COUNCIL ON AFFORDABLE HOUSING

DOCKET NO. COAH- 88-115

IN RE BOROUGH OF)

FANWOOD)

Civil Action

OPINION

Following the institution of Mt. Laurel litigation, the Borough of Fanwood was transferred to the Council on Affordable Housing (Council) by the Superior Court. Fanwood filed a final housing element and fair share plan with the council on January 5, 1987. Pursuant to the Council's methodology, Fanwood has a Mt. Laurel obligation of 87 units, comprised of 78 reallocated present and prospective need and 9 indigenous need. In its final plan, Fanwood stated that it had no usable vacant sites for use in meeting its obligation, and requested that its fair share obligation be adjusted to zero.

Objections to the plan were filed, with the objectors offering their property as potential sites for inclusionary developments. In its pre-mediation report, the Council instructed Fanwood to consider use of the objector's sites. Mediation has now commenced. By motion dated August 17, 1988, Fanwood asked the Council to order that the objector's sites be excluded from

consideration in mediation. Responses were filed by the objectors, (Patrick D. Minogue, Robert S. Rau, and the Midway Partnership) and the Council heard oral argument on September 26, 1988.

The Borough's first argument to exclude the sites is that they are under two acres in size.* Fanwood cites the Council's definition of "vacant land" as "residential areas with lot sizes in excess of two acres where environmental factors permit higher densities", N.J.A.C. 5:92-1.3, and argues that this precludes from consideration sites below two acres.

This position is inconsistent with the Council's regulations and policies. It is true that the Council has always recognized that small lots present certain difficulties. They may present planning problems not present in larger sites. Further, they may not be as attractive to developers, and thus fail to provide the requisite realistic opportunity that units will actually be built. Thus, the Council has focused on the use of larger sites, and used the two acre minimum as a guide. For this reason, municipalities are not required to include parcels smaller than two acres on their vacant land inventories.

However, it has never been Council policy that such sites may not be utilized for inclusionary developments in appropriate circumstances (in fact, the definition of vacant land also includes all "undeveloped and unused land area", without a qualification

*The Minogue site, which is comprised of three separate contiguous lots, is actually 2.65 acres in size. The Council agrees with the objectors that the existence of separate lot divisions on such a parcel does not make it "separate sites" and thus reduce its size below two acres.

based on acreage). The Council has in several cases approved municipal housing plans utilizing sites smaller than two acres where the facts of the case so warranted and the site was suitable (discussed infra). Thus, the fact that the lots are under two acres in size does not automatically disqualify them from consideration. However, the Council always considers several questions before utilizing such sites: whether the sites are suitable; whether the sites are owned by parties who are committed to their use for lower income housing; and whether there are other options available.

Second, Fanwood contends that the sites are inappropriate because they are not vacant, but instead contain single family homes. The properties are thus not "undeveloped and unused." As a corollary to this argument, Fanwood states that to permit demolition of the existing structures would not further the goal of creating lower income units, as it would cancel the affects of "filtering" and "residential conversion" that form a portion of the Council's calculation of fair share obligation.

The Council does not require municipalities to demolish structures in order to create vacant space for affordable housing. Under the Council's regulations, a municipality that lacks sufficient suitable vacant sites to meet its obligation may request a vacant land adjustment. N.J.A.C. 5:92-8.1. A municipality that is totally developed may even adjust its number to zero (in fact, several municipalities have done so). However, what has occurred in the present case is the appearance in mediation of a

developer/property owner who has expressed a willingness to demolish the structures, thus creating potentially suitable sites.* This fact has dramatically altered Fanwood's situation. As noted above, Fanwood's original housing element admitted an inability to meet any part of its obligation, due specifically to a total lack of vacant, suitable land. This is no longer the case; there are now several parcels available for aid in meeting at least part of Fanwood's obligation. The Council would be remiss if it did not make such sites the subject of mediation. In fact, the Council's regulations require that all vacant sites be considered. N.J.A.C. 5:92-8.4(a). Certainly, the Council cannot grant Fanwood an adjustment to zero for lack of any vacant land, when vacant land is available.

The Council must also reject Fanwood's argument premised on filtering and residential conversions. These are "secondary sources of housing supply/demand," and are subtracted from (or added to) "total need" in order to arrive at "pre-credited need" (the municipality's actual Mt. Laurel obligation). It is true that the Council's methodology applies these secondary sources to Fanwood. However, the "loss" of units on the sites envisioned by Fanwood would be more than made up for by the units that may be

---

*This assumes that there are no other legal impediments to demolition. To the best of the Council's knowledge, no such problems exist in this case (and could, in any event, be handled through mediation).

gained through an inclusionary development.* Thus, neither the small size of the lots, nor the existence of structures, provide a sufficient reason in this case to exclude the sites from consideration in mediation.

A third issue presented by this case is that of "site suitability." Pursuant to the Council's regulations, all sites utilized for Mt. Laurel inclusionary developments must be suitable and accord with sound planning. Of course, this includes small sites in residential areas, as in the present case. In fact, many of Fanwood's arguments are in reality issues of suitability (e.g. incompatibility with its neighborhood; density). Initial Council staff review has indicated the sites at issue to be facially suitable. Mediation must resolve any remaining site related issues.

Having concluded that the sites may not be excluded from consideration in mediation, a final issue deals with the appropriate burden of proof as to the suitability of the sites, and whether Fanwood must use these sites in its plan in order to obtain certification. As the Council has noted in previous cases, the Act is designed to permit municipalities to create their own housing plans and to submit them to the Council for review and certification. If a plan is appropriate, and review indicates the sites are suitable (including resolution of any site suitability issues raised by objectors) and the plan further meets all Council requirements, it will be certified. The fact that an objector offers

---

*Of course, any loss is speculative, as there is no guarantee filtering or conversion would ever occur on these sites.

another site will have no bearing, and the Council will not act to select which sites a municipality must use.

However, this case presents a totally different issue. As described above, the problem is that there are no sites other than those advanced by the objectors, and no municipal plan to otherwise meet any part of the constitutional obligation. Use of the objector's sites, however, has the potential to provide for satisfaction of at least part of that obligation. Thus, the Borough must use the sites in order to obtain certification, unless Council review finds the sites to be unsuitable, or Fanwood has a sufficient plan that will provide for its full Mt. Laurel obligation of 87 units. In order to be acceptable, the Borough's plan must provide as realistic an opportunity for production of the units as that presented by the objector's sites, and must provide similar tangible commitments. It must be reemphasized that the Council is not selecting the sites the Borough must use; nor is the Council's action intended to be punitive. The sites in question are simply the only choice by virtue of necessity.

For all of the above reasons, the Council will order that the sites may not be excluded from mediation, and must be considered by the Borough in a manner consistent with this Opinion.

COUNCIL ON AFFORDABLE HOUSING

By _____
James L. Logue, III
Chairman

October 17, 1988