

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

IN RE FANWOOD/MOTION TO
EXCLUDE OBJECTORS' SITES,

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Civil Action

OPINION

This matter arises as the result of separate motions filed by the Borough of Fanwood, seeking to exclude from consideration as potential sites for Mt. Laurel inclusionary developments four properties owned by objectors to Fanwood's housing element and fair share plan. This Opinion will not set forth the entire history of Fanwood's petition for substantive certification, as it is outside the scope of the issues raised by the present motions. It should be noted, however, that there are four objectors' sites at issue: the LaGrande Avenue site (owned by objectors Robert Rau, Jr. and Ernest DiFrancesco), the Terrill Road site (owned by Patrick Minogue), the Midway Avenue site (owned by the LaGrande Avenue/Midway Partnership), and the North Avenue site (owned by the Rau family).

By motion dated June 30, 1989 Fanwood requested that the LaGrande Avenue, Midway Avenue and North Avenue sites be excluded from consideration as potential Mt. Laurel sites, on the ground that the property owners had previously "threatened" the Borough with Mt. Laurel litigation, in order to obtain approval from the Borough Board of Adjustment for an unrelated application. In a

second motion, dated July 19, 1989 Fanwood requested the exclusion of the Terrill Road site, on the ground that foreclosure proceedings had been commenced against the property.* Finally, by letter dated August 4, 1989, and brief dated August 11, 1989, Fanwood requested that COAH exclude from consideration the LaGrande Avenue, Terrill Road and North Avenue sites, on the ground that use of the sites without Fanwood's consent violates L. 1989, c. 142, an amendment to the Fair Housing Act signed by Governor Kean on August 3, 1989. This opinion will address all three motions.

With regard to the latter motion, premised on L. 1989, c. 142, COAH received at its public meeting of October 30, 1989 a written opinion from the Office of the Attorney General dated October 27, 1989, which opinion concludes that L. 1989, c. 142 does not apply in the absence of demolition of residential structures on a site proposed for a Mt. Laurel development. COAH adopts the reasoning of that opinion, which will not be repeated here for the sake of brevity. Because the proposed developments on the three sites at issue (LaGrande, Terrill and North) do not involve demolition of the residential structures, Fanwood's motion to exclude the sites on this basis must be denied.**

* The July 19, 1989 motion also sought certain relief relating to the scheduling of the case then pending before the office of Administrative Law (OAL). In light of COAH's subsequent withdrawal of the matter from the OAL, this portion of the motion is moot.

** Fanwood notes in its brief that the Terrill Road site previously contained two residential structures, and that these structures were demolished by the owner in 1988. However, this fact does not mandate a different result. First, Fanwood's papers

Second, Fanwood asks that the Terrill Road site be excluded, on the ground that foreclosure proceedings have been commenced against the property. Fanwood argues that this results in a "cloud on ownership" and brings into question the availability of the site for Mt. Laurel use under COAH's regulations, as well as Minogue's "standing" before COAH. Fanwood cites COAH's opinion in Neugarten v. West Paterson in support of its position that the availability of the Terrill Road site must be determined prior to any further proceedings. In response, Minogue argues that it has a sufficient interest so as to have standing to pursue the matter. While tacitly admitting the existence of the foreclosure proceeding, Minogue argues that it has not reached a point so as to terminate his interest in the property, which interest has remained constant throughout the COAH proceedings. Finally, Minogue notes that suitability of the site should remain an issue, regardless of his ownership.

Of course, the ownership of a site, and its availability under N.J.A.C. 5:92-1.3, is always a concern to COAH. Thus, COAH will transfer the issue of the ownership of the Terrill Road site to the OAL. However, COAH notes that Minogue is correct when he asserts that the suitability of the site must be determined in any event. Minogue has expressed an interest in utilizing the site for

indicate that the structures were demolished prior to COAH's decision, pursuant to municipal permits. More importantly, the structures were not located on the portions of the site now proposed as a location for a Mt. Laurel development. In fact, it is possible that the single family houses may be replaced as part of that development.

a Mt. Laurel development; if his ownership of the site continues, the suitability must be determined as a precondition to such use. On the other hand, even if Minogue were no longer owner of the Terrill Road property, the site would still represent a potentially usable site in a municipality that has an acute shortage of vacant, usable property. Thus, the site might still be considered for use in Fanwood's plan, despite Minogue's loss of ownership. Thus, Fanwood's motion to exclude COAH's consideration of the Terrill Road site will be denied, and the issue of Minogue's ownership transferred to the OAL for determination along with the issue of suitability.

Fanwood's third motion requests that the LaGrande Avenue, Midway Avenue and North Avenue sites be excluded from consideration on the ground that the property owners previously threatened Mt. Laurel litigation against the Borough. This motion is based on an application for a use variance heard by the Borough Board of Adjustment over a period of several days in 1985. The application sought approval to construct condominium units on the LaGrande Avenue site (in an area zoned only for single family detached dwellings), and was filed by Robert Rau, Jr. and Ernest DiFrancesco.* The applicants were represented by Robert H. Kraus,

* As noted, Fanwood asks that, in addition to the LaGrande site (owned by Rau Jr. and DiFrancesco), COAH also exclude consideration of the Midway and North sites. Midway Avenue is owned by the LaGrande Avenue/Midway Partnership, and North Avenue is owned by the Rau family. Fanwood's position is that the threats made as to the application on the LaGrande site has "tainted" the applicants, so that any involvement by them as to other sites (even in a different capacity) disqualifies the site from consideration.

Esq., who also represents the owners of the LaGrande Avenue and Midway Avenue sites in the present proceedings. The 1985 application (which did not propose the creation of any Mt. Laurel housing on the LaGrande site) was denied by the Board of Adjustment on June 26, 1985.

Fanwood argues that during the course of their presentation, applicants "threatened" to bring Mt. Laurel litigation in the event their application was denied. Fanwood argues that such actions are disqualifying under So. Burlington Cty. N.A.A.C.P. v. Mount Laurel Tp., 92 N.J. 158 (1983) (Mt. Laurel II). In that case, the Supreme Court stated that

Other problems concerning builder's remedies require discussion. Care must be taken to make certain that Mount Laurel is not used as an unintended bargaining chip in a builder's negotiations with the municipality, and that the courts not be used as the enforcer for the builder's threat to bring Mount Laurel litigation if municipal approvals for projects containing no lower income housing are not forthcoming. Proof of such threats shall be sufficient to defeat Mount Laurel litigation by that developer. [Id. at 280]

Fanwood contends that certain statements made before the Board of Adjustment by Krause and by Elizabeth McKenzie, a witness for the applicants, constitute implicit and explicit threats. In support of the motion, Fanwood has provided copies of transcripts for the Board's meetings of February 21, June 20 and June 26, 1985 (and has highlighted those portions it feels support its argument), as well as a certification of William S. Winey, a former Board member, dated June 30, 1989. Fanwood concludes that, as the property owners are now seeking relief "akin" to a builder's remedy (the

zoning of their sites for inclusionary developments), the disqualification referred to in Mt. Laurel II applies.

In response, the property owners argue that nothing in their prior presentation to the Board of Adjustment can be construed as constituting a threat of future Mt. Laurel litigation. They note that Krause clearly stated that the pending application did not involve a Mt. Laurel housing component, and that the discussion of Fanwood's need for some form of more affordable housing (even if not technically low and moderate income Mt. Laurel housing) was directed towards satisfying the requirement that an applicant demonstrate "special reasons" for a requested use variance. N.J.S.A. 40:55D-70. The property owners add that, on appeal, the Superior Court, Law Division ruled that such special reasons had been established (although the Court upheld the Board's decision to deny the application on other grounds). The property owners do not contest the accuracy of the transcripts provided by Fanwood.

Fanwood correctly cites the language of Mt. Laurel II as to the effect of threats of exclusionary zoning litigation. Thus, COAH must determine whether such threats were made in the present case and, if so, what the impact of such actions should be (and whether threats disqualify an individual as to all sites he is involved with, in addition to the actual site the threat relates to). Fanwood's argument is premised entirely on the transcripts of the Board of Adjustment meeting's (which are undisputed) and Winey's certification, both of which can be reviewed by COAH. The standard for such review cannot be the perception of a single person (or

persons) as their view could be patently unreasonable. Thus, COAH must decide whether, under a reasonable reading of the materials, it appears that threats of Mt. Laurel litigation were made.

It is COAH's conclusion that this question must be answered in the negative. Although the applicants did engage in several discussions of Mt. Laurel during their presentation to the Board, the mere mention of Mt. Laurel cannot be sufficient to constitute a threat. Rather, COAH must review the language and context in order to determine whether an actual threat was made. COAH does not believe the present case involves a threat of exclusionary zoning litigation.

The applicants made clear from the start that their project was not intended to provide low and moderate income Mt. Laurel housing (exhibit A - pages 7, 9 and 37) or even least cost housing (A-17). Instead, they indicated that they were attempting to provide housing which, while more expensive than Mt. Laurel housing, was nevertheless more affordable than any housing presently available within the Borough (A-9, 15 to 16 and 37). This would fill a need for such housing, as well as help meet the specific housing needs of two groups presently cut-off from housing within the Borough-young persons and senior citizens (A-5 to 7 and 9). Applicants also suggested that, given Fanwood's situation, this might be as close to Mt. Laurel housing as the Borough could feasibly provide (A-37).

The purpose of this argument was specifically stated by the applicants - to enable them to carry their statutory burden and

establish the existence of "special reasons," thus qualifying them for a use variance. N.J.S.A. 40:55D-70(d) (A-16 to 17). Among the specific special reasons referred to by the applicants was the lack of such housing within the Borough, the need for more affordable housing, and the need of housing for young persons and senior citizens, as well as those persons who desire an option other than single family detached housing (A-17 and 38). It is also clear from the transcripts that the Board members understood that the applicants were attempting to establish the requisite special reasons (C-3, 6, 8 and 14). Thus, the discussion of affordable housing was part of a legitimate presentation by the applicants.

COAH review of the transcripts does not reveal any occasion on which the applicants threatened Mt. Laurel litigation. Specifically, the areas highlighted by Fanwood do not support its assertion. Any notion of a threat is further diminished by the applicant's expressions of doubt as to whether the site would even be usable for a Mt. Laurel development (A-8 to 9, 41 and 45). Fanwood's reliance on Krause's statements at the conclusion of the proceedings is misplaced - the statement represents nothing more than an offer to consider using the site for a Mt. Laurel project (as an alternative to the pending non-Mt. Laurel application) if the Board would prefer that approach (C-19).

There are other factors which indicate that the applicants were not perceived as having made a threat of Mt. Laurel litigation. None of the Board members mentioned such a threat at the time they voted against the application. Nor did anyone raise the

issue at the time the property owners filed Mt. Laurel litigation. Further, such litigation was not filed immediately after the Board's negative votes. Instead, the applicants filed an appeal of the decision (as noted above, the Board's decision was upheld, although the opinion stated that the applicants had successfully established special reasons, for the reasons advanced by them below). Litigation was not filed until after the Superior Court's decision, and until after a similar suit was already filed by another property owner (Minogue). In fact, no mention of threats was made by anyone until the present motion, four years after the statements were made.

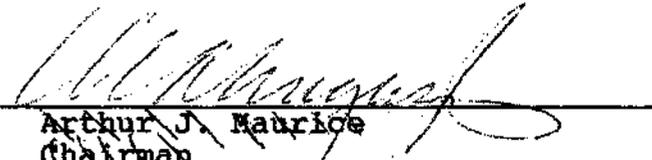
The only direct statement that the representations made before the Board were viewed as threats is contained in the Winey certification. Again, the certification is dated June 30, 1989, over four years after the statements in question. Certainly, Winey did not state at the time of the Board meetings (at which he voted against the application) that he felt threats had been made to the Board. In any event, as noted above, COAH cannot rely upon an individual's conclusion as to what constitutes a threat, and COAH's review of the transcripts indicates that the statements relied upon by Winey do not constitute threats such as to disqualify the property owners under Mt. Laurel II.

For all of the above stated reasons, the motion to exclude the LaGrande, Midway and North sites on the basis of threats will be denied. COAH notes that it will thus not reach the issue of whether statements made as to the LaGrande site could have also

disqualified the property owners as to other, unrelated sites within the same municipality.

Thus, for the reasons set forth above, Fanwood's motions to exclude the objectors' sites from consideration as part of COAH's mediation and review process shall be denied.

COUNCIL ON AFFORDABLE HOUSING

By: 

Arthur J. Maurice
Chairman

Dated: December 11, 1989.

By: William A. Angus Jr.
Acting Chairman