

IN RE DISMISS PETITION)
OF SUBSTANTIVE)
CERTIFICATION)
HOPE TWP/WARREN COUNTY)

OPINION

COAH DOCKET - #42-901

Hope Township is located in Central Warren County. The Township has a land area of 18.9 square miles and in 1987 had a population density of 88.1 persons per square mile. The Township's precredited need is 14, all of which is indigenous. On August 16, 1990 the Mayor of Hope personally filed the Township's housing element/fair share plan at the office of the Council on Affordable Housing (COAH). The plan had been adopted by the Hope Township planning board on August 6, 1990 and was memorialized by a planning board resolution on August 27, 1990. However, when the mayor delivered the housing element/fair share plan to COAH he did not have the explicit authorization of the township by way of an official resolution. Such resolution was not adopted until December 6, 1990 and it then retroactively authorized the mayor's prior filing with COAH.

H&M Investment Company filed a Mount Laurel action against Hope Township on August 31, 1990. The suit requested that Hope's land use ordinances be declared invalid, that a special master be appointed and that a builder's remedy be awarded to H&M. The Township filed a motion to transfer jurisdiction of the Mount Laurel element of the case from the Superior Court to COAH. The motion was heard by the Honorable Edmund R. Bernhard, J.S.C. on April 5, 1991. On that date, the judge decided that Hope had met the jurisdictional requirements of the Fair Housing Act and that the case should be transferred to COAH.

Mediation began on August 2, 1991 with Shirley M. Bishop as mediator. H&M Investment Company participated in the mediation. A mediation report dated November 12, 1991 was prepared by Ms. Bishop. A post-mediation report was prepared by James E. Cordingley and is dated April 1, 1992. Both reports are a part of this record.

H&M Investment filed its motion to discuss Hope's petition for substantive certification on March 24, 1992. The motion lists three separate reasons to support the request for dismissal. Point I of the

motion claims that the Township has never filed the housing element as adopted and approved by the planning board. H&M argues that when the mayor of Hope on August 16, 1990 delivered to COAH the housing element adopted by the Township planning board on August 6, 1990 he did so without authorization from the municipality. That authorization was not provided, H&M argues, until December 6, 1990 when the Township committee as a public body retroactively authorized the mayor's delivery. H&M argues that this retroactive authorization does not comport with the statute and further argues that the housing element and fair share plan delivered by the mayor on August 16 was not the one approved on August 27 by the Hope planning board. Therefore, H&M argues that COAH has never been presented with Hope's housing element and fair share plan.

At Point II of the motion H&M requests COAH dismiss Hope's petition because the Township's plan is so deficient that it fails to satisfy the filing requirements of the Fair Housing Act. H&M points to the deposition of Hope's Planner, Fred Heyer, taken on November 27, 1990 to demonstrate the deficiencies in Hope's fair share plan. For example, H&M points to Mr. Heyer's testimony that no inventory was taken of substandard housing units in Hope that may be rehabilitated. Also, no consideration was given for land which might be appropriate for the construction of low and moderate income housing, nor was a house by house survey done to determine structures appropriate for conversion or rehabilitation to low and moderate housing. H&M argues that these deficiencies violate N.J.S.A. 52:27D-311 of the Fair Housing Act. Also, H&M argues that Hope has failed to include draft ordinances with its housing element and fair share plan, a deficiency in violation of N.J.A.C. 5:91-1.2.

H&M's final point is that Hope has failed to comply with time schedules set out at N.J.S.A. 52:27D-309(a) and at N.J.A.C. 5:91-3.1(f) and that the failure to meet these time schedules necessitates a dismissal of Hope's petition. H&M states that Hope filed a resolution of participation with COAH on November 4, 1985 but then failed to comply with the time schedule set out in the Act at N.J.A.C. 52:27D-309(a) mandating that the municipality should file a housing element and fair share plan within 5 months after COAH's adoption of its criteria and guidelines. Alternatively, H&M argues

that even if Hope's August 1990 filing was considered acceptable by COAH, time schedules set out in N.J.A.C. 5:91-3.1(f) have not been met and therefore COAH can no longer retain jurisdiction pursuant to N.J.A.C. 5:91-3.3.

Hope submitted a letter brief dated April 21, 1992 in opposition to H&M's motion to dismiss Hope's petition for substantive certification. Hope contends that Judge Bernhard's decision transferring H&M's Mount Laurel case to COAH renders the procedural issues raised by H&M moot. Hope states that even if the court's decision is not looked upon by COAH as precedential, the Township has complied with the statutory and regulatory requirements of the Fair Housing Act. The Township denies H&M's allegation that the housing element and fair share plan delivered by the Mayor to COAH on August 16 is not the one approved on August 27 by the Township planning board. Accompanying the Township's letter brief is a model ordinance that the Township states it will adopt upon substantive certification. This ordinance, the Township states, provides the mechanism to implement the rehabilitation program and meet the fair share obligation of the township.

H&M's motion to dismiss Hope's petition for substantive certification is denied. The jurisdictional questions raised by Points I & III of H&M's motion have already been decided by Judge Bernhard in his decision on April 5, 1991. H&M raised with the court in that motion all of the arguments that it raises in Point I and the court decided that the jurisdiction of this matter properly belonged with COAH. Similarly, the issues raised by H&M at Point III of its brief are also jurisdictional in nature and as such must be rejected. Finally, the deficiencies in Hope's housing element and fair share plan that are listed by H&M at Point II are not sufficient, in COAH's estimation, to warrant dismissal of Hope's petition for substantive certification and the return of jurisdiction to the Superior Court.

At Point I of its brief, H&M asks COAH to dismiss Hope's petition for substantive certification because the mayor's filing of Hope's housing element and fair share plan on August 6, 1990 was not authorized by the Hope Township Committee until December 6, 1990. This retroactive authorization, H&M contends, is contrary to the Fair Housing Act in that it comes 97 days

after H&M commenced their Mount Laurel suit in Superior court against Hope. However, H&M has already fully argued its Point I contentions in the Superior Court in opposing Hope's motion to transfer jurisdiction to COAH. Judge Bernhard in his decision of April 5, 1991 rejected H&M's arguments and transferred jurisdiction to COAH. Judge Bernhard's decision constitutes "the law of the case" and must be followed by COAH in response to H&M's motion. Apart from that, however, the reasoning behind Judge Bernhard's decision is correct and COAH adopts that reasoning.

In Hill's Development Company v. Bernard's Township, 103, N.J. 1 (1986) at page 49, the New Jersey Supreme Court states "The legislative history of the Fair Housing Act makes it clear that it had two primary purposes: First, to bring an administrative agency into the field of lower income housing to satisfy the Mount Laurel obligation; second, to get the courts out of that field." In light of this legislative intent the Fair Housing Act at N.J.S.A. 52:27D-309(b) will not be construed to invalidate Hope's filing of its adopted plan because the statute does not explicitly require a resolution of a municipal body to authorize a filing with COAH. As Judge Bernhard noted, approximately half the plans filed by municipalities with COAH are not accompanied by a resolution formally authorizing the filing and COAH has accepted those housing elements for filing.

Similarly, the issues raised by H&M at Point III of its motion are jurisdictional and as such must be rejected. It is not relevant to COAH's jurisdiction that Hope filed a resolution of participation in November 4, 1985 and did not file anything further until August 1990. At N.J.S.A. 52:27D-309(b) it is clear that a municipality is immunized against a developer's Mount Laurel suit in Superior Court if the municipality files a housing element and fair share plan with COAH prior to institution of an exclusionary zoning law suit by a developer. It is clear from Judge Bernhard's decision of April 5, 1991 that Hope filed its housing element and fair share plan prior to the institution by H&M of an exclusionary zoning law suit. Therefore, COAH has jurisdiction over this case. Judge Bernhard decided that on April 5, 1991 and we reiterate that decision today.

H&M also complains that the time schedule set out at N.J.A.C.

5:91-2.1(f) has not been complied with by Hope and therefore COAH must dismiss Hope and return this matter to the Superior Court pursuant to N.J.A.C. 5:91-3.3. However, it is clear from the record that this matter has been progressing, that mediation in the matter is completed, and that Hope has accepted COAH's determined fair share number of 14 and has decided to meet its fair share obligation through rehabilitation of existing structures within Hope. COAH has the inherent power to waive the requirements of its regulations, N.J.A.C. 5:91-1.3, as long as such waiver would not contravene the provisions of the act. Here, the provisions of the act are being complied with and Hope is well on its way to meeting its fair share obligation. In fact, it would contravene the purposes of the act if COAH were to dismiss Hope's petition at this point, and return jurisdiction of this matter to the Superior Court. Therefore, the arguments brought to COAH's attention by H&M at Point III of their brief are rejected.

At Point II of its brief H&M argues that Hope has never filed a fair share plan conforming to COAH's statutory or regulatory requirements. On that point H&M extensively quotes from a deposition taken in November of 1990 by Hope's planner, Fred Heyer. However, much has happened since November of 1990 with regard to Hope's meeting its fair share obligation. It is true there are some deficiencies in Hope's fair share plan as pointed out by H&M at Point II. Some of these deficiencies are also noted in the mediation report of Shirley Bishop dated November 12, 1991 and the post-mediation report of James Cordingley dated April 1, 1992. However, it is also quite clear from these two reports that Hope has made significant strides towards meeting its fair share obligation to provide 14 units of low and moderate income housing. Hope has decided to meet its obligation through a rehabilitation program within the municipality. COAH does not object to that plan. It is not necessary that Hope meet its fair share obligation by creating inclusionary developments within the town, as H&M has offered to do. The township has hired an individual to prepare grant requests for funding its rehabilitation program. Hope provided COAH during mediation with a resolution from its governing body agreeing to bond or budget for half of its obligation, of \$70,000. Also, the Township has selected an agency to administer its rehabilitation program and its attorney has submitted a model ordinance that he asserts the Township will adopt if a petition of substantive certification is granted.

The chief purpose of the Fair Housing Act is to see that municipalities meet their obligations to provide low and moderate income housing within their communities. Hope's fair share obligation as determined by COAH is 14 units. The Township has made substantial progress during mediation to create a program whereby it will meet that obligation through rehabilitation. While there are deficiencies in its plan at this date, which have been pointed out by H&M and in the mediation and post-mediation reports, these deficiencies are, in, COAH's judgment minor and easily corrected. It would not be productive with regard to the creation of low and moderate income housing in Hope for COAH to dismiss Hope's petition for substantive certification at this date.

Therefore, for the above reasons, COAH denies the motion of H&M Investment Corporation, Inc. to dismiss Hope's petition for substantive certification.



Ara Hovnanian, Acting Chairman

DATED: June 4, 1992

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