SUPREME COURT OF NEW JERSEY
M-847/848 September Term 2013
067126

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

FILED

MAR 14 2014

CLERK

O R D E R

This matter having come before the Court on motion by the Council on Affordable Housing (Council) seeking an extension of time (M-847-13) from the five-month period for the promulgation of Third Round Rules that this Court directed as part of its holding in In re Adoption of N.J.A.C. 5:96 and 5:97, 215 N.J. 578 (2013); and

The Council having submitted the sworn certification of its Chairman, the Commissioner of Community Affairs, Richard E. Constable, III, see N.J.S.A. 52:27D-305; and

The Chairman, having informed this Court that work has progressed on the development of new Third Round Rules so that he has certified, based on personal knowledge, that a proposed set of Third Round Rules will be approved by the Council by May 1, 2014, or earlier, for publication in the New Jersey Register, as prescribed in the Administrative Procedure Act (APA), N.J.S.A. 52:14B-1 to -15; and

This Court having accepted the representation of the Council, certified by its Chairman, that the Council requires

additional time to complete its preparation and formal approval of new proposed Third Round Rules for publication; and

The Court further having accepted the representation of the Council, certified by its Chairman, that the Council will complete its preparation of a Third Round Rules proposal and will approve for publication the proposed new Third Round Rules by May 1, 2014; and

The Court having also received and considered the answers submitted by the other parties in response to the Council's motion for an extension of time as well as the moving papers and answers filed in connection with the Council's motion for stay (M-848-13);

Therefore, it is ORDERED that the motion for an extension of time is granted, subject to the following conditions:

The Council shall, by May 1, 2014, complete its actions preparing and formally approving the proposed Third Round Rules as required by this Court's decision in In re Adoption of N.J.A.C. 5:96 and 5:97;

The Council shall promptly forward the proposed rules to the Office of Administrative Law (OAL), in accordance with the OAL's Rule Publication Schedule, available at http://www.state.nj.us/oal/rules/schedule/, so that the proposed rules are published in the June 2, 2014, edition of the New Jersey Register;

The publication of the proposed rules shall commence the following schedule, pursuant to which the Council shall complete the adoption process:

The comment period shall extend to August 1, 2014, during which time the Council shall conduct a public hearing, if such a request is made to the Council within thirty (30) days following publication of the proposed Third Round Rules in the New Jersey Register; and

The Council shall adopt the proposed Third Round Rules on or before October 22, 2014, and transmit the adopted Third Round Rules to the OAL to permit publication of the adoption notice in the November 17, 2014, edition of the New Jersey Register. The adopted Third Round Rules transmitted to the OAL shall be accompanied by a report prepared by the Council listing all parties offering written or oral comments concerning the proposed Third Round Rules, summarizing the content of all comments and submissions, and providing the Council's response to the data, views, and argument contained in the submissions as required by N.J.S.A. 52:14B-4(a)(4).

It is further ORDERED that in the event that the Council does not adopt Third Round Rules by November 17, 2014, then this

Court will entertain applications for relief in the form of a motion in aid of litigants' rights, including but not limited to a request to lift the protection provided to municipalities through N.J.S.A. 52:27D-313 and, if such a request is granted, actions may be commenced on a case-by-case basis before the Law Division or in the form of "builders remedy" challenges; and

It is further ORDERED that the Appellate Division Order filed March 7, 2014, is vacated in its entirety; and

It is further ORDERED that from this date the Court is retaining jurisdiction for the sole purpose of entertaining any and all future applications to enforce the judgment of this Court requiring the adoption of new Third Round Rules as prescribed in our decision in In re Adoption of N.J.A.C. 5:96 and 5:97 and the terms of this Order; and

It is further ORDERED that the motion by the Council for a stay (M-848-13) of the March 7, 2014, Order of the Appellate Division, is dismissed as moot.

WITNESS, the Honorable Jaynee LaVecchia, Presiding Justice, at Trenton, this 14th day of March, 2014.

CLERK OF THE SUPREME COURT

JUSTICES LaVECCHIA, PATTERSON, and FERNANDEZ-VINA, and JUDGES RODRÍGUEZ and CUFF (both temporarily assigned) join in this Order. JUSTICE ALBIN filed a dissent. CHIEF JUSTICE RABNER did not participate.

JUSTICE ALBIN, dissenting.

The Court's order further postpones the building of affordable housing for the poor, housing that is required by our constitutional jurisprudence and the Fair Housing Act. For more than ten years, the Council on Affordable Housing (COAH or Council) has failed to promulgate lawful Third Round Rules to ensure that every municipality bears its fair share of providing affordable housing. This decade-long delay represents an abysmal failure of process, and the judiciary must accept its share of blame for not demanding timely compliance.

I write this dissent because the Court has failed to make the most basic inquiries to assure that the State has filed the request for an extension of time in good faith. I would have agreed to the extension request if the State had presented an adequate explanation, rather than amorphous excuses without meaningful details, for not abiding by this Court's September 26, 2013 directive. It is impossible to tell from the certification of Richard E. Constable, III, Commissioner of the Department of Community Affairs, whether any real effort was made to comply with the Court's order. The Court's granting of the State's eleventh-hour extension request on so paltry a record -- and its failure to demand answers that would explain the most recent delay -- will be disheartening to many.

History does not give me confidence that we will see compliance with the Fair Housing Act anytime soon.

On September 26, 2013, this Court insisted that rules to govern allocating fair share obligations among municipalities "cannot wait . . . . A remedy must be put in place to eliminate the limbo in which municipalities, New Jersey citizens, developers, and affordable housing interest groups have lived for too long." In re Adoption of N.J.A.C. 5:96 & 5:97, 215 N.J. 578, 620 (2013). "[W]e endorse[d] the Appellate Division's quick deadline for reimposing third-round obligations," ibid., and thus "remanded for the promulgation of a new set of rules within five months," id. at 595. The Appellate Division's order, which we affirmed, had been entered three years earlier on October 8, 2010. In re Adoption of N.J.A.C. 5:96 & 5:97, 416 N.J. Super. 462, 511 (App. Div. 2010). That order directed COAH to adopt Third Round Rules within five months using recently available data and a methodology similar to the ones promulgated in the first two rounds. Ibid.

Significantly, when we heard oral argument on November 14, 2012 in this case, COAH's counsel represented to the Court that revised Third Round Rules would not be "incredibly difficult" to prepare because "a lot of the basics are done" and the regulations could be completed within months.

So what steps did COAH take to comply with this Court's order that required promulgation of new rules by February 26, 2014? Not once in those five months did Commissioner Constable -- who by statute is the chairman of COAH -- convene a meeting of the Council. Indeed, by all appearances, the Commissioner proceeded as a one-man COAH. It bears mentioning that in June 2011, the Governor unilaterally -- without legislative authorization -- abolished COAH, an independent agency, and transferred its responsibilities to the Department of Community Affairs. In re Plan for the Abolition of the Council on Affordable Hous., 214 N.J. 444, 448 (2013). In July 2013, however, this Court ruled that the Governor had overstepped his authority and did not have the power to eliminate COAH. Ibid. Since that ruling, COAH has never met as a body. COAH member Tim Doherty is reported to have requested, after our ruling, that Commissioner Constable convene a meeting; but Mr. Doherty never received a response. See Salvador Rizzo, "NJ Court Orders Affordable Housing Agency to Get Back to Work," Star-Ledger, Mar. 7, 2014, available at http://www.nj.com/politics/index.ssf/2014/03/nj_court_orders_affordable_housing_agency_to_get_back_to_work.html.

We have received no explanation how COAH could have met the deadline set by this Court if the Council never convened as a body. When the Fair Share Housing Center sought information

from COAH about its progress in meeting the deadline, no one deigned to respond. If COAH was unable to promulgate the regulations within a five-month period, Commissioner Constable presumably knew so early in the process. That is because adoption of the regulations requires a number of steps, beginning with the proposal of regulations, a public comment period, and final adoption by COAH. See N.J.S.A. 52:14B-4(a).

Based on the present inadequate record, it appears that Commissioner Constable permitted the clock to run out, and not until the day the regulations should have been adopted did he request an extension of the deadline. The certification submitted by Commissioner Constable offers precious little about whether COAH made good-faith efforts to comply with this Court's order. The Commissioner states that "recent, available, and reliable data has been reviewed . . . and evaluated to develop a third round methodology," but he does not say by whom. Nor does he indicate what resources were devoted to this project, why the Council that he chairs has not been convened, why counsel for COAH represented to the Court that the entire task could be completed within months, why the time goals set by the Court were unattainable, and why he waited until the day the regulations were expected to go into effect to ask for an extension that will postpone the promulgation of regulations for another eight months.

With satisfactory answers to these questions, I could join the Court's grant of an extension of the deadline. But I do not believe that this Court has done its due diligence. Instead, it has uncritically accepted Commissioner Constable's certification that tells us almost nothing. This Court deserves answers, and so does the public. The delay the Court endorses today -- without any meaningful inquiry -- is another sad chapter in the continuing saga to provide affordable housing to low- and moderate-income residents.

Because I cannot join the Court's order on the inadequate record before us, I must dissent.

The foregoing is a true copy
of the original on file in my office.

CLERK OF THE SUPREME COURT
OF NEW JERSEY

ORDER ON MOTION

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

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)

MOTION FILED:	12/17/2013	BY: FAIR SHARE HOUSING
ANSWER(S) FILED:	12/27/2013	BY: LEAGUE OF MUNICIPALITIES
	12/27/2013	KINGS ROW HOMES
	01/02/2014	BERNARDS TWP
	01/06/2014	ATLANTIC HIGHLANDS
	01/07/2014	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 aide 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.

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SUPREME COURT OF NEW JERSEY

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 **CERTIFICATION OF ADAM M. GORDON IN SUPPORT OF PETITIONER'S MOTION TO ENFORCE LITIGANTS' RIGHTS**

1. I, Adam M. Gordon, Esquire, am a staff attorney for Fair Share Housing Center. I make this certification in support of Petitioner's Motion to Enforce Litigants' Rights.

2. Attached hereto as Exhibit A is the 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 to serve as an expert regarding affordable housing and to assist the Division of Law in the delivery of legal advice concerning the development of revised regulations. The scope of work included in this agreement has been redacted under a claim of work product privilege. FSHC received this document on June 13, 2014 in response to an Open Public Records Act request.

3. Attached hereto as Exhibit B is the Department of Labor's most recent official population projections for the State of New Jersey. These projections are available at http://lwd.dol.state.nj.us/labor/lpa/dmograph/lfproj/sptab1.htm (last accessed June 16, 2014).

4. Attached hereto as Exhibit C are excerpts from a spreadsheet FSHC received from COAH on May 28, 2014 through an Open Public Records Act request that show that the change to population projections used by COAH reduce the statewide prospective need for low- and moderate-income households by 30,610. The first set of excerpts, from a spreadsheet tab that Burchell calls "ORG POP 2000-2025" (presumably "original population") uses the Department of Labor data, and shows an increase of 177,849 low and moderate income households from 2000 to 2025. The second set of excerpts, from a spreadsheet tab that Burchell calls "POPULATION 2000-2025," uses COAH's proprietary methodology, and shows an increase of 147,240 low and moderate income households from 2000 to 2025. For

both sets of data we provide both the entire spreadsheet tab and excerpts showing the key cells.

5. Attached hereto as Exhibit D is a comparison of the rules proposed by COAH, as published on its website the day the rules were proposed, and the rules as published in the New Jersey Register on June 2, 2014, which show some of the changes that were made without board approval prior to publication in the New Jersey Register.

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: 6-16-14

Adam M. Gordon, Esq.