

IN THE MATTER OF THE) COUNCIL ON AFFORDABLE HOUSING
PETITION OF THE)
TOWNSHIP OF MARLBORO) DOCKET NO. COAH 001209

Marlboro Township ("Marlboro" or "the Township") received a consent order for final judgment from the courts on December 24, 1985 for its first-round affordable housing obligation. The Township adopted a housing element and fair share plan addressing its 12-year cumulative 1987-1999 obligation on March 15, 1995 and petitioned COAH for substantive certification on March 23, 1995. Marlboro's 12-year cumulative 1987-1999 affordable housing obligation is 1,056 units; a 37-unit rehabilitation component and a 1,019-unit new construction component. In an April 7, 1997 COAH Report Requesting Additional Information, it was noted that Marlboro's plan had a 26 unit shortfall and that 22 items of additional information were necessary. Thereafter, on March 6, 1998, COAH requested Marlboro to formally amend its filed fair share plan because of the substantial revisions the Township had made to the plan that had been submitted to COAH.

Marlboro adopted an amended housing element and fair share plan and repetitoned COAH for substantive certification on August 21, 1998. This amended plan for the first time included two facilities, New Hope and Discovery, which are alcohol and drug treatment facilities and which are included in Marlboro's plan to provide 63 bedrooms, which would be considered low and moderate income rental units, in each facility. Marlboro also requested that the new Hope and Discovery units be awarded rental bonuses for the 126 bedrooms in the facilities. A March 18, 1999 COAH Report requested documentation from the Township within 30 days to verify the eligibility of the New Hope and Discovery facilities for COAH credit and the requested rental bonuses.

Three objections were received to Marlboro's amended housing element and fair share plan. Additionally, Alfred Bluh and Joseph Batelli ("Bluh and Batelli" or "BB") were allowed a subsequent objection. BB's address that was initially provided to COAH by the Township was out of date. Therefore, when notice was sent to all developers with an interest in Marlboro's plan, the

notice that was sent to BB was returned to COAH. As a result, COAH permitted a supplemental objection period for BB, once the developer's correct address was discovered. COAH received BB's objection in May 2000. Marlboro Township is presently in mediation with all objectors.

Objections were raised concerning the eligibility of the New Hope and Discovery facilities for COAH credit. The facilities are licensed by the State of New Jersey as an alcohol treatment facility (New Hope) and as a drug treatment facility (Discovery). At issue in the objections was whether the facilities complied with COAH's definition of alternate living arrangement, see N.J.A.C. 5:93-1.3, and whether the facilities were primarily health care facilities, rather than residences. Consequently, the March 18, 1999 COAH Report requested documentation from the Township to verify the eligibility of these facilities. The Township thereafter submitted information on the two facilities to COAH. COAH discussed the matter with its consultant, Dr. Robert Burchell, and sought his advice with regard to the creditability of the New Hope and Discovery facilities.

Dr. Burchell issued his opinion on July 28, 1999. The opinion, accompanied by a memorandum prepared by COAH staff and a COAH task force recommendation, was presented to the Council. Attached, Exhibit A. After reviewing the supplied material, the COAH board at its August 4, 1999 meeting followed Dr. Burchell's advice and analysis and decided:

1. Residential alcoholism and drug abuse treatment facilities such as New Hope and Discovery may be considered for COAH credit as alternate living arrangements, provided each bedroom counts as one unit regardless of the number of occupants.
2. No credit will be given to bedrooms in such facilities which are reserved for high intensity health services, those housing inmates or patients who are not free to leave of their choice, those reserved for children or adolescents, or those housing adults that are not low and moderate income.

3. No determination was made regarding the eligibility of bedrooms reserved for medium intensity services based on the available information.

4. The COAH-eligible bedrooms at New Hope and Discovery would not be eligible for rental bonuses.

These policy decisions were thereafter transmitted to the participants in the COAH mediation so that the mediator, Marlboro and the objectors could better understand COAH's position with regard to the creditability of New Hope and Discovery.

Subsequently, the Township moved before the Council for an order granting rental bonuses pursuant to N.J.A.C. 5:93-15 for the New Hope and Discovery units. BB opposed the motion and submitted a certification in opposition to Marlboro's requested relief signed by J. Creih Rahenkamp, P.P., AICP. The Monmouth Housing Alliance also opposed the rental bonus credits.

Subsequently, BB filed a cross-motion before the Council seeking an order of the Council: (1) denying rental bonuses for New Hope and Discovery; (2) vacating and rescinding COAH's determination of August 4, 1999 granting affordable housing credit for New Hope and Discovery; (3) directing that the properties of BB retain their inclusionary zoning and be included in any Marlboro compliance plan as a condition of COAH granting substantive certification to Marlboro; and (4) dismissing Marlboro's petition for substantive certification without prejudice for Marlboro to refile its petition upon full notice and publication to all parties and publication pursuant to N.J.A.C. 5:91-1 et seq. Marlboro opposed BB's motion. Oral argument was held on Marlboro's motion at COAH's regular monthly meeting of February 7, 2001. Oral argument on BB's cross-motion was held at COAH's regular monthly meeting of March 7, 2001.

After a careful review of all briefs, certifications and other material submitted in both the motion and cross-motion, it is the decision of the New Jersey Council on Affordable Housing that this matter in its entirety must be transferred to the Office of


Administrative Law ("OAL") as a contested case with regard to the issues raised in the motion and the cross-motion. There are clearly material contested issues of fact with regard to the status of the New Hope and Discovery facilities as to whether they constitute creditable alternative living arrangements consistent with COAH's rules or are non-creditable health care facilities. COAH has previously granted credit for three alternative living arrangements that may be analogous to New Hope and Discovery. See Exhibit B, Memorandum of Shirley Bishop dated February 28, 2001 to COAH board. However, the certification filed by Rahenkamp in support of BB's opposition to Marlboro's motion for rental bonus credits raises issues in addition to the rental bonus credits. Rahenkamp questions whether New Hope and Discovery are alternative living arrangements and whether they may be granted COAH credit as low and moderate income housing units consistent with COAH's methodology.

An additional contested factual issue is presented by BB's contention that its property should be included in Marlboro's housing element and fair share plan. The briefs filed in this matter demonstrate that there has been a history of litigation in the courts between Marlboro and Anthony Spalliero concerning BB's property and that the court orders and decisions from that litigation may affect the BB property and BB's claims that its property should be included in Marlboro's housing element and fair share plan consistent with COAH's rules. Because of the extensive history of court litigation involving BB's property it is not clear to COAH whether those issues should in fact be dealt with by COAH (or at the OAL) or be the subject of legal proceedings in the Superior Court. The OAL judge should, therefore, determine with regard to BB's claims whether the history of the litigation between Marlboro and Spalliero affects COAH's jurisdiction, and consequently the OAL's jurisdiction, over BB's property and its claims for inclusion in any Marlboro housing element or fair share plan.

In transferring all issues raised in this motion and cross-motion to the OAL, COAH is aware that COAH's administrative determination of August 4, 1999 with regard to the eligibility of New Hope and Discovery is at issue. COAH is also aware that there may be changes to the type of services being proposed today for the New Hope and Discovery facilities that may differ from those proposed three years ago and that there may be new facts that should be presented regarding each facility that were not known or presented earlier.

Also, it should be noted that it will be impossible to continue mediation in Marlboro until all the issues that are currently transferred to the OAL are determined. Therefore, the Marlboro mediation is hereby suspended until the OAL proceeding is concluded.

Consequently, because of the importance of the issues that are transferred to OAL for fact finding, the Council hereby requests OAL to expedite this matter as quickly as possible, and preferably complete proceedings in the matter within 90 days of transfer, as set forth in N.J.S.A. 52:27D-315(c).



Renee Reiss, Secretary
New Jersey Council on
Affordable Housing

Date: June 6, 2001