

6(b)

IN THE MATTER OF THE)
TOWNSHIP OF HOLMDEL)

COUNCIL ON AFFORDABLE HOUSING
DOCKET NO. 96-802

OPINION

On August 2, 1996 K. Hovnanian Acquisitions, Inc. (HAI), the holder of an option on land zoned for inclusionary development by the Township of Holmdel, filed a motion requesting the Council on Affordable Housing (COAH) to dismiss the repetition for substantive certification of Holmdel and to direct Holmdel not to change any ordinances implementing its previously certified plan, including zoning affecting the HAI site, until mediation has ended and COAH takes action on Holmdel's repetition. If Holmdel changed its ordinances, then HAI requested accelerated denial of Holmdel's petition. For the reasons stated below, COAH denies the relief requested in HAI's motion.

Background

On May 16, 1988 Holmdel received certification from COAH for a plan that addressed a 642-unit fair share obligation. Included in the plan was the HAI site that was to yield 32 total units, of which 24 were to be low and moderate income units. The site was not the subject of a mediated agreement or a court settlement. On May 10, 1994, COAH granted Holmdel interim certification conditioned on "continued implementation of its certified housing element and fair share plan."

On March 6, 1995 Holmdel filed an adopted housing element/fair share plan and petitioned to address its cumulative 12 year obligation of 771 units. Included in the plan was the HAI site which was to yield 70 total units containing 21 affordable units. No development application had been filed by HAI prior to the 12-year petition. HAI did not object to the plan and did not participate in mediation, although HAI was notified it could do so as the owner of a site in a housing plan.

There were two objections to the March 6, 1995 petition: Ottawa Developers, Inc. and Holmdel Valley Estates. Mediation was conducted, which resulted in two mediation agreements. The Ottawa Developers, Inc. agreement was signed by both parties on June 24, 1996. The Holmdel Valley Estates agreement was signed by both parties on May 13, 1996. Both agreements contained language stipulating that if the implementing ordinances were not adopted by Holmdel, then the agreements became null and void. One agreement with Ottawa Developers, Inc. resulted in implementing ordinances being adopted by Holmdel that ratified the agreement. The Mediation Report on the Ottawa site was presented to COAH at its August 7, 1996 meeting. The other agreement with Holmdel Valley Estates did not receive sufficient votes to adopt the implementing ordinances. A status report on mediation for the Holmdel Valley

Estates site was presented to COAH at its September 4, 1996 meeting.

On May 22, 1996 Holmdel filed an amended adopted housing element with COAH and a repetition. The repetition plan did not include the HAI site but did include both the Ottawa and the Holmdel Valley Estate sites. The Holmdel Township Planning Board adopted the amended housing element on May 21, 1996. The day before the adoption, on May 20, 1996, the township committee endorsed the proposed changes by vote of the governing body. No development application for the HAI site was filed prior to the repetition. However, a development application for the HAI site was filed on June 11, 1996.

The Motion

This motion was filed on August 2, 1996. Oral argument was held at the monthly COAH meeting of October 2, 1996, with Jeffrey Kantowitz, Esq., representing HAI and Jeffrey Surenian, Esq., representing Holmdel. After oral argument a motion was made that the matter be referred to a COAH task force. In addition, Holmdel was directed on October 2 to honor the terms of its previously certified plan and the parties were directed to engage in an expedited mediation based upon HAI's objection to Holmdel's repetition. The mediation did not result in an agreement between the parties and a mediation report was issued on January 6, 1997. On January 8, 1997 the motion was considered by the Council and the relief requested by HAI was denied for the reasons stated herein.

Position of HAI

In its motion papers filed on August 2, HAI states that Holmdel's repetition must be dismissed because the township committee's endorsement of the proposed amended plan occurred the day before the planning board actually adopted the amended plan. Therefore, HAI contends that the governing body's action was not an authorized repetition because the new plan had not been duly adopted before governing body action. Further, it was HAI's position that COAH should direct Holmdel not to change its previously certified plan until after mediation and final action is taken by COAH. HAI states that until there is a true repetition, the previously certified plan must remain unchanged and in place. HAI also stated that Holmdel was continuously advised of HAI's interest in developing the property under the zoning of the 1988 certified plan and the zoning proposed in the 1995 plan. Finally, HAI objects that the Holmdel repetition relies upon "paper" bonus rental credits. HAI claims it is ready and willing to build actual affordable housing units.

Position of Holmdel

Holmdel argued in opposition that the provisions of N.J.A.C. 5:93-5.12(b) do not apply to HAI and that Holmdel is therefore not required to retain the previously certified zoning

on the HAI site that the township indicated in its repetition it wishes to remove. N.J.A.C. 5:93-5.12(b) states:

"Sites zoned for inclusionary development in addressing the 1987-1999 housing obligation shall retain such zoning in the petition addressing a 1987-1999 fair share obligation if:

1. The site was subject to an agreement pursuant to the Council's mediation process or part of a negotiated settlement in court: or
2. The developer of the site has filed a development application with the municipality prior to the expiration of the 1987-1999 substantive certification period or the municipal petition for substantive certification whichever is later."

Holmdel states that HAI's site was not subject to a mediated agreement approved by either COAH or the court and that HAI did not file a development application prior to the March 6, 1995 12-year petition, nor prior to the May 23, 1996 repetition. The development application for the HAI site was filed on June 11, 1996. Therefore, argues Holmdel, N.J.A.C. 5:93-5.12(b) does not apply.

Holmdel further states that nowhere in COAH's regulations or the Fair Housing Act is there a requirement that a municipality's endorsement of a housing element precede a planning board's adoption of the housing element. Holmdel can see no legitimate reason not to accept the filing that was endorsed by the township committee the night before the planning board adoption instead of the night after. Further, Holmdel states ". . . an examination of the language of the Amendment to the Housing Element and the Amendment to the Fair Share Plan reveals the Township and Planning Board described the new plan in exactly the same way."

Even if there was a procedural defect, Holmdel argues that COAH should allow Holmdel to cure any defect. Holmdel cites the Fanwood case, a 1988 COAH opinion, in which the borough filed a housing element with COAH prior to its adoption. COAH then gave the borough the opportunity to cure because the requirement to adopt prior to filing was a COAH requirement, not a statutory requirement. Holmdel also argues that an endorsement of a housing element is not a statutory requirement under the Fair Housing Act.

Holmdel further states that since there is no obligation to retain zoning from its previously certified plan, then COAH should not require Holmdel to keep the original zoning in place until certification is granted or denied. Holmdel alleges that HAI has no "vested rights" and is now trying to secure "vested rights"

through the planning board approval process that HAI cannot secure otherwise.

Finally, Holmdel argues that HAI should not restrain Holmdel from exercising its home rule powers to achieve constitutional compliance with its amended plan. Holmdel states that HAI is trying to secure a planning board approval of a presently pending development application and render ". . . moot any victory Holmdel may achieve in securing approval of its presently pending repetition for substantive certification."

A certification from the Holmdel consulting planner, Michael Bolan, was also submitted in which he states that COAH has indicated that housing plans may change as a result of agreements achieved through mediation. He further states that in the 1995 adopted plan, the planning board made clear its intention to modify the plan. HAI was notified of this intent to remove the HAI site in separate letters to HAI dated December 27, 1995, February 12, 1996, April 8, 1996, May 22, 1996 and June 14, 1996.

HAI's Response to Holmdel

On September 30, 1996 HAI submitted a response to the arguments raised by Holmdel. HAI noted that the Holmdel governing body had not approved the mediated agreement with Holmdel Valley Estates. HAI, therefore, contended that because the zoning for the Holmdel Valley Estates site was not enacted, the repetition of Holmdel plan could not be implemented, because it included and relied upon the rejected zoning of the Holmdel Valley Estates property. Therefore, Holmdel's submitted plan upon repetition is deficient and Holmdel must again repetition with another amended plan.

HAI further contended that because a new petition must now be submitted, HAI falls within the provisions of N.J.A.C. 5:93-5.12(b); that the HAI site must be included in a new Holmdel compliance plan; that Holmdel must continue the zoning on HAI's property from its previously certified plan, and that Holmdel's "home rule" argument is untenable.

HAI also argued that because there is no viable mediated agreement with Holmdel Valley Estates, there is no viable plan and Holmdel must now adopt a new plan and repetition again. By not ratifying the agreement, Holmdel had a shortfall, HAI stated, and HAI is ready to offer its site to address the shortfall.

HAI further contended that Holmdel interpreted N.J.A.C. 5:93-5.12(b) too narrowly. HAI observed that Holmdel stated that the requirements of the rule relative to filing a development application only occur prior to a petition for certification and not prior to a repetition. HAI disagreed and stated that the rule is relevant to a repetition. In addition, where towns had knowledge of a developer's interest, such sites should be covered and included in the plan, according to HAI. HAI stated that

N.J.A.C. 5:93-5.12(b) was designed to protect developers of previously zoned sites where there was sufficient evidence of development activity.

As to the Fanwood decision, HAI stated that the case is not relevant because COAH has now adopted new procedural rules that address the issue.

The Decision

Neither COAH regulations nor the Fair Housing Act define the sequence of municipal action required for a petition or repetition. The requirements of N.J.A.C. 5:91-2.2 address the filing of a housing plan without a petition. N.J.A.C. 5:91-2.2 states:

"The Council shall accept a municipal housing element and fair share plan for filing without a petition only under the following conditions:

1. The municipal planning board has adopted the housing element as part of the municipality's master plan pursuant to the Municipal Land Use Law (N.J.S.A. 40:55D-1 et seq.); and

2. The governing body of the municipality has passed a resolution of participation which: i. Endorses the housing element and fair share plan; and ii. Requests participation in the Council's administrative process."

The regulation clearly lists the actions necessary but does not state that the requirements be done in a specific sequence.

In this matter, Holmdel filed an amended adopted housing element which was adopted by the Holmdel Township Planning Board on May 21, 1996. The township committee endorsed the amended housing plan on May 20, 1996. Although the planning board action occurred after the governing body action, the Holmdel governing body knew of the contents of the amendment when the elected officials voted for the repetition. The planning board and the governing body both voted on the plan that the municipality then submitted to COAH in its repetition. Therefore, the repetition was not invalidated by the sequence of the actions endorsing the plan by the planning board and the governing body.

Further, it is clear that HAI did not file a development application prior to Holmdel's initial petition of March 6, 1995 or to Holmdel's repetition of May 22, 1996. HAI filed a development application on June 11, 1996. Therefore, the provisions of N.J.A.C. 5:93-5.12(b) are not applicable to the HAI site and HAI's

site has no protected status under COAH's rules. Because of this, COAH will not order Holmdel to include the HAI site in its repetitioned plan. Nor will COAH at this time order Holmdel to not change any ordinances implementing its previously certified plan, as they pertain to HAI, or grant an accelerated denial if Holmdel changes those ordinances. Mediation has ended unsuccessfully and a careful review of Holmdel's plan shows that the HAI site is not needed for Holmdel to meet its affordable housing obligation.

None of the other issues raised by the parties relative to this motion need be addressed at this time in light of the above decision.

C. Free Press

date February 5, 1997