

IN RE FAIR LAWN BOROUGH, BERGEN  
COUNTY, MOTION OF LANDMARK AT  
RADBURN SEEKING AMENDMENT OR  
DISMISSAL OF FAIR LAWN'S THIRD  
ROUND FAIR SHARE PLAN PETITION

) NEW JERSEY COUNCIL ON  
) AFFORDABLE HOUSING  
)  
) DOCKET NO. 07-1924  
)  
) MOTION DECISION  
)

On July 3, 2007, the New Jersey Council on Affordable Housing (the "Council" or "COAH") received a motion from Landmark at Radburn and Bergen Dev. Group, LLC ("Landmark"), the owner and contract purchaser of a property located in Fair Lawn Borough, Bergen County, seeking emergent relief from COAH ordering Fair Lawn to include the Landmark property in the Borough's affordable housing plan or dismissing the Borough's third round petition for substantive certification.

#### PROCEDURAL AND FACTUAL HISTORY

Fair Lawn originally petitioned COAH for second round substantive certification of its Housing Element and Fair Share Plan on December 2, 1992. Pursuant to N.J.A.C. 5:91-14.2, the Borough filed a motion with COAH on March 14, 1994, requesting to amend its Housing Element and Fair Share Plan. COAH granted Fair Lawn's request on May 10, 1994 and Fair Lawn subsequently petitioned for second round substantive certification on April 25, 1995. There was one objection filed and accepted subsequent to the expiration of the comment period. The objectors were the owners of the McBride site at Block 4702, Lot 1. COAH issued a report requesting additional information on July 28, 1995 and requested that Fair Lawn provide additional information.

On January 2, 1996, the owners of the McBride site objected to the petition's proposed density and percentage affordable housing set-aside, claiming the 1995 proposed density of

six units to the acre with a 20 percent set-aside was in contradiction to the municipality's 1991 Housing Element and its 1992 Master Plan, which envisioned inclusionary development at 15 units per acre. CO AH determined to resolve the issues through mediation. Mediation began on June 14, 1996 after extensive negotiations between the parties were unsuccessful. A mediation agreement of June 24, 1996, called for development at 17.65 dwelling units per acre with a 15 percent set-aside overlay, which would produce 52 affordable housing units. This agreement was amended on July 3, 1996 to make zoning by right. CO AH issued a Mediation Report on July 10, 1996.

On September 6, 1996, CO AH issued a Compliance Report recommending the Borough's plan receive substantive certification. This report determined that 24.15 acres of land were vacant and developable, yielding a Realistic Development Potential (RDP) of 52 units and a vacant land adjustment of 100 units.

Fair Lawn received second round substantive certification on October 2, 1996 for its 152-unit new construction obligation and 20-unit rehabilitation obligation. The certified plan included a 100-unit vacant land adjustment, a 100-unit unmet need, reductions for 52 units zoned at the McBride site, 16 credits for rehabilitation work, a four-unit rehabilitation program and overlay zones to address the unmet need on the Hadco site at Block 5834, Lot 1, on the Daly Field Tracts (which are specifically the 1.8-acre Archery Plaza site at Block 3609, Lot 1, the 4.6-acre Hayward (Heywood) site at Block 3610, Lot 1 and the 5.5-acre Daly Field at Block 3610, Lot 2), and the River Road Corridor redevelopment areas. Language in the Compliance Report of September 6, 1996, speaks to the overlay requirements,

[i]n addition, the borough submitted a draft overlay zone for the Heywood site and adjacent Daly Field tract (Block 3610, Lots 1 and 2). The Heywood tract is the location of a former industrial use and is currently undergoing environmental clean-up. According to the

borough, this site will not be available for development for several years. However, the borough has agreed to establish an overlay zone for this site when the environmental clean-up is completed. The borough must submit a status report on the Heywood and Daly Field tracts as part of its annual monitoring reports to COAH.

COAH September 6, 1996, Compliance Report, p. 5.

On December 13, 2004, Fair Lawn filed a motion requesting an extension of its second round substantive certification pursuant to N.J.A.C. 5:91-14.3 and N.J.A.C. 5:95-15.2. COAH staff reviewed the motion documents and determined that during the intervening eight years of substantive certification, Fair Lawn had failed to adopt the overlay ordinance required in the Borough's 1996 second round substantive certification. Fair Lawn's substantive certification required that the overlay zones be adopted within 45 days. Fair Lawn did adopt ordinances for the Hadco and River Road properties in late 1996, but did not adopt one for Daly Field and the Heywood site at the same time. The ordinances for the Hadco and River Road sites subsequently expired on October 3, 2002, and were not re-adopted by the Borough until April 18, 2005, when COAH staff inquired as to the status of the three required overlay zones during COAH's review of the Borough's request for an extension of its second round substantive certification.

According to Landmark and Bergen Development, during the interim period, Fair Lawn sold one parcel located within the River Road redevelopment area, and permitted use of another for market-rate housing when these parcels were the subject of an overlay to address unmet need (specifically, Block 5613, Lots 10-14 and 24 & 25, previously owned by the Borough and Block 5610, Lot 23.01). Landmark stated that these sites have been developed with both commercial and residential units, for a total of 14 market-rate units and no affordable housing units. This assertion has not been refuted in the Borough's papers.

On May 31, 2005, Landmark, the owners of the Heywood site, the contract purchasers of Daly Field, and the entity with "a contractual right to incorporate, for density and/ or open space purposes, Archery Plaza into any land development application for Daly Field" <sup>1</sup> requested that Fair Lawn change the zoning on Daly Field and the Heywood site from R-1 -1 zoning with 10,000 square foot minimum lot sizes to zoning that permitted multi-family attached housing. This request was denied on June 16 and 17, 2005.

In a July 11, 2005 report reviewing the Borough's motion request for an extension, CO AH staff noted on pages 4 and 5 that:

[subsequent to Fair Lawn's October 2, 1996 grant of substantive certification establishing a 100-unit unmet need, through August 31, 2004, the Borough has issued 301 residential building permits, of which 266 were for rental units and 35 were for-sale units. Of these, 52 were for affordable units included in the Fair Lawn plan. The Borough has advised that none of these permits issued resulted from subdivisions in the overlay zones. Fair Lawn submitted a certification that there have been no substantive changes in the availability of land, water and/or sewer capacity within the municipality. Fair Lawn submitted a statement describing how it has captured or attempted to capture affordable housing opportunities since the grant of 1987-1999 substantive certification on October 2, 1996.

<sup>1</sup> Certification of Jonathan G. Burnham, Esq., for Landmark at Radburn June 29, 2007

COAH July 11, 2005 Report, p. 4-5.

Fair Lawn did not adopt the required Daly Field and Heywood site overlay prior to its request for an extension, but a COAH task force that met on June 8, 2005 recommended to the Council that Fair Lawn receive an extension conditioned upon its adoption of overlay zoning on Daly Field and the Heywood site.

Fair Lawn received an extension to its second round substantive certification on July 27, 2005. This extension stipulated that the Borough must adopt the remaining overlay ordinance for Daly Field and the Heywood site within 45 days, or risk the automatic expiration of its substantive certification. The Borough complied, and adopted an overlay ordinance, Number 2025-2005, for the Daly Field and Heywood site on September 6, 2005.

On September 7, 2005, Landmark and Bergen Development Group LLC, filed suit in the Law Division of the Superior Court of New Jersey (Docket No. L-5716-05), challenging the overlay zoning for Daly Field and the Heywood site. In a letter dated November 22, 2005, Ronald Shimanowitz, Esq., counsel to Landmark, requested that COAH revoke Fair Lawn's extended second round substantive certification for several reasons, including: 1) the matter was currently in the Superior Court as a zoning challenge; 2) the original substantive certification granted to Fair Lawn in 1996 was conditioned on adoption of an overlay ordinance on Daly Field and the Heywood site; 3) Fair Lawn failed to adopt an overlay zone on Daly Field and the Heywood site despite Landmark's development proposal to the Borough Council on March 4, 2004; and 4) Fair Lawn failed to note Landmark's proposals in its request for an extension and did not meet the criteria at N.J.A.C. 5:91-14.3 and N.J.A.C. 5:95-15.2.

On December 19, 2005, Fair Lawn petitioned COAH for third round substantive certification. Fair Lawn's petition addressed a recalculated second round obligation of 123 new construction units and a third round rehabilitation share of six units, with a plan that included the previously granted 100-unit vacant land adjustment, the reduced unmet need of 71 units which resulted from the recalculation of Fair Lawn's prior round obligation, and the continued reliance on 52 previously granted zoning reductions at the McBride site.

On March 16, 2006, Landmark filed an objection with COAH to the Borough's third round plan, outlining the following claims: 1) The Borough should not be eligible for a vacant land adjustment when Landmark is willing to provide affordable housing on Daly Field and the Heywood site; 2) The Borough suggested the Clariant site was suitable for affordable housing development, however, this site is not currently a realistic opportunity; 3) Fair Lawn's plan has a shortfall of 21 affordable housing units; 4) Fair Lawn's growth share ordinance is deficient as it provides no bulk relief nor alternative standards for inclusionary development; and 5) The overlay zone adopted for Daly Field and the Heywood site is deficient as it provides for only six units per acre, provides no alternatives to single family detached housing and violates COAH requirements that overlay zones supplant non-residential zoning only.

On October 20, 2006, Judge Jonathan N. Harris, J.S.C., granted Landmark's motion for partial summary judgment, denied a stay and asserted that the overlay ordinance for Daly Field and the Heywood site was "hereby declared invalid and of no force and effect." To date, Fair Lawn has not submitted to COAH a replacement overlay ordinance. On November 9, 2006, Fair Lawn's attorney, Michael Kates, advised COAH that as a result of several factors, the Borough was considering amending its third round Housing Element and Fair Share Plan, pending COAH's

release of a premediation report (which was subsequently released on December 7, 2006). These factors included: the October 20, 2006 nullification of Fair Lawn's ordinance number 2025-2005, overlay for Daly Field and the Heywood site, by Judge Harris; the municipality's current understanding that the Landmark site was more contaminated than originally anticipated; and the demolition of the former Eastman-Kodak building and a redevelopment plan for the site offering to include affordable housing.

In a letter dated December 15, 2006, the Borough's consulting planner, Cheryl Bergailo, provided supplementary information that outlined the details of Fair Lawn's proposed re-petition of a third round Housing Element and Fair Share Plan. Ms. Bergailo proposes that the Borough can meet its cumulative 1987-2014 affordable housing obligations with a Housing Element and Fair Share Plan that adds family for-sale units at the Kodak site and recognizes previously uncredited alternative living arrangements in place of reliance on the previously approved vacant land adjustment, without the consequent reliance on Daly Field and the Heywood site overlay zone to address unmet need.

To date, Fair Lawn has not re-petitioned for third round substantive certification with Ms. Bergailo's proposed changes. On March 7, 2007, CO AH received Fair Lawn's response to the December 7, 2006 report requesting additional information. Fair Lawn provides some of the information requested, but requests an extension to provide any remaining information until "90 days after the adoption of COAH's Court-validated rules." The report notes that:

1. Ms. Bergailo defends the Borough's eleven-year reluctance to adopt an overlay zone that is acceptable to the Court on the Daly Field Tracts on the premise that the Borough understood there was no need to create an overlay zone on the Daly Field Tracts until "the environmental clean-up has been completed."

2. The Borough has received documentation from the New Jersey Department of Environmental Protection (DEP) indicating that chemical releases from adjacent properties have migrated to the Archery Plaza site and is currently under investigation.
3. The Borough understands that the title to the Archery Plaza site is encumbered by a deed restriction to open space use and as such does not meet COAH criteria for new construction.
4. The Borough is, in any event, prevented from finalizing its third round Housing Element and Fair Share Plan until COAH's rules are validated by the Court and Fair Lawn requests an extension of its deadline to respond to the December 7, 2006 COAH report until 90 days after the adoption of COAH's new third round rules.
5. The additional information requested on alternative living arrangements has not been provided by the necessary state agencies.
6. Additional information regarding the suitability of the Clariant site has been requested from the corporation's attorney.
7. The Borough provided new construction project and new construction unit monitoring forms for the McBride Tract.
8. The Borough provides a draft zoning ordinance for the Clariant site.
9. The Borough provided a draft affordable housing and affirmative marketing ordinance.
10. The Borough provided information on its creation of the municipal housing liaison position.

On March 20, 2007, Fair Lawn submitted a letter to COAH in clarification of Ms. Bergailo's letter of March 6, 2007. In its letter, Fair Lawn asserts that the contract language between the Radburn Association and Landmark in paragraph 8.3 does not indicate that no affordable housing may be constructed on that site, but rather that Landmark was to attempt to insure that no non-market rate residential units were required by the municipality during the site plan approval process. The contract, as distributed to all parties, included redacted language that Fair Lawn asserts "indicate that

a lower sales price...would apply if Landmark was forced to include affordable housing in its proposal."

On January 31, 2007, Judge Harris denied Landmark's motion for summary judgment and granted Fair Lawn's cross-motion, joined by COAH, to dismiss the "COAH" allegations from Landmark's complaint and transfer the affordable housing issues regarding Fair Lawn's plan to COAH's jurisdiction. COAH had argued before Judge Harris that as a result of Fair Lawn's filing of its third round petition, that the Fair Housing Act and case law required, in the first instance, that COAH be permitted to exercise its exclusive jurisdiction to review Fair Lawn's cumulative third round affordable housing plan and determine whether it would be granted or denied substantive certification, or be dismissed, prior to the court exercising its jurisdiction. In accepting this assertion, Judge Harris dismissed Landmark's affordable housing allegations in its complaint, without prejudice, and ordered that the matter be transferred to COAH for its consideration.

On July 3, 2007, Landmark filed a motion with COAH based upon Fair Lawn's failure to adopt a valid overlay zoning ordinance for the Landmark site. Landmark's motion requests that COAH designate the Landmark site as part of Fair Lawn's third round affordable housing plan or, in the alternative, that COAH dismiss Fair Lawn's third round petition from COAH's jurisdiction. Opposition papers were filed by Fair Lawn and oral argument was heard by the Council at its September 12, 2007 meeting. At the conclusion of oral argument, the Council voted to submit the matter to a COAH task force for review and to provide recommendations to the full Council.

By letter dated October 25, 2007, counsel for Fair Lawn submitted reports from the New Jersey Department of Environmental Protection ("DEP") relating to the "Heyward Tract," which is a part of the Landmark property. Fair Lawn asserts that the property is currently undergoing

\*The certifications attached to the parties' motion papers are incorporated by reference into this decision.

site remediation. Fair Lawn's submittal also included photocopy photographs of the site and equipment being used for remediation work. Fair Lawn also requested that the Council abstain from taking any action on Landmark's motion until the parties have an opportunity to review the Council's "subcommittee" report. A response letter from Landmark, dated October 30,2007, was received by COAH.

### DISCUSSION

Landmark's motion requests that the Council require Fair Lawn to include its site in Fair Lawn's third round petition currently pending before COAH, or in the alternative, have Fair Lawn's petition for third round substantive certification dismissed from COAH's jurisdiction. As noted in the procedural and factual history, as a condition of its second round substantive certification, Fair Lawn was required to adopt an overlay zoning ordinance on Daly Field and the Heywood site for its vacant land adjustment or "unmet affordable housing need" within 45 days of the grant of its substantive certification. That condition became effective on October 2, 1996, the date the Council granted Fair Lawn second round substantive certification. Notwithstanding this condition to the grant of substantive certification, Fair Lawn failed to adopt an overlay zoning ordinance for the entire Landmark property for almost nine years.

On July 27, 2005, COAH granted Fair Lawn extended second round substantive certification. As a condition of this extension, COAH required Fair Lawn to adopt within 45 days the overlay zoning that it failed to adopt in 1996. On September 6,2005, Fair Lawn finally adopted the required overlay zoning for the Landmark site. On December 19,2005, Fair Lawn filed its third round petition with COAH seeking substantive certification. In February 2006, pursuant to COAH regulations, Landmark filed objections to Fair Lawn's third round plan, including its previously filed

allegations that Fair Lawn had failed to meet COAH's requirement for the proper adoption of an overlay zoning ordinance for the Landmark property. Based upon the filing by Fair Lawn of its third round petition, COAH asserted that it had initial jurisdiction over Fair Lawn's affordable housing plan and, therefore, that the affordable housing allegations contained in Landmark's complaint against Fair Lawn that had been filed in the Superior Court of New Jersey, should be dismissed so that COAH could exercise its exclusive jurisdiction to determine the merits of the matter.

On October 20, 2006, Judge Jonathan Harris, J.S.C., invalidated the Fair Lawn overlay zoning ordinance for the Landmark site, finding that it failed to provide for six units per acre as required by the zoning ordinance. Thereafter, on January 31, 2007, Judge Harris denied Landmark's motion for summary judgment and granted Fair Lawn's cross-motion, joined by COAH, to dismiss the "COAH" allegations from Landmark's complaint and transfer the affordable housing issues regarding Fair Lawn's plan to COAH's jurisdiction. In accordance with COAH's jurisdiction of Fair Lawn's third round petition, Landmark has properly filed the instant motion with COAH.

Despite the invalidation of its required overlay zoning ordinance in October 2006, over one year later Fair Lawn has failed to take any steps towards adopting the required overlay zoning ordinance. Having been given ample opportunity to do so, and having failed to fulfill this required condition of its second round substantive certification and the granting of a vacant land adjustment, the Council now must consider the motion of Landmark requesting COAH to require Fair Lawn to include its site in the Borough's third round fair share plan or, in the alternative, to dismiss Fair Lawn's third round petition and permit this matter to proceed in the Superior Court of New Jersey. Given the specific facts of this matter, the Council deems it appropriate to order the

\*As noted earlier in this decision, Judge Harris dismissed Landmark's complaint against Fair Lawn without prejudice to Landmark's refiling

dismissal of Fair Lawn's third round petition. In doing so, the Council takes this action as being in the best interest to the production of affordable housing in Fair Lawn.

Landmark properly cites to NJ.A.C. 5:94-3.4(a)(1) for the proposition that Fair Lawn has had a continuing obligation since 1996, to provide overlay zoning for the Landmark site in order to fulfill its unmet prior affordable housing obligation pursuant to the grant of a vacant land adjustment by COAH. As noted in the regulation, where a municipality has received a vacant land adjustment and has received substantive certification, "[a]ll components of said certification or judgment that are designed to address unmet need pursuant to NJ.A.C. 5:93-4.1 (b) shall continue in full force...." In this case, despite having failed to fulfill a condition of its second round substantive certification for nine years, COAH provided Fair Lawn with an additional opportunity to adopt the required overlay zoning on the Landmark site through COAH's grant of extended substantive certification in July 2005.

Fair Lawn did adopt overlay zoning for the Landmark site in September 2005, but since October 2006, when this zoning ordinance was found to be invalid by Judge Harris, Fair Lawn has failed to undertake any efforts to adopt new valid overlay zoning for the site. Having failed to complying with its continuing obligation to provide this overlay zoning as a prerequisite to any approval of its third round petition for substantive certification, the Council can only conclude that any further efforts by COAH to obtain Fair Lawn's compliance with its third round affordable housing obligations would not be productive. Instead, the Council finds that in accordance with its regulations and the intent and purpose of the Fair Housing Act, the best potential for the production of affordable housing in Fair Lawn lies in COAH's dismissing Fair Lawn's third round petition. In

of its complaint once COAH had exercised its jurisdiction over Fair Lawn's third round petition.

doing so, Landmark is free to re-file its affordable housing allegations in its complaint in Superior Court.

The Council is mindful of the intention of the Legislature in the Fair Housing Act that the "State's preference for the resolution of existing and future disputes involving exclusionary zoning is the mediation and review process set forth in this act and not litigation, and that it is the intention of this act to provide various alternatives to the use of the builder's remedy as a method of achieving fair share housing." N.J.S.A. 52:27D-303. Indeed, not only does COAH often cite to this provision in the courts when required to assert its jurisdiction over municipal affordable housing plans filed with the Council, but COAH relied upon this provision of the Fair Housing Act when supporting Fair Lawn's cross-motion before Judge Harris to dismiss Landmark's affordable housing allegations in the Superior Court. See Certification of Jonathan G. Burnham, Exhibit N, transcript at page 27. In the instant case, however, the Council has concluded that despite its best efforts at obtaining the municipality's compliance with its 11-year old overlay zoning obligation, that this matter has reached a point where continued attempts by COAH to obtain Fair Lawn's long overdue compliance will not accelerate the actual provision of the municipality's affordable housing obligation.

In response to the October 25, 2007 submission by Fair Lawn, it first must be noted that the COAH task force assigned to review this matter and make recommendations (referred to by Fair Lawn as a subcommittee), did not produce any written report. COAH task forces do not normally create written reports. Consistent with past practice, the COAH task force reviewed the record before the Council and submits its recommendation in the form of an oral presentation to the Council at the next regularly scheduled Council meeting. The presentation and recommendation of

the task force is made either by a COAH staff person or by a deputy attorney general representing COAH. This procedure was followed in the instant case.

As far as the impact of Fair Lawn's assertions regarding the on-going environmental remediation occurring at the Landmark site, the Heywood parcel, far from evidencing any negative impact upon the ability to develop the site for affordable housing, this work seems to demonstrate that the property will indeed be available for development upon conclusion of the remediation work.

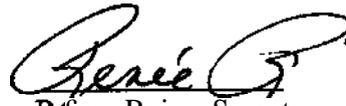
In its October 30, 2007 response, Landmark states that "the decade plus environmental cleanup is virtually complete...." In addition, COAH staff has been aware of the remediation requirements and efforts at the site for some time, as noted in the COAH Compliance Report of September 6, 1996. Landmark having successfully obtained DEP approval of the remediation plan for the site, the submittal by Fair Lawn of documentation showing the actual remediation work being accomplished does not persuade the Council that the Landmark site is inappropriate to meet Fair Lawn's affordable housing obligation. The Council also notes that it is unaware of any attempt by Fair Lawn to raise the environmental status of the site as an impediment to its affordable housing plan in 2005 when the Borough adopted the required overlay zoning for the Landmark property (on the Daly Field and the Heywood site) in order to receive extended second round substantive certification.

In addition to the specific facts of this case, the Council has also taken into account the litigation in the Superior Court before Judge Harris. The Council's action in dismissing Fair Lawn's third round petition is consistent with Judge Harris' decision in which he dismissed the affordable housing allegations of Landmark's complaint, without prejudice, in recognition of COAH's exclusive jurisdiction over a municipality's affordable housing plan voluntarily submitted to COAH for substantive certification. By dismissing Fair Lawn's petition, it is the Council's hope

that this action will pave the way for the quickest possible construction of the affordable housing necessary to meet Fair Lawn's affordable housing obligation.

DECISION

For all of the above stated reasons, the Council has determined that Fair Lawn Borough has failed to comply with COAH's grant of second round substantive certification, COAH's grant of extended substantive certification and the vacant land requirement that overlay zoning be provided for the Landmark site as a continuing obligation of Fair Lawn's third round petition. As a result, Fair Lawn's third round petition for substantive certification is hereby dismissed and Fair Lawn no longer remains under COAH's jurisdiction.

  
Renee Reiss, Secretary  
New Jersey Council on  
Affordable Housing

Dated: November 7, 2007