COUNCIL ON AFFORDABLE HOUSING
DOCKET NO. COAH 88-106(a)

IN RE:
PETITION FOR SUBSTANTIVE CERTIFICATION FILED BY THE TOWNSHIP OF DENVILLE.

Civil Action

OPINION

At its meeting of September 17, 1988, the Council on Affordable Housing (the Council) heard oral argument on an emergent basis on two motions requesting revocation of Denville's grant of substantive certification. At the next public meeting, Monday, November 7, the Council issued an oral decision on the two motions. At that meeting the Council also indicated that it would act to memorialize its decision in a written Opinion. This Opinion is issued for that purpose.

This Opinion will not restate Denville's entire procedural history before the Superior Court or Council. Denville's plan was before the Council for review following transfer from the Superior Court. On May 5, 1988 the Council issued a conditional approval of Denville's petition for substantive certification. Among the conditions Denville was ordered to comply with was the requirement that it obtain title to the "McGreevy site." The site was included in the plan as the proposed location for a Mt. Laurel inclusionary development. Denville responded to the Council that it would condemn the property, and proceeded to initiate condemnation proceedings. As the result of Denville's compliance with the conditions contained in the conditional

denial, the Council granted Denville's petition for certification on August 15, 1988. At the time of certification, the Council acted to lift an existing scarce resource sewer restraint. However, at Council order Denville continued to hold enough capacity to satisfy its Mt. Laurel obligation under the existing plan (i.e., with the McGreevy site included).

However, in an oral decision delivered on August 26, 1988, the Honorable Reginald Stanton, A.J.S.C., found that Denville did not have authority to condemn property for use in meeting its Mt. Laurel obligation. As a result of this decision, there is no longer any certainty that Denville will be able to acquire the McGreevy site. Failure to obtain the site would result in Denville's inability to successfully provide for its full fair share obligation of units, as ownership and use of the McGreevy site for lower income housing is a necessary component of Denville's plan. Denville has indicated that it is still interested in obtaining the site in question, and is actively pursuing several means to accomplish this goal.

As noted, two motions were filed with the Council subsequent to the Superior Court decision. The first, dated September 8, 1988, was filed by Angelo Cali, a property owner in Denville who was not a participant in the Council's prior mediation and review process. Cali's motion requested: i) revocation of certification; ii) reconsideration of Denville's petition in light of Judge Stanton's decision, and denial of the petition; and iii) reimposition of the scarce resource restraint. The

second motion was filed on September 30, 1988 by the Public Advocate. The Advocate had previously appeared as an objector to Denville's plan. The Advocate's motion requested: i) hearing of the matter on an emergent basis; ii) revocation of the certification; iii) an order directing Denville to create a complying plan by a set time; and iv) reimposition of the sewer restraint. Three responses were received: Denville in opposition to the motions; the property owner Maurice Soussa in support of the motions; and the property owner Stonehedge Associates in opposition to any sewer restraint that would affect its sites.

As noted, the Council heard oral argument on an emergent basis on September 17, 1988. At that argument, objections were raised by the Township to Cali's standing to bring his motion. As a result, the Council requested submissions on the issue. Cali did not present oral argument on the substantive issues at that time (and subsequently waived any oral argument). Papers on the standing issue were then filed by Denville and Cali. At its next public meeting, the Council issued an oral decision on all outstanding issues.

The first issue deals with the question of Cali's "standing" to file a motion alerting the Council to a problem with Denville's certification and seeking revocation of that certification. This must be distinguished from the totally separate question of who may participate in the Council's mediation process <u>prior</u> to certification. During the pre-certification process, a party may only participate as an objector if he has

filed valid objections within the time required by the Fair Housing Act. N.J.S.A. 52:27D-309. In the present case, Cali's failure to do so effectively barred him from participating in mediation as an objector.

However, the present case represents a separate issue not dealt with previously by the Council. It is anticipated by the Council that on occasion things may go wrong with a municipality's plan post-certification. Thus, in its resolutions granting certification, the Council provides that changes in the conditions of a plan may impact on the plan to such an extent that the certification must be declared void. The Council's intent is to encourage such a municipality to appear before it in order to correct the deficiency. In order to further this, the Council has recently approved amendments to its procedural rules specifically providing for post-certification amendments to a plan.

Thus, the Council does not intend that a post-certification problem go unattended. It would make little sense to discourage presentation of such issues to the Council by placing an artificial limit on the parties who can raise them (the original objectors may no longer be available to fill this role). Nothing in the Act requires otherwise. Thus, the Council concludes that any party may file a motion alerting it of a problem with a municipality's plan, and requesting that the Council act to help correct the situation (either through amendment or revocation). The Council's new procedural rules accord with this interpre-

tation. Cali's motion is thus appropriate. Finally, the Council notes that the filing of such a motion does not provide the party with any rights towards inclusion in any future amended plan.

The second issue of the case is whether Denville's certification should be revoked. The sole reason put forward by the movants for revocation is Judge Stanton's decision, and the resulting inability of Denville to obtain the site by condemnation. As a preliminary matter, the Council concludes that it clearly has the power to revoke certifications. This follows from general principles of administrative law, and accords with the intent of the Act that the plan continue to provide a realistic opportunity for creation of the necessary housing. It does not seem appropriate that the Council should have no recourse whatsoever where, after certification, a municipality's plan collapses through inadvertence or neglect.

However, the Council has determined that revocation is inappropriate in the present cae. It must be recalled that a post-certification problem with a plan does not automatically void that plan. The problem may be trivial, and not affect the requisite realistic opportunity. And, if it does implicate the municipality's ability to provide its fair share of lower income housing, the Council must decide the appropriate response. In some cases the problem may be corrected; in other cases the plan may have to be amended; while in some instances the municipality's behavior may necessitate voiding of the certification.

In the present case, the problem with Denville's plan is not the result of any action or inaction by the Township. Instead, it is the result of events outside of Denville's control. At the time of certification, it was assumed that Denville had the authority to obtain the property in question by condemnation. Denville proceeded to do so, only to have its actions struck down by the Superior Court. Where, as here, the problem was unanticipated at the time of certification, and not traceable to any action of the municipality, the Council does not feel that immediate revocation of certification is appropriate.

Instead, the Council will first give Denville an opportunity to acquire the property by other means. If Denville is successful, then it will have complied with the original terms of the certification (although admittedly at a later date than originally anticipated). However, this process must be closely monitored by the Council. Thus, Denville will be ordered to report to the Council on its progress in obtaining title to the McGreevy site at the Council's next public meeting, December 19. In the event satisfactory steps to acquire the property are not taken in a timely manner, or the Council concludes that the process will be fruitless or overly time consuming, then Denville will have to provide for the "lost" units in another acceptable manner. At this point, the Council's rules on post-certification amendments will come into play. The certification will remain in effect during this correction process. Of course, the Council retains the power to revoke Denville's certification at any time,

if the circumstances change so as to warrant such action. The parties are not foreclosed by this decision from bringing a motion for such relief if the situation so warrants.

The final issue concerns the request for reimposition of scarce sewer restraints. The Council concludes that it has the power to impose such restraints post-certification. Scarce resource restraints are designed to protect the ability of a municipality to meet its fair share obligation, by preserving scarce infrastructure during the period of creation and review of the municipality's plan. The logic behind the use of such restraints seems equally applicable in the present type of situation as in the pre-certification mediation and review process (when restraints have always been utilized by the Council in the past). In each case it may be necessary to insure sufficient resources to cover the municipal obligation, while the means to insure that obligation are being agreed upon.

However, in the present instance the Council does not feel that reimposition of the restraints would be appropriate. During the interim following certification of the plan (and the concurrent release of a portion of the restraints) and the present motions, certain capacity was allocated by the Township. In doing so the Township did nothing improper. The Council's policy in the past has been not to restrain resources already allocated by a municipality to innocent third parties, and the Council will not do so here. Unfortunately, the remaining capacity is appar-

ently negligible, and little purpose would be served by holding it further.

The Council recognizes that such problems will be inherent in situations where a post-certification problem occurs (as resources not needed for the existing plan will be released at certification). However, the Council's approach is an attempt to be fair to all parties concerned. The Council cannot order resources restrained indefinitely, even though not intended to be utilized in a plan, on the chance that at some point in the future something may go wrong with that plan. It must be recalled that Denville is still holding, at the Council's order, sufficient capacity to cover the plan as originally constituted. Hopefully, Denville will obtain title to the McGreevy site, thus resolving the problem. If not, then perhaps a new plan can be fashioned not requiring additional capacity. If that proves impossible, then Denville will have to take all available steps necessary to obtain needed capacity, and will have to use the first capacity obtained for Mt. Laurel purposes.

An appropriate Order embodying the terms of this Opinion will be entered by the Council.

COUNCIL ON AFFORDABLE HOUSING

By: _____
James E. Logue, III
Chairman

Dated: November 28, 1988