

IN THE MATTER OF:) Civil Action
PETITION FOR SUBSTANTIVE)
CERTIFICATION OF THE BOROUGH) OPINION
OF HASBROUCK HEIGHTS.)

This matter comes before the Council on Affordable Housing (COAH) upon three separate motions brought by the Borough of Hasbrouck Heights, objectors Anthony and Adeline Carrino, as assignees for Foresquire Corporation (objectors) and Homeowners Against Local Tragedy (HALT), a group of homeowners in Hasbrouck Heights. Rather than issue three separate opinions for each motion, COAH will address each motion separately in this single opinion.

Initially, discussion of the relevant undisputed facts in this matter would be appropriate. The objectors, who own a .93 acre parcel of land in the Borough, filed an exclusionary zoning lawsuit against Hasbrouck Heights on April 4, 1988. At the time the lawsuit was filed, Hasbrouck Heights had not properly filed its housing element and fair share plan (plan) with COAH and, accordingly, jurisdiction over the case properly resided with the Superior Court, Law Division. See N.J.S.A. 52:27D-309 and 316. By order dated June 17, 1988 the Honorable Stephen Skillman transferred the matter to COAH in its entirety as a timely objection in accordance with N.J.A.C. 5:71-7.1. Two parties, including the objectors, filed objections to the plan within the 45 day objector

period. See N.J.S.A. 52:27D-314. The objectors objected to Hasbrouck Heights' plan because it did not include their site despite an offer to construct low and moderate income housing. Mediation began on June 7, 1988 with Hasbrouck Heights represented by its mayor, planner and attorney. See N.J.S.A. 52:27D-315. After two mediation extensions, Hasbrouck Heights ultimately resolved the objections to its plan with the objectors. Specifically, Hasbrouck Heights agreed to zone the objectors' property so as to permit them to build a six-story, 45 unit building. In exchange, the objectors would contribute \$180,000 to Hasbrouck Heights which Hasbrouck Heights would use to rehabilitate low and moderate income housing in the Borough. Hasbrouck Heights and the objectors signed an agreement embodying the resolution of the objections. The other objector, Generation IV Realty, withdrew its objection. With the signed agreement and withdrawal of Generation IV Realty's objection, all objections were resolved and mediation concluded successfully.

By letter dated December 7, 1988, COAH, in response to a letter of November 29, 1988 from Hasbrouck Heights, clearly indicated that the agreement ultimately reached with the objectors was a negotiated settlement by and between the Borough and the objectors and that COAH did not mandate any terms of the agreement. After review of Hasbrouck Heights' plan, COAH determined that it satisfied all statutory and regulatory criteria and provided a realistic opportunity for the provision of Hasbrouck Heights fair share obligation and therefore granted substantive certification to

the plan by resolution dated December 19, 1988. Pursuant to the Fair Housing Act, Hasbrouck Heights was required to adopt its ordinances implementing its plan within 45 days of the grant of substantive certification. See N.J.S.A. 52:27D-314.

Hasbrouck Heights introduced and adopted the ordinance for the zoning of the objectors' site within the 45 days, however, the objectors' review of the ordinance revealed that the ordinance did not encompass the entirety of the site. This oversight was due to an inadvertent error on the objectors' part. The objectors had supplied a site plan for the site to Hasbrouck Heights, however, that site plan contained incorrect property dimensions. When Hasbrouck Heights drafted the ordinance for the site, it relied upon the site plan and therefore also included the incorrect property dimensions. Accordingly, the ordinance which was introduced and adopted did not zone the entire site as was required by the terms of the mediation agreement. The objectors, upon review of the ordinance, notified Hasbrouck Heights of the error and requested that Hasbrouck Heights correct it. Hasbrouck Heights introduced the corrected ordinance for first reading but did not officially adopt the ordinance, and instead after three and one half months, made a motion before COAH to amend its plan so as to relieve it of the obligation to zone the objectors' site. In response to this action on the Borough's part, the objectors filed a motion to require Hasbrouck Heights to adopt the ordinance pursuant to the terms of the agreement.

Initially, HALT filed a cross motion which it claimed was in response to both Hasbrouck Heights' and the objectors' motion. Since HALT filed a separate motion, its positions will be dealt with separately. COAH will begin with a discussion of and decision on Hasbrouck Heights' motion.

Hasbrouck Heights filed a motion to amend its grant of substantive certification so as to: (1) make Hasbrouck Heights solely responsible for the rehabilitation funds, (2) relieve Hasbrouck Heights of the obligation to zone the objectors site pursuant to the terms of the mediation agreement, (3) relieve the objectors from the obligation of paying the funds for rehabilitation as set forth in the mediation agreement. Hasbrouck Heights has not obtained endorsement from the objectors to amend its substantive certification as set forth in the motion, however, Hasbrouck Heights states that its motion is brought pursuant to N.J.A.C. 5:91-14.2(b) and therefore it is not required to secure such endorsement. Hasbrouck Heights also argues that it is not required to comply with the provisions of N.J.A.C. 5:91-14.3(a) and specifically says it is not required to provide evidence that the amendment was previously presented to and endorsed by the municipal planning board or proof of service by certified mail return receipt requested of the petition on all objectors, interested parties and owners of sites contained in both the certified and proposed fair share plans. While Hasbrouck Heights claims that it is not required to comply with the provisions of N.J.A.C. 5:91-14.3(a)(2) and (4) specifically, it also argues that it has complied with

N.J.A.C. 5:91-14.3(a)(1) and (3) which requires a summary and detailed reasons for the proposed amendments and the duly adopted resolution of the municipal governing body requesting COAH approval of the petition to amend. Hasbrouck Heights essentially alleges that it misunderstood the mediation process and thought that COAH mandated the settlement with the objectors.

In its original moving papers, Hasbrouck Heights indicates that it relied upon a Borough Resolution, a letter from the Borough to COAH dated November 29, 1988 and COAH's response thereto dated December 7, 1988. Those documents reveal that Hasbrouck Heights alleges it was under the mistaken impression that COAH would require a high rise structure on the site and therefore it was forced to enter into the mediation agreement with the objectors. COAH's response indicated that it never mandated such a structure during the mediation process and that it considered the agreement a negotiated settlement between the Borough and the objectors.

The objectors argue that procedurally the motion must be dismissed because it does not comply with the provisions of N.J.A.C. 5:91-14.1 et seq. Specifically, the objectors argue that the motion does not set forth detailed reasons for the amendment request nor is there any evidence of planning board action as required by N.J.A.C. 5:91-14.3. Further, the objectors argue that the motion fails to comply with N.J.A.C. 5:91-14.3(d) in that the objectors do not endorse the proposed amendment. Substantively, the objectors argue that Hasbrouck Heights voluntarily entered into

the agreement with them and the Borough should not be permitted now to rescind the agreement. The objectors state that there are no allegations of fraud, incompetent representation or unauthorized action and that the agreement was entirely voluntary and that COAH in no way mandated the agreement. Accordingly, the objectors contend that there is no basis to disallow the mediation agreement. Moreover, the objectors point out that the mediation process would be rendered meaningless if an agreement voluntarily entered into during the administrative process could be circumvented by an amendment to substantive certification without the approval of the parties to the agreement.

After review of Hasbrouck Heights' motion papers as well as the responses thereto, COAH finds that the motion fails to satisfy the procedural requirements set forth in N.J.A.C. 5:91-14.1 et seq. for the amendment of substantive certification. N.J.A.C. 5:91-14.3(d) clearly requires that in order to amend a substantive certification which affects a signed mediation agreement, the municipality must first obtain the endorsement of the owner of the site in question of the proposed amendment. Exceptions to this requirement arise when the amendment is the result of changed circumstances or the addition of a regional contribution agreement. In this case neither one of those situations is present or alleged and, accordingly, endorsement by the objectors is required before COAH can consider this motion.

Hasbrouck Heights argues that it is not required to satisfy the criteria of N.J.A.C. 5:91-14.3 because this motion is

brought pursuant to N.J.A.C. 5:91-14.2(b). A review of N.J.A.C. 5:91-14.2(b), however, reveals that subchapter 14 in its entirety must be considered when making a motion to amend substantive certification. N.J.A.C. 5:91-14.2(b) specifically provides that "[r]equests for amendments of the terms of certification may be made by any party, by filing with the council a motion containing the information required by this subchapter." (Emphasis added). This regulation makes it clear that when making a motion to amend the terms of substantive certification, the moving party must consult all provisions of Subchapter 14 to determine what information it must submit with its motion. This necessarily incorporates the provisions of N.J.A.C. 5:91-14.3 which sets forth criteria a municipality must comply with before COAH will consider a municipal petition to amend the terms of substantive certification. The Summary of Public Comments and Agency Responses unequivocally state that "... if the proposed amendment affects a signed mediation agreement, then the Council will require, in most cases, that all parties to the original mediation endorse the amendment before COAH consideration." 21 N.J.R. 161. Such endorsement is not required when changed circumstances or a regional contribution agreement necessitate the amendment. N.J.A.C. 5:91-14.3(c) and (d); 21 N.J.R. 161.

Accordingly, it is clear that Hasbrouck Heights was required to comply with N.J.A.C. 5:91-14.3(a) as well as N.J.A.C. 5:91-14.3(d). Hasbrouck Heights cannot avoid the provisions of this regulation by simply claiming that its motion is brought pur-

suant to N.J.A.C. 5:91-14.2 and ignore in their entirety the provisions of N.J.A.C. 5:91-14.3. Clearly, no RCA is involved in the amendment and Hasbrouck Heights has not alleged in its papers that the amendment request is made as a result of changed circumstances.

In this case, Hasbrouck Heights, presumably after evaluating all relevant factors, determined that it was in the best interests of the municipality to settle the matter with the objectors rather than have COAH rule on the issue and accordingly entered into a voluntary agreement with the objectors. Significantly, COAH is not a party to this agreement. COAH did not require the agreement. It was reached freely between Hasbrouck Heights and the objectors and Hasbrouck Heights does not point to anything which supports a position that COAH mandated the agreement. As the objectors point out, there are no allegations of fraud, misrepresentation or incompetence.

The objectors filed a motion which requests COAH to: 1) require Hasbrouck Heights to adopt all ordinances pursuant to the terms of the mediation agreement; 2) restrain Hasbrouck Heights from granting any development approvals until Hasbrouck Heights adopts the ordinances and 3) declare substantive certification null and void for failure to timely adopt the ordinances. The objectors' essentially contend that Hasbrouck Heights has acted in bad faith in not adopting the ordinances pursuant to the agreed upon terms of the mediation agreement. The objectors point to the fact that Hasbrouck Heights had four and one half months since execution

of the mediation agreement to adopt the ordinances and Hasbrouck Heights to date has failed to do so.

Hasbrouck Heights argues that COAH has no authority to restrain it from granting any development approvals until Hasbrouck Heights adopts the ordinances. The Borough contends that COAH's authority to restrain the issuance of development approvals applies only in an instance where land is a scarce resource and since there is no allegation of that nature in this case, COAH may not enter such a restraint. Hasbrouck Heights also points out that its fair share obligation has been found to consist solely of indigenous need and therefore land cannot be a scarce resource.

Next, Hasbrouck Heights argues that the ordinance which pertains to the objectors' site is not part of Hasbrouck Heights "fair share housing ordinance" and therefore the Borough was not required to adopt these ordinances within 45 days and revocation of Hasbrouck Heights' substantive certification as the objectors' request is inappropriate. Further, Hasbrouck Heights alleges that COAH in effect has no authority to enforce the mediation agreement since COAH's ultimate power simply is to grant or deny substantive certification. Hasbrouck Heights points out that the decision on whether to adopt the ordinances lies solely with the governing body and not with COAH. Hasbrouck Heights argues that COAH's power in the event a municipality does not adopt the ordinances is to revoke certification and not to force the municipality to adopt its ordinances.

Finally, Hasbrouck Heights concedes that COAH can revoke certification based upon "changed circumstances" such as the failure to comply with the terms of the mediation agreement, however, Hasbrouck Heights claims in this case the relief requested is premature since Hasbrouck Heights has not failed or refused to adopt the ordinances. Hasbrouck Heights contends that, at this point, it simply is asking COAH whether it may amend its substantive certification and has not failed to adopt the ordinances.

COAH finds that a restraint upon the granting of development approvals is not appropriate under these circumstances. In the Hills Development Co. v. Bernards Township, 103 N.J. 1, 61-62 (1986), the New Jersey Supreme Court stated that COAH has the authority to preserve resources, such as land, which might be necessary for satisfaction of the fair share obligation. A review of the objectors' argument leads to the conclusion that the objectors seek the restraint solely as a method to force Hasbrouck Heights to adopt the ordinances in accordance with the mediation agreement. This is not an appropriate action in this circumstance, and, accordingly, COAH will not restrain Hasbrouck Heights from granting any development approvals as the objectors' request.

The objectors ask for conflicting relief in this case. On the one hand, they ask COAH to require Hasbrouck Heights to adopt the necessary ordinance pursuant to the terms of the mediation agreement. On the other hand, they ask COAH simply to revoke substantive certification for Hasbrouck Heights' failure to timely

adopt the ordinance. COAH cannot do both. The effect of revocation of substantive certification in this case could be reversion of jurisdiction of the case to the trial court and the end of COAH involvement. N.J.S.A. 52:27D-318. The effect of requiring Hasbrouck Heights to adopt the ordinances would be to give Hasbrouck Heights the opportunity to adopt the ordinances and therefore leave substantive certification intact, at least during the time Hasbrouck Heights has to adopt the ordinance. It appears that the objectors in reality are requesting alternate relief--either require Hasbrouck Heights to adopt the ordinances or, if COAH finds that it is not appropriate to allow Hasbrouck Heights the opportunity to adopt the ordinance, revoke the grant of substantive certification.

A review of the objectors' papers reveal that the objectors' primary objective is to have Hasbrouck Heights adopt the ordinance as agreed in the mediation agreement. COAH finds that under the circumstances of this case, it is appropriate to first require Hasbrouck Heights to adopt the ordinance pursuant to the terms of the mediation agreement. The mediation agreement was reached as part of the COAH administrative process and provides funding for the provision of Hasbrouck Heights' fair share need. After mediation, Hasbrouck Heights presented a plan to COAH which utilized funds from the objectors to directly satisfy its fair share obligation. This is the plan that COAH certified. The fact that Hasbrouck Heights now offers to provide an alternative funding source is irrelevant. As previously discussed, COAH cannot allow

Hasbrouck Heights to effectively void the mediation agreement through an attempt to amend the terms of its substantive certification.

At the time COAH evaluated and certified Hasbrouck Heights' plan, it included the payment of \$180,000 from the objectors to Hasbrouck Heights to be used for affordable housing and accordingly, the agreement necessarily composed a part of Hasbrouck Heights' plan. Thus, the mediation agreement is a component of and a basis for the grant of substantive certification and COAH will require Hasbrouck Heights to adopt the ordinances to implement the plan that was certified. Additionally, Hasbrouck Heights previously has recognized that the mediation argument is part of the grant of substantive certification. In Ordinance No. 1497, adopted December 27, 1988, Hasbrouck Heights Borough Council specifically recognized that COAH's substantive certification depended upon adoption of the Ordinance to implement the mediation agreement.

No changed circumstances have been presented to COAH which would require disallowance of the mediation agreement. The objectors, by their opposition to Hasbrouck Heights' motion to amend, have indicated that they are still ready, willing and able to make the necessary contributions pursuant to the terms of the mediation agreement.

Moreover, this agreement was reached as a result of the mediation process and voluntarily entered into between the objectors and Hasbrouck Heights. If COAH were to allow Hasbrouck Heights to amend its plan so as to disregard the mediation agree-

ment, the mediation process and mediation agreements would be rendered meaningless since the municipality could come before COAH to amend its certification thereby effectively revoking the mediation agreement without any consideration to the parties to the agreement or other parties in mediation who relied upon a mediation agreement. This is precisely the result COAH sought to avoid when it adopted N.J.S.A. 5:91-14.1 et seq. In its comments to the adopted regulations COAH specifically stated it sought to protect "... the integrity of the mediation process...." 21 N.J.R. 161.

Hasbrouck Heights must adopt the ordinances pursuant to the mediation agreement which formed a basis for the Council's grant of substantive certification or risk the loss of its substantive certification. In this case, the original error in the ordinance which has caused the concern was inadvertent and due to an error on the objectors' part and the objectors primarily seek adoption of the appropriate ordinance. Therefore, COAH will allow Hasbrouck Heights the opportunity to adopt the amended ordinance so as to include the entire site pursuant to the terms of the mediation agreement. In order to insure prompt compliance with the terms of the substantive certification, COAH will require Hasbrouck Heights to adopt any ordinance necessary to implement the terms of the mediation agreement no later than June 15, 1989. It is unnecessary for COAH to address Hasbrouck Heights' last argument that the relief requested is premature since COAH will require adoption and will not immediately revoke substantive certification.

HALT filed a cross motion in response to the objectors' and Borough's motions. Halt argues that it was entitled to receive notice of the objectors' motion because it has appealed COAH's grant of substantive certification. HALT, however, pointed out that the objectors' initially did not serve HALT with a copy of the motion and consequently HALT did not receive it until March 17, 1989 at which time it promptly filed this cross-motion.

HALT asks for clarification of the terms of substantive certification to make it clear whether the mediation agreement is part of the grant of substantive certification. HALT argues that the mediation agreement is separate and apart from COAH's grant of substantive certification and therefore Hasbrouck Heights does not have to enact the zoning ordinance pursuant to the terms of the mediation agreement in order to retain its grant of substantive certification. In support of its argument, HALT relies upon COAH's position that the mediation agreement was negotiated solely between the objector's and was not COAH mandated. HALT also points out that the mediation agreement does not provide for the construction of affordable units. Therefore, HALT concludes that the mediation agreement is not a component of the substantive certification but merely is a private agreement outside to COAH's domain. COAH already has addressed this issue in its decision on the objectors' motion previously discussed and found that the mediation agreement is part of the grant of substantive certification.

HALT's motion then states that if COAH deems the mediation agreement to be a part of the substantive certification,

Hasbrouck Heights should be permitted to amend its substantive certification to disregard the mediation agreement and allowed to secure other sources of funding for its fair share obligation which the objectors' would have provided pursuant to the terms of the mediation agreement. On this point, HALT joins in Hasbrouck's motion to amend its grant of substantive certification. Finally, HALT states that if Hasbrouck Heights is not permitted to amend its substantive certification, COAH should reopen the mediation process and allow HALT to participate.

The objectors' indicate that since the relief set forth in the HALT motion is essentially the same relief requested by Hasbrouck Heights in its motion, the objectors' generally will rely upon their response to Hasbrouck Heights' motion. Over and above that response, the objectors argue that HALT has no standing to bring this motion. They argue that pursuant to N.J.A.C. 5:91-14.1 et seq. only "parties" can file such motions and HALT is not a "party." In support of its position that HALT is not a party able to file such a motion, the objectors rely upon N.J.A.C. 5:19-5.1 and 7.1 which respectively use the terms "person" and "party." The objectors argue that the use of the term "party" which is used to describe participants once the administrative process has commenced signifies some participation in the process. Therefore, the objectors argue that if there was no participation in the process that person is not a party within the meaning of N.J.A.C. 5:19-14.1 and may not bring a motion to amend substantive certification. Additionally, the objectors contend that, in any event, HALT's

motion does not comply with the regulatory criteria of N.J.A.C. 5:91-14.4 and must be dismissed. Finally, as it argued in response to Hasbrouck Heights' motion, the objectors argue that the entire mediation process would be emasculated if the relief HALT requests is granted.

Hasbrouck Heights joins in HALT's position that substantive certification does not incorporate the mediation agreement. Additionally, Hasbrouck Heights contends that HALT is an interested party due to the fact that it filed an appeal to COAH's substantive certification and further because Hasbrouck Heights has always considered HALT an interested party to the COAH process.

It should be noted that both Hasbrouck Heights and the objectors in their responses to HALT's motion cite various factual inaccuracies which they contend were put forth by other parties. A review of these alleged factual inaccuracies reveal that they relate to minor points and the basic facts of this case are undisputed. It is undisputed that mediation resolved all objections and that a mediation agreement was signed between Hasbrouck Heights and the objectors that allowed the objectors to construct a six story, 45-unit building on its property in exchange for a cash contribution of \$180,000 which Hasbrouck Heights would utilize towards satisfaction of its fair share obligation. Therefore, COAH sees no need to debate minor points when all parties agree on the material facts.

Initially, the intent of N.J.A.C. 5:91-14.1 et seq. is to permit anyone to file a motion to amend substantive certification,

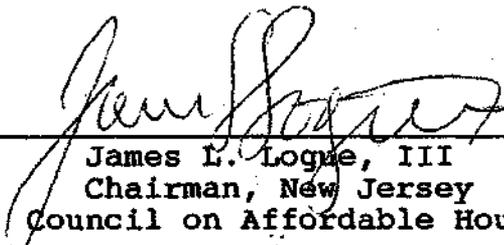
not just those who participated in mediation. If there is a problem with a certified housing element and fair share plan that renders the plan unworkable or unrealistic, the person with that knowledge should be permitted to apprise COAH of that information. Accordingly, COAH finds no merit in the objectors' position that HALT is precluded from bringing such a motion because it did not participate in the process.

While anyone may bring a motion to amend the terms of substantive certification, HALT's motion in this case is not proper because there is no claim that the certified plan is unworkable or unrealistic. N.J.A.C. 5:91-14.1 et seq., as it pertains to parties other than municipalities, was promulgated primarily to respond to changes that would render a plan unrealistic. COAH contemplated that if new or unknown facts or circumstances arose subsequent to substantive certification, persons should have an avenue to advise COAH of those circumstances and how they affect the viability of the plan. The regulations are aimed at insuring that a municipality's plan remains realistic. Thus, at the time the regulations were proposed, COAH indicated that the rules "...permit[s] a municipality to amend its plan to react to changed circumstances that may have rendered the plan suspect...." 20 N.J.R. 2164. As COAH stated, the regulations were designed to insure that plans are not rendered "unworkable" and "unrealistic." Id. Subchapter 14 was in no way intended to allow someone to revisit a plan that already had been subject to the full COAH process, simply because a change is desired.

In this case, HALT does not claim that Hasbrouck Heights' plan which received substantive certification is unrealistic. There is no allegation that new facts have come to light or facts have changed which now render Hasbrouck Heights' plan unworkable or unrealistic. In fact, a review of HALT's motion reveals that nothing has changed that would affect Hasbrouck Heights' plan subsequent to substantive certification. It appears that HALT simply does not like the plan and now it seeks to reopen the entire process. It is not proper, however, under these circumstances to consider HALT's request and reopen the entire process or to unilaterally void a mediation agreement reached in good faith. Accordingly, COAH finds that HALT's motion is inappropriate and thereby dismisses it.

In conclusion, COAH hereby dismisses Hasbrouck Heights' motion for failure to comply with N.J.A.C. 5:91-143. COAH denies the objectors' requests to restrain development in Hasbrouck Heights and revoke the Borough's grant of substantive certification but grants the objectors' request to require Hasbrouck Heights to adopt the necessary ordinances pursuant to the mediation agreement. Finally, COAH dismisses HALT's motion as being inappropriate under N.J.A.C. 5:91-14.1 et seq.

An appropriate order embodying the terms of this opinion will be entered.


James L. Logue, III
Chairman, New Jersey
Council on Affordable Housing

Dated: May 15, 1989