

~~CL v. Edison~~

24 June 1988

CL v. Edison

Letter brief in support of CL's motion to
impose restraints

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LOUIE NIKOLAIDIS, ESQ.
Attorney At Law
22 Langley Place
New Brunswick, New Jersey 08901
(201) 828-2033

June 24, 1988

Douglas V. Opalski
Executive Director
Council on Affordable Housing
11C Princess Road CN 813
Trenton, N.J. 08625-0813

Re: Civic League v. Edison & The
Planning Board of Edison Tp.

Dear Mr. Opalski:

Please accept this letter brief in support of the Civic League's motion to impose restraints on Edison Township and its Planning Board.

The relevant factual and procedural history are included in my Certification and accompanying Exhibits. The statutory basis for the instant motion is N.J.A.C. 5:91-11.1. That regulation provides that a private party may seek an order before COAH to preserve scarce resources. The New Jersey Supreme Court has defined scarce resources in the affordable housing context as those "that may be essential to the satisfaction of the municipality's obligation to provide for its fair share of its region's present and prospective need for low and

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moderate housing." Hills Development Co. v. Bernards Tp., 103 N.J. 1, 61-63. Land may be a scarce resource. Id. at 61.

The standards for granting preliminary injunctive relief are as follows: (1) probability of success on the merits; (2) irreparable harm; and (3) a balance of harms favoring the party seeking relief. See Crowe v. DeGioia, 90 N.J. 126 (1982). The Civic League meets these standards.

Probability of Success. Edison acknowledged in its Housing Element a fair share obligation of 1,111 units. The plan it has submitted to meet that obligation falls woefully short. In fact, the Township's only affirmative compliance response to its obligation has been to adopt a 10% senior citizen set aside requirement. That response is insufficient both under Mount Laurel II and under COAH's ceiling of 25% age-restricted units. See N.J.A.C. 5:92-14.3.

Edison essentially tries to write off its obligation by claiming as credits more units than it is obligated to provide. Its attempt to write off its obligation should be rejected. The report prepared by the Civic League housing expert, Alan Mallach, demonstrates that Edison will have an unmet need of at least 405 low and moderate income units even under a more than generous interpretation of its Housing Element. (Mallach

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Report, page 5). The Mallach Report establishes this shortfall by showing that the credits Edison seeks to include in its Fair Share Plan are inappropriate. For example, the claim of 1.33 units for rental units created is invalid because N.J.A.C. 5:92-14.4 only applies to newly created units, after all credits for previously created units have been taken. The credits claimed for "affordable" hospital beds and for rehabilitation of public housing are patently invalid. Finally, the Township's proposed rehabilitation program, by its own admission, is limited to a dollar amount below that which COAH recognizes as adequate, and the claimed credit for senior citizen housing exceeds the percentage allowed by N.J.A.C. 5:92-14.3.

Moreover, the credits that Mr. Mallach finds might be allowed are an extremely generous "best case" scenario, assuming that all of Edison's other claims can be substantiated. Since the documentation contained in the Housing Element is sketchy, it is quite possible that Edison's unmet need will be substantially larger once subjected to testing in mediation and review before COAH. In any event, there is a clear probability of success because of the substantial level of unmet need.

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Irreparable Harm. In the absence of a valid plan for otherwise meeting its fair share, developable land is the sine qua non of meeting the Township's obligation to provide low and moderate income housing. There can be no doubt about this after the Supreme Court's recognition of land as a scarce resource in Hills.

Edison, in its Housing Element, concedes that its land is a scarce resource:

A total of 6,695 dwelling units have been constructed in the Township since January of 1980 through July of 1986. This number of dwellings equals an annual average production of 1,030 dwelling units per year. Because of the limited developable land area suited for residential use, this rate of construction will not continue at the same level for the next six year period.

Because of limited available land and available suited for residential development, the average annual production of housing over the next six year period is expected to decrease significantly.

Edison Housing Element at 6.

Accepting Edison's representations as to the shortage of available land, any diminution of that irreplaceable resource clearly represents an irreparable harm if suitable residential

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land is allowed to be committed to projects that do not fulfill Edison's fair share obligation.

Balance of Harms. The harm to the Civic League and the public interest it represents if restraints are not granted must be weighed against the harm to Edison if restraints are granted. Crowe v. DeGoia, supra. Because the proposed Order is narrowly drafted, the petitioners, as public bodies, would suffer little if any harm were restraints to be granted. Moreover, as a matter of law, landowners are not entitled to approval of their development applications simply because they are complete and pending, if there is good reason to deny or delay final action, as there is here.

As a practical matter, however, it is equitable for this tribunal to ensure that the interests of landowners who may be affected by the restraints not be interfered with unnecessarily. To this end, the proposed Order is drawn very narrowly as to development approvals. It requires only that any such approvals granted by the municipality be conditioned on the applicability of any ordinances, regulations or other

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requirements subsequently adopted by Edison to come into compliance with its fair share obligation. Hearings can go forward, approvals can be granted, and rights can vest as to any interests other than the Civic League's interest in securing low and moderate income housing. The proposed Order also provides an expeditious mechanism for releasing individual properties from the restraints if they are not needed for fair share purposes, or if the landowner agrees to an appropriate inclusionary component.

CONCLUSION

This application for temporary restraints is an important component of the Civic League's effort to bring Edison into compliance with the Fair Housing Act. By the Township's own admission, relatively little housing development can be anticipated during the current fair share period. The Civic League's housing expert, Alan Mallach, concludes that Edison has a shortfall of at least 405 units in its Housing Element fair share plan, and that shortfall could grow by several hundred units if some of the undocumented assumptions in the Plan prove over-optimistic, as they often do.

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The carefully limited proposed Order will preserve the status quo with minimal effect on landowners until the mechanism crafted by the Legislature -- review and mediation in the Council on Affordable Housing -- is permitted to accomplish their stated tasks.

Respectfully submitted,



LOUIE NIKOLAIDIS
Attorney for Objector,
Civic League of Greater New
Brunswick

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Enc.

cc: C. Roy Epps
Peter DeSarno
Sheldon Schiffman