

IN THE MATTER OF THE)
HOUSING ELEMENT AND FAIR)
SHARE PLAN FILED BY THE)
TOWNSHIP OF BRANCHBURG)

COUNCIL ON AFFORDABLE HOUSING
COAH MOTION NO. 98-1012
OPINION

The New Jersey Council on Affordable Housing ("COAH" or "the Council") granted first round substantive certification to the Township of Branchburg ("Branchburg") in Somerset County on October 3, 1990. That first round substantive certification expired on October 3, 1996. A second round housing element and fair share plan was adopted by the Branchburg Township Planning Board on August 26, 1997 and endorsed by the township committee on April 13, 1998. On May 15, 1998 the township filed the element and plan with COAH, but did not on that date petition for substantive certification of that plan.

Branchburg has a 12 year cumulative obligation of 309 units of affordable housing: 302 units of new construction and seven units of rehabilitation. The township in its adopted and filed housing element and fair share plan is seeking credits and reductions for 100 units transferred by a Regional Contribution Agreement (RCA), 40 units of credit for for-sale units at a development known as Cedar Brook, 70 units of credit for rental units at a development known as Whiton Hills, three units of credit for rehabilitation units, eight credits for substantial compliance and 54 rental bonus credits. Branchburg proposes in its filed housing element and fair share plan to address its remaining fair share obligation through construction of a 48-unit alternative living rental project at the Midland School for housing developmentally disabled adults at that institution.

Branchburg Builders, Inc. ("Branchburg Builders") is the contract purchaser of property in Branchburg. On October 7, 1998 Branchburg Builders filed an exclusionary zoning lawsuit in Superior Court alleging that Branchburg was in violation of its constitutional Mount Laurel obligation. The builder's remedy suit was filed less than two years after Branchburg had filed its housing element and fair share plan with COAH.

On November 10, 1998 Branchburg Builders filed this motion with COAH requesting that COAH dismiss Branchburg's housing element and fair share plan. The motion was supported by a legal brief and an accompanying planning report of Arthur Bernard, P.P., analyzing Branchburg's housing element and fair share plan. Also attached to the Branchburg Builders' motion was an appendix including Branchburg's housing element and fair share plan.

Branchburg Builders' motion relies in substantial part on the Council's April 2, 1997 motion decision In re Bethlehem Township, a copy of which was also attached to Branchburg Builders brief, in which the Council dismissed Bethlehem Township from its jurisdiction because Bethlehem had failed to file either a housing element or fair share plan with COAH for which substantive certification could be considered. Branchburg Builders argues that, similarly, Branchburg's filed housing element and fair share plan are so deficient as to deprive COAH of jurisdiction over Branchburg's Mount Laurel compliance efforts. Specifically, Branchburg Builders claims that Branchburg's fair share plan seeks credit contrary to COAH's rules for 70 units of built low and moderate income rental housing on the Whiton Hills site, of which 24 are low income units and 46 are moderate income units, because Branchburg was required by its first substantive certification to develop the Whiton Hills project as half low and half moderate income rental housing. Further, Branchburg Builders challenges Branchburg's request for a rental bonus credit for the Whiton Hills housing and also challenges Branchburg's claim for credits for substantial compliance based upon the Whiton Hills housing. In addition, Branchburg Builders challenges that portion of Branchburg's filed fair share plan that seeks to meet its Mount Laurel housing obligation with 48 units of alternative living units for developmentally disabled adults at the Midland School. Branchburg Builders characterizes this housing as "student housing for adult students" and states that such housing has consistently been ruled by the courts and COAH to not be acceptable to meet a Mount Laurel obligation. Therefore, for these and other reasons,

Branchburg Builders claims that Branchburg's fair share plan "...shows a shortfall of 78 units. Indeed, as more fully detailed in the report of Arthur Bernard, the plan on its face shows a shortfall of 89 units."

Branchburg filed a letter brief in opposition to Branchburg Builders' motion on December 23, 1998. A reply brief was filed by Branchburg Builders on January 21, 1999. Oral argument was held on the motion at COAH's monthly meeting of April 7, 1999. After oral argument, the Council voted unanimously to deny Branchburg Builders' motion. This opinion memorializes that decision and also explicates the decision pursuant to R. 2:5-1(b)*.

Branchburg's housing element and fair share plan were adopted by its planning board on August 26, 1997, endorsed by the township committee on April 13, 1998 and filed with COAH on May 15, 1998. The filed housing element and fair share plan meet the criteria for invoking COAH's jurisdiction, as those criteria are outlined in COAH's motion decision In re Bethlehem Township.

Specifically, in Part V of Branchburg's filed housing element and fair share plan, captioned "Fair Share Obligation", which appears between pages 24 and 37 of the Branchburg housing element and fair share plan, Branchburg establishes what its affordable housing obligation under COAH's rules must be and presents a fair share plan to meet that obligation. Branchburg acknowledges in its filing that it has a total cumulative precredited need of 309 affordable units. It then requests credits and reductions for affordable housing created in the township consistent with COAH's rules and Branchburg's prior substantive certification. Thereby, Branchburg asserts that its precredited need has been reduced to a calculated need of 34 units of affordable housing. Branchburg then proposes as its fair share plan to meet that calculated need with alternative housing for

*On April 13, 1999 Branchburg Builders filed a Notice of Appeal with the Appellate Division from COAH's denial of this motion. COAH has since moved to have this appeal dismissed as interlocutory.

developmentally disabled adults at the Midland School that Branchburg had approved for construction on November 7, 1996. This project is to be known as the Midland Residential Community. The Midland Residential Community consists of 48 units of developmentally disabled rental housing and Branchburg seeks credit for 34 units of that low income rental housing to meet its 34 unit calculated need. The Branchburg fair share plan notes that this housing would only meet COAH's affordability criteria for low income housing if the Midland Residential Community is treated as an assisted living facility and presents calculations to substantiate that the units are in fact low income rental units.

In holding that Branchburg's filed housing element and fair share plan are sufficient to invoke COAH's jurisdiction over Branchburg's Mount Laurel compliance efforts, a conclusion that here compels a denial of the Branchburg Builders' motion, COAH is aware of Branchburg Builders' criticisms of Branchburg's filed housing element and fair share plan that were contained in Branchburg Builders' motion and attached legal brief and planner's report. However, the criticisms lodged by Branchburg Builders at Branchburg's filed housing element and fair share plan are not sufficient to deny COAH jurisdiction over Branchburg's plan. See, In re Middletown - Request for Relief by Calton Homes, Inc., Docket No. COAH 88-100(a). In fact, COAH's analysis of Branchburg's fair share plan at this point of filing reveals that this plan is no better or worse than many plans that have been routinely filed with COAH. As such, COAH's rules contemplate that such plans may change during COAH's process and that during the COAH process municipalities may have to amend plans and repetition on the amended plans. See, N.J.A.C. 5:91-1 et seq. Rather, the criticisms presented by Branchburg Builders in support of its motion are the kind of criticisms that are most appropriately treated as objections to Branchburg's plan, objections that will trigger mediation pursuant to N.J.S.A. 57:27D-315.

In Bethlehem COAH held that the document filed with COAH to invoke its jurisdiction included neither a housing element nor

a fair share plan under the most liberal possible interpretation of the Fair Housing Act and COAH's rules. Here, however, Branchburg has filed a housing element and fair share plan that is consistent with the Fair Housing Act and COAH's rules. For example, unlike the filing in Bethlehem, Branchburg's filed element and plan meet the criteria of N.J.S.A. 52:27D-310(e) and (f). Also, unlike the filing in Bethlehem, Branchburg's filed element and plan comport with the requirements of N.J.S.A. 52:27D-314 in that they constitute a plan by which Branchburg proposes to satisfy its fair share obligation.

Therefore, COAH's holding in Bethlehem does not apply to Branchburg's filed housing element and plan, as Branchburg Builders asserts. Branchburg has filed a housing element and fair share plan that is sufficient to invoke COAH's jurisdiction over Branchburg's Mount Laurel compliance efforts. For that reason, Branchburg Builders' motion seeking COAH's dismissal of Branchburg's housing element and fair share plan must be denied.


RENEE REISS
Council Secretary

Dated: 5/5/99