

**RESOLUTION DENYING KINGS ROW HOMES' MOTION REGARDING
FRANKLIN TOWNSHIP, SOMERSET COUNTY
COAH DOCKET # 08-2024**

WHEREAS, Franklin Township filed a petition for substantive certification on December 20, 2005, under COAH's first set of third round rules; and

WHEREAS, The Housing Element and Fair Share Plan (HE/FSP) that was submitted, prepared by Schoor De Palma (now CMX, Inc.), was endorsed by the governing body on December 13, 2005; and

WHEREAS, the plan that was endorsed by the governing body excluded a site identified as the Bennett Lane site while the Planning Board's plan proposed using the Bennett's Lane site to produce a considerable number of affordable housing units; and

WHEREAS, in correspondence dated December 28, 2005, COAH's Executive Director noted the deficiency in the filing because of the lack of congruence and directed Franklin that in order to remain under COAH's jurisdiction, documents reflecting a congruence of plans had to be filed within 45 days; and

WHEREAS, KRH filed an exclusionary zoning lawsuit seeking a builder's remedy against Franklin in the Superior Court of New Jersey on or about December 29, 2005; and

WHEREAS, the lawsuit also challenged the large lot, one (1) acre zoning of KRH's site on traditional land use grounds. KRH proposed to develop its property, which consists of eight (8) acres, for inclusionary development with on-site development of affordable housing as part of a set-aside in that development; and

WHEREAS, in March 2006, under Superior Court orders, Franklin moved to transfer to COAH counts of the lawsuit alleging affordable housing violations to COAH for its review and mediation; and

WHEREAS, KRH submitted an objection to Franklin's plan pursuant to COAH's rules, and identified a mediation team; however, mediation did not take place; and

WHEREAS, the final decision of the New Jersey Superior Court, Appellate Division, was made on January 25, 2007, In the Matter of the Adoption of N.J.A.C. 5:94 and 5:95 by the New Jersey Council on Affordable Housing (and related cases), 390 N.J.

Super. 1 (App. Div. 2007), and affirmed in part, reversed in part, and remanded portions of the rules back to the Council for rulemaking; and

WHEREAS, as a result of the Court decision, COAH proposed the repeal and replacement of its initial third round methodology and rules, N.J.A.C. 5:94 and N.J.A.C. 5:95, in the form of N.J.A.C. 5:96 and N.J.A.C. 5:97 and COAH's new regulations became effective on June 2, 2008 and COAH proposed additional amendments, which became effective on October 20, 2008; and

WHEREAS, on December 6, 2007, the Franklin Planning Board amended the HE/FSP to delete the Bennett Lane site and make other changes to account for the loss of units from the elimination of that inclusionary site, and on December 19, 2007, the governing body followed suit and endorsed the Board's just amended HE/FSP and re-petitioned COAH under the latest amendment. The KRH site was still not considered for inclusion in the plan; and

WHEREAS, Franklin petitioned COAH with the "new" third round plan on December 31, 2008, in which it proposes to meet its obligation through a number of inclusionary sites, redevelopment areas, and 100% affordable housing developments, but does not include KRH's site; and

WHEREAS, an incomplete letter was sent to Franklin Township on February 23, 2009 granting Franklin Township 45 days to submit the requested information; thereafter, there will be a 45-day public comment period, during which time objections may be submitted to Franklin Township's revised third round HE/FSP; and

WHEREAS, on November 10, 2008, KRH submitted a motion requesting that COAH dismiss Franklin Township from its jurisdiction or in the alternative require that Franklin Township include the KRH property in its third round petition for substantive certification; and

WHEREAS, KRH states that Franklin has abused the COAH process for the past three years, has acted in bad faith, and has maintained its jurisdiction before COAH through a proposed compliance plan that was unrealistic and was unable to meet its affordable housing obligation; and

WHEREAS, KRH has an interest in approximately eight acres of property in Franklin Township, identified at Lots 46 and 47 in Block 468.07 on Franklin's official tax map; and

WHEREAS, KRH's property is located in the easterly and central portion of Franklin along Cedar Grove Lane, also known as County Route 619, east of New Brunswick Road, and has been examined by experts in the land development and engineering fields, and the property contains potable water that can be provided to the property by water service that runs adjacent to, and/or in the immediate vicinity of the property; and

WHEREAS, KRH maintains that sanitary sewers could be provided for the property by connection to existing sewer lines adjacent to the property with sufficient capacity to accommodate the development proposed; and

WHEREAS, KRH additionally argues that its property, which is zoned R-40 Residential Zone, is within easy access to employment opportunities, shopping, the regional transportation network, schools and other community and municipal services, as well as a mass transit stop located across the street from the property; and

WHEREAS, the KRH Property is situated in Planning Area 1 (PA1) and is suitable for multi-family residential development, and KRH is ready and willing to construct an inclusionary development with a percentage of units set aside for affordable housing to help satisfy a portion of Franklin's affordable housing obligation; and

WHEREAS, KRH states that Franklin has advised that it will not consider its site for affordable housing, despite the fact that the KRH site meets the criteria for suitability as found in COAH's rules; and

WHEREAS, KRH argues that CMX, which worked for Franklin in 2005 and 2006, was also working simultaneously on eight different projects for Morris or Morris related entities, the developer of the Bennett's Lane site, in other municipalities; and

WHEREAS, KRH states that these simultaneous representations constitute a conflict of interest under the Local Government Ethics Law, N.J.S.A. 49A:9-22.2 et seq., and CMX's conduct violates the regulations governing professional planners set forth in N.J.A.C. 13:41-2.1 et seq.; and

WHEREAS, Franklin Township submitted opposition to KRH's motion on December 11, 2008; and

WHEREAS, Franklin submits that KRH's motion represents another in a long chain of motions previously made to the Superior Court of New Jersey and the Appellate Division, seeking to either have COAH divested of jurisdiction of Franklin's HE/FSP, or otherwise seek a declaration that the KRH property be included in Franklin's plan; and

WHEREAS, Franklin argues that because KRH has submitted objections to the Township's Fair Share Plan, KRH should not be permitted to circumvent COAH's mediation and review process outlined in the third round rules; and

WHEREAS, Franklin states KRH's motion is premature because KRH has filed objections with COAH to the Township's fair share plan and the motion should not be entertained by COAH until mediation has taken place; and

WHEREAS, Franklin argues that COAH is clearly the appropriate administrative body to retain jurisdiction over Franklin's plan. Franklin cites to Elon Associates, L.L.C. v. Township of Howell, 370 N.J. Super. 375 (App. Div. 2004), stating that the court recognized the desirability of keeping affordable housing matters before COAH where a municipality has petitioned for substantive certification; and

WHEREAS, Franklin additionally states that in his June 3, 2008 decision on the current matter, Judge Ashrafi recognized COAH's jurisdiction when determined that COAH is the preferred forum for resolution of KRH's issues; and

WHEREAS, Franklin maintains that KRH will have an opportunity to present its objections to the Township's plan during the COAH review process, and that to submit its motion at this point in an attempt to circumnavigate COAH's administrative process -- in which both sides will have a full opportunity to present their positions for and against the Fair Share Plan, including any basis on which the KRH property should be included in the plan -- is inappropriate; and

WHEREAS, Franklin further argues that KRH's argument to dismiss Franklin from COAH's jurisdiction is effectively a Section 319 remedy under N.J.S.A. 52:27D-319, which states:

If [COAH] has not completed its review and mediation process for a municipality within six months of receipt of a request by a party who has instituted litigation,

the party may file a motion with a court of competent jurisdiction to be relieved of the duty to exhaust administrative remedies; and

WHEREAS, Franklin maintains that, when read with N.J.S.A. 52:27D-316(b), Section 319 only applies if COAH's review and mediation process was initiated by a litigant; and

WHEREAS, Franklin additionally points to its December 20, 2007 amendment to its Housing Element and Fair Share plan, which removed the Bennetts Lane site, thereby invalidating KRH's allegation of conflict as moot; and

WHEREAS, Franklin states that Schoor DePalma only served as an advisor to the Township and its planning board regarding the HE/FSP and had no ability to vote on the plan, and maintains that Schoor DePalma is not a local government employee with the Local Government Ethics Law as KRH alleges; and

WHEREAS, Franklin also submits that the Superior Court held in its June 3, 2008 decision that the conflict of interest claim is moot as the property has been deleted from the plan; and

WHEREAS, KRH submitted a reply to Franklin's opposition on February 20, 2009; and

WHEREAS, in its reply, KRH reiterates many of the arguments made in its original moving papers, and in addition points to other municipalities that COAH has dismissed from its jurisdiction, Fair Lawn and Rockaway Township, arguing that COAH must insure its fairness and integrity by demanding good faith and probity from the municipalities that seek COAH's jurisdiction and protection; and

WHEREAS, KRH also argues that the issue raised is not an issue to be mediated under N.J.A.C. 5:96-13.1, because it is not regarding the subsequent components of Franklin's 2008 plan; and

WHEREAS, a task force convened on February 27, 2009 to consider the relief requested in KRH's motion; and

WHEREAS, the task force recommends that the Council deny KRH's motion in its entirety as it is premature given the fact that Franklin Township submitted its revised third round HE/FSP on December 31, 2008 and COAH staff review is underway; and

WHEREAS, Franklin Township is validly under COAH's jurisdiction for the revised third round and the Township will have 45 days in which to respond to the incomplete letter with the missing information and thereafter a 45-day public comment period will ensue, at which time KRH may submit an objection to the Township's HE/FSP in accordance with COAH's rules.

NOW THEREFORE BE IT RESOLVED, the Council adopts the task force's recommendation and denies KRH's motion without prejudice as it is premature; and

BE IT FURTHER RESOLVED that KRH will have the opportunity to object to Franklin's plan in accordance with COAH's rules.

I hereby certify that this
Resolution was duly adopted
by the Council on Affordable
Housing at its meeting on 3/12/2009.


Renee Reiss
Council Secretary