

In re Application for Relief : Council on Affordable Housing
in Clinton Township, : Docket No. 05-1702 | 04-1603 (c)
Hunterdon County :

This matter arises from an application for emergent relief filed with the Council on Affordable Housing ("COAH" or the "Council") on February 2, 2005, by P&H Clinton Partnership ("P&H").

P&H is the owner of Windy Acres, a site which was included in Clinton Township's First and Second Round Fair Share Plans, and was the subject of a November 22, 2004 Opinion by the Council. That opinion, attached and incorporated as if set forth at length herein, describes the detailed history of this matter before this Council and the Courts. The Council relies on that history as set forth in its previous opinion and also notes the following relevant facts.

On April 2, 2004, Clinton Township filed an amendment to its certified plan seeking to remove the Windy Acres site. On October 27, 2004, Clinton Township adopted a resolution endorsing a recommendation that all Planning Area 2 (PA2) designations be re-designated as PA3 or PA5 in the Township. On November 22, 2004, the Council ordered the Township to re-petition with a new amendment to its certified plan including the Windy Acres site and alternative mechanisms to address a potential shortfall in the event that Windy Acres was not successful in its appeal seeking sewer from the Readington-Lebanon Sewer Authority. Clinton Township complied with the Council's previous directive and, on January 24, 2005, re-petitioned the Council with a new amendment to its certified plan.¹

¹ On February 3, 2005, Clinton Township filed a motion for leave to appeal with the Superior Court, Appellate Division, claiming that the Council's November 22, 2004 opinion and November 22, 2004 Resolution Granting a Waiver of the Center Designation requirement, require it to provide for more than its fair share of affordable housing. COAH disputes this claim. That motion remains pending before the Court.

On February 2, 2005, P&H filed an application for emergent relief with COAH pursuant to N.J.A.C. 5:95-12.4. At that time, P&H asked the Council to issue an emergent order directing the Township to halt its efforts to change the designation of the Windy Acres site from PA2 to PA5 under the State Plan, and compel the Township to defend the PA2 designation of Windy Acres in the cross-acceptance proceedings before the State Planning Commission and the Office of Smart Growth. P&H also argued that the Council should direct Clinton to support P&H's lawsuit against RLSA.

P&H argued that the present matter was identical to the situation which the Council addressed in Union Township. On January 5, 2005, the Council ordered Union Township to support its certified plan which included a site known as the Milligan Farm site, then designated as a PA2. In addition, P&H submits that if Windy Acres is re-designated as a PA5 site during the cross-acceptance process, the Windy Acres site will be rendered unbuildable, because current DEP policies, designed to be consistent with state plan policies, would preclude expansion of sewer service facilities in PA5, thus creating an "end-run" around the Council's November 22, 2004 directives.

In response to P&H's emergent application, on February 7, 2005, the Council received briefs from the Township, the Clinton Township Community Coalition ("CTCC"), and SJM.

In its brief the Township asserted that COAH did not have the authority to request planning designations that are contrary to sound planning. Clinton maintains that it participated in the cross-acceptance process and based its recommendations in that process on sound planning principles, including water quality standards and environmental concerns. In addition, the Township explained that it could not designate only the Windy Acres parcel as PA2 under the State Plan because under that Plan a PA2 must have land area greater than one square mile and must be contiguous to a PA1 (Windy Acres is only .45 square miles). Clinton also argued that the PA5 designation should not negatively impact on Windy Acres ability to develop because there will be no PA1 or PA2 designations within Clinton Township should Clinton be successful in its attempt to re-designate all the PA2's to PA3 and PA5, and all development will therefore occur in PA3, 4 or 5, consistent with the Council's rules on siting of inclusionary developments. Finally, Clinton stated that P&H's concerns regarding DEP permitting were overblown, and noted that any obstacles to the development of the Windy Acres site long pre-dated the issue of its planning area designation.

The CTCC also argued that the Council should deny P&H's motion, and claimed that COAH did not have the requisite jurisdiction to provide the relief requested. CTCC maintains that P&H sought to suppress the Township's ability to advise the State Planning Commission of important environmental data. CTCC explained that the State Plan is the vehicle for determining appropriate areas of growth and that COAH should follow the direction of the State Planning Commission in analyzing growth and construction of affordable housing. Thus, CTCC argued that it would not be appropriate for COAH to order Clinton to take a specific position regarding the appropriate planning area for the Windy Acres site. CTCC also asserted that the Council must determine whether Windy Acres presents a realistic opportunity for inclusionary development before it can make any recommendation regarding the reclassification of the Windy Acres site.

SJM joined in P&H's motion and further requested that the Council order Clinton to support the current PA2 designations Townshipwide. SJM also noted that the elimination of the PA2 designations in the Township would render sewer and infrastructure expansion virtually impossible.

At its February 9, 2005 meeting the Council heard oral argument and denied the application for emergent relief. Nonetheless, the Council referred the matter to a Task Force to consider whether any relief could be provided on a non-emergent basis. This Opinion will discuss the relief that is deemed appropriate at this time.

DISCUSSION

This Council has previously noted the importance it places on municipal support of a certified plan in the context of the cross-acceptance process. In Union Township, Hunterdon County, the township had previously held out its Milligan Farm site as a "preferred affordable housing site." Nonetheless, the township had not opposed the re-designation of the Milligan Farm site from PA2 to PA5. Accordingly, the Council found that Union had an obligation to support and uphold its certified plan, which included the Milligan Farm site, then designated as PA2. The Council further directed the Township to schedule a meeting with the Office of Smart Growth (OSG) within six months; submit a petition for plan endorsement to OSG within one year; and obtain an endorsed plan from the State Planning Commission that includes the Milligan Farm site as a PA2 or within a town center within two years. In issuing its determination in the Union Township matter, COAH was cognizant of the State Plan guidelines directing growth to appropriate areas, and the need to encourage growth in PA's 1 and 2 and town centers, and, therefore, required the township and developer to meet and work with COAH Staff to assure that the affordable housing plan relied upon by the township provided a realistic opportunity for the creation of affordable housing.²

² In response to COAH's directive, Union Township submitted correspondence to the Hunterdon County Planning Board supporting the Milligan Farm site as a PA2, and will likewise file a

In the present matter, Clinton Township has not held out the Windy Acres site as a "preferred affordable housing site," and, in fact attempted to remove the site from its certified plan. However, the Council's November 22, 2004 opinion explained that such action by the Township was contrary to COAH's rules and required the Township to keep this site in its Fair Share Plan. In so doing, however, the Council was aware of the sewer issues associated with the Windy Acres site. Because such issues remained pending before the Superior Court, Appellate Division, the Council believed that it was best to allow those issues to be resolved in that forum. In the interim, the Township was advised to provide for alternative affordable housing mechanisms to address any potential shortfall from the Windy Acres site. The Council's November 22, 2004 opinion, then, represents the Council's intent to keep the *status quo* of the Windy Acres site, pending the Appellate Division's decision regarding sewer access.

separate cross-acceptance report to the Office of Smart Growth supporting the PA2 designation for the site should the County Planning Board recommend changing the planning designation to PA5.

The Council finds that Clinton Township also has an obligation to support and uphold its plan, a plan which currently contains the Windy Acres site designated as a PA2. The Council rejects the contentions that it does not have the authority to make such a finding. COAH's rules at N.J.A.C. 5:93-10.5 explain that the Council may revoke a municipality's substantive certification if it has determined that the municipality has obstructed the construction of an inclusionary development in its certified plan.

It appears to this Council that efforts by Clinton Township to re-designate the Windy Acres site as PA5 may render that project unbuildable at this time. Such action could arguably be deemed obstruction of an inclusionary development by the Council. In such instances the Council clearly has authority to act pursuant to N.J.A.C. 5:93-10.5.


While the Council is cognizant that there are many factors, other than the planning area designation, which may or may not render the development of the Windy Acres feasible,³ as explained above, COAH's previous opinion in this matter sought to maintain the *status quo* on the Windy Acres site, pending the Appellate Division's determination on sewer. Changing the planning designation of the Windy Acres site at this time has the potential to upset that *status quo* and impede affordable housing development on that site. Any action by the Township to foster such change may be construed as obstructing construction pursuant to N.J.A.C. 5:93-10.5. The Council recognizes that in certain instances, a change in planning area of a COAH certified affordable housing site may be brought about by circumstances beyond the control of a municipality; however, the Council, in fostering the goal of creating affordable housing, must also be mindful of the potential subversion of that goal by municipalities who are not willing to support and uphold their own certified affordable housing plans.

³ In fact, the Township's petition to amend its certified plan will be reviewed by COAH staff in its entirety pursuant to COAH's rules.

The Council is aware that the Hunterdon County Planning Board was scheduled to adopt the final form of its cross-acceptance report on February 22, 2005, and thereafter submit this report to the State Planning Commission. Nonetheless, pursuant to N.J.A.C. 5:85-3.6(c), a municipality may submit its own cross-acceptance report to the State Planning Commission within 45 days of the County's submission. As such, the Township still has an opportunity to submit its own cross-acceptance report in an effort to uphold its certified plan.

Clinton is therefore directed to advise COAH staff of what action it intends to take to support its certified fair share plan prior to the Council's next scheduled board meeting.

dated: *March 9, 2005*


Renee Reiss, Secretary
New Jersey Council on
Affordable Housing