

In re Adoption of Assisted )  
Living Regulations, Motion ) COUNCIL ON AFFORDABLE HOUSING  
to Settle the Record ) DOCKET NO. **COAH - 02-1413**  
RESPONSE & DECISION

This is a motion to settle the record filed by the Fair Share Housing Center, the Southern Burlington County Branch of NAACP, and the Camden County Branch of NAACP (collectively referred to as "FSHC" or the "Appellants") in association with an appeal of the adoption of regulations pertaining to assisted living residences by the Council on Affordable Housing ("COAH" or the "Council").

**PROCEDURAL HISTORY AND FACTUAL BACKGROUND**

On October 15, 2001, in response to the recent growth in the area of independent-style living quarters for senior citizens COAH published a proposal to amend N.J.A.C. 5:93 to add a new rule and accompanying definitions pertaining to regulations for municipalities seeking to obtain credit towards their affordable housing obligations for assisted living facilities. 33 N.J.R. 3601. A sixty-day comment period ensued. 33 N.J.R. 3602. Within that time period, COAH received several comments from interested persons, including FSHC. 34 N.J.R. 1663(a). After reviewing and considering the comments received, the Council provided responses to the same at 34 N.J.R. 1663(a). On April 3, 2002, the Council adopted the new rule and rule amendment with substantive and technical changes not requiring additional public notice or comment, pursuant to N.J.A.C. 1:30-6.3. Accordingly, N.J.A.C.

5:93-1.3 was amended and N.J.A.C. 5:93-5.16 was adopted effective May 6, 2002.

On June 20, 2002, FSHC filed a Notice of Appeal challenging COAH's adoption of N.J.A.C. 5:93-5.16. On July 22, 2002, the Council filed a Statement of Items Comprising the Record on Appeal ("SICR") with the Appellate Division and served FSHC with a copy of the same. On October 10, 2002, FSHC filed a motion to settle the record with the Appellate Division. COAH filed a brief in opposition to that motion, asserting, among other arguments, that appellants' motion had been raised in the wrong forum, as motions to settle the record pursuant to New Jersey Court Rule 2:5-5 require such motions to be made in the first instance to the agency below. On November 20, 2002, the Appellate Division denied FSHC's motion as premature.

#### **ARGUMENTS & DISCUSSION**

On December 13, 2002, FSHC filed the present application to settle the record. FSHC claims, as it did before the Appellate Division, that COAH provided "virtually no support in the SICR for statements that it makes to support its rulemaking [sic] judgment."

On October 17, 2002, after FSHC filed its motion in the Appellate Division, FSHC also filed a request for public documents associated with COAH's adoption of these assisted living regulations pursuant to the Open Public Records Act, N.J.S.A. 47:1A-1 ("OPRA"). Accordingly, COAH advised the Court that it was in the process of reviewing the request for additional documents to supplement the record on appeal. On October 25, 2002, COAH's record's custodian informed FSHC that COAH did not have any additional documents to respond to FSHC's OPRA request, other than those documents previously provided to FSHC with the Council's SICR.

FSHC notes four specific areas of COAH's rule-making record which it claims are deficient.

First, FSHC asserts that COAH's response to a comment at 34 N.J.R. 1663 does not make sense and is otherwise not supported by the record. The comment and response in question are as follows:

COMMENT: Proposed N.J.A.C. 5:93-16(b) should be amended to delete the option of making all of the affordable units affordable to households at 60 percent of median income. Targeting affordable assisted living units only at 60 percent of median income ignores the needs of low-income households below 50 percent of median income, which is contrary to Mount Laurel II. A recent State law (N.J.S.A. 26:2H-12.18) makes clear that assisted living residences require a reservation of 10 percent of beds for Medicaid eligible persons, specifically addressing low and moderate income requirements.

RESPONSE: The Internal Revenue Service ("IRS") Code permits developments where the rents of all the affordable units are priced to be affordable to households earning 60 percent of median income. COAH's rule reflects the IRS regulations. However, the commenter should be aware that in discussions with the New Jersey Housing and Mortgage Finance Agency ("HMFA"), it is HMFA's experience that the majority of assisted living providers set rents so that half of the affordable units are affordable to low income households (incomes below 50 percent of median income).

In addition, the State law referenced by the commenter requiring that 10 percent of beds be reserved for Medicaid eligible persons will reach the most needy of low income households which do not have assets of more than \$2,000 to \$3,000 (a requirement of Medicaid). In current dollars, an individual would pay a maximum of \$614.55 per month for room and board and Medicaid would pay a per diem rate

of approximately \$60.00 per day (approximately \$1,800 per month), for a total in excess of \$2,400 for a Medicaid-waiver bed in an assisted living facility. The State law specifically notes that the 10 percent utilization by Medicaid-eligible persons should be met through Medicaid conversion of persons who entered the residence as a private pay person that subsequently became eligible for Medicaid, or through the direct admission of Medicaid-eligible persons.

As further background on the new State law, the effective date of the law is September 5, 2001. The law requires that any new assisted living residence (and comprehensive personal care home) licensed by the New Jersey Department of Health and Senior Services ("DHSS") after the effective date of the law must reserve 10 percent of its total bed complement for use by Medicaid-eligible persons. Such licensed facilities will have three years after the date of their licensure to achieve this 10 percent utilization. In addition, if existing assisted living residences add additional assisted living beds, 10 percent of the additional beds must be reserved for use by Medicaid-eligible persons.

Although the State law allows the Commissioner of DHSS to waive the 10 percent requirement if it is determined that sufficient assisted living beds are available to meet the needs of Medicaid-eligible persons within the limits of the Federal waiver to provide assisted living services through the Medicaid program, the majority of licensed assisted living (70 out of 100 licensed facilities) currently accept Medicaid reimbursement. There are approximately 1,500 Medicaid waivers available throughout the State, which represents slightly more than 10 percent of the approximately 13,000 beds in assisted living residences and comprehensive personal care homes. DHSS is in the process of drafting regulations to implement the new State law that will be the subject of public comment. In conclusion, both the new State law and HMFA's experience in funding low-income units

in assisted living residences will ensure that low-income seniors are being served.

FSHC contends that COAH should "explain what it means and indicate what impact the IRS regulations or code" has on the Mount Laurel obligation.

COAH asserts that this request goes beyond the scope of a motion to settle the record, and instead requests COAH to argue the merits of FSHC's appeal at this time. COAH finds such a request inappropriate. As COAH explained in its response to FSHC's previous motion in the Appellate Division, this is essentially the crux of FSHC's appeal and challenge to these regulations. Accordingly, COAH asserts that it is FSHC's responsibility to demonstrate to the court, as part of its appeal of these regulations, to demonstrate the relevance or irrelevance of the IRS code and regulations, as well as COAH's "misplaced reliance," thereon, if any. COAH denies FSHC's request that it "explain what it means."

FSHC also notes that COAH has referred interchangeably to the IRS Code and regulations in its response to the above-noted comment, and asks COAH to identify which source of law it has relied upon in the above comment response.

In the interest of clarity, COAH refers FSHC to its initial rule proposal at 33 N.J.R. 3602, which explains that the proposed rule "permits all of the apartments to be affordable to

households at 60 percent of median income as per the Internal Revenue Code that governs bonding for these facilities."

In addition, FSHC contends that COAH has not provided any "memoranda, letters, reports or other documents" which support COAH's reliance on HMFA's experience and asks COAH to provide such documents in order to allow FSHC the opportunity to scrutinize HMFA's experience.

COAH has provided FSHC with all documents relied upon by the Council in proposing and adopting the regulations in question. Simply stated, COAH's rule-making record does not contain any formal memoranda, letters, etc., from HMFA detailing that agency's experience. Rather, in adopting these regulations COAH relied on oral communications between the staff of these two State agencies. In so doing, each agency was able to provide its own valuable insights based on each agency's specific area of expertise. As explained at length in both the rule's proposal and responses to comments, "the Council has worked with the underwriting staff of the [HMFA] to help craft the Council's proposed rule and amendment on assisted living residences. The [HMFA] has over five years experience in financing, administering and monitoring assisted living residences." 33 N.J.R. 3601. COAH is entitled to rely on the expertise of HMFA in this area. Moreover, the Council asserts that discussions between two State agencies is entirely appropriate. These communications not only foster the production

of innovative ideas and methods for implementing important State policies, but also provide an efficient means of so doing.

In addition, FSHC asserts that "COAH cites lots of statistics," such as "70 out of 100 licensed facilities," "approximately 1,500 Medicaid waivers," and "more than 10 percent of the approximately 13,000 beds," but, FSHC contends, provides no source for the same.

COAH disagrees that no source has been provided for these statistics. The statistics referred to in this comment-response have been provided by the Department of Health and Senior Services ("DHSS"), as noted in the first sentence of the last paragraph of this comment-response. COAH asserts that it was entirely appropriate to obtain such data from the DHSS and in so doing, appropriately relied on DHSS's expertise in mentioning these statistics in its comment-response.

The second comment-response which FSHC takes issue with is as follows:

COMMENT: Instead of allowing the entire fee for rent, food and services to be established at 50 percent of median income, as is authorized by the proposed rule and is current HMFA practice, COAH should require that the fee be affordable to households below 50 percent of median income as required by the current COAH rules on ranges of affordability.

RESPONSE: The rule would permit the entire fee package (including rent, food and services) to be established at 50 and 80 percent of median income or all at 60 percent of median income. By keeping assisted living residences

economically feasible, COAH's rule will help in the actual construction of affordable units in assisted living residences instead of having for-profit developers provide the municipality with a fee in lieu of constructing an affordable unit.

It is also HMFA's experience that the affordable unit fee packages are substantially lower than what the market units pay. HMFA reports that according to recent studies conducted nationally, residents of market units are paying 75 to 80 percent of their income on rent, food and services.

It should be noted that all residents in the affordable units in an assisted living residence must receive the same basic level of services as market units. COAH will clarify its rule at N.J.A.C. 5:93-5.16 that, to be eligible for COAH credit, all affordable units must receive the same basic services as required by HMFA's underwriting guidelines and financing policies. In addition, as part of the proposed rule at N.J.A.C. 5:93-5.16(h), HMFA will serve as the experienced entity contracted "with a municipality" to administer and monitor affordable units in an assisted living residence. COAH inadvertently omitted the phrase in quotes above.

FSHC claims that COAH's response here is inadequate because there are no documents in the SICR which indicate: (1) that COAH conducted an economic feasibility analysis; (2) that COAH considered the point at which a developer of an assisted living facility would pay a fee in lieu of construction; (3) what HMFA's experience is with regard to affordable unit fee packages; and (4) which studies HMFA reported.

COAH disagrees that the foregoing response was inadequate. In responding to the above comment, COAH relied on its own experience in dealing with economic feasibility, as well as

that of HMFA. As explained previously, HMFA has over five years experience in financing, administering and monitoring assisted living residences. 33 N.J.R. 3601. Moreover, COAH also "met with private, for-profit and not-for-profit assisted living residence providers for their input" on these regulations. Ibid. As noted above, COAH's rule-making record does not contain any formal memoranda, letters, etc., from HMFA detailing that agency's experience and all documents utilized by COAH in creating these regulations have already been provided to FSHC. Rather, in adopting these regulations COAH relied on oral communications between the staff of State agencies. In so relying, COAH accepted HMFA's accounting of studies it had reviewed in its administration of assisted living residences, as well as COAH's own experience and that of assisted living residence providers.

The third area of COAH's rule-making record which FSHC claims is deficient deals with COAH's response to an inquiry as to whether COAH confirmed that assisted living residences are part of the need assessment which generated COAH's pre-credited need numbers. COAH responded stating that Dr. Burchell, COAH's methodological consultant, had confirmed that assisted living residences are part of the need assessment. In support of this response, COAH provided a copy of Dr. Burchell's correspondence explaining how this had been confirmed. FSHC now takes issue with the merits of Dr. Burchell's letter.

While appellants may not agree with the assertions made by Dr. Burchell and relied upon by COAH in adopting these regulations, this is not a basis to supplement the rule-making record. Rather, such arguments are more appropriately addressed to the Appellate Division in FSHC's brief on the merits in this matter.

The fourth area of COAH's rule-making record which FSHC now takes issue with deals with COAH's response to the comment that "COAH should establish a minimum set-aside greater than the State-required 10 percent." COAH responded as follows:

According to [HMFA], HMFA funding for assisted living residences requires a 20 percent set-aside for affordable units. In addition, for non-HMFA funded assisted living residences, the Council believes that municipalities are sophisticated and experienced to negotiate an acceptable affordable housing set-aside to produce units. To maintain economic feasibility, there must be a balance achieved when determining the percentage of affordable units in an assisted living residence.

FSHC again asserts that COAH's response is inappropriate because there are no "economic feasibility studies," etc. in the SICR.

COAH disagrees. As explained at length above, COAH relied on COAH's own experience, HMFA's experience, and the experience of private developers of assisted living residences, in dealing with economic feasibility issues. Although this experience is not contained in any written document which could be made a part of the SICR in this appeal, COAH asserts that reliance on these

oral communications and its own experience was nonetheless an appropriate exercise of its rule-making authority.

In light of the foregoing, FSHC contends that COAH should amend its SICR to include the additional documents suggested by FSHC. As explained above, however, COAH's current SICR lists all the documents that were relied upon by COAH in proposing and adopting these regulations. These documents have already been provided to FSHC during the course of the present appeal. Accordingly, COAH has no other documents to provide to FSHC in association with this appeal. FSHC has also asked that COAH provide statements and sworn certifications answering specific questions concerning the merits of FSHC's appeal in this matter. COAH denies this request and notes that the same clearly exceeds the scope of the present motion. COAH asserts that the responses to comments and other documents contained in the rule-making record provide support for COAH's adoption of its assisted living residence regulations.

For the foregoing reasons, the motion to settle the record is denied.

  
Renee Reiss, Secretary  
New Jersey Council on  
Affordable Housing

3/5/03