

IN RE CLINTON TOWNSHIP,  
HUNTERDON COUNTY

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NEW JERSEY COUNCIL  
ON AFFORDABLE HOUSING

OPINION  
COAH 06-1806

This matter arises as a result of an Order to Show Cause issued by the New Jersey Council on Affordable Housing on November 9, 2005. That order was issued in conjunction with the Council's decision on an emergent motion filed by P&H Clinton Partnership ("P&H"). P&H's emergent motion sought to compel Clinton Township, Hunterdon County, to support P&H's efforts to obtain sewer service for the Windy Acres site which was included in the Township's certified fair share plan. Specifically, P&H asked this Council to compel Clinton Township to join in and support P&H's position on appeal before the Superior Court, Appellate Division, in a matter in which P&H ultimately sought sewer service from the Readington-Lebanon Sewer Authority ("RLSA"). The relief sought by P&H was granted in part and denied in part by COAH. (See copy of the December 14, 2005 opinion memorializing COAH's decision on that motion, attached and incorporated by reference herein). In addition, on November 9, 2005, COAH issued an Order to Show Cause as to Why COAH should not Revoke Clinton Township's Second Round Substantive Certification and Dismiss the Pending Petition to Amend that Certified Plan (See copy of November 9, 2005 Order to Show Cause attached and incorporated as if set forth at length herein).

**BACKGROUND**

The procedural and factual history concerning Clinton Township's repetition has been long and arduous. Moreover, it has been reiterated at length in COAH's prior decisions in this matter. As such, COAH will rely on the procedural history and background as set forth in its November 22, 2004 Opinion on the Motions to Revoke Clinton Township's Second Round Substantive Certification and to Dismiss the Township's Petition to Amend that Certification; the November 22, 2004 Resolution Granting a Waiver; the January 12, 2005 Resolution on the Motions for Clarification and Reconsideration; the March 9, 2005 Opinion on Motion for Emergent Relief; the November 9, 2005 Order to Show Cause; and the December 14, 2005 Opinion on the

Motion for Emergent Relief. (Copies of these COAH decisions and resolutions are attached and incorporated by reference herein). In addition, the Council notes the following pertinent facts.

Despite on-going negotiations, and direction from COAH to include the Windy Acres site in its Fair Share Plan, on October 27, 2005, Clinton Township Council rejected a proposed settlement with P&H regarding the development of Windy Acres as an affordable housing site. Accordingly, on November 9, 2005, COAH issued an Order to Show Cause as to why Clinton Township's Substantive Certification should not be Revoked ("OSC"). In response to COAH's Order, Clinton Township requested that the parties be allowed the opportunity to enter COAH mediation in an effort to resolve the outstanding issues surrounding the Windy Acres development. COAH granted the Township's request and afforded the parties the opportunity to enter mediation. As such, the resolution of the OSC was put off pending mediation. As a result of this mediation, Clinton Township and P&H executed a settlement agreement; however, this agreement is not binding on those parties without COAH's approval. Both P&H and the Township have asked COAH to approve the agreement.

In addition, and in response to the OSC, SJM Communities, an objector to the Township's petition to amend, filed a "Cross-Motion" seeking to compel the Township to include SJM's property in its second and third round affordable housing plans.

COAH heard argument on both the Order to Show Cause and SJM's "cross-motion" at its June 14, 2006 meeting. This opinion will address both the OSC and the motion.

## ARGUMENTS

### CLINTON TOWNSHIP'S RESPONSE TO THE OSC:

The Township argues that the Order to Show Cause should be dismissed because the Township and P&H have reached an agreement regarding the development of the Windy Acres site for affordable housing. The Township notes that the initial "trigger" for the issuance of the Order was the Township's initial rejection of an agreement with P&H, and since there is now an agreement between the Township and P&H, the Township submits that the OSC should be dismissed.

In addition, the Township asks that COAH approve the mediated agreement as well as several “modifications” to its pending petition to amend its certified plan. Specifically, the Township asks that it be allowed to remove two municipal construction projects within its plan, and instead receive credit for the Windy Acres site.<sup>1</sup>

P&H/WINDY ACRES RESPONSE TO THE OSC:

P&H asserts that prior to COAH’s November 9, 2005 OSC, the Township had demonstrated “bad faith” with regard to the development of the Windy Acres development. Since the issuance of the OSC, however, P&H explains that the Township has been cooperative in reaching an agreement with P&H regarding the development of the Windy Acres site. As such, P&H also requests that COAH approve the mediated agreement and allow the Township to modify its pending petition as noted above.

SJM’S CROSS-MOTION:

SJM argues that Clinton Township has exercised and continues to exercise bad faith in implementing its affordable housing plan. SJM’s motion notes that COAH previously ordered the Township to proceed with the construction of the municipal construction sites relied upon in its repetition regardless of the outcome of the Windy Acres litigation. However, SJM notes that the Township now seeks to delete these municipal sites from its plan. In addition, SJM argues that the Windy Acres site is no longer suitable for inclusionary development. SJM submits that New Jersey Department of Environmental Protection (“NJDEP”) regulations concerning Category One Waters make the provision of sewer service to the Windy Acres site problematic at best. SJM also notes that P&H was not successful in its appeal seeking sewer capacity from the Readington-Lebanon Sewer Authority (“RLSA”). (App. Div. Docket No. A-2997-03T1). As such, SJM argues that the Windy Acres site should no longer be included in the Township’s plan. Instead, SJM asserts that it has a site which is available and suitable for development as an inclusionary development. SJM submits that its site has ample sewer

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<sup>1</sup> COAH’s November 22, 2004 Opinion explained that the Township must include the Windy Acres site pursuant to N.J.A.C. 5:93-5.13(b), but could not receive any affordable housing credit for the site at that time given the question of site suitability and potential lack of sewer for the site. As such, COAH directed Clinton Township to provide alternative affordable housing mechanisms in order to address any shortfall of affordable units in Clinton’s fair share plan.

availability, and minimal environmental constraints. Therefore, SJM submits that COAH should either revoke Clinton's second round substantive certification or order that SJM's site be included in the Township's affordable housing plan.

CLINTON TOWNSHIP'S RESPONSE TO SJM'S MOTION:

Clinton Township opposes SJM's motion explaining that the SJM property is located in the ROM-1 zone (research, office and manufacturing district) and would therefore require a "wholesale rezoning from commercial to residential." In addition, the Township states that the sewer purportedly available to the SJM site would only permit the creation of one-bedroom units under DEP rules. The Township further argues that the SJM site is physically and environmentally constrained. Clinton Township also questions whether the site could support the type of development proposed by SJM in light of DEP regulations. Moreover, Clinton asserts that Windy Acres continues to pose a realistic opportunity for the creation of affordable housing as the current settlement agreement provides three alternatives to create 150 affordable units. Finally, the Township is unsure whether sufficient water capacity and pressure are available to service the proposed development.

P&H'S RESPONSE:

P&H asserts that SJM's motion for site specific relief should be denied because SJM has not established that Windy Acres fails to present a realistic opportunity for the creation of affordable housing. P&H notes various possibilities for how its site may obtain sewer. In addition, P&H argues that site-specific builder's remedies are to be awarded by COAH only in exceptional cases. Finally, P&H asserts that it has diligently sought to develop its site and should be afforded the opportunity to comply with the agreement entered by the Township and P&H.

RESPONSE FROM CLINTON TOWNSHIP COMMUNITY COALITION ("CTCC"):

The CTCC is also an objector to the Township's petition to amend and responded to both the OSC and SJM's motion for site specific relief. CTCC asserts that

COAH should not approve the agreement at issue here as the CTCC argues that there are too many environmental constraints on the Windy Acres site and that there are too many obstacles for obtaining sewer for the site. However, the CTCC does not advocate dismissal of Clinton Township from COAH's jurisdiction.

In addition, the CTCC supports SJM's cross-motion to the extent that that motion asserts that Windy Acres does not present a realistic opportunity for the creation of affordable housing. However, the CTCC does not support SJM's request for site specific relief noting that the Township has raised valid issues regarding the suitability of SJM's site for affordable housing. CTCC asserts that COAH should look at these issues in more detail before providing the extraordinary relief sought by SJM.

#### DISCUSSION

COAH initially entered the OSC at issue here after learning that Clinton Township's Council voted to reject a proposed settlement allowing for the creation of ninety affordable units on the Windy Acres site. As COAH had previously ordered that the Windy Acres site be included in the Township's petition to amend its certified fair share plan, such action by the Township Council was deemed contrary to COAH's previous directives. In response to COAH's Order, however, the Township requested and ultimately participated in COAH's mediation process in the hopes of coming to an agreement with P&H regarding the development of the Windy Acres site for affordable housing. In an attempt to foster the production of affordable housing, COAH permitted the parties to enter mediation and as a result, P&H and Clinton Township have reached an agreement. Since the issuance of the OSC, P&H and the Township executed an agreement to address the Township's second round affordable housing obligation. Therefore, COAH does not find it appropriate to revoke the Township's second round substantive certification at this time. However, it should be noted that COAH is deeply concerned about the amount of time which has passed since COAH granted second round substantive certification to Clinton Township and the lack of affordable housing created in Clinton Township since that time.<sup>2</sup> As such, it is COAH's intent by this decision to

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<sup>2</sup> While COAH is aware that Clinton has a petition to amend its certified plan currently pending before the Council, that amendment has not yet been acted upon due in large part to the request of the Township and the on-going mediation.

fashion a remedy which will ultimately produce affordable housing in Clinton Township with the least amount of delay.

In regard to SJM's request for site specific relief, however, COAH does not believe it is appropriate to order the relief sought by SJM at this time. It is undisputed that site specific relief is an extraordinary remedy granted only when exceptional circumstances are present. As explained above, COAH would like to see affordable housing in Clinton Township in the immediate future; however, COAH is not convinced that SJM is entitled to a builder's remedy at this time. As noted previously, COAH has found that Clinton Township worked collaboratively with P&H in order to implement the terms of its second round substantive certification. Accordingly, SJM's request for site specific relief is denied at this time.

In regard to the request by P&H and Clinton to approve the settlement agreement at issue, COAH concluded, based on its own analysis and from objections received in response to Clinton's Housing Element and Fair Share Plan, that input from the New Jersey Department of Environmental Protection ("DEP") was necessary to any determination of the feasibility of the Windy Acres project as proposed in the agreement. As such COAH reached out to the DEP on several occasions to receive its input. On September 12, 2006, COAH received a letter from DEP outlining a timeline, as well as the steps necessary for the Windy Acres site to obtain the necessary DEP permits and approvals. In addition, the DEP letter set forth the potential obstacles to obtaining these DEP permits and approvals. Ultimately, the DEP letter concluded, based on the information provided, that the development proposals on the Windy Acres property presented "significant regulatory challenges that would be very difficult for the [DEP] to approve." See Attached. Although the Council disagrees with DEP's assessment that it would be difficult to find that the development of Windy Acres as an affordable housing site is in the public interest, COAH recognizes that the timeframes necessary for DEP review and approval are "extensive." COAH is not able to find that inclusion of the Windy Acres site for 365 market-rate units and 90 affordable units creates a realistic opportunity for affordable housing in light of the many environmental issues and questions regarding sewer capacity regarding the development of the Windy Acres property. In addition, it should be noted that on September 13, 2006, COAH received a

letter from Stephen Eisdorfer, Esq., counsel for P&H, which advised that after additional testing it appears that the hydrological capacity on the Windy Acres site is less than originally anticipated, thereby providing "significantly less" capacity than would be needed to service the 455 unit development. Therefore, COAH cannot approve this agreement as drafted, as requested by P&H and the Township. Rather, COAH will accept the mediation agreement if the parties want to go forward with the condemnation option. The Council emphasizes, however, that it does not seek to impose a requirement on Clinton and P&H, and it is entirely in their discretion to go forward.

Notwithstanding the foregoing, COAH notes that Clinton Township has an ongoing responsibility to address its affordable housing obligation. Clinton Township's second round substantive certification will expire on March 7, 2007. Moreover, it appears that the Township has decided not to move forward with its pending amendment to this certified plan. As such, COAH is again presented with the question of how to assure that affordable housing is provided in Clinton Township in the most efficient manner possible. In light of the lengthy delays already encountered in this endeavor, COAH finds that this goal can best be accomplished in Clinton Township through a petition to for third round substantive certification on an expedited basis. Such a petition, must, by definition, address any remaining second round obligation together with the Township's third round rehabilitation and growth share obligations. N.J.A.C. 5:94-1.4. In light of the substantial delay in realizing its affordable housing goals thus far, however, COAH finds it necessary to expedite Clinton's third round submission.

As such, Clinton Township is hereby ordered to file a third round petition for substantive certification of its affordable housing plan that addresses the Township's total 1987-2014 affordable housing obligation with COAH within one hundred and twenty (120) days of this order. If no such plan is filed, COAH will revoke the Township's second round certification pursuant to the order to show cause at issue here. The Council will not entertain any request to extend this deadline for submitting a third round plan. If Clinton proposes to provide the 90 affordable units through a municipal construction project (as identified in the settlement agreement), the Township must adhere to the three year construction schedule for such project and must meet the criteria, as set forth in N.J.A.C. 5:94-4.6, including demonstration that there is adequate sewer

and water availability to serve the 90 affordable units. This documentation must be submitted with the Township's third round petition.

In addition, and in order to assure that Clinton Township provides for its affordable housing obligation as expeditiously as possible, Clinton is required to provide COAH staff with quarterly updates on its progress.

In conclusion, Clinton Township is ordered to submit a third round petition within one hundred and twenty (120) days of this opinion. Upon receipt of that petition, COAH will dismiss the Order to Show Cause if the petition meets COAH rules pursuant to N.J.A.C. 5:95-3.2. Further, COAH denies SJM's Cross-Motion in response to the Order to Show Cause seeking to compel the Township to include its property in its second or third round affordable housing plan.

  
Renee Reiss, Council Secretary

DATED: *October 11, 2006*