

In re Petition for Substantive)
Certification Filed by) Council on Affordable
Montvale Borough, Bergen County) Housing
Docket No. 03-1507

Opinion

This Opinion memorializes the Council on Affordable Housing's (COAH or Council) oral decision at its January 7, 2004 public meeting to deny Henry J. Bonnabel's (movant or Bonnabel) motion to restrain the Borough of Montvale (Montvale), the Montvale Planning Board, Zoning Board of Adjustment and Building Department from issuing any permits or development approvals for vacant land in excess of one acre until COAH has acted on Montvale's petition for substantive certification. For the reasons set forth in this Opinion, as well as for any reason stated at the January 7, 2004 COAH public meeting, the Council hereby denies movant's motion.

The relevant facts are as follows. In December 1989, Montvale was sued for exclusionary zoning in the case Kaczala, et als. v. Borough of Montvale. The parties resolved the litigation and on December 16, 1994, the Hon. Peter J. Ciolino, J.S.C., entered a Judgment of Compliance and Order for Repose. Through this action, vacant, developable land was found to be a scarce resource, so as to allow Montvale to secure a vacant land adjustment for its fair share obligation of affordable housing.

On May 11, 2000, Montvale adopted a Housing Element and Fair Share Plan (Plan) to address its 1987-1999 housing obligation. On June 5, 2000, Montvale filed its Plan with COAH and petitioned for substantive certification. There were ten (10) objections filed in response to Montvale's petition, including movant Bonnabel. On March 8, 2001, COAH issued a report requesting additional information from Montvale so as to conduct an analysis of Montvale's Realistic Development Potential (RDP). Montvale's Plan calculated its RDP at 88 units. COAH's analysis of Montvale's submission, however, revealed that several properties omitted by Montvale in its Plan, were in fact suitable for inclusionary development.

On August 30, 2001, COAH issued a report, which established a revised RDP for Montvale at 187 affordable housing units. On or about September 25, 2001, Montvale objected to COAH's revised RDP. In response, on November 26, 2001, COAH established Montvale's RDP at 186 affordable housing units and determined that mediation should commence based on the 186 RDP. Mediation sessions were held on February 26, March 4, 5, 21, April 16, 18, June 19, and August 6 and 15, 2002. During the course of mediation, an

additional property capable of producing affordable units was identified and Montvale's RDP was finalized at 188 units. Mediation was closed on December 6, 2002 without mediated agreements.

On March 17, 2003, COAH issued a Mediation Report concluding that Montvale must submit an amended housing element and fair share plan within 60 days of the Mediation Report. COAH accepted the Mediation Report at its meeting on May 7, 2003, thereby triggering the 60-day re-petition time frame. On June 19, 2003, Montvale readopted its Amended Housing Element and Fair Share Plan and re-petitioned for substantive certification. In response to Montvale's re-petition, movant Bonnabel, among others, filed an objection.

Bonnabel brought this Motion for a Scarce Resource Order and Temporary Restraints in response to the introduction of Ordinance 2003-1207 (Ordinance) introduced by Montvale on September 9, 2003 and adopted by the Borough Council on October 15, 2003. Ordinance 2003-1207 re-zones four parcels to accommodate inclusionary developments: the Rink site, the Axinn property, the Janovic property and the Baldanza parcel. The four parcels were the subject of mediation and were re-zoned after the conclusion of COAH mediation. The Ordinance does not include Bonnabel's property.

Movant raises several arguments that do not relate to the issue of whether COAH should grant a Motion for a Scarce Resource Restraint. He asserts that the agreements between Montvale and the property owners were not made public until Montvale submitted its amended fair share plan to COAH on July 7, 2003. The 45-day objection period expired on October 13, 2003 (a noticing error delayed the start of the 45-day objection period). Movant also claims that Ordinance 2003-1207 fails to address Montvale's entire affordable housing plan, and specifically excludes Bonnabel's property as an inclusionary site. Because these issues do not relate to the relief requested, this Opinion will not address those issues.

Bonnabel submits that COAH should impose temporary restraints prohibiting new development approvals for properties in the Borough of Montvale because vacant land is a scarce resource. For the 1987-1999 affordable housing cycle, Montvale obligation was established at 255 units. Movant asserts that a comprehensive vacant land inventory and recalculation of Montvale's RDP demonstrated that there is insufficient, vacant developable property within Montvale to meet its entire affordable housing obligation.

Bonnabel claims that Montvale has granted development approval to Chamberlain Developers, which does not address the properties' realistic development potential. An agreement was entered into between Chamberlain Developers, a property included in the Plan, and Montvale following the conclusion of COAH mediation. Although COAH's analysis of vacant land in the Borough establishes that Montvale is eligible for a vacant land adjustment, movant claims that development approval was granted to Chamberlain Developers for vacant properties, which do not address the RDP. Moreover, Bonnabel takes issue with the fact that the agreement requires a \$250,000 contribution to Montvale's Affordable Housing Trust Fund with no commensurate density bonus. Movant asserts that this is in direct violation of N.J.A.C. 5:93-8.10(d). Additionally, movant asserts that the proposed developer contributions, as well as the density set aside for both Janovic and Baldanza also violate the principles set forth in N.J.A.C. 5:93-8.10(d).

Movant objects to the aforementioned mediation agreements as failing to comply with sound principles of planning, COAH regulations concerning inclusionary sites or COAH regulations concerning regional contribution agreements and excessive developer contributions. Additionally, movant maintains that Montvale is "usurping COAH's role in evaluating Montvale's affordable housing compliance plan" through the adoption of Ordinance 2003-1207 prior to COAH action on Montvale's Housing Element and Fair Share Plan.

On a related track, on February 27, 2003, Bonnabel filed a prerogative writ action challenging the constitutionality of the Ordinances. Bonnabel v. Borough of Montvale, et als., Docket No. BER-L-1377-03. Montvale and the Planning Board jointly filed a Motion to Dismiss and on June 6, 2003, the Hon. Jonathan N. Harris, J.S.C., entered an Order dismissing Bonnabel's action on the basis of the requirement to exhaust administrative remedies and COAH's primary jurisdiction over Montvale. On July 16, 2003, Bonnabel filed a Notice of Appeal from Judge Harris' Order.

In addition, in a separate action, another objector to Montvale's petition, David Mann, filed a lawsuit challenging Montvale's actions as it relates to the Chamberlain parcel. David Mann v. Borough of Montvale, et als., Docket No. BER-L-10223-02. In a trial on August 6, 2003, Judge Harris dismissed the lawsuit, again deferring to COAH jurisdiction and the mediation process with regard to whether the Chamberlain Agreement and monetary contribution comply with COAH standards. No appeal was filed.

On December 17, 2003, Franklin Avenue Residents (Franklin Residents) submitted a letter brief in support of Bonnabel's Motion. Franklin Residents are objectors to Montvale's re-petition

for substantive certification. Franklin Residents also incorporated by reference all arguments, certifications, and other supporting materials accompanying its objections filed on their behalf with the Council relating to Montvale's re-petition for substantive certification.

Franklin Residents enumerate several arguments through its submission in support of Bonnabel's Motion that do not specifically relate to the scarce resource restraint. Franklin Residents argue that despite COAH's determination that the site could develop at a presumptive minimum density of six units per acre with a 20 percent set aside to produce an RDP of one unit, the agreement between the owner of the subject property, Balder Construction, and Montvale, permits the re-zoning and development of a twelve-unit apartment complex with three affordable housing units at a density of nine units pre acre.

Franklin Residents also assert that they were never given the opportunity to participate in the mediation process before COAH and that the agreement was never made available to the public. Franklin Residents maintain that Montvale has failed to provide them with a copy of the agreement despite an Open Public Records Act (OPRA) request for said documents filed with Montvale in July, 2003. It is therefore their belief that this agreement may be an illegal contract.

Moreover, Franklin Residents assert that Montvale violated N.J.S.A. 40:55d-13, when it provided only five days notice of the public hearing held in December, 2002 regarding the proposed plan, as opposed to the required ten (10) days afforded by statute. Accordingly, Franklin Residents submit that they have never had an opportunity to be heard before the Borough Council to present arguments as to the suitability of the proposed development on the Baldanza parcel. However, as these issues do not relate to the relief requested, this Opinion will not address these issues.

In support of its position, Franklin Residents advise COAH that expert John Maczuga, P.P., A.I.C.P., has determined that Montvale has failed to establish that the Baldanza site is "available, suitable, developable or approvable" pursuant to N.J.A.C. 5:93-1. Franklin Residents also maintain that Montvale continues to develop land without regard for its affordable housing obligation. Accordingly, the continued development on land within Montvale over one acre must be restrained.

On October 23, 2003, opposition papers were submitted on behalf of K. Hovnanian North Jersey Acquisitions, L.L.C. (Hovnanian). Hovnanian is the contract purchaser of property owned by Donald Axinn (Axinn) and R2D2, L.L.C. (Rink site). Hovnanian,

Axinn and R2D2 are interested parties in the COAH administrative review process and review of Montvale's re-petition for substantive certification.

On June 30, 2003, Hovnanian, Axinn, R2D2 and the Planning Board entered into two Settlement Agreements (Agreements), for the Axinn and R2D2 properties, respectively. In compliance with said Agreements, prior to the grant of substantive certification, Montvale re-zoned property to allow for the development and construction of low and moderate-income affordable housing. Hovnanian asserts that the Agreements enumerate how the substance of the Agreements will be reviewed. Specifically, the Agreements provide that:

the re-zoning of the Axinn property (as well as Rink property) and the processing, review, and adjudication of any development application shall be independent of, not be restricted or limited by, or contingent upon the status of the COAH process respecting Montvale's petition for substantive certification, nor by any determination by COAH on Montvale's petition for substantive certification." Moreover, "enforcement of the Agreements shall be through an action in the Superior Court of New Jersey, notwithstanding the COAH administrative process.

Hovnanian refutes Bonnabel's argument that a scarce resource order is necessary in this matter. Hovnanian maintains that the imposition of a scarce resource restraint against the Axinn and R2D2 properties would in fact impede the production of affordable housing in Montvale. Both the Axinn and R2D2 Agreements call for enhanced re-zoning of the respective properties for inclusionary development of the properties. Hovnanian asserts that the Axinn property will produce 26 units of low and moderate income housing on the site, as part of 128 units developed on the property, a 20.3% set-aside. The R2D2 property will produce an in lieu payment of up to \$800,000, or 32 RCA-equivalent units, a 44.4% set-aside.

Hovnanian also argues that Bonnabel's Motion contravenes COAH's regulations regarding restraints and issuance of administrative orders. N.J.A.C. 5:93-10.3. Hovnanian maintains that the requested scarce resource restraint would directly impede the production of affordable housing and asserts Montvale's right to formulate a fair share plan and provide enhanced zoning where and how the municipality determines. Specifically, Hovnanian argues that movant's example of the Chamberlain property is

irrelevant when the Agreements with R2D2 and Axinn will in fact produce affordable housing. Hovnanian maintains that movant's reliance on N.J.A.C. 5:93-8.10(d) is inapposite, as that section pertains to a town's collection of development fees and COAH's approval of the agreements as part of its grant of its substantive certification.

As stated above, Hovnanian maintains that both the Axinn and R2D2 Settlement Agreements provide for inclusionary development "independent of COAH review, processing, and determination on Montvale's petition for substantive certification." Hovnanian submits that Montvale is voluntarily using privately owned property for the production of affordable housing independent of COA H and that Montvale should be commended for effectively and voluntarily producing its fair share of affordable housing.

Hovnanian submits that regardless of what other claims Bonnabel has concerning Montvale's substantive certification, its objections should not affect the Settlement Agreements with Axinn and R2D2. First, Hovnanian maintains that any contentions Bonnabel may have with ordinances implementing the Settlement Agreements should have been made before Montvale's governing body during the public hearing on these ordinances. Hills Development v. Bernards Tp., 229 N.J. Super. 318, 332 (App. Div. 1988). Second, Hovnanian argues that the ordinances themselves are severable. Therefore, Bonnabel's objection to an ordinance affecting a site other than Axinn and R2D2 should not impede the production of affordable housing on the Axinn and R2D2 sites. Third, Hovnanian asserts that Bonnabel's objections to the proposed inclusionary developments on the Axinn and R2D2 properties should be made at the appropriate municipal level, when applications for development are presented, and should not be heard before COAH. Finally, Hovnanian submits that the arguments advanced by Bonnabel fail to support Bonnabel's motion for the relief sought.

In conclusion, Hovnanian argues that Bonnabel has brought this Motion before COAH because movant is "upset because its property has not received enhanced zoning as part of Montvale's Amended Housing Element and Fair Share Plan, as the Axinn and R2D2 sites have." Hovnanian maintains that Bonnabel's motion has no justification and cuts far too broadly. Accordingly, Hovnanian requests that Bonnabel's Motion be denied.

On October 23, 2003, Russell Huntington, Esq., counsel for Montvale filed a letter brief in opposition to Bonnabel's Motion. Montvale submits that its plan is consistent with the agreements and understandings reached during mediation and with COAH's Mediation Report dated March 17, 2003. Montvale maintains that Bonnabel submitted its moving papers merely to block Montvale from

proceeding with its plan and addressing its affordable housing obligation.

Specifically, Montvale asserts that there is "absolutely no showing that entry of such an Order is necessary to ensure that the Borough is able to comply with its Mt. Laurel obligation." "Bonnabel's Motion is the latest in a transparent effort by him to stall the progress of the Borough simply because he is dissatisfied that not all of his demands made in mediation were accommodated under the Borough's Fair Share Plan." Montvale instead submits that it has made every effort to comply with its obligation, evidenced by the adoption of Ordinance 2003-1207.

Moreover, Montvale argues that it spent from June through November 2002 pursuing negotiations with Bonnabel during mediation in an attempt to address his concerns. Montvale notes that mediation remained opened for the purpose of attempting to settle with Bonnabel. However, when Montvale failed to receive the materials it had requested from Bonnabel by the end of October 2002, Montvale decided that further negotiations with Bonnabel were fruitless. Montvale also notes that no party to the mediation, including Bonnabel, ever made a motion for entry of a scarce resource restraint, particularly during preparation of the vacant land inventory and calculation of RDP.

Montvale notes that although Bonnabel never made a motion for a scarce resource order prior to the conclusion of mediation, Art Bernard, P.P. filed comments to the March 17, 2003 Mediation Report on Bonnabel's behalf. In his comments, Mr. Bernard stated that a scarce resource restraint should have been entered by COAH.

On May 1, 2003, Montvale points out that the COAH Mediator responded that:

COAH has not seen a need to impose a Scarce Resource Restraint on Montvale because all of the suitable vacant sites are incorporated into the determination of either the Borough's RDP and/or the Borough's proposed plan to address its need."

Accordingly, Montvale submits that as there is "no support in the record to suggest that entry of a scarce resource order is necessary to ensure that the Borough will satisfy its Mt. Laurel obligation." Moreover, the "Hills Development Co. Court made clear that scarce resources orders are not available to reward or benefit builders or conversely to punish a municipality that may have objectionable aspects to its Plan." For the reasons stated, Montvale requests that Bonnabel's Motion be denied.

Mr. Huntington submitted a certification in opposition to the Motion of Henry J. Bonnabel for imposition of a Scarce Resource Restraint and other restraints. Mr. Huntington attached a true copy of the transcript of motion from the Superior Court action captioned Henry J. Bonnabel, vs. Borough of Montvale, et als., Docket No. BER-L-1377-03. Richard Preiss, P.P., A.I.C.P., Planning Consultant for Montvale, also submitted a certification in opposition to Bonnabel's Motion for Entry of a Scarce Resource Restraint.

On October 24, 2003, Donald E. Axinn, Inc. (Axinn) filed a letter in opposition to Bonnabel's Motion. In support of its position, Axinn relies on the brief and other materials submitted by K. Hovnanian North Jersey Acquisitions.

On November 3, 2003, Bonnabel filed a reply, reiterating its initial arguments. Bonnabel also refutes Hovnanian's arguments as "more form than substance" in that COAH may always exempt individual properties from a Scarce Resource Order, upon a showing that the property will in fact produce affordable housing. In this regard, Bonnabel submits that through its Motion, it is merely positioning Hovnanian and Montvale to go before COAH for the determination of whether a scarce resource restraint should apply to the Axinn and Rink properties. Bonnabel argues that the Motion is the only mechanism to keep Montvale before COAH as opposed to Superior Court.

Finally, Bonnabel submits that the preservation of vacant land in Montvale is an important public interest and that the Motion should be granted imposing a scarce resource order, and should include mechanisms of notice and a hearing so as to allow exemptions from the Order in the event such exemptions are in the public interest.

N.J.A.C. 5:91-10.1 allows any interested party to file an application to require a municipality to "...take appropriate measures to preserve scarce resources that may be essential..." to the satisfaction of a municipality's fair share need. Movant relies on this provision without offering any support as to why vacant land is a scarce resource in Montvale. Movant does point out that Montvale was assigned an RDP as a result of lack of land, but this in and of itself does not justify the imposition of a scarce resource restraint. Movant's primary complaint seems to be to the adoption of Ordinance 2003-1207, which rezones four parcels of land for inclusionary development and provides for the payment of a development fee on another. The adoption of this Ordinance provides no basis for the imposition of scarce resource restraints on the development of vacant land.

COAH conducted a review of Montvale's vacant land and established Montvale's RDP at 188. In accordance with N.J.A.C. 5:93-4.2(f), in order to determine this RDP, COAH evaluated all privately owned, contiguous vacant parcels of land of a size, which would accommodate at least five dwelling units. After consideration of all applicable vacant sites, COAH determined that the vacant land in Montvale could accommodate 188 units. This evaluation included movant's three sites. Regarding movant's three sites, COAH assigned an RDP of 14 units, 24 units and 6 units. Thus, movant's sites were considered when arriving at the number of affordable units Montvale must provide. Therefore, it is inaccurate for movant to claim that vacant land will be developed without providing for Montvale's need. Montvale's need, its RDP, included all applicable parcels of vacant land. Montvale has to develop a fair share plan that provides for all 188 affordable units.

Movant complains that Montvale has gone ahead and adopted ordinances that use vacant land without obtaining COAH approval, which COAH takes to mean without receiving substantive certification. COAH does not require a municipality to wait until it receives substantive certification before it adopts an ordinance to provide affordable housing. The municipality runs the risk that it may not receive substantive certification and then it would have to deal with the ramifications of adopting the ordinances in advance. There is, however, no bar to this approach. In this case, Montvale has vacant land to accommodate 188 affordable units and it must provide those units.

Movant also takes issue with the ordinance for the sites known as the Chamberlain site, the Rink site, the Axxin site, the Janovic site and the Baldanza site. The ordinances adopted all have provisions for affordable housing. The ordinance for the Chamberlain site provides for a development fee, while the other four sites include an actual inclusionary component. Thus, the sites of which movant complains all are being used to satisfy Montvale's RDP. Under these circumstances, COAH sees no reason to enter a restraint to halt the development of these properties. Indeed, the passage of the two ordinances may result in affordable housing being available sooner than if Montvale waited until COAH acts on its petition for substantive certification. Moreover, if movant wants to contend that Montvale's plan does not meet its obligation, movant may raise such issues as part of the normal COAH process.

Accordingly, movant's Motion is denied.

A handwritten signature in cursive script, reading "Renee Reiss", written over a horizontal line.

Renee Reiss
Council Secretary

DATED: May 5, 2004