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IN THE MATTER OF)
THE TOWNSHIP OF)
EAST GREENWICH)
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COUNCIL ON AFFORDABLE HOUSING
COAH DOCKET NO. 98-1003

OPINION

This motion arises out of a court order dated April 30, 1998 issued by the Honorable Robert E. Francis, J.S.C. in Hayley Run Limited Partnership, et al v. Township of East Greenwich, Superior Court, Law Division, Gloucester Co., Docket No. L-2402-97, an exclusionary zoning suit. The order states that:

This action is stayed for the parties to submit the issue of jurisdiction to the Council on Affordable Housing. If the Council determines that it has proper jurisdiction, then it shall decide the matters at issue between the parties herein. If the Council determines that it does not have jurisdiction, then the matters at issue between the parties herein shall be returned to this Court for resolution.

This motion regarding the jurisdiction of the Council on Affordable Housing ("COAH" or "the Council") was, therefore, briefed by the parties and orally argued before the Council at its meeting of August 5, 1998 with Mark A. Vittese, Esq. representing Hayley Run Limited Partnership, CPD Development, Inc., and Joseph and Dorothy Palladino, developers and land owners in East Greenwich ("the developers"), and Raymond J. Zane, Esq., representing East Greenwich Township and the Mayor and Council of East Greenwich ("the township"). This is the Council's decision with regard to the jurisdictional issues raised by the parties.

BACKGROUND

East Greenwich Township/Gloucester County received a first round substantive certification from COAH on October 2, 1991 for a 163-unit obligation, all new construction. This certification was to expire on October 2, 1997. Consequently, on October 2, 1997, East Greenwich filed with COAH a housing element and fair share plan to address its 276-unit cumulative second round obligation. The housing element and fair share plan were adopted by the planning board on September 30, 1997. The township committee endorsed the housing element and fair share plan on September 23, 1997, which preceeded the adoption by the planning board, but the township committee did not vote to petition the COAH at that time. Thereafter, the East Greenwich Township Committee adopted a second resolution on October 14, 1997 which was a petition for substantive certification of the housing element and fair share plan adopted by the planning board on September 30, 1997.

The developers filed an exclusionary zoning suit on October 3, 1997. The complaint was also forwarded to COAH as an objection to the housing element and fair share plan. East Greenwich filed a motion in the Superior Court suit to dismiss the complaint. After oral argument, the Court entered the April 30, 1998 order that stayed the matter and necessitated this motion with regard to the Council's jurisdiction. The positions of the parties are as follows:

EAST GREENWICH

East Greenwich states that it filed a housing element and fair share plan with COAH and then petitioned within two years of the filing. East Greenwich acknowledges the filing of the lawsuit but believes the township falls within COAH's jurisdiction as per N.J.A.C. 5:91-2.1. Moreover, East Greenwich notes that the developers filed as objectors with COAH and that COAH must adjudicate the matter before the Court does.

The township's position is that the proper filings to invoke COAH's jurisdiction were submitted prior to October 2, 1997 and that COAH has jurisdiction pursuant to N.J.A.C. 5:91-2.2.

DEVELOPERS

The developers state that COAH does not have jurisdiction because the resolution of the East Greenwich governing body endorsing the housing element and fair share plan is improper because the governing body resolution was passed prior to the planning board adoption of the housing element.

Further, the developers argue that the adoption of the housing element and fair share plan is null and void because East Greenwich failed to have the documents available for public inspection prior to adoption, as required under the Municipal Land Use Law (MLUL). The developers state that on September 23, 26, 29 30 and October 1, 1998 they or their representatives were at the Greenwich municipal building requesting to review any and all documents regarding the revised or amended housing element, fair share plan or amended Master Plan of East Greenwich. They state that no documents were available for review and that on October 2,

1997 (after the planning board adopted the housing element) the East Greenwich clerk told them that the Resolution authorizing the planner to start preparing the new documents had just been memorialized and that there were no documents for inspection at this time as no new Housing Element, Fair Share Plan and Master Plan had been adopted or even prepared.

REPLY

East Greenwich Township submitted no response to the brief filed by the developers. However, on July 30 the Township forwarded to COAH an Affidavit of Susan Costill, Municipal Clerk of East Greenwich. Ms. Costill states in her affidavit that the township housing element and fair share plan were available in her office for review "since September 19, 1997." She states that representatives of the developers on several occasions.

... appeared at the Township office and asked me about a new Master plan and new ordinances. I explained that the only new ordinances being considered were the "development fee" ordinance and a "sidewalk fee in lieu of" ordinance. I gave him copies of these ordinances. He asked for a new Master Plan. There is no new Master Plan. The Township has authorized a new Master Plan, but it has just been started and at no time did he ask for the Housing Element, which was readily available.

The developers filed a letter brief in reply stating that the issue of whether the township properly adopted the housing element and fair share plan is essential to COAH's decision on the issue of jurisdiction. If the housing plan was not properly adopted, then COAH does not have jurisdiction. The developers

further argue that the Court is the proper venue for this determination because the issue of whether a municipal adoption of a housing element is proper and consistent with the MLUL is clearly an issue that should be addressed by the Superior Court.

The developers also believe that the issue of whether the documents submitted to COAH constitute a petition should also be determined by the Court.

DISCUSSION AND DECISION

East Greenwich forwarded a letter to COAH dated October 1, 1997 that was received on October 2, 1997. Included in the submittal was a document entitled "Housing Element and Fair Share Plan for East Greenwich Township, Gloucester County" which had an adoption date of September 30, 1997 on the cover. Fourteen Exhibits were attached. Also included was the planning board resolution dated September 30, 1997 adopting the housing element and fair share plan and the endorsement by the governing body dated September 23, 1997.

The developers argue that because the governing body resolution was passed prior to the planning board adoption of the housing element COAH does not have jurisdiction. However, N.J.A.C. 5:91-2.2 sets out the filing requirements for a housing element and fair share plan. The requirements are that the a municipal planning board adopt the housing element as part of the municipality's master plan and that the governing body of the municipality pass a resolution of participation which (a) endorses the housing element and fair share plan and (b) requests that the plan remain on file without a petition. This regulation does not

set out a particular sequence for these required municipal acts; nor does the Fair Housing Act.

In its motion decision In the Matter of the Township of Holmdel dated February 5, 1997 this Council held that N.J.A.C. 5:91-2.2 did not require a particular sequence for the planning board adoption and the governing body resolution with regard to a repetition for substantive certification. There is no essential difference between a repetition and a petition. Therefore the Holmdel motion decision is controlling in this matter. As such the sequence in which the planning board and governing body of East Greenwich acted with regard to the township's housing element and fair share plan does not present deficiencies that would deprive COAH of jurisdiction over East Greenwich's housing element and fair share plan have. See, N.J.A.C. 5:91-2.2 and the Holmdel decision.

The developers also have raised an issue with regard to whether the township in adopting its housing element complied with a requirement of the MLUL that documents for which approval is sought at a hearing be available for public inspection at least 10 days before the date of the hearing. N.J.S.A. 40:55D-10(b). Further, the developers argue that municipal non-compliance with this requirement deprives COAH of jurisdiction over East Greenwich and that this issue, because it involves interpretation of the MLUL, should not be decided by COAH, but rather by the Superior Court.

There is clearly a contested issue of fact with regard to whether the appropriate, required documents were available for public inspection prior to East Greenwich's adoption of its housing

element. East Greenwich has submitted an affidavit of its municipal clerk which contradicts the statements of the developers with regard to the availability of the documents for public inspection prior to the adoption of the housing element. This contested issue of fact is material to COAH's determination of whether it has jurisdiction over East Greenwich's housing element and fair share plan.

The developers also argue that issues involving the municipal adoption of a housing element and fair share plan under the criteria of the MLUL must be determined in the Superior Court. See Alexander's Department Stores, et al v. Borough of Paramus, et al., 101 N.J. 100 (1991). However, this matter has been specifically transferred to COAH to determine issues related to COAH's jurisdiction by Judge Francis in his April 30 order. Moreover, COAH is quite used to dealing with issues relating to the MLUL and interpreting provisions of that act. Therefore, the Council will follow its normal practice and send this matter to the Office of Administrative Law ("OAL") for an adversary hearing with regard to the issue of whether the MLUL requirement at N.J.S.A. 40:55D-10(b) was met when East Greenwich adopted its housing element. Additionally, the OAL should consider, if it determines that the provisions of N.J.S.A. 40:55D-10(b) were not complied with, what are the consequences of this non-compliance to COAH's jurisdiction over East Greenwich's Mount Laurel compliance efforts. In ordering this matter to be transferred to the OAL, COAH believes that it is complying with the specific intent and wording of Judge Francis' Order of April 30, 1998.

Therefore, COAH orders that this matter be transferred to the OAL
for further proceedings consistent with this opinion.

Gene Feiss

date: September 2, 1998