

ORDER ON EMERGENT APPLICATION

In re Plan for Abolition of
COAH

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-6301-10T4
MOTION NO. M-
BEFORE PART: F
JUDGE(S): FISHER
 NUGENT
 CARCHMAN

EMERGENT APPLICATION

FILED: 8/7/12 BY: Fair Housing Center

ANSWER(S) FILED: 8/9/12 BY: Attorney General

APPEARANCE ONLY:

ORDER

THIS MATTER HAVING BEEN DULY PRESENTED TO THE COURT, IT IS ON
THIS 10th DAY OF AUGUST, 2012, HEREBY ORDERED AS FOLLOWS:

EMERGENT APPLICATION
FOR

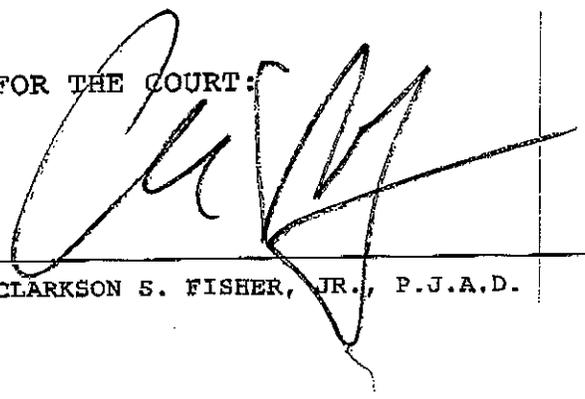
Motion for Enforcement of
Litigant's Rights

GRANTED DENIED OTHER
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SUPPLEMENTAL:

The motion is granted for the reasons set forth in the
attached per curiam opinion. Judge Nugent dissents and would
deny the motion for the reasons set forth in his attached
dissenting opinion.

FOR THE COURT:



CLARKSON S. FISHER, JR., P.J.A.D.

PER CURIAM

In this appeal, we considered whether the Governor was permitted by the Executive Reorganization Act (Reorganization Act), N.J.S.A. 52:14C-1 to -11, to abolish an independent agency created by the Legislature that is "in but not of" a department of the Executive Branch, and specifically determined "whether respondent Governor Chris Christie may, under the terms of the Reorganization Act, 'abolish' the Council on Affordable Housing (COAH), an independent agency created by the Fair Housing Act, N.J.S.A. 52:27D-301 to -329 (FHA), and transfer the duties, responsibilities and obligations of that agency to the sole authority of the Commissioner of the Department of Community Affairs (DCA)." Plan for Abolition of Council on Affordable Housing, 424 N.J. Super. 410, 412 (App. Div. 2012). We answered that question in the negative and concluded that "as an 'in but not of' agency, COAH is not subject to the Reorganization Act" and that the Governor's Reorganization Plan, in that regard, was invalid. Id. at 438. The Supreme Court has granted certification. Respondents' motion for a stay, however, was denied by this court and also by the Supreme Court. We, thus, retain jurisdiction to enter appropriate orders to ensure the enforcement of our judgment. See R. 2:9-1(a).

The essential consequence of our judgment was to reinstate the COAH Board to its status prior to the adoption of the Governor's invalid Reorganization Plan. Appellant Fair Share Housing Center (FSHC) has moved for enforcement, asserting the failure of the respondents to comply with our March 8, 2012 judgment. Specifically, FSHC expresses concern with the fact that COAH staff -- not the COAH Board as it should now exist -- has sent form letters to 372 municipalities demanding turnover of over \$100,000,000 in affordable housing trust funds by August 13, 2012. We have found it appropriate, in light of the date set for the turnover, to consider this motion on an expedited basis and directed a response from the Attorney General that was received on August 9, 2012.

In response to the motion, the Attorney General argues on behalf of respondents that the power of a court to issue an order in aid of litigant's rights is limited to the remediation of a "specific and unequivocal order." In that regard, the Attorney General contends that our March 8, 2012 judgment does not specifically refer to the demand for the turnover of the affordable housing trust funds and did not expressly state that such a turnover could not occur without the approval or direction of the restored COAH Board. We find no merit in this contention; our judgment, of course, does not refer to the action that COAH staff has since taken because it was not known at the time of our decision that the COAH staff would take that

action. That we were not prescient does not alter or limit our power to enforce a judgment pursuant to Rule 2:9-1(a).

The Attorney General also argues that the motion should be denied because respondents are in compliance with an order entered by another panel of this court in In re Failure of Council on Affordable Housing to Adopt Trust Fund Commitment Regulations, Docket No. A-5257-11 (App. Div. July 13, 2012). The panel in that case considered FSHC's application for a preliminary injunction to halt the transfer of the affordable housing trust funds because of respondents' failure to adopt regulations to effect the FHA, thereby, in FSHC's view, violating basic principles of due process. The panel denied the application but, in its order, expressed its concern "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." As a result, the panel held, among other things, 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." The Attorney General informs us that letters were sent to the municipalities on July 24, 2012, in accordance with the limitations set forth in the panel's July 13, 2012 order. We find that the ostensible compliance with the July 13, 2012 order -- FSHC has moved in this other matter for aid in litigant's rights -- does not negate our consideration of the broader question of whether COAH staff could act without approval of the COAH Board as it should be constituted in accordance with our March 8, 2012 judgment.

We, thus, grant FSHC's motion to enforce litigant's rights. Specifically, we hereby restrain COAH staff from demanding or receiving affordable housing trust funds, which have been demanded by COAH staff to be turned over by August 13, 2012. The COAH's staff's request of those funds is ultra vires. The authorization for such a turnover must come from the COAH Board. See N.J.S.A. 52:27D-329.2. The COAH Board, as it must now be constituted to comply with our March 8, 2012 judgment, has not met and has not authorized the demand imposed on the municipalities by the letters sent at the direction of the Acting Executive Director of COAH on July 24, 2012. Accordingly, the Acting Executive Director and COAH staff are hereby enjoined from seeking a turnover from any municipality of affordable housing trust funds, and any funds that have been turned over shall be returned to the municipality forthwith.

NUGENT, J.A.D., dissenting.

I would deny this motion. On the record before us, I cannot conclude that Fair Share Housing Center (FSHC) has demonstrated that the State ignored our March 8, 2012 decision in Plan for Abolition of Council, 424 N.J. Super. 410 (App. Div.), certif. granted, ___ N.J. ___, ___ (2012); a proposition central to its argument and critical to the relief it seeks.

In Plan for Abolition of Council, we held "that, as an 'in but not of' agency, the [the Council on Affordable Housing (COAH)] is not subject to the [Executive Reorganization Act, N.J.S.A. 52:14C-1 to -11,]" and "that the power to abolish COAH rests exclusively with the Legislature." Id at 438. We concluded that Reorganization Plan 001-2011, abolishing COAH, was invalid. Ibid. FSHC must demonstrate that the State wilfully failed to comply with our decision in order to obtain relief under Rule 1:10-3, which authorizes a court to provide relief to a litigant. See Hynes v. Clarke, 297 N.J. Super. 44, 57 (App. Div. 1997). See also Abbott v. Burke, 170 N.J. 537, 565 (2002) (LaVecchia, J., concurring). In an effort to satisfy that burden, FSHC essentially contends that COAH is not operating. Even if its proofs on the issue of COAH's existence and operation are competent, which is questionable, they are contradicted by the certification of COAH's Executive Director. The contradictory evidence does not establish an intentional disregard of our decision such that injunctive relief is warranted.

The primary relief FSHC seeks is preventing the State from effectuating the transfer of affordable housing trust funds from municipalities to the State. FSHC was unable to demonstrate its right to injunctive relief before another panel of this court. In re Failure of Council on Affordable Housing to Adopt Trust Fund Commitment Regulations, No. A-5257-11 (App. Div. July 13, 2012). The record before us does not establish FSHC's right to injunctive relief ancillary to an enforcement motion that does not establish an intentional disregard of our decision in Plan for Abolition of Council.