

IN RE BETHLEHEM)
TOWNSHIP: ORDER)
TO SHOW CAUSE)

OPINION

On September 9, 1996 the New Jersey Council on Affordable Housing ("COAH") issued an Order to Show Cause for the Township of Bethlehem ("Bethlehem") through its representatives and for other interested parties to appear before the Council on October 2, 1996 to show cause as to whether Bethlehem "has filed a fair share plan before COAH for which substantive certification may be considered." Further, the Order to Show Cause directed that Bethlehem and all interested parties show cause as to what fair share plan was filed with COAH and "if COAH determines that Bethlehem has not filed a fair share plan with the Council prior to October 5, 1995, what COAH's proper disposition of this matter should be."

On March 14, 1995 Bethlehem filed with COAH a document captioned "Master Plan, Housing Plan Element and Fair Share Plan, November 1994" but did not petition for substantive certification at that time. Subsequently, an exclusionary zoning law suit was filed on October 5, 1995 by K. Hovnanian Companies of North Central Jersey, Inc. ("Hovnanian"), which resulted in Bethlehem petitioning for substantive certification on October 19, 1995 of its March 14, 1995 submission. On February 16, 1996 Bethlehem moved before the Superior Court to transfer jurisdiction over its housing element and fair share plan to COAH, based, inter alia, upon its March 14, 1995 filing. On June 17, 1996 the Honorable Roger F. Mahon, J.S.C., granted Bethlehem's motion to transfer jurisdiction to COAH. Judge Mahon did not retain jurisdiction over the matter.

Once jurisdiction was transferred to COAH, the March 14, 1995 submission was reviewed and it was discovered by COAH staff that the document ended midpage on page 30 and was followed by a zoning map dated November 1984, revised October 1993. The 30 pages of the filed document appeared to include parts of a housing element, but did not appear to include a fair share plan. On June 27, 1996 COAH forwarded a letter to Bethlehem advising that the document filed with COAH on March 14 did not appear to include a fair share plan or draft implementing ordinances. Bethlehem was asked to forward within seven days the complete plan adopted on March 14, 1995 by its planning board. Thereafter, Bethlehem's attorney advised COAH that the adopted housing element and fair share plan consisted of the 30 filed pages.

COAH staff arranged a meeting for August 8, 1996 with the attorney for the township and attorneys for the two objectors to the plan, Hovnanian and the Estate of Russell Vliet, Sr. ("Vliet"). Mr. Barry Hajdu, an interested party to the Bethlehem matter because he is the owner of property zoned for affordable housing, was also invited to the meeting, but did not attend. At the August 8 meeting all present were asked to file in writing no

later than August 22, 1996 whatever additional information they thought necessary to help COAH determine what Bethlehem's fair share plan was over which COAH had been given jurisdiction by the court. Based upon the material forwarded to COAH, this Order to Show Cause was issued on September 9, 1996, so that the full Council could decide the matter. The initial return date was set for October 2, 1996. However, after several requests for adjournments from the parties, the Order to Show Cause was argued before the Council at its meeting of February 5, 1997. Appearing before the Council were Anthony Vaida, Esq., attorney for Bethlehem; Jeffrey Kantowitz, Esq., representing Hovnanian; Richard Dieterly, Esq., representing Vliet; and Mr. Barry Hajdu, pro se.

HISTORY

The following is the history of Bethlehem's efforts to adopt a housing element and fair share plan, file it with COAH and petition COAH for substantive certification. It is based in large part upon the materials supplied to COAH in response to the Order to Show Cause and COAH's request for relevant material made at the August 8, 1996 meeting.

On November 21, 1986 Bethlehem passed a resolution of intent to participate in the COAH process. COAH acknowledged the resolution of participation by letter dated December 5, 1986 and set out a schedule of submissions in that letter stating that Bethlehem must file before COAH on or before May 5, 1987 "a Formal Housing Element and Fair Share Plan". On January 14, 1987 COAH sent a letter to Bethlehem analyzing the township's master plan and land development ordinance, which had been received by COAH on December 11, 1986. Six areas of concern were listed in the letter which needed to be addressed by Bethlehem for compliance with COAH's rules. On July 27, 1987 a letter of dismissal was sent to Bethlehem because the township did not submit a housing element and fair share plan by May 5 1987 "as per COAH's letter of December 5, 1986." The township was told that if it wished to be reinstated "...the township must pass a resolution of participation... and submit an adopted final housing element." It would then be able to once again petition for substantive certification.

In 1990 Bethlehem was sued in an exclusionary zoning law suit by the Bethlehem Land Partnership, Limited. The township settled the exclusionary zoning law suit with regard to the plaintiff, but the settlement did not address municipal compliance with its fair share obligation. No judgment of compliance or repose was issued by the court as a result of this suit. The plaintiff's site was zoned for market rate housing, with the developer agreeing to pay to the township a financial contribution toward meeting the municipality's fair share obligation.

In late 1994, a document captioned "Master Plan, Housing Plan Element and Fair Share Plan November 1994" was prepared for

the township by Coppola & Coppola Associates. On the cover of this 33 page document with six appendixes and maps was written "Draft Report For Discussion Purposes Only." The Table of Contents listed twelve main sections captioned: "Introduction" (page 1); "Housing, Population and Economic Characteristics" (page 2); "Bethlehem Township's History of 'Mt. Laurel' Compliance" (page 15); "Calculated Fair share Housing Obligation" (page 18); "Existing Land Use Development" (page 19); "Environmentally Fragile Lands" (page 22); "Public Sewerage and Water Supply Systems" (page 23); "Bethlehem Township and the State Development and Redevelopment Plan" (page 23); "Bethlehem Township and the Hunterdon County Growth Management Plan" (page 25); "Land Use Planning Development Goals" (page 27); "Bethlehem Township's Existing Zone Plan" (page 28); "Bethlehem Township's Fair Share Plan" (page 30). Page 33 of the draft captioned "Bethlehem Township's Fair Share Plan" proposed to fulfill the Bethlehem fair share obligation of 59 low and moderate income units through a proposed inclusionary development of 1,900 proposed units, 235 units of which were proposed to be set aside for occupancy by eligible low and moderate income households, on 600 acres of land in the township. Also included in the proposal was a "Draft Wastewater Management Plan" to provide sewer to the proposed high density developments. This was set out at pages 30 and 31 and at "Addendum VI" to the proposed document.

This proposed November 1994 amendment to the housing element and fair share plan proved to be controversial. A Bethlehem Township Planning Board meeting scheduled to be held on February 13, 1995 was adjourned to allow the meeting to be moved to a larger location, the Thomas B. Conely School, to accommodate the large number of citizens who wished to attend.

On February 27, 1995 the planning board held a public hearing on the adoption of the proposed amendment to the Master Plan. The minutes of that meeting reflect that one of the Board members placed on the record "his disappointment with the public as to the comments made" concerning the proposed housing element and fair share plan. A motion was unanimously adopted to recommend to the township committee that rather than adopt the proposed November 1994 plan, the currently existing planned unit development overlay zone, which included zoning for affordable housing, be removed "in its entirety" by ordinance from the current municipal Master Plan. The minutes reflect that a further motion was also passed by a unanimous vote to

...adopt the Housing Plan Element as presented, up to the first half of page 30 of the document prepared by Richard Coppola, delete Addendum VI (Wastewater Management Plan) and recommend to the township committee to endorse the plan by resolution as adopted by the Board and then forward to COAH. This would provide for substantive certification to

COAH which gives the township protection from a law suit, this does not in anyway commit the township. Mr. Sutphen [the township attorney] said that ~~the board~~ should continue meetings on the fair share plan and its adoption.

On March 2, 1995 the Bethlehem Township Committee met and its minutes show that on that date it adopted Resolution #95-17 endorsing "the Housing Element as adopted by the Bethlehem Township Planning Board on February 17, 1995." and requesting "the Council on Affordable Housing to accept for filing the Housing Element of Bethlehem Township as adopted by the Planning Board on February 27, 1995 and which is hereby endorsed by the Township Committee...". The motion was seconded "...subject to the conditions it will only be the statistics" that were being endorsed and sent to COAH.

Also on March 2, 1995 the committee passed on first reading Ordinance NO. 255-5-95 "to amend the zoning map dated November 1984 and revised to October 1993, to delete the Optional Development Alternative entitled Planned Unit Developments...". The minutes of the township committee's March 2 meeting reflect that the township attorney explained the purpose of these actions as:

...to get permission to send Housing Element only down to COAH which would be the statistical portion of Mr. Coppola's, P.P., study. By sending this now, we would be 'getting our foot in the door' in starting the process so hopefully, we are not faced with a situation of another developer coming in and saying we want the zoning changed and if you don't you are going to be sued". It is the initial step in getting what is called substantive of [sic] certification which would be the Council on Affordable Housing's blessing of our plans and to address the housing needs for low and moderate income housing in the township. The Housing Element itself, this resolution doesn't say how many units or how many units we are going to construct or how we are going to address it.

With regard to the ordinance deleting the overlay zone, one committeeman "...was concerned that the 1984 Zoning map would go down to COAH accidentally and only the statistics...so that it does not go beyond that point he approved."

On March 13, 1995 William R. Sutphen, Esq., forwarded by letter to COAH the resolutions of the planning board and township committee requesting participation in COAH's administrative

process. He further stated that "I would anticipate that within the next 30 to 45 days the Bethlehem Township Committee shall adopt the Fair Share Plan and submit a Petition for Substantive Certification."

On April 28, 1995 a letter from Shirley M. Bishop, P.P., Executive Director of COAH was sent to the Mayor of Bethlehem Township acknowledging "...receipt of your adopted housing element and fair share plan which was filed on March 14, 1995...". The municipality was then informed that N.J.S.A. 52:27D-313 provided that the township could petition for substantive certification "at any time within two years" of the March 14, 1995 date. Further, the letter stated that the township's "adopted housing element and fair share plan will not be formally reviewed by COAH until such a petition is received."

It is clear from the Council's files that on March 14, 1995 the Council received the first 30 pages of the draft November 1994 document prepared by Coppola & Coppola. Nothing beyond the first half of page 30 was submitted and the section of the draft document captioned "Bethlehem Township's Fair share Plan", which began in the middle of page 30, was omitted.

On April 26, 1995 a hearing on the ordinance to delete the existing planned unit development zone, which contained a Mount Laurel setback, took place. In May 1995 Coppola & Coppola prepared a new draft housing element and fair share plan which eliminated the overlay zoning for inclusionary development that had been proposed in the November 1994 draft fair share plan. On June 12, 1995 the planning board minutes indicate that a hearing on the newly proposed fair share plan was scheduled for that night, but was postponed until July 10, 1995. On June 15, 1995 the township committee adopted on second reading Ordinance No. 255-5-95, which eliminated the PRD overlay zone in the township.

On July 10, 1995 a hearing was held by the planning board "to vote on and adopt a fair share plan." The May 1995 plan was adopted by a six to two vote. The minutes of the township committee for its July 20, 1995 meeting note that the committee had received the planning board resolution regarding the fair share plan, but tabled the matter.

The minutes of the township committee meeting on September 21, 1995 state: "A statement was received from the environmental commission supporting the planning board's Fair Housing Plan of May, 1995 provided the alternative high density zoning map is eliminated from the Plan which will have minimal, if any, impact on the environment."

On October 5, 1995 Hovnanian filed an exclusionary zoning law suit against Bethlehem, docketed in Superior Court, Chancery Division, Hunterdon County, Docket No. HNTL-L-565-95.

On October 19, 1995 the Bethlehem Township Committee endorsed by resolution the May 1995 fair share plan and adopted a resolution requesting COAH to accept for filing the fair share plan "as adopted by the planning board on June 12, 1995 and prepared by Coppola & Coppola Associates, with specific provision that the township committee disclaims endorsement of the high density overlay".

On October 20, 1995 the resolution of the Bethlehem Township Planning Board dated July 10, 1995 adopting the fair share plan and the October 19, 1995 resolution of the township committee endorsing the fair share plan as adopted by the planning board and petitioning for substantive certification were filed with COAH. The May 1995 housing element and fair share plan was not submitted to COAH on that date.

Objections to the Bethlehem petition were filed by Hovnanian, Hajdu and Vliet. On January 2, 1996 Shirley M. Bishop sent a letter to the attorney for Vliet stating that "...Bethlehem township filed an adopted housing element and fair share plan with COAH on March 14, 1995 but did not petition at that time. Subsequently, an exclusionary zoning lawsuit was filed on October 5, 1995." The letter continued that "The housing element and fair share plan and any amendments on file at the date of the filing of the exclusionary zoning lawsuit are the plans that are the subject of the petition for substantive certification and mediation."

On February 26, 1996 Bethlehem moved before the Superior Court to transfer jurisdiction over the Bethlehem housing element and fair share plan to COAH. The motion was supported by a letter brief and by certifications of Doris Lanagan, clerk of the township, and Richard Coppola, a planner for the township. Coppola stated in Paragraph 28 of his certification that "...in November of 1994, the Township forwarded to COAH its Fair Share Plan and Housing Plan Element (which Fair Share Plan and Housing Plan Element was later modified)." At Paragraph 37 he stated "The Fair Share Plan and Housing Plan Element submitted to COAH in November of 1994 and the modified plan were and are in complete compliance with the COAH regulations and the New Jersey State Development and Redevelopment Plan (SDRP):...". In her certification for the court Lanagan stated at Paragraph 8: "On March 13, 1995, the planning board's Resolution adopting the Housing Element and the Township's Resolution of Participation and adoption of the Housing Element were submitted to COAH, fulfilling the requirements set forth in the July, 1987 letter from COAH. Along with the resolutions the Township forwarded to COAH, the proposed Housing Element and Fair Share Plan, which Housing Element and Fair Share plan was later modified by the planning board and the Township prior to its acceptance by COAH and re-submitted to COAH on October 20, 1995."

Hovnanian responded to the Bethlehem motion to transfer jurisdiction to COAH, but did not contest the claims by Bethlehem

that it had filed a housing element and fair share plan with COAH on March 14, 1995. Rather, Hovnanian was under the impression that the full document prepared in draft form by Coppola & Coppola in November 1994 was forwarded to COAH on March 14. Based upon that assumption, Hovnanian submitted other extensive legal arguments as to why the court should retain jurisdiction over the township's housing element and fair share plan.

On May 16, 1996 oral argument was held before Judge Mahon on Bethlehem's motion for transfer. At page 17 of the hearing transcript the attorney for Bethlehem states:

...Jurisdiction of COA [sic] is set forth in N.J.A.C. 5:91-2.1 and that requires that the municipality shall fall within the jurisdiction of council. If a municipality has filed a Housing Element and Fair Share Plan, and is a defendant in an exclusionary zoning suit within two years of such filing, okay, so we are clearly in that category.

We filed a plan, the 11/94 plan, which incidentally would permit the construction of up to 600 units of low or moderate income housing. Okay? That's what the plans calls for. Why we're here is, I guess you call, its the old example of fear and greed. Only 60 acres of Hovnanian's property is included in that overlay. What they want now with what they're proposing to this Court is they want 300 acres. Okay. So that's the first problem, otherwise we wouldn't even [be] here if they didn't have a problem with the November plan.

That plan was filed timely in April--excuse me--in March of 1995. Its the November '94 plan. That's the plan that we're mediating at COA. That resolution and [sic] participation was adopted in March of '95. It was filed with COA. They don't dispute that....

In response, Hovnanian argued, based upon the May 1995 amendments to Bethlehem's housing element and fair share plan, that the township had not filed an effective adopted housing element and fair share plan with COAH on March 14, 1995 so that COAH should not have jurisdiction over the township plan.

Judge Mahon held that COAH did have jurisdiction over the township housing element and fair share plan. On page 29 of the motion transcript Judge Mahon states:

Then, on March 2, 1995, the township passed a Second Resolution of Participation in the administrative process of COA. This was filed with COA on March 14, 1995, along with a Fair Share Plan and the township's Final Housing Element, each of which were prepared by Coppola & Coppola Associates, township planners. They were prepared during November of 1994.

Judge Mahon noted that N.J.S.A. 52:27D-309(b) was important as to the issue of COAH's jurisdiction and that the township had argued that it complied with this requirement of the Fair Housing Act "...in that they filed their Fair Share Plan and Housing Element along with their Notice of Participation with COAH in March 1995. This occurred before Plaintiff filed the within action. Thus, the township argues this action should be removed to COA." Transcript, page 32.

Judge Mahon held that the township had complied with the requirements of N.J.S.A. 52:27D-309(b). Further, the court noted that the Fair Housing Act embodied a clearly articulated legislative preference for the resolution of disputes involving exclusionary zoning through use of the COAH administrative process and not through the courts. Therefore, Judge Mahon held:

In light of the legislative intent and since it appears that the township has complied with the requirements of N.J.S.A. 52:27D-309(b) and since the Act does not specifically forbid a municipality from modifying their Fair Share Plan after it has been submitted to COA, and finally since this case is quite new and since no discovery has yet taken place, this Court will grant Defendant's motion to transfer this action to the Council of Affordable Housing. Plaintiff's cross motion for summary judgment is denied.

Once jurisdiction was transferred to COAH, the March 14, 1995 submission on file was reviewed for the first time by COAH staff and it was discovered that the document ended in mid-sentence on page 30 and was followed by the map dated November 1984, revised October 1993. There did not appear to be a fair share plan in the submission and, therefore, on June 26, 1996 COAH forwarded a letter to Bethlehem advising that the document dated November 1994 and filed with COAH ended at page 30 and appeared not to include a fair share plan or the draft implementing ordinances. Bethlehem was asked to forward the complete plan adopted on March 14, 1995 by the planning board within seven days. Thereafter, Bethlehem's attorney advised COAH that the housing element and fair share plan did consist in fact of 30 pages, together with a zoning map. COAH

arranged for the meeting of August 8, 1996 to discuss the matter, with all parties in attendance. At the meeting all present were asked to file additional information with COAH not later than August 22, 1996 to help clarify COAH's jurisdiction and what Bethlehem's filed fair share plan was.

In response, Bethlehem in its submittal stated that the March 13, 1995 submission containing 29 ½ pages together with zoning map and a zoning ordinance was its official filing. Bethlehem's position was that its fair share plan was contained on pages 16 and 17 of the submission in the section captioned "Bethlehem Township's History of 'Mt. Laurel' Compliance". That section reviews Bethlehem's efforts to zone for its affordable housing obligation, and discusses the efforts to zone for affordable housing in its 1979 Master Plan and in its 1984 Master Plan. The discussion of the 1984 Master Plan and its approach to affordable housing was found, in part, on pages 16 and 17 and it is to this discussion that Bethlehem pointed as its fair share plan to be administered by COAH. In part, the submission at pages 16 and 17 states:

...As indicated in the "Fair Share Housing Analysis" portion of Bethlehem Township's 1984 Master Plan, the "indigenous need" for the Township was calculated to be fifty-nine (59) existing housing units.

Nevertheless, Bethlehem Township decided to plan for its future "fair share" housing obligation....

As a result of this decision to plan for its future "fair share" housing obligation, Bethlehem Township chose to calculate its housing obligation in accordance with the "consensus methodology"...

In order to accommodate the one hundred and thirty five (135) affordable housing units, the "Land Use Plan Element" portion of Bethlehem Township's September 1984 Master Plan, and the subsequent Land Development Ordinance adopted during November 1984, designated approximately four hundred (400) acres along the Interstate 78 corridor for the construction of a "Planned Unit Development" with a required set-aside of twenty percent (20%) of the housing units for occupancy by eligible "low" and "moderate" income Mt. Laurel II households.

More specifically, the "Planned Unit Development" ordinance provisions specify a maximum residential density of six (6) dwelling units per acre. Moreover, while up to fifty percent (50%) of the development may be utilized for non-residential uses, the acreage utilized for the non-residential development still is assessed a set-aside of affordable housing units as if it were developed with residential dwellings. Therefore, for each acre of land developed with the permitted non-residential uses, an additional 1.2 dwelling units of "low" and "moderate" income housing (20% of 6 du'sac) is required to be constructed in the remaining portion of the tract to be developed with the residential dwellings, without increasing the overall permitted density of six (6) dwelling units per acre within portions of the "Planned Unit Development" where the residences are being constructed.

The entire land area zoned for "Planned Unit Development" in Bethlehem Township is approximately 416.5 acres, with approximately 226.5 acres located west of Person Road, and approximately 190 acres located east of Person Road. Therefore, at the density of six (6) dwelling units per acre with a twenty percent (20%) setaside of "low" and "moderate" income units, a total of approximately five hundred (500) affordable units would theoretically result if all the lands zoned for the "Planned Unit Development" actually were to be developed (272 units west of Person Road and 228 units East of Person Road). [Emphasis in original.]

Further, Bethlehem's position was that COAH had jurisdiction because of the order of Judge Mahon: "COAH cannot be deprived of jurisdiction except by subsequent court order." Bethlehem urged that COAH commence mediation promptly and pledged full cooperation with COAH. In addition, the attorney for Bethlehem stated that COAH's July 1987 letter of dismissal advised the towns that they can reestablish participation with COAH "when they filed a housing element" and this the township had done.

The attorneys for Hovnanian and for Vliet took the position before COAH that Bethlehem did not file a fair share plan with COAH prior to the institution of the Hovnanian exclusionary zoning suit and that, therefore, COAH did not have jurisdiction over Bethlehem. The attorney for Hovnanian claimed that COAH

mistakenly accepted for filing an incomplete submission on March 14, 1995 and that the court mistakenly had concluded that a fair share plan had been filed with COAH on that date and transferred jurisdiction to COAH based upon that erroneous conclusion. The attorney for Hovnanian noted that the PRD overlay zone option that was set out at pages 16 and 17 and relied upon by Bethlehem as its fair share plan was deleted from the municipality's zoning on June 15, 1995. In addition, in May 1995 another housing element and fair share plan was prepared by Bethlehem that eliminated all overlay zoning for inclusionary development. The May 1995 plan was adopted by the planning board in July 1995, but not filed with COAH until after the institution of a law suit. COAH was not notified of the repeal of the overlay zoning or of the May 1995 plan until Bethlehem petitioned for certification of the March submission on October 20, 1995.

The attorney for Vliet presented to COAH copies of the minutes of the Bethlehem Township Planning Board and the Bethlehem Township Committee and concluded that Bethlehem did not meet the statutory requirements for a housing element. Further, the attorney stated that the only indication of a fair share plan in Bethlehem's March 14 filing with COAH was on the cover page caption, which referred to a fair share plan. However, citing the supplied minutes, he concluded that in fact the fair share plan was not filed prior to the institution of the Hovnanian suit. Because the township did not file a complete housing element and fair share plan, the Vliet attorney's position was that Judge Mahon should not have transferred the case to COAH: "We do not see how COAH could have gained or can maintain jurisdiction of this matter."

This Order to Show Cause was issued on September 9, 1996. At oral argument on February 5, 1997 the parties presented their arguments to the full COAH Board, which were as stated in their written submissions. Bethlehem pointed to pages 16 and 17 of its March 14 submission as its fair share plan. All other parties continued to maintain that the transfer of jurisdiction to COAH from the Superior Court was erroneous.

DISCUSSION

From this history, it is clear that Bethlehem intended to invoke COAH's jurisdiction by filing what it considered to be a valid housing element with COAH on March 14, 1995. It is also clear from close scrutiny of the minutes of the township planning board and of the township committee that the planning board on February 27, 1995 refused to adopt the draft fair share plan contained in the proposed November 1994 Housing Element and Fair Share Plan and the township committee on March 2, 1995 endorsed "only the statistics" of the draft housing element and voted to file it with COAH without the draft fair share plan. Therefore, the minutes of both the planning board and the township committee clearly demonstrate that Bethlehem specifically chose not to file

a fair share plan with the Council on March 14, 1995. Indeed, Bethlehem did not adopt a fair share plan until October 19, 1995 and, therefore, did not file a fair share plan with the Council prior to the institution by Hovnanian of a builder's remedy law suit on October 5, 1995.

Equally clear is the fact that Judge Mahon, when he transferred jurisdiction over Bethlehem's affordable housing obligation to COAH, was under the impression that Bethlehem's March 14, 1995 submittal to COAH contained both a housing element and fair share plan, as is specifically required by the Fair Housing Act at N.J.S.A. 52:27D-309(b):

A municipality which does not notify the council of its participation within four months may do so at any time thereafter. In any exclusionary zoning litigation instituted against such a municipality, however, there shall be no exhaustion of administrative remedy requirements pursuant to section 16 of this act unless the municipality also files its fair share plan and housing element with the council prior to the institution of the litigation.

Judge Mahon's decision relied upon unrefuted certifications and representations by Bethlehem's representatives that a fair share plan had been filed with the Council on March 14. However, it is clear from the record of Bethlehem's actions in the minutes of its planning board and township committee, as well as from COAH's records, that a fair share plan was not filed on March 14, 1995.

In its submission to the Council, the attorney for Bethlehem points to pages 16 and 17 of the March 14 submission, as well as the November 1984 zoning map (revised October 1993), as Bethlehem's fair share plan. By doing so he reinforces COAH's conclusion that Bethlehem did not file a fair share plan with the Council on March 14. These pages are in a section captioned "Bethlehem Township's History of 'Mt. Laurel' Compliance" and contain a discussion of the methodology used in the 1984 Master Plan to meet the municipality's affordable housing obligation. The section is a history of Mount Laurel compliance. It is not a fair share plan upon which COAH was asked to or can grant substantive certification. The submittal is written in the past tense: "Bethlehem township decided to plan for its future fair share housing obligation." It does not rely upon COAH's methodology, but rather one used in the courts: "Bethlehem township chose to calculate its housing obligation in accordance with the "consensus methodology...". The zoning technique pointed to by Bethlehem on pages 16 and 17 as constituting its fair share plan, the use of high density zoning for a planned unit development including affordable housing, was deleted from the Bethlehem zoning

ordinances by resolution initially adopted on March 2, 1995 and finally adopted on June 15, 1995. See, Ordinance No. 255-5-95, amending zoning ordinances and zoning map by eliminating PRD overlay zone. Pages 16 and 17 were clearly not intended by Bethlehem to constitute its fair share plan when the March 14, 1995 submission was voted on by the planning board or by the township committee. As stated by the township attorney in the March 2 minutes of the township committee, the submission "doesn't say how many units or how many units we are going to construct or how we are going to address it." The document filed with COAH, therefore, and the above history of Bethlehem's efforts to invoke COAH's jurisdiction clearly demonstrate that pages 16 and 17 were never adopted as a fair share plan and were not submitted to COAH as a fair share plan.

N.J.S.A. 52:27D-310 of the Fair Housing Act describes the required contents of a municipal housing element in terms that could also apply to a fair share plan:

A municipality's housing element shall be designed to achieve the goal of access to affordable housing to meet present and prospective housing needs, with particular attention to low and moderate income housing, and shall contain at least:...

e. A determination of the municipality's present and prospective fair share for low and moderate income housing and its capacity to accommodate its present and prospective housing needs, including its fair share for low and moderate income housing; and

f. A consideration of the lands that are most appropriate for construction of low and moderate income housing and of the existing structures most appropriate for conversion to, or rehabilitation for, low and moderate income housing,...

See also N.J.S.A. 52:27D-311 in which techniques for providing low and moderate income housing are listed as a required portion of a housing element.

The term "fair share plan" is not defined by the Fair Housing Act. However, at N.J.A.C. 5:93-1.3 "fair share plan" is defined as:

...that plan or proposal, which is in a form that may readily be converted into an ordinance, by which a municipality proposed to satisfy its obligation to create a realistic

opportunity to meet its fair share of low and moderate income housing needs of its region and which details the affirmative measures the municipality proposes to undertake to achieve its fair share of low and moderate income housing, as provided in section 9 and 14 of the Act, addresses the development regulations necessary to implement the housing element, and addresses the requirements of N.J.A.C. 5:93-7 through 11.

This definition of a fair share plan incorporates some of the statutory criteria for a housing element found at N.J.S.A. 52:27D-310. It also requires that the plan be in a form that "may be easily converted into an ordinance" and be a plan whereby the municipality proposes "to satisfy its obligation to create a realistic opportunity to meet its fair share of low and moderate income housing" pursuant to N.J.S.A. 52:27D-314.

With the above definitions in mind it is clear that Bethlehem's March 14 submittal to COAH meets neither the definition of a housing element nor the definition of a fair share plan. It does not meet the definition of a housing element found at the Fair Housing Act because it does not, for example, comply with the requirements of N.J.S.A. 52:27D-310(e) and (f). Similarly it does not meet the definition of fair share plan found at N.J.A.C. 5:93-1.3 in that it is not "in a form that may be readily converted into an ordinance" and, more importantly, does not constitute a plan by which Bethlehem Township proposes to satisfy its fair share obligation pursuant to N.J.S.A. 52:27D-314.

COAH arrives at this conclusion fully aware that the Legislature in the Fair Housing Act has articulated a strong preference for disputes involving affordable housing and exclusionary zoning to be resolved using the mediation and review process created in the Fair Housing Act. N.J.S.A. 52:27D-303. The Council in the past has, consistent with the intent of the Fair Housing Act, been liberal in interpreting the Fair Housing Act requirements of what municipal efforts are necessary to invoke and retain COAH's jurisdiction. For example, In Re Middletown - Request for Relief by Carlton Homes, Inc., Docket No. COAH 88-100(a), COAH decided a motion filed by a developer to either grant accelerated denial of Middletown's petition or a builder's remedy based upon repeated insufficiencies in the municipal fair share plan. The developer argued that based upon these insufficiencies the Council could not return a deficient plan to Middletown for additional work, but rather should return the matter to the Superior Court, which transferred the case to COAH. To this COAH responded:

Calton misinterpreted what has occurred in the present case. The Council did not reach a determination that Middletown's final

submission was so deficient that it did not constitute a housing element and fair share plan. If that were true, the case would have been returned to the court. Instead, the Council acted in a practical matter, in order to deal with a plan that in the Council's opinion met the basic criteria for submission but contained patent defects that would render mediation and review difficult and impractical. Thus, the Council did not act to relinquish jurisdiction but chose instead to require certain corrections in the plan to help ensure efficiency in the subsequent administrative process. The Council views such action as appropriate under the Act.

However, in the present case, unlike in the Middletown case, Bethlehem has not filed any fair share plan at all. Therefore, its March 14 submission is "so deficient that it did not constitute a housing element and fair share plan" and the Council, even though it desires to liberally construe the Fair Housing Act and its rules, cannot pretend that a fair share plan has been filed when it has not.

DECISION

This matter was transferred to the jurisdiction of COAH by decision of the Superior Court dated June 17, 1996. It is manifestly clear that despite the adversary proceedings in the Superior Court, the record upon which the Superior Court made its decision to transfer jurisdiction of this matter to COAH was, at the very least, incomplete. The court did not have before it the history of Bethlehem's attempts to adopt a housing element and fair share plan consistent with the requirements of the Fair Housing Act, as that history is set out in the minutes of the municipal planning board and township committee. Further, the court was not aware, as COAH now is, of the deficient nature of the submission made by Bethlehem to COAH on March 14, 1995, which was inaccurately captioned as a housing element and fair share plan. It is the filing of these documents upon which the court relied to transfer jurisdiction of the builder's remedy law suit to the Council, consistent with N.J.S.A. 52:27D-309(b). However, as is stated above, the March 14, 1995 submission to COAH is not sufficient for COAH to exercise its jurisdiction over Bethlehem Township's efforts with regard to its constitutional requirement to provide low and moderate income housing.

Bethlehem has petitioned for substantive certification of a nullity. Its March 14, 1995 submission does not constitute either a housing element or a fair share plan, as those terms are defined in the Fair Housing Act and in the Council's rules. There is nothing in the March 14 submission over which COAH can exercise its jurisdiction. Bethlehem's March 14 submission did not set out

what its fair share obligation was, consistent with COAH's current methodology, or how Bethlehem would meet that obligation. The submission consisted of "only the statistics." However, more than statistics is necessary to constitute either a valid housing element or a valid fair share plan. It is clear that Bethlehem by filing its March 14, 1995 submission desired to invoke COAH's jurisdiction. However, the Fair Housing Act is clear at N.J.S.A. 52:27D-309(b) that in order to invoke COAH's jurisdiction a municipality such as Bethlehem must file a housing element and a fair share plan consistent with the Council's rules and the Fair Housing Act prior to the institution of a builder's remedy law suit. Bethlehem did not do this.

The Superior Court, however, based upon the record before it, transferred jurisdiction to COAH over Bethlehem's housing element and fair share plan. COAH accepts this jurisdiction.

Consistent with that jurisdiction, COAH hereby determines that the Bethlehem Township March 14, 1995 submission is so inadequate when measured by the standards set out in the Fair Housing Act and COAH's rules that it does not constitute a housing element or fair share plan. Therefore, there is nothing in the March 14, 1995 submission upon which COAH can exercise its jurisdiction. Bethlehem has not filed a fair share plan for which substantive certification may be considered.

The New Jersey Council on Affordable Housing, for the reasons stated herein, dismisses the petition for substantive certification of the Township of Bethlehem filed on October 20, 1995 seeking substantive certification of its March 14, 1995 submission.


Renee Reiss,
Council Secretary

Dated: *April 2, 1997*