IN RE PARTIAL INITIAL DECISION) FROM OAL IN PARSIPPANY-TROY) HILLS CONSOLIDATED CONTESTED) CASES)	COUNCIL ON AFFORDABLE HOUSING DOCKET NO. COAH 03-1502 OPINION

This case is currently before COAH for consideration of an initial partial decision filed by Administrative Law Judge Richard McGill ("ALJ"). That decision recommends that COAH dismiss the claims of Mazdabrook Developers, L.L.C., ("Mazdabrook") and Parkside Gardens Associates, ("Parkside Gardens") for failure to provide fully responsive answers to numerous interrogatories. COAH must now decide whether to accept, modify or reject the recommendation of the ALJ.

This is a consolidated matter which arises from a series of disputes between Lake Lenore Estates, L.L.C. ("Lake Lenore"), Mazdabrook, Parkside Gardens and the Township of Parsippany-Troy Hills, (the "Township") over the terms of various COAH mediation agreements between the Township and these developers. Parsippany-Troy Hills received substantive certification from COAH on August 7, 1996. The Township's plan included zoning, rental bonus credits and a Regional Contribution Agreement ("RCA"). A major portion of its obligation was subject to negotiated agreements with Lake Lenore, Mazdabrook and Parkside. Specifically, these disputes involve the interpretation of provisions of the mediation agreements involving sewer connection fees. These disputes have been the subject of litigation in the courts and before COAH. At its January 3, 2001 monthly meeting the COAH Board voted to accept jurisdiction over the dispute with Lake Lenore and thereafter COAH

directed the Township and Lake Lenore into mediation to attempt to resolve the sewer connection fee issue. The mediation was unsuccessful and the matter was ultimately transferred to the Office of Administrative Law ("OAL"). On April 20, 2001, Mazdabrook filed a motion with COAH seeking an Order enforcing mediation agreements between Crow Foody Central/Mazdabrook Developers and Parsippany-Troy Hills, and barring the Township from levying sewerage connection fees in excess of $12.50 per unit. Subsequently, on November 30, 2001 Parkside Gardens filed a motion with COAH seeking an Order enforcing its mediation agreements with the Township and further requested that the Township cease demanding the sewerage connection fees upon units which were subject of the mediated agreements. Ultimately, the Council transferred these matters to the OAL as well.

In transferring these matters to OAL, the Board previously noted that a court order from Superior Court Judge Stanton explained that the Lake Lenore matter should proceed before COAH because public policy issues concerning the provision of affordable housing in the Township were at issue in the dispute over sewer connection fees. Moreover, the Board noted that the mediation agreements at issue were part of "the facts" upon which COAH's grant of substantive certification to the Township was based, and therefore, the interpretation of these mediation agreements was within the incidental power which is reasonably

necessary for COAH to effectuate the powers expressly granted to it by the Legislature. Thus, the Board found it appropriate that these matters be transferred to the OAL for a hearing on all material issues of contested facts, and these matters were transferred to the OAL for a full evidentiary hearing on all issues raised by the parties. The matters were later consolidated into one proceeding by the OAL.

On March 11, 2003, COAH received a Partial Initial Decision from the ALJ which recommends that the matters pending before it involving Mazdabrook and Parkside Gardens be dismissed with prejudice for failure to adequately respond to discovery. The ALJ's decision denied Mazdabrook and Parkside Gardens' motion to vacate the ALJ's previous Order suppressing their pleadings. Counsel for Mazdabrook and Parkside Gardens filed exceptions to the ALJ's partial initial decision. Counsel for the Township responded to these exceptions. Thereafter, Counsel for Mazdabrook and Parkside attempted to file a reply to the Township's response.

MAZDABROOK AND PARKSIDE GARDENS EXCEPTIONS:

Joseph A. O'Neill, Esq., filed a letter memorandum dated March 20, 2003 outlining the exceptions raised by Mazdabrook and

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*These exceptions were initially submitted as a "request for interlocutory review." However, counsel for Mazdabrook and Parkside Gardens later advised COAH staff that this request was improperly phrased and should have been submitted as exceptions. Thus, Mazdabrook's initial submission has been treated as exceptions to the ALJ's Initial Partial Decision.

Parkside Gardens to the ALJ's Initial Partial Decision. Mazdabrook and Parkside Gardens set forth the following chronology of events leading up to the ALJ's decision here:

On January 3, 2003, Parkside Gardens and Mazdabrook Developers filed a Notice of Motion to vacate order suppressing answers without prejudice. The Township filed its objection to the motion by Parkside Gardens on January 13, 2003. Petitioners replied, on January 30, 2003, to the opposition motions filed by the Township. On February 21, 2003, a telephone status conference was held on the above-captioned matters with all parties and the ALJ. On March 7, 2003 the ALJ issued his Partial Initial Decision.

Mazdabrook and Parkside Gardens assert that the ALJ applied an incorrect standard to their motion to restore previously suppressed pleadings. They contend that because the Uniform Rules of Administrative Procedure do not contain a standard to apply to a motion to vacate a dismissal for failure to respond to discovery requests, entered in accordance with N.J.A.C. 1:14.14, the ALJ should have proceeded in accordance with New Jersey Court Rules. N.J.A.C. 1:1-1.3(a).

Mazdabrook and Parkside Gardens assert that the applicable Court Rule to apply in these circumstances is R. 4:23-5, which provides a two-step procedure to ensure that appropriate answers to interrogatories are provided. For failure to answer interrogatories, Mazdabrook and Parkside Gardens argue that the

rule explains that an aggrieved defendant may move initially for dismissal of plaintiff's Complaint without prejudice and then, if the failure continues for more than ninety days, defendant may move for a dismissal with prejudice.

Mazdabrook and Parkside Gardens argue that incomplete answers to interrogatories cannot be automatically considered as a failure to answer under R. 4:23-5 and cite Adedoyin v. ARC of Morris Co. Chapter, Inc., 325 N.J. Super. 173, 180-181 (App. Div. 1999). Thus, Mazdabrook and Parkside Gardens assert that, unless bad faith is demonstrable from the overall nature of the answers, the court should treat the motion as a motion for more specific answers. Zimmerman v. United Services Automobile Association, 260 N.J. Super. 368, 373 (App. Div. 1992).

Mazdabrook and Parkside Gardens further point out that the ALJ's Order clearly states, "there was considerable disagreement as to what constituted sufficient answers to interrogatories between the parties" and explained that additional documents were needed to analyze the sufficiency of the answers given by the parties. Mazdabrook and Parkside Gardens charge that because the ALJ did not apply the ruling in the Zimmerman case, they are in a position in which their pleadings are suppresed improperly and therefore cannot proceed in the OAL hearing scheduled in May.

Thus, Mazdabrook and Parkside Gardens claim that COAH should overturn the decision of the ALJ below, and restore the pleadings of both Mazdabrook Developers and Parkside Gardens. They further request that this matter be referred back to the ALJ for a determination as to whether or not an Order for more specific answers to interrogatories is warranted.

EXCEPTIONS FILED BY LAKE LENORE:

Ben Shiriak, Esq., on behalf of Lake Lenore, submitted a letter brief dated March 19, 2003 outlining exceptions to the ALJ's Partial Initial Decision, which denied the motions by Mazdabrook and Parkside Gardens to vacate prior orders of dismissal without prejudice, and dismissed the motions by Mazdabrook and Parkside Gardens to enforce their respective mediation agreements with the Township. Lake Lenore puts forth the following arguments:

First, Lake Lenore claims that the ALJ did not correctly apply R. 4:23-5, the Rule of Court governing the failure to provide discovery. In addition, Lake Lenore asserts that the Zimmerman Principles do not warrant dismissal here. In Zimmerman, Lake Lenore explains, the Appellate Division noted the difference between not serving any answers to interrogatories and serving inadequate answers. Thus, Lake Lenore argues, the Court held that where the "real dispute is the responsiveness of the answers, the solution is an adjudication of that issue and not a dismissal of the underlying claim." Finally, Lake Lenore argues that the ALJ

did not apply the Zimmerman Principles here, as he did not make an initial ruling on the issue of responsiveness.

Based on the foregoing, Lake Lenore asserts "that the Initial Decision should be rejected and the claims of Mazdabrook and Parkside Gardens be reinstated."

REPLY BY THE TOWNSHIP OF PARSIPPANY-TROY HILLS

On March 24, 2003, Marc Friedman, Esq., on behalf of the Township of Parsippany-Troy Hills, submitted a letter in lieu of a brief in opposition to the submission of Mazdabrook and Parkside Gardens.

The Township asserts that the history of this case provides the basis for the ALJ's decision to deny the application to vacate the previously entered dismissal, and to dismiss the applications before COAH. At this time, the Township claims that Mazdabrook and Parkside Gardens have not provided fully responsive answers to the interrogatories in question. Specifically, the Township asserts that "the Judge found, that no answer had been provided to interrogatory numbers 15, 16, 19, 25 and various subparts of 26. Non-responsive answers were found to have been provided to interrogatories numbers 26, 29, 32, 34, 25 and 45. With regard to Parkside Gardens, the Judge did not go into the same detail as he did with Mazdabrook but it is clear from his Initial Decision that he reviewed each interrogatory, and determined that 17 of the interrogatories were not answered adequately."

The Township respectfully requests that Mazdabrook Developers and Parkside Gardens Associates be denied any relief.

REPLY BY MAZDABROOK AND PARKSIDE GARDENS

Replies to responses to exceptions are not generaly accepted by COAH. However, on March 28, 2003, Robert Garofolo, Esq., on behalf of Mazdabrook and Parkside Gardens, filed a reply brief in response to the Township's opposition to the exceptions of Mazdabrook and Parkside.

Mr. Garofolo asserts that his client should not be adversely impacted by the lack of his attention and responsiveness regarding this matter, and reiterates the argument regarding the ALJ's misapplication of R. 4:23-5.

In addition, Mazdabrook and Parkside Gardens take issue with the fairness and impact of the Initial Decision and explain that "R. 4:23-5(a)(1) shows a great awareness and concern for the rights of litigants in a dismissal situation, establishing a detailed procedure for notifying the client of the dismissal without prejudice. For even greater client protection, the rule requires a further notification to the client when a motion for dismissal with prejudice is made. R. 4:23-5(a)(2)." Thus, Mazdabrook and Parkside Gardens argue that the Partial Initial Decision would create a severe prejudice if accepted by COAH. Finally, Mazdabrook and Parkside Gardens charge that the ALJ's

decision is contrary to the applicable rule and the holdings of Judge Pressler in the Zimmerman case.

RESPONSE BY THE TOWNSHIP OF PARSIPPANY-TROY HILLS TO THE REPLY OF MAZDABROOK AND PARKSIDE GARDENS

Marc J. Friedman, Esq., submitted a letter dated March 28, 2003 objecting to any further submissions on behalf of Mazdabrook Developers and Parkside Gardens, and argues that N.J.A.C. 1:1-18.4 provides for the filing of a response to exceptions, but does not provide for a reply to be filed by the excepting party.

The Council must now decide whether to adopt, modify or reject the recommendations of the ALJ that COAH dismiss the applications of Mazdabrook and Parkside Gardens for failure to provide fully responsive answers to interrogatories.* The Council hereby adopts the ALJ's proposed procedural history, which accurately sets forth the history of this matter. In addition, the Council accepts the ALJ's proposed law and analysis to the extent that the same sets forth the factual analysis of the adequacy of certain interrogatories at issue here. However, the Council rejects the ALJ's proposed law and analysis to the extent that the ALJ's decision finds that the same requires dismissal with

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*Although COAH has reviewed the additional submissions of the parties in this matter, the Board does not rely on these additional submissions in making its determination.

prejudice of the pending applications of Mazdabrook and Parkside Gardens. Because dismissal with prejudice creates such a severe remedy, and in light of the applicable rules and case law, the Council finds that the remedy proposed by the ALJ is not appropriate to the situation presented here.

As explained above, COAH initially transferred this matter to OAL in order to obtain a full factual record on the contested issues in this matter. While COAH does not condone a party's failure to adequately respond to legitimate discovery requests, the Council also believes that the ALJ's proposed remedy here does not further the ultimate goal of COAH's transfer to OAL i.e., the creation of a complete factual record.

As the ALJ's decision explains at page 4, an ALJ may dismiss a proceeding, suppress a claim or take other appropriate measures for a party's "unreasonable failure to comply" with the requirements of the Uniform Rules of Administrative Procedure. N.J.A.C. 1:1-14.14. However, these administrative rules do not set forth a specific standard to utilize in dealing with a motion to vacate dismissal for failure to respond to discovery requests. Accordingly, it is appropriate to seek guidance on such matters from the New Jersey Court Rules.

Rule 4:23-5 addresses failure to make discovery and explains that dismissal with prejudice is appropriate where a motion to dismiss with prejudice has been made absent a motion to

vacate an Order of Dismissal without prejudice. In addition, to avoid a dismissal with prejudice under this rule the delinquent party shall provide the requested discovery or demonstrate exceptional circumstances.

The Appellate Division discussed the application of this rule in Zimmerman v. United States Auto, 260 N.J. Super. 368 (App. Div. 1992). In that case the Appellate Court explained that strict adherence to the prerequisites of the rule was required for an entry of dismissal with prejudice. Moreover, the Zimmerman Court held that dismissal was inappropriate where the issue involved the adequacy of interrogatory answers. Rather the Court found that the adequacy of interrogatory answers should first be determined and then an order compelling more specific answers may be appropriate.

In light of the foregoing, the Council finds that prior to dismissing the claims of Mazdabrook and Parkside Gardens, the ALJ should have issued an order compelling more specific answers to the interrogatories which were not sufficiently answered. If more specific answers were not then provided, dismissal may have been warranted. Accordingly, the Council rejects that portion of the ALJ's decision dismissing Mazdabrook and Parkside Gardens' claims with prejudice. The Council is mindful of the upcoming hearing dates previously scheduled in this matter, and does not seek to further delay a determination on the merits in these consolidated matters. Thus, the Council modifies the Partial Initial Decision

as follows: Mazdabrook and Parkside Gardens are hereby compelled to provide fully responsive answers to the interrogatories previously noted by the ALJ to be deficient. These answers should be provided in an expedited fashion. The Council will leave the timing of this matter to the discretion of the ALJ. If the parties fail to provide timely and complete answers to the above-noted interrogatories, an appropriate application may be made to the ALJ.

The Council further advises the parties that although COAH seeks a factual determination on all issues initially transferred to the OAL in this matter, continued failure to adequately respond to discovery requests will not be looked upon favorably by the Council in the future.

The ALJ's Partial Initial Decision in this matter is therefore accepted in part and modified in part, as set forth above.

Renee Reiss, Secretary
New Jersey Council on
Affordable Housing

DATED: May 7, 2003