COUNCIL ON AFFORDABLE HOUSING
DOCKET NO.COAH 87-16

IN RE DENVILLE TOWNSHIP - MOTION FOR ACCELERATED DENIAL/BUILDER'S REMEDY	CIVIL ACTION OPINION

This matter was originally opened to the Council on Affordable Housing by a motion filed on June 29, 1987 by Stonehedge Associates (Stonehedge) seeking accelerated denial or, in the alternative, imposition of a builder's remedy as to four sites owned by Stonehedge. On July 17, 1987 Maurice Soussa joined in Stonehedge's motion, again seeking accelerated denial or a builder's remedy (as to a single site owned by Soussa). The Public Advocate also joined in the motion, requesting that the Council issue accelerated denial or impose on Denville as a condition of certification a plan that the Council concluded was appropriate. Finally, in response to the motions, Denville filed on September 21, 1987 a brief in opposition to the relief requested by the moving parties, and a cross-motion seeking conditional certification or an extension of the mediation period.

Denville's history prior to the Fair Housing Act is summarized in Hills Dev. Co. v Bernards Township in Somerset County, 103 N.J. 1, 27-28 (1986) and will not be repeated here. The Township was transferred to the Council as a result of the Supreme Court's decision in Hills, and filed a draft housing element and fair share plan with the Council on October 31, 1986. The Council responded in a letter dated November 21, 1986 pointing to certain areas of the plan that needed correction. Denville filed a final plan with the Council on January 5, 1986, prior to the deadline imposed by N.J.S.A. 52:27D-309(a). However, due to deficiencies in the plan that rendered it inadequate for mediation and review, the Council returned the plan by letter dated March 6, 1987 to Denville for additional work. This letter set forth with specificity what areas the Township needed to address. Denville filed an amended plan on May 7, 1987.

Due to the filing of objections by a number of parties (including Stonehedge, Soussa and the Public Advocate) the Council initiated mediation and review on July 16, 1987 (as noted above, the present motion was filed by Stonehedge in the interim period, on June 29, 1987). The mediator's report was issued on October 29, 1987. As a result of the motions, the Council conducted a three day hearing. The first day (October 5, 1987) was devoted to the history of the case, and the question of whether imposition of accelerated denial or a builder's remedy was appropriate. The remaining days (November 23 and December 14, 1987) comprised a full factual hearing on the issue of the suitability of the sites proposed by Stonehedge and Soussa.

As a preliminary matter, it should be noted that the Council's authority to award the relief in question is not disputed by the parties. The Council's authority to impose accelerated denial was set forth by the Supreme Court in the Hills Case 103 N.J. at 56, and codified by the Council at N.J.A.C. 5:91-11.2. In Motzenbecker v the Borough of Bernardsville, COAH 87-18, the Council noted that accelerated denial is appropriate where a municipality is not acting in "a manner designed to expeditiously advance the substantive certification process," and is thus wasting the time of the parties without achieving a complying fair share plan. The granting of accelerated denial immediately terminates the mediation and review process; thereby returning the municipality to the jurisdiction of the Superior Court, if it was court transferred.

Award of a builder's remedy, on the other hand, does not end the process. Instead, the municipality is required to zone a particular site for Mt. Laurel housing as a condition of receiving substantive certification. The site thus becomes part of the municipality's plan. In Motzenbecker, the Council ordered a builder's remedy, based on its finding that the municipality had repeatedly failed to comply with Council regulations in formulating its housing element, resulting in a plan that was partially unrealistic and unworkable. Further, the municipality had continually failed to respond to Council requests for information or documentation. Despite submitting three plans, the

Council found Bernardsville's final plan "altered little from the original submission." As a result, the Council ordered site specific relief, thus meeting its obligation to ensure creation of a plan realistically capable of meeting Bernardsville's Mt. Laurel obligation.

The movants' argument in the present case is based on two separate premises: first, that the Township's behavior during the Council process (and before transfer) indicates that it is not seriously interested in creating a complying plan, but is interested in creating only delay; and, second, that as of the date of the motions (immediately prior to the mediation process) the Township had failed to create a plan that met its obligation and which the Council could certify. For the reasons set forth below, the Council concludes that it will deny the motions, as the relief requested is inappropriate under the particular facts of this case.

At this point, it is important to review the various plans submitted by Denville to the Council for the purpose of meeting its fair share obligation of 417 units (31 indigenous need and 386 new construction component). As a court transferred municipality, Denville was provided an opportunity in the first instance to create its own plan for meeting its obligation. As noted above, this was originally done through filing of a draft housing element and fair share plan on October 31, 1986. In its draft plan, Denville claimed credits of 51 units. It proposed to rehabilitate its indigenous need, and to transfer 180 units through an RCA. Funding for the RCA would be provided through zoning of a site known as the Poulos Farm site. Further, under the draft plan Denville would provide 160 units through municipal construction on the Vanderhoof site. As an alternate plan (in case the RCA failed) Denville proposed increased units on both the Poulos and Vanderhoof sites. Denville also claimed 12 rental bonus credits, and requested an adjustment based on an aquifer located in the municipality. Finally, Denville noted that it might zone for 25 accessory apartments. The total that would be provided if Denville proceeded to implement all phases of its draft plan (including all credits) would be 458 units, 41 more than required.

The Council responded to the draft plan by letter. That letter first noted that the "draft housing element generally complies with the Council's rules." However, the letter proceeded to note areas of the draft plan that required additional work or documentation. The Council first requested a detailed plan covering the rehabilitation component, as well as an analysis of costs/revenues. The Council requested additional information on both the Poulos site and the accessory apartment program. The Council noted that the adjustment was inappropriate and should be deleted. As to the municipal construction component, the Council requested information on ownership, financing and administration. The Council also noted that Denville had no real RCA plan as of this stage of the process. Finally, the Council indicated that it was not yet in a position to discuss the requested credits or the proposed fair share ordinance.

As noted, Denville responded with a final plan. After review, the Council returned the plan for further work and documentation, as it was not yet ready for the mediation process. However, a review of the plan and the Council's comments indicates that, while the plan needed further work, Denville had attempted to address certain problem areas previously identified by the Council.

The final plan proposed the same general approach taken by the draft plan: Denville again claimed 51 credits; proposed to transfer 180 units through RCAs; proposed municipal construction to provide 170 units on the Vanderhoof site; requested 12 rental bonus credits; and offered the Poulos site as the basis of an alternative plan. However, the rehabilitation component and the possible use of accessory apartments, questioned by the Council, were dropped from the plan, as was the request for an adjustment premised on the aquifer . Denville responded to the Council's request for information on the sponsor of the municipal construction project by providing information on the St. Francis Lifecare organization, as well as a basic description of the plan. Denville provided a fair share plan, although it was not complete. Further, Denville indicated that negotiations for RCAs were underway with Newark and Orange.

In returning the plan, the Council requested further information on the RCAs, the fair share ordinance, the Polous site, and the financing for both the RCAs and the Vanderhoof project. For the first time, the Council requested documentation on the credits claimed by Denville, demonstrating that the units were in fact raised to code compliance. The Council also notified Denville that the number of credits would have to be reduced to 31 (the total of Denville's indigenous need) and that rental bonus credits would have to be documented. The Council also rejected a new request for an adjustment based on the amount of Township acreage within growth areas. Finally, it is important to note that, although the suitability of the Vanderhoof site had been questioned in proceedings before the Superior Court prior to transfer, the Council had not indicated as of this date that the site was inappropriate under the Council's regulations.

Denville responded by filing an amended plan within the time permitted, which the Council determined was appropriate for mediation. As noted above, it was subsequent to the submission of this amended plan that the present motion was filed. The amended plan provided the necessary information as to credits, and properly reduced the number of credits requested to 31. As to the fair share ordinance, Denville submitted the required information on affordability controls and affirmative marketing (although certain other information remained to be provided). With regard to the RCA component, Denville raised the number to 193, and provided memoranda of understanding with both Newark and Boonton, as well as proof of two developer agreements to provide funding. Denville again proposed use of the Polous site as an RCA alternative, and provided the necessary site suitability information. Finally, the plan still proposed use of the Vanderhoof site (for 180 units), and requested 13 rental bonus credits.

Thus, as of the time of the amended plan, Denville had responded to provide much of the information requested by the Council. This is not to say that further work was not needed on the plan (especially on the RCAs and alternate plan). However, in the Council's estimation the plan was in a form that could be mediated. The major flaw in the plan, correctly

cited by the moving parties, was the reliance on the Vanderhoof site. The increased documentation provided to the Council clearly indicated that the site was not appropriate. Thus, shortly after the beginning of mediation, Denville was advised (for the first time by the Council) that the site would have to be replaced.

As a result of the Council's decision on the Vanderhoof site, as well as mediation and post-mediation negotiations, the current Denville plan has been altered from the amended plan that existed at the start of mediation. The Vanderhoof site has been replaced with the new "McGreevy site," and full site suitability documentation provided. Further, Denville has continued to provide other necessary documentation: project plans for both RCAs have been submitted, revised and resubmitted; the remaining information necessary for the fair share ordinance has been provided; and the funding for the projects has been solidified, and now includes both voluntary developer payments (including a new agreement with Stonehedge) and funds from St. Francis (and potentially the Department of Community Affairs). The plan currently addresses Denville's proper fair share number of 417 units.

In light of the above, it is the Council's determination that the extraordinary remedy of accelerated denial is not appropriate in this case. In reaching this conclusion, the Council is not saying that the plans submitted by Denville were without problems that needed correction, or that the plans complied with all regulatory requirements from the start of the process. Obviously, that is not the case. However, recognition of this fact does not mean that the Township's behavior warrants the relief requested. The Council cannot say that Denville has acted in a manner that is not calculated to advance the certification process, or that as a result the process has become a waste of time and effort that has not moved towards creation of a viable plan. Instead, Denville has proceeded to put together a plan that may meet its obligation. It has amended its plan when instructed to do so by the Council, and has supplied information at Council request. Unlike Motzenbecker, Denville's plan did not go through three drafts only to

emerge unchanged. The most obvious example is the Township's removal of the Vanderhoof site when first instructed to do so by the Council. This was done by Denville without requesting a hearing on the issue, which could have substantially protracted the proceedings. Accelerated denial would remove Denville from the mediation process, despite the fact that it is utilizing that process to create a complying plan. Thus, the Council concludes that such relief is inappropriate.

Having decided that accelerated denial is inappropriate, the remaining question raised by the original motions is whether a builder's remedy should be imposed. However, for the following reasons, the Council does not need to reach a decision on this issue. This issue is moot as to Stonehedge, as the result of an agreement between the parties and Stonehedge's subsequent withdrawal of its request for such relief. Thus, the Council need not discuss the suitability of the Stonehedge sites. As to the Soussa site, the Council notes that, despite the movant's sincerity in offering the site for low and moderate income housing, utilization of the site would not constitute a sound planning decision for two reasons. First, the site itself has serious flaws that render use for the multi-family housing proposed questionable. The site has slopes in excess of 15% (and reaching 30%) over a large percentage of the acreage; it is an environmentally sensitive site posing erosion and drainage problems that would have to be dealt with; there are road circulation and access problems that may necessitate costly off-site improvements, as well as resulting in a steeply sloped access road; and the elevation would necessitate water supply and retention improvements. While some of these problems could be dealt with by careful planning and sufficient expenditures, they render the site an inappropriate planning choice, especially where other options are available. It should be noted that an independent evaluation conducted by David N. Kinsey, acting as a master appointed by the Superior Court, concluded that the site was "unsuitable," and that use of the site for the purpose suggested would be "contrary to sound planning principles."

Second, the site is the subject of a deed restriction entered into by Soussa in 1975, which restricts development on the site to five single family dwellings. Even assuming that this restriction may be invalidated at some point, there is clearly the potential for litigation which could delay this project. While this point alone might not serve to disqualify a site, in the present case it is simply one more reason that the Soussa site is not appropriate. Thus, for all of the above reasons, the Council will not order a builder's remedy on the Soussa site.

As to the relief requested by Denville, the Council notes that it does not grant substantive certification as the result of a motion. Certification occurs only following the complete mediation and review process, when the Council is convinced that the final housing element and fair share plan provides the requisite realistic opportunity for creation of the municipality's fair share. The Council will not short circuit the process in this case by a premature decision. Second, the Council notes that Denville's request for additional time has in effect been granted as the result of the interim period between argument of the motion and this decision.

Finally, the Council notes that it received another motion for a builder's remedy, filed on December 7, 1987 by Angelo Cali. This motion was filed subsequent to the start of mediation and the first two days of hearings. Cali had not previously participated in proceedings before the Council, and is not an objector. The Council will not consider this motion, as the movant has no standing in the mediation and review process.

The Council will issue an appropriate order embodying this decision.

COUNCIL ON AFFORDABLE HOUSING

Dated: 4/18/88

By: James L. Logue, III
Chairman

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