

ORDER ON EMERGENT APPLICATION

IN RE ADOPTION OF REVISED
THIRD ROUND REGULATIONS BY
THE NEW JERSEY COUNCIL ON
AFFORDABLE HOUSING N.J.A.C.
5:96 & 5:97 (NJ LEAGUE OF
MUNICIPALITIES)

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5382-07T3
MOTION NO. M-
BEFORE PART: H
JUDGE(S): FUENTES
SIMONELLI
HAAS

EMERGENT APPLICATION

FILED: 3/7/2014

BY: COAH

ANSWER(S) FILED: 3/7/2014

BY: FAIR SHARE HOUSING

APPEARANCE ONLY:

ORDER

THIS MATTER HAVING BEEN DULY PRESENTED TO THE COURT, IT IS ON
THIS 7TH DAY OF MARCH, 2014, HEREBY ORDERED AS FOLLOWS:

EMERGENT APPLICATION

FOR

MOTION FOR A STAY OF ORDER
DATED MARCH 7, 2014 TO ENFORCE
LITIGANT'S RIGHTS

GRANTED	DENIED	OTHER
(<input type="checkbox"/>)	(<input checked="" type="checkbox"/>)	(<input checked="" type="checkbox"/>)

SUPPLEMENTAL:

This court has jurisdiction to enforce its own order.
Asbury Park Board of Education v. New Jersey Department of
Education, 369 N.J. Super. 481, 486 (App. Div. 2004). R. 2:9-
5(b). In the event COAH cannot meet the deadlines ordered by
this court in its March 7, 2014 order in aid of litigant's
rights consistent with the APA, N.J.S.A. 59:14B-4 requirements,
it may seek relief from this court to modify these deadlines on
a showing of extraordinary circumstances.

FOR THE COURT:



JOSE L. FUENTES, P.J.A.D.

IN RE ADOPTION N.J.A.C. 5:96
AND 5:97 BY THE COUNCIL OF
AFFORDABLE HOUSING

Superior Court of New Jersey
Appellate Division
Docket No. A-5382-07T3
Docket No. M-2899-13

NOTICE OF MOTION FOR STAY

To: Joseph Orlando, Clerk
Superior Court of New Jersey
Appellate Division
P.O. Box 006, 25 Market Street
Trenton, New Jersey 08625-0006

Hon. Jose Fuentes, P.J.A.D.
North Tower, Suite 1101
158 Headquarters Plaza
Morristown, NJ 07960-3965

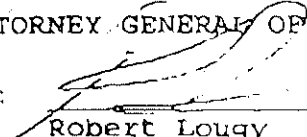
All Service List

PLEASE TAKE NOTICE that respondent-petitioner Council on Affordable Housing hereby moves before the Superior Court of New Jersey, Appellate Division, for a Stay of the Order entered by this court on March 7, 2014, pending Supreme Court review. In support of this motion, respondent relies upon the application and grounds listed thereon filed with this court.

Respectfully submitted,

JOHN J. HOFFMAN
ATTORNEY GENERAL OF NEW JERSEY

By:


Robert Lougy
Assistant Attorney General

Dated: March 7, 2014



State of New Jersey
 OFFICE OF THE ATTORNEY GENERAL
 DEPARTMENT OF LAW AND PUBLIC SAFETY
 DIVISION OF LAW
 25 MARKET STREET
 PO Box 112
 TRENTON, NJ 08625-0112

Robert.Lougy@dol.lps.state.nj.us

CHRIS CHRISTIE
 Governor

KIM GUADAGNO
 Lt. Governor

JOHN J. HOFFMAN
 Acting Attorney General

ROBERT T. LOUGY
 Acting Director

March 7, 2014

The Hon. Jose Fuentes, P.J.A.D.
 North Tower, Suite 1101
 158 Headquarters Plaza
 Morristown, NJ 07960-3965

VIA FAX TO: 973-631-6368

Re: In re Adoption of Revised Third Round Regulations by
 the New Jersey Council on Affordable Housing, N.J.A.C.
 5:96 & 5:97
 Supreme Court Docket No. 67,126
 Supreme Court Docket No. M-
 App. Div. Docket No. A-5382-07T3
 App. Div. Docket No. M-2899-13

Dear Judge Fuentes:

Per the request of chambers, please accept, on behalf of the Council on Affordable Housing, additional authority upon which the Council relies and upon which the Council is most likely to prevail. Given the pending request for an extension before the New Jersey Supreme Court of the deadlines imposed in In re Adoption of N.J.A.C. 5:96 and 5:97 by the New Jersey Council on Affordable Housing, 215 N.J. 578 (2013), the Council additionally relies upon that opinion, and the Supreme Court's prerogative to consider further relief pursuant to that decision.



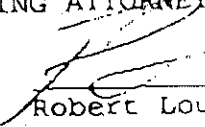
Hon. Jose Fuentes, P.J.A.D.
March 7, 2014
Page 2 of 2

Thank you for your consideration of the application,
and please do not hesitate to contact me if I may be of any
further assistance in this matter.

Respectfully submitted,

JOHN J. HOFFMAN
ACTING ATTORNEY GENERAL OF NEW JERSEY

By:


Robert Lougy

Assistant Attorney General

c: All counsel

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
APPLICATION FOR PERMISSION TO FILE EMERGENT MOTION

TO: Jospeh Orlando

DATE: 03/07/2014

FROM: Robert Lougy, AAG

TELEPHONE: (609) 292-4965 ext

The following questions are to be answered by the attorney or pro se litigant requesting permission to file an emergent motion. This questionnaire is designed to assist the court's determination respecting its further instructions. **COMPLETION OF THIS APPLICATION DOES NOT IN ANY SENSE CONSTITUTE THE FILING OF AN APPEAL OR MOTION.** There is no right to be heard orally on an emergency application. Further instructions will come from the court.

Except by permission of the court, the only documents you may submit with this application are: a copy of the decision being appealed, any opinion or statement of reasons given by the trial judge or agency, and any order or decision denying or granting a stay. A copy of this application must be served simultaneously on both your adversary and the trial judge or agency. No answer shall be filed without permission of the court.

If the court grants you permission to file an emergent motion and you have not previously filed a motion for leave to appeal or notice of appeal (whichever is applicable), you must simultaneously file one. You must also pay the applicable filing fee (\$30 for a motion for leave to appeal; \$200 for a notice of appeal), direct the charging of an account with the Superior Court, or file a motion to proceed as an indigent and supporting certification.

CASE NAME: In re Adoption of Revised Third Round Regulations by NJAC 5.96

1. What is the vicinage of the matter? (i.e., what judge, in what county or what agency entered the decision?)

n/a - Motion in aid of Litigants' Rights

2. a) What is your name, address, including any e-mail address, phone number and fax number?
Robert Lougy, AAG, Robert.Lougy@dol.lps.state.nj.us
609-292-4965 w / 609-292-690 fax

b) Whom do you represent?
Council on Affordable Housing

3. List the names of all other parties and name, address, including any known e-mail address, phone number and fax number of attorney for each.
Please see attached.

4. Do you have a written order or judgment entered by the judge or a written agency decision? You must attach a copy of the order, judgment or decision.

Attached.

5. Are there any claims against any party below, either in this or a consolidated action, which have not been disposed of, including counterclaims, cross-claims, third-party claims and applications for counsel fees? If so, the decision is not final, but rather interlocutory, and leave to appeal must be sought.

No.

6. Have you filed for a stay before the trial court or agency?

N/A

If so, do you have a court order or agency decision denying or granting same? Attach a copy of any such order or decision. Before you seek a stay from the Appellate Division, you must first apply to the trial court or agency for a stay and obtain a signed order or decision ruling on your stay application. (Court Rules 2:9-5 and 2:9-7)

7. If the order or agency decision is interlocutory, are you filing a motion for leave to appeal?

N/A

8. If interlocutory, are you filing a motion to stay the trial court or agency proceeding?

9. If the order, judgment or agency decision is final, have you filed a notice of appeal?

No.

10. What is the essence of the order, judgment or agency decision? Mandamus order requiring agency COAH to meet and undertake rulemaking and other discretionary acts, notwithstanding present pending motion before the New Jersey Supreme Court for an extension of time in which to do so, and on a schedule incompatible with timeframes established in the Administrative Procedures Act.

11. a) Has any aspect of this matter been presented to or considered by another judge or part of the Appellate Division by emergent application or prior appeal proceedings? If so, which judge or part?

No.

- b) Have the merits briefs been filed in this matter? If so, has the matter been calendared to a part?
No

12. What is the nature of the emergency?

The order intrudes upon the Supreme Court's consideration of the agency's pending motion for an extension of time in this very appellate proceeding. Additionally, it transgresses well-established principles of separation of powers and purports to waive statutory provisions governing notice and comment of proposed rules and the Open Public Meetings Act.

13. What is the irreparable harm, and when do you expect this harm to occur?

The irreparable harm is immediate. The harm is that the court has stepped into the shoes of the agency and is ordering the Council members to undertake discretionary action, under the threat of detention and personal liability, on a timetable inconsistent with the APA and inconsistent with the separation of powers.

14. What relief do you seek?

Stay of the order pending Supreme Court review.

15. What citation is most important for the proposition that you are likely to prevail on appeal?

N.J. Const. Art. III, N.J. Const art. V., section 1, para 1. N.J.S.A. 52:14B-1 et seq.; N.J.S.A. 52:27D-301 et seq.; *Crowe v. DeGioia*, 90 NJ 126 (1982); N.J.S.A. 10:4-1 et seq., R. 2:11-3(d);

16. Have you served simultaneously a copy of this application on both your adversary and the trial judge or agency?

Yes.

17. Have any transcripts been ordered (particularly of the trial judge's challenged ruling)?

No.

If so, when will the transcript be available?

Not applicable

18. Please give a brief summary of the facts of your case.

On September 26, 2013, the New Jersey Supreme Court issued an opinion that modified and affirmed this court's 2010 decision. Contrary to this court, the Supreme Court did not prohibit alternate approaches to satisfaction of the housing obligation. The Court directed COAH to promulgate new rules by February 26, 2014. On that date, the agency sought an extension of time through and including May 1, 2014. That motion remains pending with the Supreme Court.

On December 13, FSHC filed a motion to enforce litigants' rights premised upon an order that preceded the Supreme Court's disposition of this appeal. On March 7, 2014, this court entered the order subject to this application.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DISPOSITION ON APPLICATION FOR PERMISSION TO FILE EMERGENT MOTION

Case Name: In re Adoption of Revised Third Round Regulations by NIAC 5:96
Trial Court or Agency Below: COAH

DO NOT FILL IN THIS SECTION - FOR COURT USE ONLY

I. The application for leave to file an emergent motion on short notice is **Denied** for the following reasons:

The application does not concern a genuine emergency or otherwise does not warrant adjudication on short notice. Counsel may file a motion with the Clerk's Office in the ordinary course.

The applicant did not apply to the trial court or agency for a stay, and obtain a signed order, before seeking a stay from the Appellate Division.

The application concerns an order entered during trial as to which there is no prima facie showing that immediate interlocutory intervention is warranted.

Other reasons: _____

II. The application for leave to file an emergent motion on short notice is **Granted** on the following terms:

A. The applicant must file an original and two copies of the motion for emergent relief and a notice of appeal or motion for leave to appeal (plus all required fees or an indigency motion) with Judge _____ by no later than _____ On that same date, copies must be delivered to all counsel/pro se parties and to Judge _____. A copy must also be sent to the trial judge or agency whose decision is being appealed.

B. Opposition must be served and filed by no later than _____.

C. Other terms: _____

J.A.D. Date _____



Peter J. O'Connor, Esq.
 Kevin D. Walsh, Esq.
 Adam M. Gordon, Esq.
 Laura Smith-Denkler, Esq.

March 7, 2014

Hon. Jose L. Fuentes, P.J.A.D.
 Superior Court of New Jersey
 Appellate Division
 Suite 1101, North Tower
 158 Headquarters Plaza
 Morristown, NJ 07960

Hon. Marie P. Simonelli, J.A.D.
 Superior Court of New Jersey
 Appellate Division
 60 Nelson Place, 8th Floor
 Newark, 07102-1501

Hon. Michael J. Haas, J.A.D.
 Superior Court of New Jersey
 Appellate Division
 218 Haddon Avenue
 7th Floor
 Westmont, NJ 08108

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.: A-5451-07T3, Lead Docket Number A-5382-07T3 (on remand from In re N.J.A.C. 5:96 and 5:97, 418 N.J. Super. 482, 512 (App. Div. 2010), aff'd 215 N.J. 578 (2013))

Dear Honorable Judges:

I am writing in opposition to the request to stay filed by the Council on Affordable Housing (COAH).

We oppose the stay request for four reasons. First, contrary to the assertions in the application, the Supreme Court does not have jurisdiction of this matter or of the pending motion for an extension. Motions to enforce litigant's rights must be brought in the court that issued the order that the movant seeks to enforce. Asbury Park Bd. of Educ. v. New Jersey Dep't of Educ., 369 N.J. Super. 481, 486 (App. Div. 2004). Here, the order to adopt rules within five months was issued by the Appellate Division. Motions to amend or stay an order are also properly brought before the court that issued the order. Quagliato v. Bodner, 115 N.J. Super. 133 (App. Div. 1971); R. 2:9-5(b).

Second, the state does not meet the standards for a stay. The state has unclean hands. It seeks a stay from a hardship that was of its own making; and the request is contrary to the public interest. COAH has disregarded a court order and, as the Appellate Division found, has not provided a plausible explanation for its failure to comply. By contrast to the inexcusable conduct of the agency, lower-income families, people with disabilities, and seniors are harmed by the failure of COAH to comply with the court's order. Further delay will exacerbate that harm. The equities thus weigh heavily against granting a stay.

Third, there is no imminent harm. The Appellate Division's order does not violate the Open Public Meetings Act (OPMA), contrary to the State's claims. OPMA provides for 48-hour notice for special meetings, which the State can still meet by preparing public notices for posting and delivery to newspapers on Monday, given that the first meeting ordered by the Court is not until Wednesday, March 12 at 9:30 a.m. Furthermore, the only reason


that COAH has to be ordered to meet is that COAH has been in utter noncompliance with OPMA through its failure to adopt a regular schedule of monthly meetings as required by OPMA and COAH's bylaws, currently the subject of another appeal pending before this Court. If COAH had, in the words of the Court, "fulfilled its statutory obligation" to actually meet and implement the Fair Housing Act, it would have had meetings scheduled to consider and adopt the regulations as ordered by the Court. COAH cannot use its own intransigence as a rationale for further delay.

Fourth, the request made in the name of COAH was actually authorized by people other than the COAH Board. The unilateral assertions of an Assistant Attorney General who has not met with his clients since the Supreme Court affirmed the Appellate Division's order are not an adequate substitute for a meeting of the COAH board at which these important issues are addressed.

In the event that COAH contends that it cannot meet deadlines under the Administrative Procedure Act, it should identify those problems and file a motion to clarify or amend the order. Otherwise its application is speculative and premature. We thus respectfully urge the Appellate Division to deny the application filed on behalf of the Council on Affordable Housing.

Thank you for your attention to this matter.

Respectfully,



Kevin D. Walsh
Staff Attorney

c: Service List

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March 7, 2014

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Hon. Marie Simonelli, J.A.D.
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Newark, NJ 07102-1501

Hon. Richard Haas, J.A.D.
Appellate Division - Superior Court
216 Haddon Avenue
7th Floor
Westmont, NJ 08108

RE: In Re the Adoption of N.J.A.C. 5:96 and 5:97 by the
New Jersey Council on Affordable Housing
Docket No. A-5382-07T3

Honorable Presiding Judge Fuentes, and Judges Simonelli and
Haas:

We represent Martin and MTAE, Inc. (MM), respondents to the
emergent application filed by the Attorney General in the name
of the New Jersey Council on Affordable (COAH)** for a stay. The

motion should be denied for myriad reasons. (**The application on behalf of COAH is a misnomer.)

First, The Application lacks the authority of COAH, the party in interest. The Application is a nullity. It is an illegitimate and unauthorized exercise of power by the Attorney General and COAH's Chairman, who, each acting individually, lack standing and authority to act for, and speak on behalf of, the agency.

COAH is an independent agency in, but not of, the Department of Community Affairs. In re a Plan for the Abolition of COAH, etc., 214 N.J. 444 (2013). Mr. Constable is the agency's chairman. He is merely one member of the agency's board, which is statutorily mandated to have 12 members representing diverse constituencies. N.J.S.A. 52:27D-305a: In re a Plan for the Abolition of COAH, etc. (Fair Housing Act requires that Council membership represent balanced, cross-section of community and State interests representing different perspectives). Currently, COAH has only 6 members, 6 vacancies, and several unrepresented constituencies. See www.nj.gov/governor/admin/search/html, (last visited March 5, 2014).

However, it is the independent agency, acting as a board, not any single individual, which is empowered to act. COAH's By-laws authorize the Council - not any individual, nor the Attorney General - to act. See Article I, section 5, of COAH's By-laws, "General Powers" ("The property, affairs and business of the Council shall be managed by the Council." [emphasis added]). Further, COAH's Executive Director - not the Chairman - is granted certain duties under the By-laws, with respect to litigation. Yet, Article 4, section 5e of the By-laws provides:

"Legal Advice and Litigation. The Executive Director may request legal counsel to provide and, subject to the Council's approval, request legal counsel to initiate, intervene, or take any other action with regard to litigation on behalf of the Council." [emphasis added].

Unless the Council has met secretly, without notice, and in flagrant disregard of the Open Public Meetings Act, N.J.S.A. 10:4-6 et seq., there is no evidence that: (1) the Council approved any request by the Executive Director (let alone, any

action by the Chairman) to file this extension application; (2) the Council approved the Executive Director's delegation of authority to file this application to anyone, as required by the By-laws; and (3) the Council, itself, approved the filing of this extension application.

The Council's last meeting was May 2013. Neither the Council, which is directed at its annual meeting in January, to give notice of its meetings, see By-laws, Article 2, sections 1-2, nor, inexplicably, the Chairman, who under Article 2, sections 3-4, is authorized to call special or emergency meetings, respectively, has convened any meeting of COAH.

Consequently, the Application is a nullity because it lacks the Council's required authorization and approval.

Second. This request for equitable relief requires that the Applicant have clean hands. Here, COAH's conduct demonstrates an absence of clean hands.


Third. The alleged irreparable harm is all self-created. COAH has had ample time to act. Its claimed hardships are the sole result of its actions and inactions since September 16, 2013.

Fourth. COAH has waived its rights. At the November 2013 oral argument, COAH's longstanding counsel (of about 20 years) and well familiar with COAH's activity and rulemaking process, advised that rules could be proposed within 30 days. Were there a difficulty in COAH's meeting the 5 month deadline, justice, fair play, and equity demanded that COAH move for reconsideration in a timely fashion. It failed to do so, even though the Chairman's certification suggests all sorts of efforts (review, evaluation, etc.) have been ongoing. Instead, on the last day of the 5 month period it sought an extension, and not even from this Court. Yet, it offers no justification.

In sum, this is a situation all of COAH's own making. It has no equities. Moreover, the protected class and the citizens, deserve to have the constitutional obligations carried out and their rights vindicated.

The relief should be denied in totality.

Respectfully,



Jeffrey Kantowitz