

COUNCIL ON AFFORDABLE HOUSING
COAH DOCKET NO. (COAH 88/89-124(a))

JACK NEUGARTEN,)
Plaintiff,) Civil Action
v.) OPINION
BOROUGH OF WEST PATERSON)
Defendants.)

This is a motion brought by the Borough of West Paterson for an Order transferring all issues, including the adequacy of West Paterson's housing element and fair share plan (plan), to the Office of Administrative Law (OAL) for an evidentiary hearing. The motion does not explain or state the specific issues West Paterson feels should be transferred to the OAL other than to say "including the adequacy of West Paterson's housing element and fair share plan." West Paterson also asks the Council on Affordable Housing (COAH) to reconsider its decision that the burden of proof at the hearing rests upon West Paterson to demonstrate that the site owned by objector Jack Neugarten (Neugarten) is not suitable for development with low and moderate income housing.

The facts of this matter are set out more fully in the COAH's decision in Jack Neugarten v. Borough of West Paterson, COAH Docket No. 88-124 (Decided September 6, 1988). For the purposes of this motion, COAH will review the facts pertinent to this motion. On October 28, 1985, West Paterson filed a resolution of participation with COAH evidencing its intent to comply with the provisions of the Fair Housing Act. N.J.S.A. 52:27D-309. Accordingly, West Paterson's final housing element and fair share plan was due to be filed with COAH by January 5, 1987. West Paterson failed to file its plan, and pursuant to N.J.A.C. 5:91-3.3, COAH dismissed West Paterson.

Subsequently on January 14, 1987, Neugarten who sought to construct low and moderate income housing on a site in West Paterson, filed an exclusionary zoning lawsuit against the municipality. Since West Paterson failed to file its plan with COAH, jurisdiction of the lawsuit properly rested with the Superior Court, Law Division. N.J.S.A. 52:27D-309(b) and 316. The court in its discretion, however, stayed the judicial proceedings in the matter and transferred the case to COAH. The court's order specified a date for submission of West Paterson's plan with which West Paterson complied. The plan West Paterson submitted to COAH did not contain Neugarten's site.

By opinion dated September 6, 1988, COAH determined that West Paterson had to use Neugarten's site unless the site was not appropriate for development with low and moderate income housing. COAH reasoned that West Paterson was not entitled to the benefits

of the Fair Housing Act since it failed to file a housing element and fair share plan with COAH prior to the initiation of an exclusionary zoning lawsuit. As a result of COAH's decision, West Paterson was given an opportunity to comment on the suitability of Neugarten's site. West Paterson contested the propriety of development of the site with low and moderate income housing as well as Neugarten's control over the site. As a result of West Paterson's comment, COAH determined that the dispute over the Neugarten site did not resolve the constituted contested cases and, accordingly, by notice of transmittal dated March 28, 1989, COAH transferred all issues pertaining to the Neugarten's site which West Paterson raised to the OAL as a contested case for an evidentiary hearing.

West Paterson requests two specific forms of relief through this motion. West Paterson specifically asks that "... all of the issues in the Borough of West Paterson matter, including but not limited to the adequacy of the Borough's housing element and fair share plan ..." be transferred to the OAL. It is unclear from West Paterson's papers whether West Paterson is requesting that the plan with the Neugarten site be referred to the OAL or whether West Paterson's initial plan be referred to the OAL for review. In support of its position on this point, West Paterson argues that there are disputed facts which necessitate a hearing under the Fair Housing Act, specifically N.J.S.A. 52:27D-315. West Paterson relies on Hills Development Co. v. Bernards Twp., 229 N.J. Super. 318 (App. Div. 1988) in support of its argument. While West Paterson claims that there are disputed facts which necessitate a hearing, its pa-

pers do not set forth any such disputes other than to say that the adequacy of the entire plan should be referred to the OAL. Next, West Paterson asks COAH to reconsider its decision that the burden of proof regarding the Neugarten site is on the Borough to show that the site is not suitable for development with low and moderate income housing. In support of this position, West Paterson argues that there is nothing in the Fair Housing Act that allows COAH to shift the burden of proof to West Paterson. Additionally, on this point, West Paterson argues that COAH's decision regarding the burden of proof is invalid since COAH was first required to promulgate regulations on this issue and since Judge Skillman did not require it.

In response to West Paterson's motion, Neugarten argues that COAH's decision on the burden of proof is consistent with the Mt. Laurel cases and proper since COAH simply adopted the same posture as the courts on this issue. Neugarten also argues that COAH acted in accordance with the Fair Housing Act and the regulations in transferring the issues to the OAL. Neugarten contends that COAH has the discretion to determine what issues should be transferred to OAL and the issues COAH determined to transfer in this case were the exact issues West Paterson raised concerning the Neugarten site.

COAH has considered all arguments raised by the parties and concludes that West Paterson's motion should be denied in its entirety. West Paterson argues that the adequacy of its entire housing element and fair share plan should be transferred to the

OAL for hearing as a contested case and the Borough relies upon Hills Development Co. v. Bernards Twp., 229 N.J. Super. 318 (App. Div. 1988) in support of its position. The Hills case, however, does not support such a result. In the Hills case, the Appellate Division determined that pursuant to the provisions of the Fair Housing Act, COAH must transfer issues that raise disputed facts which are unresolved in mediation to the OAL for an evidentiary hearing. The Hills case does not stand for the proposition that matters which do not raise contested facts likewise must be transferred to the OAL. In fact, in In re Petition for Substantive Certification filed by the Township of Franklin, Somerset County, Docket No. A-2327-87T8 (Decided February 22, 1989) the Appellate Division specifically found that there is no need for an evidentiary hearing when there are no disputed facts. The court determined that when there are no disputed facts neither the Fair Housing Act nor due process principles require COAH to refer the matter to OAL. Under those circumstances, COAH can apply the Act and its regulations to undisputed facts to reach a conclusion. Accordingly, West Paterson's claim that its entire housing element and fair share plan must be referred to the OAL without consideration as to whether factual disputes exist simply because mediation was unsuccessful is incorrect.

In this case, mediation did not resolve the disputes as they pertained to the suitability of the Neugarten site which West Paterson raised in mediation, and, accordingly, COAH transferred all issues the Borough raised to the OAL for an evidentiary hear-

ing. At the conclusion of mediation, the only issues in dispute were those issues which pertained to Neugarten's site. In accordance with the Hills case and the Franklin case, COAH transferred all contested factual issues to the OAL for a hearing.

COAH also notes that, since West Paterson's motion papers simply set forth the broad, sweeping claim that "all issues" should be transferred to the OAL and did not set forth any factual disputes which would require an evidentiary hearing, by letter dated May 25, 1989, COAH specifically invited West Paterson to set forth any such issues which it felt should be subject to an evidentiary hearing. West Paterson responded by setting forth five issues which did not raise any factual disputes. The issues West Paterson claimed in its response should be transmitted to the OAL all involved purely legal matters which did not raise any factual disputes and accordingly, pursuant to the Hills and Franklin Township cases there is no need to transfer those issues to the OAL.

As discussed above, COAH has transferred all disputed factual issues to the OAL for an evidentiary hearing. At the conclusion of mediation, the only factual disputes between the parties centered on the use of the Neugarten site and thus all necessary issues have been transferred. COAH's response to West Paterson's request that "all issues" be transferred to the OAL obviously deals with the unresolved issues from mediation after COAH's decision that West Paterson had to use the Neugarten site if it is suitable. There is no need to consider unresolved issues which may have existed to the initial plan since COAH has required West Paterson to

use Neugarten's site if it is appropriate for development. Therefore, the initial plan which did not include the Neugarten site is not at issue as a result of COAH's September 6, 1988 decision.

In its transmittal to the OAL, COAH indicated that the burden of proof in this case was upon West Paterson to demonstrate that Neugarten's site is not appropriate for development with low and moderate income housing. Contrary to West Paterson's argument, COAH's decision on this issue is in accordance with the Fair Housing Act and COAH did not need to adopt regulations to place the burden of proof on West Paterson. As Neugarten correctly points out, the New Jersey Supreme Court specifically found that in those circumstances where a municipality is required to utilize a developers site, the burden is upon the municipality to demonstrate that the site is not appropriate. Burlington County N.A.A.C.P. v. Mt. Laurel. 92 N.J. 158, 279-280 (1983).

In the present case, COAH determined that the Legislature did not intend for the benefits of the Fair Housing Act to be bestowed upon a municipality which had failed to comply with the provisions of the Fair Housing Act in the case where a court in its discretion determined to transfer the case to COAH. COAH determined that under those circumstances, the Legislature intended for the municipality to be subject to judicial remedies and not receive the benefits of the Fair Housing Act, the most obvious of which is the ability of the municipality to choose and design its own housing element and fair share plan without the requirement of using the builder litigant's site. COAH concluded, that since such a

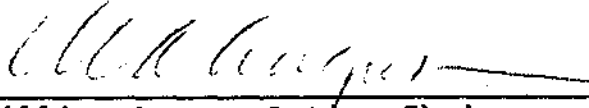
municipality would be required to use the developer's site if it was suitable had the matter stayed in court, COAH likewise should require the use of the developers site. Since use of the developers site would be required, just as it would be required in court, COAH simply followed the guidelines of the New Jersey Supreme Court and indicated that under such circumstances the burden of proof would be upon a municipality to demonstrate the inappropriateness of the developers site. Accordingly, COAH simply followed the dictates of the New Jersey Supreme Court and there is no need under such circumstances to promulgate regulations. See Airwork Service Division, etc. v. Director, Division of Taxation, 97 N.J. 290 (1984); In re Solid Waste Utility Customer Lists, 106 N.J. 508 (1987).

Finally, in its motion papers, West Paterson simply requests the two forms of relief discussed above. Although, in the introduction to the motion, West Paterson indicates some complaint with COAH's decision that West Paterson must use the Neugarten site if it is appropriate, West Paterson does not ask COAH by this motion to reconsider its decision nor does it advance any argument pertaining to this decision. West Paterson's motion plainly and simply asks COAH to transfer the adequacy of West Paterson's housing element and fair share plan to the OAL and asks that COAH reconsider its decision as to where the burden of proof should lie in the hearing. The burden of proof is a separate and distinct issue from the issue of whether West Paterson should be required to utilize the Neugarten site. In order to expedite this matter and to

avoid any future motions that may delay resolution of this matter, however, COAH will say at this point that its decision of September 6, 1988 was in accordance with the provisions of the Fair Housing Act which clearly provides that a municipality will have to use a developers site if that site is suitable for low and moderate income housing if it does not voluntarily comply with the provisions of the Fair Housing Act.

As a result of this decision, COAH does not expect any more motions which simply will serve to delay the process. The issues COAH transferred to the OAL for an evidentiary hearing represent all unresolved issues that present a factual dispute. West Paterson's motion has not set forth any additional issues which must be transferred. Additionally, the burden of proof is properly upon West Paterson. Accordingly, for the reasons set forth in this opinion, West Paterson's motion is denied.

NEW JERSEY COUNCIL ON AFFORDABLE HOUSING

By 
William Angus, Acting Chairman

Dated: June , 1989.