

IN RE THE PETITION OF THE) COUNCIL ON AFFORDABLE HOUSING
TOWNSHIP OF MARLBORO,) DOCKET NO: CAH 9170-01
MONMOUTH COUNTY) OPINION

This case is currently before COAH for consideration of an initial order filed by Administrative Law Judge Joseph Lavery ("ALJ"). That order recommends that COAH "take no further action" on this case and forward the matters previously pending before the Office of Administrative Law ("OAL") to Judge Reisner of the Superior Court, Law Division. COAH must now decide whether to adopt, modify or reject the recommendation of the ALJ.

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 and repetition 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 repetition 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. Under Marlboro's plan the two facilities,

each of which has 63 bedrooms, would each provide 63 low and moderate income rental units. Marlboro also requested that it be awarded rental bonuses for the 126 bedrooms in the two 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.

Several objections were filed in regard to Marlboro's housing element and fair share plan. Marlboro Township entered mediation with all of the objectors. The objections raised concerns as to 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 directed the issue of the two facilities in the first instance to Dr. Robert Burchell, COAH's consultant, for his review and report.

Dr. Burchell issued his report on July 28, 1999. The report, accompanied by a memorandum prepared by COAH staff and a COAH task force recommendation, was presented to the Council. After reviewing the supplied material, the Council at its August 4, 1999 meeting determined that:

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. Two of the objectors, Alfred Bluh and Joseph Batelli, 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, Bluh and Batelli 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 Bluh and Batelli 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 the motion. Oral argument was held on Marlboro's motion at COAH's regular monthly meeting of February 7, 2001. Oral argument on Bluh and Batelli's cross-motion was held at COAH's regular monthly meeting of March 7, 2001.

On June 6, 2001, after a careful review of all briefs, certifications and other material submitted in both the motion and cross-motion, the Council decided that this matter in its entirety should 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. The Council found that there were material contested issues of fact with regard to whether the New Hope and Discovery medium-intensity beds constituted creditable alternative living arrangements consistent with COAH's rules or if they were non-creditable health care facilities.

The Council found that an additional contested factual issue was presented by Bluh and Batelli's contention that their properties should be included in Marlboro's housing element and fair share plan. The briefs previously filed in this matter demonstrated a history of litigation in the courts between Marlboro and Anthony Spalliero (former contract purchaser of the sites) concerning Bluh and Batelli's properties. The Council noted that this history raised additional questions concerning the affect of previous court orders on the Bluh and Batelli properties and their claims that their properties should be included in Marlboro's housing element and fair share plan. Moreover, it was unclear 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.

Accordingly, the Council referred this matter to the OAL. In his determination, the ALJ outlined the following specific questions which were presented to OAL for determination:

1. Whether the properties of Bluh and Batelli should retain their inclusionary

zoning and be included in any Marlboro compliance plan as a condition of COAH's grant of substantive-certification.

2. Whether Marlboro's petition for substantive certification should be dismissed, without prejudice for Marlboro to refile its petition upon full notice and publication to all parties.

3. Whether Bluh and Batelli's claims, given the history of litigation, fall within the jurisdiction of COAH.

4. Whether changes to the type of services being proposed for the New Hope and Discovery facilities differ from those proposed three years ago, and whether there are new facts, not known or presented earlier, to be presented now.

5. Whether the facilities complied with COAH's definition of 'alternative living arrangements.'

6. Whether the New Hope and Discovery facilities were primarily health care facilities rather than residences.

7. Whether COAH should deny rental bonuses for the New Hope and Discovery facilities.

8. Whether COAH's administrative determination of August 4, 1999, granting affordable housing credit for the New Hope and Discovery facilities should be vacated and rescinded.

9. Whether COAH's administrative determination of August 4, 1999, with regard to the eligibility of New Hope and Discovery facilities should be altered by COAH, based on the record accumulated at hearing before the administrative law judge.

Upon referring this matter to OAL, the Council suspended mediation between Marlboro and the objectors until the conclusion

of the OAL proceeding. The Council also requested that the OAL hear this matter on an expedited basis.

On March 22, 2002, the Honorable Ronald L. Reisner, J.S.C., entered an order in the case of Bluh and Batelli v. Marlboro, Docket No. L-2193-01, Superior Court, Law Division - Monmouth County, which order provided that "the issues relating to the interpretation and enforceability of the April 1998 Settlement Agreement and Court Order...and whether the plaintiffs' properties should retain their inclusionary zoning, and be included in any Marlboro compliance plan as a condition of substantive certification, and the issues relating to the New Hope and Discovery facilities...are to be decided by the Superior Court, Law Division, Monmouth County...." The attorneys for the Township and Bluh and Batelli consented to the entry of this order. As a result, a conference call was held between COAH staff and counsel for the parties. At that time, the Township was asked to inform COAH as to whether the Township intended to withdraw its petition before COAH and, presumably, transfer its petition to the Superior Court, or, in the alternative, seek the court's approval to transfer the New Hope/Discovery issue back to COAH's jurisdiction. (This question was subsequently raised again in a COAH letter dated July 11, 2002).

On June 3, 2002, COAH received an Initial Decision from OAL which recommends that the matters pending before it be transferred to the Superior Court, pursuant to Judge Reisner's March 22, 2002 Order. Counsel for Bluh and Batelli filed one exception to the ALJ's decision. That exception stated that COAH's final order should incorporate the language of the court's March 22, 2002 order, verbatim, rather than as set forth by the ALJ.

In a letter dated July 29, 2002, from Marlboro's counsel the Township advised COAH staff that it wishes to remain under COAH's jurisdiction, and has, therefore, authorized counsel to take whatever steps are necessary in order to seek the court's approval

to transfer back to COAH the New Hope/Discovery issues. To this end, counsel advised that he has requested the consent of adversaries in this endeavor, but short of receiving consent, counsel further advised that the Township intends to file a motion with the court, seeking removal of those issues from the court's jurisdiction.

Accordingly, the Council must decide whether to adopt, modify, or reject the recommendations of the Administrative Law Judge that COAH take no further action on the issues over which the Superior Court has taken jurisdiction, and that it "forward" the file on those issues to the Court. The Council hereby adopts the ALJ's proposed Statement of the Case and Procedural History, which accurately set forth the history of this matter. However, the Council hereby modifies the ALJ's proposed Analysis of the Record and Conclusion, as set forth in detail below. This modification is necessitated by the fact that the ALJ was not aware that the Township has applied to the Court (or will shortly make such application) seeking to transfer back to COAH all of the issues relating to New Hope/Discovery that were previously transferred to the Court's jurisdiction by Order dated March 2002, and that are thus now pending before the Court.

The Council thus modifies the Initial Decision as follows: In the event that the Court determines to grant the Township's application, and transfer the New Hope/Discovery issues back to COAH, then COAH will continue to exercise jurisdiction over the Township's petition for certification, and will decide at that time how to address the New Hope/Discovery issues (for example, whether they should be transmitted again to the OAL for review). However, if the Court determines that it will deny the Township's application and thus retain jurisdiction of the New Hope/Discovery issues, COAH will determine at that time whether it will continue to exercise jurisdiction over the remainder of the Township's petition for certification. In the interim period, pending a

determination by the Court on Marlboro's application, COAH will thus retain jurisdiction of the Marlboro petition, but will conduct no further review. Of course, COAH will take no action as to the issues over which the Court has taken jurisdiction.



Renee Reiss, Secretary
New Jersey Council on
Affordable Housing

DATED: *August 14, 2002*