

IN RE BOROUGH OF NEW PROVIDENCE:)	COUNCIL ON
MOTION OF LINDE NORTH AMERICA, INC.)	AFFORDABLE HOUSING
SEEKING TO DISMISS BOROUGH FROM)	
COUNCIL'S JURISDICTION OR ACCELERATED)	DOCKET NO. 10-2244
DENIAL OF BOROUGH'S RE-PETITION)	
)	OPINION

By motion filed with the New Jersey Council on Affordable Housing (“Council” or “COAH”), dated July 20, 2010, Jeffrey L. Kantowitz, Esq., counsel on behalf of Linde North America, Inc. (“Linde”), seeks the following:

1. That COAH dismiss New Providence from its jurisdiction;
2. In the alternative, that COAH declare an accelerated denial of New Providence’s petition for substantive certification pursuant to N.J.A.C. 5:96-12.2.

PROCEDURAL HISTORY

New Providence received first round substantive certification from COAH on September 18, 1989, second round substantive certification on August 5, 1998, and extended second round substantive certification on May 11, 2005.

On December 31, 2008 New Providence petitioned COAH for third round substantive certification of its Housing Element and Fair Share Plan. Objections to New Providence’s third round Housing Element and Fair Share Plan were received from Fair Share Housing Center and Linde. Linde owns property in New Providence located at Block 370, Lot 1 and Block 380, Lot 20. A COAH Premediation Report Requesting Additional Information (RRAI) was issued on December 1, 2009. On April 9, 2010 New Providence submitted a response to COAH’s RRAI. Mediation was held on April 12, 2010 between representatives of New Providence and the two objectors. The session concluded with the mediator keeping mediation open.

New Providence’s response to COAH’s RRAI indicated that the Borough sought to rescind its municipal adjustment to its projected growth share obligation in favor of utilizing COAH’s projected growth share obligation. On April 12, 2010 COAH sent correspondence to the Borough indicating that rescinding its growth projection adjustment and utilizing COAH’s projected growth share obligation created a

fundamental change in approach to the Borough's fair share obligation and necessitated a re-petition, pursuant to N.J.A.C. 5:96-3.4. COAH's correspondence further noted that the Borough must amend its Housing Element and Fair Share Plan and re-petition COAH by July 13, 2010. On July 16, 2010 COAH received New Providence's re-petition and on August 9, 2010 COAH sent the Borough correspondence outlining the documentation needed to complete its re-petition.

LINDE NORTH AMERICA INC.'S MOTION

Linde maintains that COAH should dismiss New Providence's Housing Element and Fair Share Plan or issue an accelerated denial of substantive certification to New Providence due to Linde's contention that the Borough failed to re-petition COAH by July 13, 2010, the date set forth in COAH's April 12, 2010 correspondence to the Borough. Linde states that COAH should dismiss or issue an accelerated denial to the Borough retroactive to July 13, 2010. Linde states that COAH has the authority, through N.J.A.C. 5:96-12.3, to dismiss a municipal Housing Element and Fair Share Plan and the authority, through N.J.A.C. 5:96-12.2, to issue an accelerated denial of substantive certification. Linde contends that New Providence's actions as it relates to its Housing Element and Fair Share Plan and re-petition warrant COAH acting on the authority afforded to it through the above regulations.

Linde further maintains that New Providence has failed to meet deadlines set by COAH and asserts that missing these deadlines demonstrates municipal delay and disregard for COAH deadlines and directives and should result in the Borough's dismissal or an accelerated denial of its petition. Linde cites New Providence's April 9, 2010 response to COAH's RRAI, when a response deadline of January 30, had been set by COAH, and New Providence's July 16, 2010 re-petition, when a re-petition deadline of July 13, 2010 had been set by COAH, as demonstrating the Borough's delay.

On July 15, 2010 Linde filed a builder's remedy suit against New Providence in the Superior Court of New Jersey. Linde asserts that jurisdiction of New Providence falls to the Superior Court, as the builder's remedy suit was filed prior to COAH's receipt of the Borough's re-petition. Linde maintains that New Providence's failure to submit its re-petition to COAH by July 13, 2010 left the Borough vulnerable to a builder's remedy

suit. Linde contends that New Providence's re-petition on July 16, 2010 occurred after COAH's jurisdiction had extinguished and the Borough was already subject to a builder's remedy suit in the Superior Court.

RESPONSE BY BOROUGH OF NEW PROVIDENCE

On July 30, 2010 COAH received opposition to Linde's motion from Jonathan E. Drill, Esq. and a certification from Stuart R. Koenig, Esq. on behalf of New Providence.

New Providence maintains that its re-petition was not submitted to COAH by July 13, 2010 due to a clerical error on the part of its counsel's law office and is not indicative of an intentional delay on the part of the Borough. New Providence notes that on June 1, 2010 its Planning Board passed a resolution adopting the revised Housing Element and Fair Share Plan to the governing body. New Providence also notes that its governing body passed a resolution endorsing the revised Housing Element and Fair Share Plan on June 14, 2010. New Providence asserts that the dates of these resolutions demonstrate a good faith effort by the Borough to meet the July 13, 2010 deadline and that the failure to do so can be attributed to an unintentional error on the part of its counsel. New Providence additionally maintains that the date of July 13, 2010 for receipt of the re-petition was not a statutorily created date or a regulatory mandated deadline and that the date of July 13, 2010 as set forth in COAH's letter of April 14, 2010 does not rise to the level of a deadline imposed legislatively or by an adjudicatory order of COAH.

While New Providence acknowledges COAH's authority under N.J.A.C. 5:96-12.2 and 12.3 to issue an accelerated denial of substantive certification and to dismiss a Housing Element and Fair Share Plan, the Borough argues that past decisions have held that COAH will not order the remedy of accelerated denial or dismissal unless there are exceptional circumstances. New Providence cites COAH's decisions in In re: Denville Township – Motion for Accelerated Denial/Builder's Remedy and In re: Borough of Fanwood – Motion for Accelerated Denial/Conditional Denial as establishing accelerated denial as an "extraordinary remedy" appropriate only in instances where a municipality is not acting in a manner designed to expeditiously advance the substantive certification process. New Providence maintains that the circumstances in this case do not warrant the

“extraordinary remedy” of accelerated denial contemplated by COAH in the aforementioned opinions.

New Providence further maintains that N.J.S.A. 52:27D-309(b) and 316(b) require that COAH’s administrative remedies be exhausted prior to exclusionary zoning litigation being filed. New Providence cites Appellate Division decisions in Sod Farms Assoc. v. Township of Springfield and Elon Assoc. v. Twp of Howell as affirming that a party that wishes to challenge the affordable housing plan of a municipality that is participating in COAH’s administrative process may do so only before COAH and may not file and/or maintain an exclusionary zoning lawsuit against the municipality. The Borough argues that its initial petition and open mediation session maintained jurisdiction with COAH up until the point at which its re-petition was received.

REPLY

Although COAH’s correspondence establishing a briefing schedule indicated that no reply briefs would be accepted, on August 19, 2010 COAH received a reply brief from Jeffrey L. Kantowitz, Esq. on behalf of Linde. Linde’s reply brief addresses similar issues as raised in its motion and also addresses substantive aspects of New Providence’s amended Housing Element and Fair Share Plan. N.J.A.C. 5:96-3.6 affords a public review period during which Linde may submit comments or objections to substantive aspects of the Borough’s Housing Element and Fair Share Plan.

DISCUSSION

Pursuant to N.J.A.C. 5:96-3.4, New Providence has complied with COAH’s re-petition requirements. COAH received New Providence’s revised Housing Element and Fair Share Plan and re-petition on July 16, 2010. COAH staff has conducted a completeness review of the Borough’s re-petition and determined that additional documentation is necessary in order for the re-petition to be complete.

Pursuant to N.J.A.C. 5:97-3.1, the Borough’s re-petition identifies completed and proposed mechanisms by which New Providence proposes to address its fair share obligation. Although certain documentation is still needed in order for the Borough’s re-petition to be complete, N.J.A.C. 5:96-2.2(c) allows a municipality 45 days to correct any

deficiencies identified in its petition by COAH. On August 9, 2010 COAH sent correspondence to New Providence outlining the additional documentation needed in order for the Borough's re-petition to be complete and, pursuant to N.J.A.C. 5:96-2.2(c), noted a deadline of September 23, 2010 for receipt of the additional documentation. The filing of New Providence's re-petition three days after COAH's July 13, 2010 deadline should not disallow COAH from accepting New Providence's re-petition for review. As noted by New Providence, the July 13, 2010 deadline is not a statutory or regulatory requirement.

As noted above, New Providence has complied with both the re-petition requirements of N.J.A.C. 5:96-3.4 and the Fair Share Plan requirements of N.J.A.C. 5:97-3.1. Adherence to these regulatory requirements demonstrates New Providence's intent to participate in COAH's administrative process and to receive substantive certification of its Housing Element and Fair Share Plan.

DECISION

At a meeting on August 25, 2010 a task force of the COAH board considered the motion and the papers submitted by both parties and recommended that Linde's motion seeking dismissal of New Providence's Housing Element and Fair Share Plan or an accelerated denial of the Borough's petition for substantive certification be denied.

Based upon the reasons stated above and the task force's recommendation and oral argument heard on September 8, 2010, the Council hereby denies Linde's motion, with the exception that Linde is permitted to raise any comments or objections it may have to the Borough's re-petition, pursuant to the process afforded through N.J.A.C. 5:96-4.1.



Reneé Reiss, Secretary
Council on Affordable Housing

Dated: September 8, 2010