

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
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:

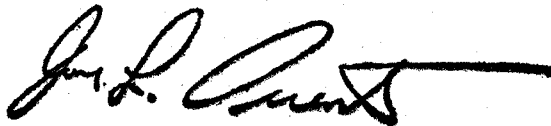
MOTION BY INTERVENOR:

MOTION TO ENFORCE LITIGANT'S
RIGHTS

GRANTED AND OTHER

SUPPLEMENTAL: See attached.

FOR THE COURT:



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

UNKNOWN
STATEWIDE

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.

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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.