

IN RE TOWNSHIP OF OCEAN: MOTIONS OF SHORELINE MANAGEMENT SEEKING TO DISMISS TOWNSHIP FROM COUNCIL'S JURISDICTION; ACCELERATE DENIAL OF TOWNSHIP'S RE-PETITION )	NEW JERSEY COUNCIL ON AFFORDABLE HOUSING ) DOCKET NO. <i>COAH 04-1608</i> OPINION )
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By motion filed with the New Jersey Council on Affordable Housing ("Council" or "COAH"), dated August 6, 2004, Ronald L. Shimanowitz, Esq., counsel on behalf of Shoreline Management Development and Realty Company, Inc. ("Shoreline"), seeks the following:

1. That COAH reject the petition of the Township of Ocean ("Township" or "Ocean") seeking substantive certification, as inadequate and not meeting the requirements of the Fair Housing Act (FHA), the Municipal Land Use Law (MLUL), and the procedural and substantive regulations of COAH;
2. That COAH dismiss Ocean from its jurisdiction;
3. In the alternative, that COAH declare an accelerated denial of Ocean's petition for substantive certification pursuant to N.J.A.C. 5:91-10.2; and
4. Alternatively, permit Shoreline to enter into the COAH process as an objector to the Township's petition for substantive certification.

PROCEDURAL HISTORY

The Township's 1987-1999 cumulative pre-credited affordable housing obligation is 254 units, including 236 new construction units and 18 rehabilitation units. The Township petitioned for second round substantive certification on May 1, 2003.\* No objections were filed. At

\*Although Shoreline dates the initial petition as March 24, 2003, COAH's records show that it was received on May 1, 2003.

approximately the same time it petitioned the Council for substantive certification, Ocean also petitioned the State Planning Commission for center designation for the village of Waretown where a portion of its affordable housing is proposed to be located. The center designation/plan endorsement process continues under review by the Office of Smart Growth (“OSG”). A pre-petition meeting on plan endorsements was held with the OSG interagency team in September 2004. Ocean re-petitioned COAH with an amended Housing Element and Fair Share Plan on September 13, 2004. The objection period ended on October 28, 2004. Shoreline has filed objections to the re-petition and, therefore, has objector status for the re-petition. The re-petition is currently undergoing staff review.

On October 16, 2003, Shoreline filed a Mount Laurel Complaint in the Superior Court of New Jersey regarding the initial petition to COAH. On April 6, 2004, Judge Eugene Serpentelli, A.J.S.C., ordered that as a result of Shoreline’s intent to file a motion with COAH, the matter would be held, pending a determination from COAH as to whether it has jurisdiction over the Township’s affordable housing plan. On August 6, 2004, Shoreline filed its motion with the Council, which is the subject of this Opinion.

#### BACKGROUND

Shoreline represents that it is the owner of Block 39, Lots 4 & 5, totaling approximately 78 acres with frontage on Route 532, also known as Wells Mills Road; and Block 41, Lot 5, totaling approximately 50 acres. Both tracts are zoned commercial. The two tracts together are referred to as the “Shoreline site.” Shoreline proposes to develop its land for residential development, including a substantial percentage of units for low and moderate income households. It asserts that the tract is available and suitable for residential development.

Shoreline asserts that the initial petition submitted to COAH in May 2003, is “so deficient and noncompliant with the rules and regulations of COAH, that it should be deemed as a non-filing” and that the Township should not be afforded the protection that accompanies a valid submission to COAH.

MOTION-POINT I - Part A

Shoreline asserts that the Township’s submission does not meet the requirements of the MLUL and the FHA and that the Housing Element and Fair Share Plan only sets forth housing data for existing conditions. Shoreline states that the plan does not include a plan for providing affordable housing, that it simply restates many of the tools that are available to any municipality without providing any detail on how these tools would be used to meet the obligation.

The two components of the Township’s Fair Share Plan are described below.

**Rehabilitation Component**

The Township will use Ocean County to undertake a continuing rehabilitation program with the township to address its 18-unit rehabilitation obligation.

**New Construction Component**

The Township will address its 236-unit new construction obligation through a combination of the following methods: (1) a regional contribution agreement; (2) construction of new affordable housing units within the Edgemont, Village Center and Route 9 Redevelopment Areas; (3) the construction of age-restricted housing in the Township’s proposed Village Center; (4) the creation of an accessory apartment ordinance; (5) credits without controls; and (6) a development fee ordinance.

Shoreline states that as required in section 310(f) of the FHA, Ocean’s Housing Element does not contain a consideration of lands that are most appropriate for construction of low and moderate income housing, including lands of developers who have expressed interest.

MOTION-POINT I - Part B

Shoreline also asserts that the Township has not complied with the procedural requirements of COAH's rules. Shoreline states that pursuant to the requirements of N.J.A.C. 5:91-2.1 and 3.1, Ocean's submission does not rise to the level of a Housing Element and Fair Share Plan and thus the submission should be deemed a non-filing. Shoreline also states the notice requirements of N.J.A.C. 5:91-3.3 and 3.4 are not met since the submission does not provide the necessary information that should be made available for public inspection. N.J.A.C. 5:91-5.2 states the Council staff is responsible for preparing a report requesting additional information or issuing a compliance report within 60 days. Shoreline asserts that the failure of staff to issue such a report indicates that "COAH must not have taken Ocean's submission as a serious event" and, therefore, COAH should issue an Administrative Order to either deny or dismiss Ocean's petition. Alternatively, Shoreline seeks to apply N.J.A.C. 5:91-10.2 which allows COAH to issue an order to expedite a denial by dismissing the petition. This would result in the matter pending in the Superior Court to proceed as builder's remedy lawsuit.

MOTION-POINT I - Part C

Shoreline also states that in addition to failing to meet the requirements of the FHA and the MLUL, the Township has also failed to comply with COAH's substantive rules. The motion lists each of the rule submission requirements that was not provided, including: a consideration of the lands that are most appropriate for affordable housing; a map of all sites designated for affordable housing; a listing of each site that includes owner, acreage, lot and block; the location and capacities of infrastructure; applications of consistency determinations regarding area wide water quality management plans; the preceding and most recently adopted master plans; freshwater wetlands

maps; and USGS quadrangle maps for designated sites. Shoreline further discusses the alleged inadequacy of the Fair Share Plan as previously addressed in Part A above.

MOTION-POINT II

Shoreline states that it should be included in the mediation process as an objector, given the fact that no documentation has been submitted regarding any proposed inclusionary sites. Since there is no way to determine the suitability of those sites, Shoreline requests that, as a developer of an allegedly suitable site, it should be permitted to participate.

RESPONSE BY TOWNSHIP OF OCEAN

On September 17, 2004, Andrew Bayer, Esq., counsel for Ocean, responded in opposition to Shoreline's motion. The Township reports that notice of the petition was duly published on March 20, 2003, with the deadline to file objections extended to June 30, 2003, due to a notice issue. No objections were filed. The Township states that "[s]ubstantively, the Township's original petition for certification complied with COAH's minimum submission requirements because it identified the mechanisms by which the Township will satisfy its affordable housing" and refers to the certification of Stanley Slachetka, AICP, PP. In his certification, Mr. Slachetka asserts that the "Township's petition was further valid because the Housing Element & Fair Share Plan filed complied with COAH's minimum submission requirements. The original petition filed was a basic element which in part identified the Edgemont Redevelopment, the Township's proposed Village Center (Waretown Village Center) and the Route 9 Redevelopment Area as areas which would in part substantially address the Township's low and moderate income housing requirement. Other parts of the Fair Share Plan were identified, such as a regional contribution agreement and a

development fee ordinance which in total fully addressed the Township's low and moderate income housing requirements."

Ocean asserts that Shoreline's motion is legally deficient because it ignores the well established legal doctrine that the Legislature and the courts have unequivocally declared that COAH acts as the administrative regulator in the field of affordable housing and has primary jurisdiction over the administration of housing obligation.\* Ocean asserts that Shoreline did not exhaust its administrative remedies by filing an objection to the plan with the Council prior to filing suit.

The Township also states that its affordable housing plan is part of an overall economic and development planning process ongoing in the Township over the past number of years. At the time the affordable housing plan was developed, the Township was also in the process of developing the various complementary components of the plan and was diligently working in good faith to plan to meet its affordable housing obligation. Ocean maintains that it submitted the initial petition with the understanding that COAH would review it and provide feedback to help the Township fill out the details. In the meantime, Ocean proceeded with the following:

1. Submission to the State Planning Commission of a Waretown Center Petition including affordable housing on May 28, 2003. The Township was awaiting advice from the Office of Smart Growth as to whether its application would be accepted and COAH was made aware that the Township was undergoing this review.
2. Preparation of a Redevelopment Plan for the Waretown Village Center Route 9 Redevelopment Area, dated July 9, 2004.

\*Holmdel Builder's Association v. Township of Holmdel, 121 N.J. 550, 557 (1990) and the FHA, N.J.S.A. 52:27D-304(a).

3. Preparation of a Redevelopment Plan for the Edgemont Park Subdivision Redevelopment Area on July 22, 2004.
4. Adoption of a Resolution on August 26, 2004, authorizing the execution of a Regional Contribution Agreement with the City of Neptune to transfer 125 units at a cost of \$25,000 per unit for a total of \$3,125,000.
5. Neptune Township adopted a similar resolution to receive the RCA funds on September 13, 2004.
6. Adoption of a resolution approving an amended Housing Element and Fair Share Plan by the Township Land Use Board and the Township Committee on September 9, 2004.
7. Adoption of a resolution affirming the Township's intent to bond for any shortfall in funding necessary to implement the Housing Element and Fair Share Plan on September 9, 2004.
8. Preparation of a Fair Share Ordinance dated September 10, 2004.
9. Preparation of an Affirmative Marketing Ordinance, dated September 10, 2004.
10. Preparation of an Accessory Apartment Ordinance, dated September 10, 2004.
11. Submission of a revised Housing Element and Fair Share Plan to COAH on September 13, 2004, as a re-petition.

Finally, the Township notes that in addition to the complexity of its affordable housing plan, it is also subject to the rules and regulations of the New Jersey Pinelands Commission and the Coastal Area Facility Review Act.

## REPLY BY SHORELINE

Shoreline filed a reply to Ocean's opposition to its motion on September 28, 2004. The brief asserts that the Township's "11<sup>th</sup> hour" attempt to cure insufficiencies in its initial petition is irrelevant and that it was only the threat of Shoreline's motion that triggered the late submission of a re-petition and the required documentation. Shoreline asserts that the issue still before the Council is whether or not the May 2003 petition for substantive certification was sufficient to invoke the substantial protection of the COAH process and that the Township's re-petition is of no moment.

Shoreline states that COAH's rule at N.J.A.C. 5:91-2.4 specifically rejects any such re-petition as it states that "A municipality that has filed a Housing Element and Fair Share Plan with the Council may amend its Housing Element prior to petitioning for substantive certification and prior to the initiation of an exclusionary zoning suit." The Township had previously petitioned the Council and an exclusionary zoning suit was filed prior to the re-petition by Ocean in September 2004.

Shoreline also asserts the Township's position that it submitted the initial petition with the understanding that COAH would review it and provide feedback, and the fact that COAH did not issue a report with the statutory time frame, is an indication that the petition was a non-filing. Shoreline states that for the Township to reference the "well established" preference for COAH jurisdiction is inaccurate since the municipality must comply with the requirements to petition before COAH can be in a position to assume jurisdiction and the municipality failed to do so. Shoreline continues to assert that it is not what the Township did in the months following its initial submission that is at issue, it is whether the initial submission warranted the grant of COAH's jurisdiction. Finally, Shoreline refutes the argument that the Township is in a difficult position because it has had



to deal with various State agencies because Ocean has managed to prepare and file an amended plan and adopt several ordinances and various resolutions in the past several months.

### DISCUSSION

Based on the jurisdiction granted to COAH under the Fair Housing Act, N.J.S.A. 52:27-D301 et seq., and the affirmation of that jurisdiction in the Appellate Division's recent decision in the Sod Farm Associates case, COAH maintains exclusive jurisdiction over Ocean Township's second round affordable housing obligation as a result of Ocean Township's voluntary filing of a petition with COAH seeking second round substantive certification from COAH. Ocean Township filed its petition on May 1, 2003, seeking substantive certification from COAH for Ocean Township's second round affordable housing obligation for the period from 1987-1999. The Township filed a re-petition with the Council on September 13, 2004, to reflect changes in its original affordable housing plan.

Pursuant to N.J.S.A. 52:27D-314, any municipality that has submitted itself to COAH's jurisdiction through the filing of a petition seeking substantive certification of an affordable housing plan, falls within the exclusive jurisdiction of COAH. This position has been asserted by COAH and has been upheld by the courts on a regular basis. Recently, the Appellate Division had the opportunity to review a challenge to COAH's exclusive jurisdiction over a pending petition for substantive certification. In the case of Sod Farm Associates v. Township of Springfield, 366 N.J. Super. 116 (App. Div. 2004), the Appellate Division reviewed such a challenge to COAH's exclusive jurisdiction. In that case, the trial court held that, based on the length of time involved in COAH's review of the Township of Springfield's petition for substantive certification, that the trial court had jurisdiction to determine the appropriateness of Springfield's affordable housing plan, even

though that plan was pending before COAH. The trial court asserted that it had simultaneous jurisdiction with COAH to review Springfield's affordable housing plan.

In an appeal by COAH, the Appellate Division reversed the trial court's decision, finding that COAH indeed had exclusive jurisdiction over a municipality's affordable housing plan when the municipality had voluntarily petitioned COAH for substantive certification. The Court held that not only was any challenge to a municipality's affordable housing plan subject to exhaustion of administrative remedies, which included COAH's exclusive review of a voluntarily submitted petition for substantive certification, but the Court further held that sole jurisdiction over challenges to COAH actions on the affordable housing aspects of an exclusionary zoning lawsuit is a matter whose jurisdiction lies with the Appellate Division. Sod Farm, *supra*, 366 N.J. Super. at 133.


In this case, the issue before the Council concerns its exclusive jurisdiction regarding a municipality that is seeking substantive certification. Ocean's re-petition to the Council in September 2004 is of no consequence in determining the Council's jurisdiction over the Township's efforts to obtain substantive certification. Ocean's re-petition supercedes its prior petition, making that petition moot. Therefore, Shoreline's motion in regard to Ocean's original petition is also moot.

However, the Council notes that Shoreline should be permitted to continue to raise any objections it has to the Township's re-petition. Shoreline has filed objections to the re-petition in a timely fashion and as a result, has been granted objector status to Ocean's re-petition.

#### ORDER

For the reasons stated above, the Council has found that a determination of the sufficiency of Ocean Township's pending affordable housing plan, in the form of a re-petition, rests within the Council's exclusive jurisdiction. Therefore, Shoreline's motion is denied, with the

exception that Shoreline is permitted to raise any objections it has to the Township's re-petition. Shoreline will have ample opportunity to challenge the Township's re-petition as an objector. However, as a result of the pending re-petition for substantive certification filed with COAH by Ocean Township, Shoreline's motion to dismiss Ocean Township from COAH's jurisdiction, based on Ocean's original petition, must be denied. The Council further orders that mediation regarding the Township's re-petition is to be completed no later than 60 days after the issuance of the pre-mediation report by COAH staff.

  
Renee Reiss, Secretary  
New Jersey Council on  
Affordable Housing

Dated: *November 22, 2004*