

IN RE MOTION TO VACATE)	NEW JERSEY COUNCIL ON
STIPULATION WITHDRAWING)	AFFORDABLE HOUSING
OBJECTION TO HOWELL)	
TOWNSHIP'S PETITION FOR)	OPINION
SECOND ROUND SUBSTANTIVE)	COAH 05-1712
CERTIFICATION)	

This matter arises from a motion filed by AST Development Corporation and AST Sunnyside ("AST") which requests that the Council: 1) vacate the September 23, 2004 Stipulation Withdrawing AST's Objection to the Township of Howell's January 30, 2003 Re-petition for Substantive Certification, 2) Compel the Amendment of Howell's Fair Share Plan to include AST's property located at Block 129, Lots 85, 87, 88.01 and 88.02; or alternatively, 3) enforce the terms of the September 23, 2004 Memorandum of Understanding ("MOU") between Howell and AST.

BACKGROUND AND PROCEDURAL HISTORY

In attempting to address its affordable housing obligation, Howell Township, Monmouth County, has had a long and arduous history before the Council and the courts; however, on October 5, 2004, Howell Township received substantive certification of its second round Housing Element and Fair Share Plan from the Council. Howell had a 12-year cumulative obligation of 1,109 units, consisting of a 154-unit rehabilitation obligation and a 955-unit new construction obligation. Howell Township received first round certification on October 30, 1989 and petitioned the Council on Affordable Housing (COAH) for second round certification on February 27, 1995. A COAH staff report dated June 2, 1995 noted several deficiencies in the plan. One objection was filed during the 45-day objection period and mediation was held. Mediation resolved several issues and a COAH Mediation Report was prepared. On December 7, 1995, Howell Township adopted a new Housing Element to address the comments of the June 2, 1995 COAH Report. The Township adopted a revised Fair Share Plan and re-petitioned COAH for substantive certification. Additional mediation sessions were held regarding the Township's re-petition, and the Township's plan was again further revised. On October 7, 1998, COAH granted substantive certification to

Howell's revised plan; however, an appeal of COAH's decision was taken by Elon Associates,¹ and ultimately, on March 20, 2001 the Appellate Division reversed substantive certification and remanded the petition to COAH to re-evaluate a site in Howell's Plan known as "site 7." As a result of COAH's review on remand, a report dated September 9, 2002 was issued which re-evaluated all of Howell's plan, including site 7, and which also requested certain additional information from the Township. On January 8, 2003, COAH issued an Administrative Order directing the Township to provide all of the information requested or re-petition. On January 31, 2003 Howell re-petitioned with a new plan.

In response to Howell's January 31, 2003 re-petition, four timely objections to Howell's petition were filed. The objectors were MGD Holdings, AST, Elon Associates and Foxmoor Development. Mediation was held with representatives from AST, Elon, Foxmoor and the Township. MGD did not participate in this mediation as an agreement between the Township and MGD had been entered between these parties before mediation began. As a result of mediation, however, AST and the Township entered into a Memorandum of Understanding ("MOU") and AST withdrew its objection with prejudice. No agreement was reached with Elon or Foxmoor, but the Township invited these parties to continue discussions for inclusion of these sites in the Township's third round plan. Thereafter, on October 5, 2004, COAH granted Howell second round substantive certification. Elon has appealed this determination, and the matter remains pending before the Superior Court, Appellate Division.

AST'S ARGUMENT:

AST asserts that, as a result of the mediation, Howell offered to include AST's property in their Third Round Housing Element and Fair Share Plan. AST asserts

¹ Although Elon did not file a timely objection to this petition, Elon did file such an objection to Howell's January 31, 2003 petition, which afforded Elon objector status at that time. Elon also filed three separate appeals, later consolidated by the Court, regarding the delay in Howell receiving substantive certification. In Re March 22, 2002 Motion to Dismiss and Intervene In The Petition of Howell Township, Monmouth County, 371 N.J. Super. 167 (App. Div. 2004), *cert. denied* 182 N.J. 140 (2004). In addition, Elon filed a complaint in the Superior Court, Law Division, which was subsequently dismissed after the March, 2001 court remand, and that dismissal was later upheld by the Appellate Court in Elon Assocs., L.L.C. v. Township of Howell, 370 N.J. Super. 475 (App. Div. 2004) *cert. denied* 182 N.J. 149 (2004).

that the Township agreed to include AST's concept plan for a new town center on AST's property as part of Howell's comprehensive re-examination of its Master Plan (the "Amended Master Plan"). In exchange, AST maintains that Howell requested that AST withdraw its objection to the Township's second round re-petition with prejudice. On September 23, 2004, AST and the Township executed an MOU detailing the agreement between the parties. Thereafter, on October 5, 2004, COAH granted the Township's repetition for substantive certification.

On December 4, 2004 and January 5, 2005, AST claims that the Howell Township Planning Board adopted an Amended Master Plan without notice to AST or reference to its Town Center Plan and, thus, violated the MOU. The Amended Master Plan was subsequently overturned by the court on unrelated grounds. On April 28, 2005, AST presented its Town Center proposal to the Board's Master Plan Subcommittee. This presentation was simultaneous with six or seven other developer presentations. AST states that although this presentation may have complied with the Municipal Land Use Law ("MLUL"), it did not reflect the detailed consideration and cooperation contemplated by the MOU and does not reflect the understanding of AST when it executed that MOU.

AST maintains that it has attempted to work with the Board to include the Town Center Plan as part of the Amended Master Plan, and has even tried to accommodate suggestions and requests from the Board. Nonetheless, AST claims that on September 27, 2005, it learned that the Board adopted an Amended Master Plan without including or referring to AST's plan for a town center.

AST thus argues that the stipulation dismissing AST's objection with prejudice should be vacated because, AST asserts, the Township breached its agreement under the MOU. AST argues that the Board's refusal to include the Town Center Plan as part of the Amended Master Plan violates the MOU and that the Township used COAH mediation to fraudulently induce AST to dismiss its objection by promising to take certain actions without any intention of following through. Therefore, AST argues that the Township's actions warrant the vacation of the Stipulation of Dismissal that was attached to the MOU.

In support of its motion, AST relies on N.J.A.C. 5:95-7.3(d), which states that parties to COAH mediation are bound by agreements entered into during mediation that are formally reduced to writing and signed. AST argues that because COAH has the power to enforce these agreements, COAH also has the power to vacate Stipulations upon a breach of such an agreement.

AST further argues that COAH's grant of substantive certification was conditioned upon the execution of the MOU, and therefore the Township should be required to either include AST's property in the COAH plan or comply with the terms of the MOU. AST notes that inasmuch as the terms of the MOU were necessary to make the Township's affordable housing plan realistically possible, COAH's grant of substantive certification relied upon the same. Nonetheless, AST contends that the Township never had any intention of complying with the MOU, and asks the Council to compel such compliance.

HOWELL TOWNSHIP'S ARGUMENT:

Howell Township claims that it advised AST during mediation that any application made by AST would need to be approved by the Planning Board prior to the Governing Body agreeing to cooperate with AST. The Township points to the MOU, which states, "The parties agree to work together in good faith to develop a plan for submission to the Planning Board in the event that the necessary zoning ordinance and master plan documents have been adopted." The Township argues that the Planning Board's decision not to include AST's plan in Howell's new Master Plan does not put Howell in breach of the MOU, as its obligation under the MOU was to "work in good faith with AST to create a zoning ordinance amendment for introduction assuming the inclusion of the Town Center Plan in the new Master Plan by the Howell Planning Board." The Township asserts that without Planning Board action, the Township's obligation was not triggered. Howell states that at no time did it make any guarantees or promises involving the Planning Board, and, in fact, throughout all negotiations clearly advised that AST must, as any other developer, proceed before the Planning Board and the Master Plan committee. There was never any intention by Howell to bypass the

authority of the Master Plan committee or the Planning Board to permit AST an unconditional right to develop. To do so would have violated the MLUL and constituted impermissible contract zoning. The Township asserts that AST knew this and still chose to enter into the MOU. Howell further argues that AST voluntarily chose to withdraw its objection with prejudice subject to the MOU. The Township contends that AST cannot now, after its failure before the Planning Board, seek another opportunity to reinstate its objection. To allow reinstatement of the objection would undermine the entire mediation process, the strong public policy encouraging settlement, and the protections provided by the grant of substantive certification.

Howell Township also asserts that it has not refused to honor the MOU and, in fact, welcomes COAH's enforcement. Howell argues that AST implies that the fact that the Planning Board adopted the new Master Plan without notice to AST is in some way violative, but does not point to any statute or case law that supports this contention. Howell relies on the MLUL, N.J.S.A. 40:55D-10a and 13, which explains that notice to an individual property owner is not required in a Master Plan hearing, rather only public notice is required, which the Planning Board provided. In any event, Howell states that the Planning Board was not a signatory to the MOU and was never intended to be bound by the MOU and therefore, was not obligated to act at all with AST under the provisions of the MOU.

Finally, Howell argues that the relief sought by AST cannot be awarded. Howell contends that AST came to the mediation seeking inclusion in the Township's third round plan. AST did not at any time object to Howell's second round plan, and the basis for the MOU was that AST would be given the opportunity to be included in round three. This motion, therefore, cannot be used as an opportunity to inquire as to the validity of the Township's housing element and fair share plan that has since received substantive certification. Moreover, Howell notes that AST makes no claims that the financial feasibility of Howell's plan has been negated, that there are any substantial impediments to development of the properties for affordable housing that are already in the plan or that Howell has failed in presenting a realistic opportunity for the provision of low and moderate income housing. Thus, Howell asserts that the motion should be denied.

PLANNING BOARD'S ARGUMENT:

The Township Planning Board notes that it was not a party to the MOU and never voted to approve the Agreement. As is required by the MLUL, the Planning Board heard a formal presentation by AST at its master plan subcommittee meeting. The full board also considered testimony from AST and the owner of the subject parcel. The Board then voted not to change the zoning on AST's property in its master plan. The Planning Board has not yet completed the hearing process and as such has not yet adopted a memorializing resolution.

The Planning Board asserts that AST's argument in support of its motion is flawed because it is based on the proposition that the Planning Board exercised bad faith and violated the MOU, however, the Planning Board was not a party to that agreement. The MOU was negotiated between AST and the Township, and at no time did the negotiating team or AST send the MOU to the Planning Board for review and approval. The settlement of any action involving the Planning Board must be deliberated and voted upon in public. As the Planning Board was neither formally part of the negotiation process nor a signatory to the MOU, there is no agreement or contract between AST and the Board. As the parties were never in privity, the Board could not have exercised bad faith. The Planning Board also notes that AST argues that the Planning Board had an absolute obligation to amend the master plan to recommend its proposed use. To accept this argument and grant AST's motion, however, would allow the Township to enter into an agreement with a third party that would bind the Planning Board and render the public hearing process useless.

In addition, the Planning Board argues that the plain language of the MOU did not require the Board to take any action. The MOU only provides, "Assuming the inclusion of the Town Center Plan in the New Master Plan, the Howell governing body and its professionals will work in good faith with AST and its professionals to create a zoning ordinance amendment for introduction and public hearing by the governing body." The MOU does not require that the Town Center proposal be incorporated into the Master Plan. Rather, if it were included, then the Governing Body would have had an obligation to adopt the appropriate implementing ordinances.

AST'S REPLY:

In response to Howell Township's argument that it did not agree to do anything under the MOU, AST points to paragraph four of the MOU which is entitled "Timing: Mutual Cooperation" and which states:

AST acknowledges and understands that Howell cannot provide any assurances to AST about the timing or the adoption of the New Master Plan and subsequent Zoning Ordinance Amendment. Howell agrees, nonetheless, that it will cooperate with AST and its professionals to advance the New Master Plan and subsequent Zoning Ordinance Amendment in good faith and with continuity of purpose.

AST thus argues that this paragraph of the MOU represents an integral component and reason why AST and Howell were able to reach a compromise during COAH mediation. AST dismissed its objection because Howell agreed to work with AST to advance AST's concept for a new Howell Township Center as part of the Amended Master Plan. Howell explicitly agreed to cooperate and work with AST in good faith with continuity of purpose so that the property would ultimately be included as part of Howell's Third Round Housing Element and Fair Share Plan.

In addition, AST asserts that the Township's evolving interpretation of the MOU smacks of bad faith, as the town center plan was struck down before Howell would even discuss working with AST. Three weeks after the execution of the MOU, the Howell Township Planning Board disavowed the terms of the MOU by voting on October 18, 2004 to eliminate the property from consideration as a town center within the Master Plan amendment. Although two members of Howell's COAH mediation team were members of the Planning Board, there was no discussion in favor of the property being designated as a town center, and the vote was taken without providing AST an opportunity to present its town center plan, and mentioning that AST might want an opportunity to present its plan.

On December 16, 2004, the Planning Board voted to adopt a resolution to amend the Land Use Element of the Master Plan and eliminate the property from consideration as a potential town center. Just before the vote, however, AST notes that concern was expressed by the mayor elect and member of the COAH mediation team that the proposed resolution might violate the MOU or be perceived as evidencing that the

Township had acted in bad faith toward AST. On January 6, 2005, the MOU was again discussed by the Planning Board, and the Board's attorney explained that the Board has the authority under the law to come back and re-examine its Master Plan at any time that it wants and make changes. By its conduct, the Township took the position that as long as AST was given an opportunity to make a presentation regarding the Town Center Plan at some unspecified time in the next nine years, its obligations were met under the MOU.

AST contends that the Township and the Planning Board were predisposed against AST. In April, 2005, AST was allowed for the first time to present its plan at a Master Plan Subcommittee meeting alongside six or seven other developers. The Master Plan was adopted by the Planning Board on September 27, 2005, at which time the Planning Board stated that the language in the MOU only required that AST be allowed to give a presentation.

AST argues that Howell admits that it did not try to assist AST in working with the Planning Board so that the Town Center would be included in the Amended Master Plan, and that Howell also admits that it did not believe that it had a good faith obligation to cooperate or work with AST.

AST states that the actions taken by the members of Howell's mediation team frustrated AST's ability to advance the Town Center Plan and constitutes deliberate bad faith by the Township. AST takes issue with the fact that the Township officials made an agreement with AST wearing their "COAH Mediation team hats" and then worked to thwart the agreement by switching to their "Planning Board hats".

COMMENTS FROM ELON ASSOCIATES :

Elon Associates ("Elon") raises the issue that since COAH requires a Planning Board member to be part of the mediation team, N.J.A.C. 5:95-7.2(f); N.J.A.C. 5:91-7.2(g), and a member of the Planning Board did take part in the mediation negotiations with AST, that the objector's intent when signing the mediation agreement may be frustrated and/or not implemented when the Planning Board did not sign the MOU that was designed to resolve AST's objection. To the extent that a planning board member took part in the negotiations with AST that resulted in the MOU, was the intent of the MOU to bind the planning board to the agreement? Elon asserts that for mediation

to be useful, the process by which an agreement is entered into must be one that is enforceable by all necessary parties. Elon further maintains that the ultimate question for COAH, posed by this motion, is whether mediation failed in a material respect because the intent of the parties was not carried out by virtue of the absence of the signature of one of the necessary parties, the Planning Board. Finally, Elon submits that to the extent that AST and the Planning Board and the Township offer factually conflicting views of what occurred, COAH should refer the matter to OAL as a contested case.

HOWELL'S RESPONSE TO ELON'S COMMENTS :

Howell submits that at no time was there any representation that the Planning Board was to execute the MOU. In fact, Howell argues that AST agreed to independently go before the Planning Board in order to secure approval for its plan. Howell further states that both parties were aware that the Planning Board member who participated in the mediation negotiations would not bind the Planning Board.

DISCUSSION

The present motion raises serious questions regarding the validity of Howell Township's second round substantive certification and the COAH mediation related to that petition for certification. The Council places great importance on its mediation process. Both COAH's rules and the Fair Housing Act seek to encourage agreements via the COAH mediation process. N.J.S.A. 52:27D-303,-315; N.J.A.C. 5:95-7.1, et seq. Accordingly, the Council has long adhered to a policy of enforcing mediation agreements to carry out the intent of the parties. As such, AST's assertion that the Township failed to exercise good faith with regard to the MOU at issue here, as well as the Township's actions subsequent to COAH's grant of substantive certification, cause the Council a great deal of concern. Indeed, misuse of the COAH mediation process cannot and will not be tolerated by the Council.

The Council finds that Howell has an affirmative obligation to work in good faith to support the inclusion of AST's property in Howell's third round petition pursuant to the MOU. While the Council notes that the MOU is ambiguously worded, the Council finds that the intent of the MOU was that Howell work together with AST to

support inclusion of its proposal in its third round plan. Paragraphs 2 and 4 of the MOU state in part:

2. . . . The parties agree to work together in good faith to develop a plan for submission to the Planning Board in the event that the necessary zoning ordinance and master plan documents have been adopted.

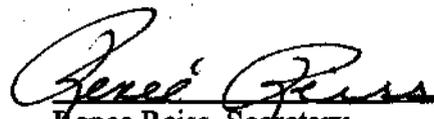
4. . . . AST acknowledges and understands that Howell cannot provide any assurances to AST about the timing or the adoption of the New Master Plan and subsequent Zoning Ordinance Amendment. Howell agrees, nonetheless, that it will cooperate with AST and its professionals to advance the New Master Plan and subsequent Zoning Ordinance Amendment in good faith and with continuity of purpose.

Indeed, the MOU provides a great deal of specificity with regard to the components of the Town Center plan. Accordingly, it can be inferred that the Township did in fact review and support AST's Town Center plan.

Before the Council makes any decision on the arguments set forth by the parties in their motion papers, however, the Council refers all parties back to mediation, so that they may attempt to resolve the discrepancies arising regarding proper implementation of the MOU. Additionally, the Council finds that if necessary, COAH's grant of second round certification to Howell may be revisited, but decision on this aspect of the motion is reserved until the conclusion of mediation.

It is thus ordered that the parties shall enter mediation as soon as possible and provide a progress report on that mediation to the Council within 60 days from the date of this decision.

Dated: March 8, 2006


Renee Reiss, Secretary
New Jersey Council on
Affordable Housing