

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-6430-08T3

IN RE ADOPTION OF MODULE 3
HOUSING ELEMENT AND FAIR
SHARE PLAN INSTRUCTIONS BY
THE EXECUTIVE DIRECTOR OF
THE HIGHLANDS COUNCIL.

Argued April 12, 2011 - Decided August 15, 2011

Before Judges Yannotti, Skillman and Roe.

On appeal from the Highlands Water
Protection and Planning Council.

Kevin D. Walsh argued the cause for
appellant Fair Share Housing Center (Fair
Share Housing Center, attorneys; Mr. Walsh,
on the briefs).

Barbara L. Conklin, Deputy Attorney General,
argued the cause for respondent New Jersey
Highlands Water Protection and Planning
Council (Paula T. Dow, Attorney General,
attorney; Melissa H. Raksa, Assistant
Attorney General, of counsel; Ms. Conklin,
on the brief).

PER CURIAM

Appellant Fair Share Housing Center, a public interest
organization that acts as an advocate for affordable housing
policies, appeals from an August 20, 2009 email sent by the
Executive Director of the Highlands Water Protection and

Planning Council (Highlands Council) to the mayor and other officials in the eighty-eight municipalities in the Highlands Region with attached instructions for preparation of the documents required for those municipalities to participate in the "Plan Conformance grant program Module 3-Housing Element and Fair Share Plan." This appeal is ancillary to Fair Share's appeal in In re Highlands Master Plan, Executive Order 114, Memorandum of Understanding between the Highlands Council and the Council on Affordable Housing, November 12, 2008 Resolution Extending Deadlines for 88 Municipalities, August 12, 2009 Resolution Extending Deadlines, and Adoption of Guidance for Highlands Municipalities that Conform to the Highlands Regional Master Plan, (In re Highlands Master Plan), Docket No. A-1026-08T1, challenging various actions of the Highlands Council, Council on Affordable Housing (COAH), and Governor, in which we are filing our opinion simultaneously with this opinion.

The challenged email stated:

As promised in my email of 8/12 attached are the Instructions for the Plan Conformance grant program Module 3-Housing Element and Fair Share Plan Instructions. These instructions provide you with guidance and timelines for submission of documents under this grant program. This document is specific about what is to be submitted to the Highlands Council and the dates by which that information is due. We have coordinated this with COAH in accordance with their Resolutions adopted on 8/12.

The instructions attached to the email were entitled:
"Module 3-Housing Element and Fair Share Plan Instructions."

This document stated in part:

On August 12, 2009, COAH adopted two resolutions providing further guidance to Highlands municipalities that are under COAH's jurisdiction. The first resolution granted a further six month extension for the submission of petition for substantive certification to June 8, 2010 to those municipalities that had previously received an extension through December 8, 2009. The second resolution, and guidance for same, approved the granting of a waiver to provide for revised growth projections based on the constraints of the RMP. . . .

The Housing Element and Fair Share Plan documents must be provided to the Highlands Council for review prior to adoption by the municipality, as a condition of the Plan Conformance Grant to ensure consistency with the RMP. After review by the Highlands Council, the Housing Element and Fair Share Plan must be submitted, as required by the RMP, to either the Council on Affordable Housing (COAH) or the Law Division of the Superior Court consistent with the Fair Housing Act. Municipalities that are currently under COAH's jurisdiction and received an extension until June 8, 2010 to prepare a Housing Element and Fair Share Plan must submit the Housing Element and Fair Share Plan to COAH to remain under COAH jurisdiction.

The August 12, 2009 COAH resolutions referred to in this quotation were attached to the Module 3 instructions as appendices. The more significant of those resolutions, which

authorized municipalities in the Highlands Region to use Highlands Regional Master Plan (RMP) "build-out" growth projections, instead of the growth projections in COAH's revised third round rules, has been invalidated by our opinion in the companion appeal being filed today. In re Highlands Master Plan, supra.

This appeal has two aspects. First, Fair Share argues that the part of the Module 3 document that prescribed the conditions for Highlands Region municipalities to establish eligibility for up to \$100,000 for reimbursement of reasonable expenses incurred in preparing petitions for "Plan Conformance" with the RMP, which must include "Housing Element and Fair Share Plan documents," is invalid because it was not adopted in accordance with the APA and exceeded the powers delegated to the Executive Director. Second, Fair Share argues that the Module 3 instructions improperly modified the affordable housing obligations of Highlands Region municipalities established by COAH in its revised third round rules.

The first aspect of Fair Share's appeal is moot. The Module 3 instructions were issued on August 20, 2009. The grant program was for reimbursement of the expenses of plan conformance documents that were required to be filed no later than June 10, 2010, which is now more than a year ago. There is

no indication that any of the funds allocated for this purpose are unexpended or that the grant program has been continued. Therefore, this aspect of Fair Share's appeal is moot. Mid-Atlantic Solar Energy Indus. Ass'n v. Christie, 418 N.J. Super. 499, 507-08 (App. Div.), certif. denied, ___ N.J. ___ (2011).

The second aspect of Fair Share's appeal is clearly without merit. R. 2:11-3(e)(1)(E). Fair Share is simply wrong in asserting that the Executive Director's Module 3 instructions in some way modified the affordable housing obligations of Highlands Region municipalities established by COAH's revised third round rules. Rather, it was COAH itself that modified those obligations through the adoption of its August 12, 2009 resolution and accompanying "Guidance" document. The Executive Director's email and the Module 3 documents simply notified Highlands Region municipalities of this action by COAH and other related actions by the Council, and attached copies.

We have now invalidated the August 19, 2009 resolution and "Guidance" document. Consequently, some of the information contained in the Module 3 instructions is no longer accurate, and the Executive Director will presumably advise the Highlands Region municipalities of this fact. However, this does not require us to declare her email or accompanying Module 3 documents invalid.

Accordingly, we dismiss as moot the part of Fair Share's appeal that challenged the Highlands Council's grant program for the expenses Highlands municipalities incurred in the preparation of plan conformance documents. We affirm the Executive Director's actions in all other aspects.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.



CLERK OF THE APPELLATE DIVISION