COUNCIL ON AFFORDABLE HOUSING
Docket No. COAH 89-205

MARTIN & MARIA RUBIN and POND VIEW TOWNHOUSES, INC.

v.

TOWNSHIP OF SOUTH ORANGE VILLAGE, et al

Civil Action

OPINION

South Orange's precredited need as determined by the Council on Affordable Housing (COAH) is 294. In December 1987, Martin and Maria Rubin filed an exclusionary zoning lawsuit against the Township of South Orange Village. South Orange had not yet filed a housing element and fair share plan with COAH at the time the lawsuit was filed. Subsequently, on August 22, 1988, Pond View Townhouses, Inc. (Pond View) likewise filed an exclusionary zoning lawsuit against South Orange. In response to a request of Pond View's attorney, by letter dated May 6, 1988 COAH, through its attorney, submitted a letter to the parties involved which indicated that COAH's position was that it did not have any jurisdiction over the matter since South Orange was sued prior to having filed a housing element and fair share plan with COAH. By Order dated October 28, 1988 the lawsuits of Rubin and Pond View were consolidated. On March 3, 1989, a case management conference was held wherein plaintiffs were ordered to file a request for review and mediation with COAH pursuant to N.J.S.A. 52:27D-316(b). This Order was formalized in a letter from the Court to the parties dated March 7, 1989. On March 7, 1989, COAH received a notice of request

for review and mediation wherein Pond View specifically asked for a resolution of the issue of whether, under the facts of this case, in light of the notice of request for review and mediation, COAH would initiate its mediation and review process. Rubin joined in Pond View's request. COAH gave all parties involved an opportunity to file papers setting forth their position on the issue raised in Pond View's notice of request for review and mediation.

Pond View argues that, pursuant to the Fair Housing Act, N.J.S.A. 52:27D-301 et seq., if a municipality fails to file its housing element and fair share plan with COAH before an exclusionary zoning lawsuit is instituted, the municipality is not entitled to engage the administrative procedures of the Fair Housing Act. Pond View asserts that such a municipality is not entitled to the protection of the Fair Housing Act; otherwise, the purpose of the Act, which is to foster compliance with the Mt. Laurel obligation and induce municipalities to voluntarily submit housing element and fair share plan for satisfaction of its Mt. Laurel obligation, would be defeated. Rubin joins in Pond View's position.

South Orange, on the other hand, argues that the Act requires the request for review and mediation to be filed with the COAH regardless of whether the municipality has filed its housing element and fair share plan with COAH prior to institution of an exclusionary zoning lawsuit. The Village further asserts that N.J.S.A. 52:27D-316(b) requires COAH to engage essentially in

settlement negotiations with the parties in an attempt to resolve the pending lawsuit. South Orange argues that the Legislature intended to rely on COAH'S expertise in this area and, hopefully, COAH will be able to reach a settlement between the parties. South Orange then envisions that the results of the settlement negotiations will be referred back to Court and the Court will act accordingly. The South Orange Planning Board essentially advances the same position as the Village. Additionally, the Planning Board relies upon N.J.S.A. 52:27D-315 which the Planning Board argues demonstrates that when a request for review and mediation is filed, COAH is not required to engage the entire administrative process but rather is required to conduct limited negotiations between the parties to the lawsuit.

The first sentence of N.J.S.A. 52:27D-316(b) cannot be read by itself. This provision must be considered together with §316(b) as a whole as well as in harmony with the Fair Housing Act in its entirety. A review of N.J.S.A. 52:27D-316(b) in its entirety and the Fair Housing Act in its entirety evidences a clear intent on the part of the Legislature to distinguish between municipalities that have filed a plan prior to the institution of a lawsuit and those that have failed to file a housing element and fair share plan prior to the institution of a lawsuit. The Fair Housing Act when read as a whole, provides that a municipality that does not file its housing element and fair share plan with COAH before an exclusionary zoning lawsuit is instituted is not entitled to exhaust the administrative remedies of COAH while a municipality which has

filed a housing element and fair share plan may avail itself of the administrative procedures and protections of the Fair Housing Act. Given the intent of the Fair Housing Act, the Council finds that the mediation and review process as set forth in the Fair Housing Act should not be instituted in this case since South Orange failed to file its housing element and fair share plan with COAH prior to the institution of an exclusionary zoning lawsuit. Jurisdiction properly lies with the Court.

The first sentence of N.J.S.A. 52:27D-316(b) provides that a person who institutes an exclusionary zoning lawsuit after the effective date of the Fair Housing Act must "...file a notice to request review and mediation with the council pursuant to sections 14 and 15 of this Act." (emphasis added). In order to properly understand this provision, N.J.S.A. 52:27D-314 and 315 must be consulted. A review of those two sections indicates that a request for review and mediation necessarily will trigger the entire COAH process. N.J.S.A. 52:27D-314 sets forth the criteria the Council must review and consider before granting substantive certification. This section thus results in either the grant, denial or conditioning of substantive certification of a municipality's housing element and fair share plan. N.J.S.A. 52:27D-315 provides for a mediation and review of the housing element and fair share plan and requires COAH to attempt to resolve any disputes to the housing element and fair share plan. Both of these provisions effectively set forth the entire COAH process, namely, mediation of disputes to a housing element and fair share plan and review of that plan to

determine whether substantive certification should be granted. Thus, the ultimate results of conducting the review and mediation pursuant to N.J.S.A. 52:27D-314 and 315 is either the grant, denial or conditioning of substantive certification.

The second sentence of N.J.S.A. 52:27D-316(b) makes it clear that if a party institutes litigation after the effective date of the Act, all administrative remedies must be exhausted which necessarily encompasses review and mediation as set forth in N.J.S.A. 52:27D-314 and 315 if the municipality has filed its housing element and fair share plan with COAH prior to the institution of the lawsuit. In order to properly evaluate the second sentence of this section, N.J.S.A. 52:27D-309, which is referred to in this sentence, must be considered. That provision specifically provides that "...there shall be no exhaustion of administrative remedy requirements pursuant to section 16 of this Act unless the municipality also files its fair share plan and housing element with the Council prior to institution of litigation." Thus, the second sentence of N.J.S.A. 52:27D-316(b) makes it clear that the entire COAH mediation and review process should be engaged when the housing element and fair share plan of the municipality has been filed before institution of the suit. N.J.S.A. 52:27D-318 also supports this result. That section states that a party's duty to exhaust administrative remedies expires when a municipality fails to submit its housing elements to the Council prior to the institution of an exclusionary zoning lawsuit.

A review of Section N.J.S.A. 52:27D-316(b) and all other relevant provisions of the Act reveals that the most logical way to interpret the first sentence of §316(b) is that a notice of request for review and mediation is only required in those instances where the litigant is required to exhaust administrative remedies since §316(b) contemplates that the entire Council process will be engaged upon the filing of request for review and mediation. The New Jersey Supreme Court's decision in Hills Development Co. v. Bernards Tp., 103 N.J. 1 (1983), also supports this interpretation. In that case the Supreme Court stated that if a municipality fails to file a plan prior to the institution of a lawsuit it would lose the benefit of the substantive certification process and be subject to judicial remedies. Id. at 35-36. Therefore, in reviewing this section the New Jersey Supreme Court contemplated that if a municipality failed to file a housing element and fair share plan with COAH before the institution of a lawsuit, that municipality would be in Court and subject to appropriate judicial remedies.

South Orange and the Planning Board argue that N.J.S.A. 52:27D-316(b) should be interpreted to require the litigant in every instance to file a notice to request review and mediation. They then argue that the notice to request review and mediation does not engage the entire Council process, but rather requires COAH to enter essentially enter into settlement negotiations with the municipality and the litigants. According to South Orange and the Planning Board, the Council would not review an entire housing element and fair share plan but would simply act as a mediator between the

litigant and the municipality in an effort to settle the matter solely between those parties. However, this view is not consistent with that provision which specifically states that the request for review and mediation triggers the entire Council process as set forth in N.J.S.A. 52:27D-314 and 315, as discussed above. Accordingly, COAH would not enter into isolated settlement negotiations solely between the litigants and the municipality. Additionally, it should be noted that COAH does not review isolated portions of a plan as the Township and the Planning Board suggest. COAH reviews an entire housing element and fair share plan to determine whether a municipality has satisfied its constitutional obligation to provide for its fair share of low and moderate income housing. Hills Development Co. v. Bernards Tp., 103 N.J. at 22.

Therefore, COAH finds that since South Orange was sued prior to the filing of a housing element and fair share plan with COAH, COAH at this time has no authority to initiate its process. Of course, as Judge Skillman found in East Hanover Assocs. v. Tp. of East Hanover, Docket No. L-092863-85, the Court has the authority if it so chooses to transfer this matter to COAH for satisfaction of South Orange's fair share obligation; however, without such a transfer the matter properly belongs in the Courts. Additionally, as expressed in COAH's letter of May 6, 1988, COAH also would act as a master for the Court if the Court so desired.

James L. Logue, Chairman
Council on Affordable Housing

Dated: April 24, 1989.