

COUNCIL ON AFFORDABLE HOUSING
DOCKET NO. COAH 89-5
OAL DOCKET NO. CAH 884-90

IN RE: MODIFICATION OF INITIAL)
DECISION IN THE MATTER OF THE)
BOROUGH OF FANWOOD, UNION COUNTY)

Civil Action

OPINION

The Council on Affordable Housing (COAH), after a careful review of the record below, including the transcripts of the hearing, the exhibits introduced into evidence and the Initial Decision of the Administrative Law Judge, hereby decides to accept in part, reject in part, and modify in part, the Initial Decision of the Administrative Law Judge Ralph Tolomeo (ALJ), decided on October 9, 1991.

COAH accepts the findings of fact and conclusions of law regarding the ownership of the Terrill Road site, as found on page 3 of the Initial Decision. The Council also accepts the findings of fact and conclusions of law regarding the ownership of the North Avenue site as found on pages 3 through 8 of the Initial Decision. With regard to the ALJ's Initial Decision concerning the site suitability of the four sites in question, the Council accepts the ALJ's generalized discussion with regard to site suitability found between pages 8 and 21 of the Initial Decision. However, as will be explained below, COAH has determined that Site 4 is not suitable for inclusionary development. Therefore, COAH holds that the ALJ's numbered conclusions of law, 1 through 26 found on pages 21 through 23, are modified to only apply to Sites 1, 2 and 3; not to Site 4.

With regard to Site 4, the Council holds that Site 4 is not suitable for inclusionary development. Site 4 includes part or all of three

separate lots, Lots 4, 5 and 7 on Block 33 at the Borough of Fanwood. It lies within the R-150 zone that permits single family homes on 15,000 square foot lots. It lies directly across the street from a train station which has been designated an historic site. Unlike Sites 1, 2 and 3, Site 4 is neither subdividable nor developable under existing Fanwood ordinances. Lots 4, 5 and 7 of Site 4 have already been subdivided and each has a structure on it. These structures are older, larger homes that have been subdivided to create two or more units on each lot.

The proponents of Site 4 wish to construct inclusionary units in the backyards of the existing structures on Lots 4, 5 and 7. In weighing the benefits of creating low and moderate income housing on Site 4 with the character of the area, the Council determines that it is inappropriate to require Fanwood Borough to include this site for purposes of determining its fair share. While it would be possible to construct additional units on Site 4, COAH does not believe it would be appropriate to require Fanwood Borough to allow further development on these relatively small, previously developed lots. In arriving at the decision, COAH paid particular attention to exhibits R-17, R-13 and the testimony of Mr. Preiss in the transcript of June 7, 1990, pages 19 through 52.

With regard to the discussion of density in the Initial Decision, COAH accepts the general discussion of the ALJ at page 23 through to the second paragraph at page 27. However, COAH is uncomfortable with the absence in the Initial Decision of a detailed rationale applying the general principles described by the ALJ to the three sites that are at issue here. Therefore, in arriving at its decision regarding the density of development assigned to Sites 1, 2 and 3, COAH paid very close

attention to the exhibits introduced in the hearing below. COAH paid special attention to and carefully scrutinized the aerial photographs of the sites and the maps, diagrams and plans of the sites that were introduced at the hearing. Based upon its review of these exhibits, in conjunction with a review of the testimony below, COAH holds the following with regard to the allowable densities on Sites, 1, 2 and 3:

1) Site 1 is located at the corner of Third Street and LaGrande Avenue. It includes Lots 23-26 in Block 60. It is immediately adjacent to a garden apartment type complex. It is immediately across the street from a park. It is around the corner from a commercial district. In short, higher density low and moderate income housing is consistent with the character of the surrounding area. The site is adjacent to community recreational and commercial areas. Therefore, COAH determines the site is available, suitable and approvable as defined in N.J.A.C. 5:92-1.3. This determination is based on the record presented to COAH, including, but not limited to Exhibits R-5(a)-(d), R-17 and R-17(a). COAH affirms the suitability of the site at 12 units per acre.

2) Site 2 consists of Block 26, Lots 36, 38 and 39 on Terrill Road. It is located within a zoning district that allows single family homes on 7,500 square foot lots. The existence of one single family detached house on Lot 37 divides and limits the flexibility of designing the site.

An electric power easement (to the east) buffers the site from single family homes with frontage on Farley Avenue. To the south of the site, along Stewart Avenue, there are a series of single family detached units on small non-conforming lots of approximately 6,500 square feet. There are also single family homes to the north and west. Many of them are also non-conforming, due to lot size.

COAH determines that this site is also available, suitable, developable and approvable. The fact that the character of the area is single family detached housing does not preclude it from higher density development. COAH agrees with the ALJ that a balancing test should be employed when weighing the need for affordable housing with the character of the community. As stated in Allendale.

"...rezoning to provide a fair share of least-cost housing promotes the general welfare, N.J.S.A. 40-55D-2. As such, it is tantamount to providing an 'inherently beneficial use', and positive aspects should be weighed heavily against zoning harm in determining validity." Yahnel v. Jamesburg Bd. of Adj. 79 N.J. Super 201 (App. Div. 1963), cert. den 41 N.J. 116 (1963). [Id. at 38; emphasis added].

However, in reviewing the record (including Exhibits R-9(a)-(d), R-18 and R-18(a)) the character of the area should be considered when assigning a density to the site. The site is relatively small and is surrounded by single family homes on small lots. The size of the site and the fact that it is divided by a lot with a single family detached unit on it limits the ability to provide a buffer between the higher density housing and the adjacent uses.

Therefore, COAH modifies the Initial Decision. Given the density of the surrounding uses, COAH determines that a larger buffer is desirable. Therefore, COAH determines that this site is suitable at six units per acre. Consistent with N.J.A.C. 5:92-8.4, six units per acre is also presumed to be the minimum density and 20 percent is the maximum set-aside permissible without a quid pro quo.

3) Site 3 is Block 26, Lot 60 located on Midway Avenue. In reviewing the record (including Exhibits R-12(a)-(d), R-18 and R-18(a)), the site has frontage along Midway Avenue. The site also is located

within the R-75 zone that permits single family homes on 7,500 square foot lots. A power easement (to the east) and Tower Place (a cul-de-sac) buffer the site from single family residences. To the west, there are single family and two family residences with frontage on Terrill Avenue that are adjacent to the site. To the north, along Midway Avenue, there are single family and two family structures. The back yards of the single family homes, with frontage on Mary Lane, are adjacent to the site's southern boundary.

The site is not restricted in its design by environmental limitations or by irregular shape. It is within walking distance of recreational and commercial areas. It is partially buffered by the power easement and Tower Place. Given the character of the area, COAH determines that Site 3 can accommodate a higher density than the Terrill Avenue site. However, since the surrounding uses are not as dense as those surrounding Site 1, COAH determines that a gross density of 10 units per acre is appropriate on this site. This reduced density will allow more of a buffer between any future development and the adjacent single family detached dwellings.

Based on this modification of the ALJ's decision, COAH determines Fanwood Borough's fair share as follows:


1) Site 1 is 1.34 acres and is suitable for low and moderate income housing at 12 units per acre and a 20 percent set-aside. At this density and set-aside, the site can yield three low and moderate income units.

2) Site 2 is 2.65 acres. At six units per acre and a 20 percent set-aside, this site can yield three low and moderate income units.

3) Site 3 is 1.2 acres. At 10 units per acre and a 20 percent set-aside, this site can accommodate two low and moderate income units.

Fanwood has already provided crediting documentation for rehabilitating nine substandard housing units occupied by low and moderate income households. Thus, Fanwood has satisfied the rehabilitation component of its obligation. Sites 1, 2 and 3 yield a remaining fair share of eight (8) units.

May 6, 1992
Date


Kevin Quince, Acting Chairman
Council on Affordable Housing

* It should be noted that Fanwood has excepted to the decisions the ALJ made concerning the burden of proof. In essence, the ALJ required Fanwood to prove that the sites were not suitable for inclusionary development, rather than having the objectors prove that their sites were suitable for inclusionary development. N.J.A.C. 5:91-4.5 does place the burden of proof on objectors to a municipal housing element when a municipality has placed itself within the jurisdiction of COAH. This rule was effective July 1, 1991, which is after the hearing but before the Initial Decision. The main task of the ALJ was to hold a fact finding hearing with regard to Sites 1 through 4 so as to provide the Council with a basis upon which it could determine Fanwood's fair share number. This has been done. The fact that the ALJ may have assigned the burden of proof correctly or incorrectly has not affected COAH's decision, nor does it taint the proceedings in any way. As has been demonstrated above, the Council looked at the exhibits and testimony of the hearing with a fresh eye and has based its decision upon its independent review of the hearing below.