J.A.C. 5:91-2.3." See, N.J.A.C. 5:91-3.2.

Once the Council has accepted the municipal housing element and fair share plan for filing, the procedures set out at N.J.A.C. 5:91-6.4 are to be followed. Once the petition is deemed to have been accepted, the Council staff "...shall prepare a COAH report requesting additional information to be filed with the Council within 60 days of receipt of the report or premediation report and circulated to the parties." The report shall indicate that "...an objector/litigant is presumptively entitled to site-specific relief." N.J.A.C. 5:91-6.4(b). The COAH report shall also determine if there are "problems" associated with the housing element and fair share plan and "While such problems are being addressed the Council shall schedule a mediation." N.J.A.C. 5:91-6.4(b). Only after mediation may a municipality "contest the suitability of an objector's site and request a hearing on the

suitability of the site before OAL." N.J.A.C. 5:91-6.4(c). Because such a municipality did not meet the requirements of the Fair Housing Act, the rule states that "...there shall be a presumption that the site is suitable and that the municipality will have the burden to show that the site is not suitable" at the OAL hearing. N.J.A.C. 5:91-6.4(c).

These rules read together refute Tenafly's position that the East Clinton Avenue site need not now be included in Tenafly's fair share plan. Rather, the rules clearly state that the site must be included, but "presumptively", and that the objector/litigant is "presumptively entitled to site-specific relief." The reason for the requirement that the site must be included in the filed fair share plan as an inclusionary site is that if it were not included then COAH would not have jurisdiction over the site. Also, the site's presence in the plan as an inclusionary site constitutes the municipality's commitment to COAH that it will in fact zone the site as an inclusionary site if required by COAH to do so after the COAH process, including an OAL hearing on suitability, is completed. Therefore, the COAH rules require that the East Clinton Avenue site be included in Tenafly's filed fair share plan as an inclusionary site. After mediation is completed, the suitability of the site may be the subject of an OAL hearing. At that hearing it would be Tenafly's burden to demonstrate that the East Clinton Avenue site is not a suitable site for development of an inclusionary development for low and moderate income housing.

It is, therefore, the Council's decision that Tenafly must within 45 days of the date of this decision adopt and file with COAH a housing element and fair share plan that presumptively includes the East Clinton Avenue site as an inclusionary site for affordable housing at COAH's required minimum gross density of six units per acre with a 20 percent set aside for low and moderate income housing. See N.J.A.C. 5:93-5.6(b)1. The Council has set 45

days as the time within which Tenafly must adopt and file a fair share plan with the East Clinton Avenue site as a presumptive site for an inclusionary affordable housing development, because only the one site need be added to the plan. If an entire new plan had to be created, the 60 days provided by N.J.A.C. 5:93-2.3 would have been appropriate. Also, because Tenafly has indicated that it misunderstood the requirements of N.J.A.C. 5:91-3.6(c), the Council has decided that it will not now dismiss Tenafly from its jurisdiction, as is provided in N.J.A.C. 5:91-6.2(e). Rather, the Council will give Tenafly the 45 days within which to file an adopted housing element and fair share plan that conforms to the Council's rules, as explicated in this decision.

Therefore, if Tenafly does not file with COAH an adopted fair share plan presumptively including the East Clinton Avenue site as an inclusionary site for affordable housing by July 19, 1999, which is 45 days from the date of this decision, Tenafly will from that date no longer enjoy the protection of COAH's jurisdiction.

Shuley M. Bishop,
Executive Director

~~RENEE REISS, Council Secretary~~

Dated:

June 7, 1999

*July 17, 1999 is the 45th day. However, it is a Saturday. Therefore, July 19, 1999, the following Monday, will be the final day Tenafly may file an adopted fair share plan with COAH.