

ORDER ON EMERGENT APPLICATION

IN RE FAILURE OF COUNCIL ON AFFORDABLE HOUSING TO ADOPT TRUST FUND COMMITMENT REGULATIONS.

SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-5257-11 MOTION NO. M- BEFORE PART: Y JUDGE(S): CUFF FUENTES MESSANO

EMERGENT APPLICATION

FILED: 7/6/12 BY: FAIR SHARE HOUSING CTR. ANSWER(S) FILED: 7/9/12 BY: NJ STATE LEAGUE OF MUNICIPALITIES 7/12/12 BY: COUNCIL ON AFFORDABLE HOUSING

APPEARANCE ONLY:

ORDER

THIS MATTER HAVING BEEN ARGUED BEFORE THE COURT, IT IS ON THIS 13th DAY OF JULY, 2012, HEREBY ORDERED AS FOLLOWS:

EMERGENT APPLICATION FOR

SUMMARY DISPOSITION OR IN THE ALTERNATIVE PRELIMINARY INJUNCTION GRANTED () DENIED (X) OTHER (X)

SUPPLEMENTAL:

Fair Share Housing Center (Fair Share) seeks a preliminary injunction to halt the transfer of funds from municipal affordable housing trust fund accounts on July 17, 2012, to the State pursuant to the terms of N.J.S.A. 52:27D-329.2. Fair Share argues that the Council on Affordable Housing (COAH) has failed to adopt regulations to effectuate the statute, this omission violates basic principles of due process, frustrates efforts by various municipalities to build affordable housing in their municipalities, and requires a stay of the transfer of these uncommitted funds until COAH defines what constitutes "committed" funds.

COAH responds that Fair Share lacks standing to raise due process claims because N.J.S.A. 52:27D-329.2 and -329.3 do not confer any rights or obligations to developers of low and moderate income housing and Fair Share is not a municipality. COAH also contends the New Jersey State League of Municipalities, which has been permitted to appear amicus curiae, lacks standing because it is a non-party. COAH also argues Fair Share cannot satisfy the rigorous standard to obtain preliminary injunctive relief or prevail summarily.

The Supreme Court held in 1990 that municipalities had the authority to impose reasonable fees on developers as an inclusionary device to promote affordable housing. Holmdel Builders Ass'n v. Twp. of Holmdel, 121 N.J. 550, 586 (1990). It required, however, COAH to adopt regulations to establish standards for the exercise of this authority to impose development fees. Ibid. Shortly thereafter, COAH adopted regulations governing municipal establishment, administration, and expenditure of development fees. 23 N.J.R. 2815; 24 N.J.R. 235. The rules required municipalities that collected development fees to deposit the fees in a separate housing trust fund and directed that municipalities must submit a housing plan to COAH for its review and approval before expenditure of these funds. N.J.A.C. 5:92-18.2(c), -18.4, and -18.7(b). The regulations specify the contents of the spending plan, including a description of the proposed use, a schedule for creation or rehabilitation of units, and a program for any municipal construction projects. N.J.A.C. 5:92-1.4(a)6 and (b). The regulations also detailed acceptable uses of collected fees. N.J.A.C. 5:92-18.15.

These regulations have remained largely unchanged. In June 2008, COAH amended the rules to expand the requirements of a municipal spending plan. N.J.A.C. 5:97-1.1 TO -10.5. The rules still require preparation of a spending plan, submission to COAH for review, and approval by COAH before any municipal affordable housing trust funds may be spent. N.J.A.C. 5:97-8.1(d). Under the current rules, a municipality must spend development fees within four years of COAH's approval of a spending plan. N.J.A.C. 5:97-8.10.

In 2008, the Legislature amended the Fair Housing Act (FHA), N.J.S.A. 52:27D-301 TO -329.19, to require "more accountability" of the municipal affordable housing trust funds. L. 2008, c. 46, § 8; Assembly Housing & Local Government Committee, Statement to A-500 (May 22, 2008). The bill, effective July 17, 2008, and codified at N.J.S.A. 52:27D-329.2, -329.3, expressly recognizes the authority of a municipality to collect development fees and payments-in-lieu from developers, requires approval of a spending plan by COAH before any

municipal affordable housing trust funds may be spent or committed, N.J.S.A. 52:27D-329.2a, and limits the activities for which the municipal housing trust funds may be expended, N.J.S.A. 52:27D-329.2c. The statute also requires a municipality that receives such fees to commit to expend these fees within four years of the date of collection. N.J.S.A. 52:27D-329.2d. Any unspent funds shall be transferred to the New Jersey Affordable Housing Trust Fund. Ibid. N.J.S.A. 52:27D-329.2 provides as follows:

The council shall establish a time by which all development fees collected within a calendar year shall be expended; provided, however, that all fees shall be committed for expenditure within four years from the date of collection. A municipality that fails to commit to expend the balance required in the development fee trust fund by the time set forth in the section shall be required by the council to transfer the remaining unspent balance at the end of the four-year period to the "New Jersey Affordable Housing Trust Fund," established pursuant to section 20 of P.L. 1985, c. 222 (C.52:27D-320), as amended by P.L. 2008, c. 46 (C.52:27D-329.1 et al.), to be used in the housing region of the transferring municipality for the authorized purposes of that fund.

N.J.S.A. 52:27D-329.3a and b authorize payment-in-lieu fees and impose a similar four year limit for the commitment of these fees.

As a preliminary matter we address the contention that Fair Share lacks standing to challenge the transfer of uncommitted funds to the State trust fund. To be sure, Fair Share is not a developer or a municipal corporation. Fair Share describes itself as "a nonprofit affordable housing sponsor-developer, [founded] to fully implement the settlement agreement in the Mount Laurel litigation with housing that would reach the very poor." Any diminution of a municipal affordable housing trust fund threatens the ability to build affordable housing in that municipality. The stated mission of Fair Share and the threat to the ability to build needed affordable housing in a municipality that has collected development fees for that purpose satisfies the liberal standing principles of this state. Crescent Pk. Tenants Ass'n v. Realty Equities Corp., 58 N.J. 98, 107-08 (1971). Moreover, Fair Share has appeared regularly as a party in matters challenging actions by COAH. See, e.g., In re

Adoption of N.J.A.C. 5:96 and 5:97, 416 N.J. Super. 462 (App. Div. 2010) (reviewing amended third round substantive rules for calculation of affordable housing need and criteria for satisfaction of need adopted by COAH), certif. granted, 205 N.J. 317 (2011); In re Adoption of N.J.A.C. 5:94 and 5:95 by the N.J. Council on Affordable Hous., 390 N.J. Super. 1 (App. Div.) (reviewing the third round substantive rules for calculation of affordable housing need and criteria for satisfaction of need adopted by COAH), certif. denied, 192 N.J. 71 (2007).

A preliminary injunction shall not issue except to prevent an irreparable harm. Crowe v. Di Gioia, 90 N.J. 126, 132 (1982). If monetary damages may redress the harm, injunctive relief is generally not appropriate. Id. at 132-33. The applicant for injunctive relief must also demonstrate a likelihood of success on the merits. Id. at 133. If the law is unsettled, injunctive relief is usually unavailable. Ibid. If the facts are controverted or the harm sought to be prevented is speculative, a preliminary injunction should not issue. Ibid. Finally, we must balance the relative hardship to the parties in granting or denying preliminary injunctive relief. Id. at 134. When the State is a party, we must consider whether the requested relief advances or compromises the public interest. Waste Mgmt. of N.J., Inc. v. Union Cnty. Utils. Auth., 399 N.J. Super. 508, 519-20 (App. Div. 2008). In the light of the record presented, we hold that Fair Share has failed to demonstrate irreparable harm or a likelihood of success on the merits.

In the light of the record presented, we are satisfied that a global preliminary injunction, restraining COAH from transferring funds held in trust by municipalities to meet their affordable housing obligations, is not warranted. For the past four years, municipalities have known of their obligation to present affordable housing plans to COAH for approval to secure the availability of trust funds and "commit" or protect such funds from forfeiture under N.J.S.A. 52:27D-329.2d. The ambiguity, if any, concerning the term "commit" has not precluded municipalities from seeking COAH's approval of particular housing projects on a case-by-case basis. The Governor's recent rejection of legislative efforts to provide a more concrete definition of "commit" does not transform a four-year-old deadline into an unforeseen event warranting immediate judicial intervention.

We are nevertheless concerned that, under these circumstances, COAH may seize affordable housing trust funds without giving the affected municipalities adequate notice and an opportunity to contest the transfer. We, therefore, order that before any transfer is effectuated, COAH must provide the affected municipality with written notice describing the exact

amount of funds intended for transfer and how such amount was calculated. Based on the Attorney General's representation to this court, the method of calculation shall follow a "first-in-first-out" approach, whereby monies and fees deposited in the municipal trust account will be segregated according to the date of deposit. The municipality shall have the right to contest before COAH the proposed transfer by demonstrating that the funds targeted for transfer have been "committed" to fund an affordable housing project by way of a legally enforceable agreement with a third party, or by such other means that show a firm and binding obligation to spend such funds in a manner consistent with the municipality's affordable housing obligations.

This appeal shall proceed from this point as a regular oral argument calendared case. The Clerk of the Appellate Division shall issue a briefing schedule to the parties.

FOR THE COURT:

A handwritten signature in black ink that reads "Mary Catherine Cuff". The signature is written in a cursive style with a large, prominent "M" and "C".

MARY CATHERINE CUFF, P.J.A.D.