

IN RE THE BOROUGH OF
HIGH BRIDGE

) NEW JERSEY COUNCIL ON
) AFFORDABLE HOUSING
) COAH DOCKET NO.: 99-1101
) MOTION DECISION

On March 26, 1999, the Borough of High Bridge ("Borough" or "High Bridge") filed a motion with the New Jersey Council on Affordable Housing ("the Council" or "COAH") seeking to amend the Borough's certified fair share plan to eliminate a site included in the plan as a site for an inclusionary development, known as the Catanzareti site, or to reduce the density of housing on the site. Also, the motion sought a waiver of the requirements of N.J.A.C. 5:93-5.13(b), which states that sites such as the Catanzareti site which were zoned consistent with a mediated agreement and included in a municipality's first-round certified fair share plan must continue to be included in a municipality's second-round plan. The sought rule waiver would then allow the Borough to utilize other methods of meeting its fair share obligation than the inclusionary zoning of the Catanzareti site.

High Bridge was granted substantive certification for COAH's first round on April 4, 1988. In its first-round certification the Borough's 39 unit housing obligation of 20 units of rehabilitation and 19 new construction units was met by zoning for an inclusionary development on the Catanzareti site. On February 26, 1997, High Bridge petitioned for substantive certification of a second-round plan. COAH received no objections to High Bridge's February 1997 petition. High Bridge's cumulative 12-year second-round obligation is 51 units of housing, 24 of which are rehabilitation units and 27 of which are new construction units. Included in the Borough's adopted second-round fair share plan is zoning for an inclusionary development on the Catanzareti site. High Bridge's second-round fair share plan has not to date received substantive certification from COAH.

The Catanzareti site is a 47 acre parcel of land owned by Pat Catanzareti. Catanzareti was one of three plaintiffs involved in a Mount Laurel builder's remedy Superior Court litigation against High Bridge that was transferred to COAH in December 1985. The parties resolved the litigation by entering into a settlement agreement dated October 1987 and executed in 1988. The current zoning for the Catanzareti site resulted from this settlement agreement. The zoning will yield a total of 170 units of housing, including 34 affordable units. The property is being developed in two phases. Phase I received preliminary approval from the Borough on August 1, 1994 and has been fully developed with 32 single-family homes. There were no affordable units built in Phase I of the project. Phase II of the project comprises the remaining market units, as well as the 34 affordable units. Catanzareti submitted an application for subdivision approval for Phase II of the development, but the High Bridge Borough Planning Board deemed the application incomplete because it did not contain a site plan application for the affordable units and ultimately denied the subdivision application. Thereafter, Catanzareti filed suit in Superior Court from the planning board's denial of the subdivision application. The litigation is currently ongoing.

The Borough's motion seeks several alternative forms of relief, all of which are directed towards eliminating or reducing the utilization of the Catanzareti site to meet High Bridge's affordable housing obligation. Specifically, the Borough requests a waiver of the requirements of N.J.A.C. 5:93-5.13(b) regarding the retention of sites such as the Catanzareti site, which are included in previously certified plans and subject to mediated agreements, and also seeks an amendment of its second-round petition to exclude the Catanzareti site from High Bridge's fair share plan. Alternatively, the Borough seeks to amend the 1987 settlement agreement between the Borough and Catanzareti to allow for a decreased density on the Catanzareti site "so as to be consistent with the site's environmental problems". Further, High Bridge

requests COAH's leave to amend its petition to permit the Borough to alter the terms of its petition for substantive certification to use credits without controls or other available techniques to meet its Mount Laurel obligation and replace the inclusionary zoning on the Catanzareti site.

The Borough's motion is supported by the certifications of Art Bernard, P.P.; Alfred Schweikert, the Mayor of the Borough of High Bridge; and Jack Wright, a public health investigator from the Hunterdon County Department of Health; as well as a legal brief filed by Peter A. Buchsbaum, Esq., the attorney for the Borough of High Bridge. In these submissions the Borough argues that COAH should not require the Borough to comply with the eleven year old settlement agreement with Catanzareti because such compliance "would work an unnecessary hardship on the Borough, its taxpayers and ultimately those seeking low and moderate income housing in the Borough." As such, the Borough seeks a waiver of N.J.A.C. 5:93-5.13.

In support of its contentions, the Borough presents a history of Catanzareti's relationship with the Borough, which it characterizes as demonstrating that Catanzareti's "status as a developer of low and moderate income housing...runs contrary to COAH's stated goals." Specifically, the Borough notes that in 1994 Catanzareti instituted a lawsuit against the Borough and commenced a companion action before COAH with regard to the Borough's requirement in its Phase I approval that he make certain improvements to Dewey Avenue. The Borough states that a settlement agreement entered into as a consequence of these actions required Catanzareti to make improvements along Dewey Avenue, improvements which he has not yet made, and also required Catanzareti to pay \$185,000 for these improvements, money which he has not yet paid. Further, the Borough states that Catanzareti's August, 1998 application to the Borough planning board to develop Phase II of his development was "woefully inadequate" in that he did not submit

a site plan for the required low and moderate income units. Also, the Borough submitted a certification of Bernard, which states that Catanzareti's proposed development of Phase II at his site ignores the site's environmental and geographic constraints and violates Borough ordinances. Also, the Bernard certification notes that the 9.73 acre parcel Catanzareti has designated for low and moderate income housing lies in the "most environmentally sensitive portion of Phase II."

The Borough also argues in support of its motion that "under the unique facts of this case in which a developer repeatedly refuses to comply with the terms of agreements and ignores legitimate planning concerns, COAH may as a matter of public policy determine that the developer's actions are no longer consistent with sound planning and the general welfare." The Borough characterizes Catanzareti's pattern of behavior as "cavalier" with regard to his disregard of the health and welfare of the residents of the Borough. The Borough states that Catanzareti paid a \$3,000 fine because of health code violations, as set out in the certification of Wright, with regard to the demolition of a building on the property that contained asbestos. Further, the Borough's claims that Catanzareti violated the Borough's soil erosion and sediment control ordinance and was ultimately issued a summons by the Borough engineer because a large pile of topsoil on the Catanzareti property created a mud slide in which a young girl slipped and fell while going to school. Also, the Borough states that Catanzareti's failure to commence paying \$185,000 in conformance with the Dewey Avenue settlement agreement has jeopardized the Borough's ability to obtain matching funds for the construction of Dewey Avenue improvements from the DOT.

Finally, the Borough argues that Catanzareti's behavior does not constitute a realistic opportunity for the creation of low and moderate income housing. Therefore, the Borough argues that it should not be required to retain Phase II of the Catanzareti

development in its housing element and fair share plan as an inclusionary development for the provision of affordable housing. Rather, the Borough would prefer to meet its affordable housing obligation in another manner, such as through the use of credits without controls or another COAH authorized method.

In response, Catanzareti filed a letter brief from his attorney, James H. Knox, Esq., supported by certifications from himself and Elizabeth C. McKenzie, P.P., planning consultant, Catanzareti acknowledges that there have been "serious disagreements with the municipality" and that there is the appearance of "bad blood". He also states that the municipality has sought to retaliate against him in various ways. He notes that there is currently a Superior Court lawsuit that he has instituted which involves issues regarding the \$185,000 due under the Dewey Avenue settlement, the soil erosion issues and the planning board's denial of his subdivision application. Further, he states that one "general thrust" of his Superior Court litigation is that the entire series of municipal and planning board actions against him detailed in the Borough's motion constitute "an organized, concerted effort to thwart the development of his low/moderate income project, in violation of the Fair Housing Act and the 1988 Settlement." As such, Catanzareti argues that COAH "should not involve itself in the squabbling" between himself and the Borough, which he believes is properly before the Superior Court. Rather, he argues that COAH should "ignore the Borough's attempts to 'demonize'" him and should support the enforceability of the 1988 settlement agreement pursuant to N.J.A.C. 5:93-5.13(b) that was arrived at through negotiations between Catanzareti and the Borough as part of COAH mediation. Further, Catanzareti argues that no waiver of that settlement agreement should be allowed by the Council and that all other matters raised by the Borough should be left to the litigation currently pending in Superior Court.

With regard to the site suitability issues raised by the Borough as set out in the Bernard certification, Catanzareti presents a certification by McKenzie and argues that Bernard's allegations are either erroneous or have been known to the Borough when it agreed to the development of the property. Catanzareti notes that the 1988 settlement agreement was, until recently, supported by the Borough and that COAH's grant of substantive certification, which depended upon the settlement agreement, has had the effect of protecting the Borough from builder's remedy lawsuits from other developers seeking to build affordable housing. Catanzareti notes that there was a sewer moratorium in place between 1988 and 1994 which prevented development of his property and denies the Borough's allegations of delay on his part in achieving affordable housing on his property. Further, Catanzareti states that in 1995 Bernard authored a report in support of the Borough's fair share plan in which he characterized the Catanzareti site as "approvable, available, developable and suitable" and that even though Bernard acknowledged in his 1995 report that "portions of the site do have slopes in excess of 15%" he went on to state that "the Catanzareti tract contains no environmental constraints that would preclude the development envisioned for the site." Catanzareti states that Bernard's current certification in support of the Borough's current motion contradicts his 1995 statements made in support of the Borough's petition for certification of its fair share plan.

In conclusion, Catanzareti argues that the change in the Borough's attitude towards the development of his property as a site for affordable housing is the product of a political change in the Borough. He states that the current mayor "has pledged to the voters of High Bridge that he will somehow 'prevent construction' of this project" and attaches a newspaper article to his certification to document the mayor's statements. Catanzareti also states that the municipality has attempted to purchase his property in order to prevent its development, but that he is unable to sell

the property because of a contract between himself and a developer. Further, Catanzareti states that the Borough's actions, including the present motion, are part of an overall strategy to "...delay, harass, [and] intimidate [him] until he runs out of money, the real estate market turns negatively, or he simply gives up the fight." In support of this contention he quotes the mayor as saying in the newspaper article "In the long run, its cheaper to keep him (Catanzareti) in court than to allow him to build." For all these reasons, Catanzareti argues, the Council should support the 1988 settlement agreement and deny the motion filed by the Borough.

Oral argument was held on the Borough's motion at COAH's regular monthly meeting of May 5, 1999. After oral argument the Council voted to deny the Borough's motion. This denial is consistent with all of COAH's prior rulings with regard to mediated agreements. COAH has uniformly in its prior decisions supported and enforced mediated agreements.

For example, in a prior motion decision involving Howell Township, COAH ordered the Township to comply with the terms of a mediated agreement and to zone as a 60 day condition of certification a particular site in the municipality as it had agreed to do in a mediated agreement. If Howell did not do so, COAH would not grant final certification. Howell was based on an interpretation of the Council's rules regarding previously certified sites. The site in question was similar to the Catanzareti site in that it had previously been included in

'In a recent motion decision involving the Township of Middletown, the Council, over the objection of a municipal signatory to a mediated agreement, allowed a mediated agreement to be modified to allow additional affordable housing to be created on an inclusionary site. Both Middletown and the owner/developer of the site supported the requested modifications. However, the Council has never permitted a mediated agreement to be unilaterally modified by a municipality without the agreement of the owner or developer of the site.

Howell's first-round certified plan as an inclusionary development providing affordable housing. As a previously certified site, like the Catanzareti site, the Howell site was governed by N.J.A.C. 5:93-5.13 and was required to be included in Howell's plan. A mediated agreement between the site's developer and the municipality then altered the density on the site and provided for an exclusively market rate development, with the payment of a development fee. This mediated agreement therefore allowed the municipality to proceed with its fair share plan. In enforcing this mediated agreement, COAH held that the municipality could not act in a fashion contrary to the mediated agreement and receive certification from the Council.

In another motion decision involving the Township of Hillsborough, the Council revoked certification from Hillsborough because of its failure to support the development of an inclusionary site, known as the HAAL site, that was the subject of a mediated agreement between Hillsborough and the developer of the site. Further, the Council stated that if Hillsborough wished to file a new petition with the Council subsequent to the Council's revocation of its certification, Hillsborough would have to include a new agreement for the development of the HAAL site in any future fair share plan filed with the Council. COAH explained this decision as follows:

There are sound policy reasons why the Council will not permit Hillsborough to ignore the HAAL site in a future fair share plan. Consistent with the Fair Housing Act and the MLUL, both Hillsborough and HAAL entered into a mediated agreement as part of COAH's process and Hillsborough sought and received certification based upon this agreement. It would be a waste of this Council's time and effort in administering the Hillsborough plan, conducting the required mediation, granting certification, and defending that certification in the Appellate Courts, for the Council to not require Hillsborough to include a new agreement for development of the Howell site in any future fair share plan filed with

the Council. Anything less would compromise the COAH process and allow any municipality in the future to repudiate mediated agreements, as Hillsborough has done here. Such municipal behavior cannot be tolerated in the future by the Council, nor will it be.

Consistent with its past holdings, COAH will not allow High Bridge to repudiate its mediated agreement with Catanzareti. High Bridge has demonstrated no compelling reason for COAH to grant a waiver of N.J.A.C. 5:93-5.13 so that High Bridge can eliminate the Catanzareti site from its fair share plan. Rather, the briefs and certifications presented to COAH demonstrate that there is a history of rancor and contentiousness between High Bridge and Catanzareti regarding the development of his site for affordable housing. Such a history is not a sufficient reason for COAH to waive the important COAH policies that are the foundation of the requirements of N.J.A.C. 5:93-5.13(b).

None of the three independent justifications for a waiver found at N.J.A.C. 5:93-15.1(b) are present in this case. High Bridge's wish to unilaterally void its agreement with Catanzareti prevents, rather than fosters, the production of affordable housing on the Catanzareti property. The waiver request also is contrary to the Fair Housing Act and COAH rules and decisions, which encourage and support municipal cooperation with developers of affordable housing, particularly developers with which municipalities enter into mediated agreements. Nor does COAH perceive any hardship for High Bridge in complying with the terms of its mediated agreement with Catanzareti. The fact that the agreement provides that the site will be developed to produce 34 units of affordable housing is not a hardship, but rather a benefit to the municipality and its housing region.** Inclusion of the

**The planning and environmental issues raised by High Bridge in this motion do not convince COAH that the Catanzareti property cannot be developed for affordable housing consistent with the mediated agreement. Phase I of the project has already been built

Catanzareti site in High Bridge's fair share plan therefore remains for High Bridge a required method of providing affordable housing, consistent with the 1988 settlement agreement.

However, it should be clear that COAH in this decision does not decide issues relative to the contentions raised by the parties in the Superior Court litigation with regard to their various disputes concerning the development of the Catanzareti property for affordable housing. The Superior Court litigation has been instituted by Catanzareti, and seeks to resolve the differences between Catanzareti and the Borough, to enforce the 1988 settlement agreement and to develop Catanzareti's property for affordable housing. A forum for these issues is properly available in the Superior Court litigation. COAH, thereafter, will await the decision of the Superior Court with regard to the issues raised in the Superior Court regarding the development of the Catanzareti property consistent with the 1988 settlement agreement before taking further action on High Bridge's second-round petition for certification.

The relief sought in the Borough's motion is, for all of these reasons, denied.

Shuley M. Bishop
Executive Director

~~RENÉE REISS, Council Secretary~~

Dated:

June 2, 1999

and no environmental or planning issues prevented that development. Moreover, the environmental issues raised by High Bridge have been known, or should have been known, to High Bridge from the time it signed the 1988 mediated agreement and were not raised, and in fact were largely contradicted, by High Bridge's 1997 petition and second-round fair share plan. As such, those issues do not now present a valid rationale for the requested waiver.