FAIR SHARE
HOUSING CENTER

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June 17, 2014

Mark Neary, Clerk
Supreme Court of New Jersey
25 W. Market Street
P.O. Box 970
Trenton, NJ 08625-0970

Re: In re Adoption of Third Round Regulations, N.J.A.C. 5:96 and 5:97, by the Council on Affordable Housing, Docket No.: 67,126

Dear Mr. Neary:

Enclosed for filing please find Fair Share Housing Center's Motion to Enforce Litigant's Rights in the above-captioned matter.

Please return a copy of the proof of service to the courier who delivered this motion.

Filing fees have been waived pursuant to the attached court order.

Please contact me with any questions or concerns. Thank you for your attention to this matter.

Respectfully,

Kevin D. Walsh
Staff Attorney

c: Service List

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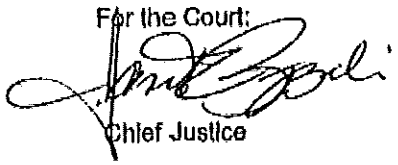
SUPREME COURT OF NEW JERSEY

Pursuant to Rule 1:13-2(a), it is ORDERED that the payment of filing fees, other fees, and charges of public officers for service of process in connection with actions filed by the Fair Share Housing Center shall be waived; this Order is effective immediately and until further order of the Court.

For the Court:



Chief Justice

Dated: January 16, 2007

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SUPREME COURT OF NEW JERSEY

NOTICE OF MOTION

IN THE MATTER OF THE ADOPTION OF N.J.A.C. 5:96 AND 5:97 BY THE NEW JERSEY COUNCIL ON AFFORDABLE HOUSING	Supreme Court Docket No. 67,126 On petition for certification to: SUPERIOR COURT APPELLATE DIVISION Docket No. A-5451-07T3 (Consolidated at the Appellate Division under Lead Docket No. A-5382-07T3) CIVIL ACTION On Appeal from the Council on Affordable Housing

To: Mark Neary, Clerk
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Geraldine Callahan, D.A.G.
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Service List

PLEASE TAKE NOTICE that, Petitioner Fair Share Housing Center, through the undersigned counsel will apply to the Supreme Court of New Jersey, 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: 6/17/2014

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SUPREME COURT OF NEW JERSEY

PROOF OF SERVICE

IN THE MATTER OF THE ADOPTION OF N.J.A.C. 5:96 AND 5:97 BY THE NEW JERSEY COUNCIL ON AFFORDABLE HOUSING	Supreme Court Docket No. 67,126 On petition for certification to: SUPERIOR COURT APPELLATE DIVISION Docket No. A-5451-07T3 (Consolidated at the Appellate Division under Lead Docket No. A-5382-07T3) CIVIL ACTION On Appeal from the Council on Affordable Housing

1. I, Laura Smith-Denker, work with Fair Share Housing Center.

2. On June 17, 2014, I caused to be delivered by hand Fair Share Housing Center's Motion to Enforce Litigants' Rights and supporting documents to Mark Neary, Clerk of the Supreme Court of New Jersey, 20 W. Market Street, P.O. Box 970, Trenton, NJ 08625 and to Geraldine Callahan, DAG, Office of the Attorney General, Division of Law, 25 Market St., P.O. Box 112, Trenton, NJ 08625.

3. On that same day, I forwarded by email and first class mail (with the exception of Ms. Callahan) two copies of those documents 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: 6/17/2014

Laura Smith-Denker

Laura Smith-Denker, Esq.

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

SUPREME COURT DOCKET NO. 67,126

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 FAIR SHARE HOUSING CENTER'S MOTION TO ENFORCE LITIGANT'S RIGHTS

Brief Table of Contents

I. Introduction 1

II. Facts and Procedural History..... 4

A. Adoption of regulations and the Third Round decisions 4

B. The Supreme Court's September 26, 2013 decision 5

C. Proposal of New Regulations 7

III. Legal Argument 8

A. The Council on Affordable Housing has violated the Supreme Court's September 26, 2013 decision and March 14, 2014 remand order. The Court should order COAH to propose rules that are similar to the Prior Round methodology 8

B. The rules proposed by COAH are substantially dissimilar to the rules based on the Prior Round methodology that COAH was ordered to propose and adopt 11

1. Calculation of Need 12

2. Allocation of Need 16

3. Meeting Need with a Realistic Opportunity .. 19

C. The Court should order COAH to make the proposed rules similar to the Prior Round rules or to hold that the trial courts provide the sole forum for the implementation of the Mount Laurel doctrine . 21

1. The Court should order adjustments to proposed rules so they comply with the Court's mandate to adopt rules similar to the Prior Round rules 22

2. Alternatively, the Court should impose the remedy available under the Court's March 14, 2014 order 24

IV. Conclusion 25

Table of Authorities

Abbott v. Burke, 163 N.J. 95 (2000)..... 9

Asbury Park Bd. Of Educ. v. New Jersey Dep't of Educ. 369 N.J. Super. 481 (App. Div. 2004)..... 9

Farmingdale Realty Co. v. Borough of Farmingdale, 55 N.J. 103 (1969) 12

Hills Development Company v. Bernards Township, 103 N.J. 1 (1986) 25

In re Adoption of N.J.A.C. 5:94 and 5:95, 390 N.J. Super. 1 (App. Div. 2007) 5

In re N.J.A.C. 5:96 and 5:97, 416 N.J. 462 (2013) ..... Passim

In re N.J.A.C. 5:96 and 5:97, 215 N.J. 578 (2013) ..... Passim

In re Six Month Extension, 372 N.J.Super. 61 (App. Div. 2004) 5, 27

Loigman v. Committee of Middletown, 308 N.J. Super 500 (App. Div. 1998) 9

P.T. v. M.S., 325 N.J. Super 193 (App. Div. 1999) 8

Rumana v. County of Passaic, 397 N.J. Super 157 (App. Div. 2007) 4

Southern Burlington County N.A.A.C.P. v. Tp. of Mount Laurel, 92 N.J. 158 (1983) 4,24

N.J.S.A. 52:27D-301 to 329.19 ..... 2, 24

N.J.S.A. 52:27D-307(b) 4, 12

N.J.S.A. 52:27D-307(c) 13

N.J.S.A. 52:27D-311(a) 4, 12

N.J.S.A. 52:27D-313 24

N.J.A.C. 5:93 ..... 9, 20

N.J.A.C. 5:93-5.6 22

N.J.A.C. 5:93-5.8 23

N.J.A.C. 5:93-5.15 23

N.J.A.C. 5:98 8

N.J.A.C. 5:99-3.3 14

Proposed N.J.A.C. 5:99 ..... 8, 19, 20

Proposed N.J.A.C. 5:99-4.3 ..... 22, 23

Proposed N.J.A.C. 5:99-7.2(a) 22, 23

Proposed N.J.A.C. 5:99-7.4 23

46 N.J.R. 924(a) 6, 14-

19,20,22,23

46 N.J.R. 931 14

40 N.J.R. 2690(a) 6

35 N.J.R. 4636(a) 5

35 N.J.R. 4700(a) 5

36 N.J.R. 5748(a) 5

36 N.J.R. 5895(a) 5

40 N.J.R. 5965(a) 6

R. 1:10-3 9

http://lwd.dol.state.nj.us/labor/lpa/dmograph/lfproj/sptab1.htm (last accessed June 16, 2014) 10,12

Abbreviations for Citations to Appendix

Movant Fair Share Housing Center's Appendix Supporting Motion to Enforce Litigants' Rights ..... Ma

Appendix Table of Contents

March 14, 2014 Supreme Court Order on New Jersey Council on Affordable Housing Order seeking an extension of time for the promulgation of Third Round Rules in In re N.J.A.C. 5:96 and 5:97 1-9

March 7, 2014 Appellate Division Order Granting Motion to Enforce Litigants' Rights in In re N.J.A.C. 5:96 and 5:97 10-14

Certification of Adam M. Gordon, Esq. in support of Petitioner's Supreme Court Motion to Enforce Litigants' Rights 15-17

Exhibit A: January 28, 2014 Retention Agreement between the State of New Jersey, Department of Law and Public Safety, Division of Law and Dr. Robert W. Burchell 18-25

Exhibit B: Department of Labor's Official Population Projections, available at http://lwd.dol.state.nj.us/labor/lpa/dmograph/lfproj/sptab1.htm (last accessed June 16, 2014) 26

Exhibit C: Excerpts of COAH spreadsheet 27-36

on population change .....

Exhibit D: Comparison of rules proposed by COAH and rules published in the June 2, 2014 New Jersey Register 37-41

Excerpts of April 30, 2014 Transcript of the New Jersey Council on Affordable Housing Public Meeting 42-44

Certification of Kevin D. Walsh 45-46

I. Introduction

Fair Share Housing Center (FSHC) moves in aid of litigant's rights for the Court to enforce its clear and unambiguous order with which the Council on Affordable Housing (COAH) has refused to comply. COAH has proposed a new set of rules fundamentally dissimilar from the methodology that the Court ordered COAH to utilize. COAH's refusal to comply with the Court's directive is not only a thinly veiled attempt to undermine the Fair Housing Act of 1985 (FHA), N.J.S.A. 52:27D-301 to -329.19 and the Constitutional prohibition against exclusionary zoning. It is also an attack on the integrity of the separation of powers in our system of government, which requires that the Executive Branch obey the orders of the Judiciary, and not take ultra vires actions unauthorized by the Legislature. Accordingly, the Court should direct COAH to propose compliant rules or alternatively return Mount Laurel matters to the trial courts as contemplated by the Court's March 14, 2014 order.

This Court's September 2013 decision, affirming Judge Skillman's order below, was clear in what it required, what it prohibited, and why. After a decade of litigation that resulted in the invalidation of two versions of Third Round rules, the Court specifically required COAH to propose Third Round rules utilizing the "previous rounds' method of allocating fair share obligations among municipalities." In re N.J.A.C. 5:96 and 5:97, 215 N.J. 578, 620 (2013). The Court expressly prohibited COAH from

inventing yet another novel approach without legislative authorization: "The FHA's language is an impediment to COAH's unilateral decision to devise a wholly new approach to determining fair share. COAH may implement the FHA's scheme, not come up with a wholly new one." Id. at 616. The Court intended, through this specific order and express prohibition, to end "the limbo in which municipalities, New Jersey citizens, developers, and affordable housing interest groups have lived for too long." Id. at 620.

Yet COAH has done precisely what the Court prohibited: without legislative authorization, it has for a third time made a "unilateral decision to devise a wholly new approach to determining fair share." This new approach substantially deviates from the Prior Round rules with regard to all three of the steps COAH must take under the FHA: (1) calculating the regional need; (2) allocating that regional need; and (3) ensuring that need is met with a realistic opportunity for low- and moderate-income housing. Disregarding the Court's order, COAH proposed rules that:

- Calculate need at a level 70 percent below what the Prior Round methodology required - by manipulating population projections and, as in growth share, using existing exclusionary zoning practices as a limit on regional need;
- Allocate need in a significantly different way from the Prior Round methodology - as in growth share, reducing municipal obligations in places that discourage growth, and using a statewide, not regional, basis for much of the fair share

calculation;

- Meet the need without the Prior Round's presumptive densities and set-asides for inclusionary development, a change also made in growth share but specifically rejected by Judge Skillman's opinion and this Court's affirmance.

In all of these deviations from the Prior Round methodology, COAH has ignored the Court's unambiguous order and embarked upon yet another experimental, drawn out process without legislative authorization or Constitutional sanction.

The Court wrote in initially upholding the creation of COAH that if it "achieves nothing but delay, the judiciary will be forced to resume its appropriate role." Hills Dev. Co. v. Tp. of Bernards, 103 N.J. 1, 23 (1986). After 15 years of delay, and COAH's refusal to comply with a simple and clear process laid out by this Court, that moment unfortunately has arrived. The Court should, in response to COAH's violation of its order, either direct COAH to come into compliance, and provide a process to ensure COAH actually follows the Court's order this time, or alternatively move forward with the relief it deferred in its March 14, 2014 order, allowing Mount Laurel actions to be commenced on a case-by-case basis in the Law Division.

II. Facts and Procedural History

A. Adoption of regulations and the Third Round decisions.

COAH is required to adopt regulations by the FHA, N.J.S.A. 52:27D-301 to -329.19, to implement the state's

constitutional Mount Laurel obligations addressing the housing needs of low- and moderate-income households. Southern Burlington County v. Tp. Of Mount Laurel, 92 N.J. 158 (1983)(Mount Laurel II). The Third Round originally was due to begin when the Second Round ended in 1999. In re Adoption of N.J.A.C. 5:94 and 5:95, 390 N.J. Super. 1, 11 (App. Div. 2007). When the Second Round concluded, however, COAH had not yet proposed the Third Round regulations. The Appellate Division found COAH's delays during this period to be "dramatic and inexplicable," noting that "[t]he public policies underlying the FHA and the Mount Laurel cases have, quite obviously, been frustrated by inaction." In Re Six Month Extension, 372 N.J. Super. 61, 95-96 (App. Div. 2004).

After the Appellate Division held if rules were not adopted COAH would forfeit its role in Mount Laurel, id. at 105, COAH finally adopted Third Round regulations on December 20, 2004, five years after the expiration of the Second Round. 36 N.J.R. 5895(a). On January 25, 2007, in response to numerous appeals, the Appellate Division reversed these regulations as violating the Mount Laurel doctrine and FHA. In re 5:94 and 5:95, supra, 390 N.J. Super. at 32. Noting that "[t]ime . . . is critical," the Appellate Division ordered COAH to complete the rulemaking process on remand "within six months," id. at 88, or by July 25, 2007. The panel declined to appoint a special master at that time, assuming that COAH actually would comply with its directive. Id. at 87.

COAH did not meet the July 25, 2007 deadline and repeatedly moved for, and received, extensions. In response, FSHC and other appellants persisted in their requests for a special master, which were denied. On May 6, 2008, nine years after the expiration of the Second Round, COAH adopted a second set of Third Round regulations, 40 N.J.R. 2690(a), which COAH then further amended on September 22, 2008, 40 N.J.R. 5965(a). These regulations were again challenged by numerous parties.

On October 8, 2010, eleven years after the expiration of the Second Round, the Appellate Division invalidated the second set of Third Round regulations. In re N.J.A.C. 5:96 and 5:97, 416 N.J. Super. 462, 511-12 (App. Div. 2010). Noting "that more than ten years have now elapsed since expiration of the second round rules," the Appellate Division remanded the matter to COAH with a "straightforward" remedy: "determine prospective need by means of a methodology similar to the methodologies used in the prior round rules." Id. at 511. The Appellate Division again rejected requests to appoint a special master at that time, finding 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.

B. The Supreme Court's September 26, 2013 decision.

On March 29, 2011, the Supreme Court granted petitions for certification filed by multiple petitioners. The Supreme Court heard oral argument on November 14, 2012. At argument, the State

advised the Court that it anticipated that it would take 30 days to prepare revised Third Round regulations if required to do so pursuant to the Appellate Division's order. Ma46.

The Supreme Court on September 26, 2013 affirmed the Appellate Division's decision, "endors[ing] the Appellate Division's quick deadline for reimposing third-round obligations based on the previous rounds' method of allocating fair share obligations among municipalities." In re N.J.A.C. 5:96 and 5:97, supra, 215 N.J. at 620. The Court held that a remedy was needed "to eliminate the limbo in which municipalities, New Jersey citizens, developers, and affordable housing interest groups have lived for too long." Ibid.

On December 13, 2013, FSHC filed a Motion to Enforce Litigant's Rights requesting that the Appellate Division appoint a special master to draft regulations for COAH to propose; in the alternative, FSHC sought to allow public interest and builder's remedy suits in the trial courts. On February 26, 2014, the last day of the period within which this Court had ordered COAH to adopt new rules, COAH filed a motion for an extension of time with this Court to propose and adopt new regulations. On March 7, 2014 the Appellate Division granted FSHC's Motion to Enforce Litigant's Rights requiring a strict timeline for COAH to adopt regulations with additional relief should COAH fail to comply with the order. On March 14, 2014, this Court vacated the Appellate Division's order, granted COAH's February 26 motion, and established a

timeline for COAH to propose and adopt new regulations. Ma1-9.

C. Proposal of New Regulations

On April 30, 2014, almost fifteen years after the expiration of the Second Round, COAH held its first meeting in almost a year. The COAH Board voted to propose N.J.A.C. 5:99 Substantive Rules and N.J.A.C. 5:98 Procedural Rules, which were drafted largely by outside consultants hired and supervised by the Attorney General's office. The COAH Board was provided the rules 24 hours in advance of the meeting. Ma43. Exactly what the experts were asked to do is unknown because the Department of Law & Public Safety, which retained the consultants without board action, has declined to provide access to the "scope of work" agreed to by the lead outside consultant, claiming work product privilege. Ma18-25. The rules were formally proposed in the New Jersey Register on June 2, 2014, with a number of changes in details and fair share numbers from the rules approved by the COAH Board. 46 N.J.R. 924(a); Ma37-41. As discussed below, the rules are vastly different from the Prior Round regulations that this Court required COAH to use.

III. Legal Argument

A. The Council on Affordable Housing has violated the Supreme Court's September 26, 2013 decision and March 14, 2014 remand order. The Court should order COAH to propose rules that are similar to the Prior Round methodology.

This motion seeks to enforce the Court's order requiring COAH