

COUNCIL ON AFFORDABLE HOUSING  
DOCKET NO.

JACK NEUGARTEN )

v. )

BOROUGH OF WEST PATERSON, et al )

OPINION

The issue raised by the Council on Affordable Housing (COAH) in this matter is whether a municipality should be required to include the site of a developer who institutes an exclusionary zoning lawsuit in its housing element and fair share plan (plan) when the municipality has failed to voluntarily file a plan with COAH in accordance with the provisions of the Fair Housing Act (Act), N.J.S.A. 52:27D-301 et seq., and that lawsuit is ultimately transferred to COAH for review of a plan and action on a petition for substantive certification. For the reasons expressed in detail in this Opinion, COAH finds that a municipality must include such a developer's site in its plan if the site is suitable for low and moderate income housing.

Jack Neugarten (Neugarten), the owner of a parcel of land in West Paterson, filed an exclusionary zoning lawsuit entitled Jack Neugarten v. Borough of West Paterson, et al, Docket No. L-015762-87, Law Division, Passaic County against West Paterson on January 14, 1987. At the time the lawsuit was filed, West Paterson

had not filed its housing element and fair share plan (plan) with COAH. West Paterson had filed a Resolution of Participation with COAH, pursuant to N.J.S.A. 52:27D-309(a), on October 28, 1985. Additionally, by letter dated September 2, 1986, West Paterson reaffirmed its intent to file a plan and participate in the administrative process. Pursuant to the Act, West Paterson was thus required to file its plan no later than January 5, 1987. However, the Borough failed to file its plan by that date. In fact, West Paterson failed to even submit a draft housing element and fair share plan pursuant to N.J.A.C. 5:91-3.1(d). Accordingly, COAH dismissed West Paterson on January 12, 1987. See N.J.A.C. 5:91-3.3. Accordingly, since West Paterson had failed to file a plan with COAH, jurisdiction over the lawsuit properly resided with the Superior Court and there was no requirement under the Act for the court to transfer the matter to COAH. See N.J.S.A. 52:27D-309(b) and 316. Nevertheless, the court, in its discretion, and by agreement of all parties, by Order dated May 27, 1987, determined to stay all judicial proceedings pending West Paterson's submittal of a plan to COAH and COAH's action on West Paterson's petition for substantive certification. West Paterson did submit a plan in accordance with the terms of the Order, however, the plan submitted did not include Neugarten's property as a site for low and moderate income housing. Neugarten objected to the plan on the basis of the site suitability of the site chosen by West Paterson for inclusionary development. Mediation was conducted, however, it did not resolve Neugarten's objections and the matter was brought before COAH at its public meeting on June 20, 1988 for a determination as to

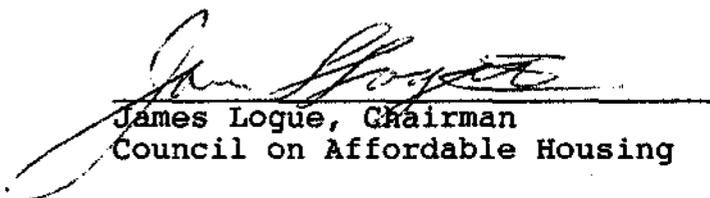
whether a contested case existed which should be transmitted to the Office of Administrative Law. It was at this time that COAH raised the question of whether West Paterson should be required to include the Neugarten site in its plan. West Paterson submitted a written response by letter dated June 23, 1988 in opposition to any requirement to include the Neugarten site.

A municipality that chooses not <sup>to</sup> comply with the Act and fails to file a plan with COAH before it is sued is not entitled to the benefits of the Act. See N.J.S.A. 52:27D-309. Jurisdiction in those cases properly lies with the Superior Court and the municipality is subject to all attendant judicial remedies. Since the Act specifically declines to accord the benefits of the Act upon such a municipality, COAH finds that it should not bestow those benefits upon a municipality that has failed to comply with the Act if the Court in its discretion determines to transfer the matter to COAH. In such cases, the municipality should be required to utilize the site of the party who instituted litigation, provided the site is suitable, whether the matter is before the court or COAH.

COAH feels its decision in this regard will serve to promote the purposes of the Act and foster continued participation by owners of land thereby resulting in increased municipal compliance with the Act. As the New Jersey Supreme Court recognized in Hills Development Co. v. Bernards Tp., 103 N.J. 1 (1986), the Act is voluntary, however, it was anticipated that the threat of litigation and the ensuing judicial remedies would encourage municipalities to comply with the Act and file a plan of its own choosing. COAH's decision in this matter promotes that concept. Municipalities that

do not file plans with COAH before the institution of a lawsuit will be required to use a developer's site if it is suitable regardless of whether they are before the court or COAH. This possibility hopefully will encourage municipalities to file plans voluntarily to avoid such ramifications.

For these reasons, as well as those set forth at the COAH meeting on July 25, 1988, COAH will require West Paterson to include the Neugarten site if it is suitable for low and moderate income housing.

  
James Logue, Chairman  
Council on Affordable Housing

Dated: *September 6*, 1988