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NELSON C. JOHNSON, L.L.C.

COURT INITIATED

IN RE:	:	SUPERIOR COURT OF
	:	NEW JERSEY
	:	LAW DIVISION
	:	ATLANTIC COUNTY and
	:	CAPE MAY COUNTY
City of Absecon	ATL-L-2726-12	:
City of Northfield	ATL-L-2050-14	:
Township of Egg Harbor	ATL-L-3501-14	:
Township of Galloway	ATL-L-1442-15	:
City of Brigantine	ATL-L-1504-15	:
Township of Egg Harbor	ATL-L-1506-15	:
Township of Hamilton	ATL-L-1517-15	:
Borough of Buena	ATL-L-1523-15	:
City of Corbin City	ATL-L-1533-15	:
Township of Mullica	ATL-L-1534-15	:
City of Somers Point	ATL-L-1538-15	:
City of Linwood	ATL-L-1539-15	:
Town of Hammonton	ATL-L-1573-15	:
Township of Buena Vista	ATL-L-1639-15	:
Borough of Cape May Point	CPM-L-292-15	:
Borough of West Cape May	CPM-L-302-15	:
Township of Upper	CPM-L-303-15	:
Township of Sea Isle City	CPM-L-304-15	:
City of Ocean City	CPM-L-305-15	:
Borough of Avalon	CPM-L-306-15	:
City of Cape May	CPM-L-307-15	:
Borough of Wildwood Crest	CPM-L-309-15	:
Borough of Woodbine	CPM-L-310-15	:
Borough of Stone Harbor	CPM-L-351-15	:
	:	MEMORANDUM OF
	:	DECISION

On September 10, 2015, this Court conducted an initial case management conference in the within proceedings and engaged in an extensive colloquy, and received the benefit of the learned opinions of all legal counsel in attendance, whose names, together with counsel for the Fair Share Housing Council (FSHC) and the New Jersey Builders' Association (NJBA), and contact information for all the attorneys involved in these proceedings are set forth in Exhibit "B" of the Court's Order of even date herewith.

Prior to the Case Management Conference, and in an effort to make a preliminary assessment of the current status of compliance with the municipal Plaintiffs' constitutional affordable housing obligations, the Court reviewed the Complaints, Certifications and documentation filed with the Court setting forth the status of the Fair Share Plans of the parties hereto. Subsequent to the aforesaid conference, the Court received a 58 page submission by Kevin D. Walsh, Esquire, on behalf of the FSHC, the same dated September 18, 2015, which was received by the Court at the end of the work day and necessitated additional review and reflection by the undersigned. The Court also received submissions from James E. Franklin, II, Esquire, and Jeffrey R. Surenian, Esquire, and it was necessary to make further examination of pertinent provisions of the Fair Housing Act, N.J.S.A. 52:27D-301, et seq. (the FHA) in light of relevant case law and Mr. Walsh's comments. As a consequence of such further review of the law, and notwithstanding any comments made by the undersigned at the time of the initial Case Management Conference, the Court has determined that some of its preliminary assessments must be modified.

Mr. Walsh's arguments demonstrate the breadth of his knowledge on all the issues before the Court except one, the facts on the ground. As a consequence of COAH's abject failure to perform its duties, and the unfortunate and untimely illness of Dr. Burchell, there presently do not exist rational and reasonable criteria for calculating the affordable housing needs of any of the Plaintiffs.

Mr. Walsh's urgings are not grounded in reality. The task he urges upon the Court is akin to being dropped in the middle of a dense forest on a cloudy day, without a compass and told, "Find your way home." With a compass one would have some comfort as to the direction to pursue; with the sun, one could plot a general course and hope for the best; with neither, one could walk in circles.

Mr. Walsh's demands for this Court to move with urgency read more like hastiness to the undersigned. His demand that the Court review the Plaintiff's Fair Share Plans and calculate their affordable needs is not accompanied by a yardstick; his complaint of a "Free Pass" to the Plaintiffs ignores the reality that Plaintiffs spent tax dollars and public officials' time toward compliance with COAH, only to have their efforts ignored by COAH. This Court refuses to punish Plaintiffs for COAH's failings.

Mr. Walsh's frustration is misplaced. COAH created the mess we are all in and it's all our task to deal with it responsibly. This Court's instinct is to err on the side of preserving precious municipal resources and to avoid unnecessary confrontations and redos upon remands to the trial court. The FSHC will be granted ample opportunity to be heard on the constitutional affordable housing obligations in Atlantic and Cape May Counties in an efficient, cost effective, and reasonable manner.

Accompanying this Memorandum of Decision (MOD) is the Court's Case Management Order of even date herewith (CMO) which establishes the initial procedures for the handling of the twenty-four Declaratory Judgment Actions (DJs) filed in Atlantic and Cape May Counties following the Supreme Court's decision in *IN THE MATTER OF THE ADOPTION OF N.J.A.C. 5:96 AND 5:97 BY THE NEW JERSEY COUNCIL ON AFFORDABLE HOUSING*, 221 N.J. 1(2015), (hereinafter "*In Re: COAH*") which decision is the most recent in a series of decisions articulating what is known as "The Mount Laurel Doctrine."

All of the Plaintiff municipalities have filed a D.J., and additionally, as noted by the findings hereinafter supporting "Exhibit A" to the CMO, all of the Plaintiffs - via either prior filings with COAH, and/or substantive certifications from COAH, or the entry of various Court Orders - have acquired a status entitling them to a degree of repose from "Builder's Remedy" litigation. In reliance upon the Complaints, Certifications, legal briefs and documentation filed by the parties, together with the argument of the attorneys present before the Court on September 10, 2015, this Court makes the following preliminary findings of fact.

FINDINGS OF FACT

1. Each of the Plaintiff municipalities have adopted a Resolution of Participation and filed their pleadings with the Court in a timely fashion, consistent with the mandates of the Order and Decision in *In Re: COAH*, and in an apparent good faith effort to go forward toward compliance with their constitutional affordable housing obligations.
2. Most of the Plaintiff municipalities - to varying degrees and at various times - went to considerable expense and effort in submitting a filing of their updated municipal planning documents with COAH, to wit, a Housing Element and Fair Share Plan,

only to have their efforts frustrated and their municipal resources dissipated as a consequence of COAH's failure to act on their submissions.

3. As discussed hereinafter, there is presently an inability to calculate the "fair share," to wit, the number of affordable housing units necessary for each municipality, nor can this Court readily discern what criteria and guidelines to apply regarding the measures to be taken by the municipalities of Atlantic and Cape May counties in satisfying their constitutional affordable housing obligations.
4. In reviewing the various submissions of the parties, it is apparent that there is a significant dispute in the "fair share" calculations advanced by the competing interests in this litigation. Proceeding to a plenary hearing on any of the Plaintiff's constitutional affordable housing obligations in advance of the demonstration of rational and reasonable criteria for calculating the affordable housing needs of the Plaintiffs will yield nothing but frustration.
5. Robert W. Burchell, PhD, a professor with Rutgers University was the individual who prepared the analysis upon which COAH based the third iteration of the "Round 3" regulations for the present and prospective regional need for affordable housing; they were proposed, but never adopted by COAH.
6. David N. Kinsey, PhD, a professor with Princeton University was the individual who prepared the analysis for the Fair Share Housing Council (FSHC) and the New Jersey Builders' Association (NJBA).
7. The divergence in the opinions of Dr. Burchell and Dr. Kinsey as to the need for affordable housing in New Jersey and in the various regions, is a formidable obstacle to an expeditious resolution of the twenty-four DJs pending before this Court.
8. Complicating things further, the Court was advised by legal counsel at the hearing on September 10, 2015 that Dr. Burchell suffered a stroke on July 27, 2015. It was reported to the Court that Dr. Burchell's illness is debilitating to such an extent that he will not be able to participate in these proceedings.
9. Given Dr. Burchell's illness, the Court must recognize the reality that there will be a delay in the finalization of a rational and reasonable criteria for calculating the constitutional affordable housing needs of the Plaintiffs. Despite this Court's

diligent inquiries, it has yet to finalize arrangements for the appointment of a Fair Share Analyst, but is hopeful that will occur soon.

10. The reality recited in the preceding paragraphs, together with the Court's understanding of the law necessitates the five month period of immunity granted to the affected Plaintiff municipalities shall be reviewed periodically.

RULING OF THE COURT SUPPORTING THE ENTRY OF CMO

The procedures for transitioning from a COAH regulated process to one controlled by the Courts, as contemplated in *In Re: COAH* will only operate efficiently upon this Court having assurance that there exists rational and reasonable criteria for calculating the constitutional affordable housing needs of the Plaintiffs. It is this Court's opinion that the Supreme Court's instructions to the trial courts, combined with the pertinent provisions of the FHA, provide ample guidance. From this Court's perspective, a reasonable interpretation of *In Re: COAH* is that the five month period of immunity must be flexible to ensure that no Plaintiff is penalized until it has first had an opportunity to calculate its affordable housing needs in compliance with rational and reasonable criteria, confirmed as such by this Court.

This Court will not engage in a recitation of the evolution of "The Mount Laurel Doctrine" and the many decisions preceding *In Re: COAH*. That's been done quite well in *In Re: COAH*. Additionally, the parties hereto are all represented by capable legal counsel and each of them have provided highly informed briefs on the issues pertinent to the analysis of the facts and law made herein. The undersigned taught a Municipal Land Use course for the Rutgers University Extension Service for 20(+) years and has lived through many of the events which went into making the "Mount Laurel Doctrine" what it is. Suffice it to say, the history preceding this litigation isn't one of New Jersey's finer moments. The struggle never ends.

That said, this Court is mindful of the authority and responsibilities it has been entrusted with by our Supreme Court in addressing the issues raised by these proceedings. The context of this litigation is one in which the exigencies associated therewith arise from the abject failure of COAH to fulfill its responsibilities under both the FHA and its own regulations. COAH's failure has resulted in hardship, uncertainty and dissipation of

resources for all the stakeholders who in good faith relied upon COAH to faithfully and diligently perform its duties. It is now incumbent upon this Court and all the stakeholders involved in these proceedings to make good faith efforts to ensure that the within municipalities affected by this litigation are in compliance with their constitutional affordable housing obligations by as early a date as is practicable.

Notwithstanding any preliminary assessments of the undersigned at the initial Case Management Conference on September 10, 2015, the Court's decision to grant all of the Plaintiff municipalities immunity from Builder's Remedy litigation for an initial period of five (5) months, to be extended as necessary until confirmation of rational and reasonable criteria, is based upon its understanding of the law as set forth hereinafter.

- A. The FHA was adopted by the New Jersey Legislature to minimize "Builder's Remedy litigation" and to encourage municipalities to comply with the law without becoming involved in protracted and costly lawsuits. N.J.S.A. 52:27D-303 declares the Legislature's intentions and states in pertinent part:

The Legislature declares that the statutory scheme set forth in this act is in the public interest ... [and] satisfies the constitutional obligation enunciated by the Supreme Court. The Legislature declares 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.

- B. In addition to discussing the status acquired by the adoption of a "resolution of participation," Section 52:27D-309(a) continues and states:

Within five months after the council's adoption of its criteria and guidelines, the municipality shall prepare and file with the council a housing element, based on the council's criteria and guidelines

...

- C. The Supreme Court's decision in *In Re: COAH* expressly articulated a preference for: (1) trial courts to follow the FHA processes "as closely as possible"; (2) trial courts to insure that municipalities receive "like treatment to that which was afforded by the FHA"; and (3) implementing procedures at the trial court level,

judges must "seek[s] to track the processes provided for in the FHA," 221 N.J. at 6, 18 and 19.

D. As noted by the Supreme Court in *In Re: COAH*, 221 N.J. 233 at 16:

[I]t bears emphasizing that the process established is **not intended to punish the towns represented before this court**, or those that are not represented but which are also in a position of unfortunate uncertainty due to COAH's failure to maintain the viability of the administrative remedy. Our goal is to establish an avenue by which towns can demonstrate their constitutional compliance to the courts through submission of a housing plan and use of processes, where appropriate, that are similar to those which would have been available through COAH for the achievement of substantive certification. (emphasis added)

E. When reading the above provisions of the FHA with the language of our Supreme Court, it is readily apparent that trial courts are obligated to continue enforcing the public policy provided for by the FHA. Because there are no current "criteria and guidelines" adopted by COAH, this Court must proceed with the necessary inquiries for ascertaining rational and reasonable criteria for calculating the constitutional affordable housing needs of Atlantic and Cape May Counties. Absent a basis for calculating the "fair share numbers," the Plaintiff municipalities do not have a target at which to aim in preparing their Housing Element and Fair Share Plan.

F. Plaintiffs share no responsibility for COAH's abject failure to fulfill its responsibility to adopt regulations in a timely fashion as mandated by the FHA. This Court will not punish the Plaintiff municipalities for COAH's failure to enforce the FHA and its own regulations.

G. Stripping the Plaintiff municipalities of immunity from Builder's Remedy litigation, at this juncture in time, will foster unnecessary litigation and will only serve to delay constitutional compliance. New Jersey law and common sense dictate the five month period of repose must be reviewed periodically to ensure that the Plaintiffs are working with rational and reasonable criteria in calculating their affordable housing needs.

H. In the event the FSHC wishes to assist the Court in expediting the process contemplated by the Court's Initial Management Order, paragraph numbers 1 and 2 facilitate the same.

Finally, nearly forty years ago, as a young lawyer, the undersigned was counselled by The Honorable George B. Francis, P.J.Ch., A.J.S., and J.A.D. (deceased), that: "There's nothing fast about justice. However long it takes, that's how long it takes." This Court will not engage in hasty conduct by pushing the twenty-four municipalities before the Court into efforts that are premature. We will do things correctly the first time – however long it takes – rather than on remand.

In addition to the Case Management Order, the Court has entered Orders on each of the Motions filed by the Plaintiffs, originally returnable September 4, 2015, and thereafter, by the Court, made returnable September 18, 2015.

 9-28-15
NELSON C. JOHNSON, J.S.C.