

IN RE MARLBORO TOWNSHIP, MONMOUTH) NEW JERSEY COUNCIL ON
COUNTY, MOTION SEEKING ACCELERATED)
DENIAL OF MARLBORO'S THIRD ROUND) DOCKET NO. 10-2226
HOUSING ELEMENT AND FAIR SHARE)
PLAN) MOTION DECISION
)
) September 8, 2010

On May 3, 2010, the New Jersey Council on Affordable Housing (the "Council" or "COAH") received a motion from Ronald L. Shimanowitz, Esq. and Jonathon Burnham, Esq., on behalf of American Properties at Marlboro, LLC (American Properties), seeking accelerated denial of Marlboro's petition for third round substantive certification and dismissal of the Township from COAH's jurisdiction. American Properties is an objector to Marlboro Township's third round Housing Element and Fair Share Plan, as the contract purchaser for Block 206, Lot 53 in Marlboro. The property was included in the Township's initial 2005 third round plan, but was not included in Marlboro's 2008 third round plan. American Properties' motion is the subject of this decision.

On April 29, 2010, Marlboro Township transmitted to COAH a motion for an extension of time to re-petition. Specifically, Marlboro requested an additional 90 days from April 30, 2010. Marlboro re-petitioned with an amended Housing Element and Fair Share Plan on July 23, 2010, before a decision was rendered on the

Township's motion. On July 28, 2010, COAH received a motion from the Weitz Entities seeking rejection by COAH of the Township's re-petition. These motions are also addressed in this motion decision.

PROCEDURAL AND FACTUAL HISTORY

Marlboro Township received a consent order for Final Judgment of Compliance concerning its affordable housing obligation on December 24, 1985, which was amended on June 5, 1990, again on March 5, 1993, and extended by court order on January 17, 1995. The Township petitioned COAH for, but never received, second round substantive certification. On December 30, 2008, Marlboro petitioned COAH for third round substantive certification of its Housing Element and Fair Share Plan. Marlboro's third round fair share obligation consists of a 36-unit rehabilitation obligation, a 1,019-unit prior round obligation, and a projected growth share obligation of 654 units. Marlboro's Fair Share Plan requested second round exclusions pursuant to N.J.A.C. 5:97-2.4, thereby reducing the Township's total projected growth share to 380 affordable units.

COAH received fourteen (14) objections to Marlboro's third round Housing Element and Fair Share Plan. A COAH Premediation Report Requesting Additional Information was issued on June 12, 2009. Mediation sessions were conducted on July 14 and August 3, 2009. Additional mediation sessions were conducted at Township Hall in Marlboro during the months of August and September. The next

step in the review process was for Marlboro to submit the additional information as requested in the June 12, 2009 report.

The items listed in the report were to be provided to COAH by August 14, 2009, pursuant to N.J.A.C. 5:96-6.2(c). Marlboro requested and received an extension until November 23, 2009 to submit the requested information listed in the Premediation Report to COAH because mediation had not yet concluded at the time. The extension request was made on August 14, 2009. On November 16, 2009, Marlboro requested a second extension to submit the outstanding items. Marlboro requested this extension because the Township indicated that it was exploring substituting an alternative site for a 176-unit project in the Township's 2008 third round plan, known as the Ingerman project, a municipally sponsored 100 percent project located on Ticetown Road. The Township was provided with an extension to submit the requested information listed in the June 12, 2009 report to COAH no later than January 29, 2010. However, COAH's letter granting the extension stated that if Marlboro substituted an alternative site for the Ingerman project, the Township would be required to re-petition COAH pursuant to N.J.A.C. 5:96-3.4 by March 15, 2010.

On March 13, 2010, Marlboro requested a third extension for a period of 180 days, stating that an additional extension was necessary due to the circumstances presented to municipalities throughout the State as to the status of the existing affordable

housing laws. The letter also stated that the Township needed additional time to coordinate and move forward on the Ingerman project. On March 16, 2010, COAH staff issued a letter to Marlboro denying the Township's request for an additional 180-day extension and providing the Township with a final 45-day extension to submit the requested information listed in the June 12, 2009 report to COAH. The remaining items were due to COAH by April 30, 2010. This deadline also applied to the Township if it intended to re-petition to change the location of the Ingerman project from the Ticetown Road site to a location on Amboy Road, which the Township deemed preferable for the project. Marlboro did not re-petition COAH by April 30, 2010. Since that time, the Township has submitted some of the items listed in the June 12, 2009 report. On May 21, 2010, the Township Council adopted a resolution authorizing a contract with the Monmouth Housing Alliance for the administration of its rehabilitation program. The Township also entered into a contract with the Monmouth Housing Alliance for the general administration of its affordable units. The Township designated the Entron site an "area in need or redevelopment" and adopted a redevelopment plan with the requirement for affordable housing on May 6, 2010. The Township indicates that a redevelopment agreement for the Entron site is forthcoming. Complete information on the Michael Weitz sites, the Multiple Sclerosis project and Ingerman project has not been submitted to COAH.

As indicated above, on April 29, 2010, Marlboro filed a motion for an extension of its time to re-petition. Oral argument on both the Township's motion for an extension of time to re-petition and American Properties' motion for accelerated denial of Marlboro's petition was heard at the June 9, 2010 COAH meeting.

On March 30, 2010, an objector to the Township's plan, Michael Weitz/OHAD ("the Weitz Entities"), filed a builder's remedy lawsuit with the Superior Court regarding the Northpointe site, which is included in the Township's plan. On May 4, 2010, American Properties also filed a builder's remedy lawsuit with the Superior Court; however, that complaint was recently dismissed without prejudice by the Court.

On May 13, 2010, COAH denied with prejudice a spending plan waiver request from Marlboro for reimbursement to Ingerman for pre-development costs expended on the Ticetown Road site, and denied without prejudice the request for costs related to the expenditure of funds for pre-development costs for site investigation and exploration of the Amboy Road site. COAH found that the Township had not demonstrated that it was committed to the Amboy Road site as part of the Township's Fair Share Plan, and that a commitment could have been demonstrated by re-petitioning COAH with the Amboy site in an amended Housing Element and Fair Share Plan and submitting a revised spending plan to include the proposed expenditures for the Amboy Road site. COAH could have then

proceeded with approving the spending plan through the normal review process.

American Properties' motion for accelerated denial

On May 3, 2010, COAH received a motion for accelerated denial of Marlboro's petition for third round substantive certification from American Properties. The owners of the American Properties' site join in the motion and rely on American Properties' submissions. The property was included in the Township's initial 2005 third round plan, but was not included in the 2008 third round plan.

American Properties maintains that Marlboro Township is not committed to being an inclusionary community. American Properties argues that despite 15 years of participation in the COAH process, the Township has neither obtained second round nor third round substantive certification. American Properties states that Marlboro continues to play a "shell game" with COAH by including and then removing sites from its fair share plans and continuing to request extensions.

American Properties states that Marlboro has added and removed sites from its plans, such as the Bluh and Batelli site, the Entron site, the Stattel Farm, and now the Ticetown Road site, which is being removed from the plan because of public pressure. American Properties asserts that the motion for an extension of time to re-

petition is another example of Marlboro's recalcitrance against COAH.

American Properties states that the Township was provided with an April 30, 2010 deadline to either (1) submit the information requested in the June 12, 2009 COAH Remediation Report; or (2) re-petition COAH with a new compliance plan. American Properties states that the Township rescinded the zoning on the Ticetown Road site on April 15, 2010, and therefore, the only choice left for Marlboro was to re-petition to replace the Ticetown Road site. American Properties maintains that Marlboro has known about the Amboy Road site since October 2009, but, after having been granted numerous extensions of time, has done nothing to advance the process. American Properties states that the day before the Township was due to re-petition, it filed a motion for a 90-day extension of time to re-petition. American Properties maintains that this should result in a dismissal of Marlboro from COAH's jurisdiction. American Properties states that N.J.A.C. 5:96-12.2 provides that COAH has the authority to deny the Township's petition on an accelerated basis:

At any time, upon its own determination, or upon the application of any interested person, the Council may deny substantive certification without proceeding further with the mediation and review process.

In addition, American Properties cites Real Estate Equities, Inc. v. Holmdel Tp., et al., which American Properties maintains sets the standard for accelerated denial:

It is the Council's interpretation that its authority to accelerate denial of substantive certification is generally intended to be employed where a municipality before the Council for substantive certification fails to participate in good faith. Thus, it is appropriate to accelerate denial where a municipality is not participating in a manner designed to expeditiously advance the substantive certification process and is, in effect, undermining the goals of the Fair Housing Act. The Supreme Court, in the Hills case, implicitly recognized that the Council need not permit its time and that of interested parties to be wasted, with the resulting delay in satisfaction of the a municipality's Mt. Laurel obligation. [COAH Docket 86-1 pg. 10]

American Properties argues that Marlboro has no intention of becoming a compliant municipality and that the dismissal of the Township would better foster the production of affordable housing. American Properties maintains that the dismissal of the Township would allow American Properties to pursue a remedy in court that would result in the development of affordable housing in Marlboro.

American Properties cites In Re: Petition of Substantive Certification of Housing Element and Fair Share Plan of the Township of Hillsborough, Somerset County [COAH Docket 97-905], where COAH revoked Hillsborough's substantive certification because the Township refused to comply with a mediated agreement because of public opposition. American Properties also cites In Re Rockaway Township [COAH Docket 06-1817] and In Re Fair Lawn [COAH Docket 07-1924], where COAH dismissed these municipalities for failure to take certain actions.

American Properties maintains that Marlboro's compliance plan is still deficient nearly 18 months after filing its petition, and

is another reason that the Township should be dismissed from COAH's jurisdiction.

Support for the Motion to Accelerate Denial

On May 21, 2010 COAH received support for the motion for accelerated denial on behalf of several owner-developers of properties located in Marlboro: Ashbel Associates, LLC (the owner of site 9A in the Township's 2008 Fair Share Plan); Pallu Associates, LLC; Gihon Associates, LLC, Great River Corp (collectively, the site 9B developers in the Township's 2008 Fair Share Plan); Elon Associates, LLC (owner of two sites in the Township, which are not in the Township's plan); and OHAD Associates, LLC (owner and developer of Northpointe in the Township's 2008 Fair Share Plan). These entities are collectively known as the "Weitz Entities."

The Weitz Entities submitted a brief in support of American Properties' motion for accelerated denial of Marlboro's petition for substantive certification and in opposition to Marlboro's request for a 90-day extension. The Weitz Entities incorporate and rely upon American Properties' briefs and certifications for both motions. The Weitz Entities also incorporate its March 30, 2009 objection to the Township's petition.

The Weitz Entities indicate that it has been attempting to develop Northpointe, and Sites 9A and 9B as inclusionary

developments in Marlboro since the early 1990s. Northpointe was included in the Township's 1985 Consent Judgment, and the Weitz Entities maintain that for the past 15 years, the Township has successfully thwarted the development of these affordable housing sites. In the Township's second round petition for substantive certification, Northpointe and Sites 9A & 9B were included in the 1995 and 1998 Fair Share Plans. The Weitz Entities maintain that the Township entered into an agreement in 2000 to facilitate the development of Sites 9A and 9B, but the Township failed to secure substantive certification and, therefore, these sites were not rezoned. In the Township's 2004 Fair Share Plan, Marlboro included Site 9A and Sites 9B as inclusionary sites, but omitted the Northpointe site as an inclusionary site, and instead proposed that the site provide money, in lieu of units, to support an 85-unit Regional Contribution Agreement (RCA).

In April 2004, the Township's Planning Board denied a site plan application for the Northpointe development. The Township and OHAD resolved the denial of the application, as well as the removal of the site as an inclusionary development in the 2004 plan by an agreement reached in the COAH mediation process. The agreement implemented various aspects of zoning and development for Northpointe (July 12, 2007 Agreement, which provided that the site would produce 299 market rate units and 71 affordable family rental units and funding for a 14-unit RCA). The Township and Weitz

Entities subsequently executed an addendum to the 2007 settlement agreement on May 18, 2009, confirming that 85 family rental units would be constructed on-site. However, the Weitz Entities argue that the Township's actions in denying the Northpointe site plan are further evidence of Marlboro's abuse of the COAH process and disregard for binding agreements.

As part of the COAH mediation process involving the 2004 third round Fair Share Plan, the Township and the Weitz Entities also reached a new agreement on Sites 9A & 9B. The February 1, 2005 Agreement provided that the site would produce 221 total units on Site 9B, including 49 affordable family rental units, and 126 market rate age-restricted units on Site 9A. The agreement removed the prerequisite that the Township secure substantive certification as a precondition to the adoption of the zoning ordinance necessary to develop the affordable housing. Notwithstanding this voluntary agreement, the Weitz Entities maintain that the Township has consistently refused to adopt the zoning required in order to implement the development of Sites 9A & 9B.

Marlboro petitioned for third round substantive certification again in 2008 under COAH's June 2, 2008 revised third round rules (N.J.A.C. 5:96 and 5:97). The Housing Element and Fair Share Plan included the Northpointe site and sites 9A and 9B, but the Weitz Entities maintain that the Township unilaterally increased the affordable housing set-aside for Site 9B from 49 units to 72 units

without any compensatory benefit or the agreement of the Site 9B Developers. As a result, the Weitz Entities filed an objection with COAH on March 30, 2009, challenging the validity of the Township's 2008 Fair Share Plan and seeking to reinstate the 2005 Agreement. In particular, the Site 9A & 9B developers sought to compel the Township to rezone Sites 9A & 9B in accordance with the 2005 Agreement.

The Weitz Entities attended the COAH mediation sessions, where a verbal agreement was reached at the final mediation session on September 10, 2009. The Township never executed the agreement, which led the Weitz Entities to file a builder's remedy lawsuit with the Superior Court.

The Weitz Entities maintain that COAH has dismissed municipalities for not acting in good faith in the past. They provide the following examples: Little Silver, Hasbrouck Heights, West Paterson, Harrington Park, Fair Lawn and Clinton Township. The Weitz Entities state that in the Clinton Township case, COAH determined that a municipality may not switch sites during mediation.

Fair Share Housing Center

On May 21, 2010 COAH received a brief from Fair Share Housing Center (FSHC), which is an objector to the Township's plan, in support of American Properties' motion for accelerated denial of Marlboro's petition for substantive certification and in opposition

to Marlboro's request for a 90-day extension. FSHC incorporates and relies upon American Properties' briefs for both motions. FSHC argues that Marlboro has expended significant resources on studies of multiple sites, filing motions, and arguments against COAH, but has expended little effort toward providing affordable housing within the Township. FSHC maintains that the Township is not acting in good faith and that remaining within the jurisdiction of COAH will not lead to a timely resolution of the issues between the parties. FSHC argues that the Township's withholding of nearly \$15 million in its municipal affordable housing trust fund (more than any other municipality in New Jersey) reflects this intent. FSHC believes that the appropriate remedy is the denial of the Township's petition and for the imposition of the judiciary's jurisdiction.

Opposition to the Motion

On May 21, 2010 COAH received opposition to the motion for accelerated denial on behalf of Marlboro Township. Marlboro states that there is no legal basis in law or fact to grant American Properties' motion for accelerated denial. Marlboro maintains that the decision for accelerated denial is "reserved for situations where COAH is convinced that a municipality is not participating in the COAH's process in a manner designed to expeditiously advance toward substantive certification" (In Re Middletown Township, COAH

Docket 91-305, pg. 6) and that COAH must be strongly convinced of this. Marlboro further argues that the remedy is discretionary and that COAH noted itself that the remedy is "extraordinary" (In Re Washington Township, COAH Docket 87-32, pg. 4) and used only in "exceptional cases" (In Re Howell COAH Docket 87-34, pg. 2). Marlboro also maintains that COAH stated in the Howell case that the use of accelerated denial goes against the intent of the Fair Housing Act. Marlboro argues that COAH only grants the remedy when the municipality has acted in bad faith and has frustrated the administrative process.

Marlboro maintains that the following standards apply in the case of an accelerated denial:

1. the accelerated denial is extraordinary and unusual;
2. the remedy is discretionary;
3. the remedy runs contrary to the intent of the Fair Housing Act;
4. the element of bad faith must be present;
5. has the municipality acted in such a way to frustrate the administrative process?

Marlboro argues that applying the above criteria to Marlboro's case warrants a conclusion that a dismissal is not appropriate because the COAH review process has been proceeding. Marlboro states that mediation took time to complete because the Township's plan had 14 objectors. Marlboro further states that it filed a motion to stay mediation as a reactive measure to a Superior Court lawsuit by the Concerned Citizens of Marlboro and needed more time to respond to the objections because of the number of objections. In addition,

Marlboro states that its decision to replace the Ticetown Road site with the Amboy Road site is in the best interests of the Township and will also make addressing the affordable housing obligation more realistic. Marlboro states that in the past, COAH has recognized that the changing of a site is not unusual and that COAH itself has noted that re-petitions occur in the normal course of proceedings (In Re Branchburg COAH Docket 98-1012, pg. 4). Marlboro maintains, therefore, that the decision to re-petition does not warrant a dismissal of the Township from COAH's jurisdiction as it is not "extraordinary" or "unusual." Marlboro also states that the site the Township intends on using, the Amboy Road site, is an objector's site. Marlboro believes that this demonstrates that the COAH mediation process works. Marlboro maintains that it is not surprising that an amendment to the plan must be made with 14 objectors to the original plan. In addition, Marlboro argues that the delay in the plan review process was not the Township's fault since Executive Order 12 and the subsequent COAH resolution suspended COAH's review of the plan. On February 9, 2010, Governor Christie issued Executive Order 12 (EO12). COAH's resolution suspending review of third round petitions pursuant to the directive of EO12 was adopted on February 16, 2010. On February 19, 2010, the Appellate Division stayed that portion of EO12 that sought to suspend review of third round activities. As a result, COAH immediately resumed third round activities, including review

of third round petitions.

Marlboro maintains that American Properties' allegation that the Township's plan is still deficient is untrue. The Township states that the administration of the Township's rehabilitation program is moving forward; the Bluh and Batelli project has been given preliminary approvals; and with regard to the Entron site, the site has been designated a redevelopment area, the redevelopment plan has been adopted, and the Township has commenced negotiations with the developer for a redeveloper's agreement. Marlboro also argues that any perceived deficiencies with Marlboro's plan still should not warrant a dismissal as COAH did not dismiss Denville Township when it was determined that the Township's plan was "not without problems that needed correction" (In Re Denville Township, COAH Docket 87-16. pg. 6).

Marlboro maintains that it has also demonstrated its compliance with COAH with other efforts, such as appointing a municipal housing liaison in 2009, who has assisted the Township in preventing units from going into foreclosure and enforcing UHAC and the local affordable housing ordinance. In addition, the Township has utilized housing trust funds to repair and replace retaining walls in Glenbrook, one of its existing affordable housing complexes. Marlboro states that it also has begun negotiations with the homeowners' association in Hamilton Park, a mobile home park in its plan, for a new lease that will extend controls on

affordability. The Township states that recently it has adopted an ordinance that provides down payment assistance to qualified homebuyers who are interested in purchasing affordable units in foreclosure.

Marlboro also argues that the Township has shown good faith at proceeding with substantive certification by filing the spending plan motion for the Ingerman project and for making progress on the Entron site. Marlboro maintains that a considerable amount of information has been submitted to COAH and the two points of information that are needed regarding the Weitz and Ingerman projects are not available at this time. Marlboro states that the Weitz issue is in litigation and, therefore, the Township cannot provide any information on that project at this time. Marlboro maintains that it attempted to provide COAH with information on the Ingerman project by filing the motion for a spending plan waiver for the exploration and investigation of the Amboy Road site, but COAH did not grant this waiver and instead wanted Marlboro to re-petition first.

Marlboro argues that the decisions that American Properties cites to support its motion were municipalities that were already granted substantive certification and the municipalities did not follow up on conditions of the certification and, therefore, the certifications were deemed null and void, such as Hillsborough. Marlboro states that in Rockaway's case, Rockaway refused to supply

COAH with information, but Marlboro has not refused to supply anything that COAH has requested and maintains that there is a reason for not submitting everything at this time. Marlboro maintains that in the Fair Lawn case, the Borough failed to adopt an overlay zone for eleven years and a comparison between Fair Lawn and Marlboro should not be made.

MEDIATION

As stated above, COAH received fourteen (14) objections to Marlboro's third round Housing Element and Fair Share Plan. Several mediation sessions were conducted. Proposals were offered to the Township for inclusionary developments by most of the objectors. No settlements were reached with these objectors and mediation was closed with regard to these objectors. However, mediation continued for several additional sessions with the Township and Weitz Entities regarding the Northpointe site and sites 9A/9B. At the final mediation session on September 10, 2009, a verbal agreement was reached between the Township and the Weitz Entities, and the mediator concluded mediation with the assumption that Marlboro would execute the agreement. However, the Township has failed to bring the agreement to a full vote by the Township Council.

June 9, 2010 Argument and Re-petition

Oral argument on both the Township's motion for an extension

to re-petition and American Properties' motion for accelerated denial was heard by the Council at the June 9, 2010 COAH meeting.

On July 23, 2010, Marlboro re-petitioned COAH with an amended Housing Element and Fair Share Plan. Marlboro's amended Housing Element and Fair Share Plan utilizes the State Planning Commission's (SPC) draft projections instead of COAH's Appendix F projections. Draft SPC projections are now available in the draft State Plan, but they have not been adopted by the SPC. The amended plan states the following:

While the COAH rules may require the use of the Appendix F projections, the Fair Housing Act and the Court in In re Adoption of N.J.A.C. 5:94, require that COAH incorporate State Planning Commission (SPC) projections to determine municipal obligations. While the SPC projections were not available in 2008 when COAH was developing its current regulations, the SPC projections are now available. The utilization of the SPC's housing and employment projections to compute the Township's growth share obligation is consistent with the Fair Housing Act, with the findings of the Court in In re Adoption of N.J.A.C. 5:94 and with the recommendations of the Governor's Housing Task Force. Therefore, the Township of Marlboro will base its obligation on the "trend" projections of the SPC.

The Township of Marlboro did not submit the required information requested in either the COAH Report Requesting Additional Information or COAH's regulations for determining the municipal growth share obligation. The absence of this essential information regarding the amendment to the Township's Housing Element and Fair Share Plan results in the Township's re-petition for substantive certification being incomplete pursuant to N.J.A.C.

5:96-3.1 et seq. As a result, the amended plan is deficient by 256 affordable units required by COAH's rules after second round exclusions are applied, pursuant to N.J.A.C. 5:97-2.4 (382 units - 126 units = 256 units).

On July 28, 2010, COAH received a motion from the Weitz Entities seeking rejection by COAH of the Township's re-petition because the Township utilized the draft SPC projections. FSHC and American Properties filed letters in support of the motion. Marlboro filed opposition to the motion.

Decision

Marlboro Township has consistently failed to demonstrate good faith during the COAH review process. The Township has requested multiple extensions without making progress on its plan until very recently. Significantly, during mediation, the Township entered into a verbal mediation agreement with the Weitz Entities, the developer of two sites in Marlboro's plan, one of which, the Northpointe project, has been in the Township's plan since the Township received a Consent Judgment in 1985. Marlboro failed to execute the agreement, refusing to bring the agreement to the full Township Council for a vote. Notwithstanding this conduct, the Township still requests credit for these two projects in its plan, despite the existing disagreements between the developer and the Township. The Township has received three extensions to submit the

information requested in the June 12, 2009 COAH Remediation Report Requesting Additional Information and to re-petition COAH with the Amboy Road site in the Township's Fair Share Plan and spending plan. The last two extensions were granted by COAH based upon the representation that the Township was exploring the possibility of a new site for its plan and would need to re-petition to include the new site. As a result, the Township knew of the need to re-petition as early as November 16, 2009, when Marlboro requested a second extension for providing the information requested in the June 12, 2009 COAH report. Specifically, Marlboro indicated that it was exploring the substitution of an alternate site for the Ingerman project, a municipally sponsored 100 percent project located on Ticetown Road. The Township could have re-petitioned COAH at any time, including as early as November 2009. In addition, Marlboro could have expedited the re-petition process since the June 9, 2010 COAH meeting when oral argument was heard on this motion and the Township's motion for an extension of time to re-petition. The Township did not re-petition until July 23, 2010. In addition, the Township's refusal to follow COAH's regulations with regard to its re-petition is further evidence that the Township is acting in bad faith. Even after being provided additional time to re-petition (by way of the time required for scheduling of these motions), the Township's amended plan remains deficient in the number of affordable units that must be provided and the information that

must be submitted. It is clear that the Township is not participating in the COAH process in a manner designed to expeditiously advance the substantive certification process.

N.J.A.C. 5:96-12.2 provides COAH with the authority to deny the Township's petition on an accelerated basis:

At any time, upon its own determination, or upon the application of any interested person, the Council may deny substantive certification without proceeding further with the mediation and review process.

On July 8, 2010, a COAH task force met to consider American Properties' motion. For all of the above stated reasons, the task force recommended that American Properties' motion for denial of Marlboro Township's petition for substantive certification and dismissal of the Township from COAH's jurisdiction be granted. A second task force met on August 25, 2010, to reconsider American Properties' motion and the recently submitted motion from the Weitz Entities seeking rejection by COAH of the re-petition. The task force once again recommended that the motion from American Properties be granted. The reluctance or inability of the Township to provide all the information requested in the June 12, 2009 COAH report, failure to execute agreements reached in mediation for affordable housing projects, and failure to re-petition in a timely manner with a plan that follows COAH's regulations, leads the Council to conclude that Marlboro's third round petition does not provide a realistic opportunity for the development of Marlboro's third round affordable housing obligation.

The plan submitted by Marlboro in its re-petition to COAH on July 23, 2010 relies on draft SPC growth projections that are inconsistent with COAH's current regulations and with the Appellate Division's decision in In the Matter of the Adoption of N.J.A.C. 5:94 and 5:95, 390 N.J. Super. 1 (App. Div. 2007). The decision states that "prior to implementing a growth share methodology and growth share ratios, COAH must have data from the State Planning Commission or from some other reputable source that the State as a whole, and that each region within the State, have sufficient vacant developable land within growth areas to enable the ratios to generate enough housing to meet the need." Id. 390 N.J. Super. 1, 54 (App. Div. 2007). The Court stated that it "...also invalidated the growth share rules to the extent that the methodology relies on unissued data from the State Planning Commission." Id. at 86. It was in response to this decision and in response to not having data from the SPC that COAH conducted a vacant land analysis of the entire State which formed the basis for COAH's revised third round regulations. The projections that Marlboro relies on, and asks COAH to accept in its re-petition do not meet the Appellate Division's standard set forth above. The projection relied upon by Marlboro has not been formally adopted by the State Planning Commission and until the State Planning Commission issues final projections in compliance with the Appellate Division decision, COAH shall continue to use its projections based upon its statewide

and regional vacant land data and analysis. Marlboro was and remains, at the present time, required to use COAH's projections for its third round affordable housing obligation.

Since the analysis prepared by the SPC remains in draft form, COAH and municipalities must rely upon the statewide vacant land data and analysis which forms the basis for COAH's third round growth share projections. As a result, Marlboro must rely upon and comply with COAH's third round regulations. For all of the above stated reasons, Marlboro's third round re-petition for substantive certification is hereby denied and Marlboro is dismissed from COAH's jurisdiction. Further, the motion submitted by the Weitz Entities seeking rejection by COAH of the Township's re-petition is moot. In addition, Marlboro's motion for an extension of time to re-petition is also moot.

A handwritten signature in cursive script that reads "Renee Reiss".

Renee Reiss, Secretary
New Jersey Council on
Affordable Housing

Dated: September 8, 2010