COUNCIL ON AFFORDABLE HOUSING
DOCKET NO. COAH 89-204

IN RE BOROUGH OF PARAMUS/	)	Civil Action
REQUEST TO VACATE SUBSTANTIVE	)	OPINION
CERTIFICATION	)	

The present matter arises as the result of a motion filed by Alexander's Department Stores of New Jersey, Inc. and Sakraf Wine and Liquor Store, Inc., (jointly referred to an Alexander's), requesting that COAH vacate the substantive certification previously granted to the Borough of Paramus, in light of the recent amendment to the Fair Housing Act, L. 1989, c. 142.

COAH granted substantive certification to Paramus' housing element and fair share plan on September 6, 1988. The certified plan includes the zoning of a site (hereafter the Westland site) for a Mt. Laurel inclusionary development containing 274 lower income units. Alexander's did not participate as an objector or interested party during COAH's mediation and review process. Paramus adopted ordinances implementing its certified plan, including the zoning of the Westland site, on or about October 18, 1988.

On August 3, 1989 Governor Kean signed L. 1989, c. 142, an Act amending the Fair Housing Act. Alexander's filed the present motion on September 1, 1989. In the motion Alexander's argues that Paramus' use of the Westland site falls within the language of

L. 1989, c. 142, and that the amendment effectively bars use of the site for the purpose intended in Paramus' plan. As a result, Alexander's argues that the substantive certification and implementing ordinances, as well as those agreements forming part of Paramus' plan, are void. Briefs in opposition to the motion were filed by Paramus and Westland Properties, Inc. (Westland Properties, Inc., hereinafter referred to as Westland, conveyed the Westland site to Paramus as part of the Borough's housing plan).

By letter dated October 4, 1989 COAH requested that the parties address the issue of COAH's ability to hear Alexander's motion at the present time. This request was based on the fact that Alexander's filed with the Superior Court, on December 7, 1988, an action in lieu of prerogative writ challenging, on various grounds, the ordinances implementing Paramus' housing plan, and naming Paramus, Westland and COAH as defendants. Defendants filed motions to dismiss the complaint, which were denied by the trial court. Interlocutory appeals of that decision are now pending in the Appellate Division. COAH's October 4 letter was directed to the question of whether it could proceed at this time on the present motion, in light of the pending Appellate Division proceeding.

Responses were received from Alexander's (October 10, 1989), Paramus (October 13, 1989) and Westland (October 18, 1989). All parties agreed that COAH may proceed at this time (although for different reasons). It is COAH's conclusion that it may proceed to hear Alexander's motion at this time. The motion raises an issue -- the effect of L. 1989, c. 142 on Paramus' certification--

unrelated to the issues presently before the Appellate Division. In fact, as noted above, Alexander's prerogative writ action was filed eight months prior to the enactment of L. 1989, c. 142. It is true that both matters involve the same parties, and that in both cases Alexander's seeks to overturn Paramus' certification. However, this does not alter the fact that they present different issues, and that the present motion is premised solely on L. 1989, c. 142 and is totally outside the scope of the prerogative writ action.

An additional preliminary matter is the question of Alexander's ability to file the present action seeking to vacate Paramus' certification, in light of its failure to participate in the prior COAH mediation and review process. COAH has promulgated regulations permitting post-certification amendments to a certified housing plan. N.J.A.C. 5:91-14.1 et seq. Such amendments may be based on necessity, or simply on a desire to change the plan to a preferable approach. Requests to amend a certified plan are not limited to the participants to the original mediation and review process, but may be made by any person.

COAH concludes that, although not specifically referred to in N.J.A.C. 5:92-14.1 et seq., requests to vacate a certification should be treated in the same manner. The two motions are certainly related, especially in light of the fact that a decision to vacate a certification may be followed by action to resubmit and amend the voided plan, in order to create a new, complying plan. It should also be noted that COAH has already heard in one instance

(involving the Township of Piscataway) a request to vacate a certification filed by a party that was not involved in the original certification process. Thus, COAH will consider Alexander's motion.

As noted, the sole issue presented is whether Paramus' plan is void as the result of the subsequent enactment of L. 1989, c. 142. That amendment provides in full that:

> 1. Nothing in the act to which this act is supplementary, [the Fair Housing Act, N.J.S.A. 52:27D-301 et seq.] shall be construed to require that a municipality fulfill all or any portion of its fair share housing obligation through permitting the development or redevelopment of property within the municipality on which is located a residential structure which has not been declared unfit, or which was within the previous three years negligently or willfully rendered unfit, for human occupancy or use pursuant to P.L. 1942, c. 112 (C. 40:48-2.3 et seq.), and which is situated on a lot of less than two acres of land or on a lot formed by merging two or more such lots if the development or redevelopment would require the demolition of that structure. Any action heretofore taken by the Council on Affordable Housing based upon such a construction of [the Fair Housing Act] is invalidated.
>
> 2. The Council on Affordable Housing shall not consider for substantive certification any application of a housing element submitted which involves the demolition of a residential structure, which has not been declared unfit, or which was within the previous three years negligently or willfully rendered unfit, for human occupancy or use pursuant to P.L. 1942, c. 112 (C. 40:48-2.3 et seq.), and which is situated on a lot of less than two acres of land or on a lot formed by merging two or more such lots unless an application for development has been previously approved by the municipal planing board or municipal zoning board pursuant to procedures prescribed by the "Municipal Land Use Law," P.L. 1975, c. 291 (C.40:55D-1 et seq.).

3. This act shall take effect immediately.

Alexander's argues that the Westland site meets each of the three criteria contained in L. 1989, c. 142. Citing the certification of Philip Caton, and attached exhibits, Alexander's contends that the Westland site contains habitable residential structures meeting the requirements of L. 1989, c. 142; that the site is comprised of lots less than one acre in size; and that the proposed Mt. Laurel development cannot be built without the demolition of the residential structures involved. In addition, Alexander's argues that Paramus failed to obtain either planning board or zoning board approval of the proposed development prior to certification, in violation of paragraph two of L. 1989, c. 142. Alexander's concludes that Paramus' certification and implementing ordinances are in violation of the terms of L. 1989, c. 142, and are thus void. Alexander's asks that COAH vacate the substantive certification and housing plan, as well as the Paramus-Westland contractual agreement, and enjoin Paramus from taking any action in furtherance of the certified plan, or from demolishing any structures on the Westland site.

It is COAH's determination that Alexander's has misinterpreted L. 1989, c. 142, that the amendment does not apply in the present situation, and that Alexander's motion must thus be denied. The first paragraph of L. 1989, c. 142 delineates a specific type of property based on three criteria (the size of the property, the existence of qualifying residential structures, and the requirement that the proposed development of the property involve the demoli-

tion of the structure(s)). The first paragraph goes on to say that a municipality may not be required to fulfill any portion of its Mt. Laurel housing obligation through the use of such property. Any prior COAH action based upon a contrary construction of the Fair Housing Act is invalidated.

The paragraph is retroactive in application, and strikes down any prior COAH action that required a municipality to utilize the type of property designated. Thus, any previous COAH decision mandating that a municipality include such property in its housing plan would be invalid under the first paragraph of L. 1989, c. 142. However, the present case does not fall within the purview of L. 1989, c. 142, paragraph one, because Paramus voluntarily elected to utilize the site in question. COAH took no action whatsoever mandating that Paramus include the site in its plan, and there is thus no action that could be struck down pursuant to L. 1989, c. 142, paragraph one.

The second paragraph of L. 1989, c. 142 provides that COAH may not consider for substantive certification any proposed housing element and fair share plan that contains a site meeting the same three criteria outlined in paragraph one, unless the municipality has previously approved the use of the site through its planning or zoning board, as appropriate. This paragraph thus deals solely with prospective COAH action. COAH is permitted to consider property meeting the three part test in the event a new precondition (planning or zoning board approval) is complied with. (Of course, such a requirement does not operate retroactively, as

municipalities could not be expected to comply with as yet unadopted procedural requirements). This paragraph clearly does not apply in the present case, as Paramus received certification prior to the enactment of L. 1989, c. 142, and is not awaiting prospective COAH action.

Thus, a facial review of the language of L. 1989, c. 142 indicates that it does not apply in the present instance. Because of this fact, it is unnecessary for COAH to consider the separate issue of whether the Westland site meets the three criteria set forth in the amendment. However, it should be noted that the papers filed with COAH indicate that Paramus contests Alexander's conclusion that the residential structures are habitable under L. 1989, c. 142, and that the proposed development would necessitate the demolition of these structures. It is also unnecessary to consider the issue raised by Paramus as to COAH's authority to enjoin the Borough from taking certain actions, as requested by Alexander's.

Thus, for all of the above-state reasons, COAH hereby determines that L. 1989, c. 142 does not apply in the present case, and that Alexander's motion to vacate Paramus' substantive certification must thus be denied.

Arthur J. Maurice, Chairman
Council on Affordable Housing

Dated: December 11, 1989.

William A. Angus Jr.
Acting Chairman