018

THE BUZAK LAW GROUP, LLC
Attorneys at Law

EDWARD J. BUZAK
(MEMBER OF N.J. & D.C. BAR)
TIENA M. COFONI
KELI L. GALLO
(MEMBER OF N.J. & N.Y. BAR)

JACQUELIN P. GIOIOSO
OF COUNSEL

MONTVILLE OFFICE PARK
150 RIVER ROAD SUITE N-4
MONTVILLE, NEW JERSEY 07045

(973) 335-0600

FAX: (973) 335-1145

E-MAIL: BLG@BUZAKLAWGROUP.COM

November 13, 2014

Edward J. Buzak, Esq.
002131973

HAND DELIVERY

Mark Neary, Clerk ,
Supreme Court of New Jersey
Richard J. Hughes Justice Complex
25 West Market Street, P.O. Box 970
Trenton, New Jersey 08625-970

Re: 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
215 N.J. 578 (2013)
Superior Court Account: 0011245

Dear Mr. Neary:

Please be advised that we represent the New Jersey State League of Municipalities (``NJLM'' or the ``League'') in the above captioned litigation. In that capacity we submit this letter brief in lieu of a more formal brief in opposition to the motion to enforce litigant's rights filed by Fair Share Housing Center (``FSHC'') which was served on us on November 3, 2014.

TABLE OF CONTENTS

TABLE OF CONTENTS TO APPENDIX

PRELIMINARY STATEMENT

FSHC moves before this Court for the enforcement of litigant's rights. They maintain that the New Jersey Council on Affordable Housing (``COAH'') has violated this Court's September 26, 2013 decision in the instant matter and its March 11, 2014 Remand Order, yet seek to impose sanctions not against the agency whom they contend violated this Court's directives, but instead against the municipalities that in good faith sought to comply with applicable regulations over the last 14 years in order to have their Housing Elements and Fair Share Plans (``HE&FSP'') in front of COAH for disposition. Without any justification or precedent, FSHC seeks to strip the municipalities of the immunity that they possess because of COAH's alleged violation of this Court's decision and its Order and instead, subject the municipalities to builder's remedy litigation.

In addition, in this motion, FHSC seeks to have this Court provide ``general guidance'' to trial courts by coordinating matters before specific judges and establishing a protocol to develop a new methodology through a rapid and clear process of mirroring the first and second round Rules except to the extent that statutory changes in the interim have resulted in portions of the first or second round Rules no longer being valid. Once the methodology is established, FSHC seeks to have this Court go back 30 years to bring all these affordable housing issues before the Court and disregard the administrative procedure that has been established in the Fair Housing Act (``FHA'') N.J.S.A. 52:27D-301

et seq. Conspicuous by its absence is any provision in the proposal of FSHC that would provide municipalities with an opportunity to comply with the regulations as may be promulgated even under FSHC's proposal.

As will be set forth in more detail hereinafter, the NJLM opposes this motion for a variety of reasons, including the following:

i. The sanctions proposed against municipalities are misdirected, misguided and inappropriate. The target municipalities of FSHC's motion did nothing more than **comply** with every set of regulations that COAH has adopted in order to utilize the administrative process created by the FHA to satisfy the municipalities' affordable housing obligation. The municipalities did nothing wrong. If the agency has violated this Court's decision or its Order, then it is the agency against whom the relief should be sought. Therefore, the municipalities should continue to retain the protections afforded them under the FHA, while the process proceeds to a conclusion.

ii. The concept of completely divesting COAH of jurisdiction is an over-reaction to a temporary impediment. A fair reading of the transcript of the October 20, 2014 COAH meeting reveals that the Agency neither defied nor ignored this Court's Order. Importantly, none of the voting members of COAH even

remotely suggested that they defy this Court's Orders and rulings. Instead, COAH members differed only on whether the regulations that contained some deficiencies should be adopted ``as is'' or whether COAH should proceed to correct those flaws through modified regulations, Thus, COAH should be afforded the opportunity to resolve the deadlock and complete the process that they started.

iii. If this Court is unwilling to allow COAH to complete the process, there are viable alternatives to reinserting the judiciary directly into the affordable housing process and reverting to those conditions that existed prior to the 1985 Fair Housing Act. COAH has expended significant resources to develop, propose and promulgate a set of regulations that attempted to comply with this Court's directives and Orders. Those efforts should neither be ignored nor wasted.

iv. A procedure should be established that begins with the body of Regulations developed by COAH, all comments received and processed, any response to and amendments derived from those comments, and ends with a set of rules for the agency, not the Court, to implement. A detailed proposal to achieve this result is detailed in Point III of this brief infra. In this way, the judiciary is only minimally reinserted into the process to clear the impediment (lack of uniform regulations)

rather than effectively dismantling the very Agency that this Court determined could not be dismantled by the Governor In re Plan for Abolition of Council on Affordable Housing, 214 N.J. 444 (2013).

PROCEDURAL HISTORY.

The NJLM relies upon the procedural history of the third round regulations as set forth by the Supreme Court in In the Matter of Adoption of N.J.A.C. 5:96 and 5:97 by the New Jersey Council on Affordable Housing, 215 N.J. 578, 593-606 (2013) (``Mount Laurel IV'').

Subsequently, FSHC filed a motion to enforce litigant's rights on December 13, 2013, which motion was granted by the Appellate Division in large part on March 7, 2014. Prior to the Appellate Division's disposition of that motion, on February 26, 2014, COAH filed a motion with this Court for an extension of time within which to propose and adopt new regulations. On March 11, 2014, this Court granted COAH's motion, vacated the Appellate Division's Order granting FSHC's motion and in doing so established a precise schedule for COAH to follow in order to propose, consider, and adopt third round regulations. (Ma1-4)[1]

On April 30, 2014, COAH proposed revised third round regulations, the day before the deadline established in this Court's March 11, 2014 Order. Those regulations were published in accordance with said Order in the New Jersey Register on June 2,

[1] ``Ma___'' refers to the Appendix attached to Movant's brief in support of its motion.

2014. 46 N.J.R. 924. A public hearing was held on July 2, 2014 and comments received by COAH on their proposed Rules up until the August 1, 2014 deadline. According to COAH's Acting Executive Director, there were approximately 3,000 commenters who responded to the Notice. (Ma30; T30-16)[2].

On October 20, 2014 COAH held a meeting to consider the adoption of the regulations. A motion was first made to postpone consideration of adoption for sixty (60) days to allow for modifications resulting from the submitted comments. That motion failed to pass on a 3-3 tie vote. The next motion to adopt the regulations also did not carry by a similar 3-3 tie vote. On October 31, 2014 FSHC filed the instant motion.

STATEMENT OF FACTS.

The NJLM relies upon the facts leading up to the Supreme Court's decision on September 26, 2013 as outlined in their opinion, Mount Laurel, 215 N.J. at 587-606 and the facts as mentioned in the Procedural History.

At the October 20, 2014 meeting, COAH accepted public comment from four individuals: Jeff Tittel, Director of the Sierra Club, Ma37-38; T7-8 to T11-21; Adam Gordon, Fair Share Housing Center, Ma38-39; T11-25 to T15-21; Lorraine Wearley, Unitarian Universalist Legislative Ministry of New Jersey, Ma39; T15-25 to T17-10; and Arnold Cohen, Housing Community Development Network of

[2] Movant's Appendix contained the Transcript of Proceedings from the October 20, 2014 COAH meeting at which they considered the adoption of the Regulations (Ma35-47). The NJLM will also reference the page(s) and line(s) of the transcript when citing to it in this letter brief.

New Jersey, Ma39-40; T17-13 to T19-8. All four of the public commenters were critical of the Regulations. Mr. Tittel referred to the Rules as ``. . . a sell-out to developers, a sell-out to land speculators and we believe that these Rules will do more harm to the State of New Jersey.'' T10-17 to T21. Ms. Wearley stated that ``[t]he proposed rules are simply not adequate to meet New Jersey's needs for affordable housing. T16-22 to T24. Mr. Cohen urged that the Rules be reconsidered:

> We should be giving towns more tools to address their affordable housing obligations, not less tools and then we need to be addressing what the needs are of people, such as people with special needs, people for rental housing and these rules do not obligate that these things happened, so I urge you to relook at the rules.
>
> These rules as currently structured hurt our economy and they'll be in place for a long time and we need to get them right.'' T18-21 to T19-8.

Most enlightening, however, were the comments of Mr. Gordon, an attorney with the Movant herein, FSHC. At the outset he declared: ``[t]he rules that you have before you today are not only unconstitutional, they're just basically irrational. They don't work and nobody who actually was trying to get affordable housing built would design anything like that.'' T12-1 to T6.

He continued: ``[t]his really hurts people with special needs. I know that's a concern of Mr. Doherty and many other people. This eviscerates the ability to give credit for most housing for people with special needs and also has no requirement for rental housing and the reality is that most people with special needs only really can afford to be in rental housing. . .

.'' T14-18-18 to 25 to T15-1-3.

Finally, Mr. Gordon, in no uncertain terms, urged COAH to take a step back and ensure that they get these Rules right. Striking a conciliatory tone, he stated:

> We can all have policy disagreements as mayors, housing advocates, developers, but there's a lot of choices that are being made here that nobody agrees with, that really hurt everybody and **I think it's really time to take a step back and make sure that you get these right before we set off on another several years of litigation** and fighting over things that, again, aren't really legitimate and policy based, that are just purely irrational problems, fundamental problems with the methodology and things that are just going to end up back with a lot of fighting and no one building homes.T15-4 to T18. (emphasis added)

However, when COAH did not adopt the very Regulations that Movant declared were ``unconstitutional'' and ``irrational'', the remedy sought before this Court is not to have COAH ``get these right'', but instead to divest COAH of jurisdiction and worse, to expose all municipalities that have followed the Rules to builder's remedy lawsuits and a process with which even this Court in its 1983 Mount Laurel II lawsuit did not favor. S.Burlington Cnty. NAACP v. Twp. of Mount Laurel, 92 N.J. 158 (1983).

When COAH began its deliberations on the Regulations at the meeting, Member Winterstella made a motion to table the adoption of the Substantive and Procedural Regulatiions for 60 days. T24-19 to T23. Member Doherty seconded the motion and complimented the staff for having worked diligently weekends and nights for several weeks, revising the comments and putting responses together. He understood that by tabling the adoption for 60 days

COAH would be in technical violation of the Supreme Court directives, but asked that the Court consider

> . . .that this board is trying to make a very sincere effort to have plans and regulations, regulations that meet the needs of our citizens of New Jersey and that comply with the Supreme Court rules as put forth and directed by the Supreme Court. T25-12 to T18

Mr. Doherty concluded ``. . . we at least need to give a fair shake to all the work that those folks have done in commenting on those rules and we hope that by doing this, we can come out with a set of rules that will not only substantially--sustain a legal challenge, but will finally resolve this issue of affordable housing in the State of New Jersey.''

Mr. Winterstella was concerned as to whether the Rules as originally proposed, given the 2,000 comments that he read, accomplished the objective. He suggested that many of the comments were on point and that the Rules as proposed did not ``. . . really move affordable housing in the state and protect the other issues.'' T27-6 to T8. He continued,

> . . .I think there should be things such as bonuses included again, some recognition of the need for apartments, low-income apartment housing. We just-this in my opinion is not a resolution that will meet the requirements of the Supreme Court. I feel that in the 60 days, I request that we have sufficient meetings to offer amendments to get this more in order and more appropriate for the Supreme Court.
>
> Hopefully, as was indicated by Tim [Doherty] the Supreme Court will allow us 60 days. Certainly, we have not had enough time to review the comments and at least I haven't had enough time and discuss them with others, with the staff and also with the council, so I

think we need this time and hopefully it will be helpful to us. T27-9 to T28-2.

The only other COAH member who commented on the motion was Mayor Walters who felt that COAH could not violate the Supreme Court Order and that they should go ahead with the adoption of the Regulations. However, she did express her agreement that the Regulations were not perfect and that there are many changes to be made. T28-7 to T13. The motion failed to garner a majority, ending in a 3-3 deadlock. T29-14 to T15.

Following the vote, Acting Executive Director Sean Thompson provided a report to the Council, T29-20 to T36-22. Mr. Thompson did indicate that the Rules up for adoption included a list of Agency initiated non-substantial changes not requiring further public hearing. T36-18 to T22.

Following Mr. Thompson's explanations, Member Marchetta moved to adopt the Regulations in N.J.A.C. 5:98 and N.J.A.C. 5:99. Mayor Walters seconded the motion. T37-4 to T6. That vote also failed to garner a majority and ended in a 3-3 deadlock.

LEGAL ARGUMENT.

POINT I.

THIS COURT SHOULD AFFORD COAH THE OPPORTUNITY TO COMPLETE THE TASK IT STARTED AND EITHER ADOPT REGULATIONS AS PROPOSED AND SIMULTANEOUSLY PROMULGATE AMENDMENTS THERETO OR, ALTERNATIVELY, DEVELOP REVISED REGULATIONS AND REPROPOSE THE SAME AS REVISED WITH A SHORT COMMENT PERIOD AND PUBLIC HEARING BEFORE ADOPTION.

A fair reading of the Transcript of the October 20, 2014 COAH meeting discloses that the Agency was caught on the horns of a

dilemma. Three of the Members were poised to adopt the Regulations as proposed even though 3 of the 6 Members formally stated on the record that the Regulations needed further work before they could be adopted. The public process that this Court articulated in its March 11, 2014 Order, including a public hearing and public comments, was intended to accomplish the very objective that it did. That process ensures that the public's voice is heard and that the agency does not ignore the public's reaction to their proposed regulations. In this case, interested parties from all perspectives took the time to comment on the Regulations and offer suggestions for modification. Clearly, some of those requests rung true to the Members and they expressed a sincere position that the Regulations needed more work, ironically agreeing with the comments of the Movant herein ``. . . to take a step back and make sure that you get these right. . . .'' T15-9 to T10. For their trouble and concern they received from the Movant a motion to remove them from the process.

The public comment process also has the benefit of legitimatizing the regulations when they are finally adopted, in addition to providing fundamental due process to all segments of the public who are affected either directly or indirectly, by them. This legitimacy is critically important when dealing with an area of law as important as this one, particularly in situations where reasonable people may differ in their approach to addressing the issues and challenges.

The adoption of Regulations of this importance, complexity and magnitude demand that the legitimate comments made by interested stakeholders in the process be fully vetted and addressed so that, as the movant said, we don't ``. . . set off on another several years of litigation and fighting . . . .'' T15-11 to T12.

Conspicuous by its absence at the COAH meeting is any defiance or ignoring of the Supreme Court's directives. Quite the contrary, the Members who voted in favor of adoption were clearly concerned about the consequences of not adopting the Regulations in light of the deadline set by this Court in its March 11, 2014 Order. Similarly, those that voted to table the adoption for 60 days were concerned about the consequences, but clearly felt that the Regulations needed adjustment and that despite the diligence with which the staff had proceeded, the Regulations on the table for adoption did not fully address the issues in a comprehensive way as pointed out by numerous comments, a position consistent with the position taken by the Movant herein.

While one could easily be critical of COAH for not proceeding more diligently so that they would be in a position to adopt modified Regulations based upon valid comments that were made, the reality is that the task was truly herculean. Reviewing, assembling, analyzing and responding to comments made by 3,000 commenters is a staggering assignment. While the Movant herein has repeatedly cited a remark made by Deputy Attorney General Callahan to Justice LaVecchia's question regarding the length of

time it would take COAH to adopt Regulations, Ms. Callahan simply could not have contemplated the magnitude of the task nor the enormous response that the proposed Regulations evoked.

The NJLM has successfully urged this Court in the past to focus on the objective and goal sought to be achieved: the promulgation and implementation of valid, constitutional and implementable Regulations that will address constitutional affordable housing obligations in this state and provide municipalities with a clear road map to its obligation and methods to satisfy that obligation. This effort has consumed the better part of almost 15 years, with litigation consuming over 10 years. Now is not the time to sever COAH from the process as Movant urges and effectively dismantle COAH's operation which this Court would not allow to happen when the Governor attempted to do so in the proposed Reorganization Plan. In re Plan for Abolition of Council on Affordable Housing, 214 N.J. 444 (2013). COAH has gotten the proverbial ball to the one yard line and should be afforded the opportunity to cross the goal line and adopt realistic and practical Regulations that will allow affordable housing to be built rather litigated.

POINT II.

IN NO EVENT SHOULD MUNICIPALITIES THAT HAVE FILED PETITIONS FOR SUBSTANTIVE CERTIFICATION CURRENTLY PENDING BEFORE COAH BE STRIPPED OF THE PROTECTIONS FROM BUILDER'S REMEDY LAWSUITS AS AUTHORIZED UNDER THE FAIR HOUSING ACT (''FHA''), N.J.S.A. 52:27D-301, et seq..

Granting the demand of FSHC to strip municipalities whose Petitions for Substantive Certification are currently pending before COAH of the protections requiring the exhaustion of administrative remedies as set forth in Section 316 of the FHA (N.J.S.A. 52:27D-316b) would frustrate one of the significant goals established in Mount Laurel II, Southern Burlinjgton County N.A.A.C.P. v. Township of Mount Laurel, 92 N.J. 158 (1983), where this Court stated ``Our rulings today have several purposes. First, we intend to encourage voluntary compliance with the constitutional obligation. . . .'' Mount Laurel II at 214. This purpose and objective was recognized and acknowledged by Judge Serpentelli in J. W. Field v. Township of Franklin, 204 N.J. Super. 445 (Law Div. 1985), wherein Judge Serpentelli stated:

> At the outset of Mount Laurel II, the Court articulated the several purposes of its rulings. The first stated purpose was the encouragement of voluntary compliance with the constitutional obligation. Id. at 455-456.

The Appellate Division reiterated the importance of voluntary compliance in K. Hovnanian Shore Acquisitions v. Tp. of Berkeley, 2003 WL 23206281 (N.J. Super. A.D.) (Docket No. A-594-01 T-1) NJLMa1[3] wherein they stated:

> Indeed, in Toll Bros. supra, in the context of affirming the grant of a builder's remedy in recognizing the continued need for the builder's remedy, the Court emphasized **that voluntary compliance is preferred, should be encouraged, and that a builder's remedy action should be considered a remedy of last resort.** (Emphasis added) NJLMa9.

[3] Reference to the Appendix to this letter brief of the NJLM shall be cited as ``NJLMa___`` with the page number inserted.

This Court also recognized that voluntary compliance is the preferred method to proceed to fulfill a municipality's obligation in Hills Dev. Co. v. Township of Bernards,, 103 N.J. 1, 52.

Those municipalities that have, in most cases, repeatedly modified their Housing Elements and Fair Share Plans (``HE&FSP'') as the third round regulations evolved with three iterations and proceeded to pursue plan approval on the basis of whatever regulations applied at the time, should not now suffer the wrath of a builder's remedy and lose their statutory protections. Such a result would undermine every tenet of voluntary compliance since Mount Laurel II and the very purpose of the FHA, which was to resolve Mount Laurel disputes through the administrative process established by the FHA and **NOT** through builder's remedy litigation. N.J.S.A. 52:27D-303. The fact that over 300 municipalities have voluntarily submitted Plans to COAH, illustrates how far we have come since Mt. Laurel II and since the FHA was adopted, almost 30 years ago. To now determine that those municipalities that have proceeded in good faith to follow the procedures set forth in the statute and regulations at a significant expense and that have retooled and recast their HE&FSP's to respond to each and every revised iteration of the third round rules have lost their protections and are now subject to builder's remedy lawsuits would be the antithesis of what the Supreme Court wanted in 1983 in Mount Laurel II and what this Court expects today in 2014.

Finally, the relief sought by FSHC is both misdirected and misguided. The municipalities did not violate this Court's March 11, 2014 Order. The municipalities that have availed themselves of the administrative, rather than judicial process authorized under the FHA, not only were voluntarily seeking to fulfill their constitutional obligation, but they were doing so based upon a set of regulations adopted by the very Agency established to do just that. To subject municipalities to punishment in the form of exposure to builder's remedy lawsuits is the height of hypocrisy. Even Mr. Gordon of FSHC publicly recognized at the October 20, 2014 COAH meeting that ``. . . [w]e can all have policy disagreements as mayors, housing advocates, developers . . . .'' T15-4 to T6. However, that disagreement should not result in punishing the municipalities for any transgressions of the agency. Indeed, perhaps the only thing that municipalities will have wound up doing wrong if this Court divests municipalities of their statutory protections and immunities is to have relied upon the integrity of the FHA and the rule of law that is the cornerstone of democracy.

POINT III

IF THIS COURT DETERMINES THAT THE SINGULAR IMPEDIMENT TO THE CONTINUATION OF THE ADMINISTRATIVE PROCESS MUST BE RESOLVED OUTSIDE OF THE AGENCY, IT SHOULD DO SO SURGICALLY, PRECISELY AND PROMPTLY, BEGINNING WITH THE BODY OF REGULATIONS DEVELOPED BY COAH, THE COMMENTS THERETO, ANY REPONSE TO AND AMENDMENTS DERIVED FROM THOSE COMMENTS AND ENDING WITH A SET OF RULES FOR THE AGENCY TO IMPLEMENT.

The NJLM has always preferred the administrative process to the judicial process and has always preferred the use of COAH and its Regulations as the primary and dispositive mechanism for municipalities to utilize in order to come into compliance with their affordable housing obligations. On the other hand, FSHC's proposal is essentially to have this Court dismantle that same agency that FSHC successfully fought to maintain and preserve, effectively making COAH a non-entity by having the judiciary displace it, eviscerate the FHA and eliminate, among other things, the multiple interests that are a necessary part of the affordable housing process. It is submitted that this Court, which recognized the importance of the existence of the agency and the legitimacy that its members give to the process, should not disregard its importance because of a specific and finite indiscretion. Instead, the impediment that has prevented the administrative process from reactivating--the inability of the agency, despite its good faith effort, to adopt a set of Regulations that can then be implemented--should be removed. If this Court is unwilling to allow COAH to complete the process, there is a far more precise solution to the stalemate than has been proposed by the Movant. That solution is to first focus on the significant body of Regulations and comments thereto in which considerable time, effort and money have been invested and establish a set of Rules that the agency would then be ordered to apply and implement in accordance with their terms, unless the agency elected to make any changes to those Regulations in the

usual course of following the procedures set forth in the Administrative Procedures Act. Utilizing this process would maintain the integrity of the FHA and the agency and preserve the administrative process while removing the sole impediment to that process proceeding.

While this Court can complete that process itself, it is respectfully submitted that instead, this Court consider the appointment of a former high-ranking policy-making official in this state who is well versed and experienced in assisting in the development, implementation and execution of public policy at the highest levels. That policymaker should be empowered to recruit three (3) Professional Planners representing the north, central and southern portions of this state to assist in reviewing the Regulations as originally proposed by COAH, the comments resulting from the public participation process, and any response to those comments as developed by the staff of COAH. Utilizing all of that work product and the resources of the agency itself, a set of Regulations should emerge that would be acceptable to the appointed policy making official and result in the recommendation for this Court to approve those Regulations and direct the agency to implement them in that form. Finally, it is critical that once the agency is directed to implement those Regulations, the municipalities currently before COAH with Petitions for Substantive Certification be given a window of opportunity to modify their HE&FSP's to comply with the applicable Regulations and submit those revised plans for disposition in accordance with

COAH's Regulations.

The advantage of this process over the process suggested by the Movant herein is multifold. First, all of the effort that has been expended by the agency to comply with this Court's Order will not be ignored or wasted. Second, the effort expended by the public in responding to the proposed Regulations and providing suggestions for proposed modifications will neither be repeated nor ignored. Third, the former policy making official selected by this Court will be facile in considering various positions and alternatives that may be put before him or her and in making decisions based upon the best available information. Fourth, this Court can then take those Regulations and hand them back to the agency, eliminating the impediment to the process going forward and allow that process to go forward by first permitting municipalities to adjust their HE&FSP's to conform to the revised Regulations and then allowing the administrative process to continue to its completion.

While no process can ensure with complete certainty that the Regulations will be legitimatized, the process outlined above stands the most likelihood of being accepted by all of the participants and having the chapter closed on the Third Round Regulations so that the focus of all of the stakeholders and interested parties in this arena will be where it ought to be: developing land use regulations that will result in the provision of real affordable housing in which low and moderate income families can live as opposed to developing reams of paper which

may be an interesting academic exercise, but in the end does not assist in providing decent and affordable housing to the people whose constitutional rights are being detrimentally affected.

CONCLUSION.

For the reasons as set forth above, the NJLM maintains and submits that this Court should deny the motion of FSHC to enforce litigant's rights. Instead, this Court should allow COAH to complete the process it started and adopt Regulations that it can then implement and execute. In the alternative, if this Court is unwilling to allow COAH to complete the process that it started and instead desires to remove the impediment which is preventing the process from going forward, it should do so in a way that begins with the substantial effort that has been expended by the agency and all interested parties which have resulted in a set of draft regulations and comments thereto and build on that base. In no situation should be municipalities who have done nothing but follow the rules of the game be stripped and divested of the statutory protections and immunities that derive from their participation in the administrative process. Once the impediment of not having a set of Regulations is removed, municipalities should be afforded an appropriate window of opportunity to conform their previously

developed HE&FSP's to the new Regulations after which the administrative process should then proceed with promptness and vigor to its completion.

Respectfully submitted,

THE BUZAK LAW GROUP, LLC

Edward J. Buzak

EJB:fd word doc. (M-534-Q)
cc: Service List Regular Mail
William Dressel, Executive Director NJLM E-Mail
Michael Cerra E-Mail
William J. Kearns, Esq. E-Mail
Jeffrey Surenian, Esq. E-Mail
Jonathan Drill, Esq. E-Mail

Not Reported in A.2d, 2003 WL 23206281 (N.J.Super.A.D.)
(Cite as: 2003 WL 23206281 (N.J.Super.A.D.))

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey, Appellate Division.
K. HOVNANIAN SHORE ACQUISITIONS, L.L.C., Plaintiff-Appellant,
v.
THE TOWNSHIP OF BERKELEY, in the County of Ocean, a Municipal Corporation, the Mayor and Township Council of the Township of Berkeley, and the Planning Board of the Township of Berkeley, Defendants-Respondents.

No. A-594-01T1.
Argued Nov. 6, 2002.
Decided July 1, 2003.

On appeal from the Superior Court of New Jersey, Law Division, Ocean County, L-1120-01.
Thomas F. Carroll, III, argued the cause for appellant (Hill Wallack, attorneys; Mr. Carroll, on the brief).

Jeffrey R. Surenian argued the cause for respondents the Township of Berkeley and the Mayor and Township Council of the Township of Berkeley (Lomell Law Firm, attorneys; Mr. Surenian, and on the brief), of counsel.

Edward F. Liston, Jr., for respondent the Planning Board of the Township of Berkeley, relies on the brief filed by the Lomell Law Firm.

Before Judges CUFF, LEFELT and WINKELSTEIN.

PER CURIAM.

*1 In this *Mount Laurel* [FN1] matter, we review an order dismissing plaintiff's complaint against a municipality. Resolution of this appeal requires us to consider the use of a temporary immunity order obtained through an ex parte application by the municipality.

FN1. *Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel*, 67 N.J. 151 (1975), and *Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel (Mount Laurel II)*, 92 N.J. 158 (1983).

Plaintiff, K. Hovnanian Shore Acquisitions, L.L.C. (plaintiff or Hovnanian), is the contract purchaser of approximately 800 acres in the Township of Berkeley (the Township), Ocean County. The Township is a sprawling municipality south and east of Toms River with frontage on the Atlantic Ocean, Barnegat Bay and the Toms River. It hosts several large state and county parks, including Island Beach State Park. Major portions of the Township lie within the Pinelands and Coastal Management Area.

The Township's housing stock includes mostly single-family homes of post-war ranch and Cape Cod styles, with newer subdivisions and retirement communities. The housing includes a significant number of units used as seasonal second homes. About 93% of the housing stock is owner-occupied, and the median value of the housing stock is approximately $103,000. The boom in retirement housing construction caused the population of the Township to triple between 1970 and 1980 and to increase by another 65% between 1980 and 1990. Residents over sixty-five years of age comprise 50.89% of the population.

In 1986 the Council on Affordable Housing (COAH) adopted its first set of substantive rules which included calculations of municipal affordable housing obligations for the "first cycle," 1987-93. COAH later promulgated another set of rules for the "second cycle," covering the cumulative period 1987-99. *In re Petition for Substantive Certification, Township of Southampton*, 338 *N.J.Super.* 103, 106 n.1 (App.Div.) (citing *N.J.A.C.* 5:93-2.1 and -2.20 and Appendix A thereto), *certif. denied*, 169 *N.J.* 610 (2001); *N.J.A.C.* 5:92. COAH assigned to the Township a first cycle fair share of 699 units.

In January 1988, when real estate developer Lifetime Homes of New Jersey, Inc. (Lifetime) was threatening to bring a builder's remedy suit if the Township did not accede to Lifetime's non-*Mount Laurel* demands, the Township filed a complaint for declaratory judgment, seeking an order barring any builder's remedy litigation for a reasonable period while the Township developed a compliance plan.

On January 28, 1988, Judge Serpentelli entered an order barring any builder's remedy to any party instituting suit against the Township for the ninety-day period during which the Township would prepare its compliance plan. The order added that if the Township proved it took all the

necessary actions, it could obtain an order of compliance that would be valid and binding for six years.

In 1988, Lifetime and another real estate developer, Foxmoor Berkeley Associates (Foxmoor), each filed an action against the Township claiming that it had failed to meet its obligation to provide for its fair share of the regional need for housing for lower income persons pursuant to the *Mount Laurel II* decision. The Township reached settlements with Foxmoor and Lifetime in 1991. Soon thereafter, it renegotiated its settlement with Lifetime.

*2 In June 1994, COAH adopted its regulations for the second housing cycle. COAH assigned the Township a second cycle cumulative fair share of 663 units of affordable housing.

On July 18, 1994, the Township Council adopted a "fair share plan" (the July 1994 plan). The July 1994 plan described an ongoing survey that had, as of that date, identified 400 existing low and moderate income households within the Township which were claimed as "credits without control." The July 1994 plan further provided for settlement agreements, permitting Foxmoor 135 dwelling units and Lifetime 935 dwelling units, yielding 15 and 100 affordable units, respectively. The 100 affordable units to be built by Lifetime would be constructed on lots owned by the municipality in the Manitou Park section of the Township.

On October 31, 1994, Judge Gibson entered a judgment of repose in the actions brought by Lifetime and Foxmoor. Among other things, the judgment granted the Township a six-year period of immunity from all *Mount Laurel* litigation and required the Township to fully implement the July 1994 plan. The July 1994 plan was held to constitute "an appropriate means to fully satisfy the Township's *Mount Laurel* obligation" subject to six conditions, including one that required the Township to "provide adequate documentation for at least 27 credits without controls over and above the 276 already found acceptable" to Philip B. Caton, the court-appointed Master in the case.

Lifetime applied to the New Jersey Department of Environmental Protection (DEP) for wetlands approvals and permits. Eventually, it became clear that environmental constraints would preclude construction of any new affordable housing units. Instead of waiting to take any further action in the next COAH housing cycle, the Township undertook a second "credits without controls" survey to determine whether its affordable housing goals were being met.

Township representatives met with Caton in January 2000 to discuss the anticipated shortfall

of affordable housing units due to environmental problems on Lifetime's tract and the proposed survey. Caton considered the approach reasonable, and the Township representatives worked with him to develop the survey documents.

At around that time, the Township's Planning Board denied Lifetime's application for approvals related to its largest market unit tract. After Lifetime failed to obtain court approval in an application to "essentially take over the processing of Lifetime's development applications and remove the Planning Board from the process," Lifetime sold its property to Ocean County for use as open space. Judge Gibson granted Lifetime's request to dismiss its litigation with prejudice, but declined to entertain the Township's request for approval of its approach to undertake a second survey. By order entered on May 15, 2000, Judge Gibson provided that the judgment of repose continue in full force and effect. The order further provided:

*3 3. Prior to the expiration of the current Judgment of Repose, the Township shall be free to file a new Housing Element and Fair Share Plan (hereinafter "affordable housing plan") with [COAH] and to either bring a declaratory relief action in court seeking the Court's approval of said affordable housing plan or petition COAH to approve said affordable housing plan.

In May 2000 the Township's Planning Board and Township Council adopted a new housing plan (the May 2000 plan). The only significant difference from the July 1994 plan was the inclusion of references to a 91-unit gap in the May 2000 plan caused by Lifetime's inability to deliver affordable housing units. The 91-unit figure recognized that the Township had four new creditworthy units provided by a nonprofit entity. The May 2000 plan stated that the 91-unit shortfall was expected to be more than satisfied through a second "credits without controls" survey, particularly because over 2500 units were identified that were not included in the first survey. Indeed, the May 2000 plan noted that "[a]ny credits over and above these 91 credits will be 'banked' for use against any future fair share quotes."

In June 2000, the Township's counsel wrote to Judge Serpentelli seeking a declaration that the Township had adequately covered the gap in its *Mount Laurel* obligations and also seeking to obtain temporary immunity to extend its repose from the period between October 30, 2000, the date that the judgment of repose would expire, and COAH's enactment of third cycle regulations. That letter set forth the requirements of COAH's "interim procedure" rules, N.J.A.C. 5:91-14.3(a), that permitted a municipality to extend its second round substantive certification "for up to one year after the effective date of the adoption of the Council's third round methodology [and] rules." The interim procedure required that the municipality's governing board adopt a resolution that: (1)

requested the extension; (2) committed to continuing to implement the certified second cycle plan; and (3) committed to addressing the municipality's third cycle obligations with a new housing element and plan (*N.J.A.C.* 5:91-14.3(a)).

Pursuant to Judge Serpentelli's guidance in response to that letter, the Township filed a complaint on August 29, 2000. *In the Matter of the Application of the Township of Berkeley, a municipal corporation of the State of New Jersey,* L-2878-00. In its complaint, the Township asked the court to: (1) take jurisdiction over its current housing plan; (2) determine whether the Township had adequately addressed the gap in its housing plan through the ongoing "credits without controls" survey; (3) determine the number of additional "credits without controls" that the Township can "bank" against future affordable housing obligations to the extent the survey reveals more than 91 credits; (4) retain jurisdiction so that the court could grant any reasonable request to extend immunity beyond October 30, 2000, the final day of immunity under the judgment of repose; and (5) resolve any of the Township's other housing plan issues, including Foxmoor's proposal to enter into a 15-unit Regional Contribution Agreement. On October 27, 2000, the Township moved before Judge Serpentelli in the *In re Berkeley* action, on short notice, for temporary immunity to protect the Township from builder's remedy suits for the period through one year after COAH's new regulations covering the third housing cycle would take effect. The application was supported by Caton, the Special Master. On November 3, 2000, Judge Serpentelli entered an Order of Temporary Immunity, granting the immunity requested effective as of October 27, 2000.

*4 On May 15, 2001, a consent order was entered amending the Foxmoor settlement. The Township agreed to accept $260,000, representing $20,000 per unit, as a contribution toward its trust fund, and agreed to take certain steps to devote some or all of those funds toward providing public water and sewer service for the Manitou Park section of the Township. On February 13, 2001, the Township Council passed a resolution to apply for and accept Homeownership Incentive Fund monies from the New Jersey Housing and Mortgage Finance Agency to enable Homes For All, Inc., to develop Township-owned land in the Manitou Park area by constructing units half of which would be moderate income units and the other half market rate units. The resolution stated that the Township was committing 116 buildable lots for the project and $500,000 in "*Mount Laurel* funds," to be disbursed based upon completion levels of construction, and provision of water, sewer and recreation facilities.

Plaintiff filed its builder's remedy complaint on April 3, 2001. It alleged that the Township had not satisfied its *Mount Laurel* obligations as described in the October 1994 judgment of repose. Plaintiff also alleged that the Township's zoning ordinances failed to provide a realistic opportu-

nity to achieve its affordable housing obligations and that its property was well-suited to meet those obligations. Plaintiff sought rezoning that would enable it to build 4800 dwelling units at a 6 unit per acre density with 960 of those units devoted to low and moderate income households.

In June and July 2001, plaintiff attempted to notice the deposition of the Township planner. The Township resisted discovery citing the temporary immunity order. Plaintiff moved to compel the deposition, and the Township moved to dismiss the complaint.

In his August 31, 2001 oral decision, Judge Serpentelli discussed the use of temporary immunity orders, noting that the device was first addressed in *J.W. Field Co. v. Township of Franklin*, 204 *N.J.Super.* 445 (Law.Div.1985), and discussed favorably in *Hills Dev. Co. v. Township of Bernards*, 103 *N.J.* 1, 62-63 (1986). He observed that the device is novel but sensible because it allows a court to monitor and to expedite compliance. He further held that the temporary immunity order was appropriate in this case because the litigation initiated by Hovnanian would not contribute positively to the process "of bringing about finality of Berkeley Township's obligation for its present fair share number." He noted that Hovnanian could participate in the consideration of whether the Township's plan adequately addresses its affordable housing obligation and possibly achieve the same result as its builder's remedy action if the court determined that the Township plan is patently insufficient to meet its obligation. By order dated September 20, 2001, plaintiff's complaint was dismissed.

On appeal, plaintiff argues that its complaint was improperly dismissed because the temporary immunity order was entered without notice to it and without its participation, that the Township is not compliant with its *Mount Laurel* obligations, that the Township had failed to bring itself within COAH's jurisdiction, and the Township housing plan is so insufficient that the Township is not entitled to repose under COAH standards. The Township responds that Judge Serpentelli properly exercised the discretion reposed in him by the Supreme Court because the Township has clearly, unconditionally and formally committed itself to voluntarily comply with its affordable housing obligation.

*5 In *Mount Laurel II,* the Court held that every New Jersey municipality had a constitutional duty to provide "a realistic opportunity for the construction of its fair share of low and moderate income housing." *Mount Laurel II, supra*, 92 *N.J.* at 221. To aid in enforcement of the obligation, the Court held that developers who succeeded in *Mount Laurel* litigation and proposed "a project providing a substantial amount of lower income housing, a builder's remedy should be granted unless the municipality establishes that because of environmental or other substantial planning

concerns, the plaintiff's proposed project is clearly contrary to sound land use planning." *Id.* at 279-80. The "substantial amount of lower income housing," *ibid.*, is known as a "mandatory set aside." *Hills, supra,* 103 *N.J.* at 31 n.4. In addition to the mandatory set aside amount, the builder's remedy would permit construction of upper or middle income housing so that the potential for profit provided builders with an incentive to enforce *Mount Laurel* obligations. *Mount Laurel II, supra,* 92 *N.J.* at 279 n.37. To be eligible for a builder's remedy, the developer must have attempted to obtain relief without litigation and must prove that the municipality's zoning ordinance required revision in order to meet the *Mount Laurel* obligation. *Id.* at 218, 278-81.

The New Jersey Fair Housing Act of 1985, *N.J.S.A.* 52:27D-301 to -329(FHA), was enacted in response to the *Mount Laurel* cases. In the FHA, the Legislature declared "that the State's preference for the resolution of existing and future disputes involving exclusionary zoning is the mediation and review process set forth in this act and not litigation, and that it is the intention of this act to provide various alternatives to the use of the builder's remedy as a method of achieving fair share housing." *N.J.S.A.* 52:27D-303.

The FHA created COAH. *N.J.S.A.* 52:27D-305. Among its duties, COAH is to determine the State's housing regions, estimate the present and prospective need for low and moderate income housing at the State and regional levels, and adopt criteria and guidelines for determining each municipality's fair share of the regional housing need. *N.J.S.A.* 52:27D-307. COAH promulgated its substantive rules to be used by municipalities to address their affordable housing obligations for the first and second cycles at *N.J.A.C.* 5:92 and 5:93.

The FHA establishes primarily an administrative structure but also provides an alternative judicial course for municipalities to address their affordable housing obligations. It also provides an option for a developer to challenge the sufficiency of the housing element in the administrative process. Initially mediation is utilized, and if mediation fails to resolve the challenge, the matter is referred to the Office of Administrative Law. *N.J.S.A.* 52:27D-315(c). In *Hills, supra,* the Court expressed its preference for COAH-resolution of *Mount Laurel* disputes. 103 *N.J.* at 52. *See also Toll Bros., Inc. v. Township of W. Windsor,* 173 *N.J.* 502, 563 (2002). COAH may also receive a complaint filed in the Superior Court upon a referral from the court. *N.J.A.C.* 5:91-2.1. The matter will be subject to mediation and returned to Superior Court if mediation fails and issues of fact must be determined. *N.J.S.A.* 52:27D-315(c); *Toll Bros., Inc. v. Township of W. Windsor,* 334 *N.J.Super.* 77, 92-93 (App.Div.2000), *certif. denied,* 168 *N.J.* 295 (2001).

*6 A municipality which files a housing element with COAH may alternatively institute an

action for a declaratory judgment granting it repose in the Superior Court. N.J.S.A. 52:27D-313(a). A judgment of repose is defined by COAH as "a judgment issued by the Superior Court approving a municipality's plan to satisfy its fair share obligation." N.J.A.C. 5:93-1.3.

COAH has conducted two cycles of housing-need review and assessment of fair share units. Third cycle numbers have not been issued. In the meantime, COAH's substantive rules for the second cycle remain effective, and COAH has adopted interim rules. *See* 31 *N.J.R.* 578(a); 31 *N.J.R.* 1479(a).

Before the enactment of the FHA, the Court sought to establish procedures to expedite and monitor litigation commenced to enforce a municipality's affordable housing obligation. In doing so, the Court signaled that it was willing to depart from established litigation models. At the beginning of its opinion in *Mount Laurel II,* Chief Justice Wilentz wrote:

The obligation is to provide a realistic opportunity for housing, not litigation. We have learned from experience, however, that unless a strong judicial hand is used, *Mount Laurel* will not result in housing, but in paper, process, witnesses, trials and appeals. We intend by this decision to strengthen it, clarify it, and make it easier for public officials, including judges, to apply it.

[*Mount Laurel II, supra,* 92 *N.J.* at 199.]

The Court then announced that one of the purposes of its opinion was to encourage voluntary compliance. *Id.* at 214. To encourage voluntary compliance, the Chief Justice selected three judges to oversee all *Mount Laurel* litigation throughout the State. *Id.* at 214, 253-55.

The Court also announced a "modification of the role of *res judicata*" for *Mount Laurel* cases. *Id.* at 291-92. The Court recognized that "[j]udicial determinations of compliance with the fair share obligation or of invalidity are not binding under ordinary rules of *res judicata* since circumstances obviously change." *Id.* at 291. The Court found, however, that judgments of compliance with *Mount Laurel* obligations "should provide that measure of finality suggested in the Municipal Land Use Law, which requires the reexamination and amendment of land use regulations every six years." *Ibid.* Accordingly, the Court held that *Mount Laurel* compliance judgments

shall have *res judicata* effect, despite changed circumstances, for a period of six years, the period to begin with the entry of the judgment by the trial court. In this way, municipalities can enjoy the repose that the *res judicata* doctrine intends, free of litigious interference with the normal

planning process.

[*Id.* at 291-92 (footnote omitted).]

The Court noted, however, that a municipality's "substantial transformation" could trigger valid litigation before the expiration of six years. *Id.* at 292 n.44.

*7 Even after the adoption of the FHA, the three specially designated judges handled all *Mount Laurel* actions until approximately 1987. Judge Serpentelli, one of the originally designated *Mount Laurel* judges, issued the temporary immunity order at issue in this case. It was he who first utilized this device in the *J.W. Field* matter in 1985. Although neither this court nor the Supreme Court has ever expressly reviewed this type of order, the Court did refer approvingly in *Hills* to the creative and effective management of *Mount Laurel* cases by the specially designated judges. Chief Justice Wilentz stated:

We would be remiss in not recognizing the very substantial contributions that the *Mount Laurel* judges have made in the interest of the just resolution of *Mount Laurel* cases. Their innovative refinement of techniques for the process of litigation has given credibility to the implementation of the *Mount Laurel* doctrine. Measured against one criterion, the advancement of the public interest, their achievements were extraordinary.

[*Hills, supra,* 103 *N.J.* at 64.]

Indeed, in its review of the procedural history in *Hills,* the Court mentioned an immunity order. *Id.* at 29-30.

The law governing the *Mount Laurel* obligation has not remained static. The FHA has been amended on sixteen occasions, most recently in 2001 with various amendments effective January 2002. The Court has also recently addressed various issues in a trilogy of cases: *Bi-County Dev., Inc. v. Borough of High Bridge,* 174 *N.J.* 301 (2002); *Fair Share Housing Ctr., Inc. v. Township of Cherry Hill,* 173 *N.J.* 393 (2002); *Toll Bros., supra,* 173 *N.J.* 502. Notably, neither the Court nor the Legislature has criticized, limited or removed the power to utilize creative litigation management techniques, such as the temporary immunity order. Indeed, in *Toll Bros., supra,* in the context of affirming the grant of a builder's remedy and recognizing the continued need for the builder's remedy, the Court emphasized that voluntary compliance is preferred, should be encouraged, and that a builder's remedy action should be considered a remedy of last resort. It said:

When enacting the FHA, the Legislature provided "various alternatives to the use of the builder's remedy as a method of achieving fair share housing," including the COAH mediation and review process, which was "the State's preference for the resolution of existing and future disputes involving exclusionary zoning...." N.J.S.A. 52:27D-303. In *Hills, supra,* 103 *N.J.* at 52, we expressed our support for COAH-resolution of *Mount Laurel* disputes, anticipating that the COAH process might more effectively foster the construction of affordable housing.

[*Toll Bros., supra,* 173 *N.J.* at 563 (footnote omitted).]

We hesitate to interfere with the remedy utilized by Judge Serpentelli in this case. Voluntary compliance is certainly the preferred mode to fulfill a municipality's fair share housing obligation. We recognize plaintiff's concern that the immunity order may be used simply as a device to stall efforts to compile a reasonable and feasible plan to provide affordable housing and that the cornerstone of the Township's housing plan, "credits without control," may be a ruse to avoid construction of additional affordable housing units. Nevertheless, the municipality is also entitled to construct a plan to meet its affordable housing obligation with timely information. The promulgation of the third round housing numbers by COAH should assist the finalization of the Township's plan. We have been advised that COAH anticipates publication of the third round numbers in late 2003.

*8 In the interim, plaintiff also has the opportunity to participate in the shaping and evaluation of the Township's plan. The Special Master is prepared to report on the Township's audit of existing housing units which may serve as credits towards the Township's affordable housing obligation. Plaintiff may participate in that review. Plaintiff's participation and the record developed during this review may be utilized to evaluate not only the Township's compliance with its housing obligation but also the bona fides of its efforts. Under these circumstances, we decline to interfere with the use of a technique designed to foster voluntary compliance by a township to meet its acknowledged *Mount Laurel* obligations, and affirm the dismissal of plaintiff's complaint.

Affirmed.

N.J.Super.A.D.,2003.
K. Hovanian Shore Acquisitions L.L.C. v. Tp. of Berkeley
Not Reported in A.2d, 2003 WL 23206281 (N.J.Super.A.D.)

Not Reported in A.2d, 2003 WL 23206281 (N.J.Super.A.D.)
(Cite as: 2003 WL 23206281 (N.J.Super.A.D.))
END OF DOCUMENT