

COUNCIL ON AFFORDABLE HOUSING
DOCKET NO. COAH 87-9

THE HILLS DEVELOPMENT CO.,)
 Plaintiff)
 v.)
 OPINION
TOWNSHIP OF BERNARDS,)
 Defendant.)

This matter was brought to Council on Affordable Housing's (Council) attention as a result of a motion raised by the Hills Development Co. (Hills) which sought to terminate the mediation process for Bernards Township's petition for substantive certification. Mediation was initiated as a result of objections raised by Mr. and Mrs. Cyrus Vance, Mr. and Mrs. Percy Pyne, III and Mr. and Mrs. Francis Pratt, II (objectors). Hills, which was joined by Bernards in its motion, claimed that the objections raised by the objectors were not proper subjects of mediation and should have been disregarded.

In response to the Hills motion, the objectors alleged certain procedural deficiencies in the adoption of Bernards' housing element, namely failure to give the required notice under the Municipal Land Use Law, N.J.S.A. 40:55D-1 et seq. and failure to comply with the provisions of the Open Public Meetings Act, N.J.S.A. 10:4-1 et seq. By order and opinion dated May 4, 1987,

the Council denied Hills' motion, however, the Council determined that it could not consider Bernards' petition for substantive certification without resolving the alleged procedural defects. Accordingly, the Council instructed the parties to fully address the issues raised by the objectors. The parties have done so and the Council is now prepared to make a determination on those issues.

Hills filed a Mt. Laurel law suit against Bernards which the New Jersey Supreme Court transferred to the Council in Hills Development Co. v. Bernards Tp. in Somerset Cty., 105 N.J. (1986). Under the Fair Housing Act, N.J.S.A. 52:27D-301 et seq., and the Council's procedural regulations, N.J.A.C. 5:91-1.1 et seq., Bernards was required to submit its housing element to the Council by January 5, 1987. On December 2, 1986, the planning board of Bernards held a public meeting at which it adopted the housing element. However, the notice of the public hearing admittedly was inadequate since Bernards did not provide the proper ten day notice of the hearing as required by the Municipal Land Use Law, (MLUL) N.J.S.A. 40:55D-1 et seq., specifically N.J.S.A. 40:55D-13. Despite this procedural defect, Bernards submitted its housing element to the Council on January 5, 1987.

The housing element contained information as to how Bernards intends to meet its fair share obligation which the Council determined to be 475. Bernards requested no adjustments or credits and the housing element proposed how Bernards would meet the full obligation of 475. Among other things, Bernards' housing element contained an implementation plan which indicated that

Bernards would rezone property owned by Hills to allow high density development with low and moderate income housing. The other aspects of the housing element addressed how Bernards intended to provide for the remaining fair share on other sites. Thus, the housing element Bernards submitted on January 5, 1987 detailed how Bernards would meet its entire fair share obligation.

At a public meeting on January 26, 1987, the Bernards Township Committee adopted a formal settlement agreement between Hills and Bernards. This agreement memorialized the fact that Bernards would rezone the property named in the housing element to allow Hills to develop the property with low and moderate income units and specified the number of units to be constructed. The agreement also addressed such issues as off tract contributions, set back and buffer requirements and provision of schools. Although the final form of the settlement agreement was presented at a public meeting, all negotiations between Bernards and Hills, as well as discussions among municipal officials leading up to the final agreement, were held in private.

On May 28, 1987, Bernards held another public hearing for the purposes of readopting the housing element which was defectively adopted on December 2, 1986 due to the lack of proper notice. There were no changes made to the plan and the exact housing element that was submitted to the Council on January 5, 1987 was adopted. It appears that the deficiency in the original adoption was brought to Bernards' attention by the objectors who instituted a lawsuit in Superior Court, Law Division challenging the defective adoption. On or about July 17, 1987, the Hon. Paul T. Murphy,

J.S.C., transferred that suit to the Council. Additionally, in their objections filed with the Council on February 19, 1987, the objectors raised their claim that Bernards' housing element was incomplete due to failure to adopt the settlement agreement between the Hills and Bernards. These essentially are the facts of this matter.*

The threshold question in this matter is whether the Council has jurisdiction to rule on alleged violations of the Municipal Land Use Law and the Open Public Meetings Act. Since the Council issued its opinion on May 4, 1987, the Court has decided that issue. The objectors filed a law suit in Superior Court, Law Division, Somerset County entitled Vance, et al. v. Bernards Township, et al. In that suit the objectors raised the alleged procedural deficiencies and challenged Bernards' action. On or about July 17, 1987, the Hon. Paul T. Murphy, J.S.C. transferred the objectors' suit to the Council, including the issues of the alleged procedural defects. Although the Council has not seen Judge Murphy's opinion, it has been informed by both the Hills and the objectors that Judge Murphy relied on Sukin v. Northfield Bd. of Education, 171 N.J. Super. 184 (App. Div. 1979) in deciding that

* Hills claims that the objectors' objections were untimely and should have been dismissed since the objections were filed on February 19, 1987 and Bernards published notice of its petition for substantive certification on January 1, 1987 and therefore the 45 day objector period expired on February 16, 1987. However, Bernards also published notice of its petition on January 5, 1987 and accordingly the objector period expired on February 19, 1987. If there are two publication dates the Council will use the later date to calculate the objector period. Accordingly, the Council's finding in its May 4, 1987 opinion regarding the timeliness of the objections will stand.

the Council has jurisdiction to rule on the alleged procedural deficiencies. The Council concurs in this opinion. The Council finds that the Sukin case makes it clear that, as a function of its primary jurisdiction which arises under the Fair Housing Act, N.J.S.A. 52:27D-1 et seq., the Council is the appropriate forum in which to decide these issues.

The Council now must address these alleged deficiencies. The objectors claim that since the settlement agreement between Bernards and Hills is an integral part of Bernards' housing element and the housing element is a component of the master plan which is required to be adopted, the settlement agreement was required to be adopted pursuant to N.J.S.A. 40:55D-13 as well. The objectors then contend that since the settlement agreement was not adopted until after January 5, 1987, the deadline for Bernards to file its housing element with the Council, Bernards' housing element was incomplete when it was submitted to the Council on January 5, 1987. In light of these contentions, the objectors request that Bernards be denied substantive certification and Bernards be required to readopt and start the process from the beginning. The objectors also contend that since that settlement agreement was required to be adopted pursuant to the MLUL, Bernards was forbidden from invoking the "litigation exception" of the Open Public Meetings Act and was required to hold all discussions pertaining to the proposed settlement in public.

Hills contends that Bernards' housing element was complete when submitted to the Council on January 5, 1987 since it satisfied all requirements of N.J.A.C. 5:91-3.1(f). Hills further

contends that the settlement agreement itself is not necessarily a component of the housing element but rather the proposed zoning and development of the Hills' property, as well as other sites, which did appear in the housing element, was the necessary component of the housing element. Additionally, Hills submits that since Bernards and Hills were conducting negotiations on the settlement of pending litigation, the "pending litigation" exception to the Open Public Meeting Act applied and the parties were entitled to engage in private sessions. Finally, Hills contends that Bernards' failure to give required notice of a master plan hearing does not create a jurisdictional defect when the parties have actual notice of the hearing and sustain no prejudice. In any event, Hills argues that the May 28, 1987 hearing for which the planning board provided proper notice, cures any defects.

Bernards joins in Hills' arguments. Bernards stresses that nothing in the Act or the Council's regulations require that the housing element actually be adopted and therefore a failure to properly adopt is not fatal to Bernards. Additionally, Bernards claims that the objectors' complaints regarding the defects were out of time. Bernards relies on R. 4:69-6 which states that a party has 45 days in which to challenge actions by a public body and the Open Public Meetings Act which also imposes a 45 day time limit. Bernards argues that since all of these alleged violations occurred on December 2, 1986, the objectors March 12, 1987 lawsuit challenging the actions came to late.

The Council will first address the issue of whether Bernards' housing element was complete when it was submitted on

January 5, 1987 despite the fact that the settlement agreement between Bernards and Hills was not adopted. The Council disagrees with the objectors contention that the settlement agreement itself was required to be adopted pursuant to the provisions of the MLUL and therefore finds that Bernards' housing element was complete as submitted. The MLUL permits a municipal planning board to prepare and adopt a master plan or any component party thereof, as a guide to development of the municipality. N.J.S.A. 40:55D-28. One of the components of the master plan is a housing element pursuant to N.J.S.A. 52:27D-310. N.J.S.A. 40:55D-28(b)(3). This provision was added to the MLUL as a result of the Governor's conditional veto of the Fair Housing Act and the Governor specifically stated that the housing element referred to in the MLUL is the same housing element as required by the Fair Housing Act. Governor's conditional veto, Senate Committee substitute for Senate Bill No. 2046 and Senate Bill No. 2334, April 26, 1985. It is clear from the language of N.J.S.A. 40:55D-28(b)(3) and the Governor's conditional veto that the housing element referred to as a component of the master plan is a housing element in accordance with the provisions of the Fair Housing Act. Accordingly, we must look to the provisions of the Fair Housing Act to determine what is required in a housing element.

The Fair Housing Act states that a municipality's housing element "shall be designed to achieve the goal of access to affordable housing to meet present and prospective housing needs, with particular attention to low and moderate income housing ..." N.J.S.A. 52:27D-310. In essence, the housing element sets forth

the municipality's plan as to how it will satisfy its constitutional obligation to provide a realistic opportunity for its fair share of its region low and moderate income housing. See N.J.S.A. 52:27D-310 and -311. The Act lists six items which must be contained in a housing element, however, these items are not exhaustive. N.J.S.A. 52:27D-310. These items focus on an analysis of the municipality and its housing stock and a determination of the municipality's fair share obligation. The Council's procedural regulations add the requirements of responses to objections, documentation of premediation efforts and copies of expert reports or studies. N.J.A.C. 5:91-3.1(f). None of these provisions require or mandate that a settlement agreement must be consummated between the municipality and a developer before a housing element can be deemed satisfactory. What is necessary, however, is that a municipality designate and specify zoning for appropriate sites. Bernards' housing element contained all of the components as required by the Act and regulations. The settlement agreement was not necessary in order to satisfy these criteria.

Bernards' housing element specifically stated that it would rezone Hills' property at higher densities in order to allow for the construction of low and moderate income housing. This technique is in accordance with N.J.S.A. 52:27D-311 which states that a municipality must consider certain techniques for providing low and moderate income housing, one of which is "rezoning for densities necessary to assure the economic viability of any inclusionary development either through mandatory set asides or density bonuses, as may be necessary ..." It is obvious from Bernards'

housing element that Bernards considered and accepted the technique and that it considered and addressed the necessary requirements.

Bernards' housing element meets the letter and intent of the Act. Bernards addressed all requirements and its housing element demonstrates how it intends to meet its fair share obligation. The fact that Bernards subsequently entered into a settlement agreement with a developer of one of its designated sites for low and moderate income housing after the housing element was submitted does not invalidate the housing element. If anything, it supports Bernards' position that its housing element as submitted provides a realistic opportunity for the provision of Bernards' fair share since it is now obvious that the housing will actually be built. Additionally, the subsequent settlement agreement did not alter in any way the housing element submitted. Accordingly, the Council finds that Bernards' housing element as submitted on January 5, 1987 was complete since it met all of the statutory and regulatory requirements and since it addressed how Bernards would meet its fair share obligation. It was unnecessary for Bernards' to have adopted the settlement agreement pursuant to the MLUL.

The Council has already concluded that Bernards' was not required to adopt its settlement agreement with Hills pursuant to the provisions of the MLUL. The Council also finds that under the Open Public Meetings Act, N.J.S.A. 10:4-1 et seq., Bernards was entitled to hold negotiations and discussions regarding the settlement in private. N.J.S.A. 10:4-12(b)(7) states that a public body may exclude the public from a portion of the meeting where the public body discusses pending litigation. There is no dispute that

there was pending litigation in this case. The lawsuit initiated by Hills against Bernards resulted in the transfer to the Council. Although Bernards was transferred to the Council, the underlying litigation remained. Thus, the lawsuit was pending litigation and any discussions regarding it could be held in private. To require a municipality to discuss possible settlement terms and strategies in a public forum could seriously undermine the municipality's ability to settle a matter and further could seriously hamper a town's ability to defend the lawsuit if the case does not settle. Bernards did hold a public hearing as soon as the settlement negotiations concluded and presented the proposed settlement. Thus, the subject and result of the closed meetings was released to the public as soon as Bernards was able to do so without prejudicing its position in the lawsuit. Of course, any discussions of negotiations held involving less than a quorum of the public body is not subject to the Open Public Meetings Act, provided that members of the public body were not purposely excluded to avoid provisions of the Act. There is nothing in the record to indicate any such behavior.

Finally, the Council must address the effect of Bernards' failure to give proper notice of its public hearing where it adopted the housing element. Bernards cured the defect by holding another public hearing on May 28, 1987 after giving proper notice. The Council is convinced that this new hearing cured the defect and no party was prejudiced by Bernards actions. While Bernards notice of the public hearing at which it adopted its housing element was inadequate, the notices of petition for substantive certification

which were published on January 1 and 5, 1987 were entirely proper. Thus, any party had the opportunity to review the housing element and register any objections thereto. The Legislature saw fit to give any person the right to object to a municipality's housing element and therefore required the municipality to publish notice of its petition and make the housing element available. Bernards did this and the fact that it did not give proper notice of its adoption hearing does not change the fact that proper notice of the petition was given. Thus, a party's right to object to the housing element was in no way affected by the faulty adoption. The cases the objectors rely on in support of its contention that the Council's jurisdiction is lost due to the defective adoption are inapposite to the cases at bar. Those cases involve invalidation of zoning ordinances and not components of a master plan. Zoning ordinances and the master plan are two different items.

Moreover, if the Council were to accept the objectors' arguments, the purposes of the Fair Housing Act would be hindered rather than helped. The objectors request that Bernards' housing element be rejected and Bernards be required to essentially readopt and start the process from the beginning. If the Council were to do this, months would be added to the process. Such a result is intolerable when proper notice of Bernards' petition for substantive certification was published and all potential objectors received the full 45 days in which to object to the housing element. Requiring Bernards to republish and allow another 45 day objector period would serve no purpose. This is especially true since the housing element that was readopted on May 28, 1987 was

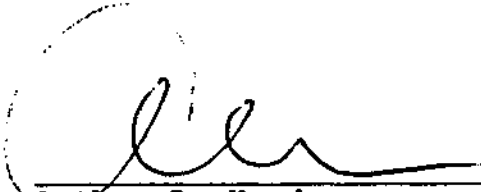
identical to the one submitted on January 5, 1987. To require Barnards to go through the entire process again would cause undue delay which the Court warned against in Hills Development Co. v. Barnards Tp. In Somerset Cty., 103 N.J. 1 (1986).

Additionally, the objectors' request to deny Barnards substantive certification would result in jurisdiction reverting to the Court. N.J.S.A. 52:27D-316 and 318. Such a result is in direct contravention to one of the purposes of the Fair Housing Act, namely, the intent to utilize the administrative process rather than the courts to vindicate the fair share obligation. N.J.S.A. 52:27D-303.

In conclusion, the Council finds that Barnards was not required to have a formally adopted settlement agreement with Hills at the time it submitted its housing element to the Council. Barnards' housing element addressed how it intended to satisfy its fair share obligation and it included designation of Hills' properties as sites for low and moderate income housing and the proposed zoning. That is what is required in the housing element and a signed settlement agreement merely supplements the housing element, it does not invalidate it. Since the settlement agreement was not required as part of the housing element, it was not required to be adopted pursuant to the provision of the MLUL. Moreover, Barnards was entitled under the "pending litigation" exception to the Open Public Meetings Act, to conduct negotiations and discussions of the settlement agreement in private. It is unnecessary to address Barnards' contention that the objectors' complaints regarding the municipality are untimely, since the Council has found that the

settlement agreement was not required to be adopted pursuant to the MLUL and Bernards properly held closed meetings. Finally, the Council finds that the defective adoption of the housing element on December 2, 1986 does not require Bernards to begin the process again since such a result frustrates the purposes of the Fair Housing Act. The defective adoption did not prejudice any potential objectors' rights since proper notice of the Bernards' petition for substantive certification had been given.

An Order embodying this decision will be entered.



Arthur R. Kondrup
Chairman

DATED:

8/3/87