

IN RE THE MATTER OF) COUNCIL ON AFFORDABLE HOUSING
BRANCHBURG BUILDERS, INC.)
v) DOCKET NO. COAH 001202
TOWNSHIP OF BRANCHBURG)

Branchburg Township, Somerset County ("Branchburg" or "the Township") received a first-round substantive certification from the Council on Affordable Housing ("COAH" or "the Council") on October 3, 1990 for a housing element and fair share plan addressing an obligation of 200 units. The Township's first-round substantive certification expired on October 3, 1996.

Branchburg's 12-year cumulative second-round obligation for 1987-1999 is 309 units, seven indigenous need rehabilitation units and 302 inclusionary new construction units. On May 15, 1998 Branchburg filed a housing element and fair share plan with COAH, but did not petition at that time. On October 7, 1998 Branchburg Builders, Inc. ("Builders") filed an exclusionary zoning lawsuit in Superior Court alleging that Branchburg was in violation of its Mount Laurel constitutional obligation. The suit was transferred to COAH's jurisdiction. On November 10, 1998 Builders filed a motion with COAH seeking to dismiss Branchburg's housing element and fair share plan. The motion was denied and jurisdiction was retained in an opinion issued by COAH on May 5, 1999. Exhibit A.

Thereafter Branchburg petitioned for substantive certification and published notice of its petition on August 3, 1999. Builders filed an objection during the 45-day comment period. Consequently, mediation between Branchburg and Builders commenced.

A COAH Report dated November 30, 1999 was prepared requesting additional information from Branchburg. The report established a 60-day time frame to submit additional information to COAH. On February 24, 2000 Builders filed a motion in the form of a letter with COAH requesting dismissal of the Township's petition for substantive certification on the basis that the Township did not submit the information required by the November 30, 1999 COAH Report within the required 60-day time frame. In this motion

Builders also raised substantive issues regarding the Township's plan that it argued required COAH's dismissal of Branchburg's plan. Branchburg responded to the motion, which was presented to the Council at its May 6, 2000 meeting. The Council tabled the motion and decided not to address the issues raised until after mediation was concluded.

On January 12, 2001 a COAH Mediation Report was issued by James E. Cordingley, COAH mediator. Exhibit B. The mediation was unsuccessful and Cordingley wrote "...no agreement was reached as Branchburg did not agree to include Branchburg Builders' site in an amended fair share plan or negotiate an alternative form of zoning." Further, reported Cordingley, at the conclusion of mediation the Township proposed to amend its fair share plan by substituting four group homes with a total of 16 bedrooms and four family rental units in a mobile home development for dormitory units at the Midland School, a school for developmentally disabled adults which Branchburg had proposed as an affordable housing site in its filed plan to which Builders objected. Because Branchburg proposed to amend its plan and repetition with an amended plan, with the issues that arose in mediation unresolved, Cordingley recommended in his COAH Mediation Report that COAH issue an administrative order to modify the procedural requirements of N.J.A.C. 5:91-7.4 and he set out a procedure for the readoption, publication and petitioning of its new fair share plan with COAH.'

The COAH Mediation Report also, in response to Builders' objection with regard to the failure of the Whiton Hills development to provide a 50/50 split of low and moderate income units as required by COAH's rules, see N.J.A.C. 5:92-5.14 and N.J.A.C. 5:93-7.2, stated that Branchburg would need to file a

'It should be noted that the procedure Cordingley proposed that COAH establish by administrative order has been incorporated into a proposed amendment of COAH's procedural rules. The proposed amended procedural rules were published on April 2, 2001 at 33 N.J.R. 1042 and amend N.J.A.C. 5:91-7.4 and N.J.A.C. 5:91-7.5. The amended rules are being adopted by the Council on the same day that this opinion is being issued, June 6, 2001.

waiver from the rule requirement in conjunction with the filing of its new housing element and fair share plan if Branchburg wished to receive all requested credits from the Whiton Hills units. The mediation report was sent out to all parties for a 14-day comment period.

Branchburg Builders filed a letter of comment to Cordingley's mediation report on January 31, 2001. The response was lengthy and incorporated many of the same substantive arguments that were raised in Builders' February 2000 Motion to Dismiss. Thereafter, on March 2, 2001 Builders filed another Motion to Dismiss Branchburg's petition for substantive certification, relying upon its January 31 response to the COAH Mediation Report as the basis for its motion. Branchburg responded to that motion by a letter dated March 23, 2001. Oral argument was held on the motion at COAH's April 4, 2001 monthly meeting.

The Council will not dismiss Branchburg's housing element and fair share plan, as requested by Builders in its motions of February 2000 and March 2001. In its decision dated May 5, 1999 the Council wrote in response to Builders' initial motion to dismiss Branchburg's fair share plan:

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.

The Council then went on to state that the criticisms filed by Builders with regard to Branchburg's fair share plan were most appropriately treated as objections and as the subjects of mediation.

Similarly, and consistent with COAH's prior decision in this matter and its regulations, Branchburg must be allowed under COAH's rules an opportunity to amend its plan and to file a new

petition on its amended fair share plan that is consistent with COAH's rules (or an opportunity to seek a waiver of those rules), as recommended by the COAH mediator. Therefore, in this decision COAH will not address Builders' extensive comments with regard to the new group home proposal that Branchburg states it intends to include in its new amended fair share plan. This is because the amended plan has not yet been accepted for filing with COAH and, therefore, is not formally before the Council. The objections that Builders has raised in its January 31 letter to COAH with regard to Branchburg's proposed amended plan may be raised as objections to that new plan.

However, with regard to the objections that Builders has raised with regard to the Whiton Hills development, the Council has the following comments. The May 4, 1990 COAH Report that formed the basis for the Council's first-round substantive certification (Exhibit C) states with regard to the Whiton Hills development:

Whiton Associates is expected to develop 22 acres in this RMU zone with 285 units, 57 of which will be low and moderate income (29 low and 28 moderate). The developer has the option of constructing rental or for sale units.

The zone requires that 40% of the units be age restricted for senior citizens over age 62. Based on this requirement, 23 units will be age restricted. The zoning should allow either for sale or rental unit development. The current plan requires Whiton to develop 38 rental units. Affirmative marketing, price stratification, unit mix and affordability controls will be consistent with N.J.A.C. 5:92-12, -14, -15.

In fact, Whiton Hills was developed with 70 affordable units, 24 age-restricted low income rental units and 46 moderate income family rental units. Clearly, the required split of low and moderate income units was not provided in the Whiton Hills development as approved. This variance from the COAH certified plan was not made known to COAH prior to Branchburg's filing of its second-round fair share plan.

Builders has objected to Branchburg receiving full credit for all 70 affordable units constructed in Whiton Hills because of the failure of the development to provide the required 50/50 low and moderate income split within the project. Further, Builders objects to the granting of rental bonus credits for these units because of their failure to comply with COAH's low and moderate income split. Builders also objects to the granting of eight units of credit for substantial compliance, pursuant to N.J.A.C. 5:93-3.6(a), because the rule gives a reduction for substantial compliance "...when the Council determines that a municipality has substantially complied with the terms of its substantive certification, and has actually created, within the municipality..." a substantial percentage of the units that were part of the municipal 1987 to 1993 housing obligation. Builders argues that the failure of the Whiton Hills project to provide the required low and moderate income split demonstrates that the municipality has not "substantially complied with the terms of its substantive certification" and takes the position that the units that have been developed at Whiton Hills that are not in compliance with the low and moderate income split cannot be counted towards the substantial compliance credit.

In his COAH Mediation Report, Cordingley responded to these objections with regard to Whiton Hills by directing Branchburg to file a request for a waiver to seek full credit for the Whiton Hills units. Because COAH does not at this point know why the Whiton Hills project was developed without COAH's requisite low and moderate income division of units within the project, the Council cannot address this issue any further at this point. For example, the Council has reviewed the Branchburg planning board's January 28, 1992 resolution with regard to the Whiton Hills approvals and does not find anything conclusive in that document as to why the low and moderate income split was not adhered to in this development. Therefore, in conjunction with the filing of its new fair share plan, if Branchburg wishes to continue to seek full credit for the Whiton Hills development, including rental bonus

credits and substantial compliance credits, the Township should file a motion giving the basis as to why those credits should be granted by COAH in light of the fact that Branchburg deviated from COAH's prior grant of substantive certification with regard to its approvals for the Whiton Hills development.

Builders also argues that because of the defects in Branchburg's filed fair share plan it should be awarded a builders' remedy, either by COAH or by the courts. Essentially, Builders argues that Branchburg's plan is so deficient that COAH, if it retains jurisdiction, should direct Branchburg to include Builders' site as a site for affordable housing in its new filed fair share plan. Alternatively, Builders argues that COAH should dismiss Branchburg from its jurisdiction and allow Builders to file a builders' remedy suit in court. Neither remedy is appropriate at this time.

As has been stated in COAH's prior decision in this matter, municipalities are typically allowed to repetition with an amended plan if necessary once they are under COAH's jurisdiction. Branchburg has indicated to the COAH mediator that it wishes to file an amended plan with COAH. The COAH mediator's determination that Branchburg should be allowed to do so is consistent with COAH's procedural rules, see N.J.A.C. 5:91-1 et seq., and Branchburg should be allowed to proceed to file a new petition with COAH.

Builders argues that because Branchburg will file a new petition it is "no longer within the protections of N.J.A.C. 5:91-3.6(a)" and that the COAH proceedings are now governed by N.J.A.C. 5:91-3.6(c), which allow for a "presumptive" builders' remedy at COAH. However, a reading of these statutory provisions reveals that Builders' argument is not correct and that the facts of this case do not fit with the requirements of N.J.A.C. 5:91-3.6(c). Rather N.J.A.C. 5:91-3.6(a) will continue to apply to Branchburg once it files its new petition.

Alternatively, Builders argues that material defects in Branchburg's contemplated amended plan, which has not yet been


accepted for filing with the Council, require dismissal of Branchburg's petition under N.J.A.C. 5:91-5.2(f). However, Branchburg's amended plan has not yet been filed with COAH and, therefore, the Council will not address the arguments that Builders makes with regard to the proposed amended plan. Branchburg is entitled to repetition with a new plan and Builders may submit its objections to the plan once it is filed. Builders has clearly pointed out several serious issues of concern with regard to the Whiton Hills site and, as has been stated, Branchburg's amended petition must be accompanied by a motion establishing the basis upon which COAH may credit the Whiton Hills site. Therefore, COAH will not dismiss Branchburg from its jurisdiction, as requested by Builders.

Builders also argues in its March 2001 motion that a plenary hearing should be conducted with regard to (a) issues concerning Branchburg's unfiled proposed plan, (b) Branchburg's entitlement to substantial compliance credits and (c) Builders' entitlement to a builders' remedy. As has been explicated above, none of these issues are ripe for a plenary hearing.

Further, the Council will not dismiss Branchburg's petition based upon Builders' motion of February 2000. The COAH mediator has stated that Branchburg supplied the information that was requested by the November 30, 1999 COAH Report, albeit not within the 60 days required by that report. Further, the substantive issues raised in that motion by Builders with regard to components of Branchburg's plan may be raised as objections to Branchburg's amended fair share plan, once it is filed. Therefore, Builders' February 2000 motion provides no independent basis upon which COAH will dismiss Branchburg's petition for substantive certification.

Therefore, the Council denies Builders' two motions to dismiss Branchburg's housing element and fair share plan, without prejudice. The Council will now, consistent with the recommendations of the mediator, issue an administrative order directing Branchburg to adopt and file a new amended plan.

However, the 60-day time period set out in the COAH mediator's recommendation will now begin as of the date of the Council's adoption of this opinion, which is June 6, 2001. Further, if the amended plan requires any waivers of the Council's rules, as discussed above, Branchburg should file a motion requesting the waiver contemporaneously with the filing of its amended plan.


Renee Reiss, Secretary
New Jersey Council on
Affordable Housing

Date: June 6, 2001