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15-Mar-1989

- Objections of the Civic League of Greater New Brunswick to Old Bridge Township's Housing Element and Fair Share Plan

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State of New Jersey
DEPARTMENT OF THE PUBLIC ADVOCATE
DIVISION OF PUBLIC INTEREST ADVOCACY

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March 15, 1989

Council on Affordable Housing
 CN 813
 11C Princess Road
 Trenton, NJ 08625-0813
 ATTN: Douglas Opalski
 Executive Director

Re: Objections of the Civic League of Greater New Brunswick to Old Bridge Township's Housing Element and Fair Share Plan

Dear Mr. Opalski:

The Civic League of Greater New Brunswick raises the following objections to the housing element and fair share plan submitted by the Township of Old Bridge to the Council on Affordable Housing. We will first identify the components of the Township's plan, as we understand it. The League will then identify the various objections it has to these components.

Old Bridge's Fair Share Plan

Under the Council's methodology, Old Bridge has an identified present and prospective need for 882 units of low and moderate income housing.* Against this overall need, the Council estimated 10 demolitions, and imputed the creation of a total of 476 units through three forces: downward filtration (425 units), accessory conversions (31 units) and spontaneous rehabilitation (20 units), for a final fair share obligation of 417 units of low and moderate income housing.

* This consists of an indigenous need of 231 substandard units, a reallocated present need of 86 units, and a prospective need of 565 units of low and moderate income housing.

There are three components to Old Bridge's proposed plan to satisfy this fair share obligation. Old Bridge claims credit for 62 units rehabilitated since 1980, and 204 units of senior citizen and disabled housing constructed in this same period of time. The Township proposes to satisfy the remainder of its obligation through an inclusionary development at the Oakwood at Madison site. The Township is not yet certain of the number of low and moderate income units that are planned for this inclusionary development.

The Civic League's Objections

1. The fair share number is too low.

There are two components to this objection: (a) the facts in Old Bridge negate the inference that 425 units of housing affordable to lower income households were created by means of downward filtration; and (b) the existence of significant amounts of vacant, developable land in Old Bridge requires that Old Bridge's fair share obligation be increased.

A. The creation of 425 units of affordable housing in Old Bridge based on downward filtration is not factually supportable.

The New Jersey Supreme Court has stated in unequivocal terms that a municipality's constitutional obligation to provide for low and moderate income housing is not limited to good faith efforts to make some lower income housing available. Rather, each municipality must provide for a realistic opportunity for the full extent of its fair share of the regional need for low and moderate income housing. In So. Burlington Cty NAACP v. Mount Laurel Tp. (Mount Laurel II), 92 N.J. 158 (1983), the Supreme Court reiterated this constitutional obligation of municipalities:

The municipal obligation to provide a realistic opportunity for low and moderate income housing is not satisfied by a good faith attempt. The housing opportunity must, in fact, be the substantial equivalent of the fair share.

Id. at 216 (emphasis added). See also Oakwood at Madison, Inc. v. Township of Madison, 72 N.J. 481, 512 (1977).

The determination of municipal housing obligations, although not an exact science, must, at a minimum, be based on an accurate and realistic assessment of the underlying facts. As a matter of constitutional law, it cannot be based upon assumptions

or considerations that are contradicted by the evidence or that bear no real relationship to housing need. See Mt. Laurel II, 92 N.J. at 300-301; Oakwood at Madison, 72 N.J. at 524-531 (rejecting a determination of a municipality's housing obligation, *inter alia*, because the determination made assumptions about relative housing need that were inconsistent with the facts).

The Fair Housing Act of 1985 expressly incorporated the constitutional obligation set forth by the New Jersey Supreme Court. See N.J.S.A. 52:27D-302 and 303. Therefore, the Council, by law, cannot approve a municipality's housing element and fair share plan unless the plan provides for the full extent of the municipality's fair share obligation, based on an accurate and realistic assessment of the underlying facts. The Council's calculation that downward filtration created 425 units of affordable housing in Old Bridge is not based on an accurate and realistic assessment of the underlying facts and must, therefore, be rejected.

Downward filtration is a market phenomenon which requires the presence of at least three factors: an older multifamily housing stock, an excess of supply over demand for middle and upper income housing units, and a demand for lower income units. Where multifamily housing is present, but one of the other market factors is missing, elementary laws of economics preclude the assumption that multifamily units formerly not affordable to low or moderate income households are becoming affordable through natural market forces.

In this instance, the evidence clearly shows that no downward filtration is taking place in Old Bridge. The demand for non-lower income housing--and indeed all housing--in Old Bridge is very intense. This is demonstrated by the high price of housing in Old Bridge and the recent, rapid increases in the price of such housing. Between 1970 and 1980, the median value of owner occupied housing in Old Bridge went up from \$24,000 to \$61,000, an increase of 254 percent,* a rate of increase much faster than that in New Jersey as a whole (161.3 percent). It is also much faster than the rate of increase in incomes in New

* Except where otherwise noted, all data in this section is taken from the various reports of the United States Bureau of Census in the 1970 and 1980 census and the New Jersey State Data Center, based on the same information.

Jersey during that period (108.3 percent). The overwhelming excess demand for middle and upper income housing over the supply in Old Bridge shown by these figures negates any inference that downward filtration is taking place.

In sum, the Civic League objects to the reduction of Old Bridge's obligation by 425 units on the basis of downward filtration. Rather, Old Bridge's housing element and fair share plan should include a means of providing for 425 additional units.

- B. Old Bridge's fair share obligation of 417 units should be increased based on the amount of vacant, developable land in Old Bridge.

The Fair Housing Act of 1985 requires the Council to determine the present and prospective need for low and moderate income housing at the State and regional levels. N.J.S.A. 52:27D-307b. The Council may grant substantive certification only if the Council finds that a municipality's fair share plan is "not inconsistent with the achievement of the low and moderate income housing needs of the region as adjusted pursuant to [N.J.S.A. 52:27D-307c.]." N.J.S.A. 52:27D-314a. Section 307c. permits the Council to adopt criteria and guidelines for adjusting municipal fair share based upon the lack of available vacant and developable land. N.J.S.A. 52:27D-307c. The Fair Housing Act makes it clear, however, that the Legislature was concerned overall with the satisfaction of the State and regional need for low and moderate income housing. See Legislative declarations and intention in N.J.S.A. 52:27D-303 ("the statutory scheme set forth in this act is in the public interest in that it comprehends a low and moderate income housing planning and financing mechanism in accordance with regional considerations") (emphasis added). Therefore, where a municipality has sufficient vacant, developable land and infrastructure to support a fair share number greater than that assigned by the Council's methodology, and where there is an unmet regional need, the municipality has the constitutional obligation to provide for such additional units. This is particularly so where, as we believe to be the case here, the Council has reduced the fair share obligations in other municipalities in the region for lack of vacant, developable land or any of the other considerations identified in N.J.S.A. 52:27D-307c.(2).

It is evident that Old Bridge has the capacity to support a fair share obligation larger than 417, in light of the significant amount of vacant, developable land and infrastructure as evidenced by the extent of market-priced development that is presently underway in Old Bridge. In addition to the Oakwood at

Madison development (which the Township has already incorporated into its plan), the Township recently approved for general development 1,095 units on 2,300 acres owned by Olympia and York. This development, by itself, can support an additional 219 units of affordable housing under a 20 percent setaside scheme. The Township expects to receive another application in the near future from Woodhaven for development of 1,095 units, making a total of 438 units of additional affordable housing that could realistically be developed in Old Bridge based only on the land available in these two sites.

In sum, the Civic League objects to the fair share number claimed by Old Bridge in its plan as being too low in light of available land and the regional need, in violation of the Fair Housing Act and the New Jersey Constitution. The Civic League asks that this deficiency be remedied by revision of Old Bridge's housing element and fair share plan to provide for at least an additional 438 units.

2. The rehabilitation credits have not been documented.

We are still awaiting information concerning the basis for the Township's assertions that the rehabilitated units identified in the appendix to the housing element and fair share plan are occupied by qualified low or moderate income households. The Civic League will advise the Council and the Township of any objections to this component once the Civic League has received and had the opportunity to review this information.

In addition, the Civic League reserves its right to challenge the claim of such credits by the Township, and the approval of such credits by the Council, as impermissible double counting, violating the terms and intent of the Fair Housing Act and the New Jersey Constitution.

3. The credits for the senior citizen housing exceed the maximum number of age-restricted units allowed, and Old Bridge's plan fails to provide sufficient housing for families.

The Council's rules cap the number of units within a municipality's fair share obligation that may be restricted to residents of a specified age. The regulation provides that no more than 25 percent of the municipality's obligation may be age-restricted. N.J.A.C. 5:92-14.3. Although the regulation, according to its terms, applies this figure to a municipal obligation "as calculated after credits and adjustments have been granted...", it is clear that the Council cannot apply this regulation by its literal terms if, in so doing, it will come into conflict with the New Jersey Constitution and the Fair Housing Act.

In this instance, Old Bridge seeks credit for 204 units, almost half of its total obligation, and over half of its non-indigenous obligation, on the basis of units that are restricted to senior citizens. Out of a fair share obligation of at least 417, Old Bridge's plan provides only 151 units, or approximately one-third of its obligation, for lower income families. This violates the spirit and intent of the Council's regulations on age-restricted units. The plan, overall, also conflicts directly with the provisions of the Fair Housing Act and the New Jersey Constitution, because such a plan fails to provide for Old Bridge's share of the regional need for housing for families. See N.J.S.A. 52:27D-302a., 302c. and 302d.; Mount Laurel I, 67 N.J. 151, 174, 182-183 ("every ...municipality must, by its land use regulations, presumptively make realistically possible an appropriate variety and choice of housing"; restrictions on the number of families with children in the municipality "are so clearly contrary to the general welfare as not to require further discussion") (emphasis added). See also Taxpayers Assn. of Weymouth Tp. v. Weymouth Tp., 80 N.J. 6, 50-51 (1976) (legality of age-restricted units must be assessed based on the municipality's overall zoning plan and the availability of sufficient housing for families).

Old Bridge should remedy this deficiency by limiting the credits claimed on this basis to no more than 104 units, and revising its plan to provide for at least an additional 100 units of affordable housing for families.

4. The creation of any age-restricted units in the Oakwood at Madison development violates the Fair Housing Act and the New Jersey Constitution

Out of a fair share obligation of 417 units, Old Bridge can legally receive credit for no more than 104 age-restricted units. Old Bridge already claims more than this number in credits for the senior citizen "Rotary" housing. Consistent with the Fair Housing Act and the New Jersey Constitution, Old Bridge cannot receive credit in its plan for any additional age-restricted units in the proposed inclusionary development, Oakwood at Madison. The Civic League objects to the inclusion of any age-restricted units in this or any other inclusionary development in Old Bridge.

5. The Oakwood at Madison inclusionary development segregates the affordable units in violation of the Fair Housing Act, the New Jersey Constitution, and state and federal anti-discrimination laws.

It is the Civic League's understanding that the Oakwood at Madison development will segregate the lower income units into one portion of the site, rather than integrate the units throughout the site. This proposal violates the Fair Housing Act, the New Jersey Constitution, state and federal anti-discrimination laws, and accepted principles of planning. The Civic League objects to Old Bridge's plan on this basis, and asks that the inclusionary development plan be revised to integrate the lower income units throughout the Oakwood at Madison development.

6. Old Bridge's plan perpetuates exclusionary zoning.

Out of an obligation of at least 417 units (and the League would argue this obligation should be significantly higher, as noted above) Old Bridge proposes to provide only 151 new units affordable to low and moderate income households. The Township proposes to reserve half of these units for residents of the Township, leaving only 75 units available for lower income households not currently residing in Old Bridge but desiring to do so. This constitutes, in simple terms, a perpetuation of exclusionary zoning, both because of the relatively small number of new units provided (151 units) and the even smaller number that will be available for nonresidents (75 units). This plan thus has the practical effect of excluding both poor people, in violation of the Mount Laurel cases, and minorities, in violation of state and federal civil rights laws and the New Jersey Constitution. The Civic League objects to Old Bridge's plan on

this additional basis. The Township should revise its plan to provide for its fair share of lower income units within the Township, and to make those units equally available to nonresidents as well as residents.

7. Reservation of Rights

The Civic League reserves the right to raise other challenges in other forums to the Council's regulations on their face and as applied to Old Bridge in this proceeding.

The League may, in addition, have other objections to this plan once it has received the information requested at the last mediation session and in my letter dated February 28, 1989. For instance we asked for, but have not yet received, a copy of Old Bridge's implementing ordinance, as amended (it was not included in the copy of the housing element and fair share plan and appendix that Old Bridge provided to the Civic League). Not having had the opportunity to review this ordinance, the League cannot say at this time whether the ordinance raises any additional objections. Nor have we received the description of the Rotary senior citizen housing, to allow the League to determine if this project raises any additional objections based on the type of housing being offered. We trust that these questions will be clarified .

Thank you for the Council's consideration of these comments and objections. By certified mail we are providing copies of this letter to the counsel representing Old Bridge in this matter.

Very truly yours,



SUSAN R. OXFORD
Assistant Deputy Public Advocate

SRO:lld

cc: Art Bernard, Mediator
Ronald Reisner, Esq.
James Colaprico, Esq.
Roy Epps, President
Civic League of Greater New Brunswick