



018

RECEIVED

2014 NOV 13 A 10:41 State of New Jersey

CHRIS CHRISTIE
Governor

OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF LAW
25 MARKET STREET
PO Box 112
TRENTON, NJ 08625-0112

JOHN J. HOFFMAN
Acting Attorney General

KIM GUADAGNO
Lt. Governor

JEFFREY S. JACOBSON
Director

SUPREME COURT
CLERK'S OFFICE

November 13, 2014

Mark Neary, Clerk
Supreme Court of New Jersey
Richard J. Hughes Justice Complex
P.O. Box
Trenton, New Jersey 08625

Re: IMO the Adoption of N.J.A.C. 5:96 and 5:97 by the
New Jersey Council on Affordable Housing
Docket No. 067126

Brief of Respondent Council on Affordable Housing
in Opposition to Motion in Aid of Litigants'
Rights

Dear Mr. Neary:

Please accept this letter brief in lieu of a more formal submission on behalf of the Council on Affordable Housing (COAH or Council) in opposition to appellant Fair Share Housing Center's (FSHC) Motion to Enforce Litigant's Rights. After complying with the March 14, 2014 order's time frames for proposal, public hearing, and notice and comment, and after discussion and two motions, COAH deadlocked on the final rule adoption, thus missing the Court's deadline for that action.



That outcome - a risk inherent in the workings of a deliberative, multi-member body representing different perspectives on affordable housing - does not warrant the extraordinary relief that FSHC seeks from this Court, particularly where the Council's impasse is a result that FSHC urged and celebrated. Accordingly, the Court should deny its motion.

TABLE OF CONTENTS

COUNTERSTATEMENT OF FACTS AND PROCEDURAL HISTORY 2
ARGUMENT 6
 The Court Should Deny This Motion and the Incredible
 Relief Sought By FSHC Because COAH Attempted But Was
 Unable To Comply With All of the Terms of the Court's
 Order. 6
CONCLUSION 12

COUNTERSTATEMENT OF FACTS AND PROCEDURAL HISTORY¹

In its opinion invalidating the most recent previous iteration of the Third Round Rules, this Court directed COAH to promulgate regulations similar to those used in the First and Second Round within five months of the issuance of its decision.

¹ The procedural and factual histories of this matter have been combined here for the convenience of the Court.

215 N.J. 578, 620 (2013). By order dated March 14, 2014, this Court extended that timeframe. (Aa1-9).²

In that order, the Court established a schedule that comported with the rulemaking process established in the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq., and imposed various deadlines for COAH that would require the Council to adopt the proposed rules by October 22, 2014 for publication in the New Jersey Register on November 17, 2014. (Aa2-3). COAH fully satisfied all but the ultimate deadline.

The order required that COAH prepare and approve proposed regulations by May 1, 2014, and forward them to the Office of Administrative Law for publication in the June 2, 2014 New Jersey Register. (Aa2). COAH complied with both of these requirements: it voted to propose the rules during an April 30, 2014 public meeting and subsequently submitted rules for publication. 46 N.J.R. 924; Aa43.

The order required that COAH hold a public hearing if it received such a request within thirty days of publication. (Aa3). Rather than wait for such a request, COAH noticed a

² "Aa" refers to appellant FSHC's appendix.

public hearing when it published the proposed rules. On July 2, 2014, COAH held a public hearing. 46 N.J.R. 924; Aa43.

As COAH proceeded through the rulemaking process consistent with this Court's mandate, FSHC returned to this Court, using the same procedural vehicle it uses now, and attempted to stop the rulemaking process established in the Court's order. On September 9, 2014, this Court denied that motion. (Aa82).

Meanwhile, COAH proceeded through the process of promulgating rules similar to those adopted in the First and Second Rounds. The order required that COAH establish a comment period for the proposed rules that extended until August 1, 2014. (Aa3). COAH did so, and received and prepared responses to more than 3,000 comments. 46 N.J.R. 924; Aa44.

Finally, the order directed that COAH adopt the final proposal by October 22, 2014 so as to allow for publication in the November 17, 2014 New Jersey Register. (Aa3). To fulfill that direction, COAH scheduled and held a public meeting on October 20, 2014 to adopt the proposed substantive and procedural Third Round Rules. (Aa36), (Aa48).

All six sitting COAH members participated in the meeting. (Aa36). When COAH reached the agenda item for the

rule adoption, a motion was made and seconded to "table for 60 days the item number 2, the adoption of N.J.A.C. 5:99 substantive rules and N.J.A.C. 5:98, procedural rules." (Aa41). Members of the Council discussed the motion, with some members expressing a desire for additional time to work on the proposal and others wanting to comply with the timeline established in this Court's order. For example, the Chair stated that "I too believe it's important to adhere to the Court's directive[.]" (Aa42). Those expressing a desire for more time recognized that adopting the motion would mean that COAH did not comply with order's deadline, but opined that it would foster the underlying intent. (Aa42). After discussion, the motion failed to carry, with three members voting in favor and three members voting against the motion. Ibid.

Subsequently, after review of the Rule proposal, a motion was made and seconded to adopt a Resolution "to adopt and publish the proposed regulations, N.J.A.C. 5:98 and 5:99." (Aa44). Consistent with their vote to table the agenda item, the same three members voted against the motion to adopt the

proposed Third Round Rules.³ The Chair of the Council, along with two other members, voted to adopt. This motion, too, failed to carry, with COAH again deadlocking three to three.

Later that day, appellant "applaud[ed] the leadership of the members of the COAH Board who today rejected the Christie Administration's deeply flawed fair housing rules." Fair Share Housing Center, "COAH Board Rejects Rule Proposal," <http://fairsharehousing.org/blog/entry/coah-board-rejects-rule-proposal/> (Oct. 20, 2014) (last visited Nov. 12, 2014).

FSHC subsequently filed its motion to enforce litigants' rights. COAH files this brief in opposition.

ARGUMENT

THE COURT SHOULD DENY THIS MOTION AND THE INCREDIBLE RELIEF SOUGHT BY FSHC BECAUSE COAH ATTEMPTED BUT WAS UNABLE TO COMPLY WITH ALL OF THE TERMS OF THE COURT'S ORDER.

This Court should deny FSHC's motion in aid of litigants' rights where it is founded upon the Council's inability to approve the proposed Rules by a majority of the members present. Because the Council attempted, but was unable,

³ During public comment at the October 20 meeting, a representative of appellant Fair Share Housing Center spoke against COAH adopting the proposed Rules and urged the Council that it "was time to take a step back." (Aa39).

to comply with the terms of the Court's order, relief is not appropriate under Rule 1:10-3.

The scope of relief under Rule 1:10-3 is limited to remediation of a violation of a court order. Abbott v. Burke, 206 N.J. 332 (2011). "Clearly, before relief can be afforded, the court must be satisfied that the party had the capacity to comply with the order and was willfully contumacious." Pressler & Verniero, Current N.J. Court Rules, Comment R. 1:10-3 (Gann). No relief is appropriate under the Rule unless "the court determines the non-compliant party was able to comply with the order and unable to show the failure was excusable." Milne v. Goldberg, 428 N.J. Super. 184, 198 (App. Div. 2012).

The Council made all possible efforts to comply with the Court's order. At every step, the Council proceeded along the path established by this Court, fully and timely complying with the order's terms. It developed the rules to be proposed consistent with the Court's order. It proposed and published those proposed rules consistent with the Court's order. And it engaged in the public hearing, notice, and comment process established in the Administrative Procedure Act and incorporated into this Court's order. As one Council member noted, "Our staff has worked diligently, I know weekends and nights for

several weeks now putting these responses and whatnot together."

(Aa41).

It fell short only at the last hurdle, and only because the members of the Council were unable agree on how to proceed consistent with their views on affordable housing and this Court's order. As one member of the Council who ultimately voted against the adoption of the proposed Rules explained:

I would hope and ask the Court as a part of this public record that they generally consider that this board is trying to make a very sincere effort to have plans and regulations, regulations that meet the needs of our citizens of New Jersey and that comply with the Supreme Court rules as put forth and directed by the Supreme Court.

[(Aa41).]

Such sentiment is hardly the fodder for a motion in aid of litigants' rights.

Simply put, the Council made all efforts but was unable to fully comply with the Court's order. See Milne, supra, 428 N.J. Super. at 198 (explaining that R. 1:10-3 requires movant to demonstrate that "party was able to comply with the order."). It took all the intermediate rulemaking steps required by statute and Court order and considered and deliberated in public session upon Rules that were ready for

adoption. Its actions and the public record amply demonstrate that it neither ignored nor willfully violated this Court's order; rather, it was simply unable to comply with the order's ultimate requirement. COAH could not act because it lacked a majority of members voting in favor of either seeking an extension or adopting the proposed Rules. Abbott v. Burke, 206 N.J. 332, 372 (2011). Where the Legislature has precisely dictated the membership of a public body to reflect different perspectives on affordable housing, N.J.S.A. 52:27D-305(a), FSHC cannot fairly petition this Court for the extraordinary measures it now seeks based on Council members' actions reflecting those different perspectives.

This is particularly true where the Council members who voted against the adoption of the proposed Rules did so consistent with the views expressed by FSHC at and after the meeting. At the meeting, a representative of FSHC urged the Council to "take a step back" from rule adoption; afterwards, that same representative later "applauded" the rejection of the proposed Rules. In such a context, where a litigant has taken public positions urging a particular outcome - which, of course, is a view it is perfectly free to hold and espouse - it can hardly complain to this Court when it achieves that goal.

Nor can FSHC demonstrate that COAH's inability to adopt the regulations was inexcusable. Milne, supra, 428 N.J. Super. at 198. The record demonstrates that some members of the Council wanted to ask this Court for an extension of time in which to complete the rulemaking process and to consider the comments, Aa41-42, while others thought that adopting the proposed Rules in compliance with the Court's order was the overriding concern, Aa42. That neither viewpoint could muster a majority is not inexcusable; it simply reflects each Council member approaching their responsibilities from their own perspective.⁴

Finally, even if the Court finds that the absence of a majority in support of either seeking an extension or adopting the proposed Rules demonstrates a willful, inexcusable violation of this Court's order, there is no basis to grant the extraordinary relief sought by movant. First, relief under a motion in aid of litigant's rights is not intended to be punitive. Ridley v. Dennison, 298 N.J. Super. 373, 381 (App.

⁴ Nor would it be appropriate for the Court to compel an affirmative vote on either motion. No such relief is available under a mandamus action, see Switz v. Middletown, 23 N.J. 580, 587-88 (1957) ("Mandamus lies to compel but not control the exercise of discretion."), and none is appropriate here.

Div. 1997); see also, Milne, supra, 428 N.J. Super. at 198. FSHC's application is precisely that, exposing the State's municipalities to unknown but substantial litigation risk and expenses. Second, it disregards the Fair Housing Act's express intent 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. Third, it elevates FSHC's parochial interests against all the other commenters, including other groups that spoke at the public meeting. Opening the floodgates to builders' remedy lawsuits would be at cross-purposes, for example, with the representative of the New Jersey Sierra Club's interest in "proper planning and smart growth," (Aa37), and would do little to address housing for people with special needs, (Aa40).


The Court should deny FSHC's motion. COAH complied to the letter, with the Court's orders in all but the last step. At the final hurdle, the Council's members exercised their prerogative to vote aye or nay on two motions concerning the proposed Rules, and neither motion carried. Because the Council did all that it was able to do and did not willfully violate this Court's order, the Court should deny FHSC's motion.

CONCLUSION

The Court should deny the motion.

Sincerely yours,

JOHN J. HOFFMAN
ACTING ATTORNEY GENERAL OF NEW JERSEY

By: 
Geraldine Callahan
Deputy Attorney General
Attorney ID 030071983

c: Kevin. D. Walsh, Esq.
Attached Service List

SERVICE LIST

IN RE ADOPTION OF THIRD ROUND REGULATIONS, N.J.A.C. 5:96
AND 5:97, BY THE COUNCIL ON AFFORDABLE HOUSING

Edward J. Buzak, Esquire
The Buzak Law Group
Montville Office Park
150 River Road, Suite 5-4
Montville, New Jersey 07045
T: 973-335-0600
F: 973-335-1145
ejbuzak@buzaklawgroup.com
slmogilesky@buzaklawgroup.com

Thomas F. Carroll, III, Esquire
Stephen Eisdorfer, Esquire
Hill Wallack
202 Carnegie Center, CN 5226
Princeton, New Jersey 08543
T: 609-734-6336
609-452-1888
tcarroll@hillwallack.com
seisdorfer@hillwallack.com

Henry L. Kent-Smith, Esquire
Fox Rothschild
Princeton Pike Corporate Center
997 Lenox Drive, Building 3
Lawrenceville, New Jersey 08648
T: 609-896-4584
F: 609-896-1469
Hkent-smith@foxrothschild.com

Jeffrey Kantowitz, Esquire
Law Office of Abe Rappaport
195 Route 46 West, Suite 6
Totowa, New Jersey 07512
T: 973-785-1799
F: 973-785-4777
Jeffrey.kantowitz@gmail.com

Christopher Norman, Esquire
Norman Kingsbury and Norman
30 Jackson Road, Suite A-2
Medford, New Jersey 08055
T: 609-760-3189
F: 609-654-6740
cnormanlaw@gmail.com

Jeffrey R. Surenian, Esquire
Surenian @ Associates, LLC
707 Union Avenue, Suite 301
Brielle, New Jersey 08730
T: 732-612-3100
F: 732-612-3101
jrs@surenian.com

Stewart Platt, Esquire
40 Berlin Avenue
Stratford, New Jersey 08084
T: 856-784-8500
F: 856-784-8050
platt@mplawoffice.com

David R. Oberlander, Esquire
Bisgaier Hoff, LLC
25 Chestnut Street, Suite 3
Haddonfield, New Jersey 08033
Ph: 856-795-0150
F: 856-795-0312
DOberlander@bisgaierhoff.com

Jonathan E. Drill, Esquire
Stickel, Koenig & Sullivan
571 Pompton Avenue
Cedar Grove, New Jersey 07009
T: 973-239-8800
F: 973-239-0369
jondrill@aol.com

Russo & Cassidy
1628 Craig Road
Toms River, New Jersey 08753-2786

Kevin J. Moore, Esquire
Sills Cummis & Gross
650 College Road East
Princeton, New Jersey 08536
T: 609-227-4600
F: 609-227-4646
kmoore@sillscummis.com

Ronald C. Morgan, Esquire
Parker McCay
9000 Midlantic Drive, Suite 300
Mt. Laurel, New Jersey 08054
T: 856-985-4010
F: 856-552-1427
rmorgan@parkermccay.com

Tracy A. Siebold, Esquire
Nehmad, Perillo & Davis
4030 Ocean Heights Avenue
Egg Harbor Township, New Jersey 08234
T: 609-927-1177
F:
tsiebold@npdlaw.com

Lawrence S. Lustberg, Esquire
Eileen M. Connor, Esquire
Gibbons P.C.
One Gateway Center
Newark, New Jersey 07102
T: 973-596-4731
F: 973-596-4731
LLustberg@gibbonslaw.com

Ronald K. Chen, Esquire
Constitutional Litigation Clinic
Center for Law & Justice
123 Washington Street
Newark, New Jersey 07102
T: 973-353-5378
F: 973-353-1445
ronchen@andromeda.rutgers.edu

Martin F. McKernan, Jr., Esquire
McKernan, McKernan & Godino
113 North Sixth Street
Camden, New Jersey 08012
T: 856-964-7759
F: 856-964-9620
mckernangodino@juno.com

Connie Pascale, Esquire
Legal Services of New Jersey
100 Metroplex Drive, Suite 402
P.O. Box 1357
Edison, New Jersey 08818
T: 973-572-9100
F: 732-572-0068
cpascale@lsnj.org

Catherine Weiss, Esquire
Lowenstein Sandler PC
65 Livingston Avenue
Roseland, New Jersey 07068
T: 973-597-2438
F: 973-597-2439
CWeiss@lowenstein.com

Georgette Castner, Esquire
Montgomery, McCracken, Walker & Rhoads
457 Haddonfield Road, Suite 600
Cherry Hill, New Jersey 08002
T: 908-713-9723
F: 908-735-7882
GCastner@mmwr.com

Edward Barocas, Jeanne Locicero
Alexander Shalom
ACLU of NJ Foundation
89 Market Street
P.O. Box 32159
Newark, New Jersey 07102
T: 973-642-2086
F: 973-642-6523
ebarocas@aclu-nj.org