

In Re Motions to Revoke Clinton Township's) COUNCIL ON AFFORDABLE HOUSING
 Second Round Substantive Certification and) DOCKET NO COAH 04-1603
 to Dismiss the Petition to Amend Second)
 Round Substantive Certification) OPINION

This matter involves Clinton Township's Second Round certified affordable housing plan and the Township's petition to amend that plan which is currently pending before the Council on Affordable Housing ("COAH" or the "Council") . Clinton Township received First Round substantive certification from the Council on February 3, 1993 and received Second Round substantive certification on March 7, 2001. The Township's Second Round fair share housing obligation is 392 units, consisting of 57 units of rehabilitation and 335 units of new construction.

On April 2, 2004, COAH received a petition from the Township to amend its Second Round substantive certification. On May 3, 2004, COAH received a motion to dismiss Clinton Township's petition for amended substantive certification from P & H Clinton Partnership ("P & H"). COAH also received a motion on May 4, 2004, from SJM Communities, LLC ("SJM"), seeking revocation of Clinton Township's existing substantive certification, and dismissal of Clinton Township's April 2004 petition for amended substantive certification. Because both motions addressed the propriety of the Township's amendment to its certified fair share plan pending before COAH, the matters were heard together by the Council on August 11, 2004. Accordingly, this opinion will address both motions together. In addition, it should be noted that the Council has received several objections to the Township's petition for amended substantive certification. Included among the objectors to this petition for amendment are SJM, P & H, and the Clinton Township Community Coalition ("CTCC"). This opinion only addresses the motions filed by P & H and SJM.

BACKGROUND

The Township included an inclusionary zoning site known as Windy Acres (or AH-1) in both its First and Second Round certified plans. P & H is the owner of Windy Acres (Block 7/Lots 18, 18.01 & 31), which was to produce 145 low and moderate-income for-sale units in the plan certified by COAH. P & H received General Development Plan (GDP) approval from the Township's planning board in 1995 and filed an amendment to that plan in 1999. Clinton designated the site for public sanitary sewer service in the Township's Wastewater Management Plan, which provided that the Windy Acres site, as well as other adjacent properties, would be served by a proposed sewage treatment plant, referred to as the Clinton East Sewer Treatment Plant. This plan was approved by the

New Jersey Department of Environmental Protection (DEP). Thereafter, on December 30, 1996, Clinton received a New Jersey Pollution Discharge Elimination System (NJPDES) Discharge Allocation Certificate from DEP. Effluent waste from the Windy Acres site was proposed to discharge into the South Branch of the Rockaway Creek. In 1999, the Township entered into various agreements to provide sewer capacity for the site. One agreement named Applied Water Management, Inc. (AWM) as the designer, constructor, owner and operator of the sewage treatment plant. This agreement obligated AWM to construct and operate the plant only if the NJPDES final permit permitted discharge of effluents into the Rockaway Creek up to certain specified levels. The Township then applied for the Final NJPDES permit in September 2000.

In 1999, P & H applied for subdivision and site plan approval from Clinton Township's planning board. Twenty-two hearings on P & H's application were held by the Planning Board between March 6, 2000, and June 4, 2001. On June 4, 2001, the Township's planning board denied P & H's development application without prejudice based on 26 grounds enumerated by the Planning Board. Most notably, the Planning Board concluded that the development lacked available sewer facilities and had environmental constraints. P & H appealed this decision to the Superior Court, Law Division. In a decision dated February 20, 2004, the Honorable Edmund R. Bernhard, J.S.C., found 21 of the 26 grounds for the Planning Board's denial to be arbitrary and unreasonable, but concluded that certain conditions and factors had to be met before the Planning Board could grant preliminary site plan and subdivision approval for the Windy Acres site. Specifically, the court found that a provision for adequate and potable source of water was required before approval could be granted.¹ The court also determined that an area must be set aside for two threatened species of birds. In addition, the court found that the developer and the Planning Board were required to determine if anything further could be done to decrease the stormwater runoff and pollution. Additionally, the court found that there must be appropriate maintenance and repair easements for each property. The court also determined that a new Letter of Interpretation (LOI) must be issued for the property from DEP and that the developer must comply with any changes or recommendations in that LOI. Additionally, the court found that a development approval could not be granted until adequate

¹ The court noted that the developer of Windy Acres has appealed the planning board's denial for the height of the proposed water tower to the Board of Public Works.

provisions for sewerage treatment were obtained. Finally, the court found that the developer had to provide the Planning Board with its Environmental Impact Statement (EIS) Phase 1 study. Thus, while the court found that certain of the Planning Board's conclusions unreasonable and arbitrary, it also found that the above-noted conditions must be met before preliminary site plan and subdivision approval could be granted.

P & H has appealed Judge Bernard's decision to the Superior Court, Appellate Division, claiming that the court should have reversed the Planning Board's denial, and granted the approvals sought by P & H, rather than reverse and remand the same as explained above. That appeal is currently pending before the court.

While the above action was pending before the court, on March 13, 2003, DEP circulated to the parties a draft NJPDES permit. On May 19, 2003, DEP regulations which changed the designation of the South Branch of the Rockaway Creek from a Category 2 (C-2) waterway to a Category 1 (C-1) waterway became effective. These regulations restrict discharge into C-1 waters that results in "any measurable changes to the existing water quality." Because the discharge of effluents proposed by Clinton would not meet the "no measurable change" standard, on July 14, 2003, DEP issued a Determination of Technical Incompleteness, which essentially denied the Township's application for the Final NJPDES permit. However, DEP invited Clinton to make further submissions to continue processing the application, and specifically stated that the Township would have to conduct instream sampling. The Township has not conducted this sampling.

As a result of the reclassification of the South Branch of the Rockaway Creek, P & H sought alternative means for the provision of sewer service for the Windy Acres site. On July 29, 2003, P & H filed a second action in the Superior Court, Law Division, before the Honorable Edward R. Bernhard, J.S.C., which sought sewage capacity for the Windy Acres site from the Readington-Lebanon Sewerage Authority (RLSA) and others. On January 20, 2004, Judge Bernhard dismissed P & H's complaint, because all available sewer capacity from RLSA had been previously allocated to other parties. Judge Bernhard determined that there was no precedent for a Mt. Laurel developer to wrest sewer capacity away from parties that already had a contractual right to that capacity. P & H has

also appealed this decision to the Superior Court, Appellate Division. That appeal also remains pending.

On September 3, 2003, SJM filed an exclusionary zoning lawsuit against the Township, and also named COAH as a defendant in the suit pursuant to N.J.S.A. 52:27D-317. SJM maintains that Clinton violated the terms and conditions of its substantive certification when the Planning Board denied P & H's development application, therefore rendering the Township's substantive certification null and void. On March 17, 2004, SJM filed a motion in that case seeking declaratory judgment that Clinton was not meeting its Mt. Laurel obligation and that SJM's site be included in Clinton's plan. The township cross-moved for dismissal of the SJM motion, claiming that COAH had jurisdiction over Clinton's Mt. Laurel obligation.

On April 2, 2004, the Council received a petition to amend Second Round substantive certification from Clinton Township. The Township's amended Housing Element and Fair Share Plan seeks to remove the Windy Acres site from its plan and replace it with two municipally-sponsored construction projects and an RCA with the City of Lambertville. The Township explains that the primary reasons for removing the Windy Acres site are 1) the reclassification of the South Branch of the Rockaway Creek which renders the Clinton East Sewage Treatment Plant infeasible to construct and operate; and 2) the belief that there were no viable alternatives to sewer service once the Superior Court dismissed P & H's lawsuit.

On June 18, 2004, the Honorable Victor Ashrafi, J.S.C transferred SJM's Mt. Laurel claims to COAH. Judge Ashrafi held that because the Township submitted a petition to COAH to amend its substantive certification and because SJM had not exhausted administrative remedies before COAH pursuant to N.J.S.A. 52:27D-316(b), COAH had primary jurisdiction in the matter. Judge Ashrafi ruled that if SJM wanted to be included in the Township's Housing Element and Fair Share Plan, it could raise the issue before COAH through its administrative process.

P & H MOTION

On May 3, 2004, COAH received a motion to dismiss Clinton Township's petition for

amended substantive certification from Stephen Eisdorfer, Esq., on behalf of P & H. P & H's motion seeks dismissal of Clinton Township's April 2004 petition for amended substantive certification.

P & H argues that Clinton Township's petition is premised upon an incorrect assertion by the Township that sewer services will not be available to Windy Acres. P & H claims this assertion is incorrect as a matter of law because the issue of whether or not sewer service is available to the Windy Acres site is pending in the Appellate Division. While P & H admits that the Clinton East Sewage Treatment Plant is now infeasible due to the stream reclassification, P & H submits that the site is still viable pending the Appellate Division's decision regarding the obligation of RLSA and others to provide sewer service to the site. Moreover, P & H argues that nearby municipalities also are required to cooperate and assist in the acquisition of these resources. P & H cites *Dynasty Construction Corp. v. Upper Saddle River*, 267 N.J. Super. 611 (App. Div. 1993), *certif. denied*, 135 N.J. 467, *appeal dismissed*, 135 N.J. 468 (1994), where the Appellate Division upheld a determination by the trial court that an adjoining municipality was constitutionally obligated to accept and treat sanitary sewage in existing plants where necessary to facilitate the construction of low- and moderate-income housing. P & H also cites *Samaritan Center v. Englishtown*, 196 N.J. Super. 437 (Law Div. 1996), where the Law Division held that the constitutional obligation to facilitate the provision of sewer service to an inclusionary development in a neighboring municipality exists even in the absence of a pre-existing cooperation or inter-municipal agreement. P & H further states that COAH conditioned Clinton's substantive certification on the premise that Clinton would take all necessary steps to provide sewer service to its inclusionary developments. Accordingly, P & H claims that the Township is in violation of its substantive certification because it failed to assure availability of water and sewer for the site.

P & H also argues that the Council's retention of jurisdiction over Clinton's petition to amend its substantive certification would violate constitutional, statutory and judicial principles, as well as the rules of the Court. P & H claims that COAH does not have jurisdiction to decide whether Clinton may remove the Windy Acres site, because of the appeal still pending before the Appellate Division. P & H submits that the Appellate Division will render a decision as to whether the Windy Acres site will receive sewer capacity, and therefore whether the same remains a valid site in the township's plan.

In addition, P & H asserts that Clinton Township's petition for amended substantive certification is otherwise invalid because it attempts to delete an inclusionary site without obtaining the endorsement of the property owner as required by N.J.A.C. 5:93-5.13. P & H claims that in accordance with N.J.A.C. 5:93-5.13(b) and (c), the Township cannot delete the Windy Acres property from its Second Round Housing Element and Fair Share Plan without agreement by P & H. In response to the Township's claim that it may remove the site because the Law Division dismissed P & H's lawsuit to compel RLSA to provide sewer service, thus rendering development of the site infeasible, P & H argues that this is still an open issue pending the decision of the Appellate Division.

In the alternative, P & H argues that the Council should stay proceedings on Clinton's petition for amended substantive certification pending the resolution of P & H's appeal regarding sewer service for Windy Acres. P & H claims that if COAH grants the amendment to the Township's substantive certification, it will render moot the Appellate Division's decision regarding the planning board's denial of the site's development application. P & H also states that while Judge Ashrafi dismissed SJM's lawsuit and transferred the matter to COAH, P & H claims that the judge did not make any determination as to whether COAH had jurisdiction to act on Clinton's petition for amended substantive certification.

Additionally, P & H argues that Clinton's proposed substitute Housing Element and Fair Share Plan is speculative and on its face fails to satisfy COAH regulations and the constitutional standards enunciated in Urban League of Essex County v. Mahwah. P & H claims that the two municipal construction projects proposed by the Township to replace the Windy Acres site do not present a realistic opportunity because certain conditions were not met. P & H states that Clinton did not submit proof of ownership, a pro-forma statement for the project, proof of adequate and stable funding, a construction schedule, or an agreement with an administrative agency.

P & H also claims that Clinton continued to include Windy Acres in its Housing Element and Fair Share plan despite environmental constraints. Although the Township claims that there were no Freshwater Wetlands Protection Act rules or other environmental protections in effect

when the Township included the site in their First Round plan in 1987, P & H claims that the Township was required to review environmental constraints on the site when they re-petitioned for First Round substantive certification in May 1992, five years after the Freshwater Wetlands Protection Act was adopted. P & H also notes that the Township included the site in its Second Round plan, and therefore rendered the site environmentally suitable.

P & H argues that Clinton's assertion that P & H was to blame for the Planning Board's denial of the Windy Acres site plan application is false. While the Township claims that the developer was not cooperative and its application was incomplete, P & H notes that Judge Bernhard's February 20, 2004 decision stated that P & H was correct in its assertion that the delay rested with Planning Board. P & H also points out that Judge Bernhard found 21 of the 26 grounds for denial arbitrary and unreasonable.

Finally, P & H argues that Clinton affirmatively sought to delay processing of the DEP permit that would have allowed for the construction and operation of the Clinton East Treatment plant. P & H submits that Clinton did not proceed to design and construct the treatment plant authorized by the NJPDES permit. P & H further argues that the level of effluent limitations provided for in the Discharge Allocation Certificate would have permitted the proposed treatment plant to serve the Windy Acres site and an adjacent site, but not any other areas of Clinton. When the Township submitted a new application for a Final NJPDES permit in September 2000, P & H claims that Clinton requested that DEP suspend processing of the application. DEP did not resume processing the application until requested to do so by Clinton on December 26, 2002. Additionally, P & H claims that Clinton lobbied DEP to reclassify the stream from C-2 to C-1.

SJM MOTION

On May 4, 2004, COAH received a motion a motion from Henry L. Kent-Smith, Esq., on behalf of SJM seeking revocation of Clinton Township's existing substantive certification, and dismissal of Clinton Township's April 2004 petition for amended substantive certification.

SJM argues that COAH should revoke Clinton Township's March 2001 substantive

certification, claiming that the Windy Acres development is no longer suitable for inclusionary development. Therefore, SJM submits that the Windy Acres site does not present a realistic opportunity for affordable housing. SJM claims that the Township intentionally stretched the development review process in order to secure substantive certification, after which it then denied P & H's development application. In support of its argument that substantive certification should be revoked, SJM cites Township of Hillsborough, Docket No. HNT-L-492-98, in which COAH revoked Hillsborough Township's substantive certification.

SJM argues that Clinton Township failed to properly advise COAH of the problems associated with the implementation of its substantive certification. SJM maintains that Clinton failed to keep COAH informed as to the issues and problems associated with the Windy Acres site by failing to submit monitoring forms and by failing to name COAH as a party to the litigation filed by P & H. Therefore, SJM argues that Clinton's substantive certification should be considered null and void.

SJM also argued that COAH should not entertain the Township's petition for amended substantive certification until resolution of its motion then pending before the Superior Court.

CLINTON TOWNSHIP'S RESPONSE

On May 25, 2004 and July 21, 2004, John E. Coley, Jr. Esq., and Mark R. Peck, Esq. on behalf of Clinton Township, submitted briefs in opposition to the motions filed by P & H and SJM. The Township objects to P & H's motion to dismiss Clinton Township's petition to amend its second round substantive certification and SJM's motions to dismiss Clinton Township's petition to amend its second round substantive certification and revoke the Township's second round substantive certification.

The Township argues that COAH's jurisdiction over Clinton Township's petition for amended substantive certification is appropriate. In response to P & H's allegation that COAH does not have jurisdiction over its petition, in light of P & H's pending appeals, the Township argues that while the courts have retained jurisdiction over matters traditionally under prerogative writ law, such as the underlying validity of a zoning ordinance, COAH retains jurisdiction over matters involving

COAH proceedings. In addition, the Township submits that Judge Ashrafi's decision to transfer SJM's matter to COAH validates COAH's jurisdiction to act on the Township's petition for amended substantive certification. The Township quotes the judge's decision, which states, "[u]ltimately, P & H has failed to show its rights before the Appellate Decision are compromised by COAH proceedings on the plaintiff's (SJM) claims in this case." (Judge Ashrafi's decision, pages 60-61).

The Township also asserts that it was not required to obtain P & H's consent to delete the Windy Acres property from its Housing Element and Fair Share Plan. Clinton cites N.J.A.C. 5:91-13.1(f), which states that "in general, a municipality shall not be able to amend zoning on sites included in the certified Housing Element and Fair Share Plan without the agreement of the affected property owner." The Township claims that it is not obligated under this rule to obtain the consent of P & H to remove the Windy Acres site from the plan because the site, without sewer, which was denied by DEP, was not a developable site under COAH regulations. Clinton maintains that N.J.A.C. 5:91-13.1(f) clearly states that receiving the property owner's consent to remove a site is not mandatory given the facts in this matter. The Township claims it acted promptly to amend its plan to satisfy its Second Round substantive certification.

The Township also asserts that its proposed substitute affordable housing sites meet the COAH criteria and present a realistic opportunity. The Township states that its proposed municipally sponsored construction projects address all the criteria of N.J.A.C. 5:93-5.5, including ownership of property, an administrative mechanism to qualify applicants for housing, a pro-forma statement for the project, a construction schedule, evidence of adequate infrastructure and stable funding. In addition, the Township explains that if there are any minor technical errors or the plan requires additional supplemental information, these items can easily be remedied or provided, at the direction of COAH.

In addition, the Township claims that COAH was advised of all aspects of its substantive certification. Clinton rebuts the allegation by SJM that the Township failed to submit annual monitoring forms to COAH. The Township submits that it has filed all required annual monitoring forms with COAH. Clinton maintains that the reports filed for 2002, 2003, and 2004

advise COAH that the Windy Acres subdivision application had been denied. Additionally, the Township states that because P & H did not bring an exclusionary zoning lawsuit against the Township, the Township was not required to name COAH as a party to the Windy Acres litigation under N.J.S.A. 52:27D-317(c).

The Township also argues that P & H is not likely to prevail in its sewerage appeal. The Township claims that contrary to P & H's assertion that it did not affirmatively seek sewer service for the Windy Acres site, the Township did comply with COAH's rules regarding durational adjustments. N.J.A.C. 5:93-4.3(c) sets forth four municipal obligations related to ensuring infrastructure for inclusionary sites in the case of a durational adjustment. The Township received such an adjustment as part of its first round substantive certification, and applied for and obtained a Discharge Allocation Permit from DEP and applied for the Final NJPDES permit. Additionally, the Township notes that it entered into various contracts with third parties as to obtaining the NJPDES permit and the construction and operation of the treatment plant. The Township claims that other parties, such as CTCC and Readington Township, brought challenges to the approval of the Final NJPDES permit. The Township also states that there are no assurances that P & H will prevail in the Appellate Division case against RLSA and the other parties. The Township claims that there is no case law that supports P & H's position regarding the sewer issue.

The Township further submits that SJM's demand that the Township's substantive certification be revoked is not justified. The Township maintains that pursuant to N.J.A.C. 5:93-10.5, COAH has the discretion to revoke substantive certification if it finds that a municipality has delayed action on an inclusionary development application, required unnecessary cost generating standards or obstructed the construction of an inclusionary development. The Township claims that none of these criteria apply to the Township. Clinton provides that an amendment to its substantive certification became necessary once it was determined that Windy Acres was no longer a viable inclusionary site. Clinton also states that P & H could have gone to COAH for relief if it felt that the planning board was delaying action pursuant to N.J.A.C. 5:93-10.4(c). The Township claims that as soon as it became apparent that the Windy Acres site was no longer viable, the Township moved to amend its substantive certification in accordance with N.J.A.C. 5:91-13.

The Township also claims that there is no need to stay proceedings before COAH pending the outcomes of the two appeals pending before the Appellate Division. The Township argues that the petition to amend its substantive certification is properly before COAH and that the Hillsborough case does not apply to this situation. In Hillsborough, the amendment was attempted by Hillsborough after its substantive certification was revoked, and Hillsborough did not cooperate with the developers in its plan, which the Township contends, is contrary to the facts here. The Township also notes that the Plaintiff in the Hillsborough case was a developer of a site included in the township's plan, unlike SJM here. Again, the Township asserts that the courts have jurisdiction to review administrative actions, while COAH has primary jurisdiction over COAH matters. The Township also notes that SJM will have an opportunity to participate in COAH's mediation process pursuant to COAH's regulations governing objections and mediation.

In response to the allegation that P & H makes regarding the Township's awareness of the environmental constraints on the Windy Acres site, the Township states that the Freshwater Protections Act and other environmental protections do not prevent the development of the site, they only limit the land available for development. Additionally, Clinton claims that it was surprised by the unexpected reclassification of the Rockaway Creek from C-2 to C-1. The Township submitted certifications from the Township engineer and the mayor stating that no one from the offices of the Township was involved in any manner in the reclassification of the Rockaway Creek.

Finally, the Township argues that it did not delay action on P & H's site plan and subdivision application. Clinton states that P & H could have gone to COAH for relief if it felt that the planning board was delaying action pursuant to N.J.A.C. 5:93-10.4(c). The Township also states that it was P & H that delayed its application by not cooperating with requests by the Planning Board and the Township engineer.

CTCC RESPONSE

On May 25, 2004, Thomas A. Borden, Esq., on behalf of CTCC, submitted a letter brief in opposition to the motions filed by P & H and SJM.

The CTCC argues that COAH has primary jurisdiction to resolve the matter of whether the Township may amend its Housing Element and Fair Share Plan to replace the Windy Acres site. CTCC states that the site has been found to be unsuitable for development due to environmental constraints and other factual issues that were not known at the time substantive certification was granted. Additionally, the Superior Court has found that P & H does not have legal rights to sewer service that has been contractually given to other third parties. CTCC also notes that P & H failed to exhaust all administrative remedies before COAH prior to going to the Superior Court, and did not include COAH as a defendant in the lawsuit as required by the Fair Housing Act. The CTCC states that, based on these actions, COAH should deny both motions and proceed with reviewing the amendment.

DISCUSSION

P & H and SJM have both asked this Council to dismiss Clinton Township's petition to amend its Second Round substantive certification. SJM also asks that the Council revoke the Township's existing substantive certification. In evaluating the relief requested by P & H and SJM the Council is mindful of the Fair Housing Act's overarching policy that affordable housing disputes are best resolved by the Council's review and mediation process, rather than through litigation. N.J.S.A. 52:27D-303. Accordingly, the Council notes that Clinton Township voluntarily came to COAH to address its affordable housing obligation. In so doing, the Council granted substantive certification to the Township's affordable housing plan. That plan included the Windy Acres site, the viability of which has recently been brought into question. Moreover, now that the viability of that site has been questioned, the Council again notes that the Township has voluntarily come to COAH to address its affordable housing obligation. As a preliminary matter, the Council finds that it is appropriate for the Council to exercise its jurisdiction over Clinton Township's Mt. Laurel compliance. While the Council is cognizant of the pending appeals filed by P & H in regard to the development of the Windy Acres site (which will be discussed in more detail below), the Council is unaware of any reason to delay its administrative proceedings regarding the Clinton Township affordable housing plan amendment. To the Council's knowledge, a stay has not been entered by the Appellate Division with regard to the Council's action on the Township's Housing Element and Fair Share Plan. Moreover, as Judge

Ashrafi noted when he transferred the SJM matter to the Council's jurisdiction, P & H has not demonstrated how it would be harmed by the Council's proceeding on this matter. The Council concurs with Judge Ashrafi that review of Clinton Township's affordable housing plan amendment and the issues raised therefrom is appropriate and should proceed before the Council.

In the alternative, P & H asserts that the Council should stay its proceedings while the P & H appeals are pending before the Appellate Division. The Council disagrees that its continuing review of the Township's amendment will impact the Appellate Division's decisions regarding the Windy Acres site. Should the Appellate Division decisions in those cases make the development of the Windy Acres site viable, the affordable housing produced as a result of such development may be used to address the Township's affordable housing obligation. However, if the Appellate Division's decisions do not create such an impact, review of the Township's amendment to address any shortfall from the Windy Acres site will already be underway. In either case, the goal of fostering the creation of affordable housing will be met. Moreover, allowing the COAH process to continue will provide both P&H and SJM with an opportunity to participate in COAH's mediation process pursuant to COAH's regulations governing objections and mediation.

The question which the Council must now decide, then, is whether the Township has properly excluded the Windy Acres site from its amended plan, and whether dismissal of this petition to amend is warranted. COAH's rules explain that affordable housing sites which addressed a municipality's first round obligation shall remain in the second round plan if the developer of such site has filed a development application with the municipality prior to the expiration of the first round substantive certification or the municipal petition for substantive certification, whichever is later. N.J.A.C. 5:93-5.13(b)(2). As such, COAH's rules further provide that a site which meets either of these conditions may be eliminated from the Township's second round plan only with the agreement of the affected property owner. In the present matter, Windy Acres was included in Clinton Township's first round plan. P&H, the developer of the Windy Acres site, received General Development Plan (GDP) approval in 1995. P & H therefore filed its development application prior to Clinton's petition for second round substantive certification, which was filed with COAH on February 2, 1999. P & H has not agreed to the elimination of its site from the Township's fair share

plan, which is required under N.J.A.C. 5:93-5.13(c) and N.J.A.C. 5:91-13.1(f).

The Township argues that N.J.A.C. 5:91-13.1(f) does not apply in this instance because the site is not a developable site under COAH regulations. The Council does not agree with this interpretation of its rule. While the Council recognizes that the trial court has issued a determination that there is no precedent for a Mt. Laurel developer to wrest sewer capacity away from parties that already had a contractual right to that capacity, the Council is also cognizant that P & H has appealed this decision to the Superior Court, Appellate Division, and that that appeal remains pending. Until a decision is rendered on that matter, the Council's rules at N.J.A.C. 5:93-5.13(b) and (c) and N.J.A.C. 5:91-13.1(f) apply, and the Township may not remove the Windy Acres site from Clinton's fair share plan.

Nonetheless, the Council does not agree that dismissal is warranted in this case. Moreover, the Council recognizes that the pending P & H appeal makes it unclear how many affordable units, if any, will be constructed on the Windy Acres site. In light of the trial court's decision, it is not appropriate for the Council to continue to grant a reduction for the affordable units on the Windy Acres site at the present time. Pending the outcome of the P & H appeal, the Council will not grant a reduction for the Windy Acres site until the Council is clear that the site meets the requirements at N.J.A.C. 5:93-5.3(b), which requires a new construction site to be available, suitable, developable and approvable as defined in N.J.A.C. 5:93-1. The Council therefore directs Clinton Township to re-petition with an amended plan within 60 days which includes the Windy Acres site with a zero unit reduction, but which also provides for a plan to address the 145 unit shortfall in the event that the Windy Acres site is deemed undevelopable.

In regard to SJM's claims that Clinton's substantive certification should be revoked for failure to keep the Council apprised of action by the Township, the Council disagrees that revocation is warranted here. COAH notes that the Township kept it informed of the status of the Windy Acres site through the Township's annual monitoring reports. Additionally, the Council notes that Township did take certain necessary steps to provide sewer service to the Windy Acres site. The Township

included the site in the wastewater management plan, applied for the appropriate permits from DEP and entered into various contracts with third parties to obtain the NJPDES permit and the construction and operation of the treatment plant. Likewise, the Council rejects SJM's arguments that Clinton Township has failed to properly advise COAH of the problems associated with the implementation of its substantive certification. As noted above, the Township provided COAH with monitoring reports and also advised the Council that the Windy Acres subdivision application had been denied without prejudice. Moreover, the Council notes that the Township was not required to name COAH as a party to the Windy Acres litigation under N.J.S.A. 52:27D-317 because P&H did not file an exclusionary zoning lawsuit against the Township. As such, the Council finds that the Township is not in violation of its substantive certification, and revocation of the same is, therefore, not appropriate.

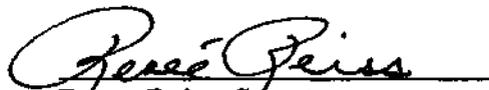
With regard to the issue of whether or not the Township acted in good faith regarding the subdivision application process, the Council declines to take a position on such claims. These are issues which have been raised in the Superior Court proceedings, and are beyond the purview of the Council at this time. While COAH's rules could have provided P & H with an avenue for relief with regard to allegations of delay by the Planning Board, P & H chose not to exercise the Council's jurisdiction and instead chose to utilize the Superior Court. As such, P & H appealed the Planning Board's denial to the Superior Court, Law Division, and has since appealed the Law Division's decision to the Appellate Division. That appeal remains pending, and the Council will not comment on the merits of the same.

In regard to the allegation that Clinton Township affirmatively sought to delay processing of the DEP permit that would have allowed for the construction and operation of the Clinton East Treatment plant, the Council again finds it beyond the scope of COAH's purview at this time. The issue of sewerability to the Windy Acres site currently remains pending before the Appellate Division. Again, while COAH's rules did allow P & H to come to COAH for assistance, P & H instead chose to litigate its sewer claims in the Superior Court. As such it would not be appropriate for the Council to comment on the same at this time.

Finally, in regard to P & H's claim that Clinton's proposed substitute Housing Element and Fair Share Plan is speculative and on its face fails to satisfy COAH regulations and constitutional standards, the Council has decided that the Township must re-petition with a new plan which includes the Windy Acres site. Once the Township has re-petitioned with its amended plan, the Council will begin its review and mediation process and ultimately determine whether or not the Township's plan meets all of COAH's requirements.

In sum, the Council denies SJM's motion to revoke Clinton Township's substantive certification as the Council did not find that the Township violated the terms of its substantive certification. In addition, the motions to dismiss Clinton Township's petition to amend the terms of its substantive certification are likewise denied. However, the Township is hereby ordered to re-petition the Council with a new amendment to its certified plan. That amendment shall include the Windy Acres site in the Township's plan. As explained above, N.J.A.C. 5:93-5.13(b), does not allow Clinton Township to remove the Windy Acres site from its Housing Element and Fair Share Plan without a signed agreement between the Township and P & H. Therefore, the Council directs Clinton Township to re-petition for amended substantive certification with a Housing Element and Fair Share Plan that includes the Windy Acres site in conformance with N.J.A.C. 5:93-5.13(b). However, because the suitability of the site is still unresolved pending the Appellate Division's decision regarding sewer capacity, it remains questionable whether or not the Council will be able to continue to grant the Township a reduction for this site. If the Appellate Division decision provides P & H with sewer capacity for its site, the Township may receive credit for the actual number of affordable units that are approved on the site. However, the Township is directed to provide for additional mechanisms in its Housing Element and Fair Share plan, in the event that the Appellate Division decision does not provide for such sewer capacity to the Windy Acres site. The Township shall re-petition within 60 days.

Dated: November 22, 2004


Renee Reiss, Secretary
New Jersey Council on
Affordable Housing