

IN RE OCTOBER 4, 2002 MOTION) COUNCIL ON AFFORDABLE HOUSING
TO INTERVENE IN THE PETITION) DOCKET NO: 02-1410
OF HOWELL TOWNSHIP, MONMOUTH) OPINION
COUNTY)

This is a motion filed by Elon Associates ("Elon") seeking an order allowing Elon to intervene in the petition for substantive certification of Howell Township, Monmouth County ("Howell" or the "Township") and to direct that Elon and Howell enter mediation immediately. In the alternative, the motion asks that the Council on Affordable Housing's ("COAH" or the "Council") dismiss Howell's pending petition and afford Howell the opportunity to repetition with a new housing element and fair share plan. Howell has a second-round (1987-1999) fair share obligation of 1,109 units. This obligation consists of a rehabilitation component of 154 units and a new construction component of 955 units. The Township petitioned the Council for substantive certification on February 27, 1995, and thereafter went through several sessions of mediation and plan amendments.

On April 3, 1998, Elon, an owner of property in Howell Township which is not included in the Township's housing element and fair share plan, filed a motion with COAH to intervene and requested that COAH either dismiss or deny Howell's petition or direct Howell to enter into mediation with Elon. Elon requested that its site be rezoned from its single-family/two-unit per acre density to a six-unit per acre density with an affordable housing setaside. Elon did not file objections to Howell's fair share

plans during any of the three comment periods. On May 6, 1998, COAH heard oral argument on the Elon motion and denied the motion at that time.

On May 6, 1998, COAH granted conditional certification to the Township's November 1997 plan. The Township complied with all conditions set forth in the conditional substantive certification and, on October 7, 1998, COAH granted final substantive certification to Howell's plan. Elon appealed COAH's grant of substantive certification to the Appellate Division. On March 20, 2001, the court reversed COAH's grant of substantive certification and remanded the case to COAH for further consideration. In its decision, the Appellate Division affirmed COAH's denial of Elon's request to intervene in this matter.

The plan which had been certified by COAH on October 7, 1998 addressed the Township's 955-unit new construction obligation with 596 credits and rental bonuses, 270 regional contribution agreement ("RCA") units, a 10-unit write-down/buy-down program and zoning to produce 79 units on Site 7 (also known as "The Fountains"). The realistic opportunity presented by the Fountains was the subject of the appeal in which the court ultimately reversed COAH's grant of substantive certification. Following the court's remand, on March 22, 2002, Elon filed a motion to intervene and have the Howell petition dismissed. Oral argument was heard on this motion on June 5, 2002. A COAH task force was convened to

discuss Elon's motion and the status of the Howell petition. As part of its deliberations on this matter, the Task Force requested that staff re-evaluate the appropriateness of Howell's entire plan. On September 9, 2002, COAH staff released a COAH Report Requesting Additional Information and noted several items that were necessary to complete review of Howell's plan. On October 4, 2002, Elon filed the present motion to intervene.

As requested by the COAH task force, COAH staff conducted an analysis of Site 7, as well as a re-evaluation of the entire Howell plan. The staff's full analysis of Howell's plan was set forth in a COAH Report Requesting Additional Information dated September 9, 2002, attached and incorporated by reference herein. Because Site 7 is the subject of a pending application for site plan approval, COAH staff's position was to defer to the expertise of the local planning officials and their technical consultants to quantify the extent to which affordable housing could be produced on Site 7. However, Howell officials and the Site 7 applicant indicated that the site was capable of producing 50 affordable rental units which would generate a 44-unit rental bonus resulting in a total of 94 credits attributed to the site. Ninety-four credits (as opposed to 79) were possible as a result of counting non-age restricted rental bonuses on Site 7 rather than age-restricted rental bonuses on other sites.

During COAH's re-analysis, COAH staff discovered that as a result of a map amendment request of the State Planning Commission initiated after COAH initially granted certification, most of Site 7 had been changed from Planning Area 2 to Planning Area 5. In addition, COAH's re-analysis of Howell's plan generated several general questions which required additional information. Therefore, COAH released the September 9, 2002 COAH Report Requesting Additional Information to determine the viability of the Howell Plan.

On October 4, 2002, Jeffrey Kantowitz, Esq., from the firm of Goldberg, Mufson & Spar, on behalf of Elon filed a letter brief in support of its present motion.

The present motion again seeks intervenor status on behalf of Elon and asks COAH to direct immediate and expedited mediation. In the alternative, Elon requests that COAH dismiss the pending Howell petition for substantive certification and give Howell an opportunity to repetition with a revised housing element and fair share plan. Finally, Elon asks that any compliance plan submitted to COAH by Howell include the Elon site.

Elon reiterated its arguments in support of its March 22, 2002 motion to intervene and alleges that it meets the criteria set forth in N.J.A.C. 1:16-1 regarding intervention. Elon contends that it has added constructively to this matter, and that its

interest in the same are unique and therefore cannot be protected by any other party.

Elon also asserts that new facts have arisen which now warrant Elon's motion to intervene. Elon points to the recent decision of the Superior Court, Law Division, dismissing its complaint therein as well as the September 9, 2002 COAH Report. Elon further argues that COAH's rules regarding reports requesting additional information require that mediation ensue during the 60-day response period. Moreover, Elon asserts that it should be made part of this mediation process.

Finally, Elon argues that Howell's petition should be dismissed because the Township has failed to provide necessary information regarding its petition to COAH and failed to implement several elements of its compliance plan. Elon asserts that such dismissal would afford Howell the opportunity to repetition with a new compliance plan.

In a letter brief dated October 25, 2002, Dominick Manco, Esq., representing Howell Township, opposed Elon's October 4, 2002 motion. The Township, relying on the doctrine of res judicata, asserts that COAH should deny Elon's third request for intervention. Additionally, with regard to Elon's contention that Site 7 is not suitable as an affordable housing site due to its partial designation as PA5, the Township points out that the entirety of Elon's site is located in PA4 (development of

affordable housing in which is also in conflict with COAH regulations) and therefore "cannot have a real and substantial stake in the outcome of Howell Township's petition." In addition, the Township argues that it has previously provided documentation regarding the suitability of Site 7, and that there is no demonstrated need for any additional sites to be included in its plan, much less a site located entirely in Planning Area 4.

On November 7, 2002, Jeffrey Kantowitz, Esq., submitted a letter in response to Howell's opposition. That letter reiterates that due to the changes in circumstances regarding Howell's plan and the development of Site 7, its motion to intervene and dismiss should be granted.

Howell Township was unable to provide answers to all of the questions raised in the September 9, 2002 COAH Report within 60 days due in part to the ongoing nature of the development application being considered on Site 7. This prompted the Township to request additional time to respond with either a comprehensive response to the September 9, 2002 COAH Report or a repetition that provided unquestionable mechanisms to address the Township's entire obligation. COAH staff agreed to provide Howell an additional 60 days with this understanding in mind. On October 7, 2002 the Howell Township governing body adopted a resolution directing the Planning Board to amend the Township's plan.

On December 11, 2002, COAH received a letter from Township Planner, Thomas Sheehan, indicating that a draft amendment to the Howell housing element and fair share plan had been prepared pursuant to the direction contained within the Howell governing body resolution of October 8, 2002.

On December 17, 2002 and December 20, 2002, COAH received letters from Township Attorney, Dominick Manco, Esq., explaining that, although an amended housing element and fair share plan had been prepared and were ready for review and adoption by both the planning board and the governing body, a change in Howell Township's administration effective January 1, 2003 rendered both bodies unacquainted with the plan amendment. Consequently, the Township requested a three-week extension of its January 8, 2003 deadline for the submission of an amended housing element and fair share plan.

At its January 8, 2003 board meeting the Council voted to grant the Township's request for a three-week extension of time in which to file an amended petition for substantive certification. In so doing, the COAH Board adopted an administrative order requiring Howell to amend its housing element and fair share plan and repetition by January 31, 2003. If the Township fails to meet this deadline, the administrative order provides that an Order to Show Cause as to why Howell should not be dismissed from COAH's jurisdiction will be issued. In addition, the Council voted at its

January 8, 2003 meeting to deny Elon's March 22, 2002 motion to intervene as well as the present motion for intervention.

In ruling on the present motion, the Council adopts and incorporates the reasons set forth in its decision denying the March 22, 2002 motion as if set forth at length herein.

In addition, the Board notes that to the extent that Howell complies with the mandate of the Council's January 8, 2003 Administrative Order, Elon will be provided with the relief it seeks by the present motion, i.e., the opportunity to object and participate in COAH's mediation process.

For the foregoing reasons, Elon's motion to intervene and dismiss Howell's plan is denied.


Renee Reiss, Secretary
New Jersey Council on
Affordable Housing

DATED: February 4, 2003