

NEW JERSEY COUNCIL ON
AFFORDABLE HOUSING

Docket No. **CP AH 87-27**

PATRICK D. MINOGUE,)

Plaintiff,)

v.)

Civil Action

THE BOROUGH OF FANWOOD,)
a municipal corporation)
of the State of New Jersey,)

Defendant.)

OPINION

PAUL M. DiFRANCESCO, JR.,)
ERNEST DiFRANCESCO, &)
ROBERT S. RAU, JR.,)

Plaintiff,)

v.)

THE BOROUGH OF FANWOOD,)
a municipal corporation)
of the State of New Jersey,)

Defendant.)

This matter was brought before the Council on Affordable Housing (Council) pursuant to an Order entered by the Honorable Eugene D. Serpentelli, J.S.C. on September 21, 1987. Judge Serpentelli transferred the matter to the Council upon the condition that the parties to the above captioned suit prepare and file motions with the Council that would enable the Council to hear and decide the following issues:

1. Whether the submission made to the Council on Affordable Housing by the Borough of Fanwood on January 5, 1987 satisfies the filing requirements of N.J.S.A. 52:27d-309(a) to vest jurisdiction of this matter with the Council on Affordable Housing. This issue is to be decided by the Council on Affordable Housing only if the Council has not previously specifically ruled thereon, in which event this issue is limited to the Council on Affordable Housing confirming that such prior ruling was so rendered.

2. In the event that the submission referred to in (1) above did not satisfy the filing requirement for the vesting of jurisdiction of this matter with the Council on Affordable Housing whether the Council on Affordable Housing could lawfully grant an extension of the time limit set forth in N.J.S.A. 52:27D-309(a) to the Borough of Fanwood and thereby acquire jurisdiction of this matter through a subsequent filing by the Borough within the extension period so granted.

By Notice of Motion dated October 28, 1987 and received by the Council on November 4, 1987, plaintiff Patrick D. Minogue (Minogue) filed such a motion. The motion included a brief setting forth Minogue's position as well as transcripts of the depositions of John Ras, member and chairman of the Fanwood Planning Board and Patricia M. Kuran, Mayor of Fanwood. The Borough of Fanwood submitted briefs in support of its positions subsequent to Minogue's motion. Additionally, plaintiffs Paul M. DeFrancesco, Ernest DiFrancesco and Robert S. Lau filed with the Council a Notice of Motion seeking instructions regarding jurisdiction and a brief in support thereof on December 3, 1987. The Council

heard oral argument at its public meeting on December 7, 1987.

The facts of this matter are undisputed and rather simple. On October 31, 1985 the Fanwood Borough Council adopted a resolution which indicated that it intended to comply with the Fair Housing Act (Act), N.J.S.A. 52:27D-301, et seq. Fanwood reaffirmed this by letter to the Council dated August 29, 1986 wherein the Borough's Mayor indicated that Fanwood still intended to abide by the aforementioned resolution. Accordingly, since Fanwood had indicated its intent to comply with the Act within four months of the effective date of the Act, it was required to submit its housing element and fair share plan (plan) to the Council by January 5, 1987. N.J.S.A. 52:27D-309(a). Fanwood hand delivered its plan to the Council on January 5, 1987. The plan indicated how Fanwood intended to deal with its precredited need of 87 units, however, the Fanwood Planning Board had not adopted the housing element as part of the municipality's master plan. By letter dated January 9, 1987, the Council informed Fanwood that it had filed its plan with the Council on January 5, 1987, however, the submittal contained no information as to whether the planning board had adopted the housing element as part of the master plan.

The Council requested Fanwood to submit the pertinent documentation if it existed. Additionally, the Council informed Fanwood that if the planning Board had not adopted the submitted housing element, it must do so by February 2, 1987. The planning board adopted the housing element

on January 30, 1987. Meanwhile, on January 21, 1987, Minogue filed a Complaint in Lieu of Prerogative Writ under Mount Laurel II against Fanwood challenging Fanwood's ordinances and seeking a builder's remedy. DiFrancesco additionally filed a Complaint in Lieu of Prerogative Writ on February 2, 1987.

Minogue argues that COAH is without jurisdiction in this matter and therefore the matter should remain with the Court. Minogue first argues that the Act, specifically, N.J.S.A. 52:27D-309(a), requires that the plan be adopted at the time it is submitted to the Council in order for it to be a valid plan. Therefore, since Fanwood's submission of January 5, 1987 was not adopted by the planning board, it did not meet the filing requirements of N.J.S.A. 52:27D-309(a) and since Minogue filed suit against Fanwood before the adoption, the case is properly before the Court. In support of this argument, Minogue relies upon the Municipal Land Use Law, specifically, N.J.S.A. 40:55D-62a, which requires adoption of zoning ordinances "after the planning board has adopted the land use plan element and the housing plan element ...".

Minogue further argues that COAH could not lawfully grant an extension of the January 5, 1987 filing date required by N.J.S.A. 52:27D-309(a). Minogue points to the statute and COAH regulations, specifically, N.J.A.C. 5:91-3.1, to demonstrate that neither provides COAH with any authority to extend the deadline. Therefore, since Fanwood did not submit its plan on time and COAH had no authority to extend the deadline, jurisdiction is properly with the Court and

not COAH.

DiFrancesco joins in the arguments raised by Minogue and also points out that Fanwood had not re-examined its master plan by August 1, 1982 as required by the Municipal Land Use Law. See N.J.S.A. 49:55D-89. DiFrancesco alleges that this failure to re-examine constitutes a rebuttable presumption that its ordinances are invalid.

Fanwood argues that it did properly file its plan with COAH on January 5, 1987 and therefore jurisdiction lies with COAH. In support of its position, Fanwood relies upon N.J.S.A. 40:49-2 which it argues provides a mechanism for a municipality to adopt its ordinances. Fanwood argues that this statute does not require the planning board to pass upon a proposed ordinance before it is adopted and accordingly, under the statutory scheme, failure to have planning board approval is not fatal to its filing. Fanwood also points out that the governing body may adopt ordinances and resolutions without planning board approval and in fact the governing body may pass ordinances which deviate from the master plan. Therefore, Fanwood argues that planning board approval was not statutorily necessary at the time of submission. Fanwood argues that planning board approval was a procedural requirement and not a statutory requirement established by COAH which COAH could relax, as it did by giving Fanwood until February 2, 1987 to provide proof of planning board adoption.

The Council finds that the submission made by Fanwood on January 5, 1987 does satisfy the filing requirements of N.J.S.A. 52:27D-309(a) and accordingly the Council properly

has jurisdiction over the matter. N.J.S.A. 52:27d-309(a)

provides:

a. Within four months after the effective date of this act, each municipality which so elects shall, by a duly adopted resolution of participation, notify the council of its intent to submit to the council its fair share housing plan. Within five months after the council's adoption of its criteria and guidelines, the municipality shall prepare and file with the council a housing element, based on the council's criteria and guidelines, and any fair share housing ordinance introduced and given first reading and second reading in a hearing pursuant to R.S. 40:49-2 which implements the housing element.

Fanwood did file on January 5, 1987 a housing element and fair share plan which contained the necessary regulatory requirements.

The housing element required by the Act, is the "housing plan element" referred to the Municipal Land Use Law as a necessary component of a municipality's master plan. N.J.S.A. 40:55D-28(b). Pursuant to the Municipal Land Use Law, the planning board is authorized to prepare and adopt the master plan.

It is apparent that at some point during the process of satisfying the fair share obligation, the housing element will have to be adopted. Minogue correctly points out that before a governing body may adopt or amend a zoning ordinance, the planning board must first have adopted the housing element and land use plan portions of the master plan for the municipality. The zoning ordinances thus enacted must be substantially consistent with that adopted housing element or, if they are not consistent, an appropriate explanation must be given. N.J.S.A. 40:55D-62(a). Thus,

an adopted housing element is a prerequisite to the adoption of zoning ordinances which will implement a municipality's plan to satisfy its fair share obligation.

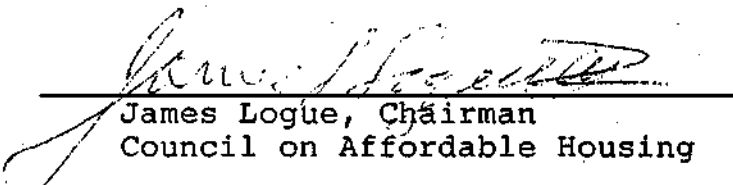
However, the Act does not require the housing element to be adopted at the time it is initially submitted. Pursuant to the Act, once a municipality files its housing element and petitions for substantive certification, the administrative process is triggered. N.J.S.A. 52:27D-314 and N.J.S.A. 52:27D-315. If there are objections to the plan, the mediation and review process is conducted. N.J.S.A. 52:27D-315. If there are no objections, the Council will conduct a review of the plan. N.J.S.A. 52:27D-314. In any event, the municipality's plan must be reviewed to ensure compliance with all statutory and regulatory requirements. Inherent in this process is the likelihood of changes to the municipality's plan. The Council may require the municipality to alter, amend, revise or otherwise change its plan to ensure compliance with the Act. Additionally, the municipality may agree with an objection to change the plan. Thus, the plan initially submitted, including the housing element, may change dramatically by the time the Council grants substantive certification. The Act recognizes this and requires the municipality to adopt its implementing ordinances after approval of the plan has been given. N.J.S.A. 52:27D-314(b). Adoption of the zoning ordinances prior to certification would be fruitless and perhaps prejudice a municipality if the ordinances had to be changed. Parties apply for various approvals, permits and variances based upon zoning or-

dinances. The granting of such approvals in many instances carries with it certain vested rights and therefore the adoption or amendment of zoning ordinances may have serious ramifications. Thus, it is not a requirement of the Act, nor is it inherent in the Act that the municipality adopt its housing element at the time it is initially submitted. What is inherent in the Act, however, in light of the Municipal Land Use Law, is that the housing element must be adopted in sufficient time to enable the municipality to adopt its zoning ordinances which implement its plan within the 45-day statutory period.

While the Act does not specifically require that the housing element be adopted at the time it is initially submitted, the Council has decided, as a matter of policy, that it is appropriate to impose such a requirement. The Council has determined that adoption of the housing element at the time of submission is necessary in order to ensure that the plan submitted has the approval of the applicable municipal authority which in the case of the housing element is the planning board. Adoption of the housing element does not carry with it the same risks of adoption of zoning ordinances. Since the Council and not the Act imposed the requirement of adoption, the Council could relax that policy and permit Fanwood as well as other municipalities to adopt the housing element at a later date. This does not alter the fact that the entire plan was submitted on January 5, 1987.

Although there were some allegations in this matter that Fanwood's housing element and fair share plan was not properly authorized for submission on January 5, 1987, the planning board did adopt it and thereby authorize it. Moreover, Fanwood did submit a housing element. The fact that the Borough adjusted its obligation from 87 to zero does not render the housing element insufficient. If Fanwood improperly adjusted its number, mediation and Council review will reveal that fact and Fanwood will be required to satisfy its obligation accordingly.

Since the Council has found that adoption of the housing element at the time of submission is not a statutory requirement and Fanwood therefore satisfied the filing requirements of N.J.S.A. 52:27D-309(a), it is unnecessary to consider the second issue raised in Judge Serpentelli's Order.


James Logue, Chairman
Council on Affordable Housing

Dated: February 16, 1988.