IN RE: MOTION FOR RECONSIDERATION FILED TOWNSHIP OF JACKSON	)	New Jersey Council on Affordable Housing
	)	COAH Docket No. 99-1108
	)	OPINION

BACKGROUND

The Fair Housing Act ("FHA"), N.J.S.A. 52:27D-301 to -329, at N.J.S.A. 52:27D-307(c)(3)(e) states:

> It shall be the duty of the Council...to:
>
> c. Adopt criteria and guidelines for:
>
> e. In its discretion, place a limit, based on a percentage of existing housing stock in a municipality and any other criteria including employment opportunities which the council deems appropriate, upon the aggregate number of units which may be allocated to a municipality as its fair share of the region's present and prospective need for low and moderate income housing. No municipality shall be required to address a fair share beyond 1,000 units within six years from the grant of substantive certification, unless it is demonstrated, following objection by an interested party in an evidentiary hearing, based upon the facts and circumstances of the affected municipality that it is likely that the municipality through its zoning powers could create a realistic opportunity for more than 1,000 low and moderate income units within that six-year period. For the purposes of this section, the facts and circumstances which shall determine whether a municipality's fair share shall exceed 1,000 units, as provided above, shall be a finding that the municipality has issued more than 5,000 certificates of occupancy for residential units in the six-year period preceding the petition for substantive certification in connection with which the objection was filed. [N.J.S.A. 52:27D-307(c)(3)(e).]

This statutory provision is known as the "1,000-unit cap" rule. This amendment to the FHA was passed in 1993 by L. 1993, c. 31, p.1 in response to a holding in Calton Homes, Inc. v. COAH et al., 244

N.J. Super. 438, 446 to 453 (App. Div. 1990) in which the Appellate Division declared the Council's prior 1,000 unit cap rule to be arbitrary and unreasonable.

N.J.S.A. 52:27D-307(c)(3)(e) is codified in the Council's rules at N.J.A.C. 5:93-14.1, which states:

> No municipality shall be required to address a fair share beyond 1,000 units within six years from the grant of substantive certification, unless it is demonstrated, following an objection and an evidentiary hearing, based upon the facts and circumstances of the affected municipality that it is likely that the municipality through its zoning powers could create a realistic opportunity for more than 1,000 low and moderate income units within the six-year period. The facts and circumstances which shall determine whether a municipality's fair share shall exceed 1,000 units shall be a finding that the municipality has issued more than 5,000 certificates of occupancy for residential units in a six-year period preceding the petition for substantive certification. [N.J.A.C. 5:93-14.1.]

The Council's rule incorporates the language of the Fair Housing Act virtually verbatim. The rule, like the statute, makes clear that no municipality will be required "to address a fair share" of greater than 1,000 units "within six years from the grant of substantive certification." Similarly, both statute and rule create an exception for municipalities that have issued more than 5,000 certificates of occupancy for residential units "in the six-year period preceding" the petition for substantive certification. However, the exception would only apply to a particular municipality following an evidentiary hearing in which "the facts and circumstances" of the affected municipality were presented.

DOVER TOWNSHIP

The first municipality to petition for substantive certification before COAH with a fair share plan to which the 1,000 unit cap rule applied was Dover Township. Dover's petition raised two questions with regard to the application of the 1,000 unit cap rule that COAH had not previously considered. The first question concerned the relationship of the 1,000 unit cap rule to COAH's second-round cumulative methodology for determining the statewide and municipal fair share obligations for the period 1987 to 1999. N.J.A.C. 5:93-Appendix A. The Council's methodology at N.J.A.C. 5:93-1 et seq. is a cumulative one in that it accounts for the actual housing activity that occurred during the Council's 1987-1993 first-round fair share cycle, which was calculated pursuant to N.J.A.C. 5:92-1 et seq. Where necessary, the new methodology corrected projections and assumptions made for the prior 1987-1993 cycle in order to reflect the most current information available as to what housing activity occurred between 1987-1993 and incorporated this information into the calculation of the 1987-1999 cumulative fair share obligation. See "Prior-Cycle Prospective Need (1987 to 1993)" at N.J.A.C. 5:93-Appendix A and N.J.A.C. 5:93-2.8.

Because the cumulative methodology created by N.J.A.C. 5:93-1 et seq. recalculated and incorporated the first-round 1987-1993 need into the second-round 1987-1999 need, the Council, when considering Dover's petition for substantive certification, was

required to consider the applicability of the 1,000 unit cap rule to both the Council's calculation of Dover's 1987-1993 need and Dover's 1987-1999 need. This was because N.J.S.A. 52:27D-307(c)(3)(e) stated that "No municipality shall be required to address a fair share beyond 1,000 units within six years..." and the cumulative methodology accounted for 12 years of Dover's affordable housing obligation. After deliberation with Dr. Robert Burchell, consultant to the Council on its methodology, the Council determined that the application of the 1,000 unit cap rule had not been fully considered with regard to municipalities in which prior-cycle prospective need was more than 1,000 units for the 1987-1993 cycle and that these municipal obligations had to be recalculated. There were 10 municipalities that fell into this category, including Dover. Therefore, the Council recalculated those obligations pursuant to Dr. Burchell's advice. See Attachment A.

The second issue with regard to the 1,000 unit cap rule that had to be determined by COAH with regard to Dover's fair share plan was the relationship between the 1,000 unit cap and the various credits and reductions allowed in COAH's rules. At issue was whether the 1,000 unit cap should be applied to Dover's "pre-credited need," see N.J.A.C. 5:93-2.13, or to Dover's "calculated need," see N.J.A.C. 5:93-2.17. COAH determined, again after consultation with Dr. Burchell, and with a formal vote of the Council, that the 1,000 unit cap should not be applied to the calculated pre-credited need, but rather, to calculated need. Thus, the 1,000 unit cap would be applied to a municipal fair share

obligation such as Dover's if, after subtracting all eligible credits and reductions from pre-credited need, the calculated need as determined pursuant to N.J.A.C. 5:93-2.17 was more than 1,000 units. Only then would the municipal fair share obligation, which is equivalent to the calculated need, be capped at 1,000 units pursuant to N.J.A.C. 5:93-14.1.

TOWNSHIP OF JACKSON

At about the same time that COAH was considering the application of the 1,000 unit cap to Dover Township's fair share obligation, the Township of Jackson was requesting before the Honorable Eugene D. Serpentelli, A.J.S.C. that the 1,000 unit cap rule be applied to its second-round fair share obligation. Jackson had a 1987-1993 prospective need that was less than 1,000 units and, therefore, the first issue with regard to the 1,000 unit cap that was applicable to Dover was not applicable to Jackson. However, Jackson in its application to Judge Serpentelli had requested that the 1,000 unit cap be applied to Jackson's pre-credited need, rather than to its calculated need. Jackson's pre-credited need was over 1,000 units, but once credits and reductions were taken, its calculated need number was under 1,000 units. Therefore, if the 1,000 unit cap was applied to Jackson's pre-credited need, Jackson would seek to apply all credits and reductions to its capped 1,000 unit pre-credited need.

Therefore, on October 1, 1999, Philip B. Caton, P.P., AICP, the appointed special master for Jackson's affordable housing compliance wrote to the Council "in the interest of coordinating

the implementation of the Mount Laurel doctrine by the courts and COAH." Caton requested a written explanation of COAH's 1,000 unit cap rule interpretation that the Council had issued with regard to Dover. Further, Caton asked COAH to address certain issues raised by Jackson Township in a certification filed by its attorney before Judge Serpentelli with regard to the applicability of the 1,000 unit cap rule to Jackson's fair share obligation.

Because of Caton's request, and also because various participants in Dover Township's mediation requested an opportunity to comment on COAH's 1,000 unit cap interpretation, COAH established a comment period for the Dover mediation participants to comment on the 1,000 unit cap rule. COAH also set up a task force to review all comments and promised to formally address all comments from Jackson and Dover. Attachment B. Comments were received by THP, Inc., a developer with property in Dover and an objector to Dover's fair share plan; the attorney for the Township of Middletown and Dover Township.

On November 1, 1999, after a formal review of its policy at its regular monthly meeting, the Council sent a letter to Caton reaffirming its interpretation of the 1,000 unit cap rule. With regard to Jackson, the letter stated that Jackson Township's prior-cycle prospective need would not be revised because it was not greater than 1,000 units and that therefore the 1,000 unit cap rule did not apply to Jackson for the period 1987-1993. Further, the letter noted that Jackson Township's pre-credited need was 1,323

units of affordable housing. "If after applying all credits and reductions, this number is greater than 1,000 it is capped at 1,000." A chart was included in the letter demonstrating that if the township's calculated need was greater than 1,000 units, it would be capped at 1,000. Also, attached to COAH's letter was a four-page document captioned "Explanation of the 1,000 Unit Cap Rule" written by Dr. Burchell and a copy of THP, Inc.'s objection to COAH's 1,000 unit cap interpretation. Attachment C.

THE MOTION

Subsequently, on December 16, 1999, the Township of Jackson, through its attorney, filed a motion for reconsideration with COAH respecting its 1,000 unit cap rule interpretation. Based upon directions from COAH, all 10 municipalities affected by COAH's 1,000 unit cap interpretations were given notice of the motion. Only Middletown Township responded.

In the extensive brief of Jackson Township filed in support of its motion for reconsideration, it offered several arguments as to why the 1,000 unit cap should be applied to pre-credited need, rather than calculated need. Jackson particularly focused on the FHA's use of the word "aggregate" at N.J.S.A. 52:27D-307. The FHA states in part at N.J.S.A. 52:27D-307(c)(3)(e) that COAH could "in its discretion, place a limit,...upon the aggregate number of units which may be allocated to a municipality as its fair share of the region's present and prospective need for low and moderate income housing. No municipality shall be required to address a fair share beyond 1,000 units within six years..."

Jackson stated in its brief, that the use of the "aggregate" manifested a legislative intention that "cap relief to be available to a municipality after fair share numbers are established and announced and while municipalities are trying to voluntarily comply with the law." Jackson's brief ("JB") at page 28. By this statutory reading, Jackson states that the use of the word "aggregate" required COAH to apply the 1,000 unit cap to pre-credited need rather than calculated need. Further, Jackson objected to Dr. Burchell's use of the term "carry-over prospective need" and objected to Dr. Burchell's focus on the concept of prospective need with regard to the 1,000 unit cap "to the exclusion of the word aggregate." JB32, JB33. Jackson further argued that:

> ...the statute does not indicate that the focus is to center on whether prior-cycle prospective need is less than 1,000 units minus present need. The statute focuses on the "aggregate" end product fair share number and not components, factors or elements leading to the calculation of the end product. The statute likewise does not authorize COAH to perform a subsequent "post-end product" calculation after subtracting credits or reductions. All credits and reductions (with the exception of the 1,000-unit cap) were to have been factored by COAH during the municipal determination process in accordance with Subchapter 2 Rules and the Appendix A Methodology... [JB34; emphasis in original.]

Finally, Jackson argued that COAH's interpretation of the 1,000 unit cap constitutes a rule as defined by N.J.S.A. 52:14B-2(e) and, therefore, should have been the object of formal rulemaking.

In its letter sent in support of Jackson's motion, the Township of Middletown stated that it also believed the 1,000 unit

cap should be applied to pre-credited need, and not to credited need.

THE DECISION

After reconsidering its rule interpretation of the 1,000 unit cap rule in the context of the arguments made by Jackson Township in its motion for reconsideration, COAH will not alter its interpretation of the 1,000 unit cap rule. Only COAH's determination with regard to whether the 1,000 unit cap is to be applied to pre-credited need or calculated need is applicable to Jackson Township. COAH believes that its determination that the 1,000 unit cap must be applied to calculated need is correct.

In 1989 COAH issued a decision In the Matter of the Township of Parsippany-Troy Hills which concerned the issue of whether the number of units that could be transferred pursuant to a Regional Contribution Agreement ("RCA") was based upon pre-credited need "or the number arrived at after credits." See, Attachment D. N.J.S.A. 52:27D-312 states that a municipality may transfer by an RCA "up to 50% of its fair share" of affordable units to another municipality. The Council determined in its Parsippany-Troy Hills decision that pre-credited need was not equivalent to fair share and that "fair share" was calculated "after taking any allowable credits or adjustments. N.J.S.A. 52:27D-307 states that no municipality shall be required to address a "fair share beyond 1,000 units...". The term "fair share" as it appears in N.J.S.A. 52:27D-307 and in N.J.S.A. 52:27D-312 must be interpreted consistently. Therefore, in both -307 and -312, the

term "fair share" must be interpreted to mean the municipal obligation "after taking any allowable credits and adjustments." The 1,000 unit cap should, consistent with COAH's Parsippany-Troy Hills decision, be applied to "calculated need," not to "pre-credited need."

The Council's interpretation of "fair share" in the Parsippany-Troy Hills decision is consistent with the description of COAH's methodology found in the Calton Homes decision, relied upon in its brief by Jackson Township. In Calton Homes it is clear that COAH's prior 1,000 unit cap rule was not applied to pre-credited need, but rather to the municipal obligation after credits and reductions:

> Two caps may further reduce a municipality's fair share; specifically, every municipality's fair share is capped at twenty percent of its occupied housing stock or 1,000 units, whichever is less. N.J.S.A. 5:92-7.1 [Calton Homes, supra, 249 N.J. Super. at 446.]

Also, compare N.J.A.C. 5:92-7.1 with N.J.A.C. 5:93-2.16 and -14.1. Therefore, it is clear that COAH's recent interpretation that the 1,000 unit cap is applicable to "calculated need" and not to "pre-credited need" is consistent with its past practice relative to the 1,000 unit cap rule invalidated in the Calton Homes decision.

Because N.J.S.A. 52:27D-307(c)(3)(e) states that "No municipality shall be required to address a fair share beyond 1,000 units within six years...", the Council has also reconsidered its calculation of second-round municipal fair share obligations for municipalities with more than 1,000 units of prior-cycle prospective need in the 1987-1993 compliance period. However, this

component of COAH's 1,000 unit cap rule interpretation does not affect Jackson Township. Therefore, COAH's reconsideration determination does not address this aspect of its rule interpretation any more than to now say that the Council continues to believe that the 1,000 unit cap necessitated that COAH revisit the prior-cycle prospective need, and that the Council has reconsidered its position and will not change it. The 1,000 unit cap rule clearly requires COAH to recalculate the first-round prior-cycle prospective need figures it carries forward into COAH's second-round methodology for the 10 municipalities with prospective needs greater than 1,000 units during COAH's first-round. COAH is secure in the propriety of this aspect of its 1,000 unit cap rule interpretation.

CONCLUSION

For all the above-captioned reasons, the Council has considered Jackson Township's arguments with regard to COAH's interpretation of its 1,000 unit cap rule. The Council will not alter the decisions it has made with regard to that rule interpretation with regard to Jackson Township. Therefore, Jackson's motion that COAH rescind its 1,000 unit cap interpretation is denied.

Council on Affordable Housing

Dated: 5/3/00