

This Order has been prepared by the Court

IN THE MATTER OF THE
APPLICATION
OF THE BOROUGH OF EAST
RUTHERFORD

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION-BERGEN COUNTY
DOCKET NO. BER-L-5925-15

Civil Action

ORDER

THIS MATTER having been opened to the court by the Borough of East Rutherford on notice to all interested parties as identified by the Supreme Court in its opinion In the Matter of the Adoption of N.J.A.C. 5:96 and 5:97 by the New Jersey Council on Affordable Housing, 221 N.J. 1 (2015), and the court having considered the arguments of counsel and having determined for the reasons set forth in the attached rider that the Borough of East Rutherford has demonstrated through prima facie documentation its good faith efforts to comply with its fair share obligation and for good cause

IT IS on this 26th day of August, 2015,

ORDERED that the Borough of East Rutherford is granted temporary immunity from exclusionary zoning suits for a period of five (5) months commencing from the date of this order; and

IT IS FURTHER ORDERED as follows:

1. By separate order the court will appoint a special master whose responsibilities and duties will be identified in the court's order.
2. The Borough of East Rutherford is directed to diligently pursue completion and submission to this court of a (supplemental) housing element and affordable housing plan satisfying the municipality's

constitutional obligation to provide for low and moderate income housing in its zoning code.

3. A case management/status conference is scheduled for

October 29, 2015 at 9 A.M.; and

IT IS FURTHER ORDERED that copies of this order shall be served by the plaintiff on all interested parties.


WILLIAM C. MEEHAN, J.S.C., retired on
recall

IN THE MATTER OF THE APPLICATION OF THE BOROUGH OF EAST
RUTHERFORD

DOCKET No. BER-L-5925-15

RIDER TO ORDER DATED August 26, 2015

Law

Immunity from Exclusionary Zoning Actions

The judiciary has resumed jurisdiction over a municipality's compliance with its constitutional obligation to create a realistic opportunity to produce a fair share of affordable housing. In re Adoption of N.J.A.C. 5:96 and 5:97 by N.J. Council on Affordable Housing, 221 N.J. 1, 6 (2015).¹ The Court outlined a procedure for those municipalities that had embraced the COAH process in good faith by participating in the Third Round process ("participating") or received Third Round substantive certification ("sub. cert."), but were hindered by the agency's inability to function. Id. at 5-6. Municipalities that did not participate ("nonparticipating towns" or "recalcitrant towns") are excluded from the process. Ibid.

First, a participating or sub. cert. municipality had thirty days to file a declaratory judgment action. Ibid.² Second, the municipality could bring a motion for temporary immunity, preventing exclusionary zoning actions. Mt. Laurel IV, supra, 221 N.J. at 27-28 (citing N.J.S.A. 52:27D-316). The immunity could last up to five months, "provided that they prepared and filed a housing element and fair share plan within [the] five month[] [period]." Ibid.

¹ Hereinafter referred to as Mt. Laurel IV.

² "If a town elects to wait until its affordable housing plan is challenged for constitutional compliance, immunity requests covering any period of time during the court's review shall be assessed on an individualized basis." Mt. Laurel IV, supra, 221 N.J. at 28.

A participating or sub. cert. municipality that devised a housing element and took action towards implementing the plan, such as adopting ordinances, receives a more favorable review of its request for immunity than “a town that merely submitted a resolution of participation and took few or perhaps no further steps toward preparation of a formal plan demonstrating its constitutional compliance.” Id. at 27–28.

The Supreme Court recognized “that not all towns that had only ‘participating’ status may have well-developed plans to submit to the court initially. A town in such circumstances poses a difficult challenge for a reviewing court, particularly when determining whether to provide some initial period of immunity while the town’s compliance with affordable housing obligations is addressed.” Id. at 27. To determine whether to grant a participating town temporary immunity

while responding to a constitutional compliance action, the court’s individualized assessment should evaluate the extent of the obligation and the steps, if any, taken toward compliance with that obligation. In connection with that, the factors that may be relevant, in addition to assessing current conditions within the community, include whether a housing element has been adopted, any activity that has occurred in the town affecting need, and progress in satisfying past obligations.

[Mt. Laurel IV, supra, 221 N.J. at 28.]

Thus, prima facie documentation of a participating municipality’s good faith efforts to comply with its fair share obligation, which will entitle it to temporary immunity, include adoption of a housing element, adoption of relevant ordinances, evidence of activity that has occurred affecting need, and the municipality’s progress satisfying past and projected need. See ibid.

Immunity, though, “should not continue for an undefined period of time; rather, the trial court's orders in furtherance of establishing municipal affordable housing obligations and compliance should include a brief, finite period of continued immunity, allowing a reasonable time as determined by the court for the municipality to achieve compliance.” Mt. Laurel IV, supra, 221 N.J. at 28. Once granted, the court has discretion to remove the immunity “if a particular town abuses the process for obtaining a judicial declaration of constitutional compliance. Review of immunity orders therefore should occur with periodic regularity and on notice.” Id. at 26. It is “[o]nly after a court has had the opportunity to fully address constitutional compliance and has found constitutional compliance wanting shall it permit exclusionary zoning actions and any builder's remedy to proceed.” Id. at 29.

Facts

In 2003, Tomu Development, Co. filed a builders’ remedy suit against the Borough of East Rutherford and Carlstadt, their Planning Boards and the New Jersey Meadowlands Commission. On November 28, 2005, the Honorable Jonathon Harris, J.S.C. awarded Tomu a builder’s remedy. Judge Harris also appointed Robert T. Regan, Esq. as the Mount Laurel Compliance Monitor and required him to file a petition with COAH for substantive certification of the Borough’s HEFSP. On June 8, 2008, East Rutherford, under the direction of Mr. Regan, filed its petition for substantive certification with COAH.

The Court decided in *Tomu* that East Rutherford’s affordable housing obligation under the second round rules was 34 indigenous need units and 70 new construction units. A builder’s remedy was awarded to Tomu, which permitted 360 market rate units

and 60 affordable units in the Borough. Since the Monitor's directive, East Rutherford has complied with its affordable housing obligation.

Analysis

Immunity

Based upon a preliminary review of the Township's submissions, as detailed above, the Court is satisfied that East Rutherford has made a good faith attempt to satisfy its affordable housing obligations.

Therefore, East Rutherford's motion for temporary immunity from exclusionary zoning actions is granted, on the condition that it prepares and files its housing element and fair share plan within five (5) months of the date of the order this rider accompanies.