

IN RE MARCH 22, 2002)
MOTION TO DISMISS AND) COUNCIL ON AFFORDABLE HOUSING
INTERVENE THE PETITION OF) DOCKET NO: 02-140S
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 denying Howell's petition or dismissing Howell from the Council on Affordable Housing's ("COAH" or the "Council") jurisdiction. 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.

PROCEDURAL HISTORY AND FACTUAL BACKGROUND

On April 3, 1998, Elon Associates, L.L.C. 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.

Thereafter, 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 its second motion remand (since the court) to intervene in and dismiss or deny the Howell petition.

Jeffrey Kantowitz, Esq. from the firm of Goldberg, Mufson & Spar on behalf of Elon filed a letter brief in support of its March 22, 2002 motion seeking: (1) intervenor status in Howell's petition for substantive certification; and (2) denial of Howell's petition and/or dismissal of Howell from COAH's jurisdiction on behalf of Elon.

Elon argues that it is entitled to intervener status pursuant to N.J.A.C. 1:1-16.3 which enumerates the factors that should be considered in ruling on a motion to intervene. These factors include a "consideration of the nature and extent of the movant's interest in the outcome of the case, whether or not the movant's interest is sufficiently different from that of any party so as to add measurably and constructively to the scope of the case, the prospect of confusion or undue delay arising from the movant's inclusion, and other appropriate matters." Elon argues that its participation in this proceeding has been constructive in

*The Council addressed Elon's October 4, 2002 motion on the papers submitted at its January 8, 2003 meeting and that motion will be the focus of a separate COAH opinion.

that it has raised serious questions as to whether Site 7 could realistically produce 79 units of affordable housing. Further, Elon contends that it has a stake in the outcome of this matter as it seeks to be included in Howell's compliance plan, and asserts that it is prepared to provide affordable housing in its development. Elon also argues that any delay stemming from the lack of viability, suitability, and developability of Site 7, and the consequent lack of viability of Howell's compliance plan is primarily, if not solely, of Howell's own making, as Howell failed to respond in a timely manner to COAH's request for additional information on Site 7.

Elon also asserts that it seeks to join in the pending proceeding as an intervenor so that it may participate in any proceeding referred to the Office of Administrative Law ("OAL").

Finally, Elon contends that Howell's petition for substantive certification should be denied and Howell should be dismissed from COAH's jurisdiction because it has failed to prove that Site 7 provides a realistic opportunity for the provision of 79 units of low and moderate income housing. As an alternative to dismissing Howell from COAH, Elon argues that the Township should be directed by COAH to re-petition and to include Elon's property in its compliance plan.

On May 13, 2002, Dominick M. Manco, Esq., from the firm Schibell & Mennie, L.L.C., submitted a letter brief on behalf of

Howell Township in response to Elon's motion. The Township argues that it has provided documentation with regard to the sewerability of Site 7 to demonstrate the existence of a realistic opportunity for sewer service to this site within the six-year period of substantive certification. Birdsall Engineering, Inc. prepared a Municipal Wastewater Plan document dated March 2002, which was adopted by the Township of Howell by Resolution on April 22, 2002.

The Township explains that Site 7 is located within the existing Section 208 Waste Water Management Plan, and is included in the recently approved Municipal Wastewater Management Plan as an area to be sewerred. Howell explains that sewage will be transmitted to the Manasquan River Regional Sewerage Authority trunk line and conveyed to the Ocean County Utilities Authority interceptor.

In addition, the Township argues that Elon's current motion is identical to its previous April 1998 motion which was denied by COAH, a denial which was subsequently affirmed by the Appellate Division. The Township explains that because the present motion involves the same issues, same parties and the same salient facts, as its previous motion, Elon is therefore, barred from bringing another motion seeking the same relief by virtue of the doctrine of res judicata.

The Township disagrees that its petition for substantive certification should be dismissed or denied asserting that Site 7 is approvable, available, developable and suitable in accordance

with N.J.A.C. 5:93-1 et seq. The Township argues that the only remaining issue before COAH pertains to the sewerability of Site 7 and asserts that this issue has been resolved through submission to COAH of documentation that the site is included in the Township's Section 208 Wastewater Management Plan and the extension of sewer infrastructure to Site 7 that is imminent under the Township's Wastewater Management Plan.

Jeffrey Kantowitz, Esq., on behalf of Elon, submitted a reply asserting that Howell failed to respond in a timely fashion to COAH's request for additional information in order for it to determine whether Site 7 provides a realistic opportunity for the provision of 79 units of low and moderate income housing. In addition, Elon argues that material facts have changed since its first motion to intervene in April 1998 and that gives Elon the right to pursue a fresh intervention motion.

Elon also asserts that Howell's petition for substantive certification should be denied and Howell should be dismissed from COAH because COAH's regulations, as applied to the facts of this matter, direct such a result. Elon cites N.J.A.C. 5:91-10.2 and -10.3 and points to delays in Howell's submission of COAH's requests for additional information that impeded production of affordable housing and obstructed COAH's administrative process. Further, according to Elon, Howell's submission presents substantial changes to an inclusionary site that justifies a denial of Howell's

petition and/or dismissal of its housing element and fair share plan.

DISCUSSION AND DECISION

To assist the COAH task force in its deliberations, 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.

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 7, 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 was 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.

With regard to Elon's request for intervenor status to participate in COAH proceedings, the Council notes that since the Appellate Division remand, Elon has been on the COAH service list and therefore been provided with all COAH staff reports on the remand. As such, Elon has had the opportunity to respond and comment on all COAH staff reports regarding the Howell petition. Moreover, Elon's request to intervene to participate in OAL proceedings is no longer relevant as it does not appear that the matter will be transferred to OAL at this time.

Furthermore, the Council does not agree that dismissal and/or accelerated denial are appropriate here. Howell, has voluntarily participated in the COAH process and previously received substantive certification. Moreover, the Township has attempted to respond to COAH's inquiries on remand in good faith. While COAH notes that Howell has requested several extensions in responding to some of the Council's requests, the Council is also aware that the Township has been entertaining the option of repeticioning COAH with a new housing element and fair share plan and has recently had a change of administration within its governing body. The Council finds these factors sufficient to warrant the requested extensions of time.

In light of the foregoing, the Council denies Elon's motion to intervene and to dismiss or deny Howell's petition for substantive certification.



Renee Reiss, Secretary
New Jersey Council on
Affordable Housing

DATED: February 4, 2003