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October 31, 2014

Mark Neary, Clerk  
Supreme Court of New Jersey  
25 W. Market Street  
P.O. Box 970  
Trenton, NJ 08625-0970

**Re: In re Adoption of Third Round Regulations, N.J.A.C. 5:96 and 5:97, by  
the Council on Affordable Housing, Docket No.: 67,126**

Dear Mr. Neary:

Enclosed for filing please find Fair Share Housing Center's Motion to Enforce Litigant's Rights in the above-captioned matter.

Please return a copy of the proof of service to the courier who delivered this motion.

Filing fees have been waived pursuant to the attached court order.

Please contact me with any questions or concerns. Thank you for your attention to this matter.

Respectfully,

A handwritten signature in black ink, appearing to read "Kevin D. Walsh", written over a horizontal line.

Kevin D. Walsh  
Staff Attorney

c: Service List

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**SUPREME COURT OF NEW JERSEY**

Pursuant to Rule 1:13-2(a), it is ORDERED that the payment of filing fees, other fees, and charges of public officers for service of process in connection with actions filed by the Fair Share Housing Center shall be waived; this Order is effective immediately and until further order of the Court.

For the Court:



Chief Justice

Dated: January 16, 2007

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**SUPREME COURT OF NEW JERSEY**  
**NOTICE OF MOTION**

**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

**To:** Mark Neary, Clerk  
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Richard J. Hughes Justice Complex  
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Trenton, NJ 08625-0970

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PLEASE TAKE NOTICE that, Petitioner Fair Share Housing Center, through the undersigned counsel will apply to the Supreme Court of New Jersey, on a Motion to Enforce Litigant's Rights.

PLEASE TAKE FURTHER NOTICE that in support of this motion, appellant will rely upon the enclosed brief with appendix.

Dated: 10/31/2014



Kevin D. Walsh, Esq.  
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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

Docket No.: A-5451-07T3  
Lead Docket Number A-5382-07T3

CIVIL ACTION

On Appeal from the Council on  
Affordable Housing, with a  
remand in In re N.J.A.C. 5:96  
and 5:97, 416 N.J. Super. 462,  
512 (App. Div. 2010), aff'd 215  
N.J. 578 (2013)

BRIEF AND APPENDIX IN SUPPORT OF FAIR SHARE  
HOUSING CENTER'S MOTION TO ENFORCE LITIGANT'S RIGHTS

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## I. Introduction

In March, this Court laid out a clear timeline for the Council on Affordable Housing (COAH) to adopt Third Round regulations as ordered by this Court, and stated that if that timeline was not met, the Court "will entertain applications for relief in the form of a motion in aid of litigants rights, including but not limited to a request to lift the protection provided to municipalities through N.J.S.A. 52:27D-313." At a meeting on October 20, 2014, two days before the October 22, 2014 deadline referenced in the March order requiring publication of rules in the New Jersey Register by November 17, 2014, COAH failed to adopt Third Round regulations. That meeting concluded with the board establishing no plan of action to address the Court's mandate, and COAH has no further meetings scheduled in 2014.

At this point, the Court is left with little choice. Given the State's complete failure to comply with the Court's Orders, particularly viewed in light of 15 years of "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), FSHC moves for the relief the Court stated it would consider at this juncture. FSHC respectfully requests that the Court "lift the protection provided to municipalities through N.J.S.A. 52:27D-313" and order that "actions may be commenced on a case-by-case basis before the Law Division or in the form of 'builders remedy' challenges."

## II. Facts and Procedural History

### A. Adoption and invalidation of Third Round rules.

The Fair Housing Act of 1985 ("FHA"), N.J.S.A. 52:27D-301 to -329.19 requires COAH to adopt regulations to implement the state's constitutional Mount Laurel obligations addressing the housing needs of low- and moderate-income households. Southern Burlington County v. Tp. of Mount Laurel, 92 N.J. 158 (1983) (Mount Laurel II). COAH's 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 Third Round regulations. In 2004, the Appellate Division held that COAH's failure to adopt regulations was "dramatic and inexplicable," and ordered that if COAH failed to adopt rules matters before COAH would be returned to the trial courts. In Re Six Month Extension, 372 N.J. Super. 61, 95-96, 105 (App. Div. 2004).

COAH finally adopted Third Round regulations on December 20, 2004. 36 N.J.R. 5895(a). On January 25, 2007, the Appellate Division reversed these regulations because they did not comply with the Mount Laurel doctrine and 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 revise the rules "within six months." Id. at 88.

COAH did not meet the July 25, 2007 deadline and repeatedly moved for, and received, extensions. On May 6, 2008, nine years

after the expiration of the Second Round, COAH adopted a second set of Third Round regulations, 40 N.J.R. 2690(a). On October 8, 2010, the Appellate Division invalidated the second set of 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 a "straightforward" remedy: "determine prospective need by means of a methodology similar to the methodologies used in the prior round rules," within a five month timeframe. Id. at 511.

**B. The Supreme Court's decision and subsequent order.**

On March 29, 2011, the Supreme Court granted petitions for certification filed by multiple petitioners. At oral argument on November 14, 2012, the State advised the Court that it would take 30 days to prepare revised Third Round regulations if required to do so pursuant to the Appellate Division's order. Mall. The Supreme Court on September 26, 2013 affirmed the decision below and "endors[ed] the Appellate Division's quick deadline for reimposing third-round obligations based on the previous rounds' method of allocating fair share obligations among municipalities." In re N.J.A.C. 5:96 and 5:97, supra, 215 N.J. at 620.

On December 13, 2013, when it became apparent that COAH would not meet the five-month deadline, FSHC filed a Motion to Enforce Litigants' Rights. On February 26, 2014, the deadline for COAH to adopt new rules, COAH filed a motion for an extension with this

Court, supported by a certification by DCA Commissioner Richard Constable that did not mention a single task that COAH had accomplished between September 2013 and February 2014 related to the Court's remand. Ma14. Indeed, as later became clear through documents obtained in July 2014 through Open Public Records Act litigation, the State did not even enter into a contract with its primary consultant on rule development until February 6, 2014, more than four months after this Court's decision and just 20 days before the February 26 deadline. Ma24.

On March 7, 2014 the Appellate Division granted FSHC's Motion to Enforce Litigants' Rights requiring a strict timeline for COAH to adopt regulations with additional relief should COAH fail to comply with the order. Ma19-22. On March 14, 2014, the Court vacated the Appellate Division's March 7, 2014 order, granted COAH's February 26 motion for an extension, and established a timeline for COAH to propose and adopt new regulations. Ma1-9. The Court further stated that if COAH failed to comply with that order it would "entertain applications for relief in the form of a motion in aid of litigants' rights, including but not limited to a request to lift the protection provided to municipalities through N.J.S.A. 52:27D-313." Ma9.

### **C. Proposal of New Regulations**

On April 30, 2014, almost fifteen years after the expiration of the Second Round, COAH held its first meeting in almost a year.

The COAH Board voted to propose N.J.A.C. 5:99 Substantive Rules and N.J.A.C. 5:98 Procedural Rules, which were drafted largely by outside consultants hired and supervised by the Attorney General's office. Ma24-31. The COAH Board was provided the proposed rules 24 hours in advance of the meeting. Ma33. The rules were formally proposed in the New Jersey Register on June 2, 2014, with a number of substantive differences from the rules actually voted on by the COAH Board. 46 N.J.R. 924(a).

The proposed rules are vastly different from the Prior Round regulations that this Court ordered COAH to use. On these grounds, FSHC filed a Motion to Enforce Litigants' Rights June 17, 2014. The Court denied this motion on September 9, 2014. Ma82.

The published rules were the subject of a comment period that concluded August 1, 2014. COAH received approximately 3000 comments on the proposed rules. Ma41.

On October 20, 2014, COAH held a public meeting with three agenda items, including the adoption of N.J.A.C. 5:99 Substantive Rules and N.J.A.C. 5:98 Procedural Rules. Ma48. Following public comments in opposition to the adoption of the regulations, COAH Board members made a motion that the Board go into an unscheduled executive session to discuss the adoption with the Board's attorneys. Ma40.

Following the executive session, when the agenda item on rule adoption came up, Board member John Winterstella moved that the adoption of the new regulations be tabled for 60 days.



Winterstella stated that "this in my opinion is not a resolution that will allow us to meet the requirements of the Supreme Court." Ma42. Winterstella sought further time to modify the regulations so that they would "meet the needs of our citizens of New Jersey and that comply with the Supreme Court rules as put forth and directed by the Supreme Court." Ma41. The vote on the motion to table adoption was 3-3 and thus failed. Ma45.

COAH's Acting Executive Director Sean Thompson then introduced a resolution to adopt the regulations. Thompson stated that the resolution, which was not shared with the public, "includes a list of agency initiated non-substantial changes that do not necessitate further public comment," but he did not propose any substantive amendments. Ma44. New Jersey Housing and Mortgage Finance Agency Executive Director Anthony Marchetta (an ex officio COAH Board member) moved to adopt the regulations. Ma44. The Board again voted 3-3, failing to adopt the regulations in time to be transmitted to the Office of Administrative Law (OAL) for publication in the November 17, 2014 New Jersey Register. MA44-45. Upon failing to pass the adoption resolution, the Board without further comment moved on to the next agenda item. Ma45. The Board once again went into executive session towards the end of the meeting, but took no further action and offered no further comment after coming out of executive session. Ma47.

This motion to enforce litigants' rights followed.

### III. Legal Argument

- A. The Council on Affordable Housing has violated the Supreme Court's September 26, 2013 decision and March 14, 2014 remand order. The Court should hold that COAH no longer protects municipalities from exclusionary zoning litigation.

FSHC files this motion to enforce litigants' rights pursuant to R. 1:10-3 and the specific provision in the Court's March 14, 2014 order permitting a motion to enforce litigants' rights in the event COAH fails to publish adopted rules by November 17, 2014. R. 1:10-3 provides litigants with a remedy when government agencies fail to carry out court orders. See, e.g., Abbott v. Burke, 163 N.J. 95 (2000) (R. 1:10-3 used to invalidate Department of Education's failure to properly implement preschool programs); Loigman v. Committee of Middletown, 308 N.J. Super. 500, 503 (App. Div. 1998) (R. 1:10-3 used to require municipal body to comply with Open Public Meetings Act). A court may grant relief in a motion in aid of litigants' rights that addresses an agency's failure to conform to a court order. Asbury Park Bd. of Educ. v. N.J. Dep't of Educ., 369 N.J. Super. 481, 486 (App. Div.), aff'd in relevant part, 180 N.J. 109 (2004). A court should grant relief under R. 1:10-3 unless a party is incapable of compliance. See, e.g., P.T. v. M.S., 325 N.J. Super. 193, 218 (App. Div. 1999). Thus, R. 1:10-3 requires only a showing that a noncompliant party is capable of carrying out the order and did not do so.

The Court's September 26, 2013 decision directed that "COAH shall adopt regulations, as directed by the Appellate Division,

without delay," i.e. within five months. In re N.J.A.C. 5:96 and 5:97, supra, 215 N.J. at 586. The Court ordered that those regulations must be "based on the previous rounds' method of allocating fair share obligations among municipalities." Id. at 620. In granting in part COAH's motion for an extension of that five-month timeframe, this Court's March 14, 2014 order detailed a specific timeline for COAH to adopt the regulations. The Court required "that the Council shall adopt the proposed Third Round Rules on or before October 22, 2014" and required COAH to publish the adopted rules compliant with the Court's decision in the New Jersey Register on November 17, 2014. Ma3. The Court also specifically retained jurisdiction "for the sole purpose of entertaining any and all future applications to enforce the judgment of this Court requiring the adoption of new Third Round Rules as prescribed in our decision in In re Adoption of N.J.A.C. 5:96 and 5:97 and the terms of this Order." Ma4. The Court specifically anticipated what would happen if COAH did not comply with the remand instructions, writing:

It is further ORDERED that in the event that the Council does not adopt Third Round Rules by November 17, 2014, then this Court will entertain applications for relief in the form of a motion in aid of litigants' rights, including but not limited to a request to lift the protection provided to municipalities through N.J.S.A. 52:27D-313 and, if such a request is granted, actions may be commenced on a case-by-case basis before the Law Division or in the form of "builders remedy" challenges;

[Ma3-4.]

The Court's September 26, 2013 order, as modified by its March 14, 2014 order, unequivocally required COAH to adopt Third Round regulations using the Prior Round methodology by October 22, 2014 for publication in the New Jersey Register by November 17, 2014<sup>1</sup>, and unequivocally stated the relief that would be considered via a motion to enforce litigants' rights should COAH fail to meet those deadlines. COAH was capable of complying with the order; four years from the Appellate Division's initial decision and more than a year from the Supreme Court's decision go well beyond the time reasonably needed to prepare a fair share methodology. As the Appellate Division noted, "the 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 5:96 and 5:97, supra, 416 N.J. Super. at 475. COAH's counsel herself acknowledged at the 2010 Supreme Court oral argument that COAH could have revised regulations within 30 days. Mall.

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<sup>1</sup>The October 22, 2014 date remains the final deadline set by the Office of Administrative Law for rule adoption for the publication of rules in the November 17, 2014 New Jersey Register. Office of Administrative Law Rule Publication Schedule, <http://www.state.nj.us/oal/rules/schedule/> (last accessed Oct. 27, 2014).

Yet instead of performing the simple task that COAH represented to the Court it could complete in 30 days, consultants hired by the Attorney General's office developed a novel methodology that took eight months after this Court's decision to even propose. Ma33. The COAH Board, which was not involved in developing the methodology, Ma33, ultimately neither adopted that novel methodology, because there was not a majority of the Board that believed the methodology complied with the FHA and this Court's order, nor established any other way forward. At COAH's October 20 meeting, the COAH Board deadlocked 3-3 on a resolution to adopt the proposed rules. Ma45. Member John Winterstella, who first moved to table the resolution and then voted against the resolution, stated that to approve the regulations as proposed "is not sufficient to really move affordable housing in this state and protect the other issues. . . . We just - this in my opinion is not a resolution that will meet the requirements of the Supreme Court." Ma42. Similarly, member Tim Doherty recognized while voting down the resolution meant that "we'll be in violation of the Supreme Court direction" in terms of timing, the substance of the rules as proposed did not "comply with the Supreme Court rules as put forth and directed by the Supreme Court." Ma41. After the regulations were voted down, the Board went into executive session "regarding pending litigation referring to the proposed rules." Ma47. And despite the Board's clear understanding that to do nothing would be to violate this Court's order, the Board came

back out of executive session and promptly adjourned the meeting, without further discussing the rules, authorizing any further action by COAH staff or the Attorney General, or setting up any future meeting. Ibid. COAH has no meetings scheduled for the rest of 2014. See COAH Meeting Schedule <http://www.nj.gov/dca/services/lps/hss/meetings.html> (last accessed Oct. 31, 2014).

With COAH having failed to comply with the Court's order, the Court should provide the relief it suggested in its March 14, 2014 order. The Court should declare that municipalities are no longer protected from Mount Laurel litigation by COAH's administrative process and that Mount Laurel proceedings should now "commence[] on a case-by-case basis" in trial courts. This relief comports with the Court's prior decisions, which make clear that the courts will take remedial action in the face of intractable delays in Mount Laurel enforcement. See, e.g., Mount Laurel II, supra, 92 N.J. at 213, 290 (stating "We may not build houses, but we do enforce the Constitution," and criticizing inaction that lasted five years (1975-1980), about one-third of the time of current interruption in Mount Laurel compliance). Since the passage of the FHA, courts have recognized that if COAH does not fulfill its statutory duty, the proper remedy is to eliminate the requirement to exhaust administrative remedies before COAH. Hills Development Company v. Bernards Township, 103 N.J. 1, 23 (1986) (if the FHA "achieves nothing but delay, the judiciary will be forced to

resume its appropriate role"); Six Month Extension, supra, 372 N.J. Super. at 105 (stating that failure of COAH to adopt adequate rules on a timely basis "will, of course, free interested parties from the constraints that substantive certification imposes"). Indeed, the Court in its March 14 order appropriately suggested precisely this relief after 14 years of failed attempts to adopt compliant regulations, and gave COAH one final chance to come into compliance.

The relief the Court suggested also accords with case law and the FHA. This remedy originally derived from the role trial courts exercised after Mount Laurel II, supra, 92 N.J. at 290, when they provided the sole route for the enforcement of the Mount Laurel doctrine. The Legislature then structured the FHA to engraft the COAH process on top of the preexisting trial court compliance process, rather than supplanting that process altogether. See, e.g., N.J.S.A. 52:27D-313(a) (authorizing municipal filing of "an action for declaratory judgment granting it repose in the Superior Court"); N.J.S.A. 52:27D-316(b) (authorizing exclusionary zoning litigation upon exhaustion of administrative remedies); N.J.S.A. 52:27D-317 (authorizing exclusionary zoning litigation following grant of substantive certification); N.J.S.A. 52:27D-318 (providing that exhaustion requirement "automatically expires" if municipality does not proceed with COAH process and exclusionary zoning litigation proceeds); N.J.S.A. 52:27D-319 (allowing motion in trial court to be relieved from exhaustion requirement if COAH

does not act within six months of public interest or developer litigant filing an objection to municipal fair share plan). Thus, the FHA explicitly authorizes continuation of the role of trial courts initially established by Mount Laurel II. The FHA provides for exhaustion of administrative remedies before COAH only on the premise that COAH would efficiently and rapidly adjudicate these matters. See also Hills, supra, 103 N.J. at 41-42 (upholding COAH-related provisions in FHA in part because "it is a procedure that may be concluded much more quickly than ordinary Mount Laurel litigation since the time periods provided for are extremely short"). With COAH unable or unwilling to function in the time-sensitive matter the FHA envisioned, returning matters to the trial courts comports with both the letter and the intent of the FHA.

At this juncture, the potential relief mentioned by the Court in its March 14 order provides the only effective way to enforce the Mount Laurel doctrine and FHA, and this Court's prior orders. As such, the Court should grant the relief it suggested in its March 14 order.

- B. As part of its order, the Court should offer general guidance to trial courts in three areas: (a) coordinating matters before specified judges; (b) developing the new methodology ordered by the Court through a rapid and clear process; and (c) ensuring fair notice and opportunity to be heard for all parties.**

In granting R. 1:10-3 motions, courts have entered orders that specify details of implementation necessary to vindicate the



underlying purpose of R. 1:10-3, namely ensuring compliance with the previous court order. See, e.g., Asbury Park Bd. of Educ. v. Dept. of Education, 180 N.J. 109 (2004) (specifying details of implementation upon granting R. 1:10-3 motion). Thus, as part of its order granting this motion, the Court should offer general guidance to the trial courts for the adjudication of Mount Laurel matters in three main areas: the designation of Mount Laurel judges, the rapid development of a consistent methodology based upon the Court's prior order to utilize the Prior Round methodology, and an orderly process with adequate notice and opportunity to be heard for all parties.

First, the Court should consolidate proceedings for at least the initial stage of developing a fair share methodology to maximize judicial efficiency. The courts have broad discretion on how to manage cases involving "common, recurrent questions of law and fact so as to promote "the efficient utilization of judicial resources." R. 4:38-1; Administrative Office of the Courts, Directive #08-12 (2012), Ma53-57. Since 1983, the Law Division has included judges designated as Mount Laurel judges. Initially, the Supreme Court in Mount Laurel II designated three Law Division judges to hear all Mount Laurel cases throughout the state. See Mount Laurel II, supra, 92 N.J. at 216; Hills, supra, 103 N.J. at 64-65 (recognizing success of this approach). Shortly after the passage of the FHA, the judiciary replaced the three designated

judges with designated judges in each vicinage to hear Mount Laurel cases.<sup>2</sup>

For judicial efficiency and consistent implementation statewide, the Court should consider designating a small number of judges, at least for an initial period to ensure development of a consistent statewide and regional methodology. Mount Laurel and the FHA requires assessment of need at a regional level. In re 5:96 and 5:97, supra, 215 N.J. at 613. Thus, for example, in Burlington, Camden, and Gloucester Counties, which constitute one COAH Region<sup>3</sup>, it would be most efficient for one judge to adjudicate the same regional numbers. And courts must also coordinate methodology across regions to determine what each region's share is of statewide population projections. Ibid. (noting that FHA requires the present and prospective need to be estimated "at both 'State and regional levels'").

As such, the Court should designate a small number of judges to conduct proceedings that result in short order in a methodology applicable within all housing regions of the state. The Court

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<sup>2</sup>Designated Mount Laurel Judges by Vicinage, See [https://www.judiciary.state.nj.us/civil/Designated\\_Mount\\_Laurel\\_Judges\\_Roster.pdf](https://www.judiciary.state.nj.us/civil/Designated_Mount_Laurel_Judges_Roster.pdf) (last accessed Oct. 27, 2014).

<sup>3</sup>Since the adoption of the Second Round rules in 1994, COAH has in every version of rules it has adopted allocated counties to regions as follows: Region 1: Bergen, Passaic, Hudson and Sussex; Region 2: Essex, Morris, Union and Warren; Region 3: Middlesex, Somerset and Hunterdon; Region 4: Monmouth, Ocean and Mercer; Region 5: Camden, Gloucester and Burlington; Region 6: Atlantic, Cape May, Cumberland and Salem. N.J.A.C. 5:93 App. A; N.J.A.C. 5:94 App. A; N.J.A.C. 5:97 App. A.

could then either have these judges continue to hear cases on the implementation of these fair share numbers, as happened effectively after Mount Laurel II, or return those cases back to vicinage Mount Laurel judges at that time. That said, nothing bars the relief sought in this motion from occurring under the current Mount Laurel judges at the vicinage level should the Court deem that process most desirable.

Second, the Court should reiterate that trial courts should follow the approach that the Court previously ordered COAH to use, but COAH failed to employ. The trial judges appointed to adjudicate Mount Laurel matters should be directed to follow the Court's and the Appellate Division's directive to use the Prior Round methodology, which has been proven to work. Changes to the Prior Round methodology and rules should be allowed only to the extent required by statutory changes since COAH adopted the Prior Round rules in 1994 (e.g. the statutory elimination of regional contribution agreements, N.J.S.A. 52:27D-312). Indeed, two planners who are recognized experts in Mount Laurel matters, one of whom was retained by FSHC, have already performed the necessary calculations for implementing the required methodology for the next decade. Ma58-59. The expert retained by FSHC, David N. Kinsey, PhD, FAICP, PP, prepared a report that was submitted to COAH during the recent failed Third Round rulemaking effort. Ma60-81. The trial courts should consider those and any other analyses by experts retained by litigants; of course all such

analyses should be subject to challenge by other parties and evaluation by the trial courts. The trial courts can and should establish a briefing and hearing schedule to finalize the methodology within 90 days so as to ensure there are no further harmful delays. The hearings that trial courts held to devise what became the Prior Round methodology after Mount Laurel II provide a useful precedent. See AMG Realty Co. v. Tp. of Warren, 207 N.J. Super. 388, 394-97 (Law Div. 1984). Indeed, the task at hand now is much simpler given that those courts operated on a blank slate without any existing methodology.

Third, and finally, the Court should direct that litigation proceed with the dispatch needed to end what the Court termed 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, supra, 215 N.J. at 620. Trial courts can and should aim to substantially complete proceedings in the first six months following the calculation of regional need. To this end, the Court should reject any calls for blanket immunity or stays for municipalities from public interest and builder litigation. Trial courts should adjudicate motions for temporary immunity or stays on a case-by-case basis based on the facts of the particular municipality and its record in meeting its Prior Round obligation and making progress towards its Third Round obligation. See generally In re 5:96 and 5:97, 416 N.J. Super. at 512 ("[W]e decline to issue a blanket stay of proceedings before

COAH or in the courts pending completion of the remand to COAH. . . . Any [stay] application should be decided in light of the status of the individual municipality's compliance with its affordable housing obligations and all other relevant circumstances." ). If temporary immunity or a stay is granted, it should be of short duration and issued only on terms that assure that it will not become a device for postponement or evasion of municipal compliance.

All Mount Laurel proceedings have the potential to foreclose the rights of lower-income people and developers willing to build homes they can afford. See, e.g., Morris County Fair Housing Council v. Boonton Tp., 197 N.J. Super. 359, 364 (Law Div. 1984) (discussing preclusive effect of Mount Laurel litigation). As such, all actions must be conducted with adequate attention to considerations of fairness and due process, especially those in which a municipality seeks immunity or a stay. N.J.S.A. 52:27D-313(a) requires newspaper notice of a municipal petition before COAH; N.J.S.A. 52:27-314 provides that any person may file an objection to any such petition. Courts generally have followed suit in requiring notice and an opportunity to be heard. See, e.g., East/West Venture v. Borough of Fort Lee, 286 N.J. Super. 311, 323 (App. Div. 1996). The Court should make clear that adequate notice, e.g. newspaper notice, and an opportunity to be heard are required in any and all exclusionary zoning actions.

This Court should lay out the basic principles of (1) appointing a smaller number of judges to adjudicate at least the initial methodology or otherwise coordinating among the existing vicinage-level Mount Laurel judges; (2) providing for expeditious return to the Prior Round methodology ordered by the Court with deviations only as required by statutory change; and (3) providing adequate notice and opportunity to be heard to all parties and determination by the trial courts of the most effective way to proceed on a case-by-case basis. Trial courts can then move forward expeditiously to adjudicate Mount Laurel litigation.

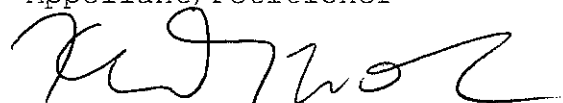
#### **IV. Conclusion**

For the foregoing reasons, FSHC respectfully requests that this Court find that COAH has not complied with its order. There are few, if any, instances of this level of noncompliance with a court order in New Jersey's modern history. After fourteen years of delay, multiple orders to adopt rules, and, most recently, an extension of nearly twice the original time for the remand in this matter with nothing to show for it, it is no longer possible to trust that COAH can or will faithfully implement the Mount Laurel doctrine. This should be the end; there should be no more extensions, no further last chances. The Court should order the relief it suggested would be available should this day come to pass in order to vindicate its authority and ensure that the rule of law prevails.

The Court thus should lift COAH's protection from Mount Laurel litigation and allow actions to proceed in the Law Division. The Court can largely leave the details of such actions to trial courts, which have decades of experience in such matters. The Court should provide general guidance to the trial courts on the number of and coordination among Mount Laurel judges; the need for a consistent methodology to be developed within 90 days that implements this Court's prior orders; and adequate notice and opportunity to be heard for all parties on any filing, especially those that would foreclose other parties' rights, to ensure that trial courts can adjudicate on a case-by-case basis the most effective route to secure compliance with this Court's orders.

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