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002131973

E-MAIL

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 Docket No. 67,126
Superior Court Account: 0011245

Dear Mr. Neary:

Please be advised that we represent the New Jersey State League of Municipalities ("NJLM" or "League") in the above captioned litigation. In accordance with an e-mail received yesterday from Robert Lougy, Assistant Attorney General, please accept this response on behalf of the League to the motion made by the State for the Supreme Court to enter an emergent stay and vacate in part the Order entered by the Appellate Division on March 7, 2014 pending the Supreme Court's deciding the pending motion for an extension of time filed by the New Jersey Council on Affordable Housing ("COAH" or the "Agency"). Please note that the League

takes no position on the vacation of that part of the Appellate Division Order granting counsel fees to the movant.

LEGAL ARGUMENT

THE NJLM SUPPORTS THE MOTION FOR A STAY
BECAUSE THE PROCESS TO WHICH THE AGENCY
HAS COMMITTED ITSELF STANDS THE BEST CHANCE
OF STOPPING THE ENDLESS LITIGATION CYCLE
CHALLENGING THE THIRD ROUND REGULATIONS
WHICH, IN THE END, IS DETRIMENTAL TO ALL
INTERESTED PARTIES AND CONTRARY TO THE OBJECTIVE
OF PRODUCING AFFORDABLE HOUSING.

The NJLM urges the Supreme Court to focus not on the immediate issue of whether the Appellate Division Order should be stayed, but instead upon the long term objective to be achieved by the rule making process. That objective, from the perspective the League, is to have the legislatively created Agency, which is "in but not of" the Department of Community Affairs ("DCA"), formulate and adopt fair and reasonable regulations consistent with this Court's charge and direction as set forth in their September 26, 2013 decision, In re the Adoption of N.J.A.C. 5:96 and 5:97 by the New Jersey Council on Affordable Housing, 215 N.J. 578 (2013) ("Mount Laurel IV") that will allow municipalities to fulfill their affordable housing constitutional obligation in a realistic and effective way. The real question facing this Court in the guise of the emergent motion for a stay and the pending motion for an extension of time is how best can the above stated objective be achieved?

While it is not difficult to cast criticisms at COAH and contend that they should have applied even greater resources to the task than they did in order to ensure compliance by February 26, 2014, the fact of the matter is that the new regulations have not been proposed in a timely manner in accordance with this Court's decision. Now this Court and all the interested parties and stakeholders must deal with that situation. Based upon the Certification submitted by the Commissioner of DCA in the motion to extend the time to promulgate new third round rules, the Agency has not ignored the obligation thrust upon it by this Court. The thus far unrefuted facts disclose that the Agency has made substantial progress and that they are on the brink of taking the extracted data and converting it into both numbers and regulations. The process of transforming raw data into numbers and regulations governing a comprehensive and sustainable administrative process is complex. All one has to do is look at the contents of the substantive and procedural Rules that have evolved from COAH since its inception. The complexity of the Rules and their breadth is astounding. In writing the new regulations, COAH must reevaluate all of the existing regulations and more importantly, integrate the new regulations into the almost 40 years of sanctioned affordable housing activity in this state. In the course of preparing new regulations, multiple policy decisions must be made. Those policy decisions are ones upon which reasonable people can differ. COAH has committed itself to completing its task by May 1, 2014. To accelerate the production of the regulations by one month and perhaps compel the Agency to make ill-advised policy decisions as

the final determinations are made is both precipitous and short-sighted.

The promulgation of the regulations by the Agency is only the first step. Equally important (or perhaps even more important to gain acceptance and legitimacy), is that the regulations be fully and comprehensively vetted under the Administrative Procedures Act ("APA"). To unrealistically accelerate the process and curtail an adequate vetting of the new Rules by all interested parties will simply encourage the refinement of those regulations by further litigation, a result which needs to be eliminated if at all possible. All interested parties should have an adequate time to review and analyze the Rules and provide the Agency with legitimate comments, concerns and suggestions. In turn, the Agency, both through its staff and through its members, must consider those comments and adjust course if it finds any of the comments persuasive. That is the way for the regulations to gain the legitimacy they need to have in order to both diminish the prospects that the same will be challenged and, by the same token, encourage municipalities to embark upon the administrative process in order to fulfill their constitutional affordable housing obligations.

Municipalities need to know the rules of the game so they can move forward in a deliberate, consistent and sanctioned manner. They have been unable to do so for the last 14 years. They have spent enormous resources and taxpayer dollars on developing housing elements and fair share plans that reflect the adopted regulations, only to have those regulations invalidated, new ones adopted, and

then having to revise their housing elements and fair share plans to accommodate the new regulations. In the case of these third round regulations, that cycle has already occurred twice and indeed there will be a third revision necessary to accommodate the new regulations. There needs to be an end to the constant and repeated challenging of regulations so that the objective of producing affordable housing can be achieved.

Although it has been an incredibly long and excruciating journey, fraught with pitfalls and multiple lawsuits, followed by multiple versions of the third round rules (at least three iterations, one in 2004, and two in 2008), we are close to the finish line. Now is not the time for the Agency to stumble for the sake of having the regulations produced 30 days sooner. Better the Agency have the time to which it has committed itself to do its job in the hopes that the final product produced will gain the legitimacy it needs in order to accomplish its goal.

CONCLUSION.

For the foregoing reasons, the NJLM supports the motion made by the State for a stay of the Appellate Division decision pending this Court's determination on COAH's motion to extend the time within which to propose regulations to May 1, 2014. The League

will file its brief in support of that motion tomorrow.

Respectfully submitted,

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EJB:fd word doc. (M-534) Enclosures

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