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March 10, 2014

HAND DELIVERY

Mark Neary, Clerk
Supreme Court of New Jersey
Richard J. Hughes Justice Complex
25 West Market Street, P.O. Box 093
Trenton, New Jersey 08625-093

Re: In re: Adoption of N.J.A.C. 5:96 and 5:97
Docket #67,126

Letter Brief in Response to New Jersey Council on
Affordable Housing's Motion For a Stay of the Appellate
Division's March 7, 2014 Order and in Support of Motion to
Extend the Time to Adopt New Third Round Rules

Dear Mr. Neary:

Please accept this letter brief in lieu of a formal brief on behalf of Appellants Bernards Township (Somerset County), Clinton Township (Hunterdon County), Union Township (Hunterdon County), and Greenwich Township (Warren County) (referred together as the "Four Towns") in response to the motion filed by the New Jersey Council on Affordable Housing for a Stay of the Appellate Division's March 7, 2014 Order and in Support of the Motion to extend the time by which COAH must propose and adopt new Third Round Rules to June 2, 2014.

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PRELIMINARY STATEMENT

This is the response by the Four Towns to two pending motions filed by the New Jersey Council on Affordable Housing ("COAH"), the motion for a Stay of the Appellate Division's March 7, 2014 Order, and the motion to extend the five month time period within which COAH must adopt new Third Round affordable housing rules and regulations (the "new Third Round rules"). After invalidating a substantial portion of the Third Round rules and regulations, the Appellate Division remanded the matter to COAH to adopt new Third Round rules within a five month period. In re N.J.A.C. 5:96 & 5:97, 416 N.J. Super. 462, 511-12 (App. Div. 2010). This Court affirmed as modified and "endorsed" the five month period. In re Adoption of N.J.S.A. 5:96 and 5:97, 215 N.J. 578, 620-21 (2013). COAH did not meet the five month deadline, which expired on February 26, 2014, and filed a motion with this Court on that date to extend the five month period in accordance with dates set forth in the accompanying certification of Richard Constable, Commissioner of the Department of Community Affairs and Chairman of COAH (the "Constable certification"). Prior to that date, Fair Share Housing Center also filed a motion, but with the Appellate Division, and to enforce litigant's rights.

The Appellate Division heard the motion to enforce litigant's rights before this Court has heard the motion for the extension, with the Appellate Division entering an Order on March 7, 2014 requiring COAH to adopt new Third Round rules in accordance with a schedule that will prevent the agency from complying with the Administrative Procedure Act (the "APA"). While the Four Towns do not condone

COAH's late adoption of the new Third Round rules, the Four Towns support COAH's motion for the extension because they believe it is much better to have COAH adopt the new Third Round rules late under a time schedule it represents can be met than under an unrealistic time frame. The Four Towns also believe that granting the extension will foster voluntary compliance by allowing compliance with the APA and will best serve the interests of all citizens of the State. As such, the Four Towns further believe that the Appellate Division order should be modified to incorporate the dates set forth in the Constable certification.

PROCEDURAL HISTORY

The Four Towns adopt as if fully set forth herein the procedural history relating to the adoption of COAH's Third Round rules and regulations as set forth by this Court in sections I.D - F of its opinion in In re Adoption of N.J.S.A. 5:96 and 5:97, 215 N.J. at 593-598. The Four Towns note and add the following.

On October 8, 2010, the Appellate Division invalidated a substantial portion of COAH's Third Round rules and regulations, including the growth share methodology used by COAH, and remanded for the promulgation of a new Third Round rules within five months. In re N.J.A.C. 5:96 & 5:97, 416 N.J. Super. at 511. On September 26, 2013, this Court affirmed as modified the Appellate Division decision in In re Adoption of N.J.S.A. 5:96 and 5:97, 215 N.J. 578, 621 (2013). The Court "endorsed" the five months time period, Id. at 620, the effect of which was that COAH was ordered to adopt new Third Round rules by February 26, 2014.

On December 16, 2013, Fair Share Housing Center ("FSHC") filed a motion to enforce litigant's rights in the Appellate Division, FTA1,¹ seeking to have a special master appointed to adopt the regulations in place of COAH or, alternatively, to strip municipalities of the benefits of the procedures, immunities and protections offered by the Fair Housing Act, N.J.S.A. 52:27D-316B, 317a, and returning all affordable housing disputes and litigation to the courts. FTA6 to 12. The New Jersey League of Municipalities, the Four Towns, the Borough of Atlantic Highlands and COAH filed opposition to FSHC's motion to enforce litigant's rights.

On February 26, 2014, COAH filed the within motion with this Court seeking an order extending the February 26, 2014 deadline to allow COAH to have until May 1, 2014 to formally propose the new rules and June 2, 2014 for publication of the new rules in the New Jersey Register. FTA13 to 14.

The Appellate Division motion to enforce litigant's rights was argued on March 5, 2014 and the Appellate Division issued an order on March 7, 2014 granting relief and ordering COAH to meet as a body on the following dates for the following purposes: (1) on March 17, 2014 to direct its Executive Director to prepare new Third Round rules, (2) on March 26, 2014 to review and adopt the new Third Round rules and arrange for publication of the rules in the New Jersey Register, and (3) on May 14, 2014 to review and consider all public comments

¹ The Four Town's appendix is referenced as "FTA."

submitted by interested parties in response to the publication of the rules, and to adopt the rules on that date. FTa20 to 24.

The time frame ordered by the Appellate Division is unrealistic, however, because it will be impossible for COAH to comply with the submission, publication, adoption and comment periods required by the APA, N.J.S.A. 52:14B-1 et seq. See, schedule of deadlines for proposing, publishing, and adopting rules published by the Office of Administrative Law, www.state.nj.us/oal/rules/schedule (last visited March 9, 2014). A printed copy of the schedule is included in the appendix to this brief. FTa26 to 28. In accordance with the schedule, in order to comply with a 30 day comment period ending on May 21, 2014, the proposed rules would have to be published on April 21, 2014 and, to do that, the rules would have to be submitted for publication to the Office of Administrative Law on March 20, 2014.

Shortly after the Appellate Division order was entered on March 7, 2014, COAH applied to the Appellate Division for a stay of the order and the Appellate Division denied the stay. FTa25. On March 10, 2014, COAH applied to this Court for a stay of the order in light of the pendency of the within motion filed with this Court by COAH for the extension of the time within which to adopt the new Third Round Rules. FTa29 to 30.

The Four Towns file the within letter brief in response to COAH's motion for the stay of the Appellate Division's March 7, 2014 Order and in support of COAH's motion for an extension of the time within which it must adopt the new Third Round rules.

STATEMENT OF FACTS

The statement of facts relating to COAH's efforts to comply with this Court's September 26, 2013 decision is taken from the Constable certification. FTa15 to 19.

COAH staff has reviewed and continues to analyze and evaluate recent, available, and reliable data to develop a Third Round methodology and also to project population and household growth. FTa16. The data sources are diverse and varied and include the 2010 United States Census data and data available from the Department of Labor Workforce Development. Id. The data allowed for a determination of how many households are predicted to be low and moderate income. FTa17.

The United States Census data has also been and continues to be analyzed to identify deteriorated units that presently are crowded, have incomplete kitchens and/or have incomplete baths. Id. The identification of these deteriorated units together with the United States Census public use microdata sample then permits the determination of the low and moderate income share of those deteriorated units. Id.

The databases for certificates of occupancy and demolition allowed for a determination of net housing growth but information on the secondary sources of supply - filtering, conversions and demolitions - have been and continue to be reviewed to determine the effects of those secondary sources on housing availability. Id. Additionally, vacant land and redevelopable land have been and continue to be reviewed to determine their effect on housing. Id.

The completion of the above described process will permit calculation of statewide low and moderate income need and affordable housing figures for all municipalities. Id. However, determining the affordable housing figures for all municipalities is just one step in the rulemaking process as the methodology must then be put into proper regulatory form. Id. And, those efforts include not only the new regulations but also require reviewing the existing regulations, both procedural and substantive, to determine how the new methodology affects them and what changes may need to be made. FTA18.

While substantial progress has been made in terms of the review and analysis of the most current data sources and the crafting of the various components of the proposed methodology incorporating those data sources, considerable work still remains to translate that work into a format that can be published in the New Jersey Register in accordance with the requirements of the APA, N.J.S.A. 52:14B-1 et seq. Id. COAH has thus requested an extension of time within which to adopt its new rules and regulations until May 1, 2014 to allow the regulations to be formally proposed and to June 2, 2014 for publication in the New Jersey Register. Id. COAH's requested time schedule will comply with the APA and provides COAH with enough time to adopt comprehensive and internally consistent rules.

LEGAL ARGUMENT

I. THE APPELLATE DIVISION'S MARCH 7, 2014 SHOULD BE MODIFIED, AND THE MOTION FOR AN EXTENSION SHOULD BE GRANTED, TO EXTEND THE TIME FOR COAH TO ADOPT THE NEW THIRD ROUND RULES BECAUSE IT IS MUCH BETTER TO HAVE COAH TO ADOPT THE NEW THIRD ROUND RULES LATE UNDER A TIME SCHEDULE IT REPRESENTS CAN BE MET THAN UNDER AN UNREALISTIC TIME FRAME

If this Court does not grant COAH's motion for an extension of the five month time period, COAH will have to adopt the new Third Round rules under the time periods established in the Appellate Division's March 7, 2014 order. However, the time periods contained in that order are unrealistic as they will not allow COAH to comply with the APA as indicated above. See, the schedule of deadlines for proposing, publishing, and adopting rules. FTa26 to 28; www.state.nj.us/oal/rules/schedule (last visited March 9, 2014).

The APA requires at least 30 days notice of the adoption of any rules and that the notice shall be published in the New Jersey Register. N.J.S.A. 52:14B-4(a)(1). The APA further requires that interested parties be given a reasonable opportunity to submit comments regarding the proposed rules as published in the New Jersey Register and establishes 30 days as a minimum time period that is reasonable. N.J.S.A. 52:14B-4(a)(3). Further, the APA prohibits the agency from adopting rules until after the end of this latter 30 day period. Id. Moreover, the APA requires the agency to prepare a written report listing all parties offering comments on the proposed rules and requires that the agency respond to all comments. N.J.S.A. 52:14B-4(a)(4).

Because the Appellate Division order does not permit COAH to comply with the requirements of the APA, the resulting rules will be flawed rules both in terms of not being effective under the APA and being rushed so not being comprehensive and internally consistent. While the Four Towns do not condone COAH's late adoption of the new Third Round rules, the Four Towns support COAH's motion for the extension because they believe it is much better to have COAH adopt the new Third Round rules late under a time schedule it represents can be met than under an unrealistic time frame. As such, the Four Towns also believe that the Appellate Division's March 7, 2014 order should be modified to incorporate the dates set forth in the Constable certification.

II. EXTENDING THE TIME FOR COAH TO ADOPT THE NEW RULES WILL FOSTER VOLUNTARY COMPLIANCE AND WILL BEST SERVE THE INTERESTS OF ALL CITIZENS OF THE STATE

One of the primary intents and purposes of the FHA, and one of the essential goals established by this Court in achieving the creation of affordable housing, is fostering municipal voluntary compliance with the constitutional obligation. See, So. Burlington County N.A.A.C.P. v. Tp. of Mount Laurel, 92 N.J. 158, 214 (1983) (Mount Laurel II), where the Court explains: "our rulings today have several purposes. First, we intend to encourage voluntary compliance with the constitutional obligation . . ." See also, Hills Dev. Co. v. Bernards Twp., 103 N.J. 1, 21 (1986), where the Court explains that vindication of the Mount Laurel obligation through COAH is "far preferable to vindication by the Courts." The Court recognized "municipalities' strong preference to exercise their zoning powers

independently and voluntarily as compared to their open hostility to court-ordered rezoning" and "municipalities' desire to avoid such litigation, a goal best achieved by voluntary compliance" through the legislatively created COAH process. Id. See also, N.J.S.A. 52:27D-302c, where the Legislature finds that the "interests of all citizens . . . would be best served by a comprehensive planning and implementation response to [the Mount Laurel] constitutional obligation."

Extending the time for COAH to adopt the new Third Round rules will foster municipal voluntary compliance and will best serve the interests of all citizens of the State because it will allow compliance with the APA and result in the adoption of comprehensive and internally consistent rules.

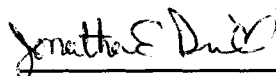
CONCLUSION

For all of the foregoing reasons, the Four Towns respectfully request that the Court modify the Appellate Division's March 7, 2014 Order and grant COAH's motion to extend the five month time period to allow COAH to have until May 1, 2014 to formally propose the new rules and June 2, 2014 for publication of the new rules in the New Jersey Register.

Respectfully submitted,

STICKEL, KOENIG, SULLIVAN & DRILL

By:



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FILED:

DECEMBER 16, 2013

In re Adoption of Third Round
Regulations, N.J.A.C. 5:96 and
5:97, by the Council on
Affordable Housing,

SUPERIOR COURT
APPELLATE DIVISION

Docket No.: A-5451-07T3
Lead Docket Number A-5382-07T3

On remand from In re N.J.A.C.
5:96 and 5:97, 416 N.J. Super.
462, 512 (App. Div. 2010), aff'd
215 N.J. 578 (2013)

CIVIL ACTION

On Appeal from New Jersey Council
on Affordable Housing

NOTICE OF MOTION

To: Clerk, Appellate Division

Geraldine Callahan, D.A.G.
State of New Jersey
Office of the Attorney General
Division of Law
25 Market St., P.O. Box 112
Trenton, NJ 08625

Service List

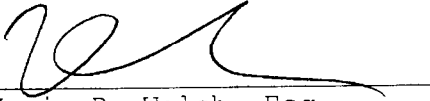
PLEASE TAKE NOTICE that, on a date and time to be determined by the Appellate Division, appellant, by and through undersigned counsel, will apply to the Superior Court of New Jersey, Appellate Division, on a Motion to Enforce Litigant's Rights.

PLEASE TAKE FURTHER NOTICE that in support of this motion, appellant will rely upon the enclosed brief with appendix.

Oral argument is requested.

Dated:

12/17/2013


Kevin D. Walsh, Esq.
Counsel for Appellant

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**In re Adoption of Third Round
Regulations, N.J.A.C. 5:96 and
5:97, by the Council on
Affordable Housing,**

SUPERIOR COURT
APPELLATE DIVISION

Docket No.: A-5451-07T3
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5:96 and 5:97, 416 N.J. Super.
462, 512 (App. Div. 2010), aff'd
215 N.J. 578 (2013)

CIVIL ACTION

On Appeal from New Jersey Council
on Affordable Housing

1. I, Laura Smith-Denker, work with Fair Share Housing Center.
2. On December 13, 2013, I caused to be mailed to the Appellate Division:
 - a. A Notice of Motion
 - b. Brief with appendix in support of the Motion
 - c. This proof of service.
3. On that same day, I forwarded two copies of those documents by first class mail to the persons on the enclosed service list.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements by me are willfully false, I am subject to punishment.

Dated: 12/13/2013



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FILED

DECEMBER 16, 2013

**IN THE MATTER OF THE ADOPTION
OF N.J.A.C. 5:96 AND 5:97 BY
THE NEW JERSEY COUNCIL ON
AFFORDABLE HOUSING**

SUPERIOR COURT
APPELLATE DIVISION

Docket Nos.: A-5382-07T3, A-5404-07T3, A-5423-07T3, A-5424-07T3, A-5429-07T3, A-5451-07T3, A-5455-07T3, A-5458-07T3, A-5460-07T3, A-5461-07T3, A-5590-07T3, A-5752-07T3, A-5756-07T3, A-5757-07T3, A-5758-07T3, A-5760-07T3, A-5761-07T3, A-5763-07T3, A-5765-07T3, A-5767-07T3, A-5871-07T3, A-5920-07T3

Docket No.: A-5451-07T3
Lead Docket Number A-5382-07T3

CIVIL ACTION

On Appeal from the Council on Affordable Housing, with a remand in In re N.J.A.C. 5:96 and 5:97, 416 N.J. Super. 462, 512 (App. Div. 2010), aff'd 215 N.J. 578 (2013)

BRIEF AND APPENDIX IN SUPPORT OF APPELLANT FAIR SHARE HOUSING CENTER'S MOTION TO ENFORCE LITIGANTS' RIGHTS

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In re Six Month Extension, 372 N.J.Super. 61 (App.Div. 2004) 4,19





that it is statutorily and constitutionally obligated to take.

Namely, the Appellate Division should order that:

1. COAH is relieved of its obligations to adopt regulations under the APA. Those duties are transferred to the special master. The special master shall conduct the administrative proceedings necessary to propose and adopt the Third Round regulations pursuant to the APA, consistent with this Court's order to adopt regulations consistent with the First and Second Round regulations.
2. The special master shall, to the maximum degree feasible, replicate the First and Second Round regulations with the best available updated data. While the special master may receive comments or proposals, both oral and written, from interested parties, including the COAH board and its individual members, prior to proposing rules, the master's role should be to update the prior round regulations consistent with the order of this court and not to make policy judgments or changes to the prior round methodology unless required by statutory changes since that methodology (e.g., the statutory elimination of regional contribution agreements, N.J.S.A. 52:27D-312).
3. The COAH staff shall be made available to the special master as needed to assist in the proposal and adoption of Third Round rules.

4. The special master shall propose regulations on or before February 15, 2013 by sending the regulations on behalf of COAH to the Office of Administrative Law, where they shall be published as a rule proposal as soon as possible.
5. After reviewing any comments received, the special master should propose a final adopted version of the rules no later than 30 days after the close of the comment deadline.
6. The order should provide for expedited review by this Court of the proposed final adopted rules by the special master and any challenge thereto, in light of the Court's appropriate concerns about the lengthy delay up to this point.
7. Upon Court approval of the rules, municipalities shall be given 90 days to adopt compliant fair share plans for COAH's review. See Mount Laurel II, supra, 92 N.J. at 281. The Court should retain jurisdiction in the event that COAH fails to act expeditiously in review of those plans, and reserve the right to direct the special master to review the plans.
8. The reasonable fees of the special master and any necessary professionals approved by the court shall be paid by COAH upon approval by the Appellate Division.

In addition to those directives, the Appellate Division should provide the special master with the traditional powers of a judicial officer and should direct the master to act where appropriate in accordance with Rule 4:41.

B. Alternatively, the Appellate Division should find that COAH no longer protects municipalities from public interest compliance and builder's remedy litigation.

FSHC alternatively moves for the Appellate Division to declare that municipalities are no longer protected from Mount Laurel litigation by COAH's administrative process and may be sued in trial courts. This is the function the trial courts exercised after Mount Laurel II, supra, 92 N.J. at 290, when they provided the sole route for the enforcement of the Mount Laurel doctrine. After 14 years of failed attempts to adopt regulations that curb exclusionary zoning as required by the Mount Laurel doctrine, COAH has failed in its mission and can no longer be relied upon to meet its statutory mandate and its constitutional duties.

The Supreme Court has recognized that "enforcement of constitutional rights cannot await a supporting political consensus" and wrote, "We may not build houses, but we do enforce the Constitution." Mount Laurel II, supra, 92 N.J. at 213. In Mount Laurel II, the Court severely criticized inaction that lasted five years (1975-1980), id. at 290, about one-third of the time of the current interruption in Mount Laurel compliance. The Court has likewise pledged that if the FHA "achieves nothing but delay, the judiciary will be forced to resume its appropriate role." Hills, supra, 103 N.J. at 23. The appropriate role of the judiciary is to take whatever steps are necessary to end the delay and implement the Mount Laurel doctrine.

The Appellate Division has previously granted the alternative relief FSHC seeks here. In 2004, the Appellate Division invalidated COAH's continued protection of municipalities in the absence of regulations and substantive review of compliance with existing fair share plans. In Re Six Month Extension, 372 N.J. Super. 61, 95-96 (App. Div. 2004). The Court found that "for nearly the equivalent of one full round of Mount Laurel administration, no municipality has been held to updated standards reflecting its present and prospective fair share of the housing needs of its region. The public policies underlying the FHA and the Mount Laurel cases have, quite obviously, been frustrated by inaction." Ibid. The Appellate Division indicated that municipalities would be exposed to builders remedy and public interest compliance litigation if COAH did not adopt regulations in a timely manner. See Six Month Extension, supra, 372 N.J. Super. at 105 ("The continued absence, for an unreasonable time, of a timely, valid and sufficiently comprehensive interim extension procedure, and COAH's action thereon, will, of course, free interested parties from the constraints that substantive certification imposes.").

In the absence of a special master whose actions will preserve the statewide compliance system established by the FHA, returning the enforcement of Mount Laurel to the trial courts provides the only effective way to prevent exclusionary zoning in New Jersey.

C. The Appellate Division should enforce its January 14, 2011 order requiring bi-weekly reporting by COAH regarding the remand proceedings.

In both of the alternative forms of relief proposed above, FSHC does not request any further role for COAH in adoption of the Third Round rules, based on its failure to comply with this Court's order. That said, in the event COAH retains any powers regarding rulemaking, FSHC moves for the Court to enforce its January 14, 2011 order requiring biweekly reporting. In keeping with the order, the report should be "submitted in the form of an affidavit or certification by the Chair of COAH." Aa25-26. The order was stayed, but by its terms lifted when the Supreme Court affirmed the Appellate Division's remand order. Enforcing this order at this point is appropriate because the state cannot meet and has not attempted to meet the five-month deadline. Biweekly reports will help ensure that COAH does not fall farther behind and will provide the court and parties with the information needed to further enforce the Appellate Division's orders.

V. Conclusion

For the foregoing reasons, FSHC respectfully urges the Appellate Division to appoint a special master to draft regulations for adoption by COAH so that the Appellate Division's order to adopt regulations is adopted as close to five months after that order was affirmed as possible, or in the alternative allow for public interest and builder's remedy suits in the trial courts. FSHC also, to the degree COAH retains any role in preparing the rules, asks that the Appellate Division to enforce its January 14, 2011 order requiring COAH to provide biweekly reports to the Court.

Dated: 12/13/2013

Respectfully submitted,
FAIR SHARE HOUSING CENTER
Attorneys for Appellant



Kevin D. Walsh, Esq.

JOHN J. HOFFMAN
ACTING ATTORNEY GENERAL OF NEW JERSEY
Attorney for Respondent,
Council on Affordable Housing
Richard J. Hughes Justice Complex
25 Market Street
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FILED:
FEBRUARY 26, 2014

By: Geraldine Callahan
Deputy Attorney General
(609) 777-3442
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Attorney ID 030071983

SUPREME COURT OF NEW JERSEY
DOCKET NO.: 67,126

IN RE ADOPTION OF N.J.A.C. 5:96
and 5:97 BY THE NEW JERSEY
COUNCIL ON AFFORDABLE HOUSING

Civil Action
NOTICE OF MOTION FOR
EXTENSION OF TIME FRAME

TO: CLERK OF THE SUPREME COURT
Mark Neary, Clerk
Supreme Court of New Jersey
Richard J. Hughes Justice Complex
P.O. Box 006
Trenton, New Jersey 08625-0006

Kevin D. Walsh, Esquire
Fair Share Housing Center
510 Park Boulevard
Cherry Hill, NJ 08002


Attached Service List

PLEASE TAKE NOTICE that respondent, Council on Affordable Housing, hereby moves before the Supreme Court of New Jersey, for an Order extending the time frame set forth In Re Adoption of N.J.S.A. 5:96, 215 N.J. 578(2013) until May 1, 2014 to allow the

regulations to be formally proposed and published in the June 2, 2014 New Jersey Register.

PLEASE TAKE FURTHER NOTICE that the Respondent shall rely upon the annexed certification of Richard E. Constable, III, in support of the within motion.

JOHN J. HOFFMAN
ACTING ATTORNEY GENERAL OF NEW JERSEY

By: 
Geraldine Callahan
Deputy Attorney General

Dated: February 26, 2014

JOHN J. HOFFMAN
ACTING ATTORNEY GENERAL OF NEW JERSEY
Attorney for Respondent,
Council on Affordable Housing
Richard J. Hughes Justice Complex
25 Market Street
PO Box 112
Trenton, New Jersey 08625-0112

FILED:
FEBRUARY 26, 2014

By: Geraldine Callahan
Deputy Attorney General
(609) 777-3442
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Attorney ID 030071983

SUPREME COURT OF NEW JERSEY
DOCKET NO.: 67,126

IN RE ADOPTION OF N.J.A.C.
5:96 AND 5:97 BY THE NEW
JERSEY COUNCIL ON AFFORDABLE
HOUSING

Civil Action

CERTIFICATION OF
RICHARD E. CONSTABLE, III

I, Richard E. Constable, III, of full age, hereby
certifies:

1. I am the Commissioner of the Department of
Community Affairs. In that capacity, I am the chairperson of
the Council on Affordable Housing.
2. In its opinion in this matter, the Court recognized
that "[m]ore than thirty years have passed since this Court
outlined a framework through which municipalities could satisfy"
their fair share obligations and "[w]e now have decades of data on

the creation of affordable housing in New Jersey." In re Adoption of N.J.A.C. 5:96, 215 N.J. 578, 606 (2013). The Court noted, among other things, data reflects "general trends in population size and the production of housing units" and significant changes in transportation patterns. Id. at 607-08. Additionally, the "economic collapse of 2008 has had a significant impact on home prices." Id. at 608. Thus, while the Court accepted the Appellate Division's five-month time frame, the Court's opinion also underscores the need to evaluate carefully the available, recent data in developing a third round methodology.

3. Consistent with the Court's opinion, recent, available, and reliable data has been reviewed and continues to be analyzed and evaluated to develop a third round methodology. Those data sources are diverse and varied. They include the 2010 United States Census data and data available from the Department of Labor Workforce Development. Also relevant and subject to the analysis is data concerning building permits and certificates of occupancy. The analysis also includes evaluating data used to develop the prior third round regulations to determine whether and to what extent it can assist or is relevant to the development of the new third round methodology.

4. This data also has been and is being used to project population and household growth. The data was extrapolated to a municipal level to estimate the number of households to be formed.

The data, including data on relative household income by municipality, then allowed for a determination of how many of those households are predicted to be low and moderate income.

5. The United States Census data has been, and continues to be, analyzed to identify deteriorated units that presently are crowded, have incomplete kitchens, and/or have incomplete baths. The identification of these deteriorated units together with United States Census public use microdata sample then permits the determination of the low and moderate income share of those deteriorated units at both a county and municipal level.

6. The databases for certificates of occupancy and demolition allowed for a determination of net housing growth. Information on the secondary sources of supply - filtering, conversions and demolitions - has been, and continues to be, reviewed to determine the effect of those secondary sources on housing availability. Additionally, available land - both vacant and redevelopable - has been, and continues to be, reviewed to determine its effect on housing.

7. The completion of this process will permit calculation of statewide low and moderate income need and affordable housing figures for all municipalities. The affordable housing figures for municipalities, however, is just one step in the rulemaking process. The methodology must then be put in proper regulatory form. Those efforts include not only the new

regulations, but also require reviewing the existing regulations, both procedural and substantive, to determine how the new methodology affects them and what changes may need to be made.

8. The new and/or revised regulations also must comply with the substantial requirements of the Administrative Procedure Act (APA), N.J.S.A. 52:14B-1 et seq. The APA requires not only the regulations, but also a summary of the regulations, which in this case will be significant given the magnitude of the subject matter, as well as various statements. The schedule for publication in the New Jersey Register must be adhered to as well. Thus, while substantial progress has been made to develop a new third round methodology, considerable work still remains to translate that work into a format that can be published in the New Jersey Register.

9. Substantial progress has been made in terms of the review and analysis of the most current data sources and the crafting of the various components of the proposed methodology incorporating those data sources. That process now must be completed so that affordable housing figures for all municipalities can be generated, translated into regulations, and published in accordance with APA requirements.

10. Accordingly, an extension of time until May 1, 2014 is requested to allow the regulations to be formally proposed and published in the June 2, 2014 New Jersey Register.

I certify that the foregoing statements made by me are true to the best of my knowledge.



Richard E. Constable, III

Dated: February 26, 2014

ORDER ON MOTION

IN RE ADOPTION OF REVISED THIRD
ROUND REGULATIONS BY THE NEW
JERSEY COUNCIL ON AFFORDABLE
HOUSING N.J.A.C. 5:96 & 5:97
(NJ LEAGUE OF MUNICIPALITIES)

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-005382-07T3
MOTION NO. M-002899-13
BEFORE PART H
JUDGE(S): JOSE L. FUENTES
MARIE P. SIMONELLI
MICHAEL J. HAAS

MOTION FILED: 12/17/2013
ANSWER(S) 12/27/2013
FILED: 12/27/2013
01/02/2014
01/06/2014
01/07/2014

BY: FAIR SHARE HOUSING
BY: LEAGUE OF MUNICIPALITIES
KINGS ROW HOMES
BERNARDS TWP
ATLANTIC HIGHLANDS
COAH

SUBMITTED TO COURT: January 16, 2014

ORDER

THIS MATTER HAVING BEEN DULY PRESENTED TO THE COURT, IT IS, ON THIS
7th day of March, 2014, HEREBY ORDERED AS FOLLOWS:

MOTION BY INTERVENOR:

MOTION TO ENFORCE LITIGANT'S
RIGHTS

GRANTED AND OTHER

SUPPLEMENTAL: See attached.

FOR THE COURT:



JOSE L FUENTES, P.J.A.D.

UNKNOWN
STATEWIDE

SLW

At this court's request, the parties presented oral argument on March 5, 2014, to supplement their submissions in connection with a motion in aid of litigant's rights filed by Fair Share Housing Center (Fair Share) pursuant to Rule 1:10-3, to enforce this court's order in In Re N.J.A.C. 5:96 and 5:97, 416 N.J. Super. 462, 511 (App. Div 2010), aff'd 215 N.J. 578 (2013), directing the Council On Affordable Housing (COAH) "to adopt new third round rules that use a methodology for determining prospective need similar to the methodologies used in the first and second rounds." Characterizing the nature of this mandate as "straight-forward," we expected that "COAH should be able to comply with this mandate within five months without the assistance of a master or an army of outside consultants." Ibid. (Emphasis added). To date, COAH has not done anything to comply with our "straight-forward" mandate.

Fair Share seeks an order from this court appointing a special master with the authority to carry out the central requirement this court ordered on October 8, 2010, as affirmed by the Supreme Court. Alternatively, Fair Share seeks a judicial declaration from this court that COAH can no longer provide administrative protection to municipalities from Mount Laurel litigation, leaving the declaratory relief provided by the Legislature under N.J.S.A. 52:27D-313 as the exclusive means for those municipalities wishing to seek preemptive action. If we were to adopt this alternative form of relief, Fair Share further requests that this court require a municipality filing a petition for substantive certification under N.J.S.A. 52:27D-313 to provide notice to Fair Share and to other public interest entities similarly devoted to protecting the constitutional rights of low and moderate income residents of this State.

On February 26, 2014, COAH filed a motion with the Supreme Court, requesting "an extension of the time until May 1, 2014 to formally propose and publish in the June 2, 2014 New Jersey Register regulations governing the third round methodology." Thus, without specifically addressing the substantive merits or practical feasibility of Fair Share's position, COAH argues that the motion pending before the Supreme Court deprives this court of jurisdiction to enforce its October 8, 2010 mandate.

The Legislature enacted the Fair Housing Act in 1985 to confer responsibility upon COAH for the administration and enforcement of the Mount Laurel doctrine.¹ COAH has the primary responsibility to determine a

¹ S. Burlington County NAACP v. Twp. of Mount Laurel, 92 N.J. 158, (1983) (Mount Laurel II); S. Burlington County NAACP v. Twp. of Mount Laurel, 67 N.J. 151, appeal dismissed and cert. denied, 423 U.S. 808, 96 S. Ct. 18, 46 L. Ed. 2d 28 (1975) (Mount Laurel I).

municipality's affordable housing obligations and to develop a mechanism for compliance with those obligations. Hills Dev. Co. v. Twp. of Bernards, 103 N.J. 1, 19-23, 31-40 (1986). In our tripartite system of governance, once a court has decided a dispute and entered a final judgment awarding relief to the aggrieved party, the executive branch is obligated to enforce the court's decree. This fundamental principle of the concept of ordered liberty applies with equal, if not greater, force when an administrative agency, as a party in a civil dispute, is ordered by the court to perform a task that is mandated by a statute that was adopted by the Legislature to fulfill a constitutional obligation. Abbott v. Burke, 206 N.J. 332, 359 (2011).

After carefully considering the record before us, WE HOLD COAH has failed to carry out this court's mandate "to adopt new third round rules that use a methodology for determining prospective need similar to the methodologies used in the first and second rounds," within the timeframe established by this court and endorsed by the Supreme Court. In Re N.J.A.C. 5:96 and 5:97, supra, 416 N.J. Super. at 511. WE FURTHER HOLD COAH has failed to offer any plausible explanation for its failure to carry out this court's order.

WE THEREFORE ORDER COAH to meet as a body on Wednesday, March 12, 2014, at 9:30 a.m., with a sufficient number of members to constitute a quorum rendering it legally capable of conducting an official meeting and taking legally binding action. At this meeting, COAH shall direct its Executive Director, and such other staff it deems appropriate, to prepare for COAH's adoption "third round rules that use a methodology for determining prospective need similar to the methodologies used in the first and second rounds." These third round rules are to be completed and presented to COAH for formal adoption by Wednesday, March 26, 2014. Copies of these proposed new third round rules shall be posted on COAH's website and copies shall be otherwise made available to the public for review at 11:00 a.m. on Friday, March 21, 2014.

WE FURTHER ORDER COAH to meet as a body on Wednesday, March 26, 2014, at 9:30 a.m., with a sufficient number of members to constitute a quorum rendering it legally capable of conducting an official meeting and taking legally binding action. At this meeting, COAH shall review and adopt the third round rules in a manner suitable to comply with the Administrative Procedures Act, including publication in the New Jersey Register.

WE FURTHER ORDER COAH to meet as a body on Wednesday, May 14, 2014, at 9:30 a.m., with a sufficient number of members to constitute a quorum rendering it legally capable of conducting an official meeting and taking legally binding action. At this meeting, COAH shall review and consider all public comments submitted by interested parties in response to the posting of the proposed third round rule in the New Jersey Register. After giving due consideration to these public comments and any proposed

amendments suggested by the Executive Director, COAH shall adopt these rules.

WE FURTHER ORDER COAH to submit to this court and to every party to this litigation bi-weekly reports detailing the actions taken to comply with this order.

WE FURTHER ORDER that in the event COAH fails to carry out any part of this court's order, each member of the COAH Board will be ordered to personally appear before this court, at a date and time designated by this court, to show cause why he or she shall not be declared in contempt of this court's authority subject to monetary sanctions, civil detention, and such other sanctions the court may deem suitable to induce compliance with this order.

WE FURTHER ORDER that until such time that new third round rules have been formally adopted, any municipality seeking to petition the Superior Court for substantive certification under N.J.S.A. 52:27D-313, must serve copies of its pleadings to Fair Share, the local chapter of the National Association for the Advancement of Colored People, and any other organization or not-for-profit entity located within ten (10) miles of the municipality that is dedicated to provide low-income or moderate-income housing to the residents of the region.

WE FURTHER ORDER that pursuant to Rule 2:9-9 this court sua sponte directs Fair Share to submit a certification attesting to the cost of professional services rendered in connection with the prosecution of this motion in aid of litigant's rights. The court thereafter will award Fair Share counsel fees commensurate with the time and professional effort it exerted in the prosecution of this motion in aid of litigant's right.

We conclude with the following explanation concerning our decision to reject Fair Share's application for the appointment of a special master. In In Re N.J.A.C. 5:96 and 5:97, we specifically acknowledged that a number of litigants had requested "that in light of COAH's failure to adopt valid third round rules in a timely manner, this court should divest COAH of the authority to perform this statutory responsibility and adopt third round rules itself with the assistance of a master." 416 N.J. Super. at 510. We declined to adopt this approach for two principal reasons. First, we noted that our colleagues had rejected a similar request for relief made by Fair Share and the New Jersey Builders Association in In re Adoption of N.J.A.C. 5:94 & 5:95, 390 N.J. Super. 1, 87-88 (App. Div.), certif. denied, 192 N.J. 71 (2007). Writing for this court in that case, Judge Cuff explained the reasons for denying this relief:

Appointment of a special master by this court is unprecedented relief.

The Legislature has granted COAH considerable authority to adopt policies and to fashion regulations that will provide a realistic opportunity for the construction of affordable housing. The Court has stated repeatedly that it is better for COAH to address the issue than the courts. We also recognize that rule making is a dynamic process. COAH has already amended some of the third round rules, see N.J.A.C. 5:94-2.4(a)(4), and has recently proposed several others. Thus, we conclude that it is appropriate to remand to the agency to commence the process to amend N.J.A.C. 5:94, the third round rules, to conform to the constitutional and statutory mandate. Time, however, is critical. The second round rules expired in 1999. The third round rules apply from 1999-2014, but effectuation of these rules has been compressed to a ten-year period and three years have already elapsed. We, therefore, direct that the rule-making process required by this opinion must be completed within six months.

[Id. at 87-88.]

Second, and perhaps most relevant here, we noted in In Re N.J.A.C. 5:96 and 5:97 that despite COAH's continued reliance on a growth share methodology to calculate and allocate prospective, we had no basis "to conclude that COAH failed to make a good faith effort to adopt this round rules in conformity with our prior opinion." 416 N.J. Super. at 510. (Emphasis added). Unfortunately, the record of inaction by COAH since we wrote those words in 2010 has cast serious doubts about this agency's good faith in complying with this court's order.

Despite these misgivings, we remain reluctant, at this time, to take the extraordinary action of declaring that this government agency is utterly incapable or unwilling to carry out its core statutory mission. We remain hopeful, however, that reasonable minds will prevail, and that the members of the COAH Board will see that this course of intransigence serves only to needlessly undermine the public's confidence in the effectiveness of public institutions. We have invalidated these rules in two prior opinions in the past seven years. In this order, we have laid a clear path for COAH to follow to fulfill its statutory obligation. If these measures prove to be ineffective, we may have no other choice but to declare that event to be COAH's third and final strike.

ORDER ON EMERGENT APPLICATION

IN RE ADOPTION OF REVISED
THIRD ROUND REGULATIONS BY
THE NEW JERSEY COUNCIL ON
AFFORDABLE HOUSING N.J.A.C.
5:96 & 5:97 (NJ LEAGUE OF
MUNICIPALITIES)

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5382-07T3
MOTION NO. M-
BEFORE PART: H
JUDGE(S): FUENTES
SIMONELLI
HAAS

EMERGENT APPLICATION

FILED: 3/7/2014

BY: COAH

ANSWER(S) FILED: 3/7/2014

BY: FAIR SHARE HOUSING

APPEARANCE ONLY:

ORDER

THIS MATTER HAVING BEEN DULY PRESENTED TO THE COURT, IT IS ON
THIS 7TH DAY OF MARCH, 2014, HEREBY ORDERED AS FOLLOWS:

EMERGENT APPLICATION
FOR

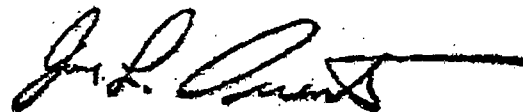
MOTION FOR A STAY OF ORDER
DATED MARCH 7, 2014 TO ENFORCE
LITIGANT'S RIGHTS

GRANTED DENIED OTHER
() (X) (X)

SUPPLEMENTAL:

This court has jurisdiction to enforce its own order.
Asbury Park Board of Education v. New Jersey Department of
Education, 369 N.J. Super. 481, 486 (App. Div. 2004). R. 2:9-
5(b). In the event COAH cannot meet the deadlines ordered by
this court in its March 7, 2014 order in aid of litigant's
rights consistent with the APA, N.J.S.A. 59:14B-4 requirements,
it may seek relief from this court to modify these deadlines on
a showing of extraordinary circumstances.

FOR THE COURT:



JOSE L. FUENTES, P.J.A.D.

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Rule Publication Schedule

2013 New Jersey Register Publication Schedule

Publication Day*	Proposal Deadline (Noon)	Adoption Deadline (Noon)	30-Day/60-Day Comment Periods End
January 7, 2013	December 5 (Wednesday)	December 12 (Wednesday)	February 6/March 8
January 22 (Tuesday)	December 19 (Wednesday)	December 27 (Thursday)	February 21/March 23
February 4	January 3 (Thursday)	January 10 (Thursday)	March 6/April 5
February 19 (Tuesday)	January 17(Thursday)	January 25 (Friday)	March 21/April 20
March 4	January 31(Thursday)	February 7 (Thursday)	April 3/May 3
March 18	February 14 (Thursday)	February 22 (Friday)	April 17/May 17
April 1	February 28 (Thursday)	March 7 (Thursday)	May 1/May 31
April 15	March 14(Thursday)	March 21 (Thursday)	May 15/June 14
May 6	April 5 (Friday)	April 12 (Friday)	June 5/July 5
May 20	April 19 (Friday)	April 26 (Friday)	June 19/July 19
June 3	May 2 (Thursday)	May 9 (Thursday)	July 3/August 2
June 17	May 16 (Thursday)	May 23 (Thursday)	July 17/August 16
July 1	May 31 (Friday)	June 7 (Friday)	July 31/ August 30
July 15	June 13 (Thursday)	June 20 (Thursday)	August 14/ September 13
August 5	July 5 (Friday)	July 12 (Friday)	September 4/ October 4
August 19	July 19 (Friday)	July 26 (Friday)	September 18/ October 18
September 3 (Tuesday)	August 2 (Friday)	August 9 (Friday)	October 3/ November 2
September 16	August 15 (Thursday)	August 22 (Thursday)	October 16/ November 15
October 7	September 6 (Friday)	September 13 (Friday)	November 6/ December 6

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New Jersey Office of Administrative Law | Rules

October 21	September 19 (Thursday)	September 26 (Thursday)	November 20/ December 20
November 4	October 3 (Thursday)	October 10 (Thursday)	December 4/ January 3
November 18	October 16 (Wednesday)	October 23 (Wednesday)	December 18/ January 17
December 2	October 30 (Wednesday)	November 7 (Thursday)	January 1/ January 31
December 16	November 14 (Thursday)	November 21 (Thursday)	January 15/ February 14
January 6 , 2014 (Tuesday)	December 4 (Wednesday)	December 11 (Wednesday)	February 5/March 7
January 21 (Tuesday)	December 18 (Wednesday)	December 26 (Thursday)	February 20/ March 22
February 3	January 2 (Thursday)	January 9 (Thursday)	March 5/April 4
February 18 (Tuesday)	January 16 (Thursday)	January 24 (Friday)	March 20/April 19

2014 New Jersey Register Publication Schedule

Publication Day*	Proposal Deadline (Noon)	Adoption Deadline (Noon)	30-Day/60-Day Comment Periods End
January 6, 2014	December 4 Wednesday	December 11 (Wednesday)	February 5/March 7
January 21 (Tuesday)	December 18 (Wednesday)	December 26 (Thursday)	February 20/March 22
February 3	January 2 (Thursday)	January 9 (Thursday)	March 5/April 4
February 18 (Tuesday)	January 16 (Thursday)	January 24 (Friday)	March 20/April 19
March 3	January 30 (Thursday)	February 6 (Thursday)	April 2/May 2
March 17	February 13 (Thursday)	February 21 (Friday)	April 16/May 16
April 7	March 7 (Friday)	March 14 (Friday)	May 7/June 6
April 21	March 20(Thursday)	March 27 (Thursday)	May 21/June 20
May 5	April 3 (Thursday)	April 10 (Thursday)	June 4/July 4
May 19	April 17 (Thursday)	April 25 (Friday)	June 18/July 18
June 2	May 1 (Thursday)	May 8 (Thursday)	July 2/August 1
June 16	May 15 (Thursday)	May 22 (Thursday)	July 16/August 15
July 7	June 5 (Thursday)	June 12 (Thursday)	August 6/ September 5
July 21	June 19 (Thursday)	June 26 (Thursday)	August 20/ September 19

August 4	July 3 (Thursday)	July 11 (Friday)	September 3/ October 3
August 18	July 18 (Friday)	July 25 (Friday)	September 17/ October 17
September 2 (Tuesday)	August 1 (Friday)	August 8 (Friday)	October 2/ November 1
September 15	August 14 (Thursday)	August 21 (Thursday)	October 15/ November 14
October 6	September 5 (Friday)	September 12 (Friday)	November 5/ December 5
October 20	September 18 (Thursday)	September 25 (Thursday)	November 19/ December 19
November 3	October 2 (Thursday)	October 9 (Thursday)	December 3/ January 2
November 17	October 15 (Wednesday)	October 22 (Wednesday)	December 17/ January 16
December 1	October 29 (Wednesday)	November 6 (Thursday)	December 31/ January 30
December 15	November 12 (Wednesday)	November 19 (Wednesday)	January 14/ February 13
January 5 , 2015	December 3 (Wednesday)	December 10 (Wednesday)	February 4/March 6
January 20 (Tuesday)	December 17 (Wednesday)	December 24 (Thursday)	February 19/ March 21
February 2	December 31 (Wednesday)	January 8 (Thursday)	March 4/April 3
February 17 (Tuesday)	January 15 (Thursday)	January 23 (Friday)	March 19/April 18

**MONDAY, unless otherwise indicated.*

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 Office of Administrative Law

a 28

JOHN J. HOFFMAN
ACTING ATTORNEY GENERAL OF NEW JERSEY
Attorney for Respondent,
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Richard J. Hughes Justice Complex
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FILED:
MARCH 10, 2013

By: Robert Lougy
Assistant Attorney General
(609) 292-4965
robert.lougy@dol.lps.state.nj.us
Attorney ID 023012002

SUPREME COURT OF NEW JERSEY
DOCKET NO.: 67,126

IN RE ADOPTION OF N.J.A.C. 5:96 : Civil Action
and 5:97 BY THE NEW JERSEY :
COUNCIL ON AFFORDABLE HOUSING : NOTICE OF EMERGENT MOTION
FOR STAY OF APPELLATE
DIVISION'S MARCH 7, 2014
ORDER AND TO VACATE THE
ORDER IN PART

TO: CLERK OF THE SUPREME COURT
Mark Neary, Clerk
Supreme Court of New Jersey
Richard J. Hughes Justice Complex
P.O. Box 006
Trenton, New Jersey 08625-0006

Kevin D. Walsh, Esquire
Fair Share Housing Center
510 Park Boulevard
Cherry Hill, NJ 08002

Attached Service List

PLEASE TAKE NOTICE that respondent, Council on Affordable
Housing, hereby moves before the Supreme Court of New Jersey, for
an Order staying and vacating in part the Appellate Division's

March 7, 2014 Order on Motion to Enforce Litigant's Rights in In Re Adoption of N.J.S.A. 5:96, 215 N.J. 578(2013).

PLEASE TAKE FURTHER NOTICE that the Respondent shall rely upon the annexed letter brief in support of the within motion.

JOHN J. HOFFMAN
ACTING ATTORNEY GENERAL OF NEW JERSEY

By: /s/Robert Lougy
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