

COUNCIL ON AFFORDABLE HOUSING
DOCKET NO. COAH 91-310

IN RE:)
PETITION FOR SUBSTANTIVE)
CERTIFICATION OF FANWOOD)
BOROUGH.)

Civil Action

OPINION

The Borough of Fanwood comes before the Council on Affordable Housing (COAH) for an Order establishing its fair share obligation and allowing Fanwood to present a new housing element and fair share plan (plan) before COAH makes any determination regarding the inclusion of the objectors' sites. Fanwood argues that the Fair Housing Act (FHA), N.J.S.A. 52:27D-301 et seq. compels this result because the FHA allows a municipality to fashion its plan once the fair share number has been calculated. Fanwood also relies on In Re Petition of Substantive Certification Filed by the Borough of Roseland, 247 N.J. Super. 203 (App. Div. 1991) in support of its arguments claiming that Roseland allows Fanwood complete discretion in the formulation of its plan once the fair share number has been established.

The objectors,* Robert S. Rau, Jr. and Richard Bower (owners of the LaGrande Avenue site), Michael McCabe (owner of the Terrill Road site), Barbara Steinfeld (principal owner of La Grande/Midway Partnership and the Midway Avenue site) and the Rau family (owners of the North Avenue site) oppose Fanwood's Motion. The objectors argue that Roseland stands for the proposition that a municipality's fair share obligation will not

* The ownership of certain subject properties changed during the course of the proceedings. The original owners were: Robert Rau, Jr. and Ernest DiFrancesco (LaGrande Avenue site); Patrick Minogue (Terrill Road site); LaGrande Avenue/Midway Partnership (Midway Avenue site); and the Rau family (North Avenue site).

be readjusted if the town chooses to use a regional contribution agreement (RCA) to satisfy its fair share and therefore does not support Fanwood's claims. The objectors also argue that Fanwood had its opportunity to submit its plan and the FHA does not entitle it to further opportunities. On this point, objector Rau argues that it is not appropriate to allow Fanwood the chance to fashion a new plan after going through mediation and over four years of COAH's administrative process. Finally, the objectors claim that Fanwood's Motion amounts to nothing more than a reconsideration of two previous COAH decisions and should be denied for the same reasons COAH denied Fanwood's previous requests.

Fanwood filed its plan with COAH on January 5, 1987. In its plan, Fanwood claimed that its fair share number of 87 should be reduced to zero because Fanwood did not have any appropriate vacant land for affordable housing construction. The objectors filed objections arguing that an adjustment to zero was not warranted because they had sites that were capable of being developed with affordable housing. Fanwood opposed inclusion of those sites arguing that the objectors' sites did not comply with COAH's regulations and thus Fanwood did not have to consider them or include them in the plan. In two decisions, In Re Borough of Fanwood, (decided, October 17, 1988) and In Re Borough of Fanwood Motion for Accelerated Denial/Conditional Denial (decided, April 24, 1989), COAH determined that it could not adjust Fanwood's obligation down from 87 without a complete inventory of suitable sites pursuant to N.J.A.C. 5:92-8. Since the suitability of the only sites offered was being contested by the Borough, it was not possible to establish an adjusted fair share without an evidentiary hearing.

Because this dispute raised contested factual issues, COAH transferred the issues to the Office of Administrative Law (OAL) for a

hearing. Ralph Tolomeo, ALJ (ALJ), determined that each of the objectors' sites is suitable for low and moderate income housing at a gross density of 12 units per acre.

COAH has modified the ALJ's Initial Decision and established Fanwood's fair share to be eight (8). The rationale for calculating this number is set forth in COAH's modification of the Initial Decision. This calculation of fair share is based on the facts before COAH. After over four years in COAH's process only four sites were presented to calculate fair share. The fair share number is based on COAH's review of these four sites.

Having established Fanwood Borough's fair share, COAH will address Fanwood's request to afford Fanwood the first opportunity to present a fair share compliance plan. The Fair Housing Act describes a process, in which municipalities that filed housing elements prior to January 5, 1987 or prior to an exclusionary lawsuit may exhaust the administrative process offered by COAH. This process enables every municipality to file a housing element and fair share plan that satisfies its fair share need. Upon petition for substantive certification or a court transfer, the Act mandates a 45 day period for parties to object to the municipal submission. COAH must then offer the municipality and the objectors the opportunity to resolve their objections through mediation. If, after mediation, there are contested issues of fact, the parties are entitled to a hearing before an Administrative Law Judge. COAH then will accept, reject or modify the ALJ's Initial Decision. All of these actions are to occur within a prescribed period of time designed to expedite COAH's administrative process.

This process has been applied to municipalities that had sufficient land to accommodate their precredited needs and to communities seeking

adjustments for various reasons, including for lack of vacant land. For example in Roseland, upon which Fanwood places primary reliance, Roseland Borough filed a housing element and fair share plan seeking an adjustment from Roseland's precredited need of 260. COAH identified suitable sites that could accommodate 165 affordable units. COAH calculated the 165 number by applying specific densities and set-asides to each site.

Having determined the 165 unit fair share, COAH allowed Roseland the ability to use the sites, identified as suitable, using the assigned densities. Consistent with the Act, Roseland also had the ability to enter into a regional contribution agreement. Roseland did not offer new sites to replace the suitable sites identified after the process was over and the fair share number was established at 165.

The Court affirmed this procedure in Roseland. Contrary to Fanwood's allegations, Roseland does not stand for the broad proposition that a municipality may fashion a new plan once its number is adjusted. Roseland says that if a municipality's need is adjusted, the municipality may use an RCA as an alternative to the sites determined to be suitable without altering the adjusted fair share number.

Moreover, there are differences between the Roseland and Fanwood Cases. Roseland filed a plan offering specific sites to address the municipality's obligation. Fanwood, on the other hand, filed a housing element and fair share plan that stated there was no suitable vacant land* in the Borough and that its fair share should be zero. Repeated

*Pursuant to N.J.A.C. 5:92-1.3, vacant land is defined as:

1. Undeveloped and unused land area;
2. Any non-residential areas with significant amounts of land not covered by impervious surfaces on site, as determined by the Council;
3. Land suitable for redevelopment or infill at higher densities; and
4. Residential areas with lot sizes in excess of two acres where environmental factors permit higher densities.

attempts to resolve disputes with objectors failed.

Fanwood was entitled to argue that there were no suitable sites in the Borough. However, having made that argument and proceeded through the entire administrative process outlined by the Fair Housing Act, the Borough is not entitled to offer new sites to replace the sites that were transferred to the Office of Administrative Law. To permit such a replacement would jeopardize the credibility of the administrative alternative to litigation established by the Legislature. It would mean that COAH did not have sufficient sites to properly calculate Fanwood Borough's fair share, see In Re Borough of Roseland, 247 N.J. Super 203 (App. Div. 1991); and it would promote the type of delay that the Supreme Court indicated would be unacceptable in Hills Development Company vs. Bernards Tp., 103 N.J. 1 (1986).

However, Fanwood will be offered the same flexibility offered to Roseland Borough. It may tailor a plan that addresses the fair share on the sites determined suitable by COAH. (Since these are the only sites that have been offered during COAH's administrative process.) Fanwood is also free to enter into regional contribution agreements for up to 50 percent of its fair share.

Objector Minogue argues that Fanwood's motion amounts to nothing more than a request for reconsideration of COAH's previous decision, In Re Borough of Fanwood Motion for Accelerated Denial/Conditional Denial, in which COAH states that unless Fanwood devised a plan that satisfies its entire precredited need, Fanwood must use the objector's sites. One inference that can be drawn from this argument is that Fanwood now must use all of the suitable sites at the appropriate densities. COAH wishes to clarify this decision in light of its decision today, so as to avoid any confusion. COAH did not order a builder's remedy at any time in this

case. COAH did not intend for its April 24, 1989 decision to provide a builder's remedy. COAH has used the objector's sites to calculate Fanwood's adjusted need.

Fanwood is directed to prepare a housing element and fair share plan that addresses its obligation within the limits imposed by this decision and the decision modifying the ALJ Initial Decision. The housing element and fair share plan shall include the three sites determined suitable, or a combination of sites and a regional contribution agreement. The housing element and fair share plan shall be adopted and filed with COAH within 90 days of this decision.

May 6, 1992
Date

Kevin Quince / ssp
Kevin Quince, Acting Chairman
Council on Affordable Housing

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