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SUPREME COURT OF NEW JERSEY

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

Supreme Court Docket
No. 67,126

On petition for certification to:

SUPERIOR COURT
APPELLATE DIVISION

Docket No. A-5451-07T3

(Consolidated at the Appellate Division under Lead Docket No. A-5382-07T3)
CIVIL ACTION

On Appeal from the Council on Affordable Housing

BRIEF AND APPENDIX OF FAIR SHARE HOUSING CENTER IN OPPOSITION TO THE COUNCIL ON AFFORDABLE HOUSING'S EMERGENT MOTION TO STAY

Brief Table of Contents

I. Introduction 1

II. Facts and Procedural History.......................... 3

A. Adoption of regulations and the Third Round decisions 3

B. Proceedings on remand from 2010 Appellate Division decision 6

C. The Supreme Court's September 26, 2013 decision and remand proceedings 7

D. March 7, 2014 Appellate Division Order 9

III. Legal Argument 10

A. The Appellate Division's order was justified given the record before the Court, and thus the likelihood of success on the merits is low 10

1. The Appellate Division correctly held that courts have the power to enforce the Constitution and statutes 10

2. The APA's deadline can be met, and, where necessary, the Appellate Division has indicated it will modify its order to ensure compliance with the APA 15

B. COAH's own inexplicable and extensive delay in acting does not create irreparable harm that justifies extraordinary relief by this Court. The equities favor denying a stay. 17

C. COAH's motion to stay and for an extension are unauthorized and procedurally improper. The Appellate Division properly has jurisdiction over motions to enforce and motions to modify its order to adopt rules within five months 20

D. The Court should reject COAH's motion for an extension and affirm the more moderate extension granted by the Appellate Division 24

IV. Conclusion 25

Table of Authorities

Abbott v. Burke, 149 N.J. 145 (1997) 23

Abbott v. Burke, 172 N.J. 294 (2002) 23

Abbott v. Burke, 177 N.J. 596 (2003) 23

Asbury Park Bd. Of Educ. V. New Jersey Dep't of Educ. 369 N.J.Super. 481 (App. Div. 2004) 23

Caporusso v. N.J. Dept. of Health, 434 N.J. Super. 88 (App. Div. 2014) 11

D.E.G. v. Tp. of Fairfield, 198 N.J. 242 (2009) 22

In re Adoption of N.J.A.C. 5:94 and 5:95, 390 N.J. Super. 1 (App.Div. 2007) 4

In re Adoption of N.J.A.C. 5:96 and 5:97, 416 N.J.Super. 462 (App.Div. 2010) 5

In re Adoption of N.J.A.C. 5:96 and 5:97, 215 N.J. 578 (2013) 7, 21, 24

In re Failure to Transmit Proposed Dental Fee Schedule to OAL, 336 N.J.Super. 253 (App. Div. 2011) 12

In re Petition of Howell Tp., 371 N.J.Super. 167 (App.Div. (App. Div. 2004), certif. denied, 182 N.J. 139 11

In re Plan for the Abolition of the Council on Affordable Housing, 424 N.J.Super. 410 (App. Div. 2012), aff'd 214 N.J. 444, (2013) 2,13,21

In re Six Month Extension, 372 N.J.Super. 61 (App.Div. 2004) 4

McKenzie v. Corzine, 396 N.J.Super. 405 (App.Div. 2007) 18

Miraph Ent. Inc. v. Bd. Of Alco. Bev., Paterson, 150 N.J.Super. 504 (1977) 25

Nazare v. Bd. Of Embalmers and Funeral Directors, 4 N.J. Super. 567 (Ch. Div. 1949) 18

Southern Burlington County N.A.A.C.P. v. Tp. of Mount Laurel, 92 N.J. 158 (1983) .... passim

N.J.S.A. 52:27D-301 to 329.19 .... passim

N.J.S.A. 52:27D-307(b) 3

35 N.J.R. 4636(a) 4
35 N.J.R. 4700(a) 4
36 N.J.R. 5748(a) 4
36 N.J.R. 5895(a) 4
40 N.J.R. 2690(a) 4-5
40 N.J.R. 3370(a) 5
40 N.J.R. 5965(a) 5

R. 1:4-4(b) 22
R. 4:50-1 22-23

Abbreviations for Citations to Appendix

New Jersey Council on Affordable Housing's Brief Supporting Emergent Motion to Stay .... Ab

New Jersey Council on Affordable Housing's Appendix Supporting Emergent Motion to Stay........................ Aa

Fair Share Housing Center Appendix Supporting Brief in Opposition to NJ Council on Affordable Housing's Motion to Stay .... Ra

Appendix Table of Contents

December 8, 2010 New Jersey Council on Affordable Housing Public Meeting Agenda 1-3

Excerpts of December 8, 2010 Transcript of New Jersey Council on Affordable Housing public meeting.............. 4-24

January 14, 2011 Appellate Division Order on Motion to Appoint Special Master Or in the Alternative Require Bi-Weekly Reporting 25-26

April 12, 2011 Appellate Division Order Staying implementation of the court's ruling in In re N.J.A.C. 5:96 and 5:97 416 N.J. Super. 462 (App.Div.2010) 27

January 14, 2011 Supreme Court Order staying Appellate Division decision In re N.J.A.C. 5:96 and 5:97 416 N.J. Super. 462 28

(App.Div.2010) ....

November 6, 2013 New Jersey Council on Affordable Housing response to Fair Share Housing Center OPRA request 29-30

November 8, 2013 New Jersey Council on Affordable Housing response to Fair Share Housing Center OPRA request 31-32

May 1, 2013 New Jersey Council on Affordable Housing Public Meeting Agenda 33-36

May 1, 2013 New Jersey Council on Affordable Housing Resolution Concerning Expenditures and Commitment of Municipal Affordable Housing Trust Funds 37-41

May 13, 2013 Appellate Division Order Staying the Seizure of Trust Funds 42

May 28, 2013 Supreme Court Order Affirming Appellate Division's Stay of the Seizure of Trust Funds 43-44

Excerpts of May 1, 2013 Transcript of New Jersey Council on Affordable Housing public meeting 45-48

Office of Administrative Law Rule Publication Schedule, available at http://www.state.nj.us/oal/rules/schedule/ (last visited December 12, 2013) 49-51

Certification of David N. Kinsey, PhD, FAICP, PP 52-69

Certification of Kevin D. Walsh, Esq...................... 70-72

Excerpt of December 23, 2014 New Jersey State League of Municipalities Brief in Opposition to FSHC's Motion to Enforce Litigant's Rights............. 73-75

Excerpt of January 3, 2014 Borough of Atlantic Highlands Brief in Opposition to FSHC's Motion to Enforce Litigant's Rights 76-78

March 7, 2014 Star Ledger article, "NJ Court orders affordable housing agency to get back to work" 79-81

I. Introduction

The judiciary has the power to order Executive Branch agencies to comply with the Constitution and statutes. At its core, the State's application for a stay before this Court attacks this basic principle. The State argues that courts may not require specific steps to enforce an order when a court has found that an agency has flagrantly ignored that order with no justification. Court opinions, in this view, would be unenforceable.

The only alternative the State offers is indefinite delay. The State has refused to offer any date certain by which COAH will adopt rules, even though the Appellate Division has repeatedly found, and this Court has affirmed, that time is of the essence, a decision that the State now improperly and collaterally asks the Court to reconsider. Over thirty years ago, this Court recognized in Mount Laurel II that constitutional rights "seem hollow indeed if the best we can do. . . is to issue orders, judgments and injunctions that assure never-ending litigation but fail to assure constitutional vindication." Southern Burlington NAACP v. Tp. of Mount Laurel, 92 N.J. 158, 289-90 (1983)(citation omitted) ("Mount Laurel II"). Although 14 years have passed without constitutionally sound third round regulations from COAH, and while *10 years ago* the Appellate Division characterized the delay as "dramatic and inexplicable" and "frustrat[ing] to the public policies underlying the Fair Housing Act, In re Six Month

Extension, 372 N.J. Super. 61, 95-96 (App. Div. 2004), certif. denied, 182 N.J. 630 (2005), the State continues to argue that it may delay as long as it wishes, without any consequences.

The Appellate Division's remedy is modest in light of the extraordinary record before it. The Appellate Division provided COAH with another two and a half months - half again as much time as it originally received - to carry out a task that its counsel represented to this Court could be carried out within 30 days, while rejecting the special master that Fair Share Housing Center (FSHC) requested. The Appellate Division provided that additional time despite having formally found that COAH had done nothing to comply with the order and provided no justification for having missed the deadline.

As the Appellate Division recognized, COAH has failed to meet even once since this Court's September 26, 2013 decision, let alone authorized either the motion for an extension or the present stay motion before this Court. In violation of this Court's decision in In re Plan for the Abolition of the Council on Affordable Housing, 424 N.J.Super. 410 (App. Div. 2012), aff'd 214 N.J. 444, (2013), the State has acted as if COAH's Board does not exist. After the Appellate Division's decision, a COAH Board member told the Star-Ledger he had asked the State to convene a meeting after this Court's September ruling, but received no response, stating "I got no communication whatsoever" about the State's plans.

The timeframes required under the Administrative Procedure Act (APA), so carefully laid out in the State's motion for a stay, would have allowed the State to issue regulations during the five-month period following the September 26, 2013 affirmance by this Court. Yet COAH made no attempt to meet that court-ordered deadline by proposing regulations, receiving and responding to comments, and issuing final rules during the period it was given, and now objects that it is the Appellate Division's order, rather than its own recalcitrance, that creates conflict with the APA.

Because the record before the Appellate Division more than justified its order, the State does not have a likelihood of success on the merits. The equities also favor denying the stay because the State has created the hardship it now claims and the impact on low- and moderate-income families, seniors, and people with special needs is significant. Moreover, the State cannot show irreparable harm from an order requiring COAH to carry out its core statutory function and obey a court decision. As such, the Court should deny the State's request for a stay.

II. Facts and Procedural History[1]

A. Adoption of regulations and the Third Round decisions.

COAH is required to adopt regulations by the Fair Housing Act of 1985, N.J.S.A. 52:27D-307(b), to implement the state's constitutional Mount Laurel obligations addressing the housing

[1] The facts and procedural history are combined because they are intertwined.

needs of low- and moderate-income households. Mount Laurel II, supra, 92 N.J. 158. The Third Round originally was due to begin when the Second Round ended in 1999. In re Adoption of N.J.A.C. 5:94 and 5:95, 390 N.J. Super. 1, 11 (App. Div. 2007). When the Second Round concluded, however, COAH had not yet proposed the Third Round regulations. COAH first proposed Third Round substantive and procedural rules in October 2003. 35 N.J.R. 4636(a); 35 N.J.R. 4700(a). The Appellate Division found COAH's delays during this period to be "dramatic and inexplicable," noting that "[t]he public policies underlying the FHA and the Mount Laurel cases have, quite obviously, been frustrated by inaction." In Re Six Month Extension, supra, 372 N.J. Super. at 95-96.

After a reproposal in August 2004, COAH ultimately adopted the first set of Third Round regulations on December 20, 2004, 36 N.J.R. 5748(a); 36 N.J.R. 5895(a). On January 25, 2007, in response to numerous appeals, the Appellate Division found that the regulations violated the Mount Laurel doctrine and the FHA. In re 5:94 and 5:95, supra, 390 N.J. Super. at 32. Noting that "[t]ime . . . is critical," the Appellate Division ordered COAH to complete rulemaking on remand "within six months," id. at 88. The panel declined to appoint a special master. Id. at 87.

COAH did not meet the July 25, 2007 deadline set for it and repeatedly moved for, and received, extensions. In response, FSHC

and other appellants persisted in their requests for a special master, which were denied.

On May 6, 2008, COAH adopted Third Round regulations for publication in the June 2, 2008 New Jersey Register, 40 N.J.R. 2690(a), thus formally meeting the latest deadline set for it. COAH, however, immediately proposed amended regulations, 40 N.J.R. 3370(a)(June 16, 2008), effectively again extending the deadline for rulemaking without requesting an extension. On September 22, 2008, COAH adopted the amended regulations. 40 N.J.R. 5965(a). These regulations were again challenged by numerous parties.

On October 8, 2010, the Appellate Division invalidated the revised Third Round regulations. In re N.J.A.C. 5:96 and 5:97, 416 N.J.Super. 462, 511-12 (App. Div.2010). Noting "that more than ten years have now elapsed since expiration of the second round rules," the Appellate Division remanded the matter to COAH with directions that it adopt regulations within five months. Ibid. The decision provided for a "straightforward" remedy: "determine prospective need by means of a methodology similar to the methodologies used in the prior round rules." Id. at 511. The Appellate Division rejected requests to appoint a special master, finding that "COAH should be able to comply with this mandate within five months without the assistance of a master or an army of outside consultants." Ibid. The panel made clear that rules were to be adopted, not just proposed, within five months. Ibid.

B. Proceedings on remand from 2010 Appellate Division decision.

Following the Appellate Division's October 8, 2010 decision, COAH made little, if any, evident progress. COAH's October and November 2010 meetings were cancelled. COAH held a meeting on December 8, 2010, but there were no decisions made regarding proceeding with the remand. Ra1.

On December 17, 2010, in view of the failure of COAH to take any steps to comply with the Appellate Division's order to adopt rules within five months, FSHC moved for a special master and to require biweekly reporting. COAH responded to that motion by arguing that it should not have to comply with the deadline because a motion to stay was pending. The Appellate Division partly granted FSHC's motion on January 14, 2011, writing:

> The mere pendency of a motion for stay to the Supreme Court does not provide justification for COAH's failure to comply with this court's order of October 8, 2010 requiring COAH to adopt revised third round regulations within five months. Therefore, COAH is directed to immediately comply with that order. . . The court defers consideration of any other relief, including appointment of a master or other relief in aid of litigant's rights, pending receipt of that first report.
>
> [Ra25.]

The Appellate Division subsequently stayed that order on April 12, 2011, Ra27, following the Supreme Court's January 14, 2011 order staying the Appellate Division's directive to adopt rules within

five months, Ra28 and the Court's March 29, 2011 grant of multiple petitions for certification.

C. The Supreme Court's September 26, 2013 decision and remand proceedings.

The Supreme Court heard oral argument on November 14, 2012. At argument, COAH through counsel advised the Court that it anticipated it would take 30 days to prepare revised Third Round regulations if required to do so pursuant to the Appellate Division's order. Ra70-71.

The Court affirmed the Appellate Division's decision on September 26, 2013. The Court held that a remedy was needed "to eliminate the limbo in which municipalities, New Jersey citizens, developers, and affordable housing interest groups have lived for too long." In re N.J.A.C. 5:96 and 5:97, 215 N.J. 578, 620 (2013). The Court "endorse[d] the Appellate Division's quick deadline for reimposing third-round obligations based on the previous rounds' method of allocating fair share obligations among municipalities." Ibid. The only portion of the decision that was modified by the Court involved the narrow issue of compliance bonuses. Id. at 619.

In the more than five months that have passed since that decision, COAH has taken no steps to comply with the remand. The COAH Board, which since 2011 has only met twice,[2] has not met since

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[2] In 2010, COAH had 11 meetings, approximately one each month. In 2011, COAH had one meeting, in March. In 2012, COAH had no meetings. In 2013, COAH had one meeting in 2013, in May, to

the Court's September 26, 2013 affirmance and had no meetings scheduled until ordered to meet this Wednesday by the Appellate Division. Ra46-47. COAH staff and the Deputy Attorney General that represents COAH refused to respond to a request by counsel for FSHC for an update regarding the status of the remand proceedings. Ra71.

In view of the failure of the COAH board to propose rules, on December 16, 2013, FSHC moved to enforce litigant's rights. In support, FSHC submitted the certification of David N. Kinsey, PhD, FAICP, PP, which shows that that the First and Second Round methodology is well established, relies on easily available data, and could be completed in 30 days. Ra52-69. COAH requested an extension to respond, and filed its brief in opposition on January 7, 2014. COAH did not address the merits of FSHC's argument, instead only arguing that the Appellate Division did not have jurisdiction.

With the five-month deadline of February 26, 2014 approaching, COAH still had not met or otherwise shown that it intended to comply with the remand order. In an email sent to counsel for FSHC at 5:02 p.m. on that day, the Deputy Attorney General, without authorization from the COAH Board, served papers requesting an extension of the five-month deadline from the Supreme Court. Aa20-55. Its motion, which was not supported by a

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attempt to seize up to $165 million in trust funds, which the Appellate Division and Supreme Court stayed. Ra42-44.

brief, included a certification by Department of Community Affairs Commissioner and COAH Chairman Richard Constable requesting an extension until June 2, 2014 to propose the rules. The certification does not address why the COAH board had not met; which parts of the Prior Round methodology were completed; and, most importantly, when rules would be adopted.

D. March 7, 2014 Appellate Division Order

On March 5, 2014, the Appellate Division heard oral argument on FSHC's motion to enforce litigant's rights. COAH had provided the Appellate Division with the Constable certification and, at oral argument, maintained that the Appellate Division did not have jurisdiction. COAH otherwise failed to address the merits of FSHC's argument and provided no justification for COAH's inaction.

By order dated March 7, 2014, the Appellate Division granted in part FSHC's motion to enforce litigant's rights. The panel found that "[t]o date, COAH has not done anything to comply with [the Appellate Division's] 'straight-forward' mandate" and that "COAH has failed to offer any plausible explanation for its failure to carry out this court's order." Aa8. It additionally held that "the record of inaction by COAH . . . has cast serious doubts about this agency's good faith in complying with this court's order." Aa10. The Appellate Division, while rejecting FSHC's request for a special master, issued a remedial order that required COAH to complete the rule proposal process, culminating

in a rule adoption on May 14, 2014, two and a half months after COAH had been required to adopt rules. Aa8.

COAH moved to stay the Appellate Division's order in an application filed that afternoon. The same three-judge panel denied the motion, stating that it has jurisdiction and any modifications to the March 7 order that may be necessary to comply with the APA, Aa15, can be requested by motion. On March 9, 2014 COAH filed a motion for an emergent stay in the Supreme Court.

III. Legal Argument

A. The Appellate Division's order was justified given the record before it, and thus the likelihood of success on the merits is low.

1. The Appellate Division correctly held that courts have the power to enforce the Constitution and statutes.

The State argues that separation of powers principles and limitations on mandamus prevent the Appellate Division from ordering COAH to hold meetings and issue rules on dates certain. State's Br. at 19-21. In the face of an exceptional record of agency noncompliance, the Appellate Division correctly rejected the State's argument, crafting a limited remedy that fell short of the relief requested. In view of the State's outrageous disregard of a court order and the Appellate Division's tailored remedy, the State is unlikely to succeed on the merits.

Courts have the power, and indeed the obligation, to ensure that agencies in the Executive Branch enforce the law. Otherwise,

our state constitution and statutes would be meaningless because agencies could choose to disregard them, as COAH did here. The Appellate Division correctly held that:

> In our tripartite system of governance, once a court has decided a dispute and entered a final judgment awarding relief to the aggrieved party, the executive branch is obligated to enforce the court's decree. This fundamental principle of the concept of ordered liberty applies with equal, if not greater, force when an administrative agency, as a party in a civil dispute, is ordered by the court to perform a task that is mandated by a statute that was adopted by the Legislature to fulfill a constitutional obligation.
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> [Aa8 (citation omitted).]

Courts have long recognized that this general principle of law applies especially strongly in the specific context of Mount Laurel litigation, writing:

> Our warning to Mount Laurel -- and to all other municipalities -- that if they do 'not perform as we expect, further judicial action may be sought . . .,' will seem hollow indeed if the best we can do to satisfy the constitutional obligation is to issue orders, judgments and injunctions that assure never-ending litigation but fail to assure constitutional vindication.
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> [Southern Burlington NAACP v. Tp. of Mount Laurel, 92 N.J. 158, 289-90 (1983)(citation omitted).]

More specifically, the Appellate Division's establishment of agency deadlines and meeting dates is appropriate, and well supported by precedent, given the State's conduct. When necessary to remedy agency inaction, courts have set specific dates for each

step of an administrative process. See, e.g., In re Petition of Howell Tp., 371 N.J. Super. 167, 188 (App. Div. 2004), certif. denied, 182 N.J. 139 (2004)(remedying "a disturbing lack of appreciation of [COAH]'s obligation to discharge its statutory responsibilities in an expeditious matter" by setting specific dates for mediation to occur, comments to be submitted, and final decision to be issued, and "supersed[ing] any conflicting COAH regulations" to ensure compliance); Caporusso v. N.J. Dept. of Health, 434 N.J. Super. 88, 110 (App. Div. 2014)(compelling specific medical marijuana-related reports to be filed by state agency to effectuate statutory requirement "within forty-five days of the date of this opinion" and rejecting State's similar argument that to do so would violate limits on court orders on state action).

The cases cited by the State for the proposition that courts effectively cannot enforce their own orders concern wholly different situations from the present matter. For example, In re Failure to Transmit Proposed Dental Fee Schedule to OAL, 336 N.J. Super. 253 (App. Div. 2001), concerned the Appellate Division's initial decision on a claim of agency inaction. By comparison, it is over ten years since the first cases in the Appellate Division challenging COAH's failure to timely promulgate Third Round rules, and almost ten years since the Appellate Division first found COAH's delays "dramatic and inexplicable," noting that "[t]he public policies underlying the FHA and the Mount Laurel cases

have, quite obviously, been frustrated by inaction." In Re Six Month Extension, 372 N.J. Super. 61, 95-96 (App. Div. 2004).

Since those early efforts to force COAH to comply, in which the courts ten years ago ordered the very kind of time-bound relief that the State now says exceeds the courts' bounds, the Appellate Division has remanded to COAH for development of rules three times, and there are still no rules consistent with the FHA and Mount Laurel doctrine. At two different times, in 2010-2011 after the Appellate Division ruled, and again more recently in the order affirmed by the Supreme Court in September 2013, COAH has flagrantly disregarded the five-month deadline imposed by the Appellate Division's decision. Given that record, it would be a fundamental failure of the judiciary for the Appellate Division to defer to an agency as it did in Dental Fee Schedule, supra, 336 N.J. Super. 253, especially in a matter involving substantial constitutional rights. The range of potential remedies is simply not the same when an agency has failed for over a decade to fulfill its most basic mandate and has repeatedly disregarded court orders.

The Appellate Division's focus on ensuring that the COAH board makes decisions involving the remand is especially appropriate given that both the Appellate Division and Supreme Court ruled that the reorganization plan abolishing the COAH board was unlawful. In re Plan for the Abolition of the Council on Affordable Housing, supra, 424 N.J. Super 410, aff'd 214 N.J. 444.

Similar to its disregard of the remand order in this matter, the State has acted as if those decisions were never issued. The COAH board has not met since this Court's rulings in either that matter or the appeal involving the Third Round rules.[3] The board thus has not considered or provided the staff with direction regarding the regulations required by this Court's affirmance of Judge Skillman's opinion; has not reviewed critical motions involving specific affordable housing developments; and has not even authorized the motions for an extension or for a stay now brought, by some other questionable authority, to this Court. The State has acted as if this Court had reversed, rather than affirmed, the Appellate Division, in both the reorganization and rules cases, and refused to convene the COAH Board even once to take any formal action to implement these decisions.

The Appellate Division, given the record before it, had no choice other than to take decisive action that would ensure compliance with its order. Despite the State's disregard of the five-month deadline affirmed by this Court, the Appellate Division granted COAH an additional two and a half months, or half again

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[3] At least one independent COAH Board member asked the State to convene a meeting, but the State has ignored him. Salvador Rizzo, "NJ court orders affordable housing agency to get back to work," The Star-Ledger, March 7, 2014, available at http://www.nj.com/politics/index.ssf/2014/03/nj_court_orders_affordable_housing_agency_to_get_back_to_work.html (last accessed March 10, 2014) (quoting COAH Board member Tim Doherty as saying he had asked Commissioner Constable to convene a meeting after this Court's ruling, but received no response, stating "I got no communication whatsoever" about the State's plans).

the initial time required by the order, with specific intermediate time frames to once again attempt compliance. This restrained ruling does not give COAH the full amount of time it seeks, but gives the agency a final chance while making it more likely that rules are actually adopted. The record would have justified even the aggressive remedy of a special master FSHC sought. The State is thus unlikely to succeed on the merits with regard to its central contention that the Appellate Division overstepped its bounds in a limited order directing COAH to comply with the remand on a specified schedule.

2. The APA's deadlines can be met. If necessary, the Appellate Division has indicated it will modify its order to ensure compliance with the APA.

COAH wrongly contends that the Appellate Division's order requires the agency to violate the APA. That position is incorrect for three reasons.

First, it is COAH's recalcitrance, not the Appellate Division's order, that has led the agency to question whether it can comply with the APA. COAH would have had no problem complying with the APA during the five-month remand period, but chose not to propose and adopt regulations in time to meet that schedule. While it is nevertheless important to provide adequate opportunities for public comment - which the Appellate Division order does in part by providing specified dates and procedures for public notice - COAH hardly has room to complain at this point given that it disregarded obvious deadlines for complying with the

APA.

Second, as acknowledged by the New Jersey State League of Municipalities in its brief filed with the Appellate Division, the APA allows rules to be adopted based on the existence of an emergency. Ra74. According to the League, "Because it is indisputable that these affordable housing issues affect the public welfare, and the failure to promulgate the regulations would create an imminent peril to a municipality's ability to satisfy its constitutional obligation, it is maintained that the agency has the power to adopt emergency regulations under this section." Ra74. Atlantic Highlands in its Appellate Division brief similarly states that "COAH can indeed still meet this deadline through the process for the adoption of emergency regulations." Ra77.[4] Pursuant to N.J.S.A. 52:14B-4c, Governor Christie should indicate whether he is willing without a court order to verify the existence of the emergency and COAH should then advise the Appellate Division of its position regarding an emergency rule prior to contending that the state cannot act. The state cannot

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[4] Furthermore, in response to FSHC's inquiry this morning regarding why COAH did not post the 48-hour notice required by the Open Public Meetings Act (OPMA), N.J.S.A. 10:4-8d, we have been advised by the Deputy Attorney General representing COAH that the agency intends to hold an emergency meeting as permitted by N.J.S.A. 10:4-9b. That statute provides that meetings may be provided without "adequate notice" to the public when "such meeting is required in order to deal with matters of such urgency and importance that a delay for the purpose of providing adequate notice would be likely to result in substantial harm to the public interest." N.J.S.A. 10:4-9b1. That standard is similar to the standard for adopting an emergency rule.

credibly claim it cannot comply with the order until it addresses these issues.

Finally, the Appellate Division has stated that COAH may apply to the Appellate Division to amend its March 7 order to allow for compliance with the APA, and as such the request to the Supreme Court is premature. Aa10. COAH has never apprised the Appellate Division why specifically it contends that it cannot comply with the timeframes by the Appellate Division while also complying with the APA. COAH raises in its brief the possibility that the Office of Administrative Law may permit publication in "an earlier issue of the Register." Aba at page 17. Given that acknowledgement, COAH should find out factually what is possible and advise the Appellate Division. In the event OAL is not able to accommodate the timeframes and in the event an emergency rule cannot be adopted, then there is more than enough time for COAH to move to amend the March 7 order issued by the Appellate Division.

In view of the State's self-created hardship, the premature assertion that COAH cannot comply with the APA and the Appellate Division's permission for COAH to move to modify, the Court should find that COAH is unlikely to prevail on the merits of its argument that the APA will be violated.

B. COAH's own inexplicable and extensive delay prevents it from claiming irreparable harm by virtue of the deadlines imposed in the Appellate Division's order. The equities favor denying a stay.

COAH claims that it will suffer irreparable harm, which it

has the burden of proving to justify the extraordinary relief of a stay, because it claims it needs even more time to effectuate a process that its own counsel represented to this Court could be completed within 30 days. However, COAH, or more accurately the state officials that claim to act in its name, created the delay that it now uses as the basis for claiming irreparable harm. Because a movant's own delay cannot be the basis for its claim of irreparable harm, COAH's motion should be denied.

As a basic principle of equitable relief, a movant cannot create the irreparable injury necessary to secure an injunction through the movant's own delay. For example, when challengers to a ballot initiative claimed irreparable injury a few days before the printing of ballots, the Appellate Division held that "plaintiffs were obligated to proceed with greater alacrity than exhibited here, and that their fear of 'imminent' irreparable injury was without merit because their delay alone created the emergency." McKenzie v. Corzine, 396 N.J. Super. 405, 414 (App. Div. 2007). See also Nazare v. Bd. of Embalmers and Funeral Directors, 4 N.J. Super. 567, 570 (Ch. Div. 1949) (denying interlocutory injunctive relief where "cry of irreparable damage comes too late").

Here, the Appellate Division found that five months provided a reasonable time frame for updating rules already in existence using a time-tested methodology that COAH utilized successfully for a dozen years. "[T]he mandate of this opinion for COAH's

adoption of new revised third round rules is straightforward: determine prospective need by means of a methodology similar to the methodologies used in the prior round rules. COAH should be able to comply with this mandate within five months without the assistance of a master or an army of outside consultants." In re N.J.A.C. 5:96 and 5:97, supra, 416 N.J. Super. at 511. The Attorney General represented that such work could be completed within 30 days before this Court at oral argument, and could have, but did not, offer a post-argument revision of that position. This Court affirmed the five-month timeframe. In the proceeding below, FSHC offered an unrebutted expert certification that that timeframe remained realistic because the methodology is replicable and the data needed is available. Ra52. Judge Fuentes' panel then specifically held that "COAH has failed to offer any plausible explanation for its failure to carry out this court's order." Aa8.

Against this backdrop, the State is in no position to cry irreparable harm for being given another two and a half months to do something it was ordered to begin five months ago. The State is estopped by its own prior representations to this Court to argue that such a timeframe is unrealistic - let alone that it reaches the extraordinary standard of irreparable harm.

Furthermore, the relative hardships favor denying the stay. As the Appellate Division found, and this Court upheld, the extensive delay in compliant Third Round rules has frustrated the Mount Laurel doctrine. Indeed, more than three years ago, Judge

Skillman cited "the fact that more than ten years have now elapsed since expiration of the second round rules" to deny a stay of proceedings before COAH until such time as new rules were adopted. The only imminent requirements of the Appellate Division's order are for COAH to, finally, meet, and to proceed expeditiously in proposing rules. It is hard to see how complying with a longstanding order, designed to effectuate constitutional and statutory requirements too long ignored, creates a hardship. In contrast, low- and moderate-income families, seniors, and people with special needs face the continuing, significant hardship of having the State frustrate any meaningful effectuation of their constitutional and statutory rights.

C. COAH's motion to stay and for an extension are unauthorized and procedurally improper. The Appellate Division properly has jurisdiction over motions to enforce and motions to modify its order to adopt rules within five months.

The State rests its five months of disregard of the rules remand order and its eight months of disregard of the reorganization decision on a thin reed indeed: A motion for an extension filed improperly with this Court minutes before the five month deadline originally imposed by Judge Skillman in 2010, which was affirmed by this Court on September 26, 2013. The State contends that that the pendency of that motion alone should lead the court to vacate the Appellate Division's March 7 order. We urge the Court to reject that argument for four reasons.

First, the motion for an extension of time to adopt the rules, like this pending stay motion, was filed with no authority from the agency whose name is on the brief. The Council's bylaws state that "[t]he Executive Director may request legal counsel to provide advice and, <u>subject to the Council's approval</u>, request legal counsel to initiate, intervene, or take any other action with regard to litigation on behalf of the Council." Ra (emphasis added). The State could not have received the Council's approval to request an extension since the Council, as a public body, may only act pursuant to the Open Public Meetings Act, and has not had any public meeting since this Court's affirmance of the decision. When this Court has affirmed the Appellate Division's view that there is a need "to fill the void created by COAH . . . without delay," <u>In re N.J.A.C. 5:96 and 5:97</u>, <u>supra</u>, 215 <u>N.J.</u> at 586, a request for further and indefinite delay is surely one of a magnitude that requires consideration by the agency's Board.

Second, the sole support provided for the motion for an extension is an unusual certification by the Commissioner of Community Affairs, Richard Constable. This certification is extraordinary in several ways. It flies in the face of this Court's decision in <u>In re Plan for the Abolition of the Council on Affordable Housing</u>, <u>supra</u>. The certification reveals the DCA Commissioner to be continuing in the role this Court invalidated in that matter - making decisions on the timing and substance of the Third Round rules without any consultation of the remainder of

the COAH Board. Additionally, the certification vaguely lays out a number of facts that surely were known to the State years ago. The unspecific assertions about generalized categories of data do not in any way specify a concrete reason why COAH could not have met the deadline, and as such do not provide sufficient proof to support the motion.[5]

The certification does not even provide a route for compliance with the Appellate Division's order as affirmed by this Court. The certification provides a timeline for mere proposal of a regulation, without any representations as to when that regulation will be adopted. Thus, the State's proposed extension would leave open further routes of delay, such as an extensive period for reviewing and responding to comments, a rule re-proposal, or simply having COAH not meet again for an extended period as has happened to date.

Third, the certification does not address the proper legal standard. The certification seeks post-judgment modification of a court order, which is governed by R. 4:50-1. This Court has recently emphasized that "[a]lthough courts are empowered to confer absolution from judgments, '[r]elief [under this rule] is granted sparingly.'" D.E.G. v. Tp. of Fairfield, 198 N.J. 242, 261

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[5] Additionally, the certification does not even properly support these limited facts. It omits the language required by R. 1:4-4(b) stating that "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

(2009)(citation omitted). The State fails to even cite R. 4:50-1, or even provide a legal brief, in seeking substantial relief from a crucial aspect of the order, which was designed to provide a rapid remedy after years of delay.

Fourth, the Appellate Division correctly found that it has jurisdiction over FSHC's motion to enforce litigants rights, a ruling that extends to the pending motion for an extension. The Appellate Division appropriately had jurisdiction because "[a] claim that a party . . . is acting in violation of [a] court order ordinarily should be brought before the court that issued that order . . . by a motion for relief in aid of litigants' rights under Rule 1:10-3." Asbury Park Bd. of Educ. v. New Jersey Dep't of Educ., 369 N.J. Super. 481, 486 (App. Div. 2004).[6] In its

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[6] The State fails to understand the factual differences between the portion of Asbury Park Bd. of Educ., supra, 369 N.J. Super. 481 it cites and the present matter. There, the Supreme Court issued the original order being enforced, with no Appellate Division order below. Abbott v. Burke, 177 N.J. 596 (2003) (extending an earlier Supreme Court order, Abbott v. Burke, 172 N.J. 294 (2002)). That order, in turn, granted relief from an earlier Supreme Court decision in which the Court explicitly retained jurisdiction. Abbott v. Burke, 149 N.J. 145, 202 (1997). In those circumstances, the Appellate Division held that a motion to enforce litigants rights was most appropriately brought before the Supreme Court, because on those facts the Supreme Court was the court that "issued the order."

The present matter differs significantly from those circumstances. Here, the Appellate Division issued an order. The Supreme Court affirmed the order with slight modifications, and did not retain jurisdiction. Thus, jurisdiction for enforcing the order reverts to the court that "issued the order." Asbury Park Bd. of Educ., supra, 369 N.J. Super. at 486. And even in the extreme circumstances of Asbury Park Bd. of Educ. it is worth noting that the Appellate Division ultimately did hear the motion brought before it.

October 8, 2010 decision, the Appellate Division directed COAH to adopt revised regulations within five months. In re N.J.A.C. 5:96 and 5:97, supra, 416 N.J. Super. at 511-12. In the Supreme Court's September 26, 2013 decision, the Court affirmed and "endorse[d]" the Appellate Division's directive to adopt revised regulations within five months, but did not issue its own order. In re Adoption of N.J.A.C. 5:96 & 5:97, supra, 215 N.J. at 620. The Court did not retain jurisdiction. FSHC thus correctly moved before the Appellate Division to enforce the Appellate Division's order.

The State's argument would create perpetual enforcement jurisdiction in this Court of any case it heard, or similarly in the Appellate Division of any case it reviewed from a trial court. Such a theory would crowd this Court and the Appellate Division with hearing enforcement matters of first impression, and has no basis in law.

D. Any challenge to an application for counsel fees is premature as such application has yet been made.

The State prematurely asks this Court to vacate a portion of the Appellate Division's order permitting FSHC to submit a certification for "the cost of professional services rendered in connection with the prosecution of this motion in aid of litigant's rights." FSHC has yet to submit such a certification or request any such fees. The court's order contemplates a further order from the court regarding such fees. When such order is

entered, the State may at that point seek review of such order before this Court. Any review at this point is premature and speculative. Furthermore, the State incorrectly argues that as a matter of law R. 2:9-9, which the Court cites, does not permit such award of fees *sua sponte*, when in fact it does. See, e.g., Miraph Ent. Inc. v. Bd. of Alco. Bev., Paterson, 150 N.J. Super. 504 (1977).

IV. Conclusion

For the foregoing reasons, FSHC respectfully requests that the Court deny the State's motion for a stay and other relief.

Dated: 3/10/2014

Respectfully submitted,
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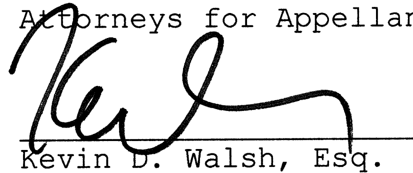

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