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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NUMBER A-5404-07T3
LEAD DOCKET NUMBER A-5382-07T3

IN THE MATTER OF
THE ADOPTION OF
N.J.A.C. 5:96 and 5:97 BY
THE NEW JERSEY COUNCIL ON
AFFORDABLE HOUSING.

) Civil Action
)
) APPEAL FROM THE FINAL ACTION OF
) THE COUNCIL ON AFFORDABLE HOUSING
)

REPLY BRIEF ON BEHALF OF APPELLANTS
TWENTY MUNICIPALITIES

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PROCEDURAL HISTORY

We rely upon the procedural history set forth in our appellate brief.

STATEMENT OF FACTS

We rely upon the statement of facts in our appellate brief, and supplement those facts with the following counter-statement of facts.

COAH repeatedly asserts it used the most current and reliable data to construct the methodology, and the process was transparent. Neither assertion is true. COAH embarked upon a path to, essentially, double the affordable housing obligation of municipalities in an effort to mollify housing advocates who sought that result in the earlier challenge to the regulations, and for other political purposes. In doing so, they did not verify their models and assumptions, or check the accuracy against known events post 2004. COAH ignored more recent and reliable data provided to them which did not support their preconceived result, created a masterful obfuscation in the information release designed to prevent anyone from duplicating or checking the municipal results, and made it difficult for those attempting to gain information (TTa279).

In reviewing COAH's Statewide conclusions, we used the COAH methodology, checked the accuracy against known events, and used more current reliable data from the same sources relied upon by COAH which was available and known to the agency during the promulgation of the regulations. We found substantial error. The vacant land and build-out analysis is in error by approximately 60 percent, and in the Highlands as high as 80+ percent. Employment projections are overstated by 40 percent, even ignoring the more recent economic turndown. Job generator calculations are overstated by more than 50 percent. Housing projections are overstated by 33 percent. Statewide need is overstated by 46 percent. These are substantial systemic problems with the regulations and the methodology chosen by COAH.

POINT I

THERE ARE A NUMBER OF CHALLENGES
RAISED BY THE TWENTY TOWNS THAT
ARE NOT REFUTED BY COAH.

We address in this point those substantive issues challenging the reliability of the methodology not refuted by COAH.

A. 2004 Employment. COAH said the 2004 employment data was derived from NJLWD data. We challenged the accuracy of

the number and the assertion. TTb50-53 and 55-56. We said that COAH arbitrarily and substantially reduced 2004 employment, knowing it was wrong, in order to make it appear employment growth from 2004 to 2018 would be greater than could be reasonably expected. TTb53. We called the number "contrived." TTb51 and 56. COAH's brief, in discussing employment projections, studiously avoids describing how the 2004 number was derived. COAHb45. In fact, the number is not defensible. This arbitrary action causes employment growth projections from 2004 to 2018 to be overstated by 90,055 jobs. It is unreasonable for COAH to rely upon a jobs number which is not supported by any reliable data just for the purpose of holding on to a flawed methodology.

B. Water Supply and Wastewater Treatment Capacity.

At TTb34-36 we asserted the vacant land and build-out analysis was flawed because COAH did not consider water supply and wastewater capacity. COAH simply assumed that if land was in a sewerage service area, there was no limit to capacity. COAH was directed by the Court to determine if there was sufficient "vacant developable land" to support a growth share methodology. In re Adoption of N.J.A.C. 5:94, 390 N.J.Super. 1 54 (App. Div. 2007). Without determining water and sewer capacity, COAH could not determine land was developable.

C. The Inaccuracy of COAH's Build-out in the Highlands Region. COAH does not dispute our assertion that the COAH build-out in the 88 Highlands communities exceeds the Highlands Council regional build-out by anywhere from 40 percent to 80+ percent. TTb36-38.

D. Excessive Extrapolation. COAH does not address the assertion that the methodology is flawed because it relies on excessive extrapolation, interpolation, and conversion in violation of AMG Realty Co. v. Warren Township, 207 N.J. Super. 388, 453 (Law Div. 1984). TTb43-44.

E. Double Counting Inclusionary Development. COAH did not respond to the assertion that municipalities, which complied with their prior round obligation, are being unreasonably assigned higher growth share obligations due to those compliance efforts being included in their historic growth rate. TTb44-45.

F. Failure to Validate the Model. COAH's consultants, in 2007 and 2008, were trying to project from earlier years what would happen after January 1, 2004, when much of what they were trying to project had already occurred. COAH does not address our argument that both the housing and employment allocation models are flawed because the accuracy of the models was not verified based upon actual events that

occurred in 2004 and later. With reference to housing, we showed 64 municipalities that issued more certificates of occupancy from 2004 to 2007 than COAH projected would be issued by 2018. TTb45-46. With reference to employment, we showed that actual job growth increased from 2004 to 2007 by an average of 23,946 per annum, which is less than half of the greater than 50,000 per annum projected by COAH. TTb48-50.

G. Retroactive Effect. At TTb78 we argued that COAH improperly calculated present and prospective need by hypothetically calculating need from 1999, and imposing obligations retroactive to 2004. The regulations should be invalidated, and COAH directed to calculate present need as of now, and prospective need out ten years from now.

H. The Requirement to Adjust Prior Round Obligations that Were Satisfied. At TTb84-85, we asserted it was unreasonable for COAH to require the entire prior round obligation to be addressed in the Third Round, instead of just addressing the remaining prior round obligation. COAH's approach denies repose for past compliance. COAH expresses no disagreement on the point. Municipalities should only be compelled to address their remaining prior round obligation in Third Round plans.

POINT II

SUBSTANTIAL ERROR IN THE VACANT LAND
AND BUILD-OUT ANALYSIS.

In order to attempt to avoid discussion of the substantial errors in the vacant land and build-out analysis, and its impact upon the methodology, COAH misstates the argument of the Twenty Towns, and understates the impact of error. Additionally, at COAHb14, it is falsely asserted COAH's consultant first looked for reliable data at the municipal level to identify vacant land, but found none. To the contrary, the contract given to the consultant called for the use of the State data that was used, without any requirement to look for municipal data. TTa191.

A. The Pilot Study. COAH asserts the Twenty Towns argue that municipal parcel level data should have been used in the vacant land analysis. COAHb90-91. COAH then attempts to explain away the Pilot Study of July 9, 2008, as simply an exploration of potential models to be used in the future. COAHb91.

First, the Twenty Towns did not argue the vacant land analysis was flawed because it did not use parcel data. Our challenge to the vacant land and build-out analysis was based on far greater error than the almost 20 percent revealed in the

Pilot Study. Our reference to the Pilot Study was made to show that COAH knew from their own consultant, as early as July 9, 2008, that there was substantial error in the vacant land and build-out analysis. TTb27-29. We asserted that COAH, knowing the results were in error, should have undertaken further review of the vacant land analysis before adopting the October 20, 2008 amendment. TTb29. Instead, COAH ignored the information in the report in contravention of the guidance provided in In re Tp. of Southampton, 338 N.J.Super. 103 (App. Div. 2001). In view of the critically important role the methodology plays in the implementation of the Fair Housing Act, COAH should not have turned a "deaf ear" to such information. Id. at 114. Additionally, COAH should have been more "transparent" about the study, both generally and in response to the October 20, 2008 OPRA request of the League. NJLma18.

Second, while COAH says the Pilot Study was conducted to explore potential models for the future, the language in the study says different. The document opens with an explanation that municipal and county officials questioned the accuracy of the vacant land analysis, because it did not utilize local information. TTa334. It then says:

COAH requested Center to conduct a pilot study to determine how and why the results might differ, and what the impact might be

on future development capacity. Id.

It later indicates that fifteen of the twenty-one counties have "full and reasonably accurate spatial databases." TTa338. The study does say, as COAH points out, that the State has no such reliable data. However, COAH could have easily adjusted the six counties that do not have accurate data based upon a review of the fifteen that do have such data. After adjusting for any MOD IV property tax map error, the study concluded the vacant land analysis used by COAH was in "error" by 14.9 percent. TTa343. At TTb28, we pointed out this error was actually 16.2 percent. The error resulted in a significant overstatement of residential and non-residential build-out capacity. TTa343-344. The consultant advised COAH that the county prepared parcel data, subject to testing several other counties, could be used in combination with the 2002 DEP LU/LC mapping "to prepare a better estimate of development and thus vacant land in large areas of the state. . . ." TTa344. The comment speaks to the present analysis, not some future analysis.

B. The Pictures. One of our primary challenges to the methodology is that what was found to be vacant developable land is largely in error. COAH never validated the results of their consultant's model. We included 100 pictures showing typical examples of the ludicrous results of the COAH analysis.

TTa27-126, described at TTb29-34. COAH dismisses the argument claiming that the analysis relied on data which was not part of the record or considered by the agency. COAHb89, fn25.

Additionally, it is argued that "if" some of that land is not developable a municipality can seek an adjustment pursuant to N.J.A.C. 5:97-5.6. COAHb92.

First, the pictures were derived from two items in the record. We took the 2002 LU/LC imagery described extensively by COAH at COAHb15-16. We then overlaid, as a yellow transparency, the spatial data containing vacant developable land reported by COAH, described extensively at COAHb16-33. The fact that COAH chose not to verify their conclusions using information in the record does not preclude our analysis of the agency data.

Second, the magnitude of error in the vacant land analysis is so pervasive as to defy correction through individual adjustments. Moreover, the adjustment process in the regulations is illusory. The vacant land and build-out forms the basis for municipal projections of growth and allocation of need. The adjustment process in N.J.A.C. 5:97-5.6 is not designed as a means to challenge or correct flaws in the vacant land analysis. Instead, it is a process by which COAH determines if the assigned growth projections can be met by increasing zoning yield on whatever vacant land actually does

exist. It has nothing to do with adjusting the vacant land found to exist by COAH, and is designed to force compliance with the projections no matter the degree of error in COAH's vacant land analysis.

To better understand COAH's approach, we provide further comment. In a Metropolitan Planning Area under the State Plan (PA1), a municipality seeking an adjustment is required to take all non-residential land, and assume job production as a result of future development of 80 jobs per acre. N.J.A.C. 5:97-5.6(e)(2). Taking COAH's job generator from N.J.A.C. 5:97, Appendix A, and considering retail space at 1.7 jobs per 1,000 square feet, we calculate one would need 47,000 square feet of floor space, and 50,760 square feet of ancillary parking area, exclusive of stormwater facilities, walkways, setbacks, buffers, landscaping, and driveways, all on one acre, to achieve 80 COAH jobs. After every remaining parcel is planned to be developed to such an extent, if the result is less than 90 percent of the projection assigned, the municipality "may" obtain an adjustment. N.J.A.C. 5:97-5.6(f). But then, N.J.A.C. 5:97-5.7 says the municipality may still be required to provide methods for recapturing any reduction in the

projected growth share.¹ The adjustment process provides no real relief from errors in the vacant land analysis, and violates the requirement that the Mount Laurel doctrine and sound land use planning remain compatible. South Burlington Cty. NAACP v. Mount Laurel Tp., 92 N.J. 240, fn25 (1983). While the Mount Laurel doctrine does not require forests or small towns to be paved over (Id. at 219), the adjustment process demands just that. COAH needs to create an adjustment process in which errors from what COAH calls vacant land, can be addressed.

Third, COAH attempts to downplay the effect the errors in the vacant land analysis have on the methodology, stating it does not effect Statewide need, and there is plenty of land. We agree that vacant land was not used, directly, to calculate Statewide need. The calculation of need was based upon population in 1999, and projected housing units in 2018, both converted to households. 40 N.J.R. 6067. The delivery of the projected housing units, however, is dependent upon there being sufficient vacant developable land to support that growth, and in that way vacant land and need are related. The Court in In the Matter of the Adoption of N.J.A.C. 5:94, 390 N.J.Super. 1, 53-55 (App. Div. 2007), instructed COAH to make certain there was sufficient vacant developable land to support Statewide and

¹ The flip side of the issue is raised by Fair Share Housing Center. FSHCb43.

regional need before implementing growth share. Due to the massive errors in the vacant land analysis, COAH has no idea how much vacant land actually exists, let alone whether or not it is developable.

POINT III

COAH OVERSTATES PROJECTED HOUSING GROWTH,
JOB GROWTH AND STATEWIDE NEED.

COAH relied upon 2006 projections from the New Jersey Department of Labor and Workforce Development (NJLWD) to project population and housing growth, job growth, and ultimately Statewide need. The Twenty Towns challenged the use of those projections, because NJLWD issued revised projections in 2008. We pointed out that if COAH used the revised NJLWD projections, which superseded the ones used by COAH, the projected housing in 2018 would have been reduced by 33 percent, the employment projection in 2018 would have been reduced by 40 percent, and Projected Need reduced by 21 percent. See TTb42 for population and housing, TTb46-50 for employment, and TTb54-55 for Statewide need.

COAH does not deny it was aware of the revised projections, nor does it dispute the Twenty Towns' numbers. COAH actually acknowledged it was aware of the NJLWD revised

projections. COAHb106. The defense appears to be that such data was not available when COAH "proposed" its Third Round rules. COAHb89, fn25, l 10. It is clear that COAH was not aware of the revised projections when it proposed regulations on January 22, 2008. 40 N.J.R. 237. COAH says the projections were revised after the June 2, 2008 adoption (COAHb106), but does not assert it was unaware of the revised projections when it proposed amendments on June 16, 2008. The revised projections were published in June 2008. TTa403-420. The revised employment projections were completed in April 2008. TTa425. COAH's consultants indicated they were in close contact with NJLWD researchers throughout the process. All indications are that COAH knew of the revised projections when the Rule amendments were proposed on June 16, 2008.

The revised NJLWD projections have significant impact upon the methodology. COAH renders meaningless the comment and response requirements of the Administrative Procedures Act. The attitude is that once the agency proposes a regulation, it will not deviate from its course no matter how wrong. It is this attitude which caused the Court, in In re Township of Southampton, supra, to criticize the agency. As soon as COAH learned of the NJLWD revised projections, the growth projections and Statewide need should have been revised accordingly. In

view of the critically important role the growth projections and calculations of Statewide need play in the implementation of the Fair Housing Act, COAH should not have ignored the more current and reliable data. The regulations must be invalidated.²

POINT IV

FILTERING.

We argued that COAH arbitrarily and unreasonably reduced the filtering found by the consultant from 47,306 units down to 23,626 units, a reduction of 23,680 units. TTb56. In explaining the reasons behind the reduction, COAH says:

COAH elected to use only filtering that occurred in suburban communities so as not to concentrate low income households in the urban areas. COAHb39.

The explanation is irrational. Whether or not the units are credited against Statewide need, they will filter down in urban areas. By not crediting such filtered units against Statewide need, COAH is actually requiring urban areas to incur a greater affordable housing obligation than would otherwise result if the urban filtering was credited against Statewide need. The action

² Any revisions to the regulations should take into account the most current and reliable data. In this regard, NJLWD reported actual job growth between January 1, 2004 and December 31, 2007 to be 95,782. TTA429 and 435. NJLWD has recently reported that New Jersey lost 85,700 jobs in 2008, and another 32,400 in January and February.

achieves the exact opposite of COAH's stated intention. This Court should direct COAH to reduce Statewide need by 23,680 filtered units.

POINT V

CONTINUED USE OF JOB GENERATOR CALCULATIONS.

At TTb64 the Twenty Towns challenged the validity of COAH's job generator calculations contained in N.J.A.C. 5:97, Appendix D. We showed that by applying those calculations to square footage of non-residential development in the years 2004 to 2007, inclusive, the job generator calculations had no relation to reality.

Based upon certificates of occupancy issued Statewide in the various use groups, the job generator calculations, if accurate, would have resulted in the production of 196,199 jobs. NJLWD reports that actual jobs created in those four years totaled 95,782. See the chart at TTa457. When compared to reality, COAH's job generator calculations overstate employment by 51 percent. The Court was right to tell COAH to count actual jobs at the municipal level.

COAH does not dispute our numbers. Instead COAH goes through a long explanation trying to set forth why they continue

to use the job generator calculations. COAHb45. COAH reports that it could not find accurate data to support counting actual jobs at the local level, and as a result, "concluded that the most reliable method for counting job growth was through a modified square footage." COAHb46.

To the contrary, COAH never intended to abandon the job generator calculation approach, or to comply with the Court's direction on remand in this regard. A review of the consultant's contract indicates the consultant was charged with estimating the number of jobs generated for 1,000 square feet of newly constructed non-residential space, in order to determine municipal affordable housing obligations. TTa186. The consultant was not charged with exploring other alternatives, and COAH had no intention of deviating from the original course.

POINT VI

THERE ARE INADEQUATE COMPLIANCE MECHANISMS.

In Point V of the Twenty Towns' brief we advanced that it facially appears there are numerous compliance mechanisms in the regulations, but as applied by COAH, they are actually quite limited. TTb64. Among other points, we explained that inclusionary development has been rendered an ineffective compliance mechanism by virtue of the October 20, 2008 Rule

amendment. TTb67. This is so because increased density begets larger growth share obligations, and the growth share ratio of one among five is essentially equal to the 20 percent set aside.

COAH does not directly respond to the majority of our argument, but it does argue that inclusionary development is a viable compliance mechanism. COAHb24, fn32. The assertion is based on the regulation which allows up to a 25 percent set aside in inclusionary development. By way of example, if the municipality grants additional density of 100 units, it incurs a growth share obligation of 20 affordable units. If the municipality requires the permitted 25 percent set aside, it will net 5 affordable units above those required to satisfy the obligation created by the development itself. In other words, a municipality can gain 5 credits toward an underlying obligation by increasing density to permit 100 extra units. To net 20 credits one would need to permit 400 units, and to net 50 an additional 1,000 units would be required. COAH proves our point that inclusionary development has been rendered ineffective as a compliance mechanism.

POINT VII

THE REGULATIONS VIOLATE THE FAIR HOUSING ACT
BY IMPOSING FINANCIAL OBLIGATIONS ON
MUNICIPALITIES.

The Twenty Towns argued in Point VI of their brief

that COAH has violated the Fair Housing Act, N.J.S.A. 52:27D-311, by requiring municipalities and their taxpayers to fund affordable housing. TTb71-77. COAH responds that there are compliance mechanisms that do not require municipal funding, citing inclusionary development (discussed in Point VI, supra), and some other minor compliance mechanisms. COAHb124. COAH argues generally there are funding sources which may serve to avoid municipal expenditure of funds and the commensurate property tax impact. COAHb123-126. Municipalities, including Twenty Towns, argue the funding sources are not real, and those that are have little funding.

What is clear is that COAH does require a funding commitment from the general revenues of municipalities to fund most of the compliance mechanisms. TTb71-72. These provisions blatantly violate the prohibition in the Fair Housing Act. N.J.S.A. 52:27D-311. The Court needs to, at least, strike down N.J.A.C. 5:97-6.2(b)(3), 6.3(b)(2), 6.8(b)(4), 6.9(b)(5), 6.10(e)(8), 6.11(d)(8), and N.J.A.C. 5:96-11.8(b)(2). While it is permissible to require municipal funding from affordable housing trust funds, it is a violation of the Fair Housing Act to require property taxpayers, especially existing low and moderate income taxpayers, to pay for the cost of affordable housing.

We would go one step further. If COAH truly believes adequate funding sources exist, then the State should be required to provide the funding to municipalities to cover any shortfall in the cost of affordable housing compliance. Such an order would guarantee the protection afforded to municipal property taxpayers by N.J.S.A. 52:27D-311.

POINT VIII

THE REGULATIONS NEED TO BE REVERSED AND REMANDED TO THE AGENCY FOR FAILURE TO PROVIDE AN ADEQUATE ECONOMIC IMPACT STATEMENT.

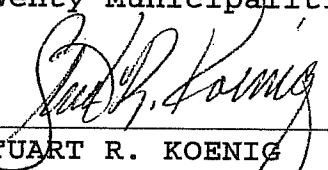
The Twenty Towns argued that COAH violated the Administrative Procedures Act, N.J.S.A. 52:14B-4(a)(2), and Rule 1:30-5.1(c)(3), in not preparing an economic impact statement that described the expected costs, revenues and other economic impact upon municipalities. Ttb75-76. COAH's only defense is that the Office of Administrative Law reviewed the economic impact statement and deemed it sufficient for publication. COAHb126, fn36.

COAH's defense is insufficient. The Twenty Towns did not challenge the promulgation of the regulations alleging there was no economic impact statement, or that it lacked clarity. They did so asserting what was contained in the statement was false. The Office of Administrative Law is charged with

reviewing the proposed rule to determine if it meets a "standard of clarity", including readability, notice, grammar, organization, phrasing and public understanding. N.J.S.A. 52:14B-4.1a. OAL would have no way of knowing there are economic impacts beyond the cost of professional fees, or that there are negative impacts when the agency says the impacts are positive. COAH admits in its brief, in discussing compliance mechanisms, that there are costs to municipalities beyond those described in the economic impact statement. COAHb125, fn33. The regulations need to be remanded to the agency, in the interest of justice, to allow COAH to prepare an economic impact statement that sets forth the expected costs, revenues and other impacts on municipalities. Texter v. Human Services Department, 88 N.J. 376, 383 (1982).

Respectfully submitted,

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