

In Re Motion of K. Hovnanian)	New Jersey Council on
North Jersey Acquisitions L.L.C.)	Affordable housing
Seeking to Enjoin)	Docket No. 10-2234
)	
Montvale Borough, Bergen County)	Motion Decision
from Rezoning the Del Ben Site)	
and Other Relief)	September 8, 2010

This matter comes before the Council on Affordable Housing (COAH or Council) by way of a motion submitted on June 14, 2010 by K. Hovnanian North Jersey Acquisitions, LLC (K. Hovnanian). K. Hovnanian requests that the Council issue an order (1) declaring that land is a scarce resource in Montvale and enjoining all development applications except inclusionary projects, such as K. Hovnanian's Del Ben Site; (2) enjoining Montvale from rezoning the Del Ben Site because rezoning conflicts with COAH's regulations; (3) requiring the Montvale Planning Board to expedite its review of the pending application, so that it is completed in July 2010; (4) accelerating the denial of Montvale's current petition for substantive certification and dismissing Montvale from COAH's jurisdiction; and (5) rescinding Montvale's second round substantive certification. The Borough of Montvale submitted opposition on June 23, 2010 and K. Hovnanian replied on June 24, 2010.

Since 2003 K. Hovnanian has been the contract purchaser of the Del Ben Inclusionary Site (the Site) which is a proposed affordable housing mechanism in Montvale's December 30, 2008 Housing Element and Fair Share Plan (HE/FSP). The Del Ben Site is located at Block 302, Lots 1 and 4, and Block 1002, Lot 7 and is approximately 45 acres in size and includes both AH-6 and R-40 zone districts. In August 2008, K. Hovnanian submitted an application for preliminary and final site plan approval with variances to the Montvale Planning Board for the development of 100 residential units on the Site, 20 of which would be affordable housing units. By Consent Order dated August 17, 2009, the application was deemed complete.

The application seeks to rearrange the lot lines to place all of the R-40 zoned land in Block 1002, Lot 7. The proposal would put all of the affordable housing units onto a

16.87 acre parcel to be developed as 100 units of housing, 20 units of which would be affordable housing.

There are issues pertaining to ingress and egress for the 16.87 inclusionary development. K. Hovnanian seeks to utilize Upper Saddle River Road, while the Borough maintains that Upper Saddle River Road does not have the capacity to handle the additional traffic and seeks to have K. Hovnanian use the southern access road, Summit Avenue, to the Site. The Borough maintains that it had always anticipated and documented that vehicular access would only be onto Summit Avenue and that initially K. Hovnanian agreed. Presentation of K. Hovnanian's application before the Borough Planning Board has commenced and is ongoing. Thus far, there have been at least fourteen appearances to date before the Borough Planning Board. K. Hovnanian states that it provided the testimony of a traffic engineer before the Montvale Planning Board who testified that the access via Upper Saddle River Road is sufficient for the proposed 100-unit development.

On June 1, 2010 the Montvale Planning Board adopted a Re-Examination Report of its Master Plan. The Re-Examination Report proposes to rezone the Del Ben Site as R-10, which permits single family dwelling units on lots with a minimum of 10,000 square feet. On June 8, 2010 the Montvale Mayor and Council introduced an ordinance affecting the zoning of the Del Ben Site. A public hearing for the rezoning ordinance was held on June 29, 2010. Counsel for K. Hovnanian also appeared at the hearing and objected to the adoption of the proposed ordinance.

On June 15, 2010 COAH issued a letter to the Borough of Montvale advising that rezoning Block 302, Lot 1, the Del Ben Site, to single family residential would be inconsistent with the adopted HE/FSP that has been submitted to COAH as part of the Borough's request for third round substantive certification. COAH notes that the potential reduction of units on the Site, due in part to DEP regulation changes, is the subject of ongoing mediation. COAH's letter points to N.J.A.C. 5:97-6.5, which prohibits a municipality from rezoning without COAH authorization where the municipality zoned for inclusionary development to address the prior round obligation. Pursuant to the Borough's submitted HEFSP, the Del Ben Site falls under that category. To date, COAH

considers the Site to represent a realistic opportunity for the creation of affordable housing.

By way of background, the Borough of Montvale received a Judgment of Compliance from the Superior Court of New Jersey on December 16, 1994. Montvale was sued for exclusionary zoning by Theodore Kaczala and Rockland Built Homes, Inc. (Bergen County Docket No. L-35838-89) and Raymond Janovic and Patricia Janovic, et al. (Bergen County Docket No. L-33745-89). The cases were consolidated by the Superior Court and a Judgment of Compliance and Order for Repose was granted by the Honorable Peter J. Ciolino, A.J.S.C., on December 16, 1994. The Final Judgment of Compliance and Order of Repose granted by the court requires inclusion of the Del Ben Site as an inclusionary site to provide 39 units on-site and further was predicated upon a HE/FSP that included a vacant land adjustment with a realistic development potential (RDP) of 146 units and an unmet need of 109 units. COAH determined a second round 1987-1999 cumulative obligation for Montvale of 255 units, all new construction.

On December 15, 2004 Montvale received second round substantive certification from COAH. The second round substantive certification included a vacant land adjustment. Montvale had not acquired a portion of the Del Ben Site for open space as required in its judgment of compliance and the Borough also included an additional vacant land analysis in its June 5, 2000 petition requesting a reduction in the RDP established by the court. COAH staff conducted an analysis of vacant land in Montvale and concluded that the RDP should be 188 units. Montvale's second round plan received substantive certification on December 15, 2004 for a plan that fully addressed the 188-unit RDP, relying in part on the Del Ben Site, and including unmet need of 67 units.

On December 30, 2008 the Borough submitted a Petition and HE/FSP to COAH seeking third round substantive certification. On May 7, 2009 COAH issued a Pre-Mediation Report requesting Additional Information from the Borough. The Borough's third round fair share obligation consists of a five-unit rehabilitation share, 188-unit RDP (67 unmet need) and a 39-unit Growth Share Obligation (GSO).

The Pre-Mediation Report notes that the Site was part of Montvale's 1994 Judgment of Compliance and the property was rezoned AH-6 to produce six units per

acre with a 20 percent set-aside for affordable housing to comply with the 1994 Judgment of Compliance. The Borough's second round certified plan attributed 39 affordable housing units to the Site, consistent with the 1994 Judgment. Montvale's third round HE/FSP maintains the Site is only capable of producing 20 affordable housing units because of environmental constraints, maintaining that changes in New Jersey Department of Environmental Protection (DEP) regulations have impacted the Site, decreasing the scope of the project from 195 total units including 39 affordable units. K. Hovnanian has submitted a development application for a portion of the Site seeking approval to construct to a total of 100 units including 20 affordable housing units. No application has been submitted to date for development of the remaining lands.

COAH's Pre-Mediation Report notes that no new affordable housing activities have been proposed in the Borough's third round plan and that assumptions made by the Borough in the HE/FSP are inconsistent with COAH's regulations. In order to have a compliant plan, Montvale must resolve its growth projection adjustment and re-petition with a third round plan that addresses the Borough's 39-unit adjusted growth share obligation. The Pre-Mediation Report provides a detailed list of minimum criteria that would need to be provided in a re-petition. On July 2, 2009 the Borough submitted to COAH adjustments and additions to the proposed HE/FSP to address the adjusted GSO. Montvale maintains that the revised HE/FSP fully addresses the Borough's entire obligation, even if the proposed 20 affordable housing units projected on the Del Ben Site were excluded.

Four parties objected to Montvale's HE/FSP: Baldanza Construction Company, K. Hovnanian, Reno Del Ben and Fair Share Housing Center. Mediation sessions were held on October 21, 2009 and July 27, 2010 without reaching an agreement. K. Hovnanian's objection concerns Montvale's review of its application, stating that Montvale is refusing to include reasonable accommodations to assist in the provision of affordable housing on its Site, and that Montvale is imposing numerous excessive cost generating requirements, including the initial escrow deposit in the amount of \$182,161.95. K. Hovnanian is also concerned that the HE/FSP requires that the 20 affordable units to be provided may be rental units, but that the project is not designed for rental units and it cannot be developed to provide rental units. K. Hovnanian states that

in the event that Montvale refuses to grant the waivers or variances necessary it reserves its right to supplement the objection to COAH and to seek a rezoning of the Del Ben Site.

K. Hovnanian's motion

K. Hovnanian argues in support of its motion that the Borough has not put forth any changed circumstance to justify the rezoning. Further, K. Hovnanian asserts that all of the circumstances surrounding the development of the Del Ben Site, including DEP storm water regulation changes, were known to all parties when COAH issued substantive certification to Montvale in 2004 and when Montvale petitioned COAH for third round substantive certification in 2008. K. Hovnanian asserts that the Borough Planning Board is delaying the application before the Board and attempting to make it difficult for the applicant to complete its public presentation. K. Hovnanian contends that the Master Plan Re-Examination Report and the attempt to rezone the Site are further examples of the Borough's actions to inappropriately delay K. Hovnanian's application. Based on this, K. Hovnanian contends that COAH should halt the re-zoning of the Del Ben Site and ensure that the pending development application proceed as expeditiously as possible.

K. Hovnanian further asserts that by removing the Del Ben Site as an inclusionary Site, Montvale's adjusted GSO will increase from 39 units to 59 units, causing the Borough's plan to fall 20 units short. K. Hovnanian points out that there is no justification for the Borough to adopt a zoning change for the Del Ben Site because there has been no change in circumstance related to the Site.

K. Hovnanian maintains that it is entitled to the relief sought in its motion, notwithstanding the opposition filed by Montvale. K. Hovnanian also states that the relief sought needs to be decided by the Council and is not appropriate for COAH mediation.

Regarding issues pertaining to ingress and egress, K. Hovnanian maintains that the environmental issues associated with the Del Ben Site relate to a change in regulations going back to 2004. K. Hovnanian argues that in 2008, the DEP informed K. Hovnanian that it would not issue a waiver for a crossing over the Special Water Resource Protection Area buffer (SWRPA) buffer because alternative access exists via Upper Saddle River

Road. The SWRPA buffer is required for major development that is adjacent to a waterway that is designated as C1. K. Hovnanian further asserts that the Borough was advised in 2008 that K. Hovnanian intended to develop the northern portion of the Del Ben Site as a separate development from the southern portion with access solely onto Upper Saddle River Road.. K. Hovnanian maintains that Upper Saddle River Road is not a substandard rural country lane, as characterized by the Borough Planning Board.

Montvale's Opposition

In its opposition, Montvale maintains that there is no basis for COAH to take action against the Borough. The Borough states that it has acted to approve seven inclusionary developments since 1993, including two by K. Hovnanian, one of which has been completed and contains 26 affordable housing units within a 128-unit development. Montvale asserts that the Del Ben Site application is presently continuing before the Montvale Planning Board. Montvale states that the HE/FSP has not been amended and continues to include the Del Ben Site for 20 affordable housing units in an inclusionary development. Montvale further maintains that adoption of the Re-Examination Report does not prevent K. Hovnanian from continuing with its application before the Borough Planning Board.

Montvale advises that Borough officials met with DEP Commissioner Bob Martin for the purpose of exploring the issuance by the DEP of a waiver to permit crossing of the SWRPA to allow access to Summit Avenue for the development of the Del Ben Site. The Borough states that it favors access to the Del Ben Site by Summit Avenue over the proposed access via Upper Saddle River Road based upon public safety and good planning concerns. The Borough advises that as a consequence of the DEP meeting, the Montvale Planning Board moved forward with the Re-examination Report. The issue of ingress and egress to the Site remains an important outstanding issue between K. Hovnanian and the Borough Planning Board.

In support of its opposition to K. Hovnanian's motion, the Borough presented the certifications of John De Pinto, member of the Montvale Planning Board and Richard Preiss, PP. Mr. De Pinto takes exception to K. Hovnanian's characterization of the Planning Board process. Mr. De Pinto notes that after fourteen sessions of the applicant

presenting its application at both regular and special meetings, there are numerous objectors, some of whom are represented by counsel, and to date their participation, as well as the public in general, has been limited to asking questions of K. Hovnanian's witnesses.

Mr. Preiss maintains that even if the Del Ben Site is rezoned, all other zoning regulations relevant to the Borough's HE/FSP will remain in effect, which will permit the production of a surplus of affordable units above the Borough's fair share obligation. For these reasons, Montvale asserts it is entitled to maintain its status as a municipality under COAH's jurisdiction.

Montvale maintains that K. Hovnanian is not entitled to any of the relief requested. The Borough asserts that (1) the matter is inappropriate for summary disposition, (2) the Borough's compliance plan should remain under COAH's jurisdiction, (3) there is no basis for imposing a scarce resource order, and (4) the Planning Board should be permitted to complete its public hearing on the K. Honvanian development application.

Discussion

The parties appeared before the Council for oral argument on July 15, 2010, and the Council referred the matter to a task force.

COAH's regulations at N.J.A.C. 5:97-6.5 state that a municipality that zoned one or more sites for inclusionary development to address its 1987-1999 housing obligation and included the site(s) in a previously certified fair share plan or judgment of compliance shall retain such zoning in the third round fair share plan if the Council determines that the Site continues to present a realistic opportunity for the production of affordable housing. A zoned but un-built site, such as K. Hovnanian's Site, that was included in a housing element and fair share plan that received prior round substantive certification or a judgment of compliance must be evaluated by the Council at the time the municipality petitions for the third round to determine if the site continues to present a realistic opportunity for the construction of affordable housing. Pursuant to its regulations, in evaluating an un-built site the Council shall consider whether the site is a

suitable site pursuant to N.J.A.C. 5:97-3.13 and whether market conditions create a realistic opportunity for the affordable housing to be constructed.

COAH's May 7, 2009 Pre-Mediation Report Requesting Additional Information analyzes the Borough's position in its HE/FSP that the entire parcel is developable for a total of 148 units, including 30 affordable housing units (100 on Parcel A in the north, the subject of this motion, and 48 in the south on Parcel B). The Borough indicates that changes in DEP regulations have impacted the Site, decreasing the scope of the project from 195 total units including 39 affordable units, to a total of 100 units including 20 affordable units. As a result, the Montvale third round plan seeks a recalculation of the previously established 188-unit second round Realistic Development Potential (RDP).

In its HE/FSP, Montvale suggests that due to additional environmental constraints realized on the Del Ben Site during the site plan approval process, the Borough's RDP should be reduced to 168 units. However, the list of sites included in Montvale's third round petition for substantive certification is identical to what was certified by COAH in the second round, with two deviations on the numbers of affordable units associated with those sites, one of which concerns the K. Hovnanian Site. The list attributes a 19-unit reduction in affordable housing on the Site due to the adoption of new DEP rules that protect C-1 stream corridors but does not discuss the potential for affordable housing production on the remaining property associated with the development application that has been submitted for the Site.

Based on the above, the Site is suitable and Montvale may not rezone the Site as it continues to provide a realistic opportunity for the construction of affordable housing. Mediation has been ongoing regarding K. Hovnanian's objections to Montvale's HE/FSP, concurrent with Montvale conducting hearings on K. Hovnanian's pending application. The most recent mediation session was held on July 27, 2010. As of the date of this decision, K Hovnanian's main objections concerning the number of units to be provided on the Site and which road will be used as access to the development on the Site are unresolved.

K. Hovnanian also requests that land be declared a scarce resource in Montvale and that all development applications, except inclusionary projects, be enjoined. The purpose of COAH granting a scarce resource restraint is to ensure that "a participating

municipality takes appropriate measures to reserve scarce resources that may be essential to fulfill the municipality's fair share obligation." N.J.A.C. 5:96-12.1. COAH's power to preserve resources through a scarce resource restraint originates from Hills Dev. Co. v. Bernards Tp., 103 N.J. 1, 61-63 (1986) (Hills). In that case, the Court stated that, "where infrastructure capacity is limited, sewerage or other resources may be exhausted, precluding future Mount Laurel development. The objective of these conditions is to prevent such use of scarce resources." Hills at 25. Montvale has previously received a vacant land adjustment and has applied for a growth projection adjustment in its pending HE/FSP. As Montvale is not permitted to rezone K. Hovnanian's Site, it is not necessary to impose a scarce resource restraint at the present time.

K. Hovnanian also requests that the Montvale Planning Board expedite its review of its pending application. COAH is mindful of its role in the Planning Board process. COAH has jurisdiction only over a municipal HE/FSP, and while COAH may promulgate regulations regarding compliance with the Fair Housing Act, it does not empower COAH to decide the underlying ordinances or the prerequisites to valid enactment of an ordinance. Alexander's Dept. Stores of N.J., Inc. v. Borough of Paramus, 125 N.J. 100 (1991). As such, COAH may only enforce its regulations regarding Montvale's HE/FSP and cannot dictate over the Borough's review process.

K. Hovnanian also requests that COAH accelerate the denial of Montvale's current petition for substantive certification and dismiss Montvale from COAH's jurisdiction and rescind Montvale's second round certification. As stated above, pursuant to N.J.A.C. 5:97-6.5, Montvale is not permitted to rezone K. Hovnanian's Site. Since the filing of K. Hovnanian's motion, Montvale has taken no further steps in the Master Plan re-examination process to rezone the Site. As such, it is not appropriate to dismiss Montvale from COAH's jurisdiction at this time.

Finally, K. Hovnanian requests that the Council rescind Montvale's second round substantive certification. As stated above, Montvale petitioned COAH for third round substantive certification on December 30, 2008. Pursuant to N.J.A.C. 5:97-3.1, a municipal third round petition addresses the cumulative 1987-2018 fair share obligation. N.J.A.C. 5:97-6.5 requires that a site zoned to address a municipal 1987-1999 housing obligation and which was included in a previously certified fair share plan or judgment of

compliance retain such zoning in the third round fair share plan if the Council determines that the Site continues to present a realistic opportunity for the production of affordable housing. Montvale's plan to address its cumulative 1987-2018 affordable housing obligation, which presently includes the Site, is currently under review by COAH. K. Hovnanian's motion to rescind the Borough's second round substantive certification is therefore denied.

Decision

K. Hovnanian's request that the Council enjoin Montvale from rezoning the Del Ben Site because rezoning conflicts with COAH's regulations is granted. All of K. Hovnanian's other requests for relief are denied without prejudice. The Council also orders Montvale to provide an update regarding the progress of the Planning Board hearing process to the Council, to be submitted COAH one week prior to each regularly scheduled Council meeting. In addition, the Council orders both parties to explore all options of ingress and egress for the Site, and to submit the factual findings of site and access suitability to the COAH mediator. The Council recommends that DEP be invited to participate in the next COAH mediation session to advise what criteria should be considered in making the findings of site and access suitability. COAH will review this matter within 90 days of this decision.



Renee Reiss
Council Secretary

Dated: September 8, 2010