COUNCIL ON AFFORDABLE HOUSING
DOCKET NO.COAH 88/89-115(a)

IN RE BOROUGH OF)
FANWOOD: MOTION FOR)
ACCELERATED DENIAL/)
CONDITIONAL DENIAL)

Civil Action
OPINION

This matter was opened to the Council on Affordable Housing (the Council) by a motion dated January 18, 1989 (and supplemented by letter dated January 20, 1989) filed by Patrick Minogue, Robert Rau, Jr., and Ernest DiFrancesco, objectors to the Borough of Fanwood's petition for substantive certification. The objectors are owners of three properties in Fanwood proposed as sites for inclusionary developments (Minogue is the owner of the Terrill Road site, while Rau, Jr. and DiFrancesco are owners of the LaGrande Avenue site and the LaGrande Avenue/Midway Partnership is the owner of the Midway Avenue site). The motion requested that the Council issue accelerated denial of Fanwood's petition or, in the alternative, that the Council issue a conditional denial, and require that Fanwood zone the objectors' sites as a condition of receiving certification. By letter dated February 5, 1989 Robert Rau, Jr. also filed with the Council requesting the same relief on behalf of himself, Robert Rau Sr. and Deborah Rau (hereafter the Rau family), with regard to a fourth property in Fanwood, the North Avenue site. As with the other petitioners, the Rau family previously filed as an objector to the Borough's plan and proposed their site for an inclusionary development. Minogue, Rau Jr. and DiFrancesco, and the Rau family will jointly be referred to as "petitioners" in this Opinion.

The facts of the case are basically undisputed. Fanwood filed a housing element with the Council on January 5, 1987, and elected not to petition for certification at that time. Subsequently, two exclusionary zoning suits were filed against Fanwood on January 21 and 29, 1987, and were consolidated by the Superior Court. On or about March 3, 1988 a request for mediation and review was filed with the Council, which request acted as a petition for certification and triggered the Council's administrative review process. The Borough published notice of the petition on or about March 25, 1988 and each of the present petitioners filed with the Council as objectors.

Fanwood's housing element requested an adjustment of its fair share obligation to zero, due to a lack of suitable vacant land (the Borough's obligation is 87 units, 9 of which represent indigenous need). As permitted by the Council, the Borough's vacant land inventory omitted several vacant sites within the Borough, as they were under two acres in size. However, following petitioners filing as objectors, the Council, in a pre-mediation report dated May 9, 1988, instructed Fanwood to consider using the petitioners' sites in meeting its obligation.

The first mediation session was held on May 27, 1988. Following additional mediation sessions, by letter dated July 12, 1988 counsel for Rau Jr. and DiFrancesco circulated a draft of a proposed agreement between the petitioners and Fanwood. However, this agreement was never implemented. The mediator's report indicates that on or about July 13, 1988 Fanwood indicated that it would file a motion seeking to exclude the petitioners' sites from consideration in mediation. The motion was filed with the Council on August 17, 1988, and was premised basically on the small size of the sites (under two acres in all but one case), the existence of structures on certain of the sites, and the "fully developed" nature of Fanwood. Fanwood concluded that use of the sites was inconsistent with sound planning. The petitioners opposed the motion, and the Council heard oral argument on September 26, 1988 (at which time it also issued the first of several extensions of mediation). In a decision dated October 17, 1988 the Council denied Fanwood's motion in its entirety, and ordered that the Borough utilize the properties in its housing plan (as sites for inclusionary developments) unless the sites were found to be unsuitable, or the Borough prepared an alternative plan providing for its full 87 unit obligation.

A mediation session was then held on October 28, 1988. According to the petitioners, Fanwood indicated at that session that it would not sign the draft agreement, that it would not mediate density for the sites without the benefit of a suitability study, and that it was going to prepare such a study. On November 1, 1988 Fanwood filed an interlocutory appeal of the Council's motion decision; which appeal was denied by the Appellate Division on November 29, 1988 (a subsequent appeal to the Supreme Court was also denied).

On December 15, 1988 Fanwood held a "public information meeting" in order to discuss the progress of the administrative process, among other issues. By letter dated December 15, 1988 counsel for Fanwood requested permission to appear before the Council at its December 19 public meeting. At that meeting, Fanwood argued that it was prepared to continue with mediation, but could not adequately do so without an understanding of its "exact fair share number." In response, the Council reiterated that the Borough's obligation continued to be 87 units, and that it would not set a lower obligation based upon the number of units that could hypothetically be accommodated on the petitioners' sites. The Council also indicated that Fanwood should advise the mediator by December 28 on whether it would continue in mediation. On or about December 27, 1988 Fanwood issued a proposal to petitioners as a basis for continuing mediation. This was rejected by petitioners by letter dated December 28, 1988, which letter also stated that further mediation was simply impossible.

At the Council's next public meeting, January 9, 1989 the mediator indicated that she was terminating mediation, on the ground that it no longer appeared fruitful to continue. This decision was accepted by the Council. On the same day Fanwood presented to the Council and petitioners a planning report, dated January 6, 1989, contesting the suitability of the Terrill Road and Midway Avenue sites, and contesting the proposed density on the LaGrande Avenue site. (Subsequently, Fanwood filed a second report, dated January 27, 1989 contesting the suitability of the North Avenue site). These reports shall be referred to as the Preiss reports. The mediator's report was issued on January 11, 1989 and a response filed by the Borough on January 27, 1989.

As noted above, the present motion by Minogue, Rau, Jr., DiFrancesco, and the LaGrande/Midway Partnership was filed on January 18, 1989 (and supported by a similar motion filed by the Rau family on February 5, 1989). The Borough filed its response on February 7, 1989 and the Council heard oral argument on February 9, 1989. Appearing at the argument were counsel for Fanwood, Minogue, Rau, Jr., DiFrancesco and the LaGrande/Midway Partnership. Robert Rau, Jr. also appeared pro se on behalf of his family as owners of the North Avenue site, and filed four letters with the Council on the date of the argument. Following the argument, by letter dated February 14, 1989 the Council provided the

parties with an opportunity to submit certain additional materials. In response, the Council received two letters and attachments filed by Rau and DeFrancesco and dated February 15 and 17, 1989; a letter on behalf of the Borough on the admissability of certain items, dated February 24, 1989; a letter from the Rau family dated March 2, 1989; and a letter response from Fanwood dated March 8, 1989.

As noted above, the present motions seek accelerated denial of Fanwood's petition. The motions are premised on alleged actions (and inaction) by Fanwood during the period of mediation. Before reviewing the substantive issues raised by the motions, it is necessary to resolve certain procedural issues. At oral argument Fanwood argued that certain items provided to the Council by petitioners in support of their motion were inadmissable, and should be excluded from the record. The Council provided Fanwood with an opportunity to file a letter detailing with specificity what items should be excluded from consideration, and the basis. Fanwood responded by letter dated February 24, 1989. No response to that letter by any party has been received by the Council.

First, Fanwood objects to numerous items contained in petitioners' appendix to their January 18, 1989 motion brief.* Items, J, P, R and U are each copies of newspaper articles written by Patricia Kuran, Mayor of Fanwood, during the period of June 16, 1988 to December 14, 1988. The articles discuss Fanwood's appearance before the Council, the Council decision of October 17, and proposed legislation to amend the Fair Housing Act to prevent use of small sites in developed towns (supported by the Mayor), among other issues. Fanwood argues that the articles are outside the scope of mediation and are irrelevant to the issues raised in the motions. The answer to the argument is two fold. First, the Council agrees with petitioners that it is free to consider all municipal actions (not just actions actually occurring during mediation sessions) in determining whether the municipality is properly participating in the administrative review process. Certainly, not every action taken by a municipality during the pendency of Council administrative review is relevant to what occurs in that review. However, the reverse is also

*Fanwood specifically does not object to items B through I, Y and Z. Further, as no mention is made of items A, W and X, the Council thus assumes they are also not objected to.

possible. Second, when faced with a claim that certain items are irrelevant, the proper approach is for the Council to review and judge the relevancy of the items, not to exclude them from its consideration. Thus, the Council will consider the items in question.

Despite objections by Fanwood, the Council will also consider item Q (a new Fanwood stormwater ordinance), item S (bills introduced into the State Legislature to amend the Fair Housing Act) and item T (a notice issued by Fanwood for its December 15, 1988 public meeting). Fanwood argues that each item is irrelevant, and that the Council should draw no inference of improper behavior from them. However, this is precisely the issue that should be decided by the Council on a motion for accelerated denial. Items M, N and O, also objected to by Fanwood, are simply one page documents setting forth the number of units, unit sizes, and densities petitioners propose for three of their sites. This material is relevant to the issue of site suitability (discussed infra) and will be considered on that issue. Fanwood also objects to inclusion in the record of item L, the "Coppola Report." The report is a two page planning review of three of the petitioners' sites (it omits North Avenue) dated December 16, 1985. Again, the item is relevant to the issue of site suitability, discussed later. Finally, item K is the draft agreement circulated during mediation. Fanwood does not object to this item, as long as it is understood that it was never accepted and signed by the Borough. A review of the petitioners' papers does not indicate that they are making this argument.

Second, Fanwood asks that portions of the petitioners' January 18 brief be "stricken" from the record. However, petitioners properly supported this material by a certification of Patrick Minogue dated January 13, 1989. Thus, the Council will not "strike" any of the material contained in petitioners' brief for several reasons. First, if Fanwood has concluded that certain facts presented by petitioners are inaccurate or unsupported it has had an opportunity to highlight them in its response to their motion. The Council does not need to "strike" the material, but will note any such factual disputes between Fanwood and petitioners. Second, a review of Fanwood's letter indicates that many of its objections are not based on admissability or inaccuracy, but on relevance. Thus, Fanwood's discussion of pages 6 through 11 of

petitioners' brief is based on its contention that the materials are irrelevant, and that no improper inferences should be drawn from the materials. As discussed above, these are proper issues for the Council to decide. (Fanwood's discussion of page 5, and pages 20 through 24 dealwith site suitability issues, and will be discussed later). Finally, Fanwood objects to pages 14 through 16 of the brief, containing a list of the actions by Fanwood that petitioners conclude merit accelerated denial. This is part of petitioners' argument, not a statement of fact. Certainly, if any of these items have not been properly supported, the Council will give no weight to it.

Next, Fanwood asks that the letters submitted by the Rau family dated February 5, 1989 and submitted at the argument be excluded from the record*. Fanwood argues that the materials were untimely, were not properly served on the Borough, and are not supported by affidavit. The Council has determined that the letters were timely and should be accepted; further, the issue of service is moot, as Fanwood was given an adequate opportunity to respond to the letters post-argument. As to the lack of a supporting affidavit, the Council will not credit any factual allegations contained in the accelerated denial letter that are not adequately supported elsewhere in the record. It should be noted, however, that this letter adds little of a factual nature to what was already covered in the petitioners' brief. The letter as to site suitability (contesting the Preiss report filed by Fanwood) will be discussed later.

Finally, Fanwood asks that the Council not consider documents filed by petitioners on February 15 and 17, 1989 dealing with unrelated actions by the Fanwood Planning Board (and in one case, Board of Adjustment). At oral argument, petitioners argued that Fanwood had on several prior

*Only two of the letters are really at issue here: the first, requesting accelerated denial/conditional denial and giving the reasons therefor; and the second, contesting the suitability statements made in the Preiss report submitted by Fanwood. The remaining two letters deal primarily with an issue not presently before the Council - whether the North Avenue site is still a part of mediation and review. In fact, the matter is in reality a "non-issue," as all four sites are legitimately a part of mediation.

occasions permitted property owners to demolish single family homes as a prelude to construction on a site. The documents submitted post-argument are the memorializations of the municipal decisions referred to at oral argument. Fanwood contends that the material is irrelevant and should be excluded from consideration. As described in detail above, the Council has concluded that matters outside of the actual mediation process may be considered on a motion for accelerated denial/conditional denial, and thus will consider the materials submitted.

No party is disputing the Council's authority to award the relief requested. As the Council has noted in other cases, use of the remedy of accelerated denial is appropriate when a municipality is not participating in the mediation and review process in a manner designed to expeditiously advance the process, and is, in effect, acting so as to undermine the goals of the Fair Housing Act and to waste the time of the Council and other parties. Accelerated denial is an extraordinary remedy, since it terminates the Council's administrative process, and returns the case to the Superior Court (in those cases, such as the present matter, that were originally transferred to the Council by the Superior Court). The Council has utilized accelerated denial on one previous occasion involving the Borough of Little Silver. In that case the municipality consistently failed to provide information necessary for the Council's review of its plan, despite repeated requests. In effect, the municipality simply failed to cooperate with the Council or actively participate in the mediation and review process. The Council thus concluded that accelerated denial was appropriate.

The alternative relief requested by petitioners is a conditional denial of Fanwood's petition. In granting conditional denial, the Council lists those specific conditions the municipality must comply with in order to receive certification. The municipality then has 60 days in which to refile a complying plan. N.J.S.A. 52:27D-314(b). In the present case, the condition requested by petitioners is the zoning of their four sites for inclusionary developments, at the densities they have proposed. Petitioners' brief describes such relief as equivalent in this case to the award of a "builder's remedy" (the award of a builder's remedy requires a municipality to zone a particular site as a condition

of receiving certification). The Council has awarded such relief on one prior occasion; in the case of Motzenbecker v. Borough of Bernardsville, Docket No. COAH 87-18, upon a finding that the municipality had consistently failed to comply with Council requirements or create a complying housing plan. The Council thus ordered a builder's remedy as to an objector's site that had previously been found suitable by a special master appointed by the Superior Court. Again, the Council's authority to order conditional denial on these terms is not disputed.

In support of their request for relief, petitioners argue that Fanwood has failed to participate in the Council's administrative process in an appropriate manner, and has wasted the time (and funds) of all parties without achieving anything of substance. The Council must thus review the specific grounds put forward by petitioners in support of this assertion, and determine whether they warrant the particular relief requested. Petitioners have cited various actions by Fanwood in support of their argument for accelerated denial/conditional denial (a detailed list of most of these actions is contained on pages 14 through 16 of petitioners' January 18 brief). Petitioners argue that, taken together, these actions warrant the relief requested. The Council will consider each of these issues in turn.

First, petitioners point to the newspaper articles written by Fanwood's mayor, Patricia Kuran. At noted above, these articles were written during the period Fanwood was engaged in mediation. The articles discuss facets of the ongoing mediation process, criticize the Council's October 17 ruling, express support for an amendment to the Fair Housing Act (and encourage other to write in support), and provide notice as to public meetings. Clearly, there is nothing improper about such actions by a municipal official. It is the prerogative of such an official to express a personal disagreement with a Council decision or policy. The mayor is certainly entitled to express her support for legislation amending the Act, and to encourage others to support such an amendment. Also, the Council attaches no importance to the mayor's characterization of the Council as having "forced" a settlement on Fanwood (Exhibit J). However, the Council does note that, when it has been agreed that

mediation shall be confidential, it is unfair for one party to unilaterally deviate from that procedure (as in the release of information on proposed zoning in the mayor's column (Exhibit R)).

Similarly, the Council does not view as inappropriate the fact that Fanwood officials appeared before a State Legislative sub-committee in support of an amendment to the Act; that municipal officials urged public support of such an amendment; that the Borough held a "public information meeting" to discuss publicly the Council's prior Fanwood decision, at which meeting municipal officials expressed their opposition to that decision; and that the Borough elected to file an interlocutory appeal of the Council's decision (these actions are not disputed in Fanwood's papers). Fanwood's right to take such action has in no way been affected by its participation in the Council's administrative review process.

Further, the Council draws no inference of improper behavior from the undisputed fact that Fanwood changed attorneys during the mediation process. Certainly, a municipality is entitled to take such action if it determines it to be appropriate or necessary and such action does not disrupt the actual mediation process. As to Fanwood's adoption (during the period of mediation) of a new stormwater ordinance, the Council simply has no basis on the record on which to draw any inference of improper municipal behavior relative to the Borough's participation in the Council process. Likewise, the Council puts no weight in Fanwood's "rejection" of the Coppola report. This report, dated December 16, 1985 and addressed to the Planning Board, implicitly accepts the suitability of three of petitioners' sites for inclusionary developments (North Avenue is not discussed), and goes on to a discussion of possible densities and designs. However, the February 24, 1989 Fanwood letter, and accompanying certification of Linda Stender of the same date, indicates that the report, while initially authorized by the Planning Board, was never acted on or accepted by it. The report, which is over three years old, was never submitted by Fanwood during mediation, and Fanwood has never indicated to the Council that it was relying on, or utilizing the report in any way. On the present record, the Council concludes that the report simply is not relevant to the issue of accelerated denial.

The petitioners also argue that Fanwood "refused to consider" that its fair share obligation might be other than zero, and attempted to adjust its obligation to zero. (It should be noted that Fanwood disputes this point). It is undisputed that Fanwood's housing element sought to adjust its fair share number from 87 to zero, on the basis of a lack of vacant land, and that the Borough's vacant land inventory omitted certain existing vacant parcels. However, the Borough identified these sites as being below two acres in size. Pursuant to Council policy a municipality may omit such smaller sites from its inventory and from consideration. It is only when a party owning such a site expresses an interest during mediation in utilizing the site for Mt. Laurel housing that a municipality must consider the property. Thus, it was not improper for Fanwood to initially request an adjustment, or to omit the small parcels from its housing plan.

In their February 5 letter petitioners argue that Fanwood has never provided a rehabilitation component to satisfy its indigenous need of nine units. The affidavits of Dennis A. Estes, Esq., former counsel for Fanwood, dated January 26 and February 3, 1989, submitted to the Council by Fanwood, indicate that the issue of a rehab component was discussed with the mediator. Petitioners do not appear to dispute this. According to Estes, Fanwood representatives suggested to the mediator that certain rehab work done since 1980 in the Borough (with the aid of the Union County Community Development Block Grant Program) might qualify for credit and satisfy the indigenous need. However, having raised this point, Fanwood apparently elected not to pursue it. During oral argument counsel for the Borough indicated that the Borough believed it had previously filed with the Council documentation on the rehab work. However, such information had not been received by the Council as of that date (and has still not been provided). Thus, petitioners are correct when they assert that the Borough has at the present time still not provided a plan for meeting its indigenous need, despite more than ample opportunity to do so.

Next, petitioners contend that during the period from July 6, 1988 through January 9, 1989 (when mediation concluded) only one mediation session was held (on October 28). Petitioners argue that this lost time

was solely due to Fanwood's refusal to mediate. Fanwood responds that there were contacts between the parties during this period (caucusmeetings and telephone conversations), but does not otherwise deny this point. At oral argument counsel for Fanwood indicated that it was thought inadvisable to mediate during the pendency of the Borough's motion and interlocutory appeal. On or about July 13, 1988 Fanwood indicated that it would file a motion as to petitioner's sites. The motion was filed on August 18, 1988 and decided by the Council on October 17, 1988. Immediately thereafter a mediation session was held (October 28). However, Fanwood then filed its interlocutory appeal, which was dismissed by the Appellate Division on November 29, 1988. (As noted above, Fanwood subsequently filed a notice of appeal with the Supreme Court, which was also denied). Following the Appellate Division's decision Fanwood requested an opportunity to be heard by the Council prior to further mediation. As described in detail above, this appearance took place on December 15, 1988, at which time the Council gave the Borough until December 28, 1988 to indicate whether it would continue to mediate. Fanwood responded in a timely fashion by offering a proposal to petitioners. However, this offer (which was basically a restatement of a proposal made earlier in mediation) was rejected by them, and mediation was terminated.

It is clear that there was unnecessary delay in the process, specifically during the period from July 13, 1988 through the Council decision on Fanwood's motion (October 17), and from Fanwood's interlocutory appeal (November 1) to the Appellate Division decision (November 29). However, this was partially attributable (at least during the first period) to Fanwood's motion, which raised a novel issue not previously addressed by the Council. Obviously, the result of the motion made a tremendous difference in mediation. If Fanwood did not have to consider the sites, then mediation was for all purposes over. On the other hand, the Council decision requiring consideration of the sites meant that further mediation was potentially useful. Although the Council does not favor delay of any sort in the mediation process, under the facts of the present case part of the delay was at least excusable. In recognition of this, the Council granted extensions of the mediation during the pendency of the motion. On the other hand, once the Council

decision was issued, mediation should have continued. If Fanwood had wished to stay the administrative process during its interlocutory appeal, it could have requested such relief. It elected not to do so. Further, there has been no explanation of the delay prior to the filing of the motion. Thus, the Council does attribute unnecessary delay in the process to Fanwood.

Petitioners also argue that the issue of site suitability was not properly raised by Fanwood. It is not disputed that Fanwood submitted no written suitability report until the final day of mediation, when it filed the first of the two Preiss reports. However, Fanwood maintains in its papers that suitability of petitioners' sites was "always an issue." It does not say in what form the issue was raised prior to the Preiss reports. The petitioners' brief notes, however, that Fanwood raised the issue verbally at the October 28 mediation session; at which point it stated that it could not mediate densities for the sites until it had prepared a site suitability analysis, and that it was preparing such a report. The mediator's report also indicates that Fanwood verbally raised the issue of site suitability during mediation.

Of course, until the Council decision of October 17, 1988 it was not established that Fanwood would have to consider the petitioners' sites. At that point, however, it became the Borough's responsibility to raise the issue, so that the mediator and petitioners were properly apprised, and the issue could be dealt with in mediation. Apparently Fanwood did raise the issue verbally at the next mediation session, and indicated that it would prepare a report. However, a period of over two months then passed prior to submission of the report to the Council and petitioners. (The record is unclear as to any further suitability discussions during the interim period). This report was not actually submitted until the very last day of mediation.

Finally, there is the issue of the prior actions by Fanwood permitting demolition of single family homes. The records submitted by petitioners cover three separate incidents. The first is action by the Borough Planning Board on October 27, 1988 granting preliminary major

subdivision approval to a developer to subdivide a site into five lots, each to contain a single family home. The record indicates that the developer would first demolish one single family home on the undivided site. Each of the new lots would apparently comply with current zoning. The second is action by the Planning Board dated April 22, 1982 granting preliminary site plan approval for construction of a motor inn on three contiguous lots, and requiring the demolition of three single family homes. The motor inn apparently complied with existing zoning. Finally, petitioners provide evidence of action by the Board of Adjustment on April 20, 1988 approving construction of a racquetball facility on property requiring the demolition of a "dilapidated dwelling."

Petitioners' point is apparently that Fanwood has allowed demolitions of single family homes in the past, and thus, that its objection to such action in this case is inappropriate. However, Fanwood has never argued to the Council that no single family home may ever be demolished within the Borough. Fanwood's position has been that demolition of single family homes to be replaced with multi-family inclusionary developments violates Mt. Laurel principles, and should not be required of Fanwood as part of meeting its fair share obligation under the Council's regulations. The Council has already indicated, by motion decision, that it disagrees with this position; however, it was certainly not inappropriate for Fanwood to raise the argument before the Council, which had not previously addressed it specifically. As a result, the Council will put no weight on these particular exhibits as evidencing inappropriate behavior by Fanwood.

Thus, the Council views certain of the items raised by petitioners as irrelevant to the issue of accelerated denial. Further, as Fanwood correctly states, the mere failure to reach agreement in mediation is not cause for any remedial action by the Council. However, petitioners have identified several actions by Fanwood that the Council concludes were clearly not conducive to mediation. Fanwood has not pursued the issue of credit for prior rehab, and thus has at the present no plan for provision of its indigenous need*. Certainly, there was unnecessary delay in the process that the Council concludes is attributable to Fanwood. Further,

*As crediting information has still not been provided, it is presumed that the Borough will meet its indigenous need through new construction.

the release of information that the parties have agreed be held confidential during the progress of mediation is inappropriate. And, asnoted above, the Borough's site suitability reports could have been produced more quickly, rather than being provided, literally, at the last minute. The question is, however, whether these Borough actions warrant the relief requested by petitioners.

The Council has concluded that the problems outlined in this Opinion, while inexcusable, do not merit the remedy of accelerated denial on the facts of the present case. As described above, accelerated denial is an extraordinary remedy, which totally ends the Council's administrative process. In cases like Fanwood's, the result would be to return the case back to the Superior Court. As this mitigates against the clear intention of the Fair Housing Act and the Supreme Court, and may in some instance cause further delay in the production of housing, it should be utilized in only the most extreme cases. On balance, the Council has concluded that the problems caused by Fanwood do not rise to that level.

As noted above, petitioners have also asked the Council for an alternative form of relief - a conditional denial of Fanwood's petition (described by petitioners as equivalent, under these facts, to a builder's remedy). The condition would be that the four sites owned by petitioners be zoned for inclusionary development at the densities proposed. If the Council were to grant this request and issue a conditional denial, Fanwood would then have the statutory 60 day period in which to comply by preparing the appropriate ordinances. The Council could then act to grant or deny certification, following review of Fanwood's submission. Thus, to grant the relief requested, the Council would have to determine the suitability of all sites, and the appropriate densities (because, in effect, the Council would be ordering unconditionally that the sites be utilized in Fanwood's plan).

Fanwood has raised a limited number of site suitability issues as to three of the sites (Terrill Road, Midway Avenue, and North Avenue) in the two Preiss reports, referred to previously. The reports conclude that the three sites are not suitable for inclusionary developments on the basis of land use incompatibility factors (the reports find these sites

otherwise suitable). The reports also contest as unsuitable the density proposed by petitioners for the LaGrande Avenue site. Of course, becauseFanwood argues that the remaining three sites are unsuitable, no discussion whatsoever of densities for those sites is contained in the Preiss reports. The question is thus whether these issues prevent any award of conditional denial, and instead mandate transfer to the Office of Administrative Law (OAL) for an evidentiary hearing.

In oral argument (and in the February 5 letter response to the Preiss reports) petitioners DiFrancesco and Rau, Jr., and the Rau family have contested the findings and conclusions contained in the Preiss reports. However, petitioners also argue, in their January 18 brief, that site suitability is not a genuine issue requiring transfer to the OAL. Petitioners cite both the Coppola report and Council staff review as affirming the suitability of the sites. They also argue that Fanwood has not carried its burden of demonstrating the unsuitability of the sites, and has advanced no real issues contesting suitability. Petitioners also contend that site suitability issues were not properly raised during mediation. Further, they state that the Council may accept all facts in the Preiss report as true, and reach a legal conclusion as to suitability. Finally, they ask that, in the event there are contested issues, the Council hear the matter itself.

The Council has determined that the case presents contested issues necessitating transfer to the OAL. As noted above, the Preiss reports contest the suitability of three of the sites, based on land use incompatibility. For example, Fanwood argues that the size and location of the sites render them unsuitable for an inclusionary development, as it will be impossible to properly buffer neighboring sites. Fanwood thus raises issues as to whether use of the sites accords with sound planning. Further, the question of the appropriate densities for all of the sites has yet to be determined. These are all issues necessitating an evidentiary hearing, which the Council concludes should be held before the OAL. It should be noted, however, that Fanwood is incorrect when it argues that there is an unresolved issue as to its proper fair share number. At the Council's December 19, 1988 public meeting it reaffirmed to Fanwood that the Borough's obligation remains at 87 units.

Thus the Council disagrees with petitioners' assertion that Fanwood raises no issues that could require an OAL hearing.* It also disagrees with any reliance upon the Coppola report, for the reasons set forth at length above. Similarly, the fact that Council staff has made a preliminary finding of suitability cannot prevent legitimate contested issues from being given an evidentiary hearing. The Council also notes that it considers Fanwood to have raised the suitability issues during mediation (discussed above). Finally, a party need not carry a burden of actually demonstrating the suitability or unsuitability of a site during mediation. Rather, that is an issue to be resolved by the trier of fact (in this case the OAL). The point of mediation is that a party must raise, and attempt to resolve (if possible), issues of suitability in a timely manner.

It has been suggested that the present case is akin to a builder's remedy situation. As described above in the discussion of the Motzenbecker case, a builder's remedy requires a municipality to zone a particular site or sites as a condition of receiving certification. The award of such relief occurs when a municipality continually fails to comply with Council requirements or create a complying, certifiable housing plan. As discussed in the Council's prior October 17, 1988 motion decision in this case, the Council was not awarding such relief at that time. Rather, the Council was recognizing that the petitioners' sites seemed to be the only viable, available option for use in meeting at least a portion of Fanwood's obligation. However, the Council also gave Fanwood an opportunity to avoid any use of the sites, by fashioning a different plan of its own choosing that met its 87 unit obligation. Mediation has ended, and Fanwood has elected not to pursue that option. Thus, the Council notes that petitioners' sites remain the only possible avenue for meeting Fanwood's obligation. Thus, although technically not a builder's remedy situation, Fanwood must utilize petitioners' sites as a condition of receiving certification if the OAL Initial Decision, and Council review of that Decision, indicates that the sites are suitable.

*The Council notes, however, that it agrees with petitioners that, as a matter of law, the mere fact that a proposed site is totally within a single family area does not automatically disqualify it from use for a Mt. Laurel inclusionary development. If this were true, certain developed municipalities could successfully evade their obligations, by pointing to this single family residential character. The fact that a municipality is "developed" does not mean that it has no obligation.

Thus, for all of the reasons set forth above, petitioners' motion for accelerated denial/conditional denial will be denied. The Council will enter an appropriate Order embodying the terms of this Opinion.

COUNCIL ON AFFORDABLE HOUSING

James L. Logue III, Chairman

DATED: April 24, 1989

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