

IN RE NEW JERSEY BUILDERS')
ASSOCIATION'S MOTION TO) COUNCIL ON AFFORDABLE HOUSING
INTERVENE AND OPPOSE INTERIM) DOCKET NO.: **COAH 1407**
AND EXTENDED SECOND-ROUND) OPINION
SUBSTANTIVE CERTIFICATIONS)

On August 16, 1999, the Council on Affordable Housing ("COAH" or the "Council") proposed regulations, N.J.A.C. 5:91-14, et seq., allowing municipalities to file for interim second-round certification or extend their previously granted second-round certification. The proposed regulations received one comment from Jeffrey Surenian, Esq., regarding the Council's policy objectives and specific timing questions relating to court action and mediation proceedings. The interim rules and procedures were adopted on October 6, 1999, and made effective November 1, 1999. As of June 2002, forty-six municipalities have received extended certification under this rule. Nine other municipalities were scheduled to receive extended substantive certification at the July 16, 2002 COAH board meeting.* However, on July 15, 2002, the New Jersey Builder's Association's ("NJBA") filed a motion with COAH seeking leave to intervene and oppose the extended second-round substantive certifications for the nine previously referenced municipalities as well as the 46 previously granted extensions.

At its July 16, 2002 meeting the Council bifurcated NJBA's motion, separating the 46 extensions previously granted from the nine pending, in an effort to allow the Council the opportunity to address the issues related to each separately. The Council heard oral argument with regard to the nine pending applications

*The following municipalities had applied for extensions of their second-round substantive certifications: Township of Allamuchy, Warren County; Township of Lawrence, Mercer County; Township of Harding, Morris County; Township of Union, Hunterdon County; Township of Manalapan, Monmouth County; Borough of Glen Rock, Bergen County; Township of Cranbury, Middlesex County; City of Bayonne, Hudson County; Borough of Ridgefield, Bergen County. In addition, since the time that NJBA filed its initial motion, Beverly City, Burlington County, also applied for an extension of its second-round substantive certification.

for extensions at its September 2, 2002 meeting. Prior to that argument, COAH received opposing briefs from eight of the nine pending municipalities. NJBA responded to those submissions on August 21, 2002. In addition, the New Jersey League of Municipalities (the "League") submitted a motion to participate as amicus curiae in this matter. The Coalition for Housing and the Environment ("CAHE") submitted a motion to intervene in these proceedings as well. At the September 2, 2002 meeting the Council granted the League's motion to participate in NJBA's motion as an amicus curiae. In addition, CAHE withdrew, without prejudice its motion to intervene, and COAH allowed CAHE to participate instead as an amicus curiae as well.

All participants at the September 2, 2002 oral argument agreed that the issues raised regarding the nine municipalities with approvals pending for substantive certification were substantially similar to the forty-six municipalities previously granted such extensions. Thus, the Council decided to rejoin the motions. In addition, the Council gave the participants the opportunity to submit supplemental briefs and responses thereto addressing issues raised during the oral argument.

On behalf of the NJBA, Henry Hill, Esq. filed a letter brief and certification in support of the motion to intervene and oppose the extended certifications. NJBA claimed standing to intervene and oppose petitions for "interim" or "extended" substantive certification because its members are active builders in all municipalities seeking extended certification and have a substantial interest in ensuring such certification extensions are not improperly granted. Accordingly, NJBA argues that if it is not given the opportunity to intervene at this juncture, the rights of its members to construct affordable housing would be "irreparably prejudiced." NJBA also argues that it has been prejudiced because

the Council did not provide public notice for these extensions prior to their being granted.

In opposing extended substantive certifications, NJBA argues that extended substantive certifications are not authorized by the Fair Housing Act, N.J.S.A. 52:27D-301, et seq. (the "FHA"), do not comply with N.J.S.A. 52:27D-314 which requires municipal fair share plans to be based on present and prospective fair share housing needs, and violate the constitutional mandate that obligations must be met on a year-by-year basis as obligations accrue. In short, NJBA argues that by granting extended certifications and not releasing third-round numbers which would quantify municipalities' continuing obligations municipalities effectively gain a "vacation" from their obligation to provide their fair share of affordable housing, which continues to accrue in the intervening time period. NJBA also asserts that second-round regulations clearly envisioned the release of third round numbers and regulations by the end of the second-round. Because extended certifications are based on historical numbers, NJBA states that the actions of the Council were ultra vires in granting extended substantive certifications, and as such, all extended certifications previously granted must be invalidated, and further opposes the grant of extended certification to the nine municipalities pending before COAH.

NJBA asserts as well that COAH must consider whether scarce resources are being dissipated that could otherwise go towards the development of affordable housing, before considering any request for extended certification.

Finally, NJBA asserts that the Council's procedure for granting extended certifications after the second-round violates procedural due process. By granting extension of litigation protection without a hearing or public notice, NJBA claims that COAH disregards procedural rights of the public.

Counsel for the following municipalities filed letter briefs in opposition to NJBA's motion: David B. Bole, Esq. representing Glen Rock Borough; Stephen F. Pellino, Esq. representing Borough of Ridgefield, Roger S. Clapp, Esq. representing Harding Township, and Jacquelin P. Gioioso, Esq. representing the Township of Manalapan; William C. Moran, Esq. representing Cranbury Township, Stuart R. Koenig, Esq. representing the Township of Hunterdon and Thomas F. Collins, Jr. Esq., P.P. representing the Township of Allamuchy; Kevin P. Nerwiski, Esq. representing Lawrence Township sent a letter joining in opposition and accepting arguments presented by other municipalities as their own. In addition, Stuart Koenig, Esq. filed a letter brief and certification representing 44 of the 46 municipalities that have received extended substantive certification.* Four municipalities

*The following are the municipalities participating in the Koenig Brief: Bedminster Township, Somerset County; Bernardsville, Borough, Somerset County; Bloomfield Township, Essex County; Bloomingdale Borough, Passaic County; Boonton Township, Morris County; Boonton Town, Morris County; Bridgewater Township, Somerset County; Collingswood Borough, Camden County; Cranbury Township, Middlesex County; Delaware Township, Hunterdon County; Fair Lawn Borough, Bergen County; Frenchtown Borough, Hunterdon County; Gibbsboro Borough, Camden County; Glen Rock Borough, Bergen County; Gloucester Township, Camden County; Harding Township, Morris County; Kinnelon Borough, Morris County; Lambertville City, Hunterdon County; Long Hill Township, Morris County; Madison Borough, Morris County; Manalapan Township, Monmouth County; Mendham Borough, Morris County; Morris Township, Morris County; Mount Holly Township, Burlington County; Old Tappan Borough, Bergen County; Peapack & Gladstone, Somerset County; Plainsboro Township, Middlesex County; Ramsey Borough, Bergen County; Raritan Township, Hunterdon County; Ridgefield Borough, Bergen County; Ridgefield Park Village, Bergen County; River Vale Township, Bergen County; Teterboro Borough, Bergen County; Scathplains Township, Union County; Union Township, Union County; Verona Township, Essex County; Warren Township, Warren County; Washington Borough, Warren County; Washington Township, Morris County; Wayne Township, Passaic County; West Orange Township, Essex County; White Township, Warren County; Winslow Township, Camden County; Woodlynne Borough, Camden County;

filed separate briefs: Ronald P. Mondello, Esq. on behalf of the Borough of Fair Lawn, Bergen County; Edwin W. Schmierer, Esq. on behalf of Princeton Township, Mercer County; Jeffrey R. Surenian on behalf of the Borough of Bloomingdale, Passaic County; and James F. Clarkin, III on behalf of Piscataway Township, Middlesex County; Edwin Schmierer on behalf of the Township of Hopewell, Mercer County, submitted a letter joining in with the arguments of the 44 municipalities. Two of the 46 affected municipalities filed briefs prior to September's oral argument: Martin Durkin, Esq. filed a letter memorandum on behalf of the Village of Ridgefield Park, Bergen County and Dwight D. de Stefan, Esq. filed a brief on behalf of the Borough of Northvale, Bergen County. The responding municipalities raised the following arguments.

The municipalities assert that NJBA does not have standing to intervene in these applications for extensions of substantive certification, alleging that NJBA's motion to intervene is speculative and based on the profit motive of its members. The municipalities assert that accusations like those currently raised by NJBA have been made against COAH in the past, and have been rejected by the Supreme Court. The municipalities rely on Hills Development v. Bernards, 103 N.J. 1 (1989), where the Court explained that it must assume that COAH will pursue the vindication of the Mt. Laurel obligation with determination and skill. Cranbury separately argues that none of the NJBA's members are active low and moderate-income housing builders in Cranbury and NJBA thus lacks standing against that Township.

The municipalities argue that NJBA's current motion opposing extended certifications is an untimely objection to a rule under the Administrative Procedures Act, N.J.S.A. 52:14b-1. Because the rules regarding interim procedures were proposed in August of 1999, the municipalities contend that NJBA is now time-barred from raising the present rule challenge. The municipalities

charge that NJBA had ample opportunity to object to the interim regulations but failed to do so, and should not now be allowed to challenge these regulations because, the municipalities claim, NJBA has not provided any evidence that their delay was unavoidable.

Regarding the substance of NJBA's claims, the municipalities argue that the rule extending substantive certification is a reasonable and valid exercise of COAH's administrative authority. The municipalities explain that the New Jersey Supreme Court has recognized that COAH's wide discretion in dealing with affordable housing matters, and such is generally entitled to deference in its efforts to ascertain which planning and statistical studies best serve the long-term statutory objectives of the Fair Housing Act. The municipalities further contend that in taking care to address the third round numbers, it was reasonable for COAH to afford municipalities continued protection during this interim period. The municipalities, relying on Township of Southampton, 338 N.J. Super. 102 (App. Div. 2001) and Toll Bros. v. West Windsor, 334 N.J. Super. 109 (App. Div. 2000) submit that COAH's actions in such instances have been recognized and implicitly sanctioned by the Appellate Courts.

The municipalities assert that COAH's power to grant extended certification is implied, emanating from the express power delegated to the agency under the FHA. Moreover, the municipalities submit that the interim regulations are necessary for COAH to carry out its legislative mandate.

Moreover, the municipalities argue that rescinding their protected status while awaiting the results of a third-round methodology would unfairly prejudice such municipalities, given their reliance on COAH's rules which specifically allow them to receive extensions of expiring certifications of their second-round obligations. The municipalities submit that this interim rule provides municipalities their only litigation protection, having no

other option without a third round obligation to respond to and for which to plan.

Several municipalities submit that nothing prohibits COAH from requiring the preservation of scarce resources. For example, Manalapan asserts that there is no showing that valuable resources are being dissipated in its township. Since the issue of scarce resources was addressed at the time of substantive certification, and because the matter is merely an extension, not a change to the terms of certification, there is no trigger for a scarce resource restraint.

The municipalities also argue that there are no factual issues in dispute here which would warrant a hearing on general due process questions. In addition, the municipalities assert that a hearing is not required here because rule-making was an appropriate manner to deal with interim procedures. Moreover, the municipalities submit that granting extensions are a procedural matter, within the agency's discretion, and therefore, a hearing is not required on the question of granting extensions.

The municipalities further allege that NJBA's challenge is simply a veiled attempt to pressure COAH to adopt a third round methodology without adequate review of the census data, and to position builders to file builder's remedy lawsuits as soon as the numbers are released. And, it is argued that exposing municipalities to builder's remedy lawsuits would not only be fundamentally unfair, but would result in immediate Mt. Laurel litigation causing "discordant development" which the Supreme Court strongly opposed as stated in the Hills decision. The municipalities note the importance of COAH's creation of a reasonable and equitable approach to the third-round methodology, explaining that the consequences of COAH's failure to develop such an approach would be so monumental as to overshadow any delays that might result from COAH's taking care and being deliberative.

Some municipalities question NJBA's assumption that the extension of second-round substantive certifications results in a moratorium for municipalities' efforts to address the state's affordable housing need. For example, Hopewell Township asserts a continuing commitment to provide affordable housing through its ongoing activities and proactive planning in partnership with the Hopewell Non-Profit Housing Corporation and the Township's Affordable Housing Committee. Bedminster claims 559 units in excess of their second-round obligation, while the Village of Ridgefield Park submits that it has a potential credit of 44 units towards its third round obligation.

NJBA responded to the contentions of the opposing municipalities in two separate briefs. NJBA denies that its present application is time barred. NJBA contends that there are no established procedures or timetables for filing objections to COAH's regulations governing extended second-round certifications. NJBA argues that COAH does not have jurisdiction to grant such certifications under the present circumstances, and that such jurisdictional challenges may be raised at any time in a proceeding. NJBA relies on the Appellate Division's decision in Southampton, which explained that COAH has an "obligation to consider any information it receives concerning the viability of a Mount Laurel compliance plan, regardless of the [timing or the] source."

NJBA asserts standing to represent both its members and the interests of low and moderate-income families, relying on Holmdel Builder's Assoc. v. Holmdel, 121 N.J. 550 (1990) and Home Builders League of South Jersey v. Berlin, 81 N.J. 127 (1979). In addition, NJBA argues that because NJBA is the predominant builder of low and moderate income housing in the State and that no other party currently represents the interests of low and moderate-income

families, whose rights are at stake, NJBA can claim standing on their behalf.

NJBA also argues that the municipalities' interpretation of the FHA regarding the timeliness of releasing third-round fair share numbers and the ensuing obligation to which municipalities must respond is out of context, contrary to the express mandates of the FHA, and conceals the irreparable harm caused by the continued delay. Contrary to the municipalities' assertion, NJBA argues that the phrase "from time to time" in the FHA contemplates a specific time period in which COAH would produce and adopt regulations (i.e. every six years). NJBA further argues that the Council has violated its duty to produce new affordable housing figures.

NJBA contends that the municipalities' argument that they will be unfairly prejudiced without continued protection from litigation is without merit, as they have made no affirmative action towards meeting their anticipated third round obligations. NJBA submits that such towns may avoid a chaotic barrage of litigation by affirmatively submitting a housing plan to the Superior Court for a declaratory judgment. NJBA contends that municipalities cannot use the excuse that COAH has not released third-round fair share numbers because municipalities can protect themselves from litigation simply by projecting a fair share number using the best data available; utilizing the standards enunciated in the Mt. Laurel II decision and its progeny, and following the guidance of the Supreme Court pursuant to the ruling in the Fair Share Housing v. Cherry Hill decision, and filing a declaratory judgment action.

NJBA states that municipalities have an affirmative constitutional duty to refrain from taking actions that would impair their ability to meet their constitutional obligations, such as dissipation of scarce resources.

In response to the municipalities' claims that extended certifications constitute final agency actions which may only be appealed to the Appellate Division, NJBA contends that it is well-established that administrative agencies have the inherent power to reopen proceedings under appropriate circumstances and revoke or modify previously entered final decisions. NJBA argues that when reopening a proceeding would further the interest of justice, an agency has not only the power, but the affirmative duty to reopen proceedings.

NJBA asserts that neither the municipalities nor the League has acknowledged that the overriding substantive issue in this proceeding is whether low and moderate income families have a right to timely affordable housing, and whether they should be forced to endure additional years of living in housing that is unsafe, unhealthy, or which they can only afford by giving up other necessities while their applications "languish indefinitely" on waiting lists.

NJBA urges that Toll Brothers v. West Windsor, *supra*, prohibits lengthy, deliberate delays in the provision of affordable housing by municipalities, and that it is inconceivable that COAH, having being charged by the Legislature to protect the rights of those in need of affordable housing, would not be bound by the same standard. NJBA states that once the creation of COAH moved past its initial startup delays, there is no statutory authorization or justification for any municipal delay in compliance.

NJBA reiterates its contention that COAH's grants of extended second round certification are particularly objectionable because they have been granted without even the "barest minimum" of procedural protections of the interests of low and moderate-income families. Counsel for NJBA further complains that the regulation provides no criteria or guidelines as to how COAH is to review and evaluate applications for extended substantive certification. NJBA

charges that in approving such a minimal application, COAH has attempted to reduce its role under N.J.S.A. 52:27D-314 to something purely ministerial. NJBA furthermore contends that in the absence of any administrative process akin to that provided for substantive certification, COAH abuses its power in a manner that is not tolerated by the New Jersey Courts.

Finally, in response to opposing municipalities' assertion in oral argument that the grant of substantive certification does not render the municipality immune from exclusionary zoning lawsuits, but merely shifts the burden of proof to the party challenging the municipalities' COAH certified compliance, NJBA argues that such an assertion greatly understates the practical consequence of burden shifting. Instead it claims that the grant of substantive certification is tantamount to a "bulletproof vest" for municipalities against exclusionary zoning lawsuits.

Like the NJBA, CAHE argues that it is axiomatic that COAH can, and must take action to remedy its rule which CAHE purports is unconstitutional. CAHE argues that changed circumstances since the promulgation of the interim rule sufficiently warrant COAH's reexamination of N.J.A.C. 5:91-14 at this time. CAHE submits that the courts have not permitted procedural barriers to constitutional claims, even when said challenges may be considered untimely. While it is COAH's stated intent to have third round numbers relate back to 1999, current interim substantive certification procedures are insufficient to rectify constitutional deficiencies created by the depletion of scare resources that have and will continue to result in the intervening period.

CAHE asserts that COAH can correct the alleged constitutional deficiencies by authorizing an expedited rule-making procedure to replace the existing interim certification procedures

with constitutionally acceptable rules. CAHE contemplates consultation with all interested parties to achieve consensus and avoid delays created by further proceedings. The proposal includes the creation of an interim obligation for affordable housing relying on the best available data. CAHE suggests adopting the growth share proposal previously presented to the Council.

COAH received a letter brief from Stuart Koenig, Esq. on behalf of the New Jersey League of Municipalities in which it responds to 9 points raised in the NJBA and CAHE supplemental briefs. Several municipalities also join in the League's brief.

The League first asserts that NJBA's position on re-opening of proceedings is disingenuous since it surely would object if municipal agencies reopened proceedings after approval of development applications, or the issuance of wetlands permits.

In response to NJBA's assertion that municipalities assume an unspoken premise that the Fair Housing Act is intended for the protection and benefit of municipalities, the League replies that it does in fact recognize its prime purpose in promoting affordable housing but adds that the Act was adopted in reaction to the builder's remedy fashioned by the New Jersey Supreme Court. The League maintains that one of the Act's purposes is to promote a legislative rather than a judicial means of addressing the municipal role in providing affordable housing, which is contrary to the remedy sought by NJBA.

The League, too, urges that COAH should be allowed adequate time to deliberate an appropriate third round methodology, especially in light of the need to incorporate the policies of the State Development and Redevelopment Plan.

The League disputes the contention made by both NJBA and CAHE that an extension must be considered with the same formality as the original grant of substantive certification, having provided no legal basis for their arguments. The League contends that

COAH's choice of rule-making over adjudication does not render the process invalid. The League argues that NJBA and CAHE simply disagree with COAH, but argue that the choice is entirely within COAH's discretion. The League goes on to argue that the constitutional right to an adjudicatory process claimed by NJBA and CAHE, is only required when there are both contested factual issues and particularized property rights.

Contrary to NJBA's assertion that the extension process is procedurally unfair to low and moderate income households, the League contends that the constitutional rights of individuals with particularized property rights or the interests of persons who can claim improper or unlawful activities by particular municipalities remain protected under COAH's procedural rules, N.J.A.C. 5:91-13.1(a) and (d). As such, the League views NJBA's claims of "bullet proof" immunity from builder's remedy lawsuits as greatly exaggerated.

Moreover, the League asserts that NJBA misstates the Court's holding and intent in Fair Share Housing, Inc. v. Cherry Hill, supra. The League argues that rather than condemning the concept of extended certification, the Court in Toll Brothers, Inc. v. Township of West Windsor endorsed the extension of a determination of compliance while numbers for a subsequent round were being formulated.

In response to the CAHE brief, the League points out that no rationale was provided by CAHE for its central argument that an extension of second-round substantive certification is unconstitutional. The League contends that CAHE's argument that there is no provision for affordable housing after 1999 misses the point as the regulation only extends protection to municipalities compliant with their second-round obligation.

Finally, in response to CAHE's proposed remedy, the League states that its lack of response does not constitute

agreement with the proposal but rather reflects the view that its opponents pose a non-existent problem, which does not warrant debate.

The municipalities assert that COAH's interim extended certification procedures are reasonable, valid, and within its authority; and that municipalities would be unduly prejudiced by granting the motion and providing the relief sought.

The present motion presents several issues for the Council to consider. The initial question is whether NJBA should be afforded intervenor status with regard to the 10 pending applications for extended substantive certification and the 46 previously granted extensions of substantive certifications, and thus whether the Council will consider NJBA's arguments regarding COAH's interim rules, N.J.A.C. 5:91-14.1, et seq.

To the extent that NJBA's current motion attempts to object to COAH's interim regulations at this time, it is clear that NJBA is out of time to do so under the Administrative Procedure Act, N.J.S.A. 52:14B-1, et seq. However, NJBA contends that its current motion is brought in order to challenge the specific requests for (and in several instances the grants of) extended certification for 56 municipalities within the State. Accordingly, to the extent that NJBA or its members have an interest in the housing elements and fair share plans of the municipalities at issue in its motion, it would appear that NJBA has at least an arguable right to be heard on these requests for extensions. Nonetheless, the argument could also be made that NJBA waived any right it had to participate in the extensions which were previously granted to the 46 municipalities currently in receipt of such extensions. Thus, it is not clear that NJBA has a right to intervene with regard to all 55 municipalities which it has named in its motion papers. Nonetheless, in light of the important

issues now raised, the Council will address the merits of the arguments presented by the participants in this matter. Accordingly, the Council must determine whether it has the authority to grant the requests for the extended substantive certifications at issue here.

The interim rules are set forth at N.J.A.C. 5:91-14.1, et seq., and allow a municipality which has not addressed its second-round fair share obligation to file its housing element and fair share plan and petition for substantive certification for the second round. N.J.A.C. 5:91-14.1 and -14.2. In addition, these rules provide protection to municipalities which have addressed their second-round obligations and received substantive certifications which are due to expire prior to the adoption of COAH's third-round methodology. In such instances, COAH determined, as a matter of public policy, that municipalities which have evidenced a commitment to the continued implementation of their second-round certified plans, should also continue to receive COAH's protection from potential Mount Laurel litigation by way of extended second-round certification. Accordingly, COAH's rules regarding extended substantive certification were proposed and adopted with but one public comment not applicable to the issues raised herein. Thus, N.J.A.C. 5:91-14.3(a) provides:

A municipality that has a second round substantive certification that shall expire prior to or within one year after the adoption of the Council's third round methodology and rules may have its second round substantive certification extended for up to one year after the effective date of the adoption of the Council's third round methodology and rules provided there is a resolution from the governing body that:

1. Requests the extension;
2. Commits to continuing to implement the certified second round plan; and

3. Commits to addressing a third round fair share obligation with a newly adopted housing element and fair share plan.

NJBA contends that these regulations are ultra vires because, NJBA asserts, they allow for certification based on "historical numbers." This argument is rejected. The interim rules specifically allow a municipality to address its second round obligation based on second round numbers. Clearly such certification is an appropriate exercise of COAH's authority. Moreover, the extension rule does not offer substantive certification for a third-round obligation, but merely provides a compliant town with interim protection pending the release and adoption of the third-round methodology. When the third-round numbers and rules are proposed and adopted, municipalities with extended second-round certifications will be required to address their third-round obligations. While COAH acknowledges the continuing municipal obligation to account for its fair share obligations, this will be done by municipalities eligible to receive extended second-round certifications. Any delay in the determination of that ongoing obligation, will be accounted for and recaptured in the Council's third-round methodology. The obligation will be met by those fair share plans certified by the Council during its third-round compliance period. Moreover, because towns which receive an extension of their second-round certifications must commit to addressing their third-round obligations as a condition of receiving the extensions, COAH has no reason to doubt that these towns will address their entire third-round obligations.

The Council's third-round methodology and rules, once adopted, will comply with the requirements of the FHA and the Mount Laurel doctrine. The third-round methodology will continue the work of the first- and second-round methodologies and implementing regulations by fairly and accurately determining the state-wide

affordable housing need and by assigning that need to the State's municipalities. The mere fact that there may be a "gap" between the second and third compliance periods, does not violate the Mount Laurel doctrine. In fact, there was a similar gap between the first and second round compliance periods as well as the first-round compliance period was from 1987 to 1993, yet the second-round rules were not adopted until June 6, 1994. Nonetheless, the affordable housing need was calculated from July 1987 through July 1999, creating a continuous calculation period upon which the first and second-rounds were based. Likewise, the third-round numbers will ultimately capture the full housing need projected through 2010.* Based on this history, the Council saw fit to provide compliant towns with some degree of protection from a builder's remedy lawsuit during this "gap" period by adopting rules which extend second-round substantive certifications.

As Counsel noted at oral argument in this matter, extended substantive certification does not preclude all future exclusionary zoning law suits, but merely provides a presumption of validity to a municipality's housing element and fair share plan. N.J.S.A. 52:27D-317. While, NJBA argues that this presumption is tantamount to a ban on such litigation, COAH disagrees with this argument. The presumption provided by the Fair Housing Act in cases where a town has received COAH's grant of substantive certification does not provide towns with a "bullet proof vest" during litigation as alleged by NJBA. Rather, the presumption serves to shift the burden of proof from the town which has substantive certification to the plaintiff in a Mount Laurel action. Ultimately, the court must determine whether such a plaintiff has rebutted the presumption of validity, which based upon NJBA's own arguments should not be so daunting a task.

*On January 11, 2002 the FHA was amended to change the projection period from six to ten years. N.J.S.A. 52:27D-310b.

Accordingly, COAH rejects NJBA's claims that COAH's extensions of second-round substantive certification have deprived or will deprive anyone of the opportunity to challenge a municipality's housing element and fair share plan.

NJBA also argues that COAH should not grant extended certifications without first engaging in a scarce resource analysis. COAH's rules do not preclude any party from filing an application for a scarce resource restraint when a municipality seeks or receives an extension. Pursuant to N.J.A.C. 5:91-10.1, any party may apply to the Council at any time for a scarce resource restraint to preserve land or other resources for affordable housing. To date, none have been filed for any municipality currently receiving extended certification pursuant to N.J.A.C. 5:91-14 et seq. Nonetheless, should COAH receive any such applications those would, of course, be considered in accordance with COAH's procedural rules.

NJBA further asserts that municipalities can protect themselves from potential Mount Laurel litigation by submitting to the jurisdiction of the Superior Court by seeking a declaratory judgment that its third-round housing plan is constitutional. That argument ignores one of the primary purposes of the Fair Housing Act, i.e. that COAH was credited to provide an alternative to court action. N.J.S.A. 52:27D-303.

The Fair Housing Act gives the Council the responsibility to develop a methodology of uniform and state-wide application so that each New Jersey municipality may determine its Mount Laurel fair share obligation. N.J.S.A. 52:27D-307. Thus, the New Jersey Supreme Court in Hills Dev. Co. v. Bernards Twp., supra, 103 N.J. at 22, explained that the Council was empowered under the FHA to create, through its methodology and implementing regulations, uniform standards regarding affordable housing policy and procedures that could be applied to each municipality in the State,

rather than having potentially inconsistent determinations made by the courts on a case-by-case basis. In light of the FHA's and the Court's preference for such matters to be resolved through the COAH process, COAH rejects NJBA's argument that towns should now go back to the courts for exclusionary zoning issues. Moreover, the reliance by these towns on COAH's rules, render it unfair to require a compliant town to be "forced" into court.*

It is undisputed that the Council is involved in a highly complex and sensitive process in creating the third-round methodology. This process has and will continue to require the Council's focused attention. As such, the Council has been and will continue to focus its efforts on creating a thoughtful and deliberative methodology and implementing regulations. Accordingly, the Council declines CAHE's invitation to create "interim numbers" for those municipalities seeking extensions of their second-round obligations as the same would only serve to

NJBA also takes issue with COAH's procedure in granting extensions of second-round certifications, claiming that the same offends notions of procedural due process since extensions are provided without public notice or opportunity for a hearing. It should be noted, however, that COAH's procedural rules, N.J.A.C. 5:91-1, et seq., are due to expire on November 5, 2002. Accordingly, COAH has proposed the readoption of these rules, which include the rules in question here. The rule readoption proposal was published on October 21, 2002 in the New Jersey Register. Under the Administrative Procedures Act, N.J.S.A. 52:14B-1, et seq., the proposal acts to extend these procedural rules for 180 days. Nonetheless, these and any other objections to the procedure currently set forth for extending second-round substantive certifications can be raised by any interested person during the course of this rule-making process. Thus, COAH can address all public comments/objections at one time and make whatever revisions to the rules it deems necessary.

As a side note, COAH has received one such objection from Stephen Eisdorfer, Esq., on behalf of NJBA. As noted above, this objection will be addressed by COAH through the normal rule-making process.

divert attention from the Council's current priority, i.e. creating the third-round methodology.

For the forgoing reasons, NJBA's motion to intervene and oppose the requests for extended certification by the aforementioned municipalities is denied.



Renee Reiss, Secretary
New Jersey Council on
Affordable Housing

DATED: November 6, 2002