COUNCIL ON AFFORDABLE HOUSING
DOCKET NO. 87-23

IN THE MATTER OF	)	
WASHINGTON TOWNSHIP	)	Civil Action
MORRIS COUNTY	)	OPINION

This matter comes before the Council on Affordable Housing following an Initial Decision of the Office of Administrative Law. The issue presented is whether, under the facts of the present matter, it is appropriate for the Council to award a "builder's remedy" to petitioner/objector Van Dalen.

That portion of the procedural history of this case that is relevant to the present issue is not disputed. Van Dalen is the owner of two parcels in Washington Township, designated as Centenary East and West, which jointly comprise approximately 127 acres. After an unsuccessful attempt to develop the properties for multi-family dwellings under existing zoning, Van Dalen initiated Mt. Laurel litigation on July 15, 1983. Following a plenary hearing, Judge Skillman determined on February 9, 1984 that a portion of Washington did fall within a "growth area" as that term was defined in Southern Burlington County NAACP v. Mount Laurel Township, 92 N.J. 158 (1983)(Mount Laurel II).

By decision dated December 6, 1984 the Court concluded that the Township's existing land use ordinances failed to provide

for its fair share of low and moderate income housing. The Court determined that Washington's fair share obligation was 227 units (102 indigenous, and 125 present and prospective) and appointed a master to assist the Township in rezoning and to make recommendations to the Court as to the possible award of a builder's remedy to Van Dalen. The master's report was subsequently submitted on August 9, 1985.

On July 2, 1985 the Legislature enacted the Fair Housing Act, N.J.S.A. 52:27D-301 et seq. On the same day Washington moved to transfer its case to the Council on Affordable Housing. The motion was consolidated with similar motions filed by the municipalities of Randolph, Denville, Roseland and Tewksbury. In Morris Cty. Fair Hous. Council v. Boonton Tp., 209 N.J. Super. 394, 449 (Law Div. 1985) Judge Skillman denied the requests for transfer as to Washington, Randolph and Denville. An appeal of this decision was filed by Randolph and Denville (and was consolidated with a similar appeal by several other municipalities), and was certified directly to the New Jersey Supreme Court. Washington did not join in the appeal.

In Hills Dev. Co. v. Bernards Tp. in Somerset Cty, 103 N.J. 1 (1986) the Supreme Court upheld the constitutionality of the Fair Housing Act, and ordered all pending Mt. Laurel cases transferred to the Council, unless such transfer would result in manifest injustice to any party. Id. at 25 and 53. In light of the Hills decision, Washington renewed its request for transfer, which was granted on April 2, 1986. A motion by Van Dalen to alter or amend the transfer order was denied on June 13, 1986. Van Dalen

proceeded to appeal the order of transfer; however, the transfer was upheld by the Appellate Division by order dated September 16, 1987.

The Township submitted its final housing element and fair share plan to the Council on January 5, 1987. Pursuant to the Council's regulations, Washington's pre-credited need obligation was determined to be 160 units, comprised of 91 present and prospective, and 69 indigenous. The housing element proposed to meet the entire obligation by zoning for inclusionary development on two sites, neither of which were owned by Van Dalen. Pursuant to the Act, Washington published notice of its petition for substantive certification on January 16, 1987. The only objecter to the plan was Van Dalen, who opposed the Township's sites on the grounds that they suffered from steep slopes and adverse environmental conditions, and because they lacked necessary infrastructure. Van Dalen also contended that he was entitled to a builder's remedy due to his long participation in the case.

As a result of the objections mediation was initiated by the Council. However, mediation was unable to resolve the disputed issues of fact raised by Van Dalen, and the matter was thus transferred to the Office of Administrative Law (OAL) as a contested case on June 22, 1987. Prior to any hearing, Van Dalen moved before the OAL for an order establishing that he was entitled to a presumption in favor of his sites, based on his original initiation of the Mt. Laurel litigation and his continued involvement in the case. Van Dalen argued that he should be awarded a builder's remedy unless Washington was able to establish that his sites were

unsuitable for a low and moderate income inclusionary development. However, in a decision dated July 31, 1987 Administrative Law Judge Beatrice S. Tylutki ruled that while the Council had authority to award the relief of a builder's remedy, it had not yet adopted any standards or guidelines governing when its use was appropriate. The ALJ concluded that a determination to award a builder's remedy prior to a full review of the Township's plan would be premature, and thus denied Van Dalen's request at that time, without prejudice to his right to raise the argument following the full hearing. Subsequently, however, Van Dalen indicated by letter that he would no longer contest the suitability of the sites selected by Washington in its plan; and further, would concede that his sites had been considered (although rejected) by the Township in the course of formulating its plan. As no further disputed issue of fact remained, the ALJ issued an Initial Decision on August 19, 1987 returning the case to the Council for appropriate disposition. On November 2, 1987, the Council heard oral argument on the sole issue of Van Dalen's possible entitlement to a builder's remedy.

Van Dalen advances two basic arguments in support of his contention that the Council should "prioritize" his sites by the award of a builder's remedy (subject, of course, to a determination of site suitability pursuant to Council regulations). First, while admitting that the Township's present plan meets all Council requirements and is thus "certifiable," he argues that this is the direct result of his efforts. Without his institution of Mt. Laurel litigation and continued participation in the process, he contends that Washington would not now be before the Council with a

complying housing element and fair share plan. He argues that his expensive and time-consuming involvement merits the relief requested as a matter of right, and that any other result would be inequitable. He contends that the courts have clearly empowered the Council to award builder's remedies, and sees no harm resulting in this case from use of the remedy, as only the "municipal prerogative to zone" will be lost.

Second, Van Dalen sees the necessity for such relief as a matter of public policy; the result of what he regards as the widespread failure of municipalities to seek certification before the Council. Unless some incentive is provided to builders to pursue Mt. Laurel cases (as litigants and objectors), Van Dalen argues that the Act will remain "ineffective," due to its reliance on voluntary municipal participation.

In response, Washington relies on the Act's emphasis on municipal discretion in formulating its plan. Washington argues that the liberal award of builder's remedies under Mt. Laurel II has been superseded by the Act. While admitting that the Council can grant such relief, Washington contends that its use should be limited to those cases in which a municipality before the Council has failed to act in good faith, as evidenced by the submission of a plan that is "illusory" and a wholesale disregarding of its obligation. Only then can the presumption against the use of builder's remedies be overcome. Washington concludes that to award a builder's remedy in this case would be a signal to other municipalities that participation before the Council is meaningless, thus

encouraging them to remain outside the process and take their chances with the courts.

The Council has previously held, in the case of Helen Motzenbecker v. The Borough of Bernardsville, Docket No. COAH 87-18, November 16, 1987, that it has the authority to award a builder's remedy in certain situations. By ordering such relief, the Council requires a municipality to zone a particular site for inclusionary development, as a condition of receiving Council approval of its petition for substantive certification, thus overriding the municipality's intent expressed in its housing element. In Motzenbecker the Council noted that its authority to award builder's remedies had been affirmed by both Judge Skillman, in Morris Cty., supra, 209 N.J. Super. at 434, and by the Supreme Court in the Hills case, supra, 103 N.J. at 47, n.13. A full discussion of this point is contained in the Motzenbecker decision, and will not be repeated here.

In Motzenbecker, the Council found that Bernardsville had consistently failed to present an acceptable housing element and fair share plan, despite numerous opportunities to do so. Despite filing a draft housing element and two separate versions of its final housing element (and receiving a Council review of each submission), Bernardville's final plan was still found to be unacceptable due to "glaring deficiencies." Further, many items were not supplied to the Council despite repeated requests. The Council noted that Bernardsville's final plan was in reality not substantially changed from the first inappropriate submission. Faced with a municipality that was not proceeding in a manner calculated to

lead to a certifiable plan, the Council concluded that it would award a builder's remedy to Motzenbecker, who owned an admittedly suitable site which she had indicated was available for a Mt. Laurel inclusionary development. The Council thus fulfilled its statutory responsibility to ensure creation of a realistic plan, by ordering that Motzenbecker's site be zoned as a condition of substantive certification.

However, while awarding a builder's remedy in Motzenbecker, the Council also made clear that the Fair Housing Act was not intended to provide any automatic right to such relief on the part of developers. The Council noted that the Legislature had indicated an intent to move away from the reliance on automatic builder's remedies that had developed following Mt. Laurel II. Instead, the Act provides a mechanism under which municipalities may voluntarily submit housing elements to the Council for review and certification. More importantly, the Act provides the municipalities with the flexibility to select from various options in meeting their Mt. Laurel obligations. N.J.S.A. 52:27D-311. As to the actual content of the plan, the Act emphasizes approaches that demonstrate a comprehensive and sound planning concept, taking into account regional considerations. N.J.S.A. 52:27D-302(c); 52:27D-303. The preference for solutions not based on a builder's remedy is made explicit by N.J.S.A. 52:27D-303, and by the Supreme Court in the Hills case, supra, 103 N.J. at 35-36.

Thus, the Act's focus is clearly away from use of builder's remedies, towards a determination of a fair share plan premised in the first instance on sound regional planning and municipal

input. As a result, municipalities appearing before the Council are first given an opportunity to present a municipally generated housing element and fair share plan for Council review. The submission describes in detail the municipality's own plan for meeting its fair share obligation, as calculated pursuant to the Council's regulations. Normally, if this plan is fully satisfactory and provides the required realistic opportunity for provision of the municipality's fair share, the Council will have no reason to deviate from the plan by awarding a builder's remedy.

The opportunity to initially prepare a housing element for submission to the Council is not limited to those municipalities voluntarily petitioning, but includes as well those municipalities, such as Washington, that are before the Council as the result of transfer by the Superior Court. In the Hills case the Supreme Court made it clear that all pending cases should be transferred, no matter what stage of the proceedings, unless the transfer would result in "manifest injustice" to any party. Hills, supra, 103 N.J. at 48-49. Once transferred, a municipality is subject to the Council's approach to the issue of compliance, and the Council is not bound by any prior decisions reached by the Superior Court. Id. at 59-60. The rationale for thus "starting over" was the Supreme Court's determination that every municipality (and thus the State as a whole) should have the benefit of the Council's approach. Id. at 52.

Thus, Van Dalen is incorrect when he argues that he has earned a right to a builder's remedy by virtue of his long involvement in the Washington case prior to transfer. The Supreme Court

specifically ruled that the loss of a builder's remedy did not constitute sufficient "manifest injustice" so as to foreclose a transfer. Id. at 54-55. As transfer acts to subject the municipality to the Council's methodology and procedures as described above, and as the Council is not bound in any manner by the prior history of the case, it is clear that a developer's involvement in a case prior to transfer does not form the basis for any equitable relief. Van Dalen's prior participation in the Washington case thus cannot entitle him to the award of a builder's remedy. To simply "reward" a developer in this fashion would violate the clear legislative intent. Judge Skillman noted this in Morris Cty., where he held that, while the Council had authority to award builder's remedies, it should not be done merely to reward a litigant for instituting Mt. Laurel litigation. Morris Cty., supra, 209 N.J. Super. at 434.

Similarly, the fact that Van Dalen has participated in the Council mediation and review process in the capacity of an objector is not sufficient, without more, to form the basis for an entitlement to a builder's remedy. As an objector, Van Dalen was entitled to take part in the mediation process. He could thus raise objections to the municipality's plan, and present those objections to the Council for consideration. He could also negotiate with the municipality in the hope of reaching an accommodation. Even if he was unable to reach agreement with the municipality, he could offer his sites to the Council as appropriate replacements in the event the municipality's sites were found to be unsuitable. Participation in the process thus provided him with certain advantages.

However, his participation did not act to guarantee him that his objections would be upheld, or that the sites he owns would be included in the plan by way of a municipal agreement or Council order. By acting as an objector Van Dalen gained the right to participate in the process; however, he did not earn the right to a builder's remedy, and any claim of reliance on that expectation has no basis, and is clearly misplaced.

However, while the intent of the Fair Housing Act is to move away from reliance on the builder's remedy as a general compliance tool, the Council in Motzenbecker made clear that it retains the authority to award such relief in certain circumstances. The Motzenbecker case itself presents one example of where such relief is appropriate. As noted above, the Council awarded Motzenbecker a builder's remedy following the continued failure by Bernardsville to provide the Council with a housing element and fair share plan that was realistic or workable. As Motzenbecker owned a site that had been found appropriate for an inclusionary development, and had indicated a willingness to use the property for that purpose, the Council required Bernardsville to zone the site accordingly. It is unquestioned that the Council has the authority to require a municipality to take such affirmative steps as a condition of receiving substantive certification. Hills, supra, 103 N.J. at 57. As the Council stated in Motzenbecker, it will not permit a municipality to frustrate the entire review and mediation process by actions that produce nothing but continued delay. Faced with a clear demonstration of municipal recalcitrance, or simply a municipality's repeated inability to provide the

Council with a legitimate plan for review, the Council has the authority to require builder's remedies as the means necessary to fulfill its statutory obligation to ensure the creation of a realistic and workable plan. It should be noted that such an award is not based on the "status" of the property owner(s), or on their prior participation in the case, but simply on their ownership of an appropriate site. Thus, while Motzenbecker had a long involvement in the Bernardsville case prior to transfer, and had in fact initiated the Bernardsville Mt. Laurel litigation, the Council could have awarded the same relief even if she had only recently entered the case as an objector.

The present case clearly does not fall within the above exception. Since its transfer to the Council, Washington has proceeded to meet the Act's requirements, both procedural and substantive. Washington filed its final housing element and fair share plan by the January 5, 1987 deadline. Although final Council review of the petition is not completed as of this date, initial review indicates that the plan provides the requisite realistic opportunity for meeting Washington's fair share obligation through the zoning of two specific sites. The only objector to these sites has, as noted, withdrawn any objection based on their suitability. Thus, unlike Bernardsville, Washington has provided the Council with a plan that apparently meets all applicable regulations, and has done so in a timely manner. No changes have been made in the plan as the result of mediation or Van Dalen's objections. An award of a builder's remedy is not necessary, as it was in the

Motzenbecker case, to ensure creation of a realistic plan.*

Finally, Van Dalen's second argument raises the question of the use of an automatic builder's remedy as an "incentive" to builders to get involved in the process. As noted, Van Dalen argues that the majority of New Jersey municipalities have not chosen to voluntarily appear before the Council and submit petitions for certification. As a result, he sees the entire process as ineffective, and states that in order to encourage participation by builders, the Council must offer the incentive of an automatic builder's remedy. He thus analogizes the present situation to that existing at the time of Mt. Laurel II, when the Supreme Court declared the necessity of using builder's remedies to encourage builder lawsuits, and through them involuntary compliance.

This argument presents the Council with a very serious issue as a matter of first impression. Pursuant to Mt. Laurel II and the Fair Housing Act, every New Jersey municipality has, at a minimum, an obligation to provide for its own indigenous need.

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* Although not a builder's remedy per se, another area in which site specific relief may be appropriate is suggested by N.J.S.A. 52:27D-310(f), which requires that a municipality drafting its housing element and fair share plan consider those sites owned by developers who are ready and willing to provide low and moderate income housing. The section thus acts as a specific exception to the general flexibility of municipalities in the selection of the means to meet their Mt. Laurel obligations, as it requires a municipality to consider certain sites as part of the process of formulating its housing element. If a municipality cannot offer a site that provides equal assurance that the housing will be constructed, and can give no valid reason for ignoring the developer's site, it may be an appropriate case for the ordering of site specific relief. However, the present case does not present this precise question, and thus the Council need not consider it at this time.

Municipalities in growth areas bear a further responsibility to provide for their share of the region's present and prospective need. The exact fair share obligation of a municipality can be calculated by using the methodology contained in the Council's substantive regulations.

However, Van Dalen correctly points out that while every municipality has a constitutional obligation, the Act itself provides no mechanism that requires a municipality to adopt a housing element and fair share plan and to petition the Council for review and certification of that plan. Under the Act, the Council obtains jurisdiction over a municipality in one of two ways: either a municipality is transferred to the Council by the Superior Court following the institution of Mt. Laurel litigation against the municipality; or a municipality voluntarily files a housing element and fair share plan with the Council and voluntarily petitions for substantive certification. All municipalities were given a period of four months from the effective date of the Act in which to voluntarily file with the Council a resolution of participation, and thus fall under the Council's jurisdiction. N.J.S.A. 52:27D-309(a). Those municipalities that elected not to file within the statutory period are permitted under the Act to do so at any time thereafter. N.J.S.A. 52:27D-309(b). However, such municipalities have no right to exhaust the Council's mediation and review process unless they have also filed a housing element and fair share plan with the Council prior to the institution of any Mt. Laurel litigation. N.J.S.A. 52:27D-309(b).

In the Hills case the Supreme Court directly addressed the question of the voluntary nature of compliance under the Act, and the possibility that this rendered the Act unconstitutional. The argument facing the Court was that the Act's reliance on voluntary municipal cooperation, in conjunction with the lack of any assured builder's remedy (and thus a loss of interest by developers) meant that in reality no housing would ever be constructed. Hills, supra, 103 N.J. at 43. The Court admitted that this challenge to the Act would be "substantial" if true; however, it determined that it would be premature at that time to reach such a conclusion. Ibid. Instead, the court chose to assume that the Act would "function well and fully satisfy the Mt. Laurel obligation." Ibid.

The court described the Act as having various advantages over court enforcement of the constitutional obligation: implementation by a state administrative agency with a broad grant of power; long-range statewide planning; a funding mechanism; and the "kind of legitimacy that may generate popular support." Id. at 22-23; 43. As a result, the court believed that if the Act worked as intended it would ensure the necessary realistic opportunity for low and moderate income housing. Id. at 21. As to the voluntary nature of compliance, it was the court's assumption that those municipalities with any significant obligation would petition within a reasonable time after adoption of the Council's guidelines; their motive being the desire to avoid litigation and court ordered zoning, and to gain the benefits of certification (chiefly, the six year period of repose and presumption of validity that

accompanies it) Id. at 22; 35-36. Finally, the court also assumed that developers would not lose all interest in the process. Id. at 44. However, while basing its decision on this assumption of compliance in the "not too distant future," Id. at 36, the court added a caveat: if the Act failed to work as intended, and instead achieved nothing but delay, the judiciary would be "forced to resume its appropriate role." Id. at 23.

It is the Council's determination that it would be premature at this time to reach the conclusion that the Act is not producing the goal of state-wide Mt. Laurel compliance intended by the Legislature. Like the Supreme Court, the Council recognizes the necessity of providing the Act the requisite time needed to work. Id. at 41-42. Van Dalen is correct when he alleges that a large number of municipalities have as of this date not petitioned for certification. However, it is still relatively early in the process. Further, as of August 1, 1988 every municipality must include a housing element as a component of its master plan, demonstrating how it will "achieve the goal of access to affordable housing." N.J.S.A. 52:27D-310 and 329; N.J.S.A. 40:55D-28. Presumably, this requirement will encourage increased participation before the Council. In the event that this does not occur, the Council may be required to reassess its present position.

Thus, the Council does not wish at the present time to determine what actions would be appropriate if it later concludes that the Act is not producing a sufficient level of compliance. However, the Council notes that the use of an automatic builder's remedy in those cases where a municipality is brought before the

Council as the result of a builder's lawsuit is clearly one option. Judge Skillman has previously suggested that the Council's use of the builder's remedy as an incentive would be appropriate. In Morris Cty., he stated that "the Council may in the exercise of its regulatory powers determine that it has the power to award builder's remedies or to encourage in some other way participation by builders before the Council." Morris Cty., supra, 209 N.J. Super. at 434. This language was specifically upheld by the Supreme Court. Hills, supra, 103 N.J. at 47, n.13.* Further, it seems unarguable that builder's remedies are an effective method of assuring increased developer lawsuits, and thus additional compliance, in light of the Supreme Court's use of the remedy in Mount Laurel II. Washington's contention, that use of the builder's remedy in this manner would only encourage municipalities to remain outside the administrative process, is incorrect. A municipality considering petitioning for certification would still have the incentive of opting to do so voluntarily and thus avoiding the potential sanction of a builder's remedy. Only those municipalities that elected not to petition (and those that fell within the ambit of the Motzenbecker decision) would be at risk. And the use of the automatic builder's remedy would increase the likelihood that those municipalities would be brought before the Council and

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* Of course, the use of an automatic builder's remedy would "reward" the builder in question. However, the basis for the award would be a Council determination that use of the automatic builder's remedy was necessary to ensure a sufficient level of compliance. It does not alter the fact that the Act is not premised in the first instance on rewarding developer participation.

required to petition for certification. Of course, the builder's remedy could not be awarded under any circumstances unless the site in question met all Council regulatory requirements, and was in accord with sound regional planning. In any event, the Council is not prepared at this time to reach a determination on what approach will be adopted if in the future the Council concludes some action is necessary.

Thus, for all of the reasons set forth above, it is the Council's determination that it will not award a builder's remedy to petitioner Van Dalen under the facts of the present matter. An appropriate order will be issued in conformance with this opinion.

COUNCIL ON AFFORDABLE HOUSING

By: _____

Dated: